

# THE MATRIMONIAL PROPERTY ACT 1976 — A QUICK GUIDE —

by

P.R.H. Webb, M.A., LL.B., LL.D.

Professor of Law in the University of Auckland.

## A. INTRODUCTORY

### [i] Preamble

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

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

### (ii) Commencement etc.

**The Act came into force on 1 February 1977: section 1 (2). It binds the Crown: section 3. Nothing in it is to apply to any Maori land within the meaning of the Maori Affairs Act 1953: section 6.**

### (iii) Rules

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

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1. Those not already familiar with the **Report of a Special Committee on Matrimonial Property (1972)** may care to peruse it. The new Act goes a long way to implement the **Report**. It is undoubtedly better than the Matrimonial Property Act 1963, which is repealed.

relation to civil proceedings for the time being in force under the 1947 Act or the 1908 Act, as the case may require, are to apply, with all necessary modifications, to proceedings under the 1976 Act.

**(iv) Minors**

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

**(v) De Facto Spouses**

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

**(vi) Privacy of Proceedings**

**Proceedings under this Act, as under the previous legislation, may be in private:** section 35 (1) states that any application or appeal under the Act is to be heard in private if the husband or the wife so desires it. <sup>2</sup>

**(vii) Evidence**

It had been thought by many people that the Court ought to be permitted to receive evidence that would normally be not admissible. **Section 36 now enacts that in all proceedings under the 1976 Act, and whether by way of hearing in the first instance or by way of appeal or otherwise howsoever, the Court may receive any evidence that it thinks fit, whether it is otherwise admissible in a Court of Law or not.** <sup>3</sup>

**(viii) Appeals**

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

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

**(ix) Costs**

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

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

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

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

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

It is not the function of this paper to deal with creditors' protection and remedies or with insolvency. No treatment is therefore given of the legal position of spouses' creditors or of the Official Assignee when a spouse is bankrupt, as to which section 20<sup>4</sup> of the 1976 Act should be consulted. Reference should also be made to section 46 concerning the protection of mortgagees (which resembles section 8 of the Matrimonial Property Act 1963, as amended by section 10 of the amending Act of 1968). Section 47 of the 1976 Act, (which provides that agreements etc. between spouses with respect to their matrimonial property and intended to defeat creditors shall be void), should also be referred to, note being taken of the point that nothing in that section is to apply to any gift by one spouse to the other if the gift is made upon a customary occasion and is reasonable in amount having regard to the donor's means and liabilities: see section 47 (2).

**B. TRANSITIONAL PROVISIONS**

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

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

On the other hand, where such proceedings have been filed but the

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4. Nothing in section 20 is to derogate from the provisions of the Joint Family Homes Act 1964: see section 20 (8) and see *Re Berry* [1976] 2 NZLR 449.

It could well be that section 20 will cause difficulties for Official Assignees and that flaws may become apparent in its application. However, it is closer than was the original approach to the Scandinavian law and to the proposals of the various Law Reform Commissions in Canada and we should therefore hope that it will prove to be on the right lines.

5. Which states that nothing in the Act is to affect the validity of any agreement entered into before 1st February 1977 by way of settlement of any question that has arisen in relation to matrimonial property and every such agreement shall have effect as if the Act had not been passed.

**hearing has not commenced before 1st February 1977, the proceedings are to be continued, according to section 55 (3), under the 1976 Act.**

### **C. (I) THE NEW ACT IS TO BE A CODE**

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

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

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

It is important to note that **every enactment must, unless it or the 1976 Act itself otherwise expressly provides, be read subject to the 1976 Act: section 4 (3). Further, where any question relating to "matrimonial property" — a term which is defined by section 8 and explained later — arises between husband and wife, or between either or both of them and any other person, in any other proceedings, the Court is to decide the question as if it had been raised in proceedings under the 1976 Act: section 4 (4)<sup>7</sup>.** It is, however, to be noted that nothing in section 4 is to affect (i) the law applicable where a spouse is acting as trustee under a deed or will; or (ii) the law relating to the imposition, assessment and collection of estate duty: section 4 (5), which also states that, for its purposes, every enactment and rule of law or of equity is to continue to operate and apply accordingly as if section 4 had not been enacted.

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

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

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

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6. See Bromley & Webb, *Family Law* (1974) pp. 778-779; 779-780; 781 n (g); 831-832, and cf. *Robinson v. Public Trustee* [1966] NZLR 748.

