Superannuation schemes and the Matrimonial Property Act 1976

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With the passage of the Matrimonial Property Act 1976 New Zealand has adopted a new system of division of property rights between spouses on divorce or separation. In this article the writer examines the new legislation as it applies to superannuation schemes, suggests that the case law to date has failed to allocate the full rights available from such schemes and argues for an approach similar to that adopted in some overseas jurisdictions.

I. INTRODUCTION

Section 8 of the Matrimonial Property Act 1976[1] defines categories of property that are matrimonial property and subject to division by the courts. One such category is superannuation — the benefits, rights or pensions derived under superannuation schemes.[2] Superannuation schemes and insurance policies[3] are likely to pose special problems for the courts if there is an attempt to allocate the full benefits of such items between both spouses. In many cases the benefits are contingent on future events that may occur beyond the dates of separation or the court hearing. While it may be possible to divide specific monetary values as at either of these dates, such values may not represent the true worth of the property. Superannuation schemes and insurance policies are also interesting because, apart from the major family assets of the matrimonial home[4] and the family chattels,[5] they are the only items of matrimonial property for which the Act directs division of the total value of the property irrespective of the fact that some entitlement may have been acquired before marriage.[6] Section 8(e) would appear to establish a

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1 For a full discussion of the Act see R. L. Fisher *The Matrimonial Property Act 1976* (Wellington, 1977), especially paras. 641-644.

2 Matrimonial Property Act 1976, s.8(i).

3 Section 8(g).

4 Section 8(a).

5 Section 8(b).

6 Any insurance policy held by one spouse on his own life or the life of his partner, and for the benefit of either partner, is matrimonial property unless it was fully paid up at the time of the marriage: s.8(g) of the Act. Therefore, even if some premium payments were made before marriage the whole policy is designated as matrimonial property once premium payments are due after marriage.

presumption that only property acquired during the marriage is subject to division[7] but this presumption does not extend to superannuation or insurance.

In this article, the discussion is limited to superannuation. Some of the arguments will be applicable by analogy to life insurance, but despite their often similar functions, life insurance and superannuation may not be able to be dealt with in the same way under the Matrimonial Property Act.[8] The purpose of this article is two-fold: (a) to show, with reference to overseas material, that the courts in New Zealand have been too restrictive in their division of superannuation rights; and (b) to suggest that the provisions of section 8(i) are conceptually unsound insofar as benefits earned prior to marriage are included as matrimonial property.

Superannuation schemes are not a minor item of matrimonial property. Aside from the matrimonial home, a prospective pension may be the only substantial asset of the matrimonial partnership. In addition, superannuation schemes and life insurance policies often represent a major source of saving by the members of the partnership. A survey conducted by the British Government Actuary in 1971 estimated that there were 11.1 million members in occupational pension schemes. This figure represented 62% of the male working population and 28% of all employed women.[9] In New Zealand there has been no survey of the total number of contributors to all superannuation schemes. However, in the government schemes there were 129,643 contributors to the Government Superannuation Fund in the year ending March 31, 1978[10] and 11,288 to the National Provident Fund.[11] It has been estimated that the total assets of private superannuation funds in 1978 were $340,000,000[12] while the approximate assets of the Government Superannuation Fund totalled $456,500,000[13] and the National Provident Fund $748,500,000.[14] Superannuation consultants report that the introduction of National Superannuation under the Social Security Amendment Act 1976, with its increased cover for all aged 60 and over, has had little effect on the numbers seeking superannuation protection. However, one trend that may have an effect on the application of the Matrimonial Property Act 1976 to superannuation is the move away from lump

7 The precise scope of s.8(e) especially in its relationship to s.9(2) is unclear. See *Wisnewski* v. *Wisnewski* (1977) Unreported, Palmerston North Registry M.116/76, but for a different view see *Reid* v. *Reid* (1977) Unreported, Wellington Registry M.39/77, and *Manuel* v. *Manuel* (1978) Unreported, Hamilton Registry M.93/77, doubted in *Delbridge* v. *Delbridge* (1978) Unreported, Wellington Registry M.169/77.

8 See G. J. van Bohemen "Spousal Rights to Contingent Benefits in Superannuation Schemes and Life Insurance Policies under the Matrimonial Property Act 1976" LL.M. Research Paper, V.U.W. 1978, of which this article is part.

9 See citation in Barrington Baker, Eekelaar, Gibson and Raikes *The Matrimonial Jurisdiction of Registrars in England and Wales* (Social Science Research Council, Oxford, 1977) 27.

10 *Report on the Government Superannuation Fund* New Zealand. Parliament. House of Representatives. Appendix to the journals, 1978, B.20.

11 *Report of the National Provident Fund Board* New Zealand. Parliament. House of Representatives. Appendix to the journals, 1978, B.19.

12 L. C. Bayliss "The New Zealand Financial System: Role, Structure and Trends", unpublished paper given to the Association of Superannuation Funds, (Wellington, 1978).

13 *Report on the Government Superannuation Fund,* supra n.10.

14 *Report of the National Provident Fund Board,* supra n.11.

sum protection to a periodic payment of benefits.[15]

Before discussing the precise application of the Matrimonial Property Act 1976 it is worthwhile to recall the aims of the Act as set out in the Title. These include: the recognition of the equal contribution of the husband and wife to the marriage partnership; and provision for a just and equitable division of the matrimonial property between the spouses when the marriage ends by separation or divorce. It is pertinent to note also the particular nature of the property-sharing regime established by the 1976 Act. It is a system of deferred sharing. While during the marriage title to property remains in the hands of the spouse who acquired the property,[16] the court has the power to divide items designated as 'matrimonial property' by section 8, irrespective of the individual spouse's title-holding rights.

II. DEFINITIONS

Section 8(i) provides as matrimonial property:

> Any pension, benefit, or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage.

Four points warrant attention:

(1) The limiting factor with pension rights is that they must come from a superannuation scheme.

(2) The entitlement need not be a present entitlement for the section to apply. Thus, even though an employee spouse may not realise any benefits for a further 10 years, the section still applies.

(3) The entitlement must be derived wholly or in part from either

(a) contributions made to the scheme after marriage, or

(b) employment during marriage.

Therefore, National Superannuation benefits are not affected by the Act as entitlement to these benefits does not flow from employment nor from contributions to the scheme.[17] What the section does cover is contributory and non-contributory schemes that arise from employment. In a contributory scheme, the employee makes regular contributions, usually by way of deductions from salary or wages, and the employer also makes regular contributions to the employee's account. In a non-contributory scheme benefits are earned by the fact of employment and the length of service while no monetary contributions are made by the employee.

15 See "Trends in Superannuation" *National Business Review,* Wellington, New Zealand, November 8, 1978.

16 The Act does not seek to change the nature of individual titleholding, only to divide property on divorce or separation.

17 National Superannuation is a universal scheme available to all aged 60 and over. It is funded from general taxation and specific contributions are not made. It is doubtful whether an argument based on contributions by way of general taxation would be accepted by a court. Payment is made to all individuals who satisfy the age requirement so both spouses have an individual right to the benefit. Cp. In *Arnold* v. *Arnold* (1978) Unreported, Whangarei Registry M.62/77 both parties were in receipt of National Superannuation but no mention was made of these funds as matrimonial property.

