Domestic Contribution and the Allocation of Property on Marital Breakdown: A Comparative Study of Australia and New Zealand

ROYSTON J LAWSON*

Reflecting the diversity of family forms in our pluralistic society are expectations that the law be responsive to some notion of a fair allocation of property,[1] a common artefact of family life in Western materialist cultures. It is not unreasonable that separating couples should anticipate that property adjustments will be made in the context of legal certainty and predictability. Economic and social justice seems possible where the distribution of property following marital breakdown reflects the type and value of individual contributions, costs and a projection of the future needs of parties.[2] Superficially this approach appears appropriate, reasonable and administratively feasible; in practice considerable complexity arises in regard to issues of both principle and measurement, particularly where the 'contribution' element is in a 'non-financial' form. The attainment of some ideal scheme for the allocation of matrimonial property on dissolution remains elusive.

Disquiet with the present Australian system, particularly with regard to the economic consequences of breakdown for women (and their custodial children) prompts a comparative study of statutory provisions and an analysis of reported decisions where domestic contribution has been a salient factor. Australia and New Zealand share somewhat similar cultural and common law traditions, yet each jurisdiction has developed somewhat unique statutory provisions for the allocation of matrimonial property. Statutory changes in these jurisdictions are responses to pressures seeking to balance the flexibility (and uncertainty) of a discretionary

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* Senior Lecturer, School of Nutrition and Public Health, Deakin University.

1 The definition of property is critical to allocation/equity considerations. *The Family Law Act* 1975 (Cth) provides little guidance in s 4. Should the Court's discretion embrace 'new property' (social security rights, tenured employment, superannuation, professional licences)? The nature of this property and its fair allocation on separation is explored in M A Glendon, *The New Family and the New Property* (Butterworths, 1984).

2 K Funder, 'Work and the Marriage Partnership' in P McDonald (ed), *Settling Up* (AIFS, 1986) p 224.

system against the potentially arbitrary and harsh effects of more predictable regimes. A comparative review of recognition and assessment of homemaker/parent contributions in the respective jurisdictions provides an insight into family dynamics, the application of legal rules, and the direction of public policy regarding social and economic justice for parties to a marriage and their children.

Considerable support has been expressed for the view that on dissolution women as homemakers and care-giving parents should be compensated adequately for loss of superannuation, loss of earning capacity, for their future responsibilities as custodial parents, and for the husband's subsequent gains in earning power. Despite express and implied reference to these issues in s 79(4) and in s 75 (2) of the *Family Law Act* 1975 (Cth) ('FLA') practitioners familiar with the present application of the law remain concerned that 'conceptual enlightenment has not led to the corresponding mathematical apportionment'.[3] The FLA concept of contribution (s 79 (4) (a) (b) and (c)) involves 'invidious and value-laden assessments of each spouse's performance in the marriage; its conceptual basis is unclear and it engenders delay and bitterness, while not influencing the outcome of the general run of cases'.[4]

Not only is there no predictable pattern in judicial behaviour, but 'nor can any binding precedent emerge from cases decided under such elusive discretion'.[5] Family Court efforts to create a rule of thumb for stereotypical families[6] have been thwarted by the High Court in *Mallet and Mallet*[7] which established that there was no legislative authority to presume equality as a starting point. Even where there are no extraordinary circumstances, and a de facto equal division of basic assets is ordered by the Court (subject to adjustment for custody of children), Wade argues that the outcome is not equal:

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3 J H Wade, 'Matrimonial Property Reform in Australia: An Overview' (1988) 22 *Family Law Quarterly* 1 at 53.

4 Australian Law Reform Commission, *Report on Matrimonial Property* (ALRC 39, 1987) p 141.

5 Id at p 46.

6 Eg *Wardman and Hudson* (1978) FLC 90-466; *Potthoff and Potthoff* (1978) FLC 90-475.

7 (1984) FLC 91-507, where Gibbs CJ said at 79,111: 'Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property or that equality should be the normal or proper starting point for the exercise of the court's discretion.'

superannuation is often overlooked; business assets are regarded as non-basic and allocated in favour of the employed spouse; males frequently manipulate the valuation of business assets; and there is inadequate adjustment for the spouse who repartners.[8]

Much valuable work regarding the economic (and other) consequences of marital breakdown has been completed in the United Kingdom,[9] the United States of America[10] and Australia.[11] These empirical studies indicate similar patterns: the economic position of women following divorce depends variously on their socio-economic status, continuing status as mothers, ability to find a new partner and level of participation in paid work. In a major Australian study undertaken by the Australian Institute of Family Studies, the economic circumstances of 825 divorced men and women were assessed during the latter part of their marriage, in the period immediately after separation, and at the time of interview. Broadly, the findings were that the economic consequences of marriage varied widely from marriage to marriage and party to party (they were otherwise congruent with the outcomes of international studies). Generally, women living alone or as sole parents experienced a drastic fall in standard of living; men or women living with a new partner returned to a standard of living close to that enjoyed previously. Men living alone or with a new partner without children or as sole parents typically improved their standard of living. There was a wide range of outcomes regarding shares of property on distribution - in a substantial number of cases this was outside what is considered an equitable 60:40 range. Although judges gave weight to both paid and unpaid contributions, they tended to balance each other out. 'Three years after separation, men were economically better off and women worse off than in their pre-separation days.'[12]

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8 J H Wade, note 3 above, at 54.

9 G Davis, A Macleod, and M Murch, 'Divorce: Who Supports the Family?' [1988] *Family Law* 217; J Eekelaar, and M Maclean, *Maintenance After Divorce* (Oxford Socio-Legal Studies, OUP, 1986).

10 L Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, 1985); HR Wishik, 'Economics of Divorce: an Exploratory Study' (1986) 20 *Family Law Quarterly* 79.

11 P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (AIFS, 1986).

12 Id at 12.

Reform Proposals

Creation of a scheme that promotes social and economic justice requires a fundamental recognition of marriage as an 'equal partnership in which the partners make contributions which are different in nature but equally valuable'.[13] Anglo-American 'separate property', and European 'community property' systems have converged somewhat over the last two decades as the latter accords more autonomy to each spouse in dealing with his/her assets/earnings during the marriage, and the former enforces more sharing of each spouse's income and property.[14] Proponents of change in common law jurisdictions argue the merits of community property systems,[15] particularly the notion of 'deferred property' where there is separate ownership during marriage but an equal division of specific property on separation. While such schemes remove the problems of principle and measurement inherent in assessment of the homemaker/parent contribution, doubt remains as to whether social justice would be achieved. Nygh has cautioned about expecting too much from such schemes; they might remove the risk of arbitrariness, but would they be fair? The relatively greater earning capacity of men, and the tendency for women to be left with the burden of housing, means that 'even the transfer of the entire equity in the former matrimonial home to the wife would not save her ... from a life of relative poverty'.[16]

The Australian Law Reform Commission (ALRC), in its Report, *Matrimonial Property*, (tabled in Parliament on 17 September 1987), proposed a property division scheme whereby all of the property of either spouse is available for reallocation (as is the present law). However, central recommendation was that the FLA be amended to include a rule of equal sharing (50:50 split) of the value of the matrimonial property as a starting point in the determination of the share of each spouse. The proposed s 71D would remove the need to compare financial and non-financial contributions as required by the present s 79(4). From this starting point, the court could make adjustments for the actions of parties in relation to child care *after* the marriage, or for a substantially greater

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13 H A Finlay, and RJ Bailey-Harris, *Family Law in Australia* (4th ed, Butterworths, 1989) p 343.

14 M A Glendon, *State, Law and Family* (New Holland Publishing, 1977) p 264.

15 See K Gray, *Reallocation of Property on Divorce* (Professional Books, 1977); J Scutt and D Graham, *For Richer for Poorer* (Penguin, 1984).

16 P Nygh, 'Sexual Discrimination and the Family Court' (1975) *UNSWLJ* 1 at 62.

contribution to the marriage by one party than by the other (including child care and household management). Adjustment could also be made for future disparities in the standards of living attainable by the parties which could be attributed to a party's responsibility for the future care of the children or to a party's income earning capacity having been affected by the marriage (proposed s 71F).

In 1992, the Joint Select Committee on the *Family Law Act* recommended a full study into the implications of a 'full matrimonial property regime', having regard to 'the desirability of treating the parties to a marriage fairly and equitably'. Consistent with concerns articulated above, the Committee reported many complaints that the current Act gave judges a wide discretion to allocate property thereby producing uncertainty, inconsistency and excessive legal costs. The Committee recommended that 'equality of sharing should be the starting point in the allocation of matrimonial property', and that 'courts should have a discretion to depart from the equality of sharing principle to take account of exceptional circumstances'. The 'matters to be taken into account in exercising a discretion may include ... the care and control of children' and 'the homemaking and child rearing contribution' of each person.[17] The Government's response to this report was tabled in Parliament on 16 December 1993. Legislation giving effect to the legislative amendments proposed by the Government is expected to be introduced in 1994.

Two Property Regimes - A Comparative Perspective

Proponents of deferred community property systems such as that operating in New Zealand point to certainty, predicability and accessibility as features conducive to fair settlement. Others who are supportive of the status quo in Australia argue that community property systems cannot redress adequately the disparity of parties' economic positions on separation; prospective elements such as child custody and limited opportunities for future paid employment may require more than an equal share of the value of matrimonial property. Regardless, past contributions for homemaking/parenting should be recognised as having value. A critical issue facing decision-makers in the current discretionary judicial environment is *relative value*. The assumption of equal contribution by each party does not guarantee equal sharing. The notion of a fair and practical scheme for the allocation of matrimonial property on dissolution remains elusive. Statutory changes in Australia and New Zealand have responded variously to pressures seeking to balance the

17 *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* (AGPS, 1992) pp 233-234.

flexibility (and uncertainty) of a discretionary system against the potentially arbitrary and harsh effects of a more predictable regime.

Despite a legal comparativist's caveat that 'family law is so largely moulded by racial or religious and political considerations that comparison is fraught with difficulty',[18] a critical review of recognition and assessment of homemaker/parent contributions in Australian and New Zealand jurisdictions provides an insight into family dynamics, public policy and the quest for social and economic justice for parties to the marriage and their children. Given a background of broadly similar socio-economic conditions and a shared common law tradition, it is useful to compare and assess legislative provisions for dealing with the economic consequences of marriage breakdown. There has been a long standing Australian interest in New Zealand's matrimonial property legislation. In 1977 in a review of Australian matrimonial property law, the Committee of the *Royal Commission on Human Relationships*[19] considered a system of fixed rights and examined the scheme proposed in the New Zealand Matrimonial Property Bill put before the New Zealand Parliament in October 1975.

Funder has pointed out that the 'purposes of international comparison is to examine our own economic, social and legal practices; to seek other options, variations and refinements; or to confirm present policies'.[20] Australia and New Zealand are appropriate for comparison because of similarities in the outcomes of divorce. In both countries the predominant pattern is the sole maternal custody of children and a major question is how to divide the responsibility for economic support between private (parental) and public (state) responsibility.[21] While New Zealand has not conducted an extensive longitudinal study of post-separation

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18 H C Gutteridge, *Comparative Law* (Cambridge Studies in International and Comparative Law, 1946) p 31.

19 Australia, *Final Report of the Royal Commission on Human Relationships* Vol 4, Part V, 'The Family' (AGPS, 1977) p 58.

20 K Funder, 'International Perspectives on the Economics of Divorce' *Family Matters* (AIFS Newsletter, 1989) no 24, p 18.