7. Cf. *Fitkevich v. Fitkevich* [1976] 2 NZLR 414 (CA).

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

#### D. CONFLICT OF LAWS

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

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

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

#### E. DEFINITIONS

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

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

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

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

- requires, a **“child of the marriage”** means any child of the husband and wife; and includes any other child (whether or not a child of the husband or of the wife) who was a member of the family of the husband and wife at the time when they ceased to live together, or at the time immediately preceding an application under this Act if at that time they had not ceased to live together. <sup>10</sup>. The same provision states that
- (ii) a **“Commonwealth Country”** means a country that is a member of the Commonwealth of Nations; and includes every territory for whose international relations the Government of any such country is responsible; and also includes the Republic of Ireland as if that country were a member of the Commonwealth of Nations.” (A **“Commonwealth country”** has been held to include the United Kingdom: see *Wyatt v. Wyatt* [1968] NZLR 811).
  - (iii) The expression, (and a very important one too), **“contribution”** has been assigned a special meaning by section 18 of the 1976 Act: see section 2 (1). It did not appear in the original bill and is picked up later on. The term **“Domestic Assets”**, which appeared in the original bill, has disappeared, as has the term **“General Assets.”**
  - (iv) The term **“Court”** means a Court having jurisdiction in the proceedings by virtue of section 22 of the 1976 Act: section 2 (1).
  - (v) A **“dwelling house”** includes, by virtue of section 2 (1), **“any flat or town house, whether or not occupied pursuant to a licence to occupy within the meaning of the Companies Amendment Act 1964.”**
  - (vi) A further important definition to be mastered is that of **“family chattels.”** Section 2 (1) states that these mean:—
    - (a) . . . chattels owned by the husband or the wife or both of them and which are —
      - (i) Household furniture or household appliances, effects, or equipment; or
      - (ii) Articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment; or
      - (iii) Motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes; or
      - (iv) Accessories of a chattel to which subparagraph (iii) of this paragraph applies; or
      - (v) Household pets; and
    - (b) Includes any of the chattels mentioned in paragraph (a) of this definition which are in the possession of the husband or the wife pursuant to a hire purchase or conditional sale agreement or an agreement for lease or hire; but

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

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

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

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

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

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

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

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

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

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

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

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11. “Habitual residence” in a country has been considered as meaning a regular physical presence which endures for some time: *Cruse v. Chittum* [1974] 2 All ER 940.

Basically, no doubt, where a couple spend all but the holidays at their home in Auckland and their holidays at their bach, the former only is the “matrimonial home.”

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

- (xii) Another, extremely important phrase that appears in section 2 (1) is "matrimonial property". It has the special meaning given to it by section 8 of the Act, which will be picked up later.
- (xiii) Also to be noted is the definition accorded by section 2 (1) to the word "owner". An "owner", in respect of any property, means the person who, apart from this Act, is by virtue of any enactment or rule of common law or equity the beneficial owner of that property; and "to own" has a corresponding meaning."
- (xiv) Lastly, we must deal with the word "property". Section 2 (1) defines this as including real and personal property and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest; and the term "asset" has a like meaning.<sup>12</sup>. This is not a great departure from the definition of "property" in section 2 of the Matrimonial Property Act 1963.
- (xv) The term "separate property", which section 2 (1) of the 1976 Act mentions, is a new concept, with the meaning accorded to it specially by section 9 of the 1976 Act. This will be picked up subsequently, but let it be said here that it has nothing to do with the old law as to the separate estate of a married woman.<sup>13</sup>.

## F. IMPORTANT RELEVANT DATES DEFINED BY SECTION 2.

### (i) Ascertaining the value of property

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

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

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

13. See Bromley & Webb, op. cit., supra, p. 762.

14. Possibly some of the cases decided under the Matrimonial Property Act 1963 and described in Bromley & Webb, op. cit. supra, pp. 821-824, will still apply to the exercise of the discretion. cf. *Harper v. Harper* [1974] Recent Law 253 (value at death).



the case of *Muirhead v. Muirhead*.<sup>15</sup> The parties left one another in 1970. By 1972 it was clear that their dispute was not going to be settled. The wife never filed her application until 1974. This caused Roper J. to say: "I would not like to encourage the view that an applicant can sit back and choose his time for making an application, being influenced perhaps by trends in the market, and meanwhile lulling the other party into the sense of false security."<sup>16</sup>

**(ii) Ascertaining the share of a spouse in the matrimonial property.**

By virtue of section 2 (3), for the purposes of the Act **the share of a spouse in the matrimonial property is, subject to section 21, to be determined as at the date on which the parties ceased to live together as husband and wife. If they have not ceased to live together as husband and wife, then the relevant date is the date of the application to the Court.** These rules are rigid; no discretion is given to depart from them. The question is, simply, are the parties living together as spouses or not?

