or principally for the purposes of the household.” A “matrimonial home” expressly includes a joint family home: section 2 (1) — a fact that it is important to note. (It will be recalled that a “dwelling house” includes any flat or townhouse).

(xii) Another, extremely important phrase that appears in section 2 (1) is “matrimonial property”. It has the special meaning given to it by section 8 of the Act, which will be picked up later.

(xiii) Also to be noted is the definition accorded by section 2 (1) to the word “owner”. An “owner”, in respect of any property, means the person who, apart from this Act, is by virtue of any enactment or rule of common law or equity the beneficial owner of that property; and “to own” has a corresponding meaning.

(xiv) Lastly, we must deal with the word “property”. Section 2 (1) defines this as including real and personal property and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest; and the term “asset” has a like meaning. 12. This is not a great departure from the definition of “property” in section 2 of the Matrimonial Property Act 1963.

(xv) The term “separate property”, which section 2 (1) of the 1976 Act mentions, is a new concept, with the meaning accorded to it specially by section 9 of the 1976 Act. This will be picked up subsequently, but let it be said here that it has nothing to do with the old law as to the separate estate of a married woman. 13.

F. IMPORTANT RELEVANT DATES DEFINED BY SECTION 2.

(i) Ascertaining the value of property

It will be recalled that one of the difficulties surrounding the former law was that one could not with certainty state at what date the value of any property to which an application related should be taken. Was it the date of e.g., the application, the hearing, the date of the final breakdown of the marriage or of the ensuing divorce? We are now told by section 2 (2) that the value “shall, subject to sections 12 and 21 of this Act, be [the] value as at the date of the hearing unless the Court, in its discretion otherwise decides.” 14.

An outstanding example of the exercise of the discretion might well be

12. As to property likely to come within the Act, see Bromley & Webb, op. cit. supra, pp 819-820 and Fitkevich v. Fitkevich [1976] 2 NZLR 414 (CA) (engagement ring).


NOTES ON THE MATRIMONIAL PROPERTY ACT, 1976
by
Pauline Vaver, LL.B (Hons), M.Jur.

From 1 February, 1977 New Zealand will have the first true matrimonial property system in its history.

The Act is designed to suit the average couple — the couple who own a modest home acquired after their marriage on long term mortgage finance, a car and perhaps some small investments; the husband has been the primary breadwinner of the family but the wife has worked for the first few years of the marriage, once the children are of school age the wife may work to assist with special projects or to assist general family finances, but her role is seen primarily as a domestic one. Couples whose concept of marriage does not fit this model of a partnership of dependants have the freedom to contract out of the scheme provided by the Act.

The scheme established is one of deferred community of property. Each spouse is free, with minor limitations, to deal with his/her property during the marriage. A community of interest is imposed when the marriage breaks down.

In the general case the home and family chattels are to be divided equally. Other property acquired since the marriage is to be divided equally unless the contribution of one spouse to the marriage partnership has clearly been greater than the contribution of the other. The onus of proving disparate contributions now rests on the spouse arguing for a greater than equal share of the property.

The policy behind the Act reflects society's concept of marriage as a partnership in which the parties are expected to fill different roles — the husband to be the breadwinner and the wife to take responsibility for child care and household management. This traditional role division is reflected in the economy and in job and educational opportunities. The average female wage is much less than the average male wage. Thus a system of property division which does not consider non-financial contributions must discriminate against women and would not be tolerated indefinitely. 1

The Act, by giving a fixed interest in the matrimonial property to both parties, gives security and certainty of interest to the wife thereby granting her the independence and dignity denied her by the 1963 Act which placed her in the position of a dependant asking for a share of her 'husband's property'. The security of interest will hopefully diminish the incidence of

1. A system which gives little credit to run-financial contributions encourages women to enter the work force and significantly alters the socio-economic structure of society.
oppressive bargaining and encourage couples to settle property problems without recourse to litigation.

The notes which follow are intended only to highlight some of the problems of interpretation which might occur in the administration of the Act and to point to court decisions which might assist in their resolution. The notes are supplemented by problems intended as illustrations of the matters discussed in the body of the notes.

1. **s.2 (2) „FAMILY CHATTELS“**

These are matrimonial property whenever acquired – s.8(b) – and however acquired – s.10 (3). They are to be shared equally where the marriage has lasted less than three years – s.13 – or extraordinary circumstances exist making such a division repugnant to justice – s.14.

**Question:** heirloom antiques – do these come within s.2 (1) (a) (ii) (articles of household ornament)? If so the manner of their acquisition by gift or inheritance is immaterial save under s.s. 13 and 14. Their retention in a particular ‘kin group’ should be protected by agreement under s.21.

**Question:** investment silver, paintings and jewellery purchased out of husband’s business earnings – are they family chattels to be shared equally?

Silver and paintings would come within the definition of family chattels. If acquired from separate property and not gifted to the wife it is arguable that they remain separate property pursuant to s.9 (2) – s.8 (b) states only “whenever” acquired, not “however” acquired, s.10 (3) excepts only s.10 (1) (2) and s.9 (4). However this is a tenuous argument and if the chattels are to be placed in the home they should be protected by agreement.

Whatever use they are put to if the chattels are purchased with matrimonial property they remain matrimonial property. Note that earnings after marriage, except those from separate property, are matrimonial property.

Jewellery – it would be difficult to bring this within the definition of family chattels. If acquired with matrimonial property it is matrimonial property – s.8 (f). If acquired with separate property it is separate property – s.9 (2) – unless given to the other spouse – s.10 (2). Presumably even if acquired with matrimonial property a gift is separate property s.10 (2) taking precedence over s.8 (f) (generalia specialibus non derogant).

Note s.21 (14) – a gift between husband and wife may be made orally or in writing and shall not require to be made by deed or by delivery.

2. **TIME OF VALUATION AND FIXING OF SHARES — s.2 (2) and (3)**

The provisions of these subsections will be relevant to all divisions of property. The Act preserves the rule established under the 1963 Act that in the general case the shares of the parties are to be fixed at the date of the separation (this is complemented by s.9 (4)) but the value of the share is to

(c) **Does not include chattels used wholly or principally for business purposes, or money or securities for money.**

This definition is not entirely dissimilar to that of “personal chattels” appearing in section 2 (1) of the Administration Act 1969, but the two definitions must not be confused — nor must their respective purposes.

(vii) A further word to be noted for the purpose of the 1976 Act, particularly where one is dealing with farms, is “homestead”. This is defined as including “a matrimonial home where the dwelling house that comprises the family residence is situated on an unsubdivided part of land that is not used wholly or principally for the purposes of the household; but does not include a matrimonial home that is occupied —

(a) Pursuant to a licence to occupy within the meaning of Part I of the Companies Amendment Act 1964; or

(b) By virtue of the ownership of a specified share of any estate or interest in the land on which the dwelling house that comprises the family residence is situated and by reason of reciprocal agreements with the owners of the other shares; or

(c) In the case of a flat or town house which is part of a block of flats or town houses or is one of a number of flats or town houses situated on the same piece of land, under a lease or other arrangement whereby the occupants of the flat or townhouses are entitled to exclusive possession of it.”

(viii) a “joint family home” means, according to section 2 (1), “any land settled as a joint family home under the Joint Family Homes Act 1964.”

(ix) A “Magistrate’s Court” means, by section 2 (1), “a Magistrate’s Court presided over by a Magistrate appointed under the Domestic Proceedings Act 1968 to exercise the domestic jurisdiction of that Court.”

(x) “Marriage” is interpreted by section 2 (1) as including “a former marriage dissolved by divorce or by decree of dissolution of a voidable marriage (whether the divorce or dissolution takes place within or outside New Zealand), and a purported marriage that is void; and “husband”, “wife”, and “spouse” each have a corresponding meaning.”

(xi) Section 2 (1) also defines which is meant by the expression “matrimonial home.” It means, “the dwelling house that is used habitually 11 or from time to time by the husband and the wife or either of them as the only or principal family residence, together with any land, buildings, or improvements appurtenant to any such dwelling house and used wholly

11. “Habitual residence” in a country has been considered as meaning a regular physical presence which endures for some time: Craze v. Chittum [1974] 2 All ER 940. Basically, no doubt, where a couple spend all but the holidays at their home in Auckland and their holidays at their bach, the former only is the “matrimonial home.”
requires, a "child of the marriage" means any child of the husband and wife; and includes any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife at the time when they ceased to live together, or at the time immediately preceding an application under this Act if at that time they had not ceased to live together. 10. The same provision states that

(ii) a "Commonwealth Country" means a country that is a member of the Commonwealth of Nations; and includes every territory for whose international relations the Government of any such country is responsible; and also includes the Republic of Ireland as if that country were a member of the Commonwealth of Nations.” (A “Commonwealth country” has been held to include the United Kingdom: see Wyatt v. Wyatt [1968] NZLR 811).

(iii) The expression, (and a very important one too), “contribution” has been assigned a special meaning by section 18 of the 1976 Act: see section 2 (1). It did not appear in the original bill and is picked up later on. The term “Domestic Assets”, which appeared in the original bill, has disappeared, as has the term “General Assets.”

(iv) The term “Court” means a Court having jurisdiction in the proceedings by virtue of section 22 of the 1976 Act: section 2 (1).

(v) A “dwelling house” includes, by virtue of section 2 (1), “any flat or town house, whether or not occupied pursuant to a licence to occupy within the meaning of the Companies Amendment Act 1964.”

(vi) A further important definition to be mastered is that of “family chattels.” Section 2 (1) states that these mean:—

(a) . . . chattels owned by the husband or the wife or both of them and which are —

(i) Household furniture or household appliances, effects, or equipment; or

(ii) Articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment; or

(iii) Motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes; or

(iv) Accessories of a chattel to which subparagraph (iii) of this paragraph applies; or

(v) Household pets; and

(b) Includes any of the chattels mentioned in paragraph (a) of this definition which are in the possession of the husband or the wife pursuant to a hire purchase or conditional sale agreement or an agreement for lease or hire; but

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10. Semble this definition cannot include an unborn child: Moore v. Moore (1975) 1 NZ Recent Law (NS) 331.

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be quantified by the value the property has at the date of the hearing.

Thus, in the general case, repayments of mortgage capital and amounts paid for improvements are repaid before the amount available for division is calculated — e.g. MacDonald 1975 Recent Law 217, Boys 1975 R.L. 210

Repayment was not invariable under the former legislation. It is submitted that the court may still take into account special circumstances why a spouse should not be credited with repayments e.g. Reid 1974 R.L. 224 — wife not credited with repayments to interest on mortgage since separation as they were regarded as being by way of rent for the use of the husband’s share of the joint property.

Repayments for improvements were credited.

Pruden 1975 R.L. 209 — Husband not credited with rates and repairs paid for since the separation as he had had exclusive use of the property and had been receiving rents.

Jujnovich 1975 R.L. 23 — Husband not credited with capital repayments made since the separation as by the terms of the separation agreement he was given exclusive possession so long as he paid the outgoings on the property.

See also Papesch 1974 R.L. 321.

The court retains a discretion to fix the value of the share at some date other than the date of the hearing — s.2 (2). Under the 1963 Act the general rule of quantifying a share at the date of the application was departed from where:

a. the application had been deliberately delayed to obtain advantage from inflationary increases in value:

Muirhead 1976 R.L. 225 — the parties separated in 1970, it became obvious in 1972 that a property settlement was not going to be reached. The wife did not file her application until 1974. The Judge in quantifying the wife’s share at the 1974 value commented: “I would not like to encourage the view that an applicant can sit back and choose his time for making an application, being influenced perhaps by trends in the market, and meanwhile lulling the other party into a false sense of security.”


Aliter if good reason exists for the delay —

Brennan-Hodgson, Sup. Ct. Wellington, 29.9.76. M34/75, Jeffries J. application delayed until the issue of custody was finally settled;

James (no. 3) 1974 R.L. 230 — wife should not be penalised for delay which had not caused the husband to alter his position in reliance on it because if the wife had received her share earlier she might have invested it

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2. See 1974 N.Z.U.L.R. 171

57
and taken advantage of inflationary increases in land prices.

b. an earlier value is justified because the respondent has made no contribution to the property since the separation and has neglected his maintenance obligations, the property being retained only through the efforts of the wife.


c. the value of the property has been diminished since the separation by the actions of one spouse —


d. the contributions of one party to the property have been minimal — this would now only apply where, for some reason, an equal division did not occur.


e. the parties had previously settled the value of property by agreement, s.55 (1) is relevant.

Knoz 1974 R.L. 104

3. DEFINITION OF MATRIMONIAL PROPERTY — s.8

The matrimonial home shall in all circumstances be matrimonial property — whenever acquired — s.8 (a) and however acquired — s.10 (3).