21 J M Lown, 'The Economics of Divorce in Australia, New Zealand and the United States: Expanding the Concept of Consumer Choice' in R N Mayer (ed), *Enhancing Consumer Choice: Proceedings of the Second International Conference on Research in the Consumer Interest* (Snowbird, 1990) p 409.

economic outcomes of the magnitude of Australia's, a study of New Zealand family court clients indicates many parallels.[22]

The ALRC Committee, 'impressed by the matrimonial property statutes enacted in New Zealand' (and Canada) in the 1970s recommended a full study of New Zealand law before making any proposals to modify present Australian law.[23] The Committee recognised that its task was not simply a matter of choosing between models based on either separate property or community property. As systems converge in their approach, the trend is to a broader recognition that marriage involves a mutual commitment (previously emphasised by community systems) yet values individual interests of the spouses (previously emphasised by separate property systems).[24] The shift is away from preoccupation with the history of the marriage towards a greater concern with the family's future. '[M]odern divorce is about the division of money and property and the future care of the children.'[25]

Domestic Work and the *Family Law Act*

The common law recognised the value of a wife's labour, but not to the wife herself. The husband had a right to action (*consortium, servitium*) in the event of his wife losing her capacity to perform domestic duties.[26] The wife had no reciprocal right. The FLA rests on the concept of marriage as a partnership; differences in the roles undertaken by spouses are accounted for by contribution not exchange.[27] While s 79(4) is a clear recognition of homemaking activity having proprietary status, in no reported case has the Court embraced any of the economic theories supporting the imputation of value for domestic contribution.[28]

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22 G Maxwell and J P Robertson, *Child Support After Separation* (Draft Paper, Justice Department, 1990).

23 ALRC, note 4 above, at p 2.

24 Id at p 14.

25 M Murch, *Justice and Welfare in Divorce* (Sweet and Maxwell, 1980) p 3.

26 R Graycar, 'Hoovering as a Hobby: The Common Law's Approach to Work in the House' (1985) 28 *Refractory Girl* 22.

27 A C Riseley 'Sex, Housework and the Law' (1981) 7 *Adel L Rev* 421.

28 The value of domestic contribution is vicarious: 'In the generality of marriages the wife bears the children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which allows the husband to perform his, she is in justice entitled to share in its fruits...' Sir Jocelyn Simon, (then) President of the Probate Division, High Court, England; cited in 358 *New Zealand Parliamentary Debates* 1968, p 3393.

Prior to amendments to the FLA in 1983, s 79(4)(b) confined the recognition of non-financial contributions to property such as gifts-in-kind by third parties and merger of property.[29] The present s 79 (4) (c) removes the necessity for courts to construct a general broad allowance in recognition of the homemaker's contribution to the welfare of the family, even though the superseded s 79(4)(b) provided no warrant for such a broad approach. Section 79(4)(c) requires the court, inter alia, to evaluate 'the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity as homemakers or parent'. The contribution element specified in s 79(4)(c) is not limited to contributions made in the capacity of homemaker or parent. In practical terms, most contributions not accounted for by s 79(4)(a) and (b) will fall into the category 'to the welfare of the family'. The term 'family' has been held by the Full Court to refer to the nuclear family[30] as consisting of the words 'constituted by the parties to the marriage and any children of the marriage'. Perhaps broader interpretation will follow referral of State powers to the Commonwealth in 1988 (ex-nuptial children) and acknowledgment of changing community standards.[31]

The term 'homemaker' is not defined in the Act, nor is there any articulation of 'parent' from a status position to an active care-giving role. Despite non-definition, the wide meaning given to the term by the Family Court does not seem to have impeded its acceptance in principle. However, the stereotype of 'homemaking' as limited to a series of housekeeping tasks has persisted,[32] and there is little if any evidence in reported judgments that acknowledges affective dimensions of homemaking. While 'parenting' suffers from

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29 H A Finlay, A J Bradbrook, and R J Bailey-Harris, *Family Law and Commentary* (Butterworths, 1986) p 601.

30 *Mehmet and Mehmet* (1987) FLC 91-801.

31 Outside of blood ties and statutory relationships, 'family' is an elusive entity. Intimate social units represent a continuum of status ranging from full ceremonial marriage to non-marriage. This diversity of form 'reflects variations in the resources which form the basis of control, the nature of economic exchange, and the groups who have power over both resources and cultural meaning.' D Edgar, *Marriage, the Family and Family Law in Australia* (Discussion Paper 13, AIFS, 1988) p 3.

32 The term 'appears to encompass all those duties commensurate with the proper management of the household [including] all the normal domestic duties traditionally undertaken by a housewife as well as gardening, home maintenance and minor repairs which most husbands would be traditionally expected to perform': Finlay, Bradbrook and Bailey-Harris, note 29 above, at p 602.

similar treatment, perhaps the legal consequences of this[33] are softened by the direction that the court's inquiry be steered by the 'paramount interest of the child' principle rather than some notion of parental contribution. In a singular attempt to consider the term 'homemaker', Ferrier J stated:

> I have not been able to find the word 'homemaker' in any dictionary available to the court ... [The term] ... describes both the mental nature, training and capacity of a person and the services rendered by that person in a household. In no way is it connotative of the marital status of the person nor is it descriptive of any family relationship to other members of a household in which services are performed.[34]

Chief Justice Nicholson used the terms 'gainful employment' and 'outside employment' to distinguish a respondent's homemaking activities from waged labour.[35] Otherwise, at least until amendments to the *Act* in 1983, the Family Court has demonstrated a predilection for avoiding definition, preferring to focus on the enabling capacity of a wife's contribution, that is, freeing the husband or father so he can devote time and energy to acquiring, conserving and improving property. This approach permeates the judgment in the leading case of *Mallet*, particularly the dicta of Mason, Deane and Dawson JJ.[36]

While 'parenting' is a gender inclusive term, 'homemaker' bears the badge of a female sex-role. Role reversal has posed no difficulty in the acknowledgment and apportionment of homemaking contribution by the Family Court. The Full Court has interpreted the term in a sexually neutral manner.[37] In the leading case of *Mahon and Mahon* it was readily accepted that the husband's major contribution to the property of the twenty year marriage had been as a homemaker and parent to the parties' foster child. Justice Nygh said that 'although it is normally the wife who relies upon her contributions as a homemaker and parent, there is nothing in the Act to suggest that it is inappropriate to take this factor into account in the case of a husband.'[38]

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33 *Family Law Act*, s 60D: '... the court shall regard the welfare of the child as the paramount consideration.'

34 *Phillips and Phillips* (unreported, 1977) cited by McCall J in *Rowan and Rowan* (1977) FLC 90,310.

35 *In the Marriage of Black and Kellner* (1992) 15 Fam LR 343.

36 (1984) FLC 91-507.

37 *Pavey and Pavey* (1976) FLC 90-051; *Rainbird and Rainbird* (1977) FLC 90-256.

38 (1982) FLC 91-242.

Two Statutory Schemes for Property Allocation

Australia - Limited Judicial Discretion

The approach normally taken by the Court is set out diagrammatically in Figure 1 of the Appendix; it follows a well-established line of authority.[39] The approach was restated by the Full Court in 1992 *In the Marriage of Ferraro* where the wife appealed successfully on the issue of exercise of discretion:

> That approach is firstly to ascertain the property of the parties at the time of the hearing, then to consider the contributions of the parties within paras (a) to (c) of s 79(4), and then to consider the matters in paras (d) to (g), more especially para (e) which takes up by reference the provisions of s 75(2) factors.[40]

Section 79(1) of the FLA gives the Family Court the following power:

> In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both parties or a child of the marriage, such settlement or transfer of property as the court determines.

The Court cannot make such an order under this section 'unless it is satisfied that, in all the circumstances, it is just and equitable to make the order' (s 79(2)).

Section 79(4) requires the Court to take into account various elements in considering what order (if any) should be made:

> In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account:
>
> (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the

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39 In property applications between parties to a marriage, the court is not bound to follow a particular process in reaching a decision; however a step-by-step approach has been adopted in some well-known decisions, viz, *Pastrikos and Pastrikos* (1980) FLC 90-897; *Lee Steere and Lee Steere* (1985) FLC 91-626; *Napthali and Napthali* (1988) FLC 92-021; *Dawes and Dawes* (1990) FLC 92-108, see also the comments of Gibbs CJ in *Mallet*, note 7 above, at 79,110.

40 (1992) 16 Fam L R 1 at 9, per Fogarty, Murray and Baker JJ.

acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;

(d) the effect of any proposed order upon the earning capacity of either party to the marriage;

(e) the matters referred to in sub-section 75(2) so far as they are relevant;

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

(g) any child support under the *Child Support (Assessment) Act* 1989 (Cth) that a party the marriage has provided, or is to provide, for the child of the marriage.

Section 79(4) is a combination of two temporal elements. First is a 'retrospective' element which looks to the past history of the marriage and in particular, each party's contribution to the property owned (s 79(4)(a)(b)) and to the welfare of the family (s 79(4)(c)). Secondly, it contains a 'prospective' element (s 79(4)(d)(e)(f)(g)) which looks toward the future. The dual nature of this section was articulated by the Full Court of the Family Court in *Sieling and Sieling*.[41] The inclusion of the factors mentioned in s 75(2) of the FLA requires the Court to consider the parties' future needs and obligations:the matters to be so taken into account are:

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

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41 (1979) FLC 90-627.

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years;

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) subject to subsection (3) the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of an other country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia

and the rate of any such pension, allowance or benefit being paid to either party;

(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;

(l) the need to protect a party who wishes to continue that party's role as a parent;

(m) if either party is cohabiting with another person - the financial circumstances relating to the cohabitation;

(n) the terms of any order made or proposed to be made under s 79 in relation to the property of the parties;

> (na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, or is to provide, for the child of the marriage; and
>
> (o) any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.

Almost every case under s 79 involves the basic question: How are efforts in earning income and acquiring assets to be compared with efforts as a homemaker and parent?[42]

New Zealand - Deferred Community Property

The purpose and policy of the *Matrimonial Property Act* 1976 (NZ) ('MPA') are stated succinctly in the Long Title.

> An Act to reform the law of matrimonial property; to recognise 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 general scheme for the allocation of matrimonial property in New Zealand is set out in Figure 2 of the Appendix. Intangible items (such as specific skill and expertise, occupational licences and tenured employment) do not form part of the community property (however superannuation rights are part of the sharing pool). The Act requires a division of property classified as matrimonial (s 8); separate property remains with its original owners (s 9). The matrimonial home and chattels are divided equally (s 11) except where the marriage is of short duration (s13)(3)) or there are 'extraordinary circumstances' (s 14). The balance of matrimonial property is subject to a different scheme and the Court is required to order equal (s 15(1)) sharing unless contribution to property such as shares, investment properties, businesses or forms or bank accounts is assessed as unequal, or (rarely) the conduct of one of the parties has been 'gross and palpable' (s 18(3)) in regard to the value of matrimonial property. The non-presumption in s 18(3) that monetary contribution in this exercise are not of greater value than non-monetary seems to support the value of domestic contribution..

Section 11 states that

> upon the division of the matrimonial property each spouse shall share equally in:

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42 ALRC, note 4 above, at p 31.

(a) The matrimonial home; and

(b) The family chattels.

The balance of matrimonial property is divided as follows (s 15):

1. Upon the division of matrimonial property (other than property to which section 11 or section 12 of this Act applies), each spouse shall share equally in it unless his or her contribution to the marriage partnership has [been clearly][43] greater than that of the other spouse.

2. Where, pursuant to subsection (1) of this section, the spouses do not share equally in the matrimonial property or any part of the matrimonial property, the share of each in the matrimonial property or in that part of is shall be determined in accordance with the contribution of each to the marriage partnership.

Section 14 provides that:

Where there are extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 of this Act applies or of any sum of money pursuant to section 12 of this Act, the share of each shall, notwithstanding anything in section 11 or section 12 of this Act, be determined in accordance with the contribution of each to the marriage partnership.

Section 18 is critical in the determination of each party's share of the balance of matrimonial property and specifies, inter alia, the following types of domestic contribution: care of any child of the marriage or of any aged or infirm relative or dependent of either spouse (s 18(1)(a)), the management of the household and the performance of household duties (s 18(1)(b)), acquisition of matrimonial property (s 18 (1) (d)), foregoing of a higher standard of living than would otherwise have been available (s 18(1)(g)), and assisting the other spouse in carrying on his or her occupation or business (s 18(1)(h)). The section reads:

1. For the purposes of this Act a contribution to the marriage partnership means all or any of the following,-

(a) The care of any child of the marriage or of any aged or infirm relative or dependant of the husband or the wife:

(b) The management of the household and the performance of household duties:

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43 In subsection (1) the words 'been clearly' were substituted for the words 'clearly been' by s 5 of the *Matrimonial Property Amendment Act (No 2)* 1983.