## **G. THE NATURE OF MATRIMONIAL PROPERTY**

It is essential to know what constitutes "**matrimonial property**". Section 8 states what it consists of —

- (a) The matrimonial home whenever acquired; and**
- (b) The family chattels whenever acquired; and**
- (c) All property owned jointly or in common in equal shares by the husband and the wife; and**
- (d) All property owned immediately before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and the wife; and**
- (e) Subject to subsection (3) to (6) of section 9 and section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and**
- (f) Any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (e) of this section; and**
- (g) Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at**

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15. (1976) 2 N.Z. Recent Law (NS) 225.

16. His Honour fixed the wife's interest on the 1974 value; he gave his judgement on 8 June 1976. This seems fair enough.

the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and

- (h) Any policy of insurance in respect of any property described in paragraphs (a) to (e) of this section; and
- (i) Any pension, benefit or right to which either the husband or the wife is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage; and
- (j) All other property that the spouses have agreed, pursuant to section 21 of the Act, shall be matrimonial property; and
- (k) Any other property that is matrimonial property by virtue of any other provision of this Act or by virtue of any other Act."

It is to be observed that, by section 2 (4), it is provided that where the classification of any property as matrimonial property or as any particular type of matrimonial property depends on the use to which it has been put, that classification is to be determined by the use to which it was put by the parties to the marriage, or, if they have ceased to live together as husband and wife, to the use to which it was being put before the parties to the marriage ceased to live together as husband and wife. This is a clarifying provision devised by Parliamentary Counsel to meet succinctly a number of separate amendments suggested by members of the Statutes Revision Committee.

#### **Difficulty over section 8(i)**

It was the clear wish of the Select Committee that superannuation rights should be part of the matrimonial property. Obviously, it is fair enough that, to the extent that contributions to a superannuation scheme come out of the matrimonial property, such as wages or salary earned during cohabitation, the proceeds should be divisible. On the other hand, there may well be formidable difficulties in reaching a fair and workable apportionment when it comes to the point.

It is to be noted that the provision would allow a man who marries when already a pensioner to keep his pension. In such a case his wife would have to rely on the ordinary law of maintenance.

## **H. NATURE OF SEPARATE PROPERTY**

It is equally essential to be able to tell what property is separate property. In this context, we must look to section 9 for guidance. The main rule, to be found in section 9 (1), is that **separate property means all property of either spouse which is not matrimonial property**. Subject to section 9 (6) and to sections 8 (e) and 10 all property acquired out of separate property, and the proceeds of any disposition of separate property will be separate property: section 9 (2). Subject again to subs. (6), any increase in the value of separate

property, and in any income or gains derived from such property, will be separate property unless the increase in value or the income or gains (as the case may be) were attributable wholly or in part — (i) to actions of the other spouse; or (ii) to the application of matrimonial property — in either of which events the increase in value or the income or gains (as the case may be) shall be matrimonial property: section 9 (3).

Specially requiring note — and remembering, for it would be easy to overlook it — are the contents of section 9 (4). It states that **all property acquired by either the husband or the wife while they are not living together as husband and wife is to be separate property unless the Court considers that it is just in the circumstances to treat such property or any part thereof as matrimonial property.**

Section 9 (5), not perhaps suprisingly, states that, subject to section 21, all property acquired by either spouse after an order of the Court has been made defining their respective interests in the matrimonial property, or dividing or providing for the division of that property, is to be separate property. However, there is a proviso to the effect that, where the matrimonial property has been divided upon the bankruptcy of a spouse, (a) the matrimonial home and any family chattels acquired subsequent to that division may be matrimonial property; and (b) any other property acquired by either the husband or the wife after the discharge of that spouse from bankruptcy may be matrimonial property.

Lastly, subject to section 10, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the spouse owning, receiving, or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either the husband or the wife in any property referred to in section 8 will be matrimonial property: section 9 (6).

#### **I. THE POSITION WHERE PROPERTY IS ACQUIRED BY SUCCESSION, BY SURVIVORSHIP, AS A BENEFICIARY UNDER A TRUST OR BY GIFT.**

**Property acquired by succession or by survivorship or as a beneficiary under a trust or as a gift from a third person is not matrimonial property: section 10 (1). However, the same subsection goes on to provide that if, with the express or implied consent of the spouse who received it, the property or the proceeds of any disposition of it have been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property, it or they will be matrimonial property.**

**Property acquired by gift from the other spouse will not be matrimonial property unless the gift is used for the benefit of both spouses: section 10 (2).**

It must be noted that notwithstanding the two subsections mentioned

above and section 9 (4), both the matrimonial home and the family chattels will be matrimonial property unless designated separate property by an agreement made in accordance with section 21.

## J. THE NATURE OF "CONTRIBUTIONS TO THE MARRIAGE PARTNERSHIP" BY SPOUSES, AND MISCONDUCT.

The previous legislation and the numerous reported cases thereon can have left few, if any, of us in doubt: a fuller and more comprehensive definition of "contribution" was long overdue. We now have it in section 18

(1) which explicitly enumerates "all or any" of these as being a "contribution" —

- (a) The care of any child of the marriage or of any aged or infirm relative or dependant of the husband or the wife: ✓
- (b) The management of the household and the performance of household duties:
- (c) The provision of money, including the earning of income, for the purposes of the marriage partnership:
- (d) The acquisition or creation of matrimonial property, including the payment of money for those purposes:
- (e) The payment of money to maintain or increase the value of — (i) the matrimonial property or any part thereof; or (ii) the separate property of the other spouse or any part thereof:
- (f) The performance of work or services in respect of — (i) the matrimonial property or any part thereof; or (ii) the separate property of the other spouse or any part thereof:
- (g) The foregoing of a higher standard of living than would otherwise have been available <sup>17</sup>: ✓
- (h) The giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support which — (i) enables the other spouse to acquire qualifications <sup>18</sup>; or (ii) aids the other spouse in the carrying on of his or her occupation or business <sup>19</sup>. ✓

This is obviously a key provision of the Act.

Stopping at this point, it is to be observed that what we are being given here is a revolutionary definition — of contribution to the marriage partnership. We are not being afforded a definition of contribution to

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17. See *J. v J.* [1971] NZLR 1020.

18. e.g. the law student's wife who supports him through law school; and see *Hounsell v. Hounsell* (1976) 1 NZ Recent Law (NZ) 99.

19. e.g., the wife in *Ev.E.* [1971] NZLR 859 (CA) who helped her husband in one of his businesses in the early years of their marriage; *Yarrall v. Yarrall* [1974] Recent Law 227.

**property.** It is submitted that we shall have to change our ways of thinking, because we have become enured by the philosophy engendered by the former Act, which led us to think in terms of the contributions a spouse made to specific items of property in dispute. Often this was the matrimonial home and the contribution was, e.g., redecorating, replanning and modernising <sup>20</sup>, gardening <sup>21</sup>, capitalising the family benefit <sup>22</sup> etc.

It might be thought that money contributions, whether under subsection (1) (c) or otherwise, are to be presumed to be of greater value than contributions of a non-monetary nature. Section 18 (2) dispels this notion by stating emphatically that there is no such presumption.

Further, in determining the contribution of a spouse to the marriage partnership, subsection (3) enacts that any misconduct of that spouse is not to be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property. The Court is, however, empowered — but not compelled — to have regard to such misconduct in determining what order it should make under any of the provisions of sections 26, 27, 28 and 33. (These relate respectively to the Courts' power to order a settlement of the matrimonial property or any part thereof for the benefit of the children of the marriage, to make an occupation order in respect of the matrimonial home, to make a vesting order in respect of a tenancy or one or more of the numerous ancillary orders listed in section 28).

#### **K.(i) THE DIVISION OF THE MATRIMONIAL HOME AND THE FAMILY CHATTELS.**

This is governed by section 11. By subsection (1), **subject to the provisions of section 11, upon the division of the matrimonial property each spouse is to share equally in (a) the matrimonial home; and (b) the family chattels.** By subsection (2), notwithstanding anything in subsection (1) (a), where (a) the husband or the wife or both of them have sold the matrimonial home with the intention of applying the proceeds of the sale wholly or in part towards the acquisition of another home as a matrimonial home; and (b) that home has not been acquired; and (c) not more than two years have elapsed since the date when those proceeds were received or became payable, whichever is the later — then each spouse will share equally in the proceeds as if they were the matrimonial home. Action is therefore necessary within the two year period.

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20. Cf. *A v.A* [1976] NZLR 731; *Yarrall v. Yarrall* [1974] Recent Law 227.

21. *Burgess v. Burgess* [1968] NZLR 65.

22. See, e.g. *Kv.K* [1971] N.Z.L.R. 1075, 1078; *Clark v. Norris* (1975) 1 NZ Recent Law (NS) 211; *Cooper v. Cooper* [1972] Recent Law 80; *Laird v. Parsons* (1976) 2 NZ Recent Law (NS) 33; *Atkins v. Atkins* (1976) 2 NZ Recