DISSOLVING THE ECONOMIC PARTNERSHIP OF MARRIAGE

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In *R.* v. *Ross-Jones; Ex Parte Beaumont*[1] Murphy J. said: 'Marriage is an economic as well as a social institution'. With this proposition few people would disagree. Accordingly, on the termination of the marriage, the economic consequences may be of equal if not greater importance to many of the parties concerned than the other consequences. This being the case, it is a strange thing to find that the law of Australia, like the law of many other countries, treats quite differently the economic relationship of spouses during the course of the marriage, as distinct from when the marriage comes to an end.

Professor Neumayer, referring to comparative matrimonial property regimes in the course of a lecture given in July 1975, made the point that: "For a long time until the end of the last war, the canvas of matrimonial systems was full of variety and colour". He went on, however, to suggest that changes are taking place:

> Today this picture is in the process of losing its variety and colour. We may distinguish three essential factors which have influenced legislators in different countries in respect of the organisation of matrimonial property in ordinary law. In the first place, economic and social changes in the modern world which have resulted in the diminution of the importance of the distinction between movables and immovables, as well as a change in the role of the woman; formerly a housewife confined to her home, she has come to exercise a profession outside her home. Secondly, the change in the basis of matrimonial systems is due to the emerging idea of the equality of the spouses. Lastly, the change has been due to the reciprocal influence of traditional matrimonial systems. Indeed, contemporary legislative policy appears to be moving towards a combination of separation and community systems. Such a merger appears to lead to a new system which combines the advantages of the two diametrically opposed systems. The new system attempts to reunite the independence of administration and disposal which are the hallmark of the systems of separation, with the existence of a joint or common fund of the two spouses — a kind of family fund —

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1 (1979) 141 C.L.R. 508 at 519.

> which, when the marriage comes to an end, is distributed between the spouses and the heirs. Thus, ideas of the separation of property have in part penetrated into the community systems. Conversely, systems of separation are inspired by the ideas of community systems.[2]

Of the three factors referred by Neumayer it is primarily with the third that this paper will be concerned.

PROPERTY DURING MARRIAGE

1. *Trial and Error*

In Australia and New Zealand, as with the United Kingdom, the starting point when discussing matrimonial property regimes must be the married women's property legislation of the late nineteenth century.[3] It was this legislation that introduced, or more correctly formalised at law, separation of property as the legal system which now governs the rights of spouses to property during marriage. The statutory base for the present system is often overlooked. Nevertheless, the present system of separation is firmly based in these statutes, which constituted one step in the emancipation of the married woman and which introduced a measure of legal equality between spouses.

The separation system simply means that marriage has no effect upon the property of the parties. Each retains the property that was owned before marriage; each retains separately the property that has been acquired by him or her during the marriage, and an unrestricted right to the income derived from such property; each has the power freely to dispose of his or her own property.

The Married Women's Property Acts, apart from severing the doctrine of unity of personality with respect to the property holding capacity of the spouses, introduced, by section 17 of the U.K. legislation,[4] a procedure for the determination of disputes between spouses relating to the possession or ownership of property. Such a procedure was necessary if there was to be separate property and a rule preventing actions between husband and wife. The section enabled a summary application to a judge, or to a lower court depending on the amount at issue. The judge was empowered to 'make such order with respect to the property in dispute, . . . as he thinks fit . . .'. It was particularly during the post

[2] Chloros (ed.), *The Reform of Family Law in Europe* (1978) 10.

[3] Married Women's Property Act 1883 (Tas.); 1883-4 (S.A.); 1890 (Vic.); 1890 (Qld.); 1892 (W.A.); 1893 (N.S.W.).

[4] Married Women's Property Act 1882 (U.K.); Married Women's Property Act 1892 (W.A.).

World War II period, with the changed economic position of wives, that the English courts began to give an interpretation of this section that gave it far greater significance than that of being a purely procedural one.

The section did not in its terms lay down the substantive rules of law to be applied by a judge in determining such disputes. During the 1950s and early 1960s in a number of English cases an interpretation was given to the section which gave to a judge a discretion, particularly where the legal title was not clear, to do what he thought was just. In such cases the courts began to recognise not only an interest in property where the spouse had financially contributed to its acquisition, but also where the contribution by a spouse had been of an indirect nature. For example, by the wife in her capacity as the bearer and rearer of the children and in looking after the home.[5]

Although this was a period of some confusion in seeing where the courts were leading in terms of the interpretation of section 17, it was a period of marked development and formation of judicial attitudes towards the position of a wife in the home, and what that meant *vis-à-vis* the property that the parties had acquired during the marriage. It was during this period that, in particular, Lord Denning was prepared to give credit to the wife by recognising that her activities in the home contributed as significantly to the acquisition of matrimonial assets as did the financial contribution of the husband who was performing his traditional role as breadwinner. In addition, in a number of these cases, the principle that equality is equity was being applied.

The result was that at one period it began to appear as if, under the cloak of giving effect to section 17 of the Married Women's Property Acts, the principle of separation of property was being significantly undermined. In this period many of the decisions were difficult to reconcile. But two things emerged. Contributions could be made both as direct financial contributions and as indirect contributions by way of services. In terms of certain assets which could be loosely referred to as "family assets", in the absence of any clear indication that these were to be held in a particular way, equality of ownership was rapidly becoming the rule.

All of this was *during the subsistence* of the marriage. This was not the statutory power to re-allocate property on divorce. This was in the process of determining a dispute between parties as to property and, theoretically, giving effect to the existing rules of law that governed the property relationships between spouses.

[5] See the cases referred to in H. Finlay, *Family Law in Australia*, 2nd ed (1979) 240 and P. M. Bromley, *Family Law* 5th ed (1976) 431.

This development in England did not make much headway in Australia. As early as 1956 in *Wirth* v. *Wirth*,[6] the High Court clearly indicated that the resolution of disputes between married persons depended not upon a judicial discretion but purely upon the rules of law and equity.

> The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who did not . . . . The title to property and proprietary rights in the case of married persons, no less than that of unmarried persons, rests upon the law and not upon judicial discretion.[7]

In the later case of *Hepworth* v. *Hepworth*[8] in another appeal under the married women's property legislation, the High Court made its position abundantly clear. Windeyer J. said:

> Community of ownership arising from marriage has no place in the common law. We have nothing that corresponds with the various regimes relating to matrimonial property that exists in countries that have the civil law . . . . If after a husband and wife have quarrelled disputed rights to property have to be decided, they must be decided according to the interests, legal and equitable, already created, not according to what may seem to be fair in a situation of discord that 'probably' was not contemplated by either when the property was acquired. I say this because of some of the observations in some of the English cases that were cited, observations that may suggest that the statutory jurisdiction that was invoked in this case gives a court a discretion to disregard existing legal and equitable rights and to make such order as may seem to it fair in the circumstances existing when it is considering the case. That has not been the view of this court.[9]

It was not until 1969 in *Pettit* v. *Pettit*[10] that in England the proposition that section 17 gave a judge a discretion to alter interests in property was finally put to rest. In that case the House of Lords made it quite clear that the powers under section 17 were, as Lord Morris put it, to answer the question "Whose is this?" and not "To whom shall this be given?". The section was procedural. It did not give the court any power to create or vary the proprietary rights of husband or wife in family assets as distinct from ascertaining and declaring their proprietary rights which already existed at the time of the court's determination. It

6 (1956) 98 C.L.R. 228.
7 Id. at 231-32 per Dixon J.
8 (1963) 110 C.L.R. 309.
9 Id. at 317.
10 [1970] A.C. 777.

is available while husband and wife are living together as well as when the marriage has broken up. It is not limited to family assets.

The court in that case was concerned with a claim by a husband for an interest in a house which was solely owned by the wife and purchased entirely out of her own moneys. The interest claimed by the husband was based upon the fact that he undertook internal decoration and built some furniture in the house. He had, in addition, planted a lawn and constructed an ornamental wall. The question for the court was whether these improvements undertaken by the husband had earned for him an interest in the home. The husband claimed his work had enhanced the value of the property by £1,000. The House of Lords refused to recognise that he had any beneficial interest. In the following year in *Gissing* v. *Gissing*[11] it confirmed the view expressed in *Pettit*.[12] There was no power to vary existing proprietary rights of the parties.

But what the House of Lords did say in these cases was that a person, whether a spouse or stranger, in whom the legal estate in land is not vested can succeed in a claim to an interest in the property against the person in whom the land is vested if it can be shown that the latter holds as trustee and the claimant has a beneficial interest as cestui que trust. It was therefore necessary to establish a resulting, implied or constructive trust.

By way of elaboration Lord Diplock went on to say that parties to a transaction in connection with the acquisition of land may well have formed a common 'intention' that the beneficial interest should be vested in them jointly, without using any express words to communicate this intention to one another. It would be possible to infer their common intention from their conduct. The conduct in turn referred to would be contributions, particularly cash contributions, towards the purchase price, or to the mortgage instalments. If there had been direct or indirect financial contributions, then it was possible to infer from this conduct that the contributing spouse was entitled to some beneficial interest in the matrimonial home. However, the contribution of some finances out of the wife's own earnings or private income to the general expenses of the household would not generally be sufficient.

In the result in that case the expenditure by the wife of about £190 on buying furniture and a refrigerator for the house, and £30 for improving the lawn; together with purchasing her own clothes and the clothes and some extras for the child of the marriage was held not to be sufficient to satisfy the common intention approach which would have

[11] [1971] A.C. 886.

[12] Supra n. 10.

resulted in the husband holding the property as trustee for himself and his wife.

The English Court of Appeal, following the lead given in *Gissing*, particularly by Lord Diplock, were subsequently prepared to draw the inference of a trust in a number of cases where both spouses had made a contribution to the price.[13]

The development of the law in this area was summarised by Lord Denning in *Cooke* v. *Head*.[14] The case concerned a claim by a mistress although the principles enunciated by Lord Denning were equally applicable to husband and wife. The parties lived together. The man acquired a piece of land and they decided to build a bungalow on it. He paid the deposit and borrowed the balance from a building society. The conveyance was taken in his name. The lady did not contribute any money, but she did a lot of heavy work in the construction of the house. Both parties were employed. They pooled their savings and the moneys were used to pay off mortgage instalments and to buy furniture. They later separated and the house was sold. The lady sought a declaration that she was jointly entitled to a one-twelfth share of the proceeds of sale and against this judgment she appealed. On appeal her interest was increased from a one-twelfth share to a one-third share of the proceeds of sale. Lord Denning went on to say:

> If this case had come up 20 or 30 years ago, I do not suppose that Miss Cooke would have had any claim to a share. It would be said that, when she did all the work on the house there was no contract to pay her anything for it. And when she put these moneys into the money box, Mr. Head made no contract to repay it. So it was a gift. But that has all been altered now. At first the courts changed the law by giving a wide interpretation to s. 17 of the *Married Women's Property Act* 1882. They took the words of that statute which gave a judge power to make such order 'as he thinks fit'. That was held, however, to be erroneous because the section did not empower the courts to alter property rights. So the courts had recourse to another way. They said that shares in a home depended on the common intention of the parties; and they used considerable freedom to ascertain that common intention. This too has recently come into disfavour, because of the difficulty of ascertaining a common intention. So the courts, under the guidance of the House of Lords, have had recourse to the final way, the law of trusts. It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or

[13] See, e.g., Falconer v. Falconer [1970] 3 All E.R. 449 at 452; Hargrave v. Newton [1971] 3 All E.R. 866 at 869; Hazel v. Hazel [1972] 1 All E.R. 923 at 926.

[14] [1972] 2 All E.R. 38.