(c) The provision of money, including the earning of income, for the purposes of the marriage partnership:

(d) The acquisition or creation of matrimonial property, including the payment of money for those purposes:

(e) The payment of money to maintain or increase the value of-

(i) The matrimonial property or any part thereof; or

(ii) The separate property of the other spouse or any part thereof:

(f) The performance of work or services in respect of-

(i) The matrimonial property or any part thereof; or

(ii) The separate property of the other spouse or any part thereof:

(g) The foregoing of a higher standard of living that would otherwise have been available:

(h) The giving of assistance or support to the other spouse (whether or not a material kind), including the giving of assistance or support which-

(i) Enables the other spouse to acquire qualifications; or

(ii) Aids the other spouse in carrying on of his or her occupation or business.

2. There shall be no presumption that a contribution of a monetary nature (whether under subsection (1)(c) of this section or otherwise) is of greater value that a contribution of a non-monetary nature.

Despite predictions of impending disaster resulting from the Act's methods of achieving comparable treatment for wives,[44] and initially the generation of much litigation, the New Zealand Court of Appeal has resolved many areas of uncertainty in the Act. The fundamental principle in s 18 (that all contributions to the marriage as a whole must be taken into account) is a radical shift from the trend under the *Matrimonial Property Act 1963 (NZ)* that contributions to particular property had to be shown.

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44 Eg R L Fisher, 'The Matrimonial Property Bill - Misguided Chivalry?' (1976) *NZLJ* 253.

Statutory Interpretation - Domestic Contribution in the Principal Acts

The Family Law Act 1975

The FLA was greeted as a major breakthrough in 'overcoming the cosmetic nature of the law as to property ownership by replacing the *Matrimonial Causes Act 1958 (Cth)* with legislation providing for a recognition of the efforts made traditionally by women in the home sphere and in parenting.[45] Prior to amendments to the FLA in 1983 and the critical decision of the High Court in *Mallet*,[46] a series of decisions of the Full Court of the Family Court of Australia took the view that the purpose of the former s 79(4)(b)[47] was to ensure recognition of the homemaker/parent contribution. The optimism in some quarters[48] that equality would be a normal starting point for the assessment of contributions in property allocation, was dampened considerably by the High Court's finding in *Mallet* that there was no rule of equality of division to be found in the FLA While a majority of the High Court did not preclude a conclusion that equality of division might be the proper result in most cases[49] a trial judge's discretion under s 79 could not be fettered.

In *Mallet*, the High Court majority of three to two (Gibbs CJ, Wilson and Dawson JJ, Mason and Dean JJ dissenting) overturned a decision of the Full Court of the Family Court to divide equally the assets of a divorced couple. The judges disapproved of a universal starting point or presumption which would give the homemaker spouse an equal share of matrimonial property. The strongest statement came from Gibbs CJ as follows:

> [T]he Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be

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45 J A Scutt, 'Principle vs Practice: Defining "Quality" in Family Property Division on Divorce' (1983) 57 *ALJ* 144.

46 (1984) 156 CLR 605.

47 '... the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity as homemaker or parent.' Since the 1983 amendments s 79(4)(b) refers only to the 'contribution (other than a financial contribution)' to the property.

48 Inspired by remarks such as those made by Evatt CJ in *Rolfe and Rolfe* (1979) FLC 90-629, that homemaker contributions 'be recognised not in a token way but in a substantial way'.

49 (1984) 156 CLR 605, per Mason J at 625; per Deane J at 639; per Dawson J at 645.

> equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorised by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered [by] the application of supposed rules for which the *Family Law Act* provides no warrant.[50]

It is one thing to say that domestic contribution should be recognised 'not in a token way but in a substantial way',[51] but what is substantial? No scheme, formula or index was given to value Mrs Mallet's twenty-nine years of contribution as a homemaker and parent. There was no attempt to compensate Mrs Mallet for lost earning capacity, diminished paid work skills or detachment from professional contacts. Serious consequences would follow from the suggestion of Wilson, J that when placing a monetary value on the role of homemaker, 'the quality of the contribution ... may vary enormously, from the inadequate to the exceptionally good.'[52] The High Court demonstrated little interest or awareness of the socio-legal-economic literature regarding valuation or opportunity cost of homemaking activity. The judgment does not reveal cognisance by the Court of the universal debate on the place of discretion in matrimonial property disputes, nor of the growing marginality of 'fault' or 'inadequacy'.

Another judgment critical to discretionary treatment of domestic contribution was the High Court decision in *Norbis and Norbis*[53] where the court was required to decide whether there was a proper approach to the division of property under the FLA. The Full Court of the Family Court decided that in the particular circumstances of the case a *global* approach was appropriate (ie division of the parties' assets on the basis of an overall proportion of the total assets to be divided). Alternatively, in an asset-to-asset approach, determination would be made in regard to the parties' interests in individual items of property. The High Court overturned the Full court decision; in particular, Wilson and Dawson JJ commented that the FLA did not

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50 (1984) 156 CLR 605 at 610.

51 *Rolfe and Rolfe* (1979) FLC 90-629 at 78,273 per Evatt CJ.

52 Ibid.

53 (1986) FLC 91-712.

> dictate the employment of any particular method in the formulation of an appropriate order for the alteration of property interests. The matters which are to be taken into account will sometimes require the division of the assets, or some of them upon the basis of their individual values, but in other cases no more than an overall division will be required. In some cases either approach may be adopted in part or in whole.[54]

The Matrimonial Property Act 1976

The MPA created the first true matrimonial property system in the history of New Zealand,[55] and implemented most of the recommendations in the *Report of a Special Committee on Matrimonial Property* 1972. The MPA was a move toward the community property regimes characteristic of civil law jurisdictions. However, impending passage of the Bill triggered a spate of concern and criticism; the scheme was 'tentative in approach', 'misguided chivalry', 'backward looking' and 'bedevilled by conceptual difficulties'. A leading family law practitioner agreed that the '[t]he Bill's objective of comparable treatment for wives is the right one. Its methods of achieving it are a disaster.'[56] Family Courts have concurrent jurisdiction with the High Court in respect of proceedings under the Act (MPA s 3). Generally, the Act does not affect ownership or dealings until an application for division is made under s 4 of the Act (when the marriage has broken down).

The previous legislation and reports of numerous cases thereon left little doubt that a fuller and more comprehensive definition of 'contribution' was long overdue. Section 18, which enumerates 'all or any' of an exhaustive list as contributions manifested 'a revolutionary definition - of contribution to the marriage partnership', not 'a definition of contribution to property.'[57] In *Reid v Reid*,[58] a landmark test of the MPA, Richardson J said: 'The [MPA] is not a technical statute.' This approach was strongly supported by Woodhouse J in *Reid* and in *Martin v Martin*.[59] The judgments in these leading cases made it clear that Parliament's intention was that the MPA regarded marriage as a partnership of

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54 Id at 75,174.

55 P Vaver, 'Notes on the *Matrimonial Property Act* 1976' in *Proceedings: The Matrimonial Property Act 1976* (Legal Research Foundation Seminar: Auckland University, 1977) p 55.

56 R L Fisher, note 44 above, at p 258.

57 P R H Webb, '*The Matrimonial Property Act* 1976 - A Quick Guide' in *Proceedings*, note 55 above.

58 [1979] 1 NZLR 572 at 580-83.

59 [1979] 1 NZLR 97 at 99.

equals, was biased toward an equal entitlement of spouses to matrimonial property, avoided uncertainty by providing a settled statutory concept of justice, rejected the notion that monetary contributions to a marriage automatically had a greater weight than non-monetary contributions and was legislation directed toward the equal status of women in society.

The Act is a reform measure which recognises a 'marriage partnership' in which the contributions of each spouse are equal although different. Adoption of the principle 'contribution to the marriage partnership' triggered concern that such 'contribution' would have to be defined carefully in order to avoid throwing the marriage open to judicial scrutiny perhaps leading to uncertainty and disparity. Section 18 is an attempt to overcome this by providing an exhaustive definition of *contribution*, together with a provision requiring there be no presumption that monetary contributions were of no greater value than non-monetary.[60] The 'just division' of matrimonial property under the Act avoids discretionary departure from rules laid down in the Act. The interests of children of the marriage are taken into account (s 26) and the legal capacity of married women reaffirmed (s 49).

The prima facie equal division of matrimonial property on separation/dissolution stems from the Act's underlying philosophy that contribution is to the marital partnership rather than to property. Gender equality in property matters is enhanced by a movement away from individual discretion to the application of a general rule. The scheme implemented is that of deferred sharing, ie separate ownership and management until the matrimonial property is divided at the end of the marriage.

The Application of Statutory Rules

Temporal Dimension

Unlike the qualitative aspects of homemaking and parenting generally sidestepped by the Family Court of Australia, the temporal aspect is readily quantified. Duration of marriage often has a bearing on assessment of a homemaker's general contribution, especially where the marriage is short. The Court examines respective contributions more closely in the case of a comparatively short marriage than in the case of a longer period.[61] In *Berta and Berta*,[62]

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60 T K McLay, '*The Matrimonial Property Act* 1976' in *Proceedings*, note 55 above, at p 7.

61 *Quinn and Quinn* (1979) FLC 90-677; *Crawford and Crawford* (1979) FLC 90-647.

where the marriage was less than three years and there were no children, the Full Court inquiry into contribution proceeded on the basis that in a short marriage, financial contributions of the parties are likely to be weighted more than non-financial contributions. The length of marriage is significant if the wife's contribution is to be weighted against assets brought to the marriage by the husband but it is not so difficult to match domestic contribution with the husband's contribution via paid work during that time.

While it is difficult to argue a homemaking contribution for marriages of fifteen weeks,[63] or up to two years' duration,[64] where parties make a substantial contribution over a longer period, the court is more likely to find parity between parties' contributions. In *Paskiewicz and Paskiewicz*,[65] the wife made small financial contributions relative to the husband, but carried out homemaking for many years. Her contribution was regarded as 'more or less equal to that made financially by the husband'. In *Shaw and Shaw*,[66] (a marriage of twelve years and no children) the wife's case was argued almost entirely on the strength of her contribution to the welfare of the family, as a homemaker/parent under s 79(4)(c). The Full Court of the Family Court of Australia reduced the trial judge's award, on the basis that the wife's share of property should be modest as a reflection of the husband's substantial contributions of income and homemaking.

In *Lawler and Lawler*[67] there were two children of the marriage of 13 years (plus a further 5 years separation under one roof) and the wife had borne the major responsibility for care of the children. It was held that contributions made by the wife as a homemaker and parent, both before and during the marriage, were real and relevant considerations in adjusting the property. Gee J referred specifically to *Lee Steere*, in which the Full Court articulated the general guideline:

> The longer the duration of the marriage, depending on the equality and extent of her contribution, the more the proportionality of the original contribution is reduced. The proposition that the strength of a contribution made at the inception of a marriage is eroded, not by

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62 (1988) FLC 91-916.

63 *Doyle and Doyle* (1980) FLC 91-845.

64 *Ramsay and Ramsay* (1978) FLC 90-449.

65 (1976) FLC 90-044.

66 (1989) FLC 92-010. Significantly, during the marriage property diminished rather than accumulated.

67 (1988) FLC 91-927.

> the passage of time but by the off-setting contribution of the other spouse, still holds true.[68]

In *Harris and Harris*,[69] the Full Court disallowed the husband's appeal against the trial judge's weighting of the wife's domestic contribution. Over twenty-four years, and as the mother of three children, the wife had carried out her role as parent and homemaker and thus made a substantial contribution to the welfare of the family (s 79(4)(c)), and also made indirect contributions to the acquisition and improvement of property by caring for children while the husband pursued farming and business interests. In the opinion of the Full Court,

> [h]is Honour did not err when he considered that the contributions made by the parties over the period of the marriage were such that it would be just and equitable to treat them as having contributed equally under each section, 79(4)(a), (b) and (c) of the Act... [However] the task of proceeding under s 79 is not akin to an accounting exercise.[70]

It is now well established that the Court will consider contributions of the parties made before the marriage. In *Olliver and Olliver*[71] (prior to amendment of s 79 in 1983) where the parties had cohabited for ten years before marrying, the Court could find nothing in s 79(4)(a) and (b) which required it to disregard financial or other material contributions made before the marriage. The wife was awarded 12 percent of total assets in *G and G*[72] for her (sole) contribution as homemaker and parent during nine years co-habitation and five years of marriage. Recognition of this ante-nuptial contribution to the welfare of the family was followed in *Nemeth and Nemeth*.[73]

Post-separation contribution is similarly recognised. In *Williams and Williams*[74] the husband was granted leave to appeal to the High Court on the grounds that the Full Court of the Family Court wrongly took into account the wife's contribution to the welfare of the family after the husband left home. The High Court held (unanimously) that the wife's post-separation contribution was a

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68 (1985) FLC 91-626, at 80, 078.