The main test in relation to section 8 is — when was the property acquired. All property acquired after marriage other than by inheritance or gift is to be matrimonial property, and in the general case subject to equal sharing — s.8 (e), s.11, s.15. Section 2 defines property as including both personal and real property. Thus all income earned after marriage, except that earned from separate property which is not used to acquire property for common use — s.9 (3), is matrimonial property. New Zealanders will therefore be unable to take advantage of the scheme developed in continental countries of depriving the community by channeling excess income into separate property. Increase in value of separate property obtained in this manner is matrimonial property — s.9 (3) (b).

Property acquired out of separate property during the marriage for the common use and benefit of both parties is to be matrimonial property — s.8 (e). S.2 (4) states that where property is to be classified according to its use the use during the marriage is to be taken. The emphasis is placed on use rather than intention of use at the time of acquisition. Thus a business purchased with separate property during marriage may become matrimonial property if the income from it is used for matrimonial purposes. Where it is not used for the common benefit property purchased during marriage from separate property is separate property — s.9 (2) and (6).

Income derived from separate property is separate property and remains separate property unless and in so far as it is attributable to the actions of the non-owning spouse or the application of matrimonial property — s.9 (3), or is acquired for the common use — s.8 (e).

under the 1976 Act are pending in any Court and one of the spouses then dies. According to section 5 (3), the proceedings may continue and be completed, and any appeal may be brought and determined, and the Court may make any order under the 1976 Act that it might have made if the spouse had not died. 8

D. CONFLICT OF LAWS

Some provision clearly needed to be made in order to show to what property the 1976 Act is to apply. Section 7 (1) enacts that the Act is to apply to [i] immovables in New Zealand; and [ii] movables in New Zealand or elsewhere, if at the date of an application made pursuant to the 1976 Act or of any agreement between the spouses relating to the division of their property, either spouse is domiciled in New Zealand. 9.

Spouses are given the right to choose New Zealand law to govern their matrimonial property position, for section 7 (2) states that: “This Act shall also apply in any case where the husband and the wife agree in writing that it shall apply.”

The converse would also seem to be true, to some extent: according to section 7 (3), subject to subsection (2), the 1976 Act will not apply to any matrimonial property if the parties to the marriage have agreed, before or upon their marriage to each other, that the matrimonial property law of some country other than New Zealand shall apply to that property, and the agreement is in writing or is otherwise valid according to the law of that country — unless the Court determines that the application of the law of the other country by virtue of any such agreement would be contrary to justice or public policy. It will be interesting to see what laws may become “blacklisted” and for what reasons. It will also be interesting to see what procedures will be adopted when a property dispute has to be settled in New Zealand Courts in respect of matrimonial property subject to an overseas regime that is “clean”.

E. DEFINITIONS

Now that we are slightly nearer the point where we may consider the central core of the Act, we can turn to the definitions of some of the essential terms so that we may better appreciate what is being talked about.

(i) According to section 2 (1), in the 1976 Act, unless the context otherwise

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8. Note the new section 76 of the Matrimonial Proceedings Act 1963, concerning the recovery of money from the estate of a deceased party, inserted by the Second Schedule of the 1976 Act.

9. Notwithstanding anything in subsection (1), where any order under the 1976 Act is sought against any person who is neither domiciled nor resident in New Zealand, the Court may decline to make an order in respect of any movable property not in New Zealand: section 7 (4). Cf. Cocksedge v. Cocksedge [1971] Recent Law 179.
C. (I) THE NEW ACT IS TO BE A CODE

According to section 4 (1), except as otherwise expressly provided in the 1976 Act, the 1976 Act is to have effect in place of the rules and presumptions of the common law and equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provision is made by the 1976 Act, between spouses, and each of them, and third persons.

Without limiting the generality of the above provision, the following presumptions no longer apply between spouses:—

(i) of advancement;
(ii) of resulting trust;
(iii) that the use of a wife’s income by her husband with her consent during the marriage is a gift: section 4 (2)6.

It is important to note that every enactment must, unless it or the 1976 Act itself otherwise expressly provides, be read subject to the 1976 Act: section 4 (3). Further, where any question relating to “matrimonial property” — a term which is defined by section 8 and explained later — arises between husband and wife, or between either or both of them and any other person, in any other proceedings, the Court is to decide the question as if it had been raised in proceedings under the 1976 Act: section 4 (4)7. It is, however, to be noted that nothing in section 4 is to affect (i) the law applicable where a spouse is acting as trustee under a deed or will; or (ii) the law relating to the imposition, assessment and collection of estate duty: section 4 (6), which also states that, for its purposes, every enactment and rule of law or of equity is to continue to operate and apply accordingly as if section 4 had not been enacted.

(II) THE 1976 ACT IS TO APPLY ONLY DURING THE JOINT LIFETIME OF SPOUSES.

By section 5 (1), subject to subsections 5 (2) and (3) and except as otherwise expressly provided in the 1976 Act, nothing in the 1976 Act is to apply after the death of either spouse. Every enactment and rule of law or of equity will continue to operate and apply in such case as if the 1976 Act had not been passed: section 5 (1). It is provided in section 5 (2) that either spouse’s death shall not affect the validity or effect of anything already done or suffered pursuant to the provisions of the 1976 Act.

It may now be wondered what will be the position where proceedings

Thus if a couple live on a farm which is the husband’s separate property income earned from the farm is matrimonial property and everything acquired with it is matrimonial property if the earnings are used to maintain the family — s.8 (e), but the increase in value of the farm remains separate property — s.9 (2), except in so far as s.9 (3) applies. The situation would be otherwise if the family did not live from the earnings of the farm but from income derived from some other source.

In such a case if the wife put all her efforts into earning income which was matrimonial property while the husband’s efforts were largely directed to his separate property it might be a case for saying that the wife had made a clearly greater contribution to the matrimonial property and should be awarded a more than equal share — s.15.

4. DEFINITION OF SEPARATE PROPERTY — s.9

The factors to keep in mind are: when was the property acquired; to what use has the property been put — s.8 (e); how has the property been sustained — s.9 (3), s.17 (1).

In general terms it can be said that property acquired prior to marriage, after marriage by inheritance or gift, or after the couple have separated, is separate property. However the use the property is put to during the marriage may affect its classification.

The Act provides for situations where one spouse in some way contributes to the separate property of the other. The contribution may be by way of working unpaid in a business which is separate property — s.18 (1) (f), by accepting a lower standard of living so that funds may be freed for the business — s.18 (1) (g), by entertaining business clients where the business is separate property. If such contribution results in an increase in the value of the separate property, or in income or gains from it, such increase, income or gains becomes matrimonial property and subject to the equal division rule of s.15.

If, as in the case of Mrs Haldane, the contributions of the non-owning spouse do not result in an increase in the value of the property the contributions may be considered by the court as a reason for increasing the share of that spouse in the matrimonial property or may be the basis of an order for payment of a sum from separate property — s.17 (1), s.33 (3) (n).

If the separate property is increased in value or sustained due to the application of matrimonial property the same consequences occur.

Question: A wife owns a hairdressing business which is her separate property. The husband gifts her $5,000 from his post-marriage earnings to assist with the business. The income is matrimonial property. Is the increase in value of the hairdressing business to this application of matrimonial property the same consequences occur.

Seemingly not — s.10 (2), unless the business is used for the common benefit. Spouses should be prudent in making gifts.

Property acquired while the spouses are not living together is separate


property unless the court in exercise of its discretion decrees otherwise — s.9 (4).

Living together = consortium. Thus a couple do not cease to live together merely because they are physically separate. Equally a couple who remain under the same roof but have little to do with one another may be living together. Physical separation (which may occur under the same roof) plus the intention on the part of one party to end the marriage is necessary. The intent need not be communicated but must be given effect by overt action shown by a change in the nature of the consortium.


**Question:** A wife is imprisoned. The husband decides to end the marriage but has not communicated this intent nor taken any legal steps to end marriage when he wins $60,000 in a lottery. Can the wife claim that the winnings are matrimonial property? The court would look to factors such as whether the husband had visited the wife in prison or written to her in an effort to establish whether the parties were living together as husband and wife.

The court retains a discretion and may regard property acquired after separation as matrimonial property. A possible case for exercise of this discretion would be where the husband dissipated his earnings during the marriage and lived on the wife's earnings. After cohabitation ceased the husband acquires property by gambling or from an accident compensation claim. In such a case the court may regard the property as matrimonial property to which the wife is entitled to at least an equal share. Alternatively the court may classify the winnings as separate property but order the husband to pay a share of them to the wife — s.33 (3) (n). cf. *Thompson*, 1968 N.Z.L.R. 504.

5. **GIFTS** — s.10

a. gifts from third parties — three points arise: s.10 (1)

(i) a gift must be distinguished from a true business loan — *Haldane* 1975

1 N.Z.L.R. 672, two Judges regard the property as a gift from the husband's father while two did not.

(ii) was the gift to the community or to one spouse only — the use to which the gift has been put will probably affect how the court reads the intent unless there is clear evidence of intention. Tracing of gifts into other property is against the policy of the Act — s.10 (1). The nature of the property given e.g. personal chattel, money for general use, deposit on land; the occasion of the gift — birthday present, wedding anniversary; method of presentation — if money was it paid into a joint account or toward property being acquired jointly, are factors for consideration.

cf. *Hartley* 1976 R.L. 124 — husband's father paid $600 towards the

proceedings under the Act the Court may make such order as to costs as it thinks fit.

(x) **Creditors' Protection and Remedies and Insolvency.**

It is not the function of this paper to deal with creditors' protection and remedies or with insolvency. No treatment is therefore given of the legal position of spouses' creditors or of the Official Assignee when a spouse is bankrupt, as to which section 20 of the 1976 Act should be consulted. Reference should also be made to section 46 concerning the protection of mortgagees (which resembles section 8 of the Matrimonial Property Act 1963, as amended by section 10 of the amending Act of 1968). Section 47 of the 1976 Act, (which provides that agreements etc. between spouses with respect to their matrimonial property and intended to defeat creditors shall be void), should also be referred to, note being taken of the point that nothing in that section is to apply to any gift by one spouse to the other if the gift is made upon a customary occasion and is reasonable in amount having regard to the donor's means and liabilities: see section 47 (2).

B. **TRANSITIONAL PROVISIONS**

Notwithstanding the provisions of section 21 of the Act (which, as we shall see, relates to the power to make agreements as to property), but subject to section 57 (5) of the Act 20, where any application under the Act relates to the matrimonial property of any marriage that took place before 1st February 1977, the Court is bound by section 55 (1), in dealing with that application, to have regard to any agreement entered into before the 1st February 1977 by the parties to that marriage.

By section 55 (2), where proceedings have been filed under the Matrimonial Property Act 1963 or Part VIII of the Matrimonial Proceedings Act 1963 and the hearing of those proceedings has commenced before 1st February 1977, the proceedings are to be continued as if the Act had not been passed unless the parties agree to the proceedings being continued under the 1976 Act.

On the other hand, where such proceedings have been filed but the
relation to civil proceedings for the time being in force under the 1947 Act or the 1908 Act, as the case may require, are to apply, with all necessary modifications, to proceedings under the 1976 Act.

(iv) Minors

The position of minors is set out in section 52. Notwithstanding any enactment or rule of law, a minor who is or has been married may bring, institute or defend proceedings under the 1976 Act without a guardian ad litem or next friend. Every judgement or order of the Court under the Act will be binding upon such a minor and may be enforced against him or her just as if he or she were of full age.

(v) De Facto Spouses

No provision is made by the Act for de facto spouses, who are thus left to pursue such other remedies as they may be advised, such as their rights under a resulting trust.

(vi) Privacy of Proceedings

Proceedings under this Act, as under the previous legislation, may be in private: section 35 (1) states that any application or appeal under the Act is to be heard in private if the husband or the wife so desires it.

(vii) Evidence

It had been thought by many people that the Court ought to be permitted to receive evidence that would normally not be admissible. Section 36 now enacts that in all proceedings under the 1976 Act, and whether by way of hearing in the first instance or by way of appeal or otherwise howsoever, the Court may receive any evidence that it thinks fit, whether it is otherwise admissible in a Court of Law or not.

(viii) Appeals

Section 39 makes provision for appeals from the Magistrate's Court to the Supreme Court and from the Supreme Court to the Court of Appeal: subsections (1) and (2). Subsection (4) states that the Supreme Court or the Court of Appeal, as the case may be, may, in its discretion, rehear the whole or any part of the evidence, or may receive further evidence, if it thinks the interests of justice so require.

Provision is made by subsection (3) for appeals to the Judicial Committee of the Privy Council.

(ix) Costs

The matter of costs must be mentioned. According to section 40, subject to any rules of procedure made for the purposes of the Act, in any

2. Subject thereto, where any application is made under the 1976 Act to a Magistrate's Court, the provisions of section 111 of the Domestic Proceedings Act 1968 are to apply. (This deals with sittings of the Court and the matter of who may be present in Court): see section 35 (2).