> impute a constructive or resulting trust. The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and may be to other relationships too.[15]

At first it appeared that these decisions of the English Court of Appeal would be followed in Australia. In *Leibrandt*,[16] Woodward J., in an application under section 22 of the *Married Women's Property Act* (N.S.W.) held that a husband who was the sole registered proprietor of a property held the property in trust for both the husband and wife in equal shares. He found that the wife had contributed more than half of the purchase price. She had subsequently contributed both directly and indirectly to the construction of the garage and the house on the land. The contributions included manual work, living in sub-standard accommodation in order to reduce the cost of maintaining her and the children so that more money would be available for the erection of the home and direct financial assistance for the purchase of building materials. In addition, from her own earnings, she directly contributed to the expenses of running the household, thus permitting the husband's resources to be used in improving their capital position.

From all this he found that the common intention of the parties to be inferred from these circumstances at the time of purchase was that the beneficial interest in the property should be held by them jointly. He concluded that if he were not satisfied of the existence at the time of acquisition of the property of such a common intention, he would be satisfied 'that the parties have by their joint effort acquired the property for their own benefit, and under such circumstances that the defendant must be held to have the legal title on trust for both of them'.[17]

On the other hand, in respect to other blocks of land he held there was no such interest in the wife. Her assistance by way of helping the husband to clear the land and erect a garage upon it was, in his view, insubstantial and insignificant. In this regard he was following the dictum of Lord Reid in *Pettit*. The approach in *Leibrandt*, which dealt with a husband and wife relationship, has also been followed in the case of de facto relationships. *Cooke* v. *Head*[18] itself was such a case in England. In Australia, in *McRae* v. *Walley*[19], the pooling of earnings for a period

[15] Id. at 41.
[16] (1976) F.L.C. 90-058.
[17] Id. at 75, 264.
[18] Supra n. 14.
[19] Supreme Court of Western Australia, 1975 (unreported).

of ten years led Jones J. to find that the de facto husband, in whose name the property stood alone, was trustee for both parties equally. In New South Wales, in *Valent* v. *Salamon*,[20] Holland J. applied both *Gissing* and *Cooke* v. *Head*. There the de facto relationship had lasted for eleven years, during which time the de facto wife had worked and contributed her earnings to meet household expenses enabling the de facto husband to pay off the mortgage on the home unit. Holland J. held the plaintiff was entitled to a beneficial interest in the unit, finding that there was no express agreement between the parties but that an intention in relation to the unit could be imputed from their words and conduct.[21]

However, in Australia this development may well have been arrested for the time being with the decision of the New South Wales Court of Appeal in *Allen* v. *Snyder*[22] and also the Victorian decisions of *Kardynal* v. *Dodek*[23] and *Hohol* v. *Hohol*.[24] Whether permanently or temporarily remains to be seen.

In *Allen* v. *Snyder*[25] the parties lived together, unmarried, for nearly thirteen years. For about eight years they lived together in a house that was solely owned by the de facto husband. Subsequently, when the relationship came to an end, the male plaintiff sought to evict the female defendant from the house and she resisted on the ground that the beneficial interest was shared equally between them. The trial judge rejected her claim and she appealed from his decision. It was claimed on her behalf that the trial judge should have inferred as a matter of fact that the parties held a common intention that the beneficial interest in the property was to be divided equally between them, or, alternatively, that he should have imputed to them a like intention as a matter of law. The Court of Appeal then considered the cases of *Pettit* and *Gissing* and the subsequent developments in the Court of Appeal leading up to *Cooke* v. *Head*. In the result the Court of Appeal upheld the trial judge. It is not necessary at this stage to embark upon a close analysis of the law of trusts, or to comment upon the analysis given by the New South Wales Court of Appeal. It is sufficient to say that the conclusion of Glass J.A. with which Samuels J.A. agreed was that:

> The doctrine that a trust of the matrimonial home may arise in favour of a spouse as a result of her contribution to the acquisition

[20] 8 Dec. 1976 (unreported).

[21] See Bayley, 'Legal Recognition of De Facto Relationships' (1978) 52 *A L.J* 174 at 181.

[22] (1979) FLC 90-656.

[23] (1980) FLC 90-823.

[24] (1980) FLC 90-824.

[25] Supra n. 22.

> or maintenance of the home in the absence of any actual understanding or reciprocal intention is also wholly inconsistent with the line of reasoning in the High Court cases referred to in *Hepworth* v. *Hepworth*. Since the decisions of the English Court of Appeal which establish a novel constructive trust are in conflict also with dicta in the House of Lords, this court is directed by ultimate authority both in England and Australia not to follow them.[26]

In short, the court found that in order to raise a trust it was necessary to find evidence of common intention that the parties should share the beneficial interest. On the facts it was held that a common interest was established if the parties married or if the man died. But no such intention was established which gave the woman an interest while they lived in a de facto relationship. As Samuel J.A. said an attempt was made to solve this problem by the invention of what 'I might call the trust by imputation'. Here the inquiry was: 'What reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question'. In the result both Glass and Samuel JJ.A. would not follow Lord Reid's views about the imputation of intention as they believed his views did not command the support necessary to clothe them with authority. Secondly, Lord Denning's doctrine of the new constructive trust they held to be contrary to the majority opinion in *Gissing* and *Pettit*, and also to the reasoning in cases such as *Hepworth* and *Wirth*. Samuel J.A. concluded with the following words:

> I do not consider that, by the device of the constructive trust, we are able to impose some scheme of community of ownership of property acquired for common use by spouses or others living in a domestic relationship. Nor do I think that we should attempt to do so. It may seem an attractive way of deciding the problems that undoubtedly arise when such relationships break up. But the right solution involves questions of social policy which are for the legislators to determine.[27]

Accordingly, we come back to the starting point. Once again an attempt to introduce some form of community, on this occasion by way of constructive trust, has for the time being been set at rest in Australia. The words of Windeyer J. in the High Court in *Hepworth*[28] are still as applicable now as when they were pronounced in 1956. The matrimonial property regime during the marriage of the parties is that of separation. The rights of the parties are determined with respect to property by the applicability of the ordinary rules of law and equity. In. the

[26] Id. at 78, 476.
[27] Id. at 78, 481.
[28] Supra n. 8.

1950s there was an attempt to erode this by giving to the judge a wide ranging discretion in Section 17 of the *Married Women's Property Act*. In the 1970s a second attempt to make inroads into the separation of property system was attempted by devising a new form of trust. Both attempts have for the time being foundered.

2. *The Result*

The importance of these decisions are twofold. The latter apply to both marriage and de facto or other domestic relationships. They all apply not only to the determination of property disputes during marriage under the Married Women's Property Acts but also to the determination of property questions pursuant to section 78 of the *Family Law Act* and its Western Australia counterpart.

By that section and its counterpart in the *Family Court Act* 1975 (W.A.),[29] the court, in proceedings between the parties to a marriage with respect to existing title or rights in respect of property, may declare the title or rights, if any, a part has in respect of the property.

The two principal sections in the *Family Law Act* relating to property are sections 78 and 79. Section 78 provides:

> (1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.
>
> (2) Where a court makes a declaration under sub-paragraph (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.
>
> (3) An order under this section is binding on the parties to the marriage but not on any other person.

Section 79 provides:

> (1) 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 thinks fit 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 of the parties or a child of the marriage, such settlement or transfer of property as the court determines.

[29] S. 29(1).

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

. . . .

(4) In considering what order should be made under this section the court shall take into account —

> (a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property; (b) 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 of homemaker or parent; (c) the effect of any proposed order upon the earning capacity of either party; (d) the matters referred to in sub-section 75(2) so far as they are relevant; and (e) any other order made under this Act affecting a party.

The decisions of the Family Court such as *McDougall* v. *McDougall*,[30] *Vance* v. *Vance*[31] have made it clear that the approach of the Family Court of Australia to the interpretation of section 78 is similar to the approach of the State courts when dealing with questions arising under section 17 of the *Married Women's Property Act*.

Section 79, on the other hand, provides a much wider power to the court to re-allocate property between the parties irrespective of their strict entitlements. In short, interests are not declared but property is redistributed between the parties by the application of the principles referred to in the section. Upon the breakdown of marriage, therefore, under section 79 of the *Family Law Act* an entirely new property regime comes into existence.

The overall result then is (with the exception of Victoria and Western Australia) as follows:

(i) Upon marriage and during marriage there applies in Australia a property regime of separation.

(ii) During the marriage, under the married women's property legislation in all States, the rights of the parties to a marriage can be determined with respect to the property that each owns. The only limitation on the availability of invoking this legislation may be the establishment of the question as to

[30] (1976) FLC 90-076 per Asche S.J.

[31] (1978) FLC 90-522 per Gibson J.

"title" or "property in dispute". As a practical measure, however, the establishment of such a question or dispute would not be difficult. The determination of any question is according to the strict application of rules of law and equity and attempts to liberalise or expand the courts powers under this procedure by means of the expansion of the discretion vested in the judge, or the development of a new trust, have for the time being failed.

(iii) During the marriage a declaration can also be obtained as to the rights in respect of property of the parties under section 78. A determination under section 78 is made upon the same principles as applicable to section 17. There are, however, two distinctions. Proceedings under section 78 are not available until such times as an application for principal relief has been filed. This means an application for dissolution, nullity or declaration as to the validity of a marriage or divorce has been filed. In the majority of cases this means an application for dissolution, and this in turn means that the parties have been living apart for a period of twelve months. There is, accordingly a temporal limitation upon when the proceedings can be commenced.

The other distinction is the question that arose in the cases of *McDougall* and *Vance*. In the former case Asche J. held that a section 78 application could not be brought unless existing title or rights of the parties were "uncertain or in dispute". In his view section 78 was not available to declare existing rights and make consequential orders if such rights were plainly evident.[32] In the later case of *Vance* this view was not followed by Gibson J. He contrasted the wording of section 17 and section 78 and noted that section 78 did not require a question as to title or property in dispute as a condition for its operation; as did section 17. Accordingly, the section was available to a party to a marriage who was a co-owner of property with the other party to seek a declaration and consequential orders (which could include sale or partition) even though there was no dispute as to the title to the property.[33] In *Vance* title to the property had been determined by a Supreme Court order some two years prior to the proceedings before Gibson J. Accordingly, it would have been difficult to have

[32] Supra n. 30.
[33] Supra n. 31.

established that there was any dispute as to the interests of the parties in the property.

If the latter decision is followed by the Full Court of the Family Court of Australia, then it is not necessary to have a dispute as to title before a declaration is obtained under section 78, but nevertheless there is still the temporal limitation upon the commencement of such proceedings.

(iv) Once the marriage has ended, or at least proceedings have been commenced which will dissolve the marriage, then section 79 can be invoked. In the application of this section totally different principles are utilised. Here is the power to alter the interests of the parties. In exercising this power the court redistributes the property in accordance with what it currently considers necessary to achieve justice between the parties. It is with the exercise of this power that it is possible to say that there is, in a broad way, a principle of an embryo deferred community of property or equalisation of assets system emerging.

3. *The Exceptions*

It is clear, then, that there is one property regime during the marriage and a totally different property regime when the marriage has ended. Two exceptions to this in Australia are introduced by the *Marriage Act* of Victoria and the *Family Court Act* of Western Australia. In 1958 the Victorian *Marriage Act* Was amended to overcome the decision in *Wirth* v. *Wirth*[34] relating to section 17 applications. By sec. 161(4) the court, in dealing with section 17 applications, is required to proceed in such a way so as not to defeat any common intention which was expressed by the husband and wife and 'shall, to the exclusion of any presumption of advancement or other presumption of law and equity' apply a presumption (which is rebuttable) that, with respect to any property acquired for occupation as the matrimonial home, the parties hold such property as joint tenants. Thus, to this extent; the principle of separation of property is not applied with respect to the matrimonial home.