69 (1991) FLC 92-254.

70 Id at 78, 705-6.

71 (1978) FLC 90-499.

72 (1984) FLC 91-582 at 79,694.

73 (1987) FLC 91-844 at 76,380.

74 (1985) FLC 91-628.

valid consideration under s 79(4)(c). In *Turnbull and Turnbull,*[75] the parties had been married for a little under two years prior to separation. The wife brought very little to the marriage by way of property, while the husband had made a substantial financial contribution at the time of marriage. Throughout the marriage, the wife was a homemaker; the Court took account of her contribution to the welfare of the parties' daughter and her attention to gardens and lawns surrounding the homestead. Blake J awarded her $125,000 plus child maintenance of $120 per week from a property pool of $5 million.

In New Zealand, the prima facie equal sharing of the matrimonial home and family chattels is constrained by the imposition of technical criteria including the duration of the marriage. A short marriage is defined in s 13(3) of MPA as a marriage:

> in which the spouses have lived together as husband and wife for a period of less than three years (in the computation of which any period of resumed cohabitation with the motive of reconciliation may be excluded if it lasts for not more than three months) or, if the Court having regard to all the circumstances of the marriage considers it just, for a period longer than three years.

Where a marriage has been of short duration, s 13(1) states that

> sections 11 and 12 of this Act shall not apply:
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> (a) To any asset owned wholly or substantially by one spouse at the date of the marriage; or
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> (b) To any asset that has come to one spouse after the date of the marriage by succession or by survivorship or as the beneficiary under a trust or by gift from a third person; or
>
> (c) Where the contribution of one spouse to the marriage partnership has clearly been disproportionately greater than that of the other spouse.

Section 14 allows an extension of this definition of a short marriage if there are 'extraordinary circumstances', that in the opinion of the Court render repugnant to justice the equal sharing of property (to which s 11 applies). Relative brevity of the marriage has been a mitigating factor in marriages of five years and eight years.[76]

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75 (1991) FLC 92-258.

76 *Park v Park* [1980] 2 NZLR 278; *Aarons v Aarons* (1979) 2 MPC 1.

Soon after the MPA was in operation there were some attempts to avoid equal sharing by arguing s 13(3) (disproportionate contribution to the marriage partnership). Marriages up to 4 years 4 months were judged as 'short',[77] while in *Ratima and Ratima*[78] the husband's contribution of cash for the family home gave him a greater share. In the marriage of less than three years the wife's domestic contribution lacked the immediacy and tangible quality of money (despite the presumption in s 18 (2) regarding monetary/non-monetary contributions).

In *Illingworth v Illingworth*[79] the marriage lasted two and a half years. The husband was awarded two-thirds of the family home because he used pre-marriage assets for the purposes of the marriage. The Court of Appeal considered the wife's domestic contribution to be substantial, but not equal to the husband's monetary contribution. In his interpretation of s 13(1)(3), Richardson J said 'it is proper to have regard to their expectations in the marriage partnership and the manner in which they chose to organise their affairs'.[80] (The wife had given up her career at the behest of the husband to assist him socially in business engagements.)

Where a couple married for four and a half years but lived separately for half of this time,[81] the trial judge looked at the quality of the marriage and found it was a marriage of short duration (s 13(3)). The High Court held that circumstances were such that it was a clear case for declaration under s 13(3). In *Watson v Watson*,[82] in a marriage of just less than three years, but preceded by cohabitation of seven years, the wife was awarded two-thirds of the home and chattels. The wife's contribution was judged by the High Court 'clearly disproportionately greater' owing to her full responsibility for business and financial matters in the marriage partnership. This decision indicates that equality in division of assets does not follow where one party is less able in a financial sense (despite ante-nuptial contribution).

Under the MPA, marriage per se does not mean instant equality: 'equal sharing of the matrimonial home is a privilege that

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77 *Lewis v Lewis* (1977) 1 MPC 725; *Chittenden v Chittenden* (1978) 1 MPC 39.

78 (1978) 1 MPC 172.

79 [1981] 1 NZLR 1.

80 Id at 10.

81 *Albardo and Albardo* [1988] 5 NZFLR 532.

82 [1990] 7 NZFLR 51.

must be earned.'[83] Section 13(1)(c) has proven to be a primary escape route for those in marriages of less than three years who seek to avoid equal sharing. Where marriages are a little over three years in duration, partners seeking to maximise their share of the matrimonial home and chattels have argued s 13(1)(c), which has focussed the judicial mind on the type and extent of contribution. Homemaking vis-a-vis financial contribution has not enjoyed the benefit of the Court's discretion.

The 'three year' rule is based on the notion that in a short marriage there is relatively little time for contribution through homemaking/parenting to have a great impact on the marriage partnership. In *Bowie v Bowie,*[84] Somers J held that in a marriage of seven years, household management and performance of the household duties by the wife 'could not be other than of marginal significance'. Conversely, 'the longer the marriage, and the less ample the financial resources, the more difficult it will often be to establish a case for unequal sharing'.[85] Judicial decision-making in New Zealand reflects attempts to accommodate competing tensions; certainty, simplicity, expediency and legislative control should not compromise the desire for individual justice on the basis of actual contributions.[86]

The Court of Appeal has applied the equal division rule strictly, even when parties' contributions are unequal. In *Martin v Martin*[87] where the home belonged to the husband prior to marriage and the wife undertook homemaking/parenting activities in a three-and-a-half year marriage, the Court held this not to be a marriage of short duration nor a situation sufficiently extraordinary to render equal sharing repugnant to justice. The home was divided equally. Justice Woodhouse stated the test:

> the question in every case will be whether the marriage has been so restricted in point of time and unduly limited in terms of quality that it may justly be described as a marriage of short duration.

However, where the matrimonial property included a farm, judicial discretion took on another complexion. The case of *Walsh v*

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83 C Bridge, 'Reallocation of Property After Marriage Breakdown: The *Matrimonial Property Act* 1976' in M Henaghan and B Atkin (eds), *Family Law Policy in New Zealand* (OUP, 1992) p 236.

84 (1978) 2 MPC 22.

85 Per Richardson J in *Williams v Williams* [1980] 1 NZLR 532 at 534.

86 R L Fisher, *Fisher on Family Law* (Butterworths, 1984) p 400.

87 [1979] 1 NZLR 97.

Walsh[88] represented a failure to give full effect to the 'policy' underlying the MPA. Although the wife worked hard on the farm and cared for two children in a marriage which lasted ten years, Hardie Boys J described this as a 'relatively short marriage partnership', although it was seven years longer than the 'marriages of short duration' defined in s 13 of the Act. The Court conceded that the wife's homemaking and parenting role was 'very substantial' and 'dutiful'; however her contribution to the marriage as a whole was only one quarter! Critics of this decision point to drafting inadequacies in the MPA.[89]

Conduct of the Parties

It is tempting to consider conduct of the parties as a criterion for establishing some qualitative measure of the homemaking/parenting contribution. On this basis 'good conduct' would enhance the relative value of contribution while discounting would apply where misconduct diminished the standard of homemaking/parenting (and thus the worth of the contribution). The ALRC, in its *Report on Matrimonial Property*, recommended no change to the present law: fault is relevant in property matters insofar as it affects property or finances and property decisions should not depend on the allocation of blame for marital breakdown. (The ALRC reported submissions from many people who felt their marriages had broken down through no fault of their own and against their will). The Commission was mindful that, to allow general imputations of fault in the breakdown of a marriage to influence property and financial matters would revive many of the worst features of the law before the *Family Law Act*.[90]

The homemaking contribution of the wife, which to some extent had been recognised in decisions under the *Matrimonial Causes Act* 1959 (Cth),[91] was given recognition for the first time in the FLA, s 79(4)(b). Under the Act a new philosophy of economic justice emerged; there was a 'shift from allocating property in accord with conduct to a consideration of matters of economic justice.'[92] The result of decisions such as *Soblusky and Soblusky*[93] and *Ferguson and*

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88 [1984] 3 NZLR 23.

89 W R Atkin, 'Matrimonial Property: Time to Take Stock' [1985] *NZLJ* 25.

90 ALRC, note 4 above, at p 39.

91 *Horne v Horne* (1962) 3 FLR 38.

92 D Kovacs, *Family Property Proceedings in Australia* (Butterworths, 1992) p 211.

93 (1976) FLC 90-124.

Ferguson[94] is that the behaviour of the parties toward each other is not, per se, relevant to applications under s 79.[95] However, matrimonial misconduct which affects the spouses' property or their financial position can often be considered under either s 79(4) or s 75(2). Other conduct which has financial effects (such as the dissipation or wastage of assets) may be taken into account under s 75(2)(o).[96]

The conduct issue was tested in *Sheedy and Sheedy*,[97] where the wife sought enhanced valuation of her contribution on the basis that her efforts as a homemaker had been made more difficult by the husband's maltreatment. The court held that it was not the behaviours of the parties against each other, per se, that was relevant to applications under the (then) s 79(4)(b). Justice Nygh stated that it is

> in the light of these principles that one might consider the interpretations of s 79(4)(c) which refers to the contribution made in the capacity of a homemaker and parent. A failure to make such contribution is clearly relevant whether that failure is the result of fault or misfortune. Thus, it may be relevant that a wife has spent most of her time away from the matrimonial home or conversely, that a husband was never there to assist her with the upbringing of the children. It is not, however, the question of fault which is *per se* relevant in such a situation. The absence may be caused by conduct which could be described as misbehaviour or it may be caused from accident which is outside anyone's control, such as a serious physical or mental illness, or the absence of a spouse for business and other reasons. It is clearly not sufficient merely to allege misconduct and expect the court to draw the inference therefrom that his misconduct resulted in a non-contribution. It is perfectly possible for one spouse to be personally obnoxious to the other and yet to be an adequate homemaker and parent.[98]

The issue of conduct begs the question of *fault*. In *Mallet*, Wilson J said that:

> The quality of the contribution made by the wife as a homemaker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every

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94 (1978) FLC 90-500.

95 *Sheedy and Sheedy* (1979) FLC 90-719.

96 Ie 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.' See *Antmann and Antmann* (1980) FLC 90-908; *Anastasio and Anastasio* (1981) FLC 90-093; *Tuck and Tuck* (1981) FLC 91-021.

97 (1979) FLC 90-719.

98 *Sheedy and Sheedy* (1979) FLC 90-719 at 78,872.

> way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party.[99]

While this statement raises some concern that the evaluative process suggested might provide an impetus for the re-introduction in Australia of matrimonial fault principles, particularly in regard to the non-performance or inadequate performance of homemaker roles, the Family Court has not responded positively to the above dicta.

In the Marriage of Shewring[100] (a five year marriage preceded by three years co-habitation, no children) the Full Court in finding that the contribution of the wife within the meaning of s 79(4)(a)(b) and (c) 'far outweighed' that of the husband, supported the following dictum of the trial judge:

> What was an issue in this case was the question of quality of contribution. I am aware very much of the remarks made by Wilson J in *Mallet and Mallet*,[101] and, in fact, on the basis of that remark it has been suggested from time to time that the court must assess in some way or another the quality of contribution made by a party, for instance as breadwinner on the one hand and as homemaker on the other, on a scale which presumably ranks from the perfect to a total failure. I myself cannot accept that anything like that was every in Sir Ronald's mind. It is not, I think, the function of this court. It has never done so and I trust will never do so in future, to assess the quality of each party on a scoring board which, so far as breadwinners are concerned, would give top marks to the Holmes a Court's of this world and bottom mark to the unemployed roustabout and, I suppose, in the homemaker and parenting stakes would give top marks to those ladies who in the age of the great dictators would have received the glorious motherhood medal, and bottom marks to those ladies, who it is alleged spend most of their time in the tennis club and the coffee klatsch and waste their precious time in idle pleasure. I take the view based upon the traditional marriage vows that the parties take on another for better and for worse.
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> The assessment of the quality of the contribution should be based on the principle that each party should make such contribution as can be reasonably expected having regard to the nature of the parties'

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99 (1984) FLC 91-507 at 79,126.