3. Cf. Domestic Proceedings Act 1968, s.114; Guardianship Act 1968, s.28; Adoption Act 1955, s.24.

arrears of payments on a section the couple were acquiring jointly. The Court regarded the payment as a gift to both spouses because of the joint ownership.

Milne 1976 R.L. 266 — considerable gifts of money by the wife's parents to assist the couple purchase the several matrimonial homes they owned during the marriage were regarded as a gift to the wife alone.

The emphasis in s.10 (1) is again on use rather than intention. Thus if a gift is used for family purposes it may be presumed, in the absence of evidence to the contrary, that it was a gift to the community.

(iii) If it is established that the gift was to one spouse only the property may still become matrimonial property where it is used in such a way that it cannot reasonably be traced in and separated from matrimonial property.

Examples:

- The wife receives a car from her parents for her birthday. She uses it for her own purposes. So long as the car remains unsold (unless it is simply exchanged for another), or if sold so long as the proceeds are unmingled, it will be separate property.

- If the wife sells the car and uses the money to build an addition on the family beach house the money will be so intermingled as to become matrimonial property.


b. Gifts between spouses — s.10 (2).

Such gifts remain separate property unless used for the benefit of both. This phraseology is capable of very wide interpretation — anything which improves the standard of living of the family is for the benefit of both. A gift of a business to the wife which enables her to provide for her own personal needs thereby relieves the community assets of this liability. Would the business therefore be being used for the benefit of both parties?

Gifts of jewellery to the wife would be separate property even if purchased with matrimonial property.

Gifts of property to the wife for tax purposes would be matrimonial property if the property was used by the family.

6. DIVISION OF HOME AND FAMILY CHATTELS — s.11

These are to be divided equally unless the marriage has been short or extraordinary circumstances exist which would make an equal sharing repugnant to justice.

A short marriage is one where the parties have lived together for less than three years. In such a case equal division is not automatic in three circumstances:

a. in relation to property owned wholly or substantially by one spouse at the time of the marriage or,
b. acquired by gift or inheritance since marriage — i.e. an asset by asset approach is to be used, or
e. if the contributions of one spouse to the marriage partnership have clearly been disproportionately greater.

In such cases division is according to contributions to the marriage partnership. The onus of proof is on the party disputing the equal division.

Contributions to the partnership. cf. s. 13 (1) (c) and s.15 (1). S.13 is stronger and accords with the overall policy of the Act that the home and chattels are to be divided equally except in unusual circumstances.

The concept of contributions to property is eliminated. It is submitted that the only test which is in accord with the policy of the Act is: has the spouse given his/her best efforts to the marriage partnership, evaluating the contributions and comparing them in financial terms should have no place under the new Act.

S.18 lists types of contributions, there is no indication whether this list is exhaustive. A wife who is unable to assist in the family business because of the need to care of an incurably ill child of the family is making a contribution to the marriage — s.18 (1) (a), and should not be penalised because her husbands contributions in the business are more rewarding financially. What of the situation of a spouse who is unable to contribute because of his/her own illness — is it sufficient that they do the best that they can or will the rationale of Haycock (1974 1 N.Z.L.R. 409) that contributions which might have been made but were not made cannot be credited, follow through into the new Act?

Division will not be equal if extraordinary circumstances exist — s.14.

It should be noted that the concern here is with general circumstances which need not relate to disparity in contributions, though they may.

This is the one section which allows the court to consider general matrimonial misconduct in relation to whether to make an order and the amount of the order. Misconduct cannot be used to affect the amount of general matrimonial property ordered to be given to a spouse yet the Act allows a less than equal division of general matrimonial property more easily than such a division of the home and chattels.

It is therefore submitted that to affect the discretion under s.14 conduct would need to be extreme. e.g. a spouse who gambles all his/her own earnings and lives off the earnings of the other spouse allowing the other spouse to pay the deposit and all the outgoings on the house and take full responsibility for household management, particularly if the house was mortgaged to pay for gambling debts.

In James (no 3) 1976 R.L. 32 Cooke J said that where a considerable sum was involved the general rule laid down in Haycock (1974 1 N.Z.L.R. 409) that household services should be valued at 1% per year of marriage, should not apply. The couple had been married for 24 years. The house property was worth $142,200 nett. The wife, who had always filled a solely domestic role, was awarded $25,000. It is submitted that to bring James under s.14

THE MATRIMONIAL PROPERTY ACT 1976
— A QUICK GUIDE —
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A. INTRODUCTORY

Preamble

The preamble to the Matrimonial Property Act 1976, as it is called by section 1 (1), states that the Act is "An Act to reform the law of matrimonial property; to recognize the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce, and in certain other circumstances, while taking account of the interests of any children of the marriage; and to reaffirm the legal capacity of married women."

The legislation is not easy to grasp, and only time and experience will reveal whether the claims made in the preamble are justified or whether gaps will need to be filled and amendments will need to be made. 1

Commencement etc.


Rules

As might be expected, there is power to make rules and regulations. Thus, section 53 (1) enacts that rules may from time to time be made in the manner prescribed by the Judicature Act 1908 relating to the procedure of the Supreme Court under the Act and to appeals to the Court of Appeal under the Act. Section 53 (2) enables the Governor-General by Order in Council to make regulations from time to time under section 100 A of the Judicature Act 1908. Also, by section 53 (3), in addition to all other powers conferred by the Magistrates' Courts Act 1947, the Governor-General may, by Order in Council, from time to time make rules under the 1947 Act providing for such matters as are contemplated by, or necessary for, giving full effect to the provisions of the 1976 Act and for the due administration thereof. In the absence of any rules under section 53 or in any situation not covered by any such rules, then, according to section 53 (4), the rules in

1. Those not already familiar with the Report of a Special Committee on Matrimonial Property (1972) may care to peruse it. The new Act goes a long way to implement the Report. It is undoubtedly better than the Matrimonial Property Act 1963, which is repealed.
Act had made such a division theoretically possible and also seemed to take too narrow a view of the provisions of section 15. The very brief analysis of the *Haldane* decision gives some general idea of the likely effect of the 1976 Act on a fairly typical farming situation. It is not without significance that Federated Farmers made submissions to the Select Committee and at that time was counted as one of the more enthusiastic supporters of the Bill!

The N.Z. Chambers of Commerce (more than somewhat belatedly) became concerned at the provisions of the Bill relating to creditors and circulated a memorandum — which completely overlooked (or misunderstood) the provisions of both the 1963 Act and the Joint Family Homes Act 1964!

The N.Z. Organisation of Men (which had opposed the Bill before the Committee) continued its opposition claiming that the new law would encourage spouses to “walk out” on their marriage partners “taking half the property with them.”

Finally the N.Z. Law Society (and some lawyers — and several litigants who had a direct interest in the matter) objected to the transitional provisions.

In addition one practitioner (who had earlier made submissions to the Select Committee) wrote to the writer (in his capacity as Chairman) suggesting that the *Haldane* decision removed the necessity for new legislation. This suggestion overlooked the obligation to legislate for equal sharing (which could, in no way, be spelled out of the *Haldane* decision) and also the other matters that were considered by the Select Committee when the Privy Council’s Opinion became available.

**CONCLUSION**

The Matrimonial Property Act 1976 represents an important piece of social legislation. Its evolution can be clearly traced from the Matrimonial Property Act 1963 (which was, in itself, a significant advance on previous legislation). It also represents — and this is important for any political party — the specific implementation of a policy undertaking by the present Government. If there is a certain rigidity in the presumptions that are to be applied and the rules that are laid down that fact possibly has its origin in the decisions of the Courts (particularly since 1971) and the judicial interpretations previously applied to matrimonial property (and joint family home) legislation.

The legislature has now clearly determined that there should be a general presumption of equal sharing of matrimonial property and that, in the case of a matrimonial home, this presumption should be difficult to rebut. Parliament was moving towards this when it passed the Joint Family Homes Amendment Act 1974 and has now spelled out its intention even more clearly to the Courts. It is now for the judiciary and the practising profession to give practical effect to the legislation.

would be against the policy of the Act. The Act is not intended to force women into the work force (see the preamble). Mrs James had at all times put her best efforts into her domestic role.

S.14 might be applicable where property of considerable value had been built up despite the extravagance of, and lack of assistance from, the wife.

Where property has been retained solely because of the efforts of one spouse after desertion of the other spouse s.14 may apply —

**King 1974 R.L. 101** — the house in dispute had been purchased with the proceeds of the sale of a former home to which the applicant wife had made no financial contribution. The husband deserted the wife the year the property was purchased and was untraceable for six years. The wife retained the home out of a domestic purposes benefit and part-time earnings. The wife was given a 2/3 interest in the property and exclusive possession.

See also *Andrew 1976 R.L.17*

**7. DIVISION OF OTHER PROPERTY — s.15**

The length of the marriage is not automatically a factor.

Contrast “clearly greater” in s.15 (1) with “clearly disproportionately greater” s.13 (1) (c). S.15 (1) as reported back from the Statute Revision Committee also contained the word “disproportionately” — it was presumably eliminated because, inter alia, of the opposition of the Federated Farmers Assoc., to the Act.

Note that the onus of proving greater contribution rests upon the spouse disputing the equal division.

Contributions which are of concern are those to the marriage partnership not to a particular asset. S.18 (2) declares that there shall be no presumption that a contribution of a monetary nature is of greater value than one of a non-monetary nature. Contributions should not be translated into monetary terms and set upon a balance sheet — such an approach would be inherently unjust to women as the average female wage is far less than the average male wage.

The Act is based upon the concept of marriage as a partnership to which each contributes according to their particular role and abilities. It is particularly designed to protect the women in a traditional role segregated marriage. In line with this philosophy concern should be only with whether each spouse has to the best of his/her ability used all his/her efforts for the benefit of the family unit. The Act recognises that it is impossible to attempt to evaluate efforts in monetary terms — some husbands do not wish their wives to work outside the home, some even get pleasure or benefit from the wife’s pursuit of leisure activities in place of household tasks.

However when spouses challenge the automatic equal division the courts will be forced to evaluate the services of a housewife who has put all her efforts into her household tasks and left her husband to supply the income against the efforts of a wife who has not only had full responsibility for child care and household management but has also worked outside the
home and used her income for family purposes. If the first wife is to get 50% of the property (and her efforts might well be equal to those of a husband who has simply worked from 9-5) is the second wife to get a more than equal share?

It should be noted that studies in New Zealand ("Career, Marriage and Family", Society for Research on Women, Wellington 1976; "Dual Career Families", S.R.O.W Auckland, 1976) of families in which both spouses work show that the wife generally retains major responsibility for child care and household management.

A recent case under the 1963 Act illustrates this situation. 

King, Sup. Ct. Wellington. 22.11.76 M102/76. White J.

The couple were married in 1957. The wife worked outside the home for most of the marriage and averaged slightly higher earnings than the husband. The wife did all the housework and had major responsibility for the care of the children. The husband provided for the family budget "but made sure his own way of life did not suffer." The equity in the home was less than it would have been had the husband spent less on his own pleasures. The Judge granted the wife a 75% interest in the house on the basis that her contribution was "much greater than the husband's."

The other side of the coin is where the husband has substantial income. It is submitted that it is unlikely that the courts will regard ordinary domestic contributions as being of equivalent weight. The wife in such cases will possibly be regarded as being sufficiently rewarded for her services by a half share of the home and family chattels.

8. SUSTENANCE OR DIMINUTION OF SEparate PROPERTY - s.17

Section 17 complements s.9 (3) (a). It is intended to aid people such as Mrs Haldane whose efforts in aid of her husband's separate property did not result in any increase in the value of the property but where nevertheless efforts for the marriage partnership which should be recognised. Under the Act for her efforts Mrs Haldane might receive an increased share in the homestead or family chattels, or her husband might be ordered to make her a payment from his separate property. (The application of the new Act to the Haldane facts is considered in one of the problems attached to these notes.)

Can "actions" in s.17 (2) be negative as well as positive? For example a husband is required to gradually sell shares which are his separate property to pay for a housekeeper because his wife prefers playing bridge to doing the housework, should the wife's share of the matrimonial property be decreased by the amount spent?

9. CONTRIBUTIONS - s.18

Is the list exhaustive? cf the wording of s.33 (3).

S.18 (1) (g) foregoing a higher standard of living - e.g. a husband's farm is separate property, he choses to leave the profits in the business rather

On the available facts this case could hardly be described as one in which equal division would be repugnant to justice and the wife therefore would probably have received half of the value of the homestead and the family chattels.

(ii) The matrimonial property, other than the matrimonial home and family chattels, would have been dealt with on the following principles:-

- that the property in question should be divided equally (section 15 (1));
- that equal division would not occur if one spouse could establish that his/her contribution to the marriage partnership had clearly been greater than that of the other (section 15 (1)); and
- that "contribution" would be assessed in accordance with the principles set out in section 18.

Testing the available facts against these principles does not suggest that either spouse made a clearly greater contribution to the marriage partnership than did the other. The wife would probably, therefore, have received half the matrimonial property other than the home and chattels.

(iii) The separate property would have been dealt with on the following principles:-

- that "separate property" would include that acquired by gift from a third party (sections 9 and 10);
- that the gifted property would remain as separate property unless it had been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard it as separate property (section 10 (1)); and
- any income from the separate property used with consent for purpose of the matrimonial property would become matrimonial property (section 9 (b)).

Under this formula the farm was, and would almost certainly have remained as, separate property. Any income therefrom which had been used with the husband's consent for the purpose of other matrimonial property would become matrimonial property and would be divided equally.

In summary, therefore, the wife would probably have received half the matrimonial property the value of which could have been increased by income from the husband's separate property. Certainly she would have benefited under the 1976 Act, but in the absence of detailed information, the extent of such benefit is impossible to assess.

OPPOSITION TO THE BILL

After the Bill had been reported back to the House by the Select Committee, opposition to its provisions came from several quarters.

The N.Z. Federated Farmers expressed concern at the implications on farming enterprises and particularly at the possibility that a farm property might be "split up" as a result of a Court decision. The views expressed by the Federation did, however, appear to ignore the fact that even the 1963
Judges can take a different view of the same facts under the very broad terms of the 1963 Act. Nonetheless the Select Committee was of the opinion that many of the Privy Council’s comments were remarkably in line with, and vindicated, the approach taken in the Bill. It so happened that the three essential findings (supra) also formed the basis of the new legislation — but the Bill also dealt with a number of other matters that required attention.

THE EFFECT OF THE 1976 ACT ON HALDANE v. HALDANE

The reported facts in Haldane are insufficient to assess what might have been the wife’s specific entitlement under the 1976 Act. Specifically evidence is lacking on:
(i) the value of the homestead (a fact which gave the Court of Appeal difficulty in quantifying the wife’s interest);
(ii) the nature and value of the family chattels; and
(iii) the nature and value of the matrimonial property (other than the home and chattels).

In any case the crucial feature of the wife’s position under the 1963 Act, by contrast with the 1976 Act, is that under the former she was entitled to nothing unless she could establish a contribution. Under the latter she would have been entitled as of right, to a specific share in the matrimonial property unless her husband could rebut the presumption of equality.

Nonetheless, because the Haldane decision represents the latest (and now presumably definitive) statement on the 1963 Act it is useful to compare the manner in which the wife’s claim would have been dealt with under the two Acts:

(a) Matrimonial Property Act 1963

The wife received a one quarter share in the last lot of the farm property remaining in the husband’s ownership; why she should have received that share in that piece of land is not readily apparent. She also received the sum of $4,000; the only reason suggested for this award is that it was the sum which stood to the husband’s credit in his local bank account. In total she received $19,000 but why the Supreme Court decided her contribution was worth only this amount and not more is unclear.

(b) The Matrimonial Property Act 1976

Under the 1976 Act the wife’s claim would have been considered under three “headings”:
(i) The matrimonial home and family chattels would have been dealt with in accordance with the following principles:—
 — that the home and chattels are matrimonial property whenever and howsoever acquired (section 8 (a) and (b));
 — that a cash allowance would be made for a homestead (section 12); and
 — that equal division would not be permitted if it is repugnant to justice (section 14)

than use them for family purposes. This foregoing of a higher standard of living is a contribution by the wife (it cannot be regarded as a contribution by the husband as it has increased the value of his separate property). The contribution can be used by the wife to claim that the increase in the value of the farm due to monies not being taken out is matrimonial property — s.9 (3) (a); or to give her a larger share in the matrimonial property or an award from separate property — s.17 (1) (b), if “actions” can be construed to cover negative as well as positive actions; or simply weighed with her other contributions to the marriage partnership affecting the courts exercise of discretion under s.15 (1) and s.13 (1) (c).

Misconduct — to be relevant it must be ‘gross and palpable’ and have significantly affected the extent or value of the property. Such misconduct may be a reason for making a less than equal division and it may be taken into account when the court determines the form of order to make.

The word “gross and palpable” possibly comes from English decisions concerned with the effect of conduct on the Courts’ exercise of discretion in awarding maintenance and making property settlements. The phrase “gross and obvious” achieved prominence in Wachtel, 1973 Fam. 72.

In Harnett, 1973 Fam. 156 at 165 Bagnall J. explained that “gross” describes the conduct while “obvious” describes the clarity or certainty with which it is seen to be gross. He continued: “In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless.”

See also Guzner v. Underdown, 1974 2 All E.R. 351. It must be emphasised that the English Judges were concerned with general misconduct. S.18 is only concerned with misconduct which affects the extent or value of property. A spouse who gambles excessively thereby diminishing his/her contribution to the partnership or causing matrimonial property to be sold or mortgaged; a spouse who drinks to excess diminishing his/her ability to earn or contribute to the family welfare; a spouse who persists in giving expensive gifts to outsiders, may be conducting himself/herself in such a way as to invoke the Court’s exercise of its discretion to award the offending spouse a less than equal share in the matrimonial property despite a considerable positive contribution to the property.

10. MATRIMONIAL PROPERTY AND CREDITORS — s.19, s.20

These sections make it clear that the scheme of the Act is one of a deferred rather than a full community of property. The “owner” is free to deal with his/her property during the relationship. Restraints and protections are, unfortunately, few. Non-owning spouses would be wise to ensure that homes are registered as joint family homes, and other property as joint tenancies or tenancies in common, or they should make use of s.42.
In the general case each spouse has a protected interest in one half of the value of the matrimonial home — s.20 (2); the matrimonial chattels may not be sold to defeat a claim under the Act — s.45; dispositions intended to defeat a claim under the Act may be restrained or in some cases set aside — s.s. 43, 44; but little protection is given against a spouse who mortgages or dissipates matrimonial property.

Most full community property systems make dispositions of certain types of property invalid unless the consent of both spouses is obtained.

The "owner" of matrimonial property may sell or mortgage it and dissipate the proceeds. The other spouse's remedy is an action for division of the matrimonial property or declaration of interest in particular property — s.25 (2) (c). In such cases the court may order a spouse to transfer separate property or make a money payment from separate property (s.20 (6), s.33 (3) (n) ), or diminish the share of the offending spouse in the matrimonial property — s.15. If there is no separate property and the matrimonial property has been so diminished that even the full amount is insufficient to satisfy the 'innocent' spouse it is unfortunate. It is also unfortunate that litigation is necessary to protect the interest of a spouse (s.42 notices only apply to land) as litigation will almost inevitably lead to the final breakdown of the marriage.

The non-owning spouse who wishes the marriage to continue must suffer the consequences of loss of property.

Protected interest in the home — the "owning" spouse can cut into the protected interest of the non-owning spouse by mortgaging the property to pay a personal debt or a common debt. An owning husband can mortgage the home to raise money for a family business, for general household expenses or to raise money to pursue his pleasures, and cut into the wife's interest without her consent. In such cases the wife must rely on the courts discretion under s.15 (1) or, if the mortgage was to assist the husband's separate property to develop his property. Why she did not receive some higher figure remains (at least to this writer - and with respect) as something of a mystery.

For situations under the previous Act of orders from "separate property" because of diminution of "matrimonial property" for separate purposes see: Nimbert 1975 R.L. 24 — the husband owned the home and a business at the time of the marriage. During the marriage the husband took several mortgages over the home to finance his business. The home was sold at an undervalue in a mortgagee's sale leaving $201.08 nett to be divided between the parties. The marriage had lasted 32 years. The wife had helped the husband in his business. The judge declared that a fair equity in the house would have been $10,000 and ordered the husband to pay the wife 7/24 of this sum.


11. CONTRACTING OUT OF THE SCHEME — s.21

Section 21 is intended to give maximum freedom of choice to couples to

Haldane v. Haldane became available to the Select Committee while it was deliberating on the Bill. Within the context of the Committee's deliberations on the Bill the decision made three important points:—

(1) the concept of contribution was an essential principle of the 1963 Act;
(2) contributions may be indirect (i.e. a contribution in the home may be a contribution not only to that home but other assets as well); and
(3) an "asset by asset" was not justified by the terms of the 1963 Act — the property should be looked at as a whole.

It was really only in (3) and in the application of (2) that the Privy Council clearly departed from the view of the Court of Appeal. Their Lordships' other comments are more by way of observation — neither necessary to the decision nor strictly in disagreement with the lower court (e.g. the position of family farms, the treatment of gifts and bequests and the approach to questions of misconduct). The Privy Council clearly regarded the 1968 amendment as a substantial clarification of the intention of Parliament and also placed considerable emphasis on the state of the law before 1963.

Although the decision certainly clarified the 1963 Act it did not, in the opinion of the Select Committee, avoid the need for further legislation. This was particularly so because:—

(a) It was still necessary for one spouse (usually the wife) to establish a contribution to the other's property. The approach remained one of "his" and "hers" rather than "theirs".
(b) The manner of assessment of an applicant's interest was left at large and still dependent upon the view of the individual judicial officer. Mrs Haldane received $19,000 out of an estate worth $118,500 after 29 years of marriage, rearing five children and without any suggestion that she had failed to "pull her weight" and notwithstanding a specific finding that her services and management contributed to the husband's ability to develop his property. Why she did not receive some higher figure remains (at least to this writer — and with respect) as something of a mystery.
(c) A rebuttable presumption of equal division could not easily be imported into the 1963 Act. Only a new statute could establish the presumption of equal division and deal with all of its legal consequences.
(d) The decision did not (it could not) deal with many of the other problems that had arisen under the 1963 Act; e.g. the right of one spouse to claim against the other's bankrupt estate or the right to lodge a caveat or Notice of Interest.
(e) Their Lordships commented that the 1963 Act was "extraordinarily difficult to construe as can be seen by the great diversity of judicial opinion that it has evoked". Certainly the various decisions delivered in the course of the Haldane litigation alone illustrate how different
In the final analysis the Select Committee decided (having rejected the possibility of a lengthy "tail" or "phase-out period" for the 1963 Act, and having also rejected the chaotic possibility inherent in a delayed implementation of the 1976 Act) that the only alternative was to provide for a relatively early commencement date (1 February 1977) and to make it possible for any case which has not actually reached a hearing by that date to be determined under the new legislation.

It has been suggested that such an arbitrary provision renders an injustice to those who have elected to bring their proceedings under the 1963 Act. That contention is, however, fallacious; up until the passing of the 1976 Act any party involved in a matrimonial property dispute had no option other than to issue his/her proceedings under the 1963 Act (because that was the only legislation which directly dealt with questions of matrimonial property).

The short point of the matter, however, is this: if the legislature has decided that the present matrimonial property code no longer meets the needs of society — or the ends of justice — then it is only proper that all matrimonial property disputes should be determined in accordance with the new code from the earliest possible opportunity — and that is what the Act provides.

8. Claims after death (section 5)

Both the Bill and the 1976 Act provide that proceedings under the 1976 Act can only be instituted whilst both parties are alive. This is in direct contrast to the previous position — it having become increasingly common for a party to a marriage whose interest had not been adequately protected under a will not only to issue proceedings under the Family Protection Act 1955 but, contemporaneously, to take action under the Matrimonial Property Act 1963.

A number of submissions advocated that the principles in the Bill should be extended to operate after the death of one spouse. There was general agreement with that proposition — however the Bill itself could not simply be so extended. Quite apart from the substantial interference with testamentary rights that would be involved in legislating for the equal division of property on the death of one spouse, the death of one of the parties raises a number of difficult and complex issues; the Minister of Justice has directed the Department of Justice to examine this question in detail with a view to the possible introduction of legislation at a relatively early stage.

In the meantime the 1963 Act must continue in force for the limited purpose of enabling matrimonial property proceedings to be instituted after the death of one party; this is an interim situation which all would regard as unsatisfactory but unavoidable.

Haldane's Case

Copies of the decision of the Judicial Committee of the Privy Council in work out their own property schemes. It recognises that there is no single ideology of marriage; that there is current in our society the partnership model and, increasingly, marriages as unions of independent equals striving for maximum individual fulfillment.

Attacking agreements: s.21 (8) (b) gives the court a discretion to declare void any agreement where it would be unjust to give effect to it. S.21 (10) gives guidelines for the exercise of the discretion. The power granted is very wide but as all couples who enter into agreements will have been independently advised — s.21 (5), it is to be hoped that the courts will follow their practice under s.79 Matrimonial Proceedings Act, 1963, and avoid agreements only in very unusual cases. Note the power given by s.21 (8) is not one to vary but only to avoid. If the agreement is void the other provisions of the Act apply as if an agreement had never been made — s.21 (12).