As Cretney[35] has pointed out, the principle of separate property is now an historical paradox. The common law doctrine of the unity of personality of husband and wife, and its consequences upon the relationship of the parties to their property, was seen as an injustice to the

[34] Supra n. 6.
[35] S. Cretney, *Principles of Family Law* (1974) 146-150.

wife. Demand for separate ownership of property came in particular with respect to personalty which otherwise vested in the husband. Demand came with the major social change of the wife becoming a wage earner. With the more affluent classes in the United Kingdom this had been achieved by the employment of the separate use, thus preventing an interest vesting in the husband on marriage. The solution was to adopt a legal regime of separation of property. As Cretney suggests,[36] this was simple. The concept was familiar to the middle classes. It did nothing more than to give every married woman nearly the same rights as for generations English upper classes had secured under a marriage settlement for their daughters. It also lacked the alien connotations of the European community system. Finally, it accorded with the currently fashionable notions of philosophical individualism. It introduced proprietary egalitarianism.[37] The paradox, as he points out, is that now, some ninety years later, the system which was created to further married women's rights should be seen as a crying injustice. Now the system is viewed as depriving the married woman of her just deserts from her efforts in the course of the marriage. It is now thought that there should be a more equitable sharing of property between the parties to a marriage, and it is significant that what was once regarded as an alien foreign system is more and more looked to as providing an appropriate property regime between the parties to a marriage. The provisions of Victorian *Marriage Act* can be seen in this context.

The other exception to the principle of separation of property during marriage in Australia is provided by the recent amendments to the *Family Court Act* 1975 (W.A.).[38] However, before turning to these provisions some short reference should be made to developments in New Zealand and the United Kingdom.

To alleviate what might be seen as the harsh consequences of the separation system upon a wife, England has passed two pieces of legislation. The first was the *Married Women's Property Act* of 1964 which gave the wife an interest in savings from housekeeping which resulted from her skill and economy as a housewife. The savings would previously have been considered to have been the husband's as he was the original source of the money. By the 1964 Act, however, any money that was derived from such a housekeeping allowance, or any property that was acquired with such money, should in the absence of any agreement between the parties to the contrary be treated as belonging to the husband and wife in equal shares. The Act provided a proprietary interest

[36] Id.
[37] Id. at 149.
[38] Act No. 58 of 1979.

in the wife in the savings and the proceeds of the savings from housekeeping. This legislation raises a number of problems which it is not necessary to go into in any detail at this stage. It was, incidentally, unilateral and not mutual. The husband acquired no interest in the savings that might be made from the wife's earnings.[39]

The other development in England was the *Matrimonial Homes Act* of 1967. This Act gave either party a right not to be evicted or excluded from the dwelling house that had been occupied as the matrimonial home. The right was protected by permitting a charge to be registered against the land. The purpose of the Act was to protect, in particular, a wife who may be evicted by a third party to whom the husband had sold the property, or a mortgagee of the husband, where the husband was in default, who was taking proceedings to either sell or foreclose on the property. In short, the Act was to overcome the difficulties of the right to occupy being protected by means of an injunction following the decision in *National Provincial Bank* v. *Ainsworth*.[40] Again, with this Act a number of difficulties arise which are not necessary to canvass in detail here.[41]. Although this Act did not give the wife a proprietary interest in the property, what it did give to her was a personal right — protected by registration of the charge — to occupation of a matrimonial home. That right, however, ended on termination of the marriage (unless a court extended it), or by death. The charge will also be void against the husband's trustee in bankruptcy or his creditors' trustee if his estate is assigned to them under a Deed of Arrangement. As Bromley has pointed out, this was another example of the principle that the claims of the creditors are to be preferred to those of the spouse, but also 'one can see the anxiety of the legislator that the creditors should not be defrauded by the registration of a charge intended to defeat their claim to the property'.[42]

In New Zealand the *Matrimonial Property Act* of 1976 which has introduced the new regime for the distribution of matrimonial property between the parties, does so principally only where the marriage has broken down. By section 25 the circumstances in which the court may make orders under the Act are restricted to the situation where the husband and wife are living apart, separated, the marriage has been dissolved, or one party has been responsible for the endangering of the matrimonial property, or seriously diminishing its value, or either party is an undischarged bankrupt. However, with respect to a specific item of

[39] See Bromley, supra n. 5, at 445, 447; Cretney, supra n. 35, at 167, 168.

[40] [1965] A.C. 1171.

[41] See Cretney, supra n. 35, at 167-173; Bromley, supra n. 5, at 477-487.

[42] Bromley, supra n. 5, at 485.

property, an application may be made at any time. In general, however, it is possible to say that in New Zealand the intention of the Act was not to introduce a new property regime during the marriage, but only a new regime for the redistribution of the property upon it coming to an end.

Western Australia

Following the decisions of the High Court of Australia in *Russell* v. *Russell* and *Farrelly* v. *Farrelly* which restricted the jurisdiction under the *Family Law Act* in property questions to, firstly, proceedings between the parties to a marriage and, secondly, proceedings which were ancillary to proceedings for principal relief,[43] the Parliament of Western Australia amended the *Family Court Act* to overcome such limitations.

Section 29 of the state Act now reproduces section 78 of the *Family Law Act*, the only distinction being that property of a partnership in which a stranger is a member of the partnership with the parties of the marriage is exempt from its ambit. Again, section 30 of the state Act reproduces section 79 of the *Family Law Act* but with the same exemption in relation to partnership property. The guiding principles are those which are set out in section 28 of the Act. In full the sections read as follows:

> 29.(1) In proceedings between the parties to a marriage with respect of the property of such parties or either of them except the interest of a party to the marriage in a partnership with a person who is neither a party to the marriage nor a child of the marriage, the Court may declare the title or rights, if any, that a party has in respect of the property.
>
> (2) Where the Court makes a declaration under subsection (1), it may, if it thinks having regard to the principles set out in section 28 and all the circumstances of the case that it is just and equitable to do so, make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.
>
> 30.(1) In proceedings between the parties to a marriage with respect to the property of such parties or either of them except the interest of a party to the marriage in a partnership with a person who is neither a party to the marriage nor a child of the marriage, the Court may make such orders as it thinks fit altering the interests

[43] I.e. the property questions had to be in relation to proceedings which were concurrent, pending or completed for dissolution, nullity etc.

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.

(2) In proceedings under this section the Court may adjourn the proceedings upon such terms and conditions as it thinks fit for any period including such periods as may be expedient to enable the Court to consider the likely effect if any of an order on the marriage and the children of the marriage, and shall not make an order unless it is satisfied having regard to the principles set out in section 28 and all the circumstances of the case that it is just and equitable to do so.

(3) In considering what order should be made under this section the Court shall take into account—

(a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;

(b) 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 of home-maker or parent;

(c) the effect of any proposed order upon the earning capacity of either party;

(d) the matters referred to in subsection (2) of section 75 of the Family Law Act so far as they are relevant; and

(e) any other order made under this or any other Act affecting a party.

28.(1) The Court in the exercise of its non-federal jurisdiction shall in so far as those principles are capable of application to the case have regard to the following principles—

(a) the need to preserve and protect the institution of marriage as the union of man and woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of

society, particularly while it is responsible for the care and education of children;

(c) the need to protect the rights of children and to promote their welfare;

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage; and

(e) the effect of any order on the stability of the marriage and the welfare of the children of the marriage.

What is immediately apparent from these provisions is that there is no constitutional limitation as to when these proceedings may be commenced. They are not proceedings related to any proceedings for principal relief, but can stand on their own. Nor are the two sections dependant upon preconditions, such as a question of title or a dispute between parties. Although section 29 of the *Family Court Act* is not of great significance, bearing in mind the availability to parties of proceedings under section 17 of the *Married Women's Property Act*, this is not true of section 30. That section enables a redistribution of property between the parties to a marriage *apparently at any stage of the marriage, and not dependant upon the breakdown of the marriage.* The only limitations on jurisdiction are the likely effect of an order on the marriage and on the children of the marriage, and that the court must be satisfied that it is carrying out the principles of section 28 of the Act. It would not take great ingenuity to establish that a redistribution of property between the parties would be fulfilling the principles of section 28. What then is the position in Western Australia? Without doubt there would be the separation of property system upon marriage. However, at any stage of the marriage a redistribution of the property could take place and this would be based on principles of contribution which would then determine the property rights of the parties according to the sharing principles based on the performance of the parties during the marriage rather than a strict entitlement according to the application of legal rules. Has this then advanced the embryo doctrine of deferred community of property available to other parties in Australia from the time when the marriage has broken down (or twelve months after such time) to any stage of the marriage? The earlier the application, that is the sooner it is made after marriage, the less likelihood there would be of any great redistribution. However, what is important is that it does not depend upon the institution of proceedings for principal relief.

The limitation on the exercise of this jurisdiction by the court is con-

tained in section 30(2). The court is given the power to adjourn the proceedings on such terms and for such period as it thinks fit to enable the court to consider the likely effect of any order on the marriage and the children of the marriage and *shall* not make an order unless it is satisfied, having regard to the principles set out in section 28 of the Act, that it is just and expedient to do so. The considerations the court is to take into account are broad. The Western Australian court has not yet given any definitive decision as to when it will proceed to exercise the jurisdiction conferred by section 30.[44] Under this adjournment power the question of whether the marriage has broken down must, of necessity, be a question of considerable significance. But is it not possible to say that there can be circumstances in which the marriage may not have broken down, but it would be appropriate to exercise jurisdiction under the section and not invoke the adjournment power? The adjournment power was not put in by accident. It was a deliberate and considered step.

To the extent that the power to alter interests in property is available and can be used before the breakdown of a marriage, or before proceedings for principal relief have been commenced, section 30 of the *Family Court Act* 1975 (W.A.) is perhaps the nearest that Australia comes to the introduction of a different property regime during the marriage.

4. *The Future?*

The final question I wish to pose under this part of the paper is, should we have two property regimes, one during the marriage and another on its termination? This question was posed in 1971 by Professor Kahn-Freund[45] to whom the prospect of married persons not knowing what their rights were at any particular time seemed quite unsupportable and unacceptable. He contrasted it with the position of partners in an ordinary commercial partnership. Who would consider a system of law whereby these partners did not know their rights during the existence of the partnership, but only upon its termination? And what, he asks, would a wife think when seeking advice on her position regarding the property of the spouses which had been acquired during the marriage, but all taken in the husband's name, and the husband had subsequently left the wife and children. It does seem strange indeed to say to her that it is the husband's unless, in Australia, she commences

[44] Obviously, applications from States other than Western Australia would raise problems of private international law concerning resorting to a jurisdiction.

[45] See 'Matrimonial Property; Where do we go from here?' in *Selected Writings* (1978) 163-195.

divorce proceedings, in which case the court may allocate her a share of that property. If the parting is of recent origin, then at least twelve months must expire before she is in a position to take such proceedings—by which time of course the husband could well have disposed of the property. Under the rule in *McCarney's Case*[46] nothing could be done to enjoin the husband from so doing, and it has only been recently, under the revised principle in *Seiling*[47] that the court now has decided that it is possible to grant an injunction restraining the disposition of such property pending the hearing of an application with respect to it. But what if the wife is not minded to take proceedings for divorce? What if she prefers to live in hope that the husband will return? And further, what of creditors? On the one hand they are entitled to know what property is available to satisfy their debts, but more importantly should a spouse have to stand by and watch property accumulated during a marriage be taken by creditors because of the conduct of the other spouse which has unnecessarily jeopardized the future security of the wife and children. Why should she not, at that stage, be entitled to take proceedings which will give to her an appropriate share of the property?

To expand on this a little, take the not uncommon situation in Australia and New Zealand of a family that has lived together for ten years. There are two or three children and during the course of the marriage the family has accumulated some assets. In many cases these assets would be what we call family assets. A substantial equity in a house has been acquired, a car, furniture, and perhaps some savings. These have been acquired by the parties' joint efforts. However, as also has frequently been the case, the property is all in the name of the husband. As with most or many marriages no question of whether it is his or hers arises during the halcyon days. It is ours. The husband may eventually, for various reasons, turn out to be either a gambler, a spendthrift, a borrower, or simply an inept business man and accumulate debts which cannot be paid. There is no question of the wife having an interest in any of the assets by way of contract, gift or trust. Any application for a declaration by her would accordingly fail. The property is all the husband's. What protection is there for the wife and the family in preventing the creditors from taking all? Nor is this a case in which there is any suggestion that the marriage is breaking down or is likely to terminate. The parties intend to continue living together. As the law now stands it tells this wife that she must stand by and watch the family property taken and dispersed amongst the creditors.

[46] (1977) FLC 90-200.
[47] (1979) FLC 90-627.

The facts in the situation that I have outlined would normally, on a section 79 application, result in the court making a distribution of the property in such a way that the wife would acquire perhaps an equal interest with the husband. As the law now stands in Australia a section 17 application by the wife would be hopeless. A section 79 application under the *Family Law Act* would not be available. The only state in which an application could be brought would be in Western Australia pursuant to section 30 of the *Family Court Act* of that state. Is there any reason why the wife could not make such an application and the husband consent to an order? Such an order would protect the marriage, protect the family unit, protect the rights of the children and promote their welfare, and probably promote the stability of the marriage. Accordingly, it would comply with the principles to be applied in section 28 of the Act. At least in that state of Australia the wife's earned interest in the accumulated properties of the parties may be protected.

If this interpretation of section 30 is correct an application could be made at any time. Whether the interest of the parties be altered depends upon whether the judge thinks fit to do so. It could be well argued that the extent of the alteration could not be beyond what a strict application of the contribution principles would require. If the application was to transfer all the property into the name of the wife and thus totally defeat the creditors, the court may well have to consider whether such an order is appropriate in the circumstances. Obviously, what this means is the sooner such an application is made after the marriage the more important are the financial contributions and the less important are the non-financial contributions. But in the case I have instanced above the contributions under both headings are made out.

One other limitation to an application under section 30 as a matter of practice is apparent. As the Full Court has said in *King*[48] only one application for an alteration of property interests is available. There is no reason to believe that the reasoning in *King* in dealing with section 79 federal Act would not be equally applicable to application under section 30 of the *Family Court Act*. It would not then be possible to make a series of applications from time to time with respect to individual items of property. In addition, the jurisdiction under the state Act is superseded upon the federal jurisdiction being invoked.[49]

The question then arises, is this as it ought to be? Should the law then provide for the acquisition of an interest in the family assets by a spouse

[48] (1976) FLC 90-113.

[49] A. F. Dickey and R. Davis, *Annotated Family Court Act & Regulations of Western Australia* (1980) 39-40.

even though the marriage is not terminating? On principle, as between the two spouses, there is no reason at all why this should not happen. The question arises in its starkest form when one takes into account the interests of third parties, for example creditors. At this stage one has to balance the interests of such third parties against the interests of the spouses. It is interesting to see in two related jurisdictions how this balancing of interests between creditors and the spouses is resolved. In the *Matrimonial Homes Act* 1967 (U.K.) the protection that the wife acquires for occupation of the matrimonial home by the registration of a charge comes to an end if the husband is adjudicated bankrupt. By section 2(5) the charge is void against the trustee in bankruptcy. On the other hand, the circumstances in which the property sharing regime is provided for in the *Matrimonial Property Act* 1976 (N.Z.) include the bankruptcy of a spouse.[50] Generally speaking, however, the Act attempts to reconcile the conflicting claims of creditors and the non-owner spouse. This is not done with respect to all the property of the parties, but in particular with respect to the matrimonial home. The non-owner spouse is given a "protected interest" in the matrimonial home (which includes the home or the proceedings of sale from it). In general this is one-half of the net equity, but the property must be utilised to meet secured creditors. Adjustment takes place so that the wife's protected interest, which is fixed at $10,000 by order in council, is then available to her and is not available to meet unsecured creditors of the husband. These provisions of the New Zealand Act, as they are, clearly attempt to preserve to a non-owner spouse an interest at least in the matrimonial home which is not subject to meeting the debts incurred by the owner spouse.[51]

5. *Conclusion*

With respect to the discussion to this point the conclusion to be drawn is simply the question, has the time not now arrived for a reconsideration of the dual matrimonial property regime that governs Australia? The indeterminate rights of the parties upon the breakdown of their marriage created by the broad discretion vested in a court are only

[50] S. 25(2)(d).

[51] Although the Act principally envisages a global division of property between the parties, nevertheless, by s. 25(3), it is possible to make individual applications from time to time relating to specific pieces of property. The circumstances when this may be done are not governed by the general circumstances which would enable the provisions relating to a global division of property to be invoked. To this extent New Zealand has made some considerable inroads into the separation of property system during the course of the marriage which is not in the process of disintegrating or terminated. However, a global division clearly can only take place upon a total breakdown of marriage.

exacerbated by the duality of rights depending upon the state of the marriage relationship. This, in turn, is further exacerbated by the separate development in different States of Australia of the matrimonial property regime during marriage. The contribution principle and sharing that applies after termination of the marriage throughout Australia applies in varying degrees in other States. At one extreme is Western Australia which would appear to permit a re-allocation of property at any stage during the marriage on this principle. To a lesser extent Victoria, by the *Marriage Act*, has introduced presumptions relating to the matrimonial home providing for a more equitable sharing of that particular item of family property. The rest of the states, prior to a termination, adhere strictly to a separation of property system. It is in this latter respect that once we accept the separation of property system as being unfair to a non-owner spouse then has not the time arrived to attempt to introduce an appropriate property regime during marriage, and at the same time attempt to introduce uniformity for all the citizens of Australia.

The conclusion above is, of course, specifically referrable to family assets. To introduce some system of joint administration of *all* assets during marriage would run into problems similar to those encountered in this branch of the law with joint custody orders. Also, it would be criticised for inhibiting legitimate risk taking in business. The proposals I advance do not attempt to prevent this from occurring. What I am simply suggesting is that the matrimonial assets, strictly so called, be preserved for the benefit of the family. Or, at least, an appropriate share be protected for the non-owner spouse.

I have referred to one paradox earlier. The other paradox that practitioners in this field continue to meet is the statement of principle as to the position of the family in the community and the need to protect it. And yet, when dealing with questions of property, the insistence on the continuation of a separation system probably does more harm to the ultimate welfare of a family than some system of sharing during the continuance of the marriage.

PROPERTY AT THE END OF THE MARRIAGE

The Australian matrimonial property regime can be summarised as follows:

> During the marriage the separation of property system exists. There is no fixed entitlement of either spouse to any property which entitlement arises out of the status of marriage. Nor is there

any fixed entitlement to assets acquired after the parties have married.

Upon the marriage coming to an end (by the institution of principal relief—except in W.A.) a spouse has to rely on the exercise of the discretion of a judge to obtain an interest or to share in the property that has been acquired or that is owned by the parties at the time of the proceedings. It is the judicial discretion that determines what interest (if any) a spouse is entitled to.

The discretion is exercised by the application of a mixture of principles. These principles, broadly speaking, are principles of contribution to the acquisition, etc., of the property, and the needs of the parties.

No distinction is drawn between property which may be loosely called family assets and business or other property.

It is to these four aspects of the present Australian system that I now turn.

No Fixed Entitlement

Perhaps one of the criticisms of the administration of family law in Australia has been directed to the re-allocation of property on divorce resting solely on a judge's discretion. The width and significance of this discretion was commented on in *De Winter* v. *De Winter* where Gibbs J. said:

> Moreover the discretion confided to the Family Court is make orders affecting interest in property under s. 79 of the Family Law Act is extraordinarily wide. Such orders may, of course, disturb existing rights: few curial orders can have a greater effect on ordinary citizens of modest means. It needs hardly to be said that such a discretion is to be exercised with scrupulous care.[52]

The deficiency of a broad discretionary system of this sort is commonly said to be uncertainty and unpredictability in the result. Taking a broad view of the decisions of the Family Court of Australia over the last four years one would be entitled to say that, with the development of the principles, there is not the unpredictability or uncertainty in the result of a case that one might expect. The system has a built-in flexibility. It enables a judge to take into account all aspects of the evidence and this does result in minor variations in any individual case. As more

52 (1979) 23 A.L.R. 211 at 218, (1979) F.L.C. 90-605 at 78,092.

decisions of the Appeal Court are given which clarify the guidelines to be applied by the trial judges in the redistribution of property on divorce the less room there is for uncertainty.

But if a fixed entitlement is established, a number of questions then arise. Are the parties to be given an opportunity of contracting out? Is the court to be given the power to vary the fixed rights that are given in appropriate cases? And finally, what is the position of creditors who may have been dealing with one party to the marriage on the assumption that that party was the sole owner of all the property against which execution could ultimately be levied to meet debts that may have been incurred?

Ontario and New Zealand have taken a different direction from that taken in Australia. The principle behind the acts in those two countries is, one could say, that of a fixed entitlement. There is, there, an entitlement to share in what may be referred to as family assets. But in each country there have been safeguards inserted in the legislation to enable a variation to the fixed entitlements to be made in appropriate cases. The simple question that arises is whether we should persevere with the flexibility of the discretionary system, or strengthen presumptions in favour of an equal sharing of certain assets such as the family assets. The difficulty with introducing a fixed entitlement system is to then define and set out in statutory form the exceptions and the circumstances in which the fixed entitlements can be varied. These in turn generally are discretionary. The end result is that one approach is discretionary from the outset and develops a set of principles which are applied but which contain within them the power to do justice according to the facts and circumstances of an individual case. The other system provides for fixed entitlement; but then provides for exceptions which in turn imports at that point a discretion in the judge to vary.

The Balancing Process—
(1) *Financial and Non-Financial Contributions*

The broad discretion contained in section 79 to re-allocate the property of the parties upon dissolution of the marriage is to be exercised by reference to the considerations contained in section 79(4). This in turn involves a delicate exercise in balancing the various considerations that are set out in that subsection. The court is required to take into account the direct and indirect financial and non-financial contributions of the parties.[53] To ascertain the financial contributions made directly or indirectly by or on behalf of a party with respect to the property is not a

[53] See sub-ss. 4(a) and 4(b).

difficult exercise. It is usually a question of evidence and the financial contributions are reasonably easily ascertained.

The non-financial contributions are those made by either party in the capacity of homemaker or parent. This consideration involves an examination of the whole history of the marriage and the part that the parties have played in it.

The financial contributions involve not only the money acquired or earned by the parties during the marriage that has been spent on the family, or for the benefit of the family, but in addition will include money or property that the parties brought into the marriage, i.e. separate property owned by each prior to the marriage, acquisitions of money or property during the marriage but unrelated to the relationship: for example, money or property acquired by gift or inheritance. A financial contribution can also be made by one spouse assisting the other spouse outside the home, i.e. in the pursuit of business activities which in turn result in the acquisition of property during the marriage.

The first balancing exercise that the court is faced with is the relative merits or significance of the financial and non-financial contributions. The first step that the Australian courts have taken is to give recognition to the fact that non-financial contributions in an appropriate case have an equality of status with financial contributions. In *Rolfe* v. *Rolfe* Evatt C.J. enunciated this principle as follows:

> The purpose of sec. 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a home maker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and the to the family the Act clearly intends that her contribution should be recognised not in a token way but in a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value.[54]

But this is in appropriate circumstances. Some indication of when the circumstances are inappropriate was given by the Full Court in *Quinn* v. *Quinn*.[55] That was a case of a three year marriage with cohabitation for

[54] (1979) F.L.C. 90-629 at 78,272.
[55] (1979) F.L.C. 90-677.

less than two years. The home was purchased at a price of $25,000 of which $15,000 had been provided by the wife. The balance was secured by a loan and the payments under the mortgage loan were met by the husband. The Full Court upheld the trial judge's decision that the house vest in the wife upon payment by her to him of the sum of $3,500. The house was registered in the joint names of the parties. Evatt C.J. said:

> The fact that the marriage was of short duration, in the circumstances of this case in my view does give some added weight to the capital contribution which the wife made to the acquisition of this home, as against the contributions which the husband made from his income and earnings during the marriage. That is, because the marriage was of such short duration, the asset in question to a large extent could be seen not as an asset accumulated from the efforts of the parties during the marriage but still largely an asset brought into the marriage by the wife.[56]

And in his reasons for judgment Asche J. said:

> there may come a stage in many cases, where equal sharing might become a just and equitable result. In fact, it might be said that parties who start from an unequal position, so far as contribution to the family assets is concerned, may nevertheless reach a point by later financial, homemaking or parental contributions, and often over a period of time when equalising of assets or at least of the asset constituted by the matrimonial home, will become just and equitable. However, over a short period and a grossly unequal initial contribution, it may not be just and equitable to equate the assets. It may, in some cases, be inequitable.[57]

In short, what these pages indicate is that when balancing the financial against the non-financial contributions, the financial contributions weigh heavier in the scale when the duration of the marriage has been too short for non-financial contributions to assume any significance. It does not mean that they assume no significance, but presumably a marriage of any duration has enabled a party to it to make a non-financial contribution, but the longer the marriage the greater the significance of it when setting off that non-financial contribution against the financial contribution made by the other party to the marriage.

The time then arrives when these contributions are equated with the result that in the exercise of its discretion the court leans heavily towards an equalisation of the assets of the parties. This position was made abundantly clear by the Full Court in the well-known case of *Wardman* v. *Hudson* where it said:

[56] Id. at 78,613.
[57] Id. at 78,617.

> It appears to us that in relation to a jointly owned property of parties whose marriage has broken down or in respect of a property which has been acquired jointly by such parties as a result of their joint contributions over a significant period of time that at least a proper starting point is that the property upon dissolution of the marriage and the resolution of the financial issues between them ought to be treated as jointly owned and ought in ordinary circumstances to be divided equally between them. This we consider is at least a strong prima facie position.[58]

The Court went on in that case to cite with approval from another judgment of the Full Court, *Potthoff* v. *Potthoff*, where it was said:

> where a court under the Family Law Act is dealing with jointly owned assets or assets which are acquired or built up by the joint efforts of the parties in a marriage which has lasted for a number of years, equality is, in (our) view, at least the proper starting point. One should then look to the particular circumstances of the individual case to see whether a change from that position is in all the circumstances justified.[59]

Wardman v. *Hudson* was a case of a 14-year marriage, three children, and a history of the husband working and the wife at an early stage of the marriage also working until such time as the youngest child was born.

The court, however, was concerned to see that these statements were not to be accepted as universally applicable to every case. Balancing of considerations did not stop simply with an assessment of the financial and non-financial contributions. There were other considerations to be taken into account which may well upset this equalisation result. It went on to say:

> Ultimately of course each case has to be determined on its own individual circumstances, and the individual circumstances of a particular case may indicate that some other result is the proper one. For example, the need of a non-working mother to have suitable accommodation for young children of the marriage may obviously call for a different result.[60]

In addition, in the later case of *Nesci*,[61] Asche J. was equally concerned to ensure that the position in *Wardman* v. *Hudson* did not impose a universally recognised rule of a fifty-fifty distribution of property

58 (1978) F.L.C. 90-466 at 77,384.
59 (1978) F.L.C. 90-475, at 77, 466.
60 Supra n. 58, at 77,384.
61 Appeal No., 45/1979, 11 July 1979 (unreported).

between the parties to a marriage of some significant length.[62] The Full Court in *Crawford* v. *Crawford*[63] again confirmed its earlier view expressed in the case of *Wardman* v. *Hudson*.[64]

The Balancing Process—
(2) Contributions against Needs

The next considerations that are frequently referred to in the cases as matters which must be balanced against the financial and non-financial contributions of the parties are the considerations contained in section 75(2) of the *Family Law Act* so far as they are relevant. This section contains all the matters to be taken into account when dealing with an application for maintenance of a party. In short, it introduces all the considerations to be looked at in determining whether a party has a need for maintenance. By incorporating this section into the section relating to the re-allocation of property on divorce the court is then faced with an extraordinarily complex exercise. The contribution principles which determine property applications are, by their very nature, retrospective in aspect. They look to the past and what the parties have done in the past towards acquiring or conserving the property that they now, at the date of the application, own either jointly or individually. The court is principally examining these contributions to see whether an alteration in the present holding of the property is warranted.

On the other hand, by requiring the court to take into account the provisions of section 75(2), it is also looking to the future needs of the parties. Section 75(2) is principally prospective in operation. What this means, then, is that the court, in determining how to re-allocate the property of the parties, is to look to their financial future. It means that the redistribution of property based on past contributions may not necessarily be given effect to because the future needs of the parties would indicate that such a redistribution would not be equitable in the circumstances. I, in the past, have been critical of this confusion of principle. I have been prepared to advocate that the two should be separated, or at least far greater emphasis placed on the contribution principle in property applications. The two could be separated—property being determined by reference to one set of principles and maintenance by reference to another. I am, however, also cognisant of the fact that there are some cases in which justice could not done without considering the future needs of the parties. It may well be that following a distribution of a property on a contributions principle, it is

62 See also Freeman v. Freeman (1979) F.L.C. 90-697.
63 (1979) F.L.C. 90-647.
64 Supra n. 58.

impossible to obtain an effective maintenance order which would otherwise be justified in the circumstances, because the property has been dissipated. It may well also be appropriate in cases where a future effective maintenance order seem remote. In such a case an additional benefit can be provided under the property provisions and future maintenance be abandoned.

The distinction between these different approaches to determining property applications was recognised by the Full Court in *Seiling* v. *Seiling*, where it was said:

> The provision of sec. 79 enable the Court to overcome the inequity of determining the interests of husband and wife in their property according to the strict rules of law and equity. Those provisions have both a retrospective and a prospective element. They look back to see how property was acquired, who contributed to it and in what form. They look ahead to ensure that the Court considers the means and needs of each spouse and of the children.[65]

This was re-affirmed by the Full Court in *Crawford* v. *Crawford*, where the court went on to say:

> Section 72 focuses upon 'need' and 'capacity.' Whereas sec. 79 is much more widely embracing and is largely, but not exclusively, concerned with past contributions of various kinds to the marriage and to the assets built up during the marriage as well as with 'need' in a perhaps more indirect manner by virtue of sec. 75(2).[66]

This passage at least seems to indicate that in the balancing process between past contributions and future needs, perhaps more emphasis is to be placed upon the past contributions than the future needs. In other words, having decided what distribution ought to take place by reference to contributions, the question may then arise whether in the circumstances disclosed by reference to the section 75 principles this, in turn, should not be adjusted. Let me hasten to add that I am not suggesting that there are individual steps in the process when section 79 is being applied, as I would think that all the dicta of the Full Court would indicate to the contrary. What is clear; however, from *Crawford's Case*, is that a lack of need does not disqualify a party from an application under section 79. This is as it ought to be. The contribution principle is, in a sense a redistribution of property upon the basis of an interest that has been earned as a result of behaviour and conduct throughout a marriage. The fact that at the end of a marriage, for any reason at all, a party is in no need of that interest in property should not disqualify the

65 Supra n. 47, at 78, 264.
66 Supra n. 63, at 78, 411.

party from receiving his or her just fruits of the effort that he or she has put into the marriage.

In *Dench* v. *Dench*[67] an adjustment beyond the expected 50-50 division of the matrimonial home was made because of the unequal financial position of the parties overall. The trial judge had found that the proceeds of sale of the matrimonial home should be divided equally between the parties. The Full Court, on considering the unequal general financial position of the parties and the need for the wife to provide accommodation for a dependant child, decided on a division of the proceeds on a 60-40 basis. The case is all the more interesting because the wife had not been able to make out a case for maintenance for herself. Accordingly, although she could not establish sufficient need for a maintenance order, nevertheless the court made an adjustment in her favour on the property application. In doing this the court's reasoning was as follows:

> The interrelationship between sec. 72, 75 and 79 is such that the factors under sec. 75(2) may be relevant under sec. 79(4)(d) even where a spouse has not been able to establish an entitlement to maintenance. A party may be in a position to make reasonable provision for his or her own maintenance and yet remain at an overall disadvantage when the financial resources of the parties are compared.[68]

In that case the court was taking into account the provision of section 75(2)(b). Another consideration of section 75(2) that is coming before the courts with increasing frequency is 75(2)(f). That subsection requires the court to take into account the eligibility of either party for a pension or any benefit under a superannuation fund or scheme. The whole problem of how to deal with superannuation has not, in the Australian scene, yet been finally resolved.

This is not the time and place to undertake an examination of how superannuation should be taken into account upon the breakdown of a marriage. However, a number of aspects of superannuation have now been clarified by the Full Court in *Crapp* v. *Crapp*.[69] From this case it is now fairly clear that in general an interest under a superannuation fund is not property as defined in section 4 of the *Family Law Act*. As Fogarty J. said in that case:

> It is normally a contingent interest only; until he actually receives it in his hands he has no control over it; he is unable to alienate it in the meantime and in the event of his death prior to retirement the

[67] (1978) F.L.C. 90-469.
[68] Id. at 77, 406.
[69] (1979) F.L.C. 90-615.

> right does not form part of his estate. In my view such an interest falls outside the term 'property'.[70]

However the entitlement to a superannuation benefit at some stage in the future is a matter to be taken into account. This is justified either by reference to section 75(2)(f) of the *Family Law Act*,[71] or, as Fogarty J. pointed out in *Crapp's Case*, if that were not so the court could take into account the future entitlement to some superannuation benefit pursuant to section 75(2)(o). He concluded that, therefore, it was clear 'that this was an entitlement that the court was entitled to take into account. This accords with the approach in all of the recorded cases and also accords with what one might describe as the commonsense of the situation.'

Crapp's Case itself dealt with a marriage of 17 years duration. Two children were born, aged 17 and 15 at the time of the action. The substantial asset of the parties concerning which the application was brought was the matrimonial home. The wife remained in the matrimonial home with the children. The husband had been ordered to pay $80 per week maintenance for the two children. He was a high income earner with a net income after tax of $29,000. The wife at the time of the hearing was aged 49 years and employed in a clerical position at $125 per week net. At the time of the hearing the husband was aged 44 years and if he continued in his employment until his retirement at 55 years, he would become entitled, by way of superannuation, to a lump sum of approximately $300,000. As was pointed out by the appeal court, were it not for the presence of the superannuation fund interest the result of the case would have been highly predictable, and the ambit of the discretion under section 79 would have been fairly narrowly confined. Presumably by these comments, there being an adequate maintenance order for the children, the order would have probably been that the matrimonial home be sold and the proceeds divided equally. Fogarty J. went on:

> However, the superannuation fund interest introduces into the matter a further element which is very much of the future, has real elements of uncertainty about it and is highly subjective in its evaluation. It is a matter in relation to which different judges may arrive at differing conclusions and consequently a matter in respect of which an appellate Court exercising the accepted principles of appeals in relation to discretionary orders, ought to be reluctant to interfere.[72]

70 Id. at 78, 181.

71 See also Bailey (1978) F.L.C. 90-424; Stacey (1977) F.L.C. 90-324

72 Supra n. 69, at 78, 186.

The trial judge had ordered that the home (valued at $90,000) be transferred to the wife and that the husband pay off the mortgage thereon ($14,000) and, until it was paid off, assume all liability under it. In arriving at this conclusion the trial judge had assessed the present value of the husband's superannuation entitlement at $76,000 and his long service leave entitlement at $27,000, and on top of this he had a half interest in the matrimonial home. The appeal court was not prepared to take into account the husband's present value of his superannuation as property, particularly as property from which any order against him could be satisfied. Nevertheless, it was prepared to regard the future entitlement as something to be taken into account. And how did it do this? By estimating the wife's half interest in the home, if it were sold, at $38,000 and concluding that a further $18,000 would provide her with a substantial capital sum from which she would be able to obtain appropriate accommodation, but would leave the husband with an asset of $12,000. To take from him the whole of his present asset was at this time inappropriate. Accordingly, to give the wife the sum of $56,000 the court ordered that the proceeds of sale of the matrimonial home be divided in the proportions of 74% to the wife and the balance to the husband.

In a sense a similar approach was adopted by Connor J. in *Petterson* v. *Petterson*.[73] There the husband, in only a matter of four years' time, was to receive a superannuation benefit of a pension equal to 47% of his retiring salary and a lump sum of $42,500. The property in respect of which the application was brought was a home valued at $79,000. The marriage was of 34 years duration and there had been four children. Connor J. decided that the wife was entitled to an annuity of $3,120 per annum or $60 per week which should satisfy her maintenance requirement. In order to produce this annuity she needed a lump sum of $65,000. This, in turn, therefore required the division of the proceeds of sale of the home as to 13/16ths to the wife and 3/16ths to the husband.

Both of the above cases could be regarded as an adjustment to the normal division of property upon the breakdown of the marriage by reference to the future needs of the parties, although in the latter case, in a sense, the division of the proceeds of sale of the house was to satisfy the future maintenance needs of the wife. If anything can be gleaned from an examination of the cases where a superannuation entitlement has been taken into account in determining a property application, it is to underscore the comment of Fogarty J. that the valuation of the interest is highly subjective and the approach of different judges may vary

[73] (1979) F.L.C. 90-717.

markedly. Two things are, however, clear. Where the superannuation entitlement does not fall in for some years to come, then as Tonge J. said in *McHarg* v. *McHarg*[74] the entitlement is taken into account only in a general way. Secondly, the court does not seem inclined to adopt an actuarial calculation of the present value of the respondent's interest in the superannuation fund and, then, treat this in an indirect way as property of the parties and credit the wife with a sum equal to half the amount so determined. Nor does the court simply look at the total amount of contributions and interest earned upon such contributions over the period of the marriage and treat this as the amount to be taken into account—again, by giving the wife a half interest in the sum so calculated.

But the problem with both of these approaches is that there must be sufficient other property which can be used to make the compensating adjustment. What has been done, however, is to consider the future needs of the applicant and make an increased adjustment in the applicant's favour based upon the fact that the respondent will, at some time in the future, be in a vastly superior financial position because of the maturity of superannuation benefits.

Other considerations that have resulted in a variation to the expected property adjustment of the parties that have been taken into account by the courts are the generally weaker financial position of the applicant because of the responsibility to care for a child and, in consequence, the less opportunity to earn an income.[75]

The Balancing Process—
(3) Effect on Earning Capacity

Section 79 does not distinguish between family assets, business property, or any other type of property. It is all-embracing. It gives the court power to deal with 'the property of the parties'. Accordingly, from time to time the court is faced with the next exercise in the balancing of the considerations in section 79(4). The legislature obviously recognised that, by gathering within the net of section 79 all where certain property was income producing and which it would be necessary to preserve in the hands of a particular party. This would enable there to be a future source of funds which might be required to satisfy a maintenance order for the other spouse or dependant children. It did this by requiring the court to take into account 'the effect of any proposed order upon the earning capacity of either party'.

The problem arises where the court is faced with, in particular, busi-

[74] (1980) F.L.C. 90-811.
[75] See Freeman v. Freeman (1979) F.L.C. 90-697.

ness asets. These have taken many forms. They can include income-producing property used for conducting manufacturing, retailing, farming, or the conduct of a professional practice. To require the sale of any of this property might well put the respondent out of business and dry up the income upon which all parties are relying. In *Scott* v. *Scott*,[76] at an early stage in the Court's history, Demack J. was faced with this problem when the property the subject of the application consisted of both a house and a farm. The house was valued at $15,000 and the farming land at $50,000. It was a marriage of thirteen years' duration and two children, both living with the applicant wife. The wife was apparently clearly entitled to one-half interest of the house and, had the farm been non-income producing property, probably a half-interest in that too. However, Demack J. pointed out that this land was used for farming purposes and was essential for the production of an income and was therefore in quite a different category from land which simply provides a place for the family home. In his view:

> If the continued availability of the land is essential to one spouse as a place on which to work and produce income, in my opinion, any property order affecting such land should not affect its production capacity or seriously reduce its income producing potential.[77]

The husband had retained possession of both the house and land. He had a borrowing capacity on the security of the farm. In the end result the wife was awarded the sum of $12,500. Clearly, it had been necessary to preserve the farm to enable the husband to continue to obtain an income from it and, in lieu of a half-interest in that, the wife received approximately a further $5,000 above an amount equal to one-half of the house.

Other examples of the court taking into account the necessity to preserve property for the purpose of producing income can be seen in *Elias* v. *Elias*,[78] where in the division of property the partnership business which was conducted by the husband was vested in him and a sum paid to the wife which would then enable the husband to remain in business. Also *Healy* v. *Healy*[79] where a farm was left with the husband to enable him to continue earning a living and a sum awarded to the wife which he could afford to raise, but which may well have been greater had the property not been a farming property from which the husband obtained his income. As the court said in that case:

[76] (1977) F.L.C. 90-251.
[77] Id. at 76, 353.
[78] (1977) F.L.C. 90-267.
[79] (1977) F.L.C. 90-295.

> If the respondent's financial position and opportunity for employment had been more favourable, it may well have been that a more substantial award would have been appropriate.[80]

Apart from adjusting the sum payable to preserve the income producing property, the other re-arrangement frequently made by the court is to leave with the party who depends on the income producing property that property, and vest in the other party non-income producing property.

Finally, in the balancing process the court is required to take into account:

> (e) any other order made under this Act affecting a party.

The obvious order which must be regarded as a compensatory order with a property order is one relating to maintenance.

Before completing this examination of the way in which the court exercises its discretion under section 79, I should draw attention to two further facets of the process. The first is that the court has, as a general rule, set its fact against the determination of interests by reference to any mathematical formula. Although this was done in the early case of *Currie* v. *Currie*,[81] where the amount awarded to the wife was initially one-half of the value of the property related to contributions after marriage. The husband had paid for two-thirds of the house before marriage. The balance was paid after marriage. The marriage lasted seven years and there was one child. At the time of the application the house was valued at $19,000. The court said that $6,500 represented the amount accrued during the marriage. The wife was entitled to half of this, namely $3,250. Because of the unequal financial position of the parties this sum was increased to $5,000.

However, in subsequent cases any attempt to resolve property applications by reference to a mathematical formula related to contributions, financial or otherwise, has been disapproved. For example, in *Potthoff* v. *Potthoff*,[82] Ferrier J. purported to apply a formula that he extracted from *Currie's Case*. There he purported to set apart the value of the property brought into the marriage by the husband and then divide the balance equally. To this approach the Full Court said:

> *Currie's Case* contains no formula for the resolution of property disputes either generally or in this specific case. *Currie's Case* is a

80 Id. at 76, 565.
81 (1976) F.L.C. 90-101.
82 Supra n. 59.

> very unusual case dependant upon its own particular facts and history. If it has any matters of general principle at all (about which I am doubtful) it demonstrates no more than the obvious, namely that there is distinction between the considerations applicable under the State Marriage Acts and the considerations applicable under the present Act, but beyond that . . . *Currie's Case* cannot possibly go any further and is dependant upon its own peculiar history.[83]

This view was reiterated in *Quinn* v. *Quinn* by the Chief Justice, where she said:

> Speaking for myself, I do not necessarily subscribe to the view that one should do mathematical calculations in determining the appropriate property order to make under sec. 79. Nevertheless, it is important for the court under sec. 79 to reach a view as to the proportions which should be regarded as the contribution of each spouse to the acquisition, conservation and improvement of the property under sec. 79(4), particularly paras. (a) and (b). As I said, I do not necessarily think that need to be done with mathematical precision, but it is important to reach a view as to whether the contributions of one party were greater than or equal to those of the other party.[84]

Of course the court takes into account property brought into the marriage and acquired apart from their own efforts. In doing so, in a broad way, this is related to the property the parties enjoy when the marriage terminates. But, consistently with the preservation of its broad discretion, the court has declined to then redistribute the property by reference to any exact proportions that may result.

The other final matter that I wish to refer to is the refusal of the court to attempt to link contributions to any specific property. Once an application under section 79 has been made then all the property of the parties is subject to an order. The court has refused to restrict the property to be redistributed to property which may be directly or indirectly linked to the contributions. In a sense, of course, all the property is indirectly linked to the contributions of the parties (apart from property not acquired by the parties' efforts). In *Coleman* v. *Coleman* the court made this principle quite clear in the following words:

> In many cases the most important aspect of a party's claim to a property settlement is the extent of that party's contribution to the acquisition, conservation or improvement of the property of the

[83] Id. at 77, 447.

[84] Supra n. 55, at 78, 615.

other party, Whether that contribution be direct or indirect, financial or otherwise (sec. 79(4)(a) and (b)). It may, however, be an error to try to link a party's contribution specifically to one asset, particularly if the contribution is made in the capacity of home-maker and parent. Where there has been such a contribution by one party the Court's order under sec. 79 may alter interests in or settle any property of the respondent on the applicant (or require the payment of money in lieu thereof) if it is just and equitable to do so.[85]

Conclusion

Where then does all this lead? And, further, to the uninitiated in the Australian system, is it possible to see or predict the outcome of any particular case? One would expect the answer to be that in the Australian system there is a higher degree of uncertainty in the result of cases. Curiously enough this is not necessarily so, and perhaps the high rate of settlements at pre-trial conferences indicates that the outcome of many cases is, in fact, highly predictable. The Australian system of vesting a judge with an all-pervading discretion and requiring him to take into account certain factors in exercising this discretion, however, does lead to a close examination of the whole history of the marriage, the contributions to it, the financial position of the parties now and in the future. At the trial court level this is frequently a long and painstaking exercise. The balancing process required of the judge, when taking into account the considerations, frequently means that as soon as the scales tip in favour of one party resort can be had to another one of these considerations, bringing the scales back on to an even keel again. In many cases the evaluation, as has been said, is a highly individualistic or subjective one. The result is that minor variations may easily, and frequently do, appear to occur from judge to judge. This, in turn, becomes difficult for litigants to understand.

In cases with substantial property, containing a mixture of business and domestic assets, individual variations are more readily understood by the community. But I cannot help but wonder whether, in the vast majority of cases, where the assets of the parties at the breakdown of the marriage consist of strictly domestic assets (that is, the house, car, boat, etc.), with a marriage of any duration, an individual variation by reference to one or other of the considerations in section 79(4) is understood or is desirable.

Australia has opted for the broad discretionary system. Other countries have not, and I now turn to briefly examine two alternatives.

[85] 1979 (unreported).

PART III—COMPARISONS

The present Australian system of redistributing property of parties on the breakdown of the marriage is the system that has been discarded by a number of other Commonwealth countries in favour of a system which, firstly, classifies property of parties to a marriage and, secondly, attaches to different classifications much more clearly defined rights with respect to that property. New Zealand, in 1976, by the *Matrimonial Property Act* of that year, introduced such a system, as also did Ontario by the *Family Law Reform Act* 1978. It is to these two alternative models as to methods of redistributing property on divorce that I now turn.

New Zealand: Family Assets

This is not the place, nor am I the person, to make a detailed examination of the New Zealand legislation. However, some time ago I said that the dangers of adopting the type of system introduced in New Zealand were that, unless the legislation was extraordinarily complex, then one of the risks was that individual cases might not fit in the legislative prescription, resulting in a possible injustice to one of the parties. I said at that time that Australia ought to wait and observe the experience of the administration of laws similar to those in New Zealand and Ontario before introducing any radical changes. With the benefit of the cases that have since then been decided, it would appear to me that parts of the other systems become more attractive as more experience is gained. In any event, at that time I did advocate that in Australia there should be a considerable strengthening of the presumption of equal sharing of matrimonial property strictly so called—that is the matrimonial home and the family assets.

At the risk of oversimplication, one could say that the New Zealand system divides property of parties to a marriage into three categories: Firstly, the home and family chattels—family chattels including such things as furniture, vehicles, caravans, boats, pets, articles used by a family as household ornaments, etc. The Act requires that this property *shall* be shared equally by the parties. The exceptions are marriages of short duration when the equal sharing principle does not apply to assets brought into the marriage by one party, acquired by a party by gift or succession, or there has clearly been a disproportionate contribution by one party to such property. Where this has occurred the property is divided in accordance with the contributions of the parties to the *marriage partnership*. In addition, a short marriage is defined as one of less than three years. Secondly, the equal sharing rule with respect to the

home and family assets can be replaced by the contribution principle where there are 'extraordinary circumstances that in the opinion of the court render repugnant to justice the equal sharing between the spouses'.[86] Thirdly, other matrimonial property shall be shared equally, unless the contributions of a spouse are clearly greater than that of the other spouse.[87] This 'balance matrimonial property' is defined to include jointly owned property, property owned before the marriage if it was intended for the common use and benefit of the parties; after-acquired property; insurance policies; a pension or benefit under a superannuation scheme. Normally the rule is that it will be shared equally, but if the contribution of one party has clearly been greater than the other party then it is shared according to the contributions.

Contributions for the purposes of the Act include contributions both of a financial and non-financial nature. And, in particular, the Act provides that a contribution of a financial nature is not to be presumed to be of a greater value than a contribution of a non-financial nature.[88] There is, in addition, with respect to this balance matrimonial property, a prohibition on taking into account misconduct of a spouse unless the misconduct has affected the value of the matrimonial property.[89]

Any property of either party which does not fall within these categories or descriptions of property remains separate property of the spouses. In the case of family assets and the home there is an extraordinarily strong presumption of equal sharing. The exceptions are short marriages and extraordinary circumstances. In the case of other matrimonial property there is still a high presumption of equal sharing. However, it may be that in these cases it is easier to displace the equal sharing rule. The language of this statute is strong and vigorous, and it would seem to me that the interpretation by the court demonstrates a robust approach to give effect to the legislative intent.

The intent of the legislature was referred to with respect to family assets in *Castle* v. *Castle* where Quilliam J. said:

> The general purport and intent of the Act is, I think, clear. Except for marriages of short duration (which us not the case here) it is to ensure that in the majority of cases there will be an equal division between the spouses of all the matrimonial property. This is, I think, the primary and governing intention of the legislature and s. 14 is to be interpreted in the light of that.[90]

86 See s. 14.
87 See s. 15.
88 See s. 18.
89 See s. 18(3).
90 [1977] 2 N.Z.L.R. 97 at 102.

Again in *Reid* v. *Reid*, Woodhouse J. said:

> The legislative expectation expressed in the 1963 Act that all this could be done in justice to husband and wife if it were left to the Courts to exercise a wide judicial discretion has been abandoned. Instead this new Act first spells out a strong bias in favour of equality. Then it goes on to provide for the unequal cases and for 'other' matrimonial property and it does so by setting down a carefully contained statutory formula. It is a formula related not to the mode of acquisition of the property but to the much wider achievement for the marriage partnership of each of the spouses. When the formula applies to require an unequal division there is still the need for individual consideration to be given to individual cases. But that need does not involve or permit the exercise of any individual discretion but rather the application of the statutory rules to the particular facts.[91]

With such strong presumptions in favour of equal sharing it is not surprising that the litigation under the Act seems to have concentrated on attempts to bring individual cases within those provisions of the Act that displace the equal sharing rule. Section 13(3) is such a section. In the early case of *Castle* v. *Castle*[92] a disparity of contributions towards the marriage was advanced as being an extraordinary circumstance that rendered it repugnant to justice to apply the equal sharing rule with respect to the domestic family assets. This was a marriage of fiteen years duration and three adopted children. The home was sold for $20,000. Over the years of the marriage some $7,000 had been given by the wife's father towards the purchase ultimately of this home. The disparity of contribution argument as an extraordinary circumstance failed. Quilliam J. said:

> This raises at once the question of whether any disparity of contribution may be regarded as an extra-ordinary circumstance. I do not think one can say this may never be the case because it is not hard to imagine a situation in which the disparity in contributions is so gross as to compel the court to conclude that an equal division of property would be repugnant to justice. Except, however, in such an exceptional situation I think the whole tenor of the Act is expressly designed to exclude a division of property arrived at by a consideration of respective contributions. This, after all, was the basic theme of the legislation which has now been replaced. What has replaced it is an Act which was, I think, intended to substitute a new approach. I think, therefore, that no mere imbalance in the

91 [1979] 1 N.Z.L.R. 572 at 581.
92 Supra n. 90.

> contributions of the spouses, nor even a substantial imbalance, is intended to be treated as an extraordinary circumstance. Only a gross disparity of a kind which simply cannot be ignored will suffice.[93]

This approach was followed By Perry J. in *Dalton* v. *Dalton*[94] where the wife had provided the three homes in which the parties lived. The children's education had been paid for by a family trust set up by the wife's family and the husband's financial contribution to housekeeping had been small. The wife sought an order that the husband had no interest in the matrimonial home. Despite the disparity of contribution it was ordered that the home and family chattels be shared equally between the parties. Perry J. went on to say:

> If the legislature had intended that disparity of contributions was to be an extraordinary circumstance under s. 14 it would have been easy to say so in identical words to those used in s. 15. But it does not. I think the failure to do so is because it intended that a disparity in contributions to these assets was not to be regarded as an 'extraordinary' circumstance.
>
> And I think too the legislature intended that the weighing of contributions was to be regarded as irrelevant and to be avoided in the division of the matrimonial home and the family chattels as contrary to the concept and philosophy of the marriage partnership.
>
> Accepting now as I must this concept and philosophy of the marriage partnership, because it is clearly the spirit behind the 1976 Act, I am not prepared to regard a disparity in contributions to the matrimonial home and the family chattels as an extraordinary circumstance which would justify an alteration to an equal sharing of these. I add that I find the absence of any specific provision requiring a consideration of the respective contributions to the matrimonial home and family chattels fortifies this view. And further the specific power to take contributions to the marriage partnership into account in the case of the balance of the matrimonial property further fortifies this view.[95]

This approach was approved by the Full Court in *Martin* v. *Martin*.[96] It was here in particular that the strength of the language creating the circumstances which replace the equal sharing rule with respect to the domestic family assets was commented upon. An approach as vigorous as the language has been taken. Woodhouse J. said:

93 Id. at 103.
94 [1978] 1 N.Z.L.R. 829.
95 Id. at 836.
96 [1979] 1 N.Z.L.R. 97.

> At the same time the phrase 'extraordinary circumstances' refers, I think, to circumstances that must not only be remarkable in degree but also be unusual in kind. It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.[97]

After agreeing with the judgment in *Castle* v. *Castle*[98] he then concluded that 'if disparity in contributions by itself can ever give rise to the exception to equal sharing which is contained in s. 14 then the disproportion would have to be gross indeed.' Richardson J. in the same case[99] adopted the same robust approach. In his view it seemed that the legislature intended to impose a rigorous test allowing very limited scope for unequal sharing of the matrimonial home and family chattels. This was a case of a marriage of three and a half years and accordingly did not come within the short marriage rule, and the husband sought an order that the home was his alone on the basis that he had provided the home and all the moneys for maintaining it. The disparity of contribution argument again failed. Although it would seem that disparity of contributions in the view of most of the judges in New Zealand will not bring into play section 14, a slight change of emphasis can be seen in the judgment of Cook J. in *Dalton* v. *Dalton*.[100] After re-affirming the strength of the burden imposed by section 14, he nevertheless went on to indicate that he could see no adequate reason for 'shutting out such natural consideration as contributions to the marriage partnership or to the matrimonial home itself in deciding whether a party had discharged the onus of proving extraordinary circumstances . . .'.

Nor also has the fact that the wife was insane constituted an extraordinary circumstance.[101]

If an exception is proved to the equal sharing of the domestic family assets, then the application of the contribution principle can be seen in *Stallinger* v. *Stallinger*.[102] This was a marriage of short duration and one in which the husband had brought into it an equity equal to half the value of the house. The sharing determined by the judge in that case was that he should take 75 per cent of the proceeds of the house being sold. Accordingly, by a combination of strong legislative language, recognised and given effect to, by the courts, it seems rare indeed for a

97 Id. at 102.
98 Supra n. 90.
99 Supra. n. 96, at 111.
100 Supra n. 94.
101 See X. v. X. [1977] 2 N.Z.L.R. 423.
102 [1978] 1 N.Z.L.R. 727.

situation to arise in New Zealand where the matrimonial home and family assets in a marriage that has lasted longer than three years will be divided other than in equal shares between the two parties.

Balance of Matrimonial Property

With respect to the balance of the matrimonial property the principle attacks seems to have been to exclude such property from the presumption of equal sharing by showing it is not matrimonial property. Or, to show that the contributions of one party have been clearly greater than the other by attaching greater weight to financial contributions over and above non-financial contributions. So far these attempts have not been too successful. In *Reid* v. *Reid*[103] the major asset in dispute was the sum of $500,000 representing the proceeds of sale of the husband's shares in a company which he had developed. It was a marriage of twenty-one years and four children. Within five years of the marriage the husband had set up a company to develop and market an invention of his for dealing with containers. So successful was this, and the husband's ability for inventing, that some seventeen years later he sold the business for a total of some $500,000. An attempt was made to exclude this money from the definition of matrimonial property by a restrictive interpretation of section 8(e) and resulting in an expanded interpretation of the meaning of 'separate property'. In short, the effect would be that business assets acquired after marriage, which were not acquired for the common use and benefit of both the husband and wife, would remain the sole property of the one party.

The argument failed to find favour with the Full Court. Again, the judgment of Woodhouse J. clearly indicates a strong commitment to upholding the equal share rule with respect to matrimonial property. As he said:

> In my opinion it would be contrary to the general purposes of this Act, the Matrimonial Property Act as it is called, if the plain and ordinary meaning of the opening words of s. 8(e) were to be radically cut down in order to enlarge the definition of separate property. Section 8(e) deals with post-marriage acquisitions of husband or wife. It is accordingly one of the critical pivots upon which all else in the Act is designed to turn. For that reason the 'separate property' operation of s. 9(2) has been made expressly subject to s. 8(e). If Parliament had intended to preserve the status of separate property after it had been used to make post-marriage acquisitions then the converse would be the position. Section 8(e) would have been made subject to the overriding effect of s. 9(2).

[103] [1979] 1 N.Z.L.R. 572.

> For these various reasons I think that the words 'all property acquired by either the husband or the wife after the marriage' where they appear in s. 8(e) mean precisely what they say. It is not in dispute that assets derived from the business in the present case were acquired after the marriage. In the circumstances they must be regarded as matrimonial property and divisible between the husband and the wife in terms of s. 15 of the Act.[104]

If, then, property is found to be matrimonial property the only other way of preventing the equal sharing rule is to show that the contributions of one party have 'clearly been greater' than the other. The definition of contributions of spouses contained in section 18 is all-embracing. It is a contribution to the marriage partnership — and not to the acquisition of property — and covers all aspects of family life. In doing so, it imposes a prohibition on regarding one type of contribution as being preeminent over another. In these circumstances it must be difficult to show in a marriage of any duration with each party performing his or her usual part within the marriage, for the contributions of one to clearly be greater than the other. This problem was recognised by the New Zealand Full Court in *Reid* v. *Reid*.[105] It involves comparison of unlike duties and functions within a marriage. But this has always been the case, even under a discretionary system such as Australia's. What is clear from *Reid's Case* is that minor variations will be ignored. There must be a substantial and significant difference in the part that each party has played in the marriage before the equal sharing rule is displaced.

It is at this point, when assessing the contributions of each, that the judicial discretion becomes evident. This was a case in which there was no complaint about the part the wife had played. As Woodhouse J. said:

> The functional division of effort which they accepted has meant that while she was succeeding in ways that defy quantification in any mathematical or tangible sense, he was left free to exercise his considerable abilities and so produce graphic and enviable results in the world of commerce.[106]

In that case the husband's efforts were capable of quantification. He had acquired by his own efforts a monetary benefit of some $500,000. The problem in such cases is always to set that against the part the wife has played in remaining in the home caring for the children and caring for the household and the husband. The trial judge in the circumstances decided his contributions were clearly greater. He apportioned

[104] Id. at 579.
[105] Supra n. 103.
[106] Id. at 590.

the $500,000 between them as to one-third and two-thirds. The Full Court agreed with the finding, but in the end changed the apportionment to 60/40.

What is clear from this cursory examination of the New Zealand experiment and its development is that the legislature introduced this new matrimonial property regime with a clear intention that it was to provide for an equal sharing of all matrimonial property. The judicial interpretation of the statute has recognised this underlying policy and has given effect to it. It has done so by a strict interpretation of the exclusionary provisions that would take matrimonial assets out of the equal sharing rule. The result would appear to be that except in marriages of less than three years equal sharing of matrimonial assets would be a principle now of New Zealand law which it would be exceedingly difficult to escape.

The problems in giving effect to the Act in the ordinary run of cases seem to have been few. In *Brink* v. *Brink*[107] the trial judge indicated that in his view the equal sharing rule would have worked an injustice had it not been for the fact that he was able to rely on section 25 and deal with the property individually rather than globally. Apart from this case there seem to have been few other comments from the Bench on anomolies or inequities in the application of the new law.

Of course, one may not necessarily agree with the underlying policy in the legislation, or in some aspects of the legislation. Three years, one may say, is too short a marriage for the contributions in many cases to be regarded as equal. Should there be such strong presumptions in favour of equal sharing of all after-acquired property and should there be such a strong presumption of the part each party plays in a marriage? It is with these comments in mind that I turn to see how Ontario has resolved these questions.

Ontario Family Law Reform Act

The solution to the division of family property upon the termination of a marriage adopted by the Province of Ontario in its *Family Law Reform Act* 1978 is in some respects similar to New Zealand, but in other respects it contrasts sharply. It begins by defining family assets and then providing for a statutory equal sharing of such assets. Exceptions to the equal sharing rule are far more flexible than the New Zealand exceptions. At the other end of the scale, non-family assets are only redistributed upon proof of a contribution by the non-owning spouse, in either work, money or money's worth, towards the acquisi-

[107] [1978] 1 N.Z.L.R. 734.

tion, management and maintenance of the property. And further, in assessing the contribution the court shall not have regard to the relationship of husband and wife, or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. There is an adjustment provision between the two categories of assets. If the equal division of family assets results in an inequitable solution, the court may redistribute the non-family assets to rectify this inequity. In short, then, there is an equal sharing of family assets and a sharing of non-family assets according to a contribution of a financial nature towards, not the marriage, but the property, with an equalising provision to ensure that injustice does not result.

This scheme is set out principally in three sections of the Act. The family assets are defined to include the matrimonial home and property ordinarily used and enjoyed by the spouses and their children for shelter, transportation, household, educational, recreational, social or aesthetic purposes. In short, this is the home and property used and enjoyed by the spouses whilst residing together for a number of specific purposes.[108] This property then, on a decree nisi or when the parties are separated, is to be shared equally. The equal sharing rule can be displaced by agreement; if it is a short marriage (but as distinct from New Zealand this is not defined in terms of years); or by reference to when the property was acquired or if acquired by inheritance or gift, or by any other circumstance relating to the acquisition of the property which would make it inequitable to share equally. However, by subsection (5), the purpose of the section is explained in that it is to recognise that child care, household management and financial provision are the joint responsibility of the spouses and that inherent in the marital relationship there is a joint contribution entitling the spouses to an equal division of the family assets.[109] Section 8 then provides:

> Where one spouse or former spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property, other than family assets, in which the other has or had an interest, upon application, the court may by order,
>
> (a) direct the payment of an amount in compensation therefor; or
> (b) award a share of the interest of the other spouse in the property appropriate to the contribution,
>
> and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the

108 See s. 3(b).
109 See s. 4.

> acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

The adjustment between the family and non-family assets is provided in section 4(6) where the court shall make a division of any property that is not a family asset where one party has unreasonably impoverished the family assets, or the result of a division of the family assets would be inequitable having regard to the considerations which give rise to an unequal division of family assets and the effect of the assumption by one spouse of the normal marital responsibilities and the ability of the other spouse to acquire, manage or maintain property that is not a family asset.

With respect to family assets in Ontario the legislative intent is clear and, as in New Zealand, the attitude of the court has been to support and give effect to what could only be described as a clear intention. In *Silverstein* v. *Silverstein* Galligan J. commented:

> It seems clear to me that the intention of the legislature of Ontario when it enacted the Family Law Reform Act was that 'family assets' in Ontario are to be divided equally between the spouses on termination of their marriage, regardless of who happens to be the legal owner of the family assets. It is my opinion that the legislature intended to put an end once and for all to the interminable litigation that has been before the courts of this province concerning the ownership of, or interest in, those assets which were jointly used by spouses while living together as a married couple. That intention is made clear by the provision of s. 4(1) of the Act . . . .[110]

Then, after referring to the provisions which enabled an unequal distribution of family assets to be made, he then continued:

> It is my opinion that a court shall be loathe to depart from that basic rule, and it should exercise its power to depart from that rule only in clear cases where inequity would result, having regard to one or more of the statutory criteria set out in paras. (a) to (f). I do not think that the property law as between spouses in this province is now to be vague and uncertain and dependent upon the sense of fairness of an individual judge in an individual case. The legislature is responsible to the people of the province for the enactment of the laws that govern property rights. Judges do not share in that responsibility. It seems to me that the legislature has spoken and expressed its intent clearly and without ambiguity and I can see my duty to apply that law in accordance with the obvious intention of the legislature.[111]

110 (1978) 1 R.F.L. 239 at 255.
111 Id. at 256-257.

With respect to family assets, then, the only question that seems to have arisen in the Ontario courts has been whether a particular asset falls within the definition or not. Apart from the matrimonial home the definition is broadly the use and enjoyment. Accordingly, litigation has included such questions as 'Was a car that was occasionally used by the wife a family asset?'. On the evidence it was found to be so,[112] whereas a doll collection belonging to the wife was not, as it had not been used or enjoyed by the husband.[113] A private rug collection owned by the husband, not used by the family, was also not a family asset,[114] as also a holiday condominium in Florida which, although intended to be used for recreational purposes by the family, had not in fact been so used was held to be neither a family asset nor a matrimonial home.[115]

The next type of litigation experienced in Ontario seems to revolve around showing circumstances in which the equal division of the family assets should not be applied. In *King* v. *King*[116] a marriage of two years duration with the husband remaining on in the matrimonial home and maintaining the payments on it together with the son of the marriage, resulted in a division in his favour of $37,000 to $5,000 in favour of the wife. An unequal division of family assets was made in *O'Reilly's Case*,[117] but in that case there was a house and a partnership in which the husband worked which provided him with his income. The history of the twenty-one year marriage showed that the wife had also worked throughout and assumed by far the greater burden of the household responsibilities. The view of the judges in that case was that it was not a practical solution to divide the non-family asset as this would deprive the husband of his means of support, and accordingly an unequal division of the family asset (the home) was then made to compensate the wife accordingly. As distinct from *O'Reilly*, the cases of *Bregman*[118] and *Silverstein*[119] were cases in which affluent husbands had non-family assets which were capable of division. In *Bregman's Case* the family assets consisted of assets to the value of $655,000 that were divided equally between the parties. In addition the husband had accumulated a private fortune to the value of $2.8 million. It was a marriage of nearly thirty years duration and there had been three children. In that case Henry J. considered the proper interpretation of section 4(6) of the

[112] Coburn v. Coburn (1979) 6 R.F.L. 235.
[113] Boydell v. Boydell (1978) 2 R.F.L. 121.
[114] Bregman v. Bregman (1979) 7 R.F.L. 201.
[115] Taylor v. Taylor (1979) 6 R.F.L. 341.
[116] (1979) 9 R.F.L. 294.
[117] (1979) 9 R.F.L. 1.
[118] Supra n. 114.
[119] Supra n. 110.

Act was to enable the court to take into account the history of the domestic role of the wife which enabled the husband to acquire property and therefore enabled the court to then distribute the non-family assets to give effect to the fulfilment of the role of the wife as wife and mother. He went on to say:

> I have carefully considered the provisions of s. 4(6) of the Family Reform Act. In my opinion, it imports a new concept into the family law which recognises the importance of the traditional role of a wife and mother in the financial success that her husband achieves. The intention of the legislature is to recognise that contribution in the distribution of the total assets. That contribution is to a greater or lesser degree, except in the case of a wife who had abdicated her responsibility as defined in s. 4(5), invariably present. In very many cases, because the assets will take account of the wife's contribution adequately. But where the accumulation of the assets by the husband is significantly in excess of the family assets, some further distribution of non-family assets may be necessary to recognise adequately the wife's contribution to their acquisition by the performance of her domestic role (quite apart from any more direct contribution mentioned in s. 8, which, as I find, is not present here). The inequity in these circumstances may therefore arise because division of the family assets is inadequate to reflect the full extent of the role of the wife and mother in the husband's financial success.[120]

The result was that the wife received an award of a further $300,000 from the non-family assets to compensate her for this part that she had played in the marriage.

The three schemes in the three different jurisdictions have many points of similarity and many points of contrast. They move from the discretionary system of Australia through to a middle position taken up in the Ontario statute to the firmest of all in New Zealand. As far as family assets are concerned, the position arrived at by the case law in Australia and by the statutory provisions in the other two jurisdictions is not too dissimilar. There is an equal recognition of the part played by both parties to the marriage. In the normal run of marriages with the usual family assets this will result in an equal division—in Ontario and New Zealand by virtue of the strong statutory presumptions; in Australia the same result might well be arrived at but only after a detailed examination of the history of the marriage. The point of difference is that it does not appear in New Zealand and Ontario that the future needs of the parties are necessarily taken into account when redistribut-

120 Supra n. 114.

ing property, whereas in Australia this is the case. Maintenance in those two jurisdictions seems to be separate from the redistribution of property. It is a significant consideration in Australia. Non-family assets in Australia and New Zealand (apart from separate property) fall to be determined by contributions, whereas on the face of it in Ontario this is restricted to financial contributions. But by virtue of the compensating provisions, however, non-financial contributions gain recognition. The statutory provisions in Ontario and New Zealand do, however, have the virtue of placing the onus on a party who seeks unequal division, and not only an onus but a heavy one. Thus must have the benefit of eliminating a considerable amount of unnecessary litigation. To an extent it does introduce a greater degree of certainty and predictability in the law, which must be desirable.

Conclusions

Each one of the systems that I have examined begins with the concept of separate property, with the hallmark of such systems, namely the independence of administration and disposal. Each one of the systems then imports in a different way some of the concepts of the community system when the marriage has come to an end. This is not community of property strictly so called, if there is any universal system of community of property, but a system of deferred community or 'equalisation of assets' upon the marriage terminating.

It is at this point that we see different approaches as to how, at the end of a marriage, the property the parties then own should be reallocated. All the systems have as their underlying theme or policy that at the conclusion of a marriage the strict adherence to the separation of property system may well work an injustice; that it is appropriate at that point of time to re-examine what property the parties have, how they acquired it, who then is legally entitled to it, and to see whether a readjustment should not be made. The difference that then emerges is how the re-adjustment is effected. Each system, presumably, reflects the needs and the attitudes of the society for which it was designed. Australia currently has a system with the greatest possible flexibility which enables the maximum number of considerations to be taken into account, and a maximum number of variable answers to any particular case. This may be because this is the way in which the Australian community wants it. However, I believe the time has now come for Australia to carefully examine systems which reduce this flexibility, at least with respect to some categories of property. The community has an interest in predictability and certainty in the law and also an interest in reducing the cost of litigation, and the cost of administration of the law.

Although it is often said that the law does not shape or mould community attitudes, this is one area in which it would be surprising if the Australian community has not come to recognise that, with respect to family assets, the expectation of parties to a marriage on it coming to an end is that such assets should be shared equally. With respect to other assets I would still favour the retention of a greater degree of flexibility than is currently shown in the other systems I have examined above.