100 (1987) 12 FLR 139.

101 (1984) 9 Fam LR 449 at 470.

> capacity, the ability of each of the parties and expectations of the spouses.[102]

There may be exceptional cases 'where a party has ignored completely the basic concepts upon which the "partnership of marriage" is founded',[103] or settlement of applications in which the 'homemaker contribution (or more likely the non-contribution) of a party in the capacity of homemaker or parent could be in issue and involve the consideration of conduct of a "fault" nature'.[104] In *Weber and Weber*,[105] the Court discounted the wife's entitlement (interest in the matrimonial home) on account of her chronic alcoholism and expenditure of housekeeping monies on alcohol (which affected her performance as a homemaker).

In *Norbis*[106] the trial judge adjusted the wife's contribution in a thirty year marriage as it was limited by her indifferent health due mostly to arthritis. It was a material circumstances in *Albany and Albany*[107] that the wife had 'lost interest' in the homemaking/parenting role toward the end of the period of cohabitation. However, where a husband's occupation (medical practitioner) created increased pressure on the homemaker wife and parent (allowing the husband to work longer hours to improve his financial position), the Full Court concluded that 'the respective contributions of the husband and the wife under s 79(4)(a)(b)(c) should [except for an inheritance] have been treated as equal.'[108]

Owing to the absence of conduct as fault in s 79(4), attempts have been made to invoke the provisions of s 43, s 79(2) and s 75(2)(o). In *Schokker and Edwards*,[109] the Full Court's order that the husband pay the wife a further $11,000 in property settlement was founded on the 'just and equitable' provision of s 79(2). However, the decision in *Soblusky* (spousal maintenance) demonstrated the Full Court's interpretation of s 75(2)(o) as a provision which 'does not include facts or circumstances relating to the marital history as such

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102 (1987) 12 FLR 139 at 141.

103 *Ferguson and Ferguson* (1978) FLC 90-500 (Full Court) at 77,606.

104 *Burdon and Nikou* (1977) FLC 90-293 at 76,557 per Marshall SJ.

105 (1976) FLC 90-072.

106 Note 53 above.

107 (1980) FLC 90-905.

108 *Horsley and Horsley* (1991) FLC 92-205 at 78,403.

109 (1986) FLC 91-723.

of the parties, but relate only as to facts or circumstances of a broadly financial nature'.[110]

Uncertainty regarding conduct was resolved in *Fisher and Fisher* where the Full Court re-stated that behaviour of parties to a marriage, not being of a financial nature, was not relevant in proceedings under s 79. The Court agreed with Strauss J in *Ferguson* by stating that s 43 did not provide any justification for taking into account matrimonial misconduct as such either under s 75(2)(o) or s 79(2). The function of the Court is:

> to make an adjustment of property in the light of contribution and relative needs and resources ... [I]t is the existence of the respective contributions and needs which is the primary subject of investigation and not the causes thereof.[111]

In New Zealand, conduct may be argued as a factor where a party seeks departure from the rule of equal sharing of the matrimonial home and chattels. Where the Court accepts that 'extraordinary circumstances' would make equal sharing 'repugnant to justice' (s 14), the Court will make further enquiries into parties' contributions to the marriage partnership (s 18). The test to be satisfied before departure from equal sharing is stringent and vigorous. Soon after the MPA came into operation, the Court made it clear that unequal sharing of home and chattels would require circumstances remarkable in degree and unusual in kind. In *Castle* v *Castle*,[112] the wife claimed that her contribution via gifts from parents and running a business amounted to extraordinary circumstances in relation to the husband who made little contribution financially and was unable to keep a steady job. In rejecting the wife's argument, Quilliam J said:

> ... no mere imbalance in the contributions of the spouses, not even a substantial imbalance, is intended to be treated as an extraordinary circumstances. Only a gross disparity of a kind which simply cannot be ignored will suffice.[113]

This decision sits uneasily with *Madden v Madden*,[114] where the couple started marriage with very little, but eventually acquired a house. The Court found that there were extraordinary circumstances

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110 Note 93 above, at 75,586.

111 (1990) FLC 92-127 at 77,847.

112 [1977] 2 NZLR 97.

113 Id at 102-3.

114 (1978) MPC 134.

and set aside equal sharing on the grounds that the wife drank excessively and was alcoholic.

In the leading case, *Martin*,[115] the Court of Appeal rejected both grounds put forward by counsel suggesting extraordinary circumstances. The Court expressly approved Quilliam J's dicta in *Castle*; it did not matter that the husband had provided the matrimonial home and family income and made a greater contribution to a relatively short marriage. In view of the wife's management of the household, performance of family duties and care of a child, the imbalance of contributions was hardly in the category of an extraordinary circumstance. Similarly in *Dalton and Dalton*[116] where the wife provided the whole of the finance for the matrimonial home and most of the running expenses, cared for children and managed the household, the disparity was not enough to rebut equal sharing.

The application of s 14 is rare indeed. However, in *Drummond v Drummond*,[117] marriage 'with an eye to property chances' amounted to extraordinary circumstances. The wife owned the matrimonial home and other assets and was in receipt of a pension, while the husband had very little. The Court at first instance found the husband not to be honest and trustworthy; he had manipulated the wife throughout a relatively short marriage to provide himself with a home, loyal housekeeper, malleable companion and property. The husband lost his appeal against an award of twenty percent of the matrimonial home and chattels; in his judgment, Fraser J cited with approval the dicta of Richardson J in *Martin*.

The statutory scheme in New Zealand, under the MPA, is founded on the key principle than in most marriage partnerships, each spouse will have contributed in different but equally important ways; consequently, 'no form of contribution is inherently likely to provide weightier benefits'.[118] Evaluation of both relative and absolute contributions (identified in s 18 (1), and treated globally) may seem to demand weighting on the basis of conduct. Should a wife be penalised due to the curtailment of her domestic contribution caused by illness? When considering a wife's contribution, the Court cannot take it upon itself to 'add something for which a wife might have made, and even would have made, but in the event, did not,

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115 [1979] 1 NZLR 97.

116 [1979] 1 NZLR 113.

117 [1989] BCL 1930.

118 Per Woodhouse J in *Martin* [1979] 1 NZLR 97 at 99.

from whatever cause'.[119] Although s 18(1)(g) recognises expressly sacrifices in a family's standard of living, this does not require an examination of a wife's prudence and economy in homemaking.

Section 18(3) of the MPA provides the Court with a discretion:

> The Court may:
>
> (a) In determining the contribution of a spouse to the marriage partnership; or
>
> (b) In determining what order it should make under any of the provisions of sections 26, 27, 28 and 33 of this Act:
>
> take into account any misconduct of a spouse that has been gross and palpable and has significantly affected the extent or value of the matrimonial property; but shall not otherwise take any misconduct of a spouse into account, whether to diminish or detract from the positive contribution of that spouse or otherwise howsoever.

Unequal division of other matrimonial property (ie other than the matrimonial home and chattels) occurs only where the contribution of one spouse to the marriage 'has been clearly greater' than that of the other spouse (s 15(1)), on the basis of the contribution of each to the marriage partnership. The applicant seeking a greater share must demonstrate to the Court that there has been a disparity of contribution. '[T]he onus involves a positive demonstration that the contribution is greater to a significant degree so that the disparity really stands out in the circumstances of the case.'[120] In establishing a disparity of contributions, the Court follows accepted principles articulated in authoritative judgments.[121] A 'conduct-based' disparity arises 'where there has been a marked failure by one spouse to measure up to the expectations of the marriage.'[122]

There is a potential problem here with domestic contribution (as set out in s 18(1)), however this is obviated largely by s 18(3) which makes misconduct irrelevant unless it is 'gross and palpable' and has 'significantly affected the extent or value of the matrimonial property.' The Court makes a global evaluation of contributions

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119 Per Turner J in *Haycock v Haycock* [1974] 1 NZLR at 413; regarded as applicable to the MPA in *Manuel v Manuel* (1978) 1 MPC 136.

120 *Barton and Barton* [1979] 1 NZLR 130 at 132, per Woodhouse J.

121 That is: *Reid*, note 58 above; *Maw v Maw* [1981] NZLR 25; *Lynch v Lynch* [1980] 3 MPC 101.

122 *Reid*, note 58 above, at 584 per Woodhouse J.

during the whole span of the marriage.[123] Adultery, desertion, and cruelty are by themselves irrelevant. Excessive drinking and neglect of children[124] are also unlikely to be relevant as misconduct, but may prejudice a favourable assessment of a spouse's positive contributions to the marriage.

Where a spouse has contributed relatively less because of chronic sickness, the Court takes account of the actual contribution, not the potential contribution if there had been no disability.[125] Poor mental health will not always render equal sharing unjust,[126] nor will physical disability[127] or alcoholism.[128] It is clear that the Court makes no enquiry into the performance of domestic activities per se; attention is focused on matters concerned with the value of the property (eg, drinking may diminish a spouse's ability to contribute to family welfare or gambling may cause a property to be sold).

In summary, there are four key elements in s 18(3) in regard to conduct and equal sharing.[129] The misconduct must be 'gross and palpable'[130] (eg wastage of matrimonial property); mere mismanagement[131] or voluntary unemployment[132] are not considered. The diminished value of the property is the relevant mitigating factor, not so much the spouse's actions (or lack thereof). The lost value must be 'significant' (s 18(3)) and trivial losses are regarded as immaterial. The misconduct must also occur before separation. Misconduct occurring after separation is irrelevant in determining contributions to the marriage partnership.[133]

However, misconduct falling short of the above may be material as a background against which the other spouse's own

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123 *Williams v Williams* [1980] 1 NZLR 532; *Maw*, note 121 above.

124 Cf *Buljan v Buljan* (1981) 4 MPC 30.

125 *Manuel v Manuel* (1978) 1 MPC 136.

126 *O'Keefe v O'Keefe* (1980) 3 MPC 128.

127 *McLaren v McLaren* [1982] 1 NZLR 273.

128 *Kerrisk v Kerrisk* (1981) 4 MPC 123.

129 RL Fisher, note 86 above, at p 420.

130 Section 18(3). The words 'gross and palpable' were obviously taken from the speech of Lord Simon in *Haldane* [1976] 2 NZLR 715 at 728 (PC), interpreting s 6A of the *Matrimonial Property Act* 1963. See, for example, the contemporaneous English maintenance cases, such as *Wachtel v Wachtel* [1973] Fam 72 90 (regard paid only to conduct which is 'both obvious and gross'); *Trippas v Trippas* [1973] Fam 134.

131 *Foss v Foss* [1977] 2 NZLR 185.

132 *Mentick v Mentick* (1978) 1 MPC 143.

133 *Godfrey v Godfrey* (1978) 1 MPC 90.

positive contributions accrue more weight. In *Williams v Williams*[134] recognition was given to the husband's contributions to the care of his wife, the home and family, due to the wife's alcohol problem. Also, conduct having a negative effect upon the family welfare may be considered under s 15 of the Act (equal sharing subject to equal contributions) by regarding it as a 'failure by one partner to a marriage to measure up to ordinary responsibilities'.[135]

Homemaking/Parenting as Contribution to Business Assets

Despite the broad rule that domestic activities of one partner contribute toward the acquisition of property by the other[136] (by his/her business activities), the Family Court 'has not been disposed to regard domestic contribution as having the same weighting towards a partner's business as in the case of a ordinary employed person'.[137] The pre-1983 theoretical situation that the wife through her domestic activity freed the husband to generate wealth,[138] is no longer required as s 79(4)(c) directs the Court to take into account contributions to the welfare of the family. However, the distinction between marital and business assets clearly adopted in *Wardman and Hudson*[139] and *Potthoff*[140] gave way to the logical step in *W and W*,[141] where the wife was awarded a thirty percent share in the husband's business:

> The Court must look at the totality of the assets of the parties whether acquired by inheritance, by pre-marital effort, or by way of business activity during the marriage, although the manner in which the particular assets have been acquired or contributed to may be relevant in determining the overall distribution between the parties. That approach, in my opinion, is the result of the court's obligation under s 79(4)(a) and (b) [now (a) (b) and (c)] to consider the contribution made by the parties to 'the property' which is described in subsection (1) of that section as 'the property of the parties to a marriage or either of them', ie the entirety of the assets owned by them either jointly or severally.

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134 [1979] 1 NZLR 122 (CA).

135 *Reid v Reid* [1979] 1 NZLR 572 at 584 per Woodhouse J.

136 See *Aroney and Aroney* (1979) FLC 90-709; cited with approval in *Albany and Albany* (1980) FLC 90-905.

137 A Dickey, *Family Law* (2nd ed, Law Book Company, 1990) p 599.

138 See *Zappacosta and Zappacosta* (1976) FLC 90-089; *Rolfe and Rolfe* (1979) FLC 90-629; *Mallet* (1984) FLC 91-507 at 79,132 per Mason J.

139 (1978) FLC 90-466.

140 Note 6 above.

141 (1980) FLC 90-877 at 75,525 per Nygh J.

This approach was supported by Nygh J in *Mathews and Mathews*,[142] who was critical of the asset-by-asset approach 'which would suggest that a wife, by contributing to the maintenance of the matrimonial home, has made no contribution to the husband's acquisition of business assets'.

A property jurisprudence was developed by the Family Court in the early 1980s; a spouse's domestic (and other) activities were regarded as contributions to the other spouse's business activities, depending on the particular circumstances of the case.[143] After a long marriage where the parties built up assets by joint efforts (even by the homemaker alone) equality emerged as a starting point in the alteration of property interests.[144] Following the High Court's decision in *Mallet* it is now clear that there is no such general principle or guideline as 'equality is a starting point.' Consequently, post-*Mallet* there are significant disparities in Full Court assessments in homemaker/parenting contribution to business assets. Since *Mallet* any measure to introduce certainty has been struck down by the requirement for discretion in the application of s 79:

> [A]s arithmetic equality was achieved in only a small minority of cases, it cannot be said that the High Court in *Mallet* destroyed a jurisprudence by which the Family Court was gradually achieving an informal community of property. It is doubtful that such a jurisprudence ever existed.[145]

Special problems in allocation occur where the business assets comprise or include a farm.[146] The issue was addressed by the ALRC;[147] in its discussion of whether farms acquired during marriage could be included as matrimonial property, the FLA was criticised for failing to give clear guidance (because of the wide discretion of s 79). The matter was of sufficient concern to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, that a full chapter was devoted

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142 (1980) FLC 90-887 at 75,600.

143 Eg *Tuck and Tuck* (1980) FLC 90-872; *Dupont and Dupont (No 3)* (1981) FLC 91-103.

144 *Zdravkovic and Zdravkovic* (1982) FLC 91-220; *Racine and Hammond* (1982) FLC 91-277.

145 D Kovacs, note 92 above, at p 220.

146 Realisation of a farm to meet a property order may have dire effects not only on the respondent, but on the viability of the enterprise and on members of the extended family.

147 Note 4 above, p 138.

to 'Family Farms and Property Settlements' in its 1992 *Report*.[148] The early decision in *Scott and Scott*[149] preserved the farm as a productive entity for the husband with little concern for a 'just and equitable' distribution of property between the spouses. However, the Full Court in *Magas and Magas*[150] concluded that if justice and equity pointed to sale of the farm, then that should be the outcome. A most comprehensive analysis of the issue was made in *Lee Steere and Lee Steere*[151] in which the Full Court affirmed that there was no special rule for farms; the ordinary principles of s 79 apply despite the attempts at consistency (a three-step approach) in *Lee Steere*. The dicta regarding discretion in *Mallet* are omnipresent.

In 1992, the Full Court delivered a detailed judgment addressing the application of discretion and the nexus between contributions to home/family welfare and business assets in regard to property allocation. In *Ferraro* (a marriage of twenty-seven years, three children) the wife devoted her time to homemaking and parenting while the husband created large business interests. The trial judge awarded thirty per cent of the total assets of $10.6m to the wife. The wife appealed on the grounds that her contributions were equal to those of the husband. The trial judge had rejected the wife's application; her contribution, 'limited in quantum and value' did not rank equally with the husband's 'very substantial contribution to the acquisition and improvement of the parties' property':

> The parties' property empire blossomed because the husband had the innate drive, skills and abilities to enable him to succeed in his chosen occupation, whereas the wife's contribution was neither greater nor less than when the husband had been a carpenter. To equalise the parties' contributions is akin to comparing the contribution of the creator of Sissinghurst Gardens, whose breadth of vision and imagination, talent, drive and endeavours led to the creation of the most beautiful garden in England, with that of the gardener who assisted with the tilling of soil and the weeding of the beds.[152]

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148 *The Family Law Act 1975: Aspects of Its Operation and Interpretation*, Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act* (1992), Chapter 11.

149 (1977) FLC 90-251.

150 (1980) FLC 90-885.

151 (1985) FLC 91-626.

152 *Ferraro* (1992) 16 Fam LR 1 at 28.

This unfortunate analogy was followed by the trial judge's assessment of parties' contributions to property as 70:30 in the husband's favour, based on the application of *Mallet* and *Lee Steere*.

The Full Court (Fogarty, Murray and Baker JJ) saw two matters as central to the appellant's case:

> (a) How and to what extent is the quality of the parties' respective roles to be evaluated?
>
> (b) How is the comparison of those disparate roles carried out in the context of settling their property between them within the confines of s 79?[153]

In reference to (a), the Court stated that *Mallet* 'still represents the major point of reference for this issue', particularly the statement of Wilson J which embraces the dicta of the former Chief Justice in *Rolfe*, which stated that 'homemaker contributions be recognised not in a token way but in a substantial way.'

> The task of evaluating and comparing the parties' respective contributions where one party has exclusively been the breadwinner and the other exclusively the homemaker, is a most difficult one to perform because the evaluation and comparison cannot be conducted on a 'level playing field'. Firstly, it involves making a crucial comparison between fundamentally different activities, and a comparison between contributions to property and contributions to the welfare of the family. Secondly, whilst a breadwinner contribution can be objectively assessed by reference to such things as that party's employment record, income and the value of the assets acquired, an assessment of the quality of a homemaker contribution to the family is vulnerable to subjective value judgments as to what constituted a competent homemaker and parent and can not be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role.[154]

However, the Court stated that where there is a 'normal range' of roles 'no detailed assessment is either called for or appropriate', except where there are 'special features' which add or subtract from the norm (not to be confused with fault or misconduct).

In reference to (b) (relative weight of parties' contributions), the Court cited the dicta of Gibb CJ in *Mallet*:

> The Act does not indicate the relative weight that should be given to different circumstances, or how a conflict between opposing

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153 Id at 35.

154 Id at 38.

> considerations should be resolved - those are left to the Court's discretion, which must, of course, be exercised judicially ...
>
> It is necessary for the Court, in each case, after having regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case.[155]

The Full Court alluded to the economic consequences of divorce and confirmed the concept inherent in the FLA that 'marriage is a social and economic unit between equals'. The 1983 amendments to the FLA and contemporary social views 'increasingly give greater recognition to the contribution of a homemaker and parent when compared with the more obvious and direct financial contributions of the breadwinner.'[156]

In its judgment in *Ferraro*, the Full Court reviewed five family property cases to 'illustrate the shift towards a greater societal recognition of the worth of domestic labour' post-1983. The 'mindful' exercise of discretion was demonstrated by reference to *Aldred and Aldred (No 3)*,[157] *Gamer and Gamer*,[158] *Napthali and Napthali*,[159] *Dawes and Dawes*,[160] and *Harris and Harris*.[161] From this limited sample of appellate cases (*Aldred* was a trial judgment) the Full Court proposed that '[t]here is also, we think, an evolving social background which gives greater emphasis to the equality and partnership concepts in marriage and, no doubt, this evolutionary process will continue.'[162]

Following its exhaustive review of relevant sections of the FLA, the High Court judgment in *Mallet*, leading Family Court judgments (pre- and post-1983) and the views of learned commentators, the Full Court in *Ferraro* concluded as follows:

> The argument for the appellant in this case is that in the circumstances here the proper exercise of the discretion by the trial judge should have been equality. Expressed in that way, that is a difficult argument having regard to the width of the discretion which s 79 gives. However, the essential aspects of the argument are that the trial judge approached the issues on an incorrect basis; alternatively, that 30% falls outside the range of a reasonable exercise

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155 Id at 40.

156 Ibid.

157 (1988) FLC 91-933.

158 (1988) FLC 91-932.

159 (1988) FLC 92-021.

160 (1990) FLC 92-108.

161 (1991) FLC 92-254.

162 (1992) 16 Fam LR 1 at 47.

> of that discretion. On either view, the contention is that the Full Court should re-exercise that discretion and should reach a conclusion of equality.
>
> Essential to these submissions is a consideration of the process of evaluation and comparison of the disparate roles of the partners to the marriage already referred to.[163]

The *Ferraro* judgment makes it clear that *Mallet* remains the principal authority in the exercise of discretion under s 79. Subsequent decisions have, however, established that the Court will be cognisant of special factors deviating from the norm that it considers deserve recognition. In *Ferraro*, the Sissinghurst analogy denigrated the wife's contribution over three decades: on appeal the wife was awarded 37.5 per cent of the parties' assets (the trial judgment was 30 percent).[164] Spouses anticipating a 'just and equitable' order from the Court might be consoled with the Full Court's statement that: '[T]his is ... an evolutionary process and applications under s 79 will need to be determined against the evolving legal and social background.'[165] Discretion and uncertainty are confirmed bedfellows in property allocation under the FLA.

The New Zealand MPA approach to contribution to a spouse's business is somewhat different from that applying in Australia. Notwithstanding any of the provisions in s 11 and s 15, the Act provides further opportunities for partners to share the economic fruits of the marriage partnership. Section 15 directs the Court to order equal sharing of the balance of matrimonial property (ie that which is not the home and chattels defined in s 8) on the basis of the relative contributions of the parties (s 18(1)), subject to qualification by s 18(2) and (3). The other potential opportunity is dependent on a partner's ability to demonstrate sustenance (s 17) of the other's separate property (defined in s 9(2)) or to prove that (her) actions lead to an increase in the value of the separate property (in which case that increase would be deemed matrimonial property (s 9(3)(a) and (b)). At face, both provisions would seem to enhance sharing possibilities for the homemaker partner.

The notion of 'separate property' is articulated in s 9, particularly s 9(3) which states that:

> any increase in the value of separate property, and any income or gains derived from such property, shall be separate property unless

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163 Id.

164 Each 1 percent of contribution is equal to approximately $100,000.

165 *Ferraro*, (1992) 16 Fam L R 1 at 15.

> the increase in value or the income or gains ... were attributable wholly or in part:
>
> (a) To actions of the other spouse; or
>
> (b) To the application of matrimonial property,-
>
> in either of which events the increase in value or the income or gains (as the case may be) shall be matrimonial property.

In cases where large amounts of property are the 'separate property' of one party, the other party is likely to receive less property overall. This outcome stems from the judicial interpretation of provisions defining various categories of matrimonial and separate property.[166] Separate property remains separate 'unless the Court considers that it is just in the circumstances to treat such property or any part thereof as matrimonial property' (s 9(4)). Intangibles (eg professional degrees and licences, specific skills and expertise, job tenure, on-going employment benefits and on-going income from employment) do not form part of the community of property at separation; however, business goodwill and superannuation entitlements fall into the sharing pool.

The general rule with separate property is that any increase in value (or any gains from it) is deemed as separate property. It is clear from the judgments in *Walsh v Walsh*[167] and *Cross v Cross*[168] that a causal link must be established between the actions of the (homemaking) party and the increase in property values. The argument that work such as child care and household management indirectly influences separate property insofar as it releases the other party to devote time and energy to building a business (separate property) has not been accepted by the Court in relation to s 9(3) and s 17(1). Contributions to the marriage of a general kind are not enough.[169]

The 'balance of matrimonial property' is subject to a different statutory scheme than the 'home and chattels'. The fundamental presumption of equal sharing (s 15(1)), can be displaced by the relative contribution provision in s 15(2). For the average marriage,

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166 Eg s 8(d) (property acquired in contemplation of marriage) has resulted in injustice in some situations, eg in *Campbell v Campbell* (1978) 2 MPC 33, where a shop bought in contemplation of marriage and owned and operated by the husband was held to be his separate property as it was intended for use only by him

167 (1984) 3 NZFLR 23 (CA).

168 (1984) 5 NZFLR 433 (CA).

169 *Palmer v Palmer* (1982) 5 MPC 116.

balance of property is not an issue as there is nothing there; usually it consists of assets such as a business, form, livestock, shares, investment property, holiday home or life assurance policies. The rebuttal of equal sharing is possible on less stringent grounds where separate property is at stake.[170] Outcomes of the application of s 15 are supported by a study of out-of-court settlements involving balance of property.[171] The conclusion was that contributions in the form of unusual income or property, rather than family service, tipped the balance and it was the spouse working outside the home who most often made this contribution. In an affluent marriage, the homemaking spouse will seldom obtain half the property in settlement and 'the threshold [at which the 50:50 rule disappears] is reached when the amount of income earned or property acquired exceeds that of a typical, middle class family'.[172] The rule seemed to be that the proportion of balance of property received by the homemaker in out-of-court settlements varied inversely with the value of property.

Section 18(1)(a)(b) gives express recognition to homemaking, while s 18(2) is intended to remove the possibility that less weight will be given to contributions of a domestic nature that those of a financial or proprietary nature. This reflects strongly the notion that 'provision of an efficient home base by a wife leaves the husband free to earn the family income and to attend to a business enterprise or the investment of capital savings'.[173] Other contributions to the marriage partnership set out in s 8 include (1)(f) which recognises the performance of work or services in respect to the other spouse's separate property. Also related to a spouse' business affairs is the 'foregoing of a higher standard of living than would otherwise have been available',as this is frequently incidental to the development of a farm or business where profits are ploughed back rather than immediately enjoyed. Section 18 (1)(h) specifies the giving of assistance or support that aids the other spouse in carrying on his or her occupation or business or earning qualifications with a view to continuing income from employment. This strengthens the key concept in s 8(1)(a),(b) and s 8(2) that domestic contribution is of equal importance to earning activities from which the other spouse is freed.

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170 Bridge, note 83 above, at p 235.

171 J M Krauskopf and C J Krauskopf, 'Comparable Sharing in Practice: A Pilot Study of Results under the *Matrimonial Property Act* 1976' (1988) 18 *Victoria University of Wellington L Rev* 21.

172 Id at 27.

173 Fisher, note 86 above, at p 427.

In *Rhodes v Rhodes*[174] (a thirteen year marriage, four children and a balance of property of almost $1 million) the wife 'did all in her power to help the husband', who in turn had 'shown quite unusual ability in business.' As the wife was awarded twenty per cent of the balance of property, the philosophical ideals of the Act were not so readily converted into equality. However, the Court of Appeal interpreted s 15 much more strictly in *Reid* where Woodhouse J said, 'the efforts of one spouse in looking after the home and bearing the major domestic responsibilities are intended by both spouses to free the other to concentrate on work outside the home for the benefit of the marriage partnership'.[175] The decision in *Reid* set a yardstick against which business success of husbands has become measured; the Court in apportioning separate property, looks to the sustainability of the business and the consequences on the husband's future livelihood. Where the property is a business, the Court has been reluctant to divide equally;[176] however when the balance is money or property, the usual outcome, ceteris paribus, is equality.

The Court is faced with a special dilemma where a farm is the balance of matrimonial property. Farms are a contentious issue under the MPA as they are joint working enterprises for husbands and wives, often have a large capital value and create complex problems with physical and financial division. Bridge[177] analysed cases involving farms decided between 1977 and 1983; she asserted that many divisions were not consistent with the principles of the MPA. In cases where large amounts of property were involved, financial and property contributions were often given more importance than other types of contribution and considerations such as preserving the family farm (for the benefit of the husband) were often taken into account. Of the thirty-six farm property cases examined up to 1983, nineteen were divided equally according to underlying presumptions of the MPA, while seventeen were divided unequally in varying proportions.[178] In a series of decisions in 1978,[179] the husband was awarded seventy-five percent of the farm property; in each case, equal sharing was refuted on the basis of input of outside (usually family) capital. Despite the inherent

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174 (1978) 2 MPC 159.

175 *Reid v Reid* [1979] 1 NZLR 584, at 584.

176 Eg *Griffith v Griffith* (1978) 1 MPC 10; *Gardner v Gardner* (1981) 4 MPC 75.

177 C Bridge, 'The Division of Farms under the Matrimonial Property Act' [1983] *NZLJ* 20.

178 Ibid.

179 *Baddeley v Baddeley* (1978) 1 MPC 10; *Bleakley v Bleakley* (1978) 1 MPC 31; *Manuel v Manuel* (1978) 1 MPC 138; *Forde v Forde* (1978) 1 MPC 136.

legislative equality of s 18 contribution factors, the Court has been loath to give full relative weight to the wife's normal domestic role.

The decision in *Reid* confirmed that Parliament had intended equal sharing; the 60:40 division was consolidated by the Court's decision in *Yakich v Yakich*[180] and *Johnston v Johnston*[181] and looked like becoming the norm. However, following the decisions in *Walsh*,[182] *Cross v Cross*[183] and *Jackson v Jackson*,[184] the trend in division of farms became somewhat less predictable. In the leading case, *Walsh*, the wife argued 'a clearly greater' contribution to the fifty percent of the farm deemed as matrimonial property. The Court of Appeal awarded the wife twenty-five percent, a significant departure from its approach in *Reid*. In *Walsh* the wife cared for two children in a ten year marriage (described by Hardie Boys, J as 'relatively short' (cf three years in s 13)). Although her role as a wife and mother was 'very substantial' and 'dutiful', the proportion allocated was contrary to the principle in s 18(2). Atkin[185] found this decision 'astonishing' and pointed to drafting problems with equality concepts. Bridge commented that:

> [F]aced with half of a million dollar farm to divide, the Court of Appeal refused to give effect to the philosophy of the Act and accord recognition to the equal contribution of the husband and wife to the matrimonial partnership. Instead, the Court exercised its discretion under s 15 so as to arrive at a result which would lie more easily with its own perceptions of fair play.[186]

Whither a Fair Outcome?

While it is 'doubtful that a law of matrimonial property could be designed that would satisfy all strands of opinion',[187] there has evolved across most common law jurisdictions a general consensus of what is *fair*. The proper test for this criterion is not a function of equal division, rather it is based on a just distribution of economic

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180 (1982) 5 MPC 191. In a thirty-year marriage, where the farm was purchased with a gift from the husband's parents, it was held that neither spouse had made a greater contribution than the other.

181 (1984) 3 NZFLR 65.

182 (1984) 3 NZFLR 23 (CA).

183 (1984) 2 NZFLR 433.

184 (1984) 2 NZFLR 374.

185 Note 89 above, at 28.

186 C Bridge, 'Division of Farms under the *Matrimonial Property Act*: A Further Review' [1985] *NZLJ* 298.

187 ALRC, note 4 above, at p 15.

hardship arising from the marriage breakdown. A legislative responsive to this objective would have regard to

> the equal status of the spouses in the marriage relationship
>
> any disparity, arising from the marriage, in the capacity of the spouses to achieve a reasonable standard of living after separation
>
> the shared responsibility of the spouses for the future welfare of any dependent children of the marriage.[188]

The implementation of these principles requires judicial decision-makers to address the issue of the 'importance to be attached to the contribution of those whose input to the relationship has been in services which are unwaged',[189] ie the domestic contributions of homemaking and parenting.

Judicial discretion is a distinctive characteristic of property allocation under the FLA; the factors to be taken into account are specified (particularly in s 79(1) and (4), and s 75(2)) but there is no guidance as to how the Court should interpret and apply the provisions. Proponents of discretion point to the 'possibility of doing justice in every case'[190] and see it as an appropriate response to the lack of consensus in Australian society regarding attitudes towards divorce.[191] Dickey made four observations concerning the exercise of the Family Court's discretion: the discretion is very wide; competing claims and relevant considerations are taken into account, but there is no precise mathematical exercise; the High Court is insistent that each case be decided on its merits; and no specific order under s 79(1) is preferred over all others.[192] However, 'at times when marriages are breaking down at a high rate, it is an unaffordable luxury to continue with a broad discretionary system that treats each case as intrinsically different.'[193] The inequity of outcomes consequent in a scheme lacking precision and certainty has been a perennial focus for

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188 Id at p 129.

189 R Ingleby, 'Australian Matrimonial Property Laws: The Rise and Fall of Discretion' in M P Ellinghaus, A J Braddock and A J Duggan, *The Emergence of Australian Law* (Butterworths, 1989) p 178.

190 *Norbis*, note 53 above, at 75,166.

191 'It is not surprising that given this diversity of opinions the Parliament did not require the power conferred by s 79 to be exercised in accordance with fixed rules,': *Mallet* (1984) FLC 91-507 at 79,110 per Gibbs CJ.

192 A Dickey, note 137 above, at p 564.

193 M Harrison, 'Matrimonial Property Reform'(1993) 31 *Family Matters* 19.

criticism of the discretionary scheme since its implementation in 1975.[194]

The resolution of property disputes in Australia has been the subject of various enquiries since 1980.[195] In each instance there has been an acknowledgment of the scheme operating in New Zealand under the *Matrimonial Property Act.* Following a firm recommendation in the Report of the first Joint Select Committee (1980), the Australian Institute of Family Studies (AIFS) undertook research on the economic consequences of marital breakdown and the ALRC reviewed the application of discretion including a comparative study of the 'deferred community property' scheme in New Zealand. The ALRC concluded that Australian law could be improved if certain aspects of the MPA were adopted in Australia (notwithstanding continuing acknowledgment of the post-separation circumstances of the spouses and their children). The second Joint Select Committee reviewed submissions from diverse sources (eg the public, legal practitioners, the Family Court Judiciary, the AIFS) and recommended legislative changes which generally mirror the MPA. The Committee recommended, inter alia, that equality of sharing be the starting point in property allocation, pre-nuptial agreements should be valid, and that courts have a discretion to depart from the equality of sharing principle to take account of exceptional circumstances.[196]

The provision for contribution in the FLA would seem to augur well for spouses relying on recognition of their efforts as homemakers and parents, particularly following the amendment of s 79(4)(c) in 1983.[197] However, following an exhaustive analysis of 'homemaker cases' under the FLA, Kovacs rejected the popular view in family law texts and suggested that since 1983, judgments have

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194 E Goodman, 'Property Law Following Dissolution of Marriage: Is There a Future for Judicial Discretion?' (1982) 13 *FLR* 131. For a feminist view, see J Scutt, note 45 above, at p 143. For commentary from an Australian Family Court Judge, see Nygh J, 'Sexual Discrimination and the Family Court' (1975) 8 *U NSW L J* 62.

195 Joint Select Committee on the *Family Law Act* (*Family Law in Australia,* AGPS, 1980); Australian Institute of Family Studies, note 2 above; ALRC Report, note 4 above, and the Joint Select Committee on Certain Aspects of the Operation of Interpretation of the *Family Law Act* (1992).

196 Joint Select Committee, note 195 above, at p 233.

197 Section 79(4)(c) remains narrower in scope than s 20 of the *De Facto Relations Act* 1984 (NSW) and s 285 of the *Property Law Act* 1958 (Victoria), both of which acknowledge contribution not only to 'family', but to the 'partner'.

been based on the principles established in *Wardman and Hudson*.[198] The amendment has not created equity for homemakers. In reality, the Court

> does not ... seek to evaluate contributions at all. Rather it is the case when the Court finds, say, that a spouse who is a homemaker contributor to a business venture which was undertaken entirely by the other spouse, that finding reflects a policy which is more or less articulated, that all the economic fruits of the marriage are to be shared irrespective of their actual derivation. A genuine contribution enquiry would involve quantifying the respective effort of each spouse and then in some way the ultimate value or return of those efforts. This in fact does not occur.[199]

Kovacs concluded that judicial decision making on policy principles relegates the language of contribution to a 'matter of ritual', and raises the issue 'whether it would make a difference if some other concept were employed'. If the Kovacs assessment is correct, elements such as length of marriage, conduct and contribution to the respondent's business are little more than marginal variables in the determination of outcomes - a gloss in reported judgments!

The ALRC in its initial enquiry into alternative regimes to that provided for by the FLA was attracted to the 'undoubted strengths' of the New Zealand MPA.[200] The MPA scheme demonstrated the characteristics of a 'good law of matrimonial property' as it was based on marriage-partnership concept (all but mandatory equal sharing of home family chattels) and despite the initial volume of litigation[201] (which clarified interpretation of the Act) it resulted in a high degree of probability. Although a substantial body of matrimonial property case law has accumulated since 1976, there is a lack of empirical data regarding outcomes of the MPA for homemaker spouses. Unfortunately, the ALRC Report, *Matrimonial Property*, was limited to the judicial interpretation of several key New Zealand appellate cases and did not draw on the growing body of critical comment from practitioners and legal academics. In 1991, a Wellington barrister observed that the MPA

> operates in a context where women still take primary responsibility for raising children and where the employment position of women has not improved to any great extent. On breakup of marriage the

198 Note 6 above.

199 D Kovacs, note 92 above, at p 212.

200 Note 4 above, at p 56.

201 See *Martin*, note 115 above; *Dalton*, note 116 above; *Williams*, note 74 above; *Reid*, note 58 above.

> [MPA], the maintenance law and provision of welfare do not achieve equality in real terms. The laws that we have thus far do not change the access to resources and information in any radical way. There is still inequality of outcome. The broader society increasingly measures value in monetary terms and does not recognise looking after dependents as valuable activity.[202]

In a limited empirical study[203] of the MPA, respondents were reported regarding the overall division of property as 'better or more fair' than the former system. Judges stated that the equality presumption and contribution guidelines had narrowed their discretion significantly, while lawyers reported that typical cases were settled on a 50:50 basis, thereby buttressing the equality presumption. All respondents credited Woodhouse J with clarifying the guidelines basic to the underlying philosophy of the Act. Significantly, there was no consensus on methodology for quantifying contribution or for comparing *relative* contributions of partners. Consequently, discretion remains, to some extent, unfettered as there are no statutory guidelines, particularly in evaluating the relative worth of unusual skill or effort and/or the provision of capital from outside of the marriage. A further significant finding was that 'non-legal factors are often the ultimate factor at arriving at a settlement.'[204] Most respondents agreed with Richardson J in *Reid*, that the MPA 'is social legislation of the widest general application'[205] which required the courts to consider contribution to the marriage partnership rather than to property. Nonetheless, there was consensus that the (putative) control of discretion in the division of property did not result in equal division per se.

Gibson (a family law practitioner and QC) considered the operation of s 14 (equal sharing of the home and family chattels); he concluded that the 'Court's discretions under the Act ... are well and thriving, and long may it be so to achieve, just results in matrimonial

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202 V Ullrich, 'Matrimonial Property - Is There Equality Under the *Matrimonial Property Act*?' in *Proceedings of the Family Law Conference* (New Zealand Law Society, 1991) p 102.

203 Krauskopf and Krauskopf, note 171 above, at p 21 (based on interviews with twenty-eight judges, lawyers, academics (but not clients) and focussed on out-of-court settlements regarding the 'balance of property' (s 15)).

204 Id at p 28 (eg avoiding the emotional cost of litigation, making concessions out of guilt; assessing (by observation) the relative economic situation of parties).

205 Note 58 above, at 610.

property litigation.'[206] Section 14 gives a judge a discretion. The early decisions of the Court of Appeal (*Martin, Dalton, Williams*) established that 'under s 14 a departure from equal sharing would be sought only in those rare cases where the facts could warrant such a course'.[207] However, some judgments are out of line with judicial opinion.[208] Similarly the decisions in *Walsh, Cross* and *Jackson* raise issues about the role and extent of judicial discretion under s 15 (equal sharing of balance of property) and the weighting of special financial contributions to the matrimonial partnership. The 'interpretation of s 15 has gone full circle [since] the Act has been in force'[209] leaving an undercurrent of doubt about the fundamental philosophy of the MPA.

Bridge reported that there is a 'general feeling in New Zealand that the equality purported to have been achieved by the 1976 Act is more theoretical than real.'[210] These feelings were vented to a Royal Commission on Social Policy in 1988:[211] despite the equal division of matrimonial property, women's living standards tended to drop after dissolution, particularly where women had custody of children (while the living standards of former husbands tended to rise). (The AIFS gathered the same type of evidence in 1986). Equal division has not provided the homemaking spouse with an equal chance in the future. Bridge suggests four reasons why this is so: (a) the assets being re-allocated and the mechanics of division is largely retrospective - earning capacity is not divisible property; (b) there is no provision for future lives of the homemaking spouse and

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206 J Gibson, 'Matrimonial Property - Is There Equality Under the *Matrimonial Property Act*?' in (1991) *Proceedings of the Family Law Conference*, note 202 above, at p 97.

207 Per Richardson J in *Wilson v Wilson* [1991] 1 NZLR 687 at 697.

208 C Bridge, 'Extraordinary Circumstances' [1987] *NZLJ* 373. In *Hurst v Hurst* [1987] BCL 607, Williamson J 'failed to appreciate the philosophical base in s 14' where a wife's contributions (essentially provided by her family as gifts) were considered 'extraordinary' in a marriage of six years. In *Bloxham* where the husband argued that the wife did not accept her share of 'household responsibilities', had an affair and the marriage was relatively short, the Court was heavily influenced by perceived fault on behalf of the wife and awarded her one-third of both the matrimonial home and balance of property (unreported, Christchurch Registry M 529/85; cited in C Bridge, 'Extraordinary Circumstances Again' [1988] *NZLJ* 63).

209 Bridge, note 186 above, at p 296.

210 Bridge, note 83 above, at p 247.

211 Royal Commission on Social Policy *Report* (New Zealand Government Printer, 1988) Volume IV, p 217.

children;[212] (c) the Courts have sung the praises of self-sacrificing and caring mothers but refused to accord full acknowledgment of the financial sacrifice involved (opportunity cost); (d) children's housing needs are subordinated to the 'clean-break' principle which gives spouses immediate access to their equity.[213]

Despite these criticisms of the MPA, there are features of the statutory scheme worthy of adoption in Australia. There is ambivalence in Australia regarding the central role of discretion; however there is strength in the Court's power to take a prospective view of parties' (and children's) lives. While the empirical base supporting division on a prospective basis is sound and current,[214] *Mallet* has remained a barrier to consistency and a greater certainty in expectations. The welfare of spouses, particularly those with custody of children, cannot wait for the evolving social and legal background promised by the Full Court in *Ferraro*. Both the MPA and the FLA reflect approaches to property division that are almost two decades old. Any scheme responsive to current social values must embrace the 'new property' (eg, occupational licences, tenured employment, pension entitlements, redundancy payments) and lead to arrangements that are both fair and responsible to parties and children of the marriage. Amendments to the *Family Law Act* following the scheme outlined by the Attorney-General in December 1993[215] are a defensible response in the current socio-political climate but may not go far enough. Following recommendations 70, 71 and 72 from the Joint Select Committee Report 1992, the Government will amend the Act, inter alia, (a) to combine relevant matters to be taken in account under s 75(2) and s 79(4) for the purposes of alteration of property interests, (b) require the Court to recognise equality of sharing as the starting point in the allocation of matrimonial property, and (c) give pre-nuptial financial agreements statutory

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212 The group set up to inquire into Matrimonial Property and Family Protection reviewed the Australian FLA property provisions but rejected any move toward a rule of unequal division. *Report of the Working Group on Matrimonial Property and Family Protection* (Government Printer, 1988) p 11.

213 Bridge, note 83 above , at pp 247-252.

214 See K Funder, M Harrison and R Weston, *Settling Down: Pathways of Parents After Divorce* (Monograph 13, AIFS, 1993). This longitudinal study of the readjustment of men and women 5-8 years after separation supports arguments regarding property distribution based on analysis of how earnings are curtailed in marriage by responsibility for children.

215 *Family Law Act 1975: Directions for Amendment. Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* (AGPS 1993) p 39.

recognition. These amendments are part of 'the most far reaching reform process in family law since the current Act's introduction in 1975'.[216] Perhaps, Ingleby's suggestion to turn property division, into 'a more administrative process'[217] (thereby making the process simpler, more certain, more attainable) should also be included in legislation.

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216 News Release from the Attorney-General, 'A New Era in Family Law' Release 82/93.

217 R Ingleby, *Solicitors and Divorce* (Clarendon Press, 1992) p 80.

Appendix

Figure 1

General Scheme for Allocation of Property under the Family Law Act 1975 (Australia)

- Application to commence proceedings between parties with respect to property: 'matrimonial cause' [s 4(1)(ca)(i)(i)]; 'property' [s 4(1)].

- Court must bear in mind four guiding principles [s 43 (a)(b)(c)(d)].

- Court exercises its power to alter property interests and make orders [s 79(1)].

- Court exercises its discretion taking into account seven matters in s 79(4). *'Restrospective elements':* contribution to relevant property by each party, both financial [s 79(4)(a)] and non-financial [s 79(4)(b)]; contribution to 'the welfare of the family constituted by the parties to the marriage, and any children of the marriage, including any contribution made in the capacity of homemaker or parent' [s79(4)(c)]. *'Prospective elements':* General ecomonic cirumstances of the parties and maintenance considerations:

  - effect of proposed order on earning capacity of either party [s 79(4)(d)

  - matters referred to in s 75(2) so far as they are relevant [s 79(4)(e)]

  - effect of any other order under the Act [s 79(4)(f)]

  - level of child support from a party [s 79(4)(g)]

- Prior to making the order, the court must be 'satisfied that , in all the circumstances, it is just and equitable to make the order' [s 79(2)]. Court makes order/s within the parameters of ss 80, 81. The matters to be taken into account [s 75(2)] include each party's (a) age and health, (b) income, property, financial resources and capacity for gainful employment, (c) care or control of a child of the marriage under 18 years, (d) commitments to support self or another party, (e) responsibilities to support another person, (g) enjoyment of a reasonable standard of living - where parties have separated (l) the need to protrect a party who wishes to continue in the parent role, (m) the financial circumstances relating to cohabitation of either party, (na) any child support provided or to be provided for a child of the marriage, and (o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

Figure 2

General Scheme for Allocation of Property under the Matrimonial Property Act, 1976 (New Zealand)

- 'An Act to reform the law of matrimonial property; to recognise 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' [Long Title]

- Matrimonial property identified [s 8].

- Separate property identified [s 9].

- Division of matrimonial home and family chattels [s 11] with a special rule for homesteads [s 12].

- Each spouse shares equally except where

  - marriage is of short duration (less than three years) [s 13(3)].

  - one spouse owned the home or chattel substantially at the marriage date [s 13(1)(a)]

  - assets are acquired after marriage from succession, survivorship or a trust [s 13(1)(b)]

  - one spouse's contribution to the marriage partnership has been disproportionately greater [s 13(1)(c)]

  and/or

  - extraordinary circumstances [s 14] render repugnant to justice equal sharing; determination is in accordance with contribution to the marriage partnership.

- Balance of matrimonial property is shared equally unless the contribution of one spouse has been clearly greater than that of the other spouse [s 15(1)(1)] in which case shares are determined by the contribution of each to the marriage partnership [s 15(2)]. Contribution means all or any of the following: [s 18] (a) care of any child of the marriage, aged/infirm relative or dependent of either spouse (b) management of the household and performance of household duties (c) provision of money, including earning of income for the marriage partnership (d) acquisition or creation of matrimonial proeprty (e) payment of money to maintain or increase value of matrimonial property and/or spouse's separate assistance, material or otherwise, enabling other spouse to acquire qualifications or aids the carrying on of his/her occupation or business. There is no presumption that a contribution of a monetary nature is of greater value than a contribution of non-monetary nature [s 18(2)]. The Court in

determining contribution takes into account only the misconduct of a spouse that is gross and palpable and has significantly affected the extent or value of the matrimonial property [s 18(3)].

- Court makes order/s [s 25(1)(2)(3)].