(4) The section extends to all schemes where entitlement is derived wholly or in part during the marriage. The meaning of 'entitlement' is the crux of this article — whether it means rights that can be realised immediately or whether it extends to rights that are presently earned but will not come to fruition for a further period. Whatever the scope of entitlement, rights earned before marriage are matrimonial property once some entitlement has been earned during the marriage. That is, the whole scheme is characterised as matrimonial property irrespective of pre-marriage entitlement.[18]

If all of these conditions are satisfied the scheme is matrimonial property and is divided in accordance with section 15. Under that section, property is divided equally unless one spouse can show a clearly greater contribution to the marriage partnership. Such contributions are defined in section 18. The provision of money and the creation of matrimonial property are included in such contributions[19] but they are only part of the list and section 18(2) forbids any presumption that monetary contributions are to be weighed more favourably than non-monetary ones. In *Haldane* v. *Haldane*[20] the Privy Council declared that under the Matrimonial Property Act 1963 it was not sufficient to show a greater contribution to a particular asset to warrant unequal distribution and the 1976 Act follows a similar course. It would not be sufficient, therefore, for a spouse to show that an employee spouse had earned 70% of his entitlement to pension benefits before the marriage in order to get unequal distribution of those benefits.

The major problems in dividing superannuation benefits are these:

(1) If considerable entitlement is earned prior to marriage the non-employee spouse will receive a share in benefits earned before the formation of the marriage partnership.

(2) If the scheme matures beyond the date of division, does the court divide all benefits to which the employee spouse may become entitled? To do so would be to go against section 2(2): "The value of any property to which the Act relates shall . . . be its value as at the date of the hearing unless the Court in its discretion otherwise decides". Therefore, unless the court exercises its discretion, the value will be that at the date of hearing and any benefits earned by contribution or employment after the hearing are not considered.

(3) All non-contributory and most contributory schemes depend on the money advanced by the employer. If the benefits have not come to fruition at the date of the hearing, can the court award the non-employee spouse a share of such monies? To do so is to award that spouse a share in monies that may never be received by the employee spouse should he decide to withdraw from the scheme. To fail to do so would be to deny the non-employee spouse benefits that have been earned by one member of the partnership by working at his employment. On the other hand, one may view the monies advanced by the employer as a gift and this view may be justified under section 10 of the Act.

(4) One of the greatest problems is how to award the benefits. If the employer's contributions are seen as part of the matrimonial property, how is the court to distribute equitably benefits that are still subject to further contingencies of contributions and/or employment?

18 See *Y* v. *Y* [1977] 2 N.Z.L.R. 385, 405.

19 Section 18 (1) (c), (d), and (e).

20 [1976] 2 N.Z.L.R. 715.

III. NEW ZEALAND CASE LAW

The major case dealing with some of these problems is *Y.* v. *Y.*[21] In that case the husband had been employed since 1950 and had contributed first to the Government Superannuation Fund and then to the National Provident Fund. His total contributions to the date of the court hearing amounted to $10,865, less interest. The contributions to the date of the separation of the couple were $10,558 less interest. Employer contributions were $11,295 and $10,989 respectively. The couple had married in 1955 so that the husband had been contributing to a superannuation scheme for all of his married life, and for five years prior to marriage. At the date of the hearing the husband was aged 50. To receive a full pension he had to be aged 60 or to have completed 40 years' contributory service to the scheme, neither of which condition was fulfilled. However, there were options for earlier retirement with a pension at either age 55 or 57 should the Superannuation Board agree in the first instance, or the Board and his employer in the second. Furthermore, he could retire at any time and receive a pension if found to be medically unfit. Any pension was not governed by the amount of contributions but by the length of service and the salary over the five years preceding retirement. At the time of the hearing the husband could withdraw from the scheme, or retire in which case he would receive his refundable contributions to the scheme, unless some pension was granted in the latter situation. There were certain provisions for his widow should the husband die. Chilwell J. summarised the wife's position:[22]

> The wife's right to an allowance . . . is conditional upon her husband remaining a contributing employee and being either a pensioner or entitled to be one, and is, of course, further conditional upon his death . . . . Her right to any pension could be defeated by the husband if in his lifetime he elects to receive a refund of the whole of his refundable contributions . . . .

Counsel for the husband submitted that the value of this item of property was the amount of the total refundable contributions made by the husband between the date of the marriage and the date the parties separated. Thus, he sought to exclude from consideration any contributions made by the husband before the marriage. Counsel for the wife submitted, with the aid of a chartered accountant, three alternative valuations of the property:

(a) Assume the husband retired at that moment with the necessary consents to receive a pension, or due to medical unfitness. Based on an actuarial assessment of the husband's life expectancy the lump sum of $68,954 was arrived at. This figure was then reduced, first by 6%, to take account of the tax the pension would incur; secondly by 37.5% for the likelihood of the husband electing to withdraw from the scheme; and thirdly by 15% to allow for the possibility of the husband's death before retirement. The result was $36,632.

(b) A calculation based on the husband's retirement allowance at age 60 assuming his salary was not increased and no allowance was made for inflation, i.e. $10,525. After deducting tax, the figure would be $7,150. This figure was then divided in proportion to pre-separation and post-separation service, i.e.

21 [1977] 2 N.Z.L.R. 385.

22 Ibid., 399.

$5,268 : $1,932. If the former figure was received for the duration of the husband's life expectancy from the date of retirement, the lump sum would be $25,794.

(c) A calculation based on assessments of the contributions of the husband and of his employer with compound interest: $39,405. The accountant concluded that the first method was to be preferred; i.e. a figure of about $35,000. Therefore, prima facie the wife would be entitled to $17,500 under section 5.

Chilwell J. was not taken with any of these methods of valuation. He was understandably quizzical at the result that the wife should be entitled to $17,500, when at the present time the husband could only withdraw from the scheme and receive $10,800 as refundable contributions. He asked the accountant where the money could be found, for which the reply was that if the husband had no other assets he could assign future rights. Pursuing that line of reasoning, his Honour asked which would be more desirable: half of the refundable contributions — i.e. $5,000 or $17,500 spread over the 13 years life expectancy of the husband once he reached age 60: i.e. $1,346 per year.[23] While his Honour may be justifiably concerned about requiring a husband to pay the wife a sum which he could not at that time realise, on the facts of the present case, the husband had more than enough other assets to offset $17,500. Furthermore, the answer given by the accountant was given on the basis that the husband had no other assets. If that was the case, the payment of $5,000 ordered by the court could be just as impossible.[24] However, his Honour does appear to have conceded that section 31[25] with its special provision for effecting the distribution of pension benefits, was designed to deal with the difficulties of allocating a lump sum, by provision of periodic payments.[26] A precis drafted by counsel for the wife was submitted for consideration, but Chilwell J. did not dwell on the matter.

His Honour then proceeded to deal with a number of policy considerations. He referred to the Title and purposes of the Act, then went on to say:[27]

> It is not the purpose of the Act to fetter the future freedom of each of the parties to live his or her separate life. The exact opposite was intended by Parliament. Nor is it the purpose of the Act to discourage future endeavour nor even subsequent marriage . . . . It is my opinion that in approaching a valuation of s.8(i) property the court must have regard to the purpose of the Act as stated in the long title and to the facts as they actually exist. While not necessarily ignoring the future benefits, the contingencies upon which they depend and actuarial assessments of present worth, these things must be placed in proper perspective. The cause of action is not akin to one for the loss of a spouse and hence the loss of a pension or a better pension. It is a cause of action based on the current legislative policy of promoting freedom for each spouse to embrace a new life separate from one another.

With these principles in mind, Chilwell J. proceeded to consider the three methods of valuation proposed on behalf of the wife, and found flaws in each. In the first case the husband had not retired, nor had he shown any intention to

23 Ibid., 401, 402.

24 The total value of the matrimonial assets excluding superannuation was $74,422. Therefore, even with the division of 60% to the husband and 40% to the wife, the husband had more than enough assets to offset payment of a greater sum to the wife.

25 See discussion of s.32 post in Part V "Division of pension benefits".

26 [1977] 2 N.Z.L.R. 385, 402.

27 Ibid., 403.

do so or to make the necessary applications for consent. In the second, the husband was still ten years away from being able to claim a full pension. The third case was based on the hypotheses that the husband was presently entitled to his employer's contributions and that these contributions and his own had been earning compound interest. "Well, of course, these hypotheses are far from the truth. The husband has no entitlement whatever to the employer's contributions, nor if the *total* of the two sets of contributions is in fact earning interest, has he any entitlement to that interest as such."[28] Further questioning of the accountant confirmed his Honour's view of the unreality of these calculations. The husband was entitled to buy back superannuation rights but these could not be sold to anyone else.

Therefore, Chilwell J. concluded that[29]

> . . . taking the factual position as it was at the date of hearing the only logical approach is to enquire for what amount could the husband realise his s.8(i) property as at the date of hearing? His market was limited to . . . withdrawing from the scheme or resigning as an employee. On either method he is entitled to receive only a refund of his 'refundable contributions' which definition excludes interest.

The figure arrived at was $10,864, less interest.

However, his Honour went on to make three very important points:

(1) There was no justification for the wife to receive any part of the amount of contributions made by the husband since the date of separation. Therefore, he valued the property as at the date the couple ceased to live together as man and wife, i.e. the date of separation. Thus without explicitly citing section 2(2) Chilwell J. was exercising his discretion to value the property at a date other than the date of the hearing.

(2) He rejected the submission made by counsel for the husband that a further deduction should be made in respect of contributions made before the marriage. "The 'entitlement' which has to be valued is that which is derived '. . . wholly *or in part,* from contributions made to the scheme after marriage . . .' section 8(i)".[30]

(3) While Chilwell J. rejected as 'fundamentally wrong' the approach by counsel for the wife, he did admit of a possible exception:[31]

> . . . it may not be the wrong approach in another case where the facts are different; for example, where the parties separate on the eve of one of them reaching retirement and becoming entitled to a full life pension. I express no opinion for obvious seasons. If I am wrong in my judgment on valuation then any actuarial valuation may have to take into account the wife's contingent right to an allowance (by way of pension) or to a election. On one view this may be the wife's s.8(i) property. The effect of taking her property into account may be to reduce significantly the value of the husband's s.8(i) property if one is offset against the other.

Other cases in New Zealand have not shown any divergence from *Y.* v. *Y.*[32] However, it should be noted that in *Haggie* v. *Haggie*[33] counsel agreed that the contributions made by the husband to a superannuation scheme should be valued together with his life insurance policies. Barker J. commended this sensible

28 Ibid., 404.

29 Idem.

30 Ibid., 405.

31 Idem.

32 See *Edwards* v. *Edwards* (1977) Unreported, Auckland Registry M.803/75 and *van Zijl* v. *van Zijl* (1977) Unreported, Wellington Registry M.384/77.

33 (1978) Unreported, Hamilton Registry M.67/77.

agreement because otherwise an involved actuarial assessment might have had to have been made.[34] Therefore Barker J. seems prepared to admit the possibility of actuarial assessments of the value of superannuation rights but the question was avoided by the agreement of counsel.

The other case where superannuation rights were given some detailed analysis is *Edwards* v. *Edwards*.[35] At first glance the facts of that case would appear to come within one of Chilwell J.'s admitted possible exceptions. The parties married in 1937 and separated in 1974. Since the divorce decree was made absolute in 1976 the husband had remarried. He had been a contributing member to the Government Life Office superannuation scheme since May 1963. That scheme provided that a member could retire at the anniversary date nearest to his 65th birthday. At the date of the hearing in August 1977 the husband was aged 64 years, 9 months and he had in fact retired in May of that year, and was in receipt of a pension.

Under the provisions of the scheme a member's contributions were applied in the purchase of a deferred annuity payable from the normal retirement date for five years certain and life thereafter, with premiums refundable in the event of death before the annuity became payable. There were certain other provisions in the event of prior retirement: a member who retired within ten years of his normal retirement date was entitled to certain pension rights, subject to the consent of the Government Life Commissioner; a member who left could elect either to receive a refund of his contributions, or an insurance policy assuring the pension purchased by his own contributions, or if the Commissioner agreed, a policy assuring both employee and employer contributions.

At the date of separation the husband would have been entitled on retirement to a pension of $1,580 per year. At the date of hearing the possible pension payable would have been approximately $2,150 per year. However, on retirement the husband had commuted one quarter of his entitlement to receive a capital sum of $5,152, which would have left him with a pension of $1,610 per year. Next he exercised a joint and survivorship option which ensured a pension payable to his second wife, should he predecease her, bringing the pension down to $1,105 per year.

Therefore, counsel were left with the unenviable task of attempting to place a value on property that had changed substantially between separation and hearing. At the beginning of his judgment Richardson J. reiterated a number of propositions made by Somers J. in *Barron* v. *Barron*.[36] To these, his Honour added four more, the last two of which are relevant to both life insurance and superannuation:[37]

> The discretion conferred on the court under s.2(2) to determine the value of matrimonial property at a date other than the date of hearing applies to any 'property'. The court may determine that some items of matrimonial property should be valued at the date of hearing in the ordinary way but that other items should be valued at the date of separation or other date or dates.

Secondly, his Honour quoted section 9(4) which provides that property acquired by either spouse while not living together as husband and wife should be separate

34 Ibid., 3.

35 Supra n.32.

36 [1977] 1 N.Z.L.R. 454, 459-460.

37 Supra n.32 at 5-6.

property unless the court considers it just to treat such property or any part thereof as matrimonial property. With this section in mind his Honour concluded:[38]

> However, if the property is used to increase the value of any interest of husband or wife in any matrimonial property under s.8, that previously separate property is matrimonial property (s.9(6)). It follows that contributions after the date of separation made from separate property to items of matrimonial property, such as insurance policies, *pension schemes* and building society shares, merge in the matrimonial property and the contributing spouse has no right to credit for his contributions. In this respect s.30 is an ancillary provision and does not allow a departure from the shares in the insurance policies determined under s.15. But the existence of such post-separation contributions is a factor in considering whether the value of the item of matrimonial property should be determined under s.2(2) at a date preceding the date of hearing.

Counsel for the wife had submitted that valuation should be at the date of the hearing and that, subject possibly to deductions for contributions made by the husband before retirement, the value should be the present value of the annuity for five years certain, before conversion into a joint and survivorship annuity, but after committing 25% to cash. Therefore, there was no claim for any benefits beyond the five year period, and an admission that calculations between separation and retirement ought to be deducted. The husband's counsel submitted a valuation very similar to that accepted by Chilwell J. in *Y.* v. *Y.*: valuation as at the date of the separation of the parties and including only contributions to that date.

Richardson J. accepted the reasoning in *Y.* v. *Y.* and noted the comments as to the policy of the Act made by Chilwell J.[39] He pointed out that the husband's only immediate entitlement at the date of separation was withdrawal from the scheme and a refund of contributions. Any further pension rights were dependent on working until the ordinary retirement date, or, an earlier retirement with a pension if the employer consented. He therefore accepted the approach of counsel for the husband for three reasons:[40]

> . . . as a matter of public policy it would be wrong to make determinations under the Act on the basis of one party continuing to work in an employment. No one should be locked into an existing employment or be constrained to continue in that employment to meet a liability under the Matrimonial Property legislation and it follows that awards should not be made on the assumption that the party will continue in that employment.
> . . . taking the matter as at the date of separation, the husband's pension on his retirement on 31 May, 1977, two years, nine months later, was dependent on his working to that date and making the appropriate financial contributions to the scheme. He was to earn his retirement pension by working for the further period and the measure of what was available at the date of separation was the refund of his contributions.
> . . . the other element in the provision of the pension on retirement was the making of contributions after the date of separation and by virtue of section 9(6) those contributions, though from the husband's separate property, merge in the interest in the superannuation scheme as an item of matrimonial property, if valuation is at the date of hearing. This is not a case where as at the date of separation the husband could raise more in respect of his interest in the superannuation scheme than the amount of his contributions and it seems to me that the proper course is to value that item of property as at the date of separation and on that basis.

38 Idem. Emphasis added.

39 Supra n.27.

40 *Edwards* v. *Edwards* supra n.32 at 12-13.

Richardson J. rejected the submission that this was one of the situations about which Chilwell J. declined to express an opinion, i.e. where the parties separate on the eve of one of them reaching retirement and becoming entitled to a full life pension. The period between separation and retirement was over 20% of the total period of the husband's involvement in the scheme. Moreover, his Honour clearly felt that the basic principle governing division was actual entitlement as at the date of separation.[41]

From the decisions in *Y.* v. *Y.* and *Edwards* it is clear that the courts will not divide any rights which the employee spouse cannot immediately realise as at the date of separation, save possibly Chilwell J.'s exception. Furthermore, in the majority of cases the court will exercise its discretion under section 2(2) and exclude from valuation, any contributions made between separation and the court hearing.

Chilwell and Richardson JJ. examined the wording of section 8(i) and equated 'entitlement' with 'realisability'. The focus of their enquiries was as to what rights the husband could realise at the date of the separation. It is the submission of this writer that the conceptual underpinnings of both the decisions are wrong. Section 8(i) includes benefits or rights to which a spouse is 'entitled or may become entitled'. Thus the wording of that section in itself indicates that the court may make an enquiry going beyond the amounts that the employee spouse may realise at the relevant date of evaluation. One can draw an analogy with life insurance. The House of Lords in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*[42] held that an assignee of a policy was entitled to the benefits that would accrue to him on maturation of the policy, from the date the assignment was completed. The fact that the rights were contingent on future payments of premiums, and that the amount of benefits that would accrue at the date of maturation would increase above the amount for which he could realise from the policy as at the date of assignment, did not alter the fact that the policy belonged to him from the date of assignment.

It will be argued in the course of this paper that the same is true for superannuation benefits. The employee spouse is entitled to the benefits that will accrue in the future, as from the time that he makes his contributions to the scheme or serves his employment. As will be shown in this paper, this is the view adopted by various American states in their analysis of superannuation benefits.

In his judgment Chilwell J. adverted to the policy of the Act as stated in the Title. However, in *Y.* v. *Y.* and *Edwards* the predominant concern seemed to be not with effecting a "just division" of the property but with apportioning benefits in a way so as not to fetter the future freedom of the spouses after separation. It will be shown that there are methods of division that can avoid this result, and that the 1976 Act itself provides the machinery for such a division. The predominant concern of the court must be to recognise the equal contribution of both spouses to the marriage partnership. If we accept that pension benefits are earned by the employee spouse by his employment and contributions, these benefits must be seen as part of his contribution to the partnership, and therefore available in equal shares to the other spouse subject to proof of a clearly greater contribution to the marriage partnership. Admittedly, the courts in *Y.* v. *Y.* and *Edwards* were confronted with

41 Ibid., 13.
42 [1953] A.C. 347, 361 per Viscount Simon and 364 per Lord Porter.

very complex schemes that at the date of hearing were difficult to compute as to their probable values. However, in neither case did the courts limit their decisions to the particular factual intricacies of the cases but preferred to base their decisions upon a principle of immediate entitlement which it is submitted is incorrect and at odds with the purposes of the Act.

IV. THE RIGHT TO PENSION BENEFITS

The bulk of the material discussed in this section comes from the "community property" jurisdictions of the United States.[43] Such systems, inherited from the French and Spanish traditions, involve joint ownership of property acquired during the marriage. Thus, while under the old model, the husband is the manager of the community property, both spouses have legal title throughout the marriage. At the dissolution of the marriage, either by death or divorce, the property is divided equally between the husband and the wife. There has been a warning that "New Zealand can only get minimal assistance from cases of other jurisdictions decided on social legislation which deals with a materially different milieu".[44] Nevertheless, the American material is not to be dismissed lightly. The only significant difference between the community property system and a system of deferred sharing such as New Zealand has, is the title of the spouses during the continuation of the marriage. Upon divorce or separation, the rights of the spouses to community or matrimonial property are the same. One can also point to the New Jersey decision of *Kruger* v. *Kruger*[45] to show that the analysis of spousal rights to superannuation schemes that was pioneered by the community property jurisdictions has received judicial acceptance in the more traditional Common Law states.

The American cases show a gradual development towards granting the non-employee spouse a greater share in pension benefits. Unlike the New Zealand courts, the American courts do not have a comprehensive statute detailing the various items of property that should be divided at dissolution. For example, the Californian Civil Code merely provides "The court shall . . . divide the community property of the parties and the quasi-community equally."[46] Therefore, the first task of the court, faced with a pension scheme is to determine whether such a scheme, including one where the pension had not matured, is "community property".

One of the first cases to deal with this question was *French* v. *French*.[47] In that case the husband had been in active service in the navy for 16 years and at the time of divorce, was in the Naval Reserve. After 14 years in the Reserve the husband would be entitled to a pension. The wife argued that such benefits were to be seen as compensation for services rendered when the husband was married, and as such ought to classified as community property. The trial court found in her favour but on appeal the Supreme Court of California rejected that argument. It was accepted that retired pay is compensation for past services and was community property, but, due to the fact that the husband had to fulfil a further

43 I.e. California, Texas, Louisiana, Washington, Nevada, Arizona, New Mexico, Idaho.
44 [1977] 2 N.Z.L.R. 429.
45 354 A. 2d 340 (1976).
46 Californian Civil Code Section 4800.
47 112 P. 2d 235 (1941).

14 years in the Reserve, the right to retired pay was merely an expectancy and not subject to division as community property.[48]

From the decision in *French* the concept of 'vesting' developed. Only if the employee spouse was actually in receipt of a pension, or could at the date of valuation actually elect to retire and receive a pension, would the other spouse have a right to any benefits. In the former case the pension was said to have matured, and in the latter, to have "vested". This concept of vesting seems also to be the criterion applied in *Y.* v. *Y.* and *Edwards*. The court in both cases looked at immediate entitlement as at the date of separation. In both cases the only right was to refundable contributions, but one can infer from the decisions that had the husband in either case been able to retire and receive a pension, without the consent of anyone else, that right would have been subject to division.

The vesting concept when applied in its full rigour produced patently unjust results. In *Langlinais* v. *David*[49] the couple had married in 1935. The husband had been a contributory member of a retirement fund from 1937 to 1941 and from 1942 to 1970. The couple separated in 1970, less than one year before retirement. By the time of the hearing the husband was in receipt of a pension and had actually received $23,000 in pension cheques by that time. The Louisiana Court of Appeals held that at the date of separation the husband's interest in the plan was dependent on further service and that he had no immediate right to the fund. Therefore, the wife was only entitled to one half of the amount which the husband could claim at separation, i.e. refundable contributions totalling $4,733. Hopefully even Richardson J. would hold in a similar case before him that this case came within the Chilwell J. exception of separation on the eve of retirement. In *Langlinais* the time between separation and retirement was 1/37 of the total time in the scheme.

Langlinais is a comparatively recent decision but even before 1974, courts in other states found means of circumventing the inequities produced by such a rigid conceptual approach. Thus the court in *Miser* v. *Miser*[50] gave the wife a share in pension benefits even though the husband did not have an immediate right to any benefits. The husband had served for 18 years in the military, and would be entitled to a pension after 20 years. Even though the husband had a further two years to serve before receiving a pension, the court relied on the fact that the husband had just signed a contract to serve for a further five year period so he was bound by the contract to serve until vesting occurred. The court rejected as having no validity the argument that their order would force the husband to continue to work in order to pay off the wife.

The Washington courts circumvented the *French* decision by developing a new concept of "vesting", i.e. where the employee still did not have a present right to any pension, he was nevertheless seen as having a "vested" interest in the scheme in that he had a right to benefits from the date of his employment and that the scheme could not be altered to his detriment.[51] In one of these cases, *Wilder* v. *Wilder*[52] the court said that it must consider all the circumstances and evaluate the possibility that the party who had a contingent right to the pension benefit

48 Ibid., 236-237. 49 289 So. 2d 343 (1974). 50 475 S.W. 2d 597 (1972).
51 *De Revere* v. *De Revere* 491 P. 2d 249 (1971); *Wilder* v. *Wilder* 534 P. 2d 1355 (1975).
52 534 P. 2d 1355 (1975).

would eventually enjoy it. Such consideration should take three factors into account:

(1) the length of time remaining before eligibility;

(2) any other option available to the employee spouse and the likelihood that he would decide to pursue some other career and abandon his pension rights;

(3) the community investment in the pension scheme and whether, in the event that the employee spouse decides to abandon his pension rights, the community contribution should still be seen as an asset under his control, to be balanced against other assets awarded to the other spouse.[53]

In the case before the court the husband had completed 19/20 of the time required to gain a pension so, coupled with an admitted intention to continue to work, the court declared that there was no reasonable prospect of other employment that would make the abandonment of pension rights feasible, and gave the wife a share in the value of the future pension benefits.

Had the American case law stopped at that point it is arguable that it goes little further than what New Zealand courts have already done, in that the cases cited above were all exceptional cases of separation on the eve of retirement when pensions which had been earned over a considerable period of the marriage were about to be realised. Nevertheless, the *De Revere* and *Wilder* cases show a more adventurous spirit in recognition of a "vested" right to pension benefits from the time the employee spouse had joined the pension scheme, and the latter case saw the court involving itself in the calculation of the probability that pension benefits will in fact be acquired. The other notable principle from the cases, including *French,* is recognition that pension benefits are not a gratuity but are in the nature of deferred compensation for services rendered in the past.

However, there has been considerable further development. In California the concept of "vesting" as developed in *French* began to arouse judicial hostility[54] and in *In re the Marriage of Brown,*[55] Tobriner J. gave judgment for the unanimous Californian Supreme Court in expressly overruling *French* and the concept of vesting. The husband was a member of his employer's non-contributory retirement scheme. Entitlement to a benefit was decided on a points basis: if an employee acquired 78 points he was eligible for a pension. If he was discharged or retired before such accumulation he forfeited all rights. If he accumulated 78 points he could elect to retire and receive a certain pension, or he could continue to work until age 63 and receive an increased pension. At the date of separation in September 1973 the husband had accumulated 72 points. If he continued to work until 1976 he would have accumulated sufficient points to retire and receive $310 per month. If he chose to continue to work until aged 63 he would receive $485 per month. The couple had been married for 23 years.

The trial court applied the strict vesting concept of *French* with the result that the pension rights were characterised as a mere expectancy and not subject to division. As the scheme was non-contributory, the wife got nothing at all in the way of pension rights. Tobriner J. began his judgment by overruling *French* and

53 Ibid., 1358.

54 *In re the Marriage of Fithian* 517 P. 2d 449 (1974).

55 544 P. 2d 561 (1976). *Brown* has been followed in California in *In re the Marriage of Freiberg* 127 Cal. Rptr. 792 (1976); in Texas in *Cearley* v. *Cearley* 544 S.W. 2d 661; and in New Jersey in *Kruger* v. *Kruger* 354 A. 2d 340 (1976).

declared that non-vested pension rights were not an expectancy but a contingent interest in property. The *French* rule was said to compel an inequitable division of rights acquired by community effort. "Pension rights, whether or not vested, represent a property interest. To the extent that such rights derive from employment during coverture, they comprise a community asset subject to division".[56] He elaborated on his definition of pension rights as a form of property, rather than an expectancy:[57]

> . . . the defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence . . . . Since pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefits is a contractual right derived from the terms of the employment contract. Since a contractual right is not a mere expectancy but a chose in action, a form of property . . . an employee acquires a property right to pension benefits when he enters into the performance of his employment contract.

Tobriner J. went on to note the increasing importance of pension plans earned by the employee for his services and declared that: "A division of community property which awards one spouse the entire value of this asset without any off-setting award to the other spouse does not represent that equal division of community property contemplated by Civil Code Section 4800."[58]

In that case, the consequence of the division was that the wife's entitlement to this asset leapt from zero to a substantial figure. The court was dealing with a scheme to which no contributions had been made by the husband, but it was held that both spouses had an interest in the benefits that were earned during the period of the community. The decision is based on an analysis of superannuation schemes that is applicable to both contributory and non-contributory schemes. Although *Brown* has been followed not only in California and Texas,[59] but also in the Common Law state of New Jersey,[60] the Ontario Law Reform Commission has proposed an alternative course of evaluation for its proposed property sharing regime.[61] The Commission argued its case by analogy to life insurance. It had determined that policies held by third parties that benefitted one spouse were gifts and not subject to division.[62] Therefore, it held that contributions by the employer were also to be seen as gifts and outside the ambit of matrimonial property.[63] It is submitted that this is an incorrect analysis of the true nature of the pension today. Fundamental to all of the United States cases, even the pre-*Brown* decisions, is acceptance of the proposition that pension benefits are deferred compensation for services rendered. They are part of the employment contract and are one of the inducements of remuneration for which the employee offers his services.

If the *Brown* reasoning is applied in New Zealand it would be held that the employee spouse has a present entitlement to the benefits earned up to the date of valuation, even though these benefits will only be available in the future, and they

56 544 P. 2d 561, 562-563 (1976).
57 Ibid., 565.
58 Ibid., 566.
59 Supra, n.55.
60 Idem.
61 Ontario Law Reform Commission *Report on Family Law* Part IV "Family Property Law", 97 (Ontario, 1974).
62 Ibid., 94-95. New Zealand also accepts that policies held by third parties for the benefit of a spouse are not matrimonial property — see s.8(g) of the Matrimonial Property Act 1976.
63 Ibid., 97.

may never be realised if he dies before he is eligible for a pension or if he withdraws from the scheme. The fact that these benefits are still subject to contingencies does not, however, mean that the employee does not have a present entitlement to the benefits nor that such benefits should not be taken into account in any division of rights. Furthermore, section 8(i) of the Matrimonial Property Act 1976 includes not only benefits to which a spouse is presently entitled, but those to which he "may become entitled". These words of themselves suggest that the approach taken in *Y.* v. *Y.* and *Edwards* is unduly narrow. These words should not be taken to include rights and benefits earned by contributions and/or employment after the date of division but they indicate that to focus solely on realisability is inconsistent with the Act.

Whatever the conceptual analysis of entitlement to pension rights, the non-employee spouse should be able to claim some share in future benefits. The Matrimonial Property Act 1976 calls for recognition of the joint contributions of both spouses. Is it equitable division when one spouse fulfils his or her part of the marriage contract by employment which has the added consideration of a pension, while the other spouse has not been able to acquire a pension and therefore is deprived of all benefits? The words of Tobriner J. in *Brown* apply directly to the New Zealand legislation and its stated purposes:[64]

> . . . whatever abstract terminology we impose, the joint effort that composes the community, and the respective contributions of the spouses that make up its assets, are the meaningful criteria. The wife's contribution to the community is not one whit less if we declare the husband's pension rights not a contingent asset but a mere 'expectancy'. Fortunately we can appropriately reflect the realistic situation by recognising that the husband's pension rights, a contingent interest, whether vested or not vested, comprise a property interest in the community and that the wife may properly share in it.

It is submitted that the decision in *Brown* should be seen as a spur to the New Zealand courts to look beyond the narrow approach of *Y.* v. *Y.* and *Edwards.* The primary consideration must be to fulfil the purposes of the Act and division solely of refundable contributions does not appear to achieve that legislative aim. By recognition of the fact that pension benefits are compensation for past services the court can infer that these are benefits to which the employee has a present right, even though fruition of these rights must occur at a later date.

V. DIVISION OF PENSION BENEFITS

A. Periodic Payment

The preceding discussion has focused on the question of entitlement to future pension benefits. Once this principle has been established the more difficult task faces the court of how to equitably apportion those future benefits. Both Chilwell and Richardson JJ. appear to have been more concerned with this question than any other. If one awards a lump sum to the wife as at the date of hearing it may be seen as forcing the husband to pay a sum in lieu of an asset he may never in fact realise. Pension benefits, unless already matured or vested in the sense that the employee

64 544 P. 2d 561, 569-570 (1976).

has only to elect to retire to receive a pension, are subject to contingencies of continued work and continual life and this factor has above all seemed to demand the decision in *Y.* v. *Y.* and *Edwards.*

Lump sum division of superannuation rights, even if confined solely to refundable contributions, can cause significant problems. If no monies are as yet realised from the superannuation scheme at the date of division the greatest problem is to finance the settlement due to the non-employee spouse. The problems are multiplied if the employee spouse is obliged to pay a share of the full rights earned to the date of division, as even withdrawing from the scheme he may be unable to pay the full amount. If he is forced to withdraw, his partner will realise a great deal more than he will as she will be awarded a share in the employer's contributions which the employee spouse will now never realise. A system of periodic payment can avoid these difficulties. Periodic payments are not without disadvantages — they may continue an unhappy link between an estranged couple, and may involve administrative difficulties of supervision. However, these difficulties can be overcome and do not justify denial to the non-employee spouse of his or her rights to a share in the full benefits.

Because of the nature of pensions the Matrimonial Property Act 1976 provides a special section for utilisation by the courts for division of benefits. Section 31 provides:

> (1) Where the matrimonial property to which any application under this Act relates includes property of the kind described in Section 8(i) of this Act, the Court may make any order under this Act, or any provision of any such order, conditional on the husband or wife entering into an arrangement or deed of covenant designed to ensure that the other spouse receives his or her share of that property, and every arrangement or deed entered into pursuant to any such condition shall have effect according to its tenor.
> (2) A copy of any arrangement or deed entered into pursuant to subsection (1) of this section may be served on the manager of the superannuation scheme from which the entitlement is derived.
> (3) Where a copy of any such arrangement or deed is served on any such manager he shall notwithstanding the provision of any Act, deed or rules governing the scheme, be bound by the provisions of the arrangement or deed.

The wording of section 31(1) suggests that it is an ancillary provision enacted to enable the court to facilitate division of the property. Therefore it does not enable the court to depart from the shares in pension schemes determined under section 15. Richardson J. made the same point in relation to section 30 in *Edwards*[65] and it is submitted that this principle is equally applicable to section 31.[66]

The other point to note in section 31 is subsection 3 wherein any arrangement shall bind the manager of a superannuation scheme notwithstanding the provisions of any Act of Parliament. The pension scheme in *Y.* v. *Y.* was governed by the National Provident Fund Act 1950 which in section 78 forbad the assignment of any monies payable under the Act. Chilwell J. commented: "Presumably s.31(3) overrides s.78. It is curious that a court-inspired deed of covenant can effectively repeal a prior Act of Parliament."[67] With all due respect to his Honour, any

65 Supra, n.38.
66 One should note that s.18(3) may affect the type of order given by the court.
67 [1977] 2 N.Z.L.R. 385, 402-403.

agreement under section 31 is only ordered by the court but inspired by an Act of Parliament. The basic constitutional principle is that a subsequent Act of Parliament overrides a former one. Therefore, section 31 overrides any provision of the National Provident Fund Act. Furthermore, section 4(3) of the Matrimonial Property Act 1976 expressly provides: "Every enactment shall, unless it or this Act otherwise expressly provides, be read subject to this Act." Therefore, this Act not only provides retrospective predominance over earlier Acts, but seeks to prospectively predominate over subsequent legislation. Therefore, it is submitted that the contradiction foreseen by Chilwell J. is more apparent than real.

Section 31 enables a court to order that benefits that accrue in the future be apportioned, and it is submitted that the provisions of this section enable the court to avoid many of the difficulties foreseen by Chilwell and Richardson JJ. The most obvious application of a section 31 arrangement would be in the situation where one of the spouses is already in receipt of a regular pension. Rather than attempt to calculate the possible life span of the recipient spouse and thereby award the other spouse a lump-sum, the court may order a regular apportionment of pension benefits as they are received. This will avoid the imposition on the pensioner spouse of the obligation to pay an amount which he may never realise due to prior death, and which he might not be able at present to pay due to the non-possession of other assets to pay the other spouse. However, a section 31 type of agreement could be used also in the situation where the employee spouse is not yet eligible to receive pension benefits.[68]

The method of allocation of pension benefits is one that the court must choose by consideration of the facts of each case. Once again, the *Brown* case provides a relevant discussion of the issues facing the courts. Counsel for the husband had argued that to repudiate the *French* rule would restrict the freedom of the employee to change his occupation or the terms of his employment. To this the court replied:[69]

> In dividing non-vested pension rights as community property the court must take account of the possibility that death or termination of employment may destroy those rights before they mature. In some cases the trial court may be able to evaluate this risk in determining the present value of those rights . . . . But if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights it can instead award each spouse an appropriate portion of each pension payment as it is made. This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest . . . . As to the claim that our present holding will infringe upon the employee's freedom of contract, we note that judicial recognition of the non-employee spouse's interest in vested pension rights has not limited the employee's freedom to change or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits), or to elect between alternative retirement programs. We do not conceive that judicial recognition of spouses' rights in non-vested pensions will change the law in this respect. The employee retains the right to decide, and by his decision define the nature of the retirement benefits owned by the community.

68 Periodic payments of pension benefits should not be viewed as a form of maintenance. See discussion post in Part VII "Maintenance or Property".

69 544 P. 2d 561, 567-568 (1976).

In the above passage the court drew upon cases where pension rights had been vested though not matured, i.e. where the employee spouse had the right to retire with a pension as at the date of valuation but had elected to continue to work for a further period. The enquiry of Chilwell and Richardson JJ. had been to determine what rights the husband could immediately realise at the date of valuation. If, for example, the husband in *Y.* v. *Y.* was already able to retire with a pension, solely at his own election, the implication was that the court would have divided those pension rights even though the husband was not actually in receipt of any pension benefits. The most equitable way of doing so would be to give the wife a share in each pension cheque as it was received without attempting to estimate what the total value of any benefits might actually be. Such allocation has the advantage of dividing equally between both spouses the risk that such benefits might not in fact be realised. The provisions of section 31 provide the court with such machinery. It is submitted that the same type of agreement could be used in the case of "non-vested" pensions, with the court demanding that the employee spouse pay the non-employee spouse a determined fraction of benefits if, as, and when, they are received. Thus both spouses share equally the risk that no benefits will actually be received.

The Texan case *Miser* v. *Miser* [70] is an example of such an order. The couple had been married for 171 months so the court ordered that the husband pay the wife a half share of a sum of the fraction of $\frac{\text{171 months}}{\text{total number of months in the scheme,}}$ if, as and when any benefits were received. A similar order could be made by a New Zealand court with a second contingent order that should the husband withdraw from the scheme, the wife should be paid a half share in the value of refundable contributions as at the date of separation. The advantages of the scheme are that the husband does not have to pay the wife a sum from an asset he does not presently have at the date of hearing, and shares equally the risk that the benefits might never be received due to prior death.

"If, as and when" simply means that A shall pay B such monies if he receives them, in such amount as he receives and when he receives them. The order is computed by a number of different fractional valuations according to the nature of the scheme:

(a) If the scheme is contributory the fraction would be calculated according to the contributions made:

$$\frac{\textit{amount of contributions made during the marriage}}{\textit{amount of total contributions made to the scheme}} \times \frac{1}{2}$$

However, in many schemes, the value of the scheme does not depend on the amount of contributions at all. Another difficulty is that there may not be a record kept for the amount of contributions made at each payment.

(b) For schemes that are non-contributory, a valuation could be made on the number of years in the scheme:

$$\frac{\textit{years or months in the scheme during marriage}}{\textit{total years or months in the scheme}} \times \frac{1}{2}$$

70 475 S.W. 2d 597 (1972).

Such a valuation is equally applicable to the type of contributory scheme where contributions do not reflect the value of the scheme.

(c) Another approach, where the pension benefits are calculated on the amount of income received in employment is:

$$\frac{\textit{income earned during marriage}}{\textit{total income earned}} \times \frac{1}{2}$$

All three approaches can sometimes be applied and may produce different figures so the most equitable system may be to take the average of the result of all three of the above systems of valuation.[71]

The choice of the method of valuation should only be made after the court has enquired into the essential elements and requirements of the scheme in question. In *Y.* v. *Y.* the contribution approach would be inappropriate as counsel for the wife admitted that the ultimate worth of the pension did not depend on the amount of contributions made. Similarly, the second approach may not produce a fair result as the ultimate pension value was calculated by reference to the average salary over the five years preceding retirement. The terminal salary will usually be greater than the salary at the time of separation. Is it fair that the benefit shared by the spouses should be calculated on the base of an entitlement increased by years of employment following the dissolution of the marriage? The Californian Court of Appeal in *In Re Marriage of Freiberg*[72] overrode an appeal by the husband where an award had been made in favour of the wife on the second method of calculation. His objection was based on the inequity suggested above. The court held that the fact that the husband's basic pay (on which the pension would be calculated) at retirement would be separate property, was irrelevant. The court relied on the fact that the husband had ultimate control over the amount of benefit received by both parties, to justify rejection of the husband's appeal. It was pointed out that any increase in benefit due to further years of employment would benefit both spouses, just as a decrease in salary prior to retirement would work to their equal detriment.[73]

The Court of Civil Appeals in Texas adopted a contrary view in *In Re Marriage of Rister.*[74] The husband in that case was a member of a scheme similar to the scheme in *Y.* v. *Y.* The trial court allocated the wife a fraction of benefits if, as and when received by the husband, which fraction was that of $\frac{\textit{community time in the scheme}}{\textit{total time in the scheme.}}$

On appeal the court reaffirmed that retirement benefits are compensation for services rendered and that since the benefit that would accrue on retirement would be increased by further years in service and an increased salary after divorce, the trial court's order had the effect of awarding benefits earned by the husband after divorce, to the wife. The court held that benefits earned after divorce are separate property. Therefore, the court held that the formula applied was incorrect and remitted the case for retrial on this point. It has been suggested that the conflict between *Freiberg* and *Rister* is best resolved by holding the *Freiberg* approach to

71 For a fuller discussion of the different approaches see M.J. Simon "Toward a More Equitable Distribution of Pension Benefits" (1976) 3 South. Univ. L. Rev. 51.

72 127 Cal. Rptr. 792 (1976).

73 Ibid., 797-798.

74 512 S.W. 2d 72 (1974).

be applicable where future periodic payments are ordered, and the *Rister* approach where a final capital sum is determined at the date of divorce.[75]

The other obstacle to a periodic payment type of division is that it requires court supervision and is therefore administratively too burdensome on the courts. The court in *Brown* rejected administrative workload as a valid reason for unequal sharing of benefits owing to the wife, and adverted to other periodic payments ordered and supervised by the courts — i.e. alimony.[76] This same reasoning can be applied to New Zealand, but section 31 provides a more desirable approach in that the agreement may be served on the manager of the superannuation scheme and it is he who is charged with the responsibility of apportioning the benefit. Thus a wife need have no fear of an estranged husband withholding money payable to her. The other advantage of section 31 is that the court need not involve itself with a taxation analysis. In *Kruger* v. *Kruger*[77] a Common Law state applied the reasoning of *Brown* but held that division of future benefits should only be made of the net benefits accruing to the husband, as any other apportionment would result in the husband paying tax for benefits received by the wife.[78] In New Zealand, if the manager of the superannuation scheme is charged with allocating each spouse's share, the employee spouse receives, and is taxed on, only the amount due to him.

The other problem with the periodic payment method of division is how to define the limit of the non-employee spouse's rights. If one takes the simple example of a couple separating and a court order being made dividing pension payments if, as and when they are made, can the non-employee spouse assign his rights or leave them by devise? In the community property states the wife's entitlement is based on the fact of community ownership so that she is seen as having title to these payments. Can she continue to receive benefits even though the husband whose employment earned the benefits has predeceased her? If she could and the husband remarried and then died, and his widow was given a benefit by the scheme, there is the possibility that two, probably estranged women will be sharing the benefit. Aside from the fact that many schemes prohibit any assignment of rights the community property states have made a policy decision to prevent such results. While accepting the fact that after divorce the property becomes the separate property of the wife, it has been declared that "the pension terminates with the death of the husband, and the wife's share also terminates if she predeceases the husband."[79] This must also be the case in New Zealand. After all, if instead of a periodic payment, the court decided to allocate the wife a lump sum, it is the life expectancy of the employee spouse and the probable pension he will receive that are the criteria for valuation. Therefore, any arrangement under section 31 should include a direction to the effect of the words quoted above. This would also allay the fears expressed by Chilwell J. in *Y.* v. *Y.* that a manager of a superannuation scheme would find himself obliged to pay out more than the amount for which the scheme provided.[80]

75 K. J. Gray *Reallocation of Property on Divorce* (Oxon., 1977) 167.

76 544 P. 2d 561, 568-569 (1976). See discussion of maintenance similarities post, Part VII.

77 354 A. 2d 340 (1976).

78 Ibid., 345.

79 *In re the Marriage of Fithian* 517 P. 2d 449, 451 (1974) and accepted in *Kruger* v. *Kruger* 354 A. 2d 340, 345 (1976).

80 [1977] 2 N.Z.L.R. 385, 403.

B. Lump Sum Valuation

It is important to note that the powers given to the court under section 31 are additional to the more general provisions of section 33.[81] The court in *Brown* admitted that in some cases it may be more desirable to give a lump sum valuation as at the date of separation, thus leaving each spouse completely separate from each other.[82] Richardson and Chilwell JJ. found this factor to be of great importance in *Edwards* and *Y.* v. *Y.* However, if such a valuation is made it must be recognised that the court is not making a present of a sum of money to the non-employee spouse, but is allocating to him the property to which he is entitled. In any lump sum valuation the courts could have regard to the factors spelt out in *Wilder* v. *Wilder*.[83]

New Zealand courts are not inexperienced in awarding lump sums in lieu of contingent future benefits. In the deaths by accident compensation field, the courts were involved in similar types of valuation.[84] Indeed, Chilwell J. in *Y.* v. *Y.* commented on the likelihood that the valuations proposed by counsel for the wife were motivated by experience in this field.[85] His Honour took the matter no further due to his view of the entitlement of the husband to the pension benefits, but if, as it has been argued in this paper, the husband does have a present entitlement to those future benefits, the courts have experience upon which to draw.

If the court wishes to ensure that neither spouse is dependent on the other it could use a number of the options available to it under section 33 — e.g. order payment of money by the employee spouse;[86] or, it could even require the employee spouse to purchase an insurance policy of equivalent value[87] under the general powers of section 33(1), though this last course may be no more attractive than an arrangement entered into under section 31. It is also interesting to note that in all of the suggested valuations advanced by counsel in *Y.* v. *Y.* there was a deduction made to take account of future tax paid. Cases in this area may once again bring before the courts the questions about the propriety of taking into consideration the probable tax that would be paid by the actual recipient of the benefit.

It is now accepted that in taxation of damages for personal injuries the court should take into account the probable tax that would have been paid by the injured man.[88] However, the acceptance is by no means universal[89] and with the current rate of inflation and the agitation for further review of the taxation tables, any estimation of probable tax is a hazardous prediction at best.

81 R. L. Fisher *The Matrimonial Property Act 1976* (Wellington, 1977) para. 641.
82 544 P. 2d 561, 567 (1976).
83 534 P. 2d 1355, 1358. See supra, n.52.
84 E.g. *Le Bagge* v. *Buses* [1958] N.Z.L.R. 630 C.A. and *Attorney-General* v. *Green* [1967] N.Z.L.R. 888 C.A.
85 [1977] 2 N.Z.L.R. 385, 399.
86 Section 33(3)(i) Matrimonial Property Act 1976.
87 E.g. *Parker* v. *Parker* [1972] Fam. 116.
88 *British Transport Commission* v. *Gourley* [1956] A.C. 185 H.L. accepted in New Zealand in *Smith* v. *Wellington Woollen Manufacturing Co. Ltd.* [1956] N.Z.L.R. 491 CA.
89 See rejection of *Gourley* in Canada in *R* v. *Jennings* (1966) 57 D.L.R. (2d) 644. See discussion G. D. S. Taylor "The Element of Income Tax in Damages Awards for Personal Injuries" (1969) 5 V.U.W.L.R. 208.

VI. LEGISLATIVE REDRAFTING

A complicating factor in any allocation of pension benefits is the wording of section 8(i). The proposals advanced in this paper have concentrated on ensuring for the non-employee spouse an equitable share of matrimonial property as demanded by the Act, but due to the drafting of section 8(i), if the suggestions made here are accepted, there could be a concomitant inequity for the employee spouse. The community property states, and now New Jersey with the decision in *Kruger* only divide property earned by the community. Therefore, any benefits earned prior to marriage or after separation, are excluded from the division: e.g. they are not included in the top figure of any of the fractional divisions outlined above.[90] Section 8(i) defines as matrimonial property any benefits to which a spouse is entitled if entitlement is derived wholly or in part from contributions or employment since marriage. While the courts appear determined to exclude from consideration any entitlement earned after the marriage, Chilwell J. found that the wording of section 8(i) demanded that pre-marriage contributions must be matrimonial property.[91] As noted in the Introduction, the presumption of the Act would appear to be that only property acquired during the marriage should be matrimonial property. Notable exceptions are the matrimonial home and the family chattels, but we can justify these exceptions on the grounds that no matter who buys these assets, they have been devoted to the communal life of the marriage. The same justification does not hold true for superannuation rights nor insurance policies. These are items purchased from the income or service of the individual, and if that individual effort had been expended to purchase other items such as shares, they would be separate property, unless purchased in contemplation of marriage. Superannuation, taken out before marriage, can be seen as provision by the individual for his old age. It could be argued that on marriage that purpose changes and it is seen as provision for the old age of the couple. It is not however realistic to rely on this argument as justification for including entitlement earned prior to marriage as part of the divisible property. To do so we would have to apply the argument to all personal savings accumulated before the marriage that were not used by the partnership. Such property is not matrimonial property unless acquired in contemplation of the marriage and it was intended for the common use and benefit of the marriage.[92]

It is submitted that section 8(i) should be redrafted to enable the court to exclude from consideration any pre-marriage contributions or service. If this is not done, the result of obliging the court to divide pre-marriage entitlement may militate against the court perceiving entitlement as anything more than realisable value at the date of separation on the grounds that any other formulation would result in an over-allocation of this asset to the non-employee spouse.

VII. MAINTENANCE OR PROPERTY

The question arises in the context of superannuation benefits, especially with a periodic payment system of division, as to whether the employee spouse is in fact being asked to pay an indirect form of maintenance. Common Law jurisdictions

90 See discussion supra in Part V.
91 [1977] 2 N.Z.L.R. 385, 405.
92 See s.8(d).

have sometimes preferred to see superannuation benefits as going to maintenance rather than property division.[93] The community property states strongly reject that approach:[94]

> Alimony lies within the discretion of the trial court; the spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.

This attitude follows also from the fact that pension benefits are seen as property, choses in action. New Zealand courts do not need to conceptualise the distinction as the Matrimonial Property Act 1976 declares pension rights to be property under section 8(i). Statutory distinction between property and maintenance provisions was the basis upon which the English Court of Appeal in *Trippas* v. *Trippas*[95] rejected the submissions that the award of a lump sum as the wife's share from the sale of a family business was merely a way of quantifying maintenance.

Therefore, while it may be argued that the receipt of share in pension benefits is a ground for denying or reducing maintenance,[96] it cannot be argued that such a share in benefits should be denied merely because the wife is in a satisfactory financial position. The right to a share in pension benefits is a right due to contributions to the marriage partnership, and not due to the need to support a former wife.

VIII. SUMMATION

It is submitted that the approach of the New Zealand courts as evidenced in *Y.* v. *Y.* and *Edwards* v. *Edwards* is incorrect. There is ample persuasive precedent from other jurisdictions for characterising rights to future pension benefits as rights earned during the marriage, and that such benefits can and should be apportioned equitably between both spouses. Furthermore, there is a need to redraft section 8(i) so as to exclude entitlement earned prior to the marriage.

93 See Colorado: *In re the Marriage of Ellis* 538 P. 2d 1347 (1975) and Australia: *In re Marriage of Foster* (1977) 3 Fam. L.N. 74.
94 *In re the Marriage of Peterson* 115 Cal. Rptr. 184, 191.
95 [1973] Fam. 138, 140.
96 Section 32.

Local Government Law in New Zealand

Kenneth A. Palmer

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