S.21 (10) (c) — agreements unfair or unreasonable in light of all the circumstances at the time of signing. Some element of fraud or inequality in bargaining power should be shown. The latter will be difficult to prove when each party has been independently advised. Courts in the past have been reluctant to accept claims that an agreement should be set aside under s.79 Matrimonial Proceedings Act as unfair because entered into when the applicant was distraught if the applicant had been independently advised — McKavanagh, 1976 R.L. 33.

cf. Richards, 1971 N.Z.L.R. 222. This case was concerned with an application to vary a maintenance agreement under s.21 (c) Domestic Proceedings Act, 1968. The husband had agreed to pay his wife a sum of maintenance in the belief that she was going to take a part-time job and find accommodation for herself and the children. In fact at the time the agreement was entered into the wife had obtained a housekeeping position and was receiving free board for herself and the children and a wage. The Court varied the agreement on the basis that it was unfair at the time it was entered into. The Judge commented that for an agreement to be unfair or unreasonable the matter alleged must be so at variance with the original contemplation of the parties that, in the opinion of the court, the person seeking the variation would not have entered into the particular agreement had the true position been known. s.21 (10) (d) — unfair or unreasonable in light of change in circumstances.

The agreement, being made to contract out of a scheme intended to come into effect mainly on breakdown of marriage or to settle a particular dispute, will be made with the event of marriage breakdown in mind. Therefore the occasion of marriage breakdown or its cause should not in itself be such as to make it unjust to enforce the agreement. However the subclause states that it does not matter whether or not the changes were foreseen by the parties. It is submitted that this clause is in line with the policy of the rest of the section that spouses are adults capable of managing their own property. Wide discretions encourage litigation which creates
13. INTERESTS

Interest is a concept which has developed in the English law as a possibility to be considered only when future maintenance payments were uncertain and is financially and emotionally destructive.


General matrimonial misconduct will be relevant under subclauses (d) and (e).

It should be noted that s.79 of the Matrimonial Proceedings Act cannot be used to alter an agreement unless the variation is in the interests of any child of the marriage.

Example: A couple each own a business at the time of the marriage. Both businesses are moderately successful when the couple agree that 50% of the nett profits from each business shall be matrimonial property. One business remains moderately successful while the other becomes an international enterprise worth millions of dollars. S.21 (10) (d) may be used to have the agreement avoided. It is submitted that where a couple have made an agreement a clearer case of injustice must be made out that need be established to invoke the Court’s discretion under s.15 (1).

12. CONCURRENT JURISDICTION — s.22

S.22 (3) places the onus of satisfying the Supreme Court that a matter should stay in the lower court on the party wishing to retain the original jurisdiction. If the party who wished to switch jurisdictions had to justify his/her request tactical switches of jurisdiction would be discouraged. Such tactics are, unfortunately, encouraged by s.22.

13. INTERESTS OF THE CHILDREN — s.26

The new Act places much greater emphasis on the interests of the children than the 1963 Act. Settlement of property on the children was previously unusual and seems to have been regarded by the majority of judges as a possibility to be considered only when future maintenance payments were uncertain.

S.26 gives a general power to settle property on the children while s.21 (16) allows such an order to disturb the provisions of an agreement.

Uncertainty of future maintenance payments and the special requirements of a particular child e.g. a handicapped child, may be the type of factors influencing the exercise of discretion under this section.

See Carruthers, 1975 R.L. 161, for a fact situation in which s.26 might have been used. (The facts of this case are discussed in the attached problems).

14. PROPERTY AND MAINTENANCE — s.32

Many jurisdictions which have community property schemes do not provide for spousal maintenance, or limit payments to a short period after dissolution of the marriage. The rationale for this approach is that if a wife obtains half of the assets built up during the marriage there is no reason why the husband should continue to support her out of his share. This logic only applies if there is some matrimonial property, the wife receives half of between husband and wife it was considered appropriate that the registration should be of a “Notice of Claim of Interest” rather than a Caveat — although it was necessary, in section 42 (3), to give the notice similar legal effect to that of a caveat.

6. Rights of Creditors (section 20)

Although of considerable importance the original clause (11) in the Bill attracted few submissions.

In its original form the Bill provided that the share of each spouse in the matrimonial property should be free from the claims of unsecured creditors of the other spouse while the whole of the property would be liable for debts incurred jointly or for a common purpose. This scheme was in accordance with the recommendations of the 1972 Committee but had the disadvantage of reducing the property potential available to unsecured creditors thus making them possibly more reluctant to give credit to married persons.

The alternative approach (which was finally adopted by the Committee) was to provide that each spouse should have a protected interest in the matrimonial home to the extent of $10,000 or half of the equity of each spouse in the home — whichever is the lesser.

Special provision is made for the payment of secured or unsecured personal debts. Although the Act specifically provides that nothing under section 20 shall derogate from the provisions of the 1972 Committee Act 1964 it is clear that in taking this step (and in the same Act providing for equal division of the proceeds of the home and in the same year legislating for automatic death duty exemption for a matrimonial home) the usefulness of the Joint Family Homes Act has largely been superceded.

7. The Transitional Provisions (section 55)

It was recognised that, at whatever date the Bill took effect, there would be those who would prefer to have their particular cases dealt with under the 1963 Act! It was further recognised that any commencement date would, of necessity, be an arbitrary one.

Matrimonial property proceedings are usually protracted — and can sometimes take 18-24 months from the time proceedings are issued until the matter is heard. If the legislation had provided that all proceedings issued prior to a given date were to be heard under the 1963 Act, cases under that Act would continue to be heard for several years — and at the same time the Courts would (in respect of more recent cases) be applying the new law.

The second alternative would have been to delay the commencement date until, say, late 1977 thereby allowing the majority of actions commenced under the 1963 Act to be disposed of. This would, however, result in a chaotic situation for the Courts. Those parties who wanted to have their cases heard under the 1963 Act would be pressing for early (often premature) fixtures. On the other hand those who considered that their cause would be better served by the 1976 Act would be seeking delays and the Courts could be subjected to spurious applications for adjournment.
in my view is to enable possession to be given or a just and proper apportionment to be made of those capital family assets which Denning LJ. referred to in *Fribance v. Fribance* [1957] 1 W.L.R. 364, 387 [1957] 1 All E.R. 357, 359 as "the things intended to be a continuing provision for the parties during their joint lives"; the working capital of the marriage partnership as they may be generically described in contrast, for example, with formal gifts or investments brought to the marriage by one party or the other or achieved by incomes ranging well outside normal family needs." (emphasis added).

Having adopted the term "contribution to the marriage partnership" it was immediately apparent that such "contribution" had to be defined carefully in order to avoid throwing the whole marriage open to judicial scrutiny; that would present the Courts with a formidable and invidious task and would lead to much uncertainty and disparity. Accordingly Section 18 provides an exhaustive definition of "contribution to the marriage partnership".

Furthermore the section provides (perhaps unnecessarily in view of the exhaustive definition of "contribution") that there shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature and also eliminates conduct from the notion of contribution except in circumstances where (using the general formula of the 1968 amendment but preferring the words of the Privy Council in Haldane) the misconduct has been "gross and palpable and has significantly affected the extent or value of the marital property."

4. Agreements between spouses (section 21)

There was no serious contention before the Committee that spouses should be prevented from making property arrangements between themselves that would differ from the scheme of the Act. Special arrangements may sometimes be particularly necessary (for instance in the case of a second marriage).

On the other hand there was widespread concern lest a more sophisticated and stronger partner should prevail upon the other to sign away his/her rights. For this reason section 21 (4), (5) and (6) provides a specific formula for the validity of such an arrangement (with a general power for the Court to "absolve" any minor irregularity — 21 (9)). The Committee was also concerned with the problem of agreements entered into many years before any real question as to the division of matrimonial property might have arisen. In order to overcome the possibility of abuse the Court was therefore given power to override such an agreement in the interests of justice (21 (8) (b) and 10)).

5. Registration of Notice of Interest (section 42).

Most submissions supported this provision in principle (although surprisingly some doubted whether it would be much advantage in practice). Because it is contemplated that such a notice might in some circumstances be lodged when there are in fact no "unhappy differences" it, there are no dependant children of the marriage and the wife has not diminished her ability to provide for herself by reason of having placed her family responsibilities before her employment opportunities. Maintenance will still be necessary where the wife cares for dependent children.

S.32 attempts to ensure that all financial matters are considered at the one hearing so that an overall just solution may be reached. Under the 1963 Act the court tended to discount property awards because of maintenance payments. Property division will now usually be automatic thus maintenance will be the flexible element in achieving an overall just financial result.


In the Supreme Court the wife was awarded a half share in the matrimonial home and adjoining section (together worth $68,000), exclusive possession of the home; maintenance of $65 pw for herself and $12 pw for each of two dependent children; a $2,500 lump sum and the right to take provisions from her husband's business. The wife had successfully petitioned for a divorce based on the husband's adultery. The Judges of the Court of Appeal accepted that the wife had made a substantial contribution to the home. However, having regard to the effect of the combination of the property and maintenance orders they considered that the husband was being required to expend too much capital to maintain his family. Other than the home and section the husband had assets of $6,500 plus an interest in his father's estate of $9,400. The Court considered that his share in his business had minimal resale value. The lower court's orders were varied. The wife was given a 1/3 interest in the home, $60 pw maintenance, $7.50 for one child and $10 pw for the other. The capital sum was affirmed. The section was vested solely in the husband.

15. Restraining Dispositions — s.43

The court may restrain a disposition being made to defeat an application under the Act. Section 43 follows the wording of s.80 Matrimonial Proceedings Act. It is to be hoped that s.43 will be interpreted so as to give more protection than was afforded by s.80.

cf Chapman, Supreme Court, Auckland. 23.6.73. Mahon J.

The wife attempted to place a caveat against property owned by the husband. When the husband was successful in having it removed the wife applied for an order under s.80. The order was refused when the husband satisfied the court that he was not selling to defeat the wife's claim but because of ill health. No order for security was made.

The new Act offers little protection against dissipation of assets. It is hoped that this will be borne in mind when a court is asked to exercise its discretion under s.43

16. Transitional Provisions — s.55, s.57

S.55 (1) requires the court to take into consideration any agreement
entered into prior to 1 February 1977. This very open ended provision will, barring an amendment, be effective for many years. It does not have the precision of s.6 (2) of the Matrimonial Property Act, 1963 which initially caused so many difficulties in its application. (See Stevens, 1974 2 N.Z.L.R. 129; Jones, 1975 2 N.Z.L.R. 347).

An agreement requires a consensus, offer and acceptance, but these may be oral or written, express or implied. Difficulties of proof will be enormous. It is possible that the court will follow cases decided under s.6 (2) of the previous Act and regard only those agreements which are express and intended to ensure in the circumstances which have occurred, and are still subsisting at the time of the court hearing.

However s.55 (1) must be contrasted with s.57 (5) which considers an agreement by way of settlement of any question of property. It is arguable that s.57 (5) covers the type of agreement reached in an intent to establish property rights i.e. the sort considered sufficient to invoke the bar under s.6 (2) of the 1963 Act, and therefore s.55 (1) covers any agreement, for whatever purpose and whether intended to ensure. S.57 (5) was, in all probability, inserted to ensure that a spouse who had reached a property settlement under the provisions of the 1963 Act after marriage breakdown did not attempt to try to reopen the dispute under the new Act.

The agreement is not binding on the court but my concern is that if s.55 (1) is widely construed individuals may be encouraged to use an ‘agreement’ as a means of challenging the automatic division provided for by the Act. The White Paper which accompanied the initial Bill stated that one of the Bill’s purposes was to create a certain system of property ownership so that litigation would be unnecessary except in the most unusual of cases. This purpose could be defeated by a liberal interpretation of s.55 (1).

Examples: agreements under the 1963 Act.

Ritzma, 1975 R.L. 208 — the wife was held to be bound to the unequal share holding between herself and her husband in the family business agreed to in the memorandum of association of the company.

Ryan, 1975 R.L. 165 — the home was purchased with money provided by the husband who then formally gifted it to the wife. Although the gift was an unilateral one the court held that it amounted to a common intention which bound the husband.

Catton, 1976 R.L. 17 — Wife was held not to be bound by a provision in a separation agreement giving the house to the husband as it was subject to a condition which the husband had not fulfilled.

On the other hand, again, the Government’s manifesto undertaking was to “legislate to provide for a rebuttal presumption that . . . matrimonial property acquired during the marriage is to be shared equally between the spouses” (emphasis added). Accordingly the Act provides that the matrimonial property other than the home and chattels shall be dealt with separately and section 15 divides it equally between the spouses unless one can show that “his or her contribution to the marriage partnership has clearly been greater than that of the other spouse”. In the event that this presumption is rebutted the share of each in the matrimonial property is to be determined in accordance with his or her contribution to the marriage partnership.

3. The concept of “contribution”.

Until the decision of the Privy Council in Haldane v. Haldane 14 (and particularly as a result of the decision of the Court of Appeal in E. v. E.) the Courts were bound to adopt a “contribution to the asset” approach. Even had this concept not been rejected by the Privy Council it is almost certain that the Select Committee would have done so — regarding the approach, although perhaps convenient, as artificial and presenting considerable difficulties where specific assets, or a limited number of assets, are in dispute.

The Committee preferred, instead, to adopt the concept of “contribution to the marriage partnership” thereby returning very much to the approach contemplated by Woodhouse J. in Hofman v. Hofman:— 15

"Marriage is a partnership of a very special nature and with respect I think (the 1963) Act puts a proper emphasis upon that fact. In my opinion it enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilled housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the family income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the constructive efforts of the other, and it appears to me that considerations of this sort will now properly play a considerable part in the assessment to be made. At least it can be said with confidence that artificial adjustments founded merely on money contributions by the one spouse or the other can now be avoided, and that women who have devoted themselves to their homes and their families need not suddenly find themselves facing an economic frustration (at least in the area of family assets) which their husbands or wives who are wage earners have usually been able to avoid. The purpose of the (1963) Act

14. (1975), (unrep) (P.C.)
15. [1965] NZLR 795 (S.C.)
disagreement with the proposed definition of matrimonial property although for drafting reasons it became necessary to define matrimonial and separate property in separate sections (8 and 9).

2. The division of matrimonial property (Sections 11-14)

The Bill originally divided matrimonial property into two categories — domestic and general assets; it provided for the equal division of the former (subject to a rebuttable presumption — clause 9) and for the latter to be divided according to the spouses contribution to the particular asset (clause 13) — hence the reference by the Minister of Justice, in his New Plymouth speech, to the Bill "being perhaps a little less radical than the Government General Election Policy" (which simply provided for "a rebuttable presumption... that matrimonial property acquired during the marriage is to be shared equally between the spouses...").

Studies in England have shown that married couples tend to regard the matrimonial home and family possessions in a different light from other assets — and there is no reason to believe that the New Zealand attitude is very different.

The 1974 Amendment to the Joint Family Homes Act recognised this different "status" for these particular assets (or at least the home) by providing for joint ownership and equal division of the proceeds of the sale of a Joint Family Home. It was only logical that both the Bill and ultimately the 1976 Act should extend this concept to all matrimonial homes.

Accordingly sections 11 to 14 provide that the matrimonial home (or an allowance for a homestead or moneys set aside for a home or an allowance therefor) and the family chattels shall be divided equally unless the marriage has been of short duration or there are extraordinary circumstances that in the opinion of the Court render repugnant to justice the equal sharing of these assets; if these latter circumstances arise the share of each spouse shall be determined in accordance with the contribution of each spouse to the marriage partnership.

Having dealt, in this way, with those assets which will probably comprise the only matrimonial property in the majority of cases, it was then necessary for the Committee to decide upon the manner in which the remainder of matrimonial property (other than the home and chattels) should be divided. It was immediately clear that there would be great difficulty in applying the same rules (i.e. as in sections 11 to 14) to the remaining matrimonial property. Both the public and the Courts would certainly consider it unfair that a spouse who had made no contribution to the building of an extensive business property may nevertheless be entitled to receive half thereof. There would be a real danger that the Courts would shrink from ordering an equal division of the home and chattels if that finding was also, automatically, to result in an equal division of the remaining matrimonial property. Accordingly it was clearly necessary to differentiate between the home and chattels on the one hand and the remaining matrimonial property on the other.
separate property — s.33 (3) (n). The husband's contribution would seem not to come within those listed in s.18. Is s.18 exhaustive?

cf. Wallace, 1975 R.L. 31 — husband's application refused as contributions were not to property in dispute.

3. Contributions to the marriage partnership

The couple were married in 1947 and separated in 1975. There are five children of the marriage, one still dependant.

Neither party had any assets at the time of marriage. In 1957 a farm was purchased without capital outlay. From the birth of a child in 1958 the wife suffered from recurrent depression which affected her ability to assist on the farm and in the home. The farm was sold in 1965 for $8,400. The proceeds were used to purchase the home property now in dispute and an adjoining section. From 1965 the wife worked part-time and used her income for her own needs. The house has a value of $13,400 and the section $1,600.

What is the wife's entitlement?

The home is matrimonial property to be divided jointly unless extraordinary circumstances exist — s.11 (1) (a), s.14. The wife contributed little to the marriage after 1958. However it can be argued that she did what she was psychologically able to. This was not a case of voluntary disregard of family duties. Section 14 should not be used.

The section is matrimonial property subject to division under s.15 (1). It is likely that the husband's contributions will be regarded as clearly greater than those of the wife. The clash between evaluating contributions and regarding the test as one of whether best efforts have been made arises directly here.

cf Haycock, 1974 1 N.Z.L.R. 409 — the nett amount for division was $12,400 (a sum was set aside for child maintenance), the wife received a quarter share.

4. Gifts from third parties — sustenance of separate property

The couple were married in 1940 and separated in 1969. There are five children of the marriage. The husband worked on his father's farm until 1945. In 1945 the husband obtained a farm through his father. The farm was subject to a mortgage to the Public Trust of $12,600 and one of $5,300 to the husband's father. By 1955 the mortgage to the husband's father had been reduced to $2,500 and this amount was forgiven. The husband received $29,000 under the terms of his father's will in 1955. $11,600 of this was paid to the Public Trust and a further $7,000 spent on capital improvements on the farm. Despite the payment to the Public Trust the mortgage increased steadily during the marriage. The wife performed a mainly domestic role during the marriage although she gave some little assistance on the farm at harvest and shearing time.

Although by no means approaching unanimity (some submissions were strongly opposed to the Bill) the majority gave it qualified support.

SOME MATTERS OF GENERAL CONSIDERATION

[a] The General Approach:

The 1976 Act's underlying principle, which appeared to command wide (although not universal) acceptance, is that marriage is an equal partnership to which each spouse contributes in different ways according to his or her ability, and that the division of property between the spouses, if the marriage breaks up, should reflect this. It follows that an income-earning contribution should not be regarded as having greater value than contributions in other forms. The 1976 Act is not primarily a device for giving wives more matrimonial property than they have hitherto received. Certainly in many cases it will have that effect, but its essential purpose is to provide for a fair and just sharing of assets.

[b] The Complexity of the Bill:

Some witnesses were critical of the complexity and detail of the Bill. Whilst sympathising with this view the Committee concluded that any substantial "simplification" would be deceptive and illusory because it would simply transfer to the unpredictable process of judicial interpretation the answering of important questions that pose themselves in any attempt to reform Matrimonial Property law. The elaborate detail into which the various Canadian Law Reform Bodies have found it necessary to go, in their recommendations on the subject, suggests that it is simply not possible to state the law in this area in a series of simple propositions. Similarly the Swedish Law, which provides for equal sharing, is a complex code.

c] Overseas Legislation:

Community of property between husband and wife (with equal division when the marriage ends) exists in the laws of the majority of European and European-settled countries outside the common law jurisdictions. These countries embrace the widest social and ideological diversity, from the traditional and conservative (Quebec, Spain) to the most liberal and radical (Denmark, Sweden) and from the capitalist orientated (California, Texas) to the eastern bloc (Hungary, Poland).

In Canada (where outside Quebec the present law is similar to that of New Zealand before 1963) very comprehensive reports have recently been delivered by the Law Reform Commissions of Canada and of several provinces. These have, without exception, favoured the concept of an equal sharing of matrimonial property between husband and wife.

THE MAJOR POLICY CONSIDERATIONS

In the opinion of the Committee the Bill (and the submissions made on it) raised a number of important issues:

1. The scope of matrimonial property (Section 8)

With one exception the submissions did not display any fundamental
THE 1975 MATRIMONIAL PROPERTY BILL

The Matrimonial Property Bill was introduced by the then Minister of Justice, Hon. Dr. A.M. Finlay, at the end of the 1975 Parliamentary Session. After a brief and non-contentious introductory debate the Bill was read a first time and referred to the Statutes Revision Committee for recess study.

Following the change in Government there was some speculation that the Bill would not be proceeded with; this speculation was in seeming ignorance of the National Party's Manifesto undertaking. Nonetheless it was necessary for the new Government to give careful consideration to the Bill to see whether, if amended, it could be used as a vehicle to implement its election policy. Finally in a speech to the New Plymouth North Rotary Club on 13 May 1976 the Minister of Justice, Hon. David Thomson, said—

"(The National Government is) committed to legislating to create a presumption of equal division of . . . matrimonial property between husband and wife should the marriage break up. A presumption which will, however, be able to be displaced in proper circumstances. This represents a very important social advance and in its concept represents a bold step forward . . . When we took office we looked into the Bill and found that, broadly, it was consistent with our election policy and we propose to go ahead with it subject to any changes that may suggest themselves in the light of evidence to be given on the Bill . . . The Bill is perhaps a little less radical than the words of the Government Election Policy, read literally, in that it confines the starting point of equal division to that part of matrimonial property which it terms "domestic assets". It is also more than a little complex but this may well be justified."

The Statutes Revision Select Committee therefore proceeded to consider the Bill, taking the first evidence in mid-1976.

The Committee — which save for one issue (the inclusion of de facto marriages) dealt with the Bill on a completely non-partisan basis — comprised Hon. David Thomson, Mr B.E. Brill, Mr D.M.J. Jones, Mr D.F. Quigley, Marilyn Waring, Hon. Dr. A.M. Finlay, Hon. A. Faulkner, Mr J.L. Hunt, Mr R. Prebble and the writer as Chairman. It is interesting to note that for the first time since the 1940's the majority of the Statutes Revision Committee were qualified lawyers — nearly all with recent experience in practice.

SUBMISSIONS TO THE SELECT COMMITTEE

The Select Committee received a total of 51 submissions from individuals and organisations — a number of whom were heard in person. Although the New Zealand Law Society made submissions surprisingly few practising lawyers tendered their personal views — although several assisted in the preparation and appeared in support of submissions prepared by organisations such as Federated Farmers, various Zonta Clubs and the Women's Electoral Lobby.

When the couple separated the husband retained 30 acres of the property (worth $60,000) and subdivided and sold the remainder for a net profit of $42,800. With this money he has since purchased other assets and now has assets worth $118,500. The wife has no assets and is receiving $50pw maintenance.

Was the farm a gift? If it was not a gift it was matrimonial property s.8 (e). If it was a gift does s.10 (1) apply? The same questions apply to the amount of the mortgage which was forgiven.

The homestead would have been matrimonial property — s.8 (a), s.10 (3). However it was sold with no intention of another being bought therefore to obtain her interest the wife must apply under s.11 (3) (b) but as there is no other matrimonial property for an order to be made out of do s.33 (3) (n) or s.20 (6) apply?

If the farm was separate property the wife may apply under s.17 (1) (b), if it was matrimonial property s.15(1). Can it be said that the husband's contribution to the partnership was clearly greater when he put little effort into maintaining the farm. The property the husband now has was, except for the thirty acres, acquired after the separation and is therefore separate property — s.9 (4). However if it was acquired with the proceeds of the sale of matrimonial property this might be a reason for the court to decide that s.8 (b) governs and it is matrimonial property. If not the wife must ask for an order under s.33 (3) (n).

Should the wife's share be fixed at the unimproved value the property had at the time of separation?

5. Contributions to separate property

A. The couple were married in 1956 and separated in 1972. There are three children of the marriage. At the time of the marriage the husband was a tenant-in-common in equal shares with his father on a farm.

Throughout the marriage as well as taking full responsibility for managing the household and for child care the wife worked 6-8 hours a day in the farm milking and doing general farm chores. She was unpaid except for the last 12 months when she received $100 p.m. In 1966 the partnership purchased a second property with mortgage monies plus a $12,000 loan from the husband's mother and $1,000 from the farm account. Both properties were run as one unit. In 1972 the husband's share of the farm was valued at $91,700. At present the husband's share in the first property is valued at $109,000 and the second property at $70,000. The homestead has a value of $20,000.
At the time of the separation the wife took a car valued at $1,000. The husband had a car valued at $3,000.

The husband owes $60,593 to his father and $14,343 to his mother.

B. The facts as above save that the husband purchases his father's share of the partnership in 1968. The father takes a mortgage back. The values given are the full value of the farm.

The husband's share in the initial property is separate property — s.9 (1). The second farm is matrimonial property — s.8 (e). The homestead is matrimonial property — s.8(a).

The increase in value of the first farm due to the wife's work i.e. the savings in farm wages, is matrimonial property — s.9 (3) (a). The wife is entitled to at least a half share of this increase — s.15 (1).

The second farm is to be divided equally — s.15 (1) unless the contributions of one are clearly greater. The property was not gifted from the parents, the husband paid no money for it, the wife's contribution to the marriage partnership is arguably clearly greater than those of the husband.

Should the wife share in the inflationary increase in value of the second farm since the separation when the husband will have the continuing mortgage liability (although he will also have the property)? The wife is entitled to a half share of the value of the homestead — s.12 (1).

Both cars were matrimonial property and their value, presumably the value they had at the time of the separation, should be shared equally.

The wife's share in the second farm and homestead may be increased by virtue of her work on the farm which is the husband's separate property — s.17.

b. One half of the first farm now becomes matrimonial property — s.8 (e).

There is an argument that property obtained out of separate property or income from separate property is separate property. But here the farm can be said to have acquired for common benefit so it is matrimonial property — s.8 (e), more importantly no cash was paid for it. The question is whether the husband's contribution to the partnership has been clearly greater than that of the wife. The property was obtained because of the relationship of the husband to the seller but the loans were business loans (although they might be forgiven at some later date) and the wife will only share in the equity which she helped to build up.

cf. Akehurst, 1975 R.L. 275 — the wife received $17,000.

6. Gifts between spouses — husband's business — date of fixing value of shares.

The couple were married in 1944. The husband left the family in 1973

surprised at the very ready manner in which the Courts were prepared to rebut this presumption of equality. In this apparent "thwarting" of their legislative intention one can possibly find the origin of legislature's desire to write, into the Bill and finally the 1976 Act, clear and unequivocal directions to the Judiciary as to its intentions, and, as to the manner in which the presumption of equal sharing was (if in any circumstances) to be rebutted.

THE SELECT COMMITTEE ON WOMEN'S RIGHTS

The 1975 Select Committee on Women's Rights, in its report to Parliament took the question of equal sharing of matrimonial property one step further, when it said:—

"... the law should presume that the husband and wife’s respective contributions to the marriage assets are of equal value thereby entitling each to an equal share in these assets. We do not envisage that the rule of equal division would be applied rigidly, but rather that it would function as the basic principle for assessing the disposal of marriage assets in place of the existing provisions under which the wife’s share of property, accumulated during the marriage, is determined at the discretion of the Court". 11

1975 ELECTION MANIFESTOS

In its 1975 Election Manifesto the National Party stated:—

"National believes that the law must treat marriage as a partnership of equals with reciprocal obligations, and will legislate to provide for a rebuttal presumption that, when a marriage is legally terminated, matrimonial property acquired during the marriage is to be shared equally between the spouses. The courts will be permitted to override this presumption where considered necessary in the interests of fairness and equity". 12 (Emphasis added).

Having introduced the Bill, and published the explanatory paper, the Labour Party's attitude had been fairly clearly expressed. Nonetheless it, too, in its manifesto stated:—

"The Matrimonial Property Amendment Bill marks a radical new approach to a very difficult problem. It deals with the division of property between spouses who are living but estranged. To extend this to cover surviving spouses presents knottier problems but the Government's Exploratory Paper indicates the lines along which it is thinking." 13.

etc. — and any accretion, during the marriage, in the value of previously-owned property).
2. The concept of contribution should be related to the marriage assets in general so that a "global order" could be made — although the Committee did recognize the special position of the matrimonial home.
3. The Court should be obliged in all cases (and not merely those relating to the matrimonial home) to have regard to contributions made to the property.
4. In addition to the types of order which the Court could make pursuant to the 1963 Act it should be permitted to authorize one spouse to occupy the matrimonial home to the exclusion of the other and to order the payment of a lump sum from one party to another.
5. A substantive approach should be substituted for the procedural approach of the 1963 Act.
6. A "common intention" 8 should only be binding on the parties where the event that has happened (e.g. divorce, death of one spouse etc.) was clearly in the contemplation of the parties when that common intention was formed.
7. On the bankruptcy of one spouse his or her assets only should be available to creditors, and that the rule in Donnelly v. Official Assignee 9 should be abrogated to allow an application by one spouse to be brought against the other's assignee in bankruptcy.
8. A spouse whose name does not appear upon the title should be entitled to register notice of his or her interest.
9. The Court should have power to hear such evidence as it thinks fit whether or not that evidence is legally admissible under the ordinary rules of evidence.
10. In any new code the jurisdiction of the Court (in the conflict of laws sense) should be specified.

THE JOINT FAMILY HOMES AMENDMENT ACT 1974

Section 7 of Joint Family Homes Amendment Act 1974 provided that, on the registration of a Joint Family Home, the spouses were to become the legal and beneficial owners of the home property as joint tenants. The amendment created a presumption of an equal interest in the proceeds of the sale of the home; Parliament clearly intended that this presumption should be capable of being rebutted and, specifically, that the Court should retain a discretion to make orders under the Matrimonial Property Act 1963. 10 Nonetheless most non-lawyer Parliamentarians would have been and has since refused to pay maintenance or outgoings on the house. There are five children of the marriage.

Three pieces of property are in dispute.
1. The matrimonial home built in 1953 by the husband with assistance from the wife. It was valued at $25,000 with the equity of $20,000 in 1973. It is now valued at $30,000. Since the separation the wife has paid $1,000 interest on the mortgage and spent $500 redecorating the home.
2. A holiday house purchased in 1965 for $2,500. The property is registered in the wife's name for tax purposes. The wife signed an acknowledgement of debt to the husband at the time of the purchase but the husband has paid all the outgoings on the property. The property was valued at $9,000 in 1973. It is now worth $10,500. The husband has spent $500 on maintenance and outgoings on the property since 1973.
3. The husband's joinery business established in 1946. The property on which the business stands is now worth $10,000. During the marriage the wife spent 1-2 hours per week on secretarial work for the business. She received $10pw for this work from 1970.

What is the value of the wife's interest in each piece of property?

1. The home is matrimonial property — s.8 (a), and is to be divided equally — s.11 (a). It is doubtful whether the fact that the husband physically built the house could be regarded as an extraordinary circumstance under s.14 (cf Papesch, 1974 R.L. 321). It is unlikely that the husband's desertion would affect his share, though it might be a factor supporting an application by the wife for exclusive possession. The desertion and failure to pay maintenance may be regarded as reasons for quantifying the husband's interest at the 1973 value, or for repaying to the wife the outgoings she has paid since the separation before determining the value of the property available for division — see Hartley, 1976 R.L. 124, Andrew, 1976 R.L. 17, Fleet, 1975 R.L. 216. If the desertion is disregarded the court will take the current value of the property, deduct any capital payments made by the wife since the separation and repay these to her, and divide the remaining amount equally between the parties — s.2 (2) (3).
2. Is the home the wife's separate property by reason of being a gift from the husband? It is probably matrimonial property as it was used by the family and its value increased due to the husband's efforts and the application of matrimonial property — s.10 (2), s.9 (3). Should the division be equal or have the husband's contributions to the partnership clearly been greater? Five children take a lot of time and effort and the wife also gave some assistance in the business.
3. The conflict between contributions to property and contributions to the partnership, and quantifying contributions and simply asking has each party done their best, arises in relation to the business. The wife has

8. Sec. 6 (2) 1963 Act.
not worked outside the home. She therefore has made an investment not only in the assets built up during the marriage but also in the husband's career.

cf Witte, 1975 R.L. 214. The wife received 40% interest in the home, 10% in the beach house and $750 for her work in the business.

Where considerable property exists the court by giving the wife a share in the business assets may enable her to provide for herself in the future and free the husband of the millstone of periodic maintenance payments and the wife of the indignity of being a dependant.

7. Gifts from third parties - contributions

The parties were married in 1961 and separated in 1974 when the wife left to live with another man. There were three children of the marriage. At the time of the marriage the wife had $1,000 and the husband had $400. For the first five years of the marriage the husband worked as a share-milkker on the wife's father's farm, first on a 29% share then on an equal basis. The father said he allowed this because he wished to encourage his son-in-law and to take the couple's mind off the incurable illness of their child who was born in 1962. The father sold the herd and implements to the husband for $4,000, which was considerably below market value. The wife assisted on the farm as she was able but much of her time was taken up with the care of the child who had muscular dystrophy. The child died in 1968. In 1967 the father sold the farm and the husband received $10,000 for the herd and implements. The father loaned the husband $6,000 on second mortgage for 10 years at 6½% to buy a farm.

73 acres were purchased for $22,600. In 1970 44 acres were purchased with mortgage monies for $15,000 and another 19 acres were obtained in the same manner in 1973 for $12,000. All the properties were worked as one unit. The farm was registered in the husband's name while the farm account was in the joint names of the parties. The net equity in the property is $60,000. The homestead is worth $20,000.

What share is the wife entitled to?

The gifts appear to have been to the couple rather than to the individual and there is considerable intermingling of the gifts with property acquired after the marriage through the efforts of the couple. Therefore all property is matrimonial property. The wife is entitled to a ½ share in the value of the homestead. Can it be said that the husband's contributions to the partnership are clearly greater than the wife's? The wife's care of the child which prevented her from assisting on the farm is a contribution to the partnership.

cf Oliff, Sup. Ct. Auckland. 1.11.76. M638/75. Barker J. — the wife received $15,000 and half interest in the home and $5,000 share in the farm.

THE MATRIMONIAL PROPERTY AMENDMENT ACT 1968

The 1963 Act was the subject of five amendments (including two inserted by the Domestic Proceedings Act 1968 and the Administration Act 1969); the most important of these was the Matrimonial Property Amendment Act of 1968 which (inter alia) inserted Section 6A (which substantially limited the relevance of misconduct).

1972 COMMITTEE REPORT

In 1969 the New Zealand Law Society made representations to the then Minister of Justice (the late Hon. J.R. Hanan) relating to the effect of insolventy on the rights of spouses under the 1963 Act. The Minister, in turn, raised a number of other matters of concern regarding the Act and suggested that all these matters could usefully be discussed between the Society and the Justice Department. In the result a special committee was established comprising Mr S.C. Ennor of Auckland and Mr A. Hearn of Christchurch (both nominated by the Law Society), Mr R.G.F. Barker (Justice Department — Legal Adviser) and Mr B.J. Cameron (now Deputy Secretary for Justice — who also acted as convener).

In its unanimous report, presented to the Minister of Justice in June 1972, the Committee said:

"We are satisfied that there is a need to enact as soon as possible a single, clear and comprehensive statute to regulate matrimonial property in New Zealand. The Matrimonial Property Act 1963 has already been much amended; there are several illogical differences between the Act and Part VIII of the Matrimonial Proceedings Act 1963; there remain a number of internal anomalies and defects; and further attempts at piece-meal amendments are likely to compound rather than resolve these difficulties. Furthermore, the 1963 Act was tentative in policy and was in form engrained upon a primarily procedural section of the Married Women's Property Act 1952, first enacted in 1884. We believe that public and professional opinion has moved a considerable distance since 1963, and that the time has come for a coherent and rational code on this most important subject of the property relations between husband and wife."

The Committee also recommended that such a matrimonial property code should be based on the 1963 Act, but should have incorporated into it most of the provisions of Part VIII of the Matrimonial Proceedings Act 1963 (as well as the new provisions which the Committee proposed).

The committee further recommended that:

1. The new Statute should extend to all the assets of the marriage (i.e. all property acquired in contemplation of the marriage by either party or since the marriage by either party — otherwise than by gift, inheritance

It is, however, important to observe that the 1963 Act was something of an "afterthought". The then Minister of Justice, the late Hon. J.R. Hanan, had already introduced the Matrimonial Proceedings Act 1963 which made important changes to other aspects of matrimonial law and, at fairly short notice, arranged for a Bill to be prepared and introduced to deal more adequately with questions of property, which were at that time covered by the Married Women’s Property Act 1952. Although the 1963 Act represented a substantial advance on the previous legislation it still had many defects. Not the least of these was the fact that the Act was largely procedural in form; it dealt with questions arising in criminal proceedings, proceedings in tort between husband and wife, and used terminology such as "in any question between husband and wife as to the title to or possession of property".

Furthermore the 1963 Act took the previous law as its starting point and merely added a gloss to it. A spouse still had to rely upon "contribution" as the foundation for any property application against the other.

Such defects might, perhaps, have been regarded as being of little consequence had not a number of substantive problems also arisen in the practical application of the 1963 Act:

1. There was much uncertainty as to how the law would be applied in any case. The decided cases indicate that results could differ significantly on seemingly similar facts and could, indeed, depend a great deal upon which judicial officer determined the matter. This was inevitable where the Court was given such a wide discretion.

2. It was often suggested that the practice of the Courts had been less generous (particularly to wives).

3. The decision of the Court of Appeal in E. v. E. raised the problem of specific contribution to specific assets — and high-lighted the difficulties of a wife who was unable to prove such contribution.

4. The overlapping, and in some ways conflicting, jurisdictions of the 1963 Act with the Matrimonial Proceedings Act 1963 gave rise to inconsistencies.

There were other problems as well — not the least of which was the inability of a spouse to lodge a caveat to protect his/her interest, the inability of the Court to interfere with maintenance orders when making a Matrimonial Property Order and the narrow "range" of orders which the Court could in fact make in determining a property application.

8. Gifts between spouses — orders out of separate property

The couple were married in 1964 and separated in 1976. There are two children of the marriage.

At the time of the marriage the wife owned a dairy farm worth $39,000 and other lands valued at $3,500, a car and furniture. The husband owned a van and tools together worth $2,000. After the marriage the couple jointly ran the farm and the wife gave the husband a half interest in the stock and plant. The wife sold her second piece of land for $17,000 and purchased another in the joint names of the couple of $4,000, the extra $13,000 was used to reduce the mortgage on the farm, to make improvements to it and to purchase a house. The couple shifted to the house and put share milkers on the farm. A mortgage was raised on the farm and used to purchase land in the husband’s name in 1972. In 1973 the farm was sold and the proceeds used to pay the mortgage on the husband’s land. Monies from all properties were at all times paid into a joint account. After the separation the house was sold for $4,500 net. The husband has signed an agreement to sell his land to third parties for $13,583 gross, $7,583 nett. The husband’s mismanagement was primarily responsible for the loss of the assets.

What is the wife’s share?

The proceeds from the sale of the home must be divided equally unless the husband’s mismanagement can be regarded as an extraordinary circumstance — s.14.

The husband’s land was acquired during the marriage from the proceeds of jointly owned property. Joint property is matrimonial property — s.8 (c), property purchased with matrimonial property is matrimonial property unless the husband can establish that the property was a gift to him.

Even if it was a gift it was used for the benefit of both as all profits from it were paid into a joint account. It is therefore matrimonial property to be divided equally unless the wife’s contributions have been clearly greater.

cf. Rehn (1976), 1 Fam. L.R. 11,115 (Aust.), the wife received the property registered in the husband’s name and a half share in the house proceeds.

9. Conduct — husband having considerable assets at the time of the marriage.

The couple were married in 1954 when the husband was 41 and the wife 21. The parties were divorced on the grounds of the wife’s adultery in 1976. There are two children of the marriage.

At the time of the marriage the husband had assets worth $12,300. The wife had no assets. The husband used his assets to purchase two businesses which were sold in 1975. In the initial years of the marriage the wife assisted part-time in the business. From 1958 the husband purchased, renovated and sold houses. The wife assisted with the redecoration of the houses.

The equity in the matrimonial home at the time of the divorce was $12,000.
The husband, in 1976, had other assets worth $66,000 made up of property purchased since the marriage. During the marriage the husband gave the wife a house, a car and jewellery worth $9,000.

What is the wife entitled to?

The home and cars, if used for family purposes, are to be divided equally unless extraordinary circumstances exist. Adultery after a long marriage during which contributions are made cannot be regarded as a s.14 circumstance. However if the wife’s house is classified as separate property in which the husband has no interest this coupled with the misconduct may be sufficient to invoke s.14.

The other assets of the husband are matrimonial property as they were acquired since the marriage. Those acquired with assets owned at the time of the marriage will be matrimonial property in so far as they were acquired to earn income for family uses — s.8 (e).

If they are matrimonial property is the husband entitled to a greater share because of clearly greater contributions? Conduct can only be taken into account in the form of the order — s.18 (3), and must be gross and palpable and have affected the property. The adultery has not affected the extent or value of the property. Does the husband’s initial financial contribution and continued efforts outweigh the wife’s general assistance note s.18 (2). A factor in weighing their general efforts to the partnership would be the gifts the wife received from the matrimonial property, though these must be balanced against any expenditure by the husband for his own purposes as we are no longer dealing with property regarded as the husband’s but with matrimonial property.

The husband’s gifts to the wife are separate property unless used for common purposes s.10 (2).

cf. EvE, 1971 N.Z.L.R. 859 — the couple were declared to be tenants in common in equal shares of the house, the husband to have exclusive possession. No other order was made.

10. Assets owned by wife on marriage — conduct — interests of children

Couple were married in 1959 and separated in 1972. There are five children of the marriage presently aged from 14 to 6 years. The wife has considerable inherited wealth. The couple came to N.Z. in 1962.

In 1964 the wife purchased a cottage in her own name which the couple lived in for 9 months. The wife then purchased a house for $8,000. It was settled as a joint family home. The husband paid the housekeeping expenses and shared the outgoings on the home. The couple separated in 1972 when, by agreement, the wife was given custody and exclusive possession. In 1973 without warning the wife left the home and the children and went overseas. She has had virtually no contact with the family since. The husband moved back into the home to care for the children. He is now living in a de facto relationship with a woman who has two children.
and he wishes to raise a mortgage on the property to build an extension. The house is valued at $32,000 and the cottage is $15,000.

The home whenever and however acquired is matrimonial property to be divided jointly save in exceptional circumstances. Does the wife’s wealth, her conduct and the husband’s care of the children entitle him a greater than half share. Alternatively should the court exercise its discretion under s.26 and vest half the house in the husband and the other half in trust for the children.

The cottage was purchased out of separate property and remains separate property unless it has been used for common purposes s.8 (e). If it is matrimonial property are the contributions of one party clearly greater such that an equal division should not occur — s.15 (1). Contributions are settled at the date of the separation so the husband’s continuing contribution of caring for the children can only be considered as a reason for quantifying the wife’s interest at the value on separation. The interests of the children may be considered and the equal sharing disturbed by an order for their benefit.

cf Carruthers, 1975 R.L. 161. The home property was vested in the husband. The wife was given a registered mortgage over the property (ranking after the mortgage to the bank raised to obtain money for the extensions) of 75% of its value. Interest on the mortgage to be 4% pa, the rate increasing by 1% pa. from the following quarter day as each child attained 18. The mortgage to be repaid on the sale or other disposition of the property; or on the property ceasing to be the principal residence of the husband and any child of the marriage; or the youngest child normally residing with the husband attaining 18.

11. Management of matrimonial property

The husband has a greengrocery business which is matrimonial property. The wife works in the business. The husband is approached by a van salesman who attempts to sell him the idea of buying an expensive van and extending the business by a suburban vegetable round. The wife states that the van should not be bought.

Unbeknown to the wife the husband agrees to buy the van. The purchase is made in the name of the company. The scheme is a failure and the business is unable to keep up the payments on the van. The dealer sues for the price. The wife argues that the debt is a personal one and should be paid out of separate property owed by the husband.

The court would have jurisdiction by a s.25 (2) (c). s.20 (5) a secured debt is deducted from matrimonial property unless it is a personal debt. It is not a personal debt if it is incurred in the course of a common enterprise.
12. Assets owned prior to marriage — decrease in value since separation.

The parties were married in 1957 and separated in 1973. There are three children of the marriage. At the time of the marriage the husband owned 1 a butchery business; 2, a 17 acre farm at Mangere; 3, a house. The house was sold in 1959 and the proceeds used to pay arrears of tax. Until 1970 the family lived on the farm. Both parties worked on the farm and in the butchery. The wife had sole responsibility for the management of the house and the care of the children. In 1970 the farm was sold for $40,000 and another purchased in Pukekohe for $20,000. $12,000 cash was paid. The family moved to live on the new farm. The wife took a job earning $47pw and used this to pay the household expenses — the husband did not provide any housekeeping money. The wife spent $1,000 she received from a legacy repairing and furnishing the house. The husband sold the butchery in 1972 for $4,000.

The present value of the farm is $57,500. The homestead is in poor condition and worth little. The mortgage on the farm is $16,000, at the time of the separation it was $9,000. No other assets remain. The husband let the farms and butchery run down.

The farm is matrimonial property as it was acquired during the marriage for common use — s.8 (e). The wife is entitled to a half share in the value of the homestead unless extraordinary circumstances justify a greater share.

The farm is to be divided according to s.15 (1). The wife's assumption of full responsibility for the family, her assistance in the business (which was lost because of the husband's neglect), and her acceptance of a lower standard of living than was possible (living in a poor house and paying the housekeeping while the husband dissipated considerable assets) entitle her to a more than equal share. The wife's share should be fixed on the equity in the property at the time of the separation, as the mortgages raised after the separation were raised to pay the husband's separate debts — s.20 (2) (6).


The wife was given a 30% interest in the farm. The equity being fixed as it was at the time of the separation.

13. Dissipation of matrimonial property — order from separate property.

At the time of the marriage the husband owned a considerable number of gilt edged securities. After the marriage the couple buy a house and business on a small deposit which is paid by the husband. The house is in the husband's name. Both work in the business. Five years later the business is sold and the money paid into a joint account. Without the wife's knowledge the husband mortgages the house and dissipates the mortgage money plus the money from the joint account. The mortgage is called up and the house sold for $20,000 gross leaving $5,000 nett. Can the wife claim against the husband's separate property?

INTRODUCTION

One of the important functions of the Legal Research Foundation is assisting the legal profession, not only to understand difficult and uncertain areas of the law but to absorb quickly and accurately new legislation which comes onto the statute books. The Matrimonial Property Act 1976 which became law on 14th December 1976 and came into force on 1st February 1977 makes substantial changes in an area of the law of which every practitioner must have some working knowledge.

Over the years since its inception the Foundation has developed the ability to mount a seminar quickly and efficiently. It was therefore clear that it should do something about the new act. It was however doubly fortunate in that it had available the expertise of Professor P.R.H. Webb, Mrs Pauline Vaver and Mr J.K. McLay. Professor Webb with his book on family law is an acknowledged expert in matrimonial matters, Mrs Vaver has given substantial assistance in the preparation of the Bill, and Mr McLay was the Chairman of the Statutes Revision Committee which considered the Bill in detail prior to its enactment.

We are deeply grateful to them for the efforts they have put in to producing at short notice the papers printed in this booklet for the seminar. We know they will be of great assistance to the profession and through it to the public which primarily we exist to service.

P.G. HILLYER, Q.C.
Chairman — Legal Research Foundation Inc.
The house was matrimonial property to be divided jointly therefore the wife was entitled to a half share in the $20,000. However the protected interest in the house given to her by s.20 (2) is liable for secured personal debts of the husband. S.20 (6) (b) allows the wife to claim against the husband’s separate property for the extra $5,000.

The business was acquired during the marriage for the common use and is therefore matrimonial property to be divided according to s.15 (1).

Can the court make an order against the husband’s separate property for the wife’s share?


The couple were married in 1969, separated in 1972 and divorced Jan. 1, 1976. There are no children to the marriage.

The matrimonial home had been purchased in contemplation of marriage. The husband paid $700 and the wife $3,000, the remainder was financed by mortgage. When the couple separated the husband sold the house and used the $5,200 proceeds to pay matrimonial debts and to purchase a $4,000 car. The car was subsequently sold and the assets dissipated. After the divorce the husband, with finance from his father and a bank, purchased a house and a business.

Can the wife apply out of time against the husband’s separate property?

The separate property of the husband has been in no way sustained by matrimonial property or the efforts of the wife so s.9 (3) (b), 17 (1) (a) and 20 (6) do not apply. Does s.33 (3) (n) give jurisdiction to order the ‘husband’ to pay a sum of money to the ‘wife’?

cf Wynd v. Langl, Sup. Ct New Plymouth. 27.5.74. M14/73. The court refused to make an order as no identifiable item of property to which the wife had made a contribution existed.

15. Agreement — contributions clearly greater.

The couple were married in 1960 and separated in 1976. There are two children of the marriage. The husband worked spasmodically during the marriage and never gave the wife any housekeeping money. Four properties were purchased during the marriage.

1. The matrimonial home purchased by the wife and registered in her name, now worth $23,000.
2. Paid for jointly by the parties and registered in joint names. Worth $19,000. When the couple separated in 1975 the husband agreed to allow the wife to buy his share for $7,000. He refused to complete the agreement after the wife had paid part of the purchase price.
3 & 4 purchased by the wife in her name and with her money. Worth $25,000 and $10,000. The husband did some minor repair work on the properties.
All properties are prima facia matrimonial property as they were purchased after the marriage.

1. equal shares unless extraordinary circumstances exist.
2. Is there an agreement under s.55 or a settlement under s.57 (5)?
3 & 4 Purchased from monies earned during the marriage therefore matrimonial property. Are her contributions clearly greater? The husband appears to have put little effort into the marriage partnership. cf Knox, 1974 R.L. 104 — 1 & 2 equal shares with the husband share in No. 2 fixed in the value agreed to on separation; 3 & 4 husband given $250 for work done.

CONTENTS

INTRODUCTION
   P.G. Hillyer, Q.C., LL.B .................p. 5

PAPERS
   Professor P.R.H. Webb, M.A., LL.B., LL.D., p.23
   Pauline Vaver, LL.B. (Hons), M.Jr. ........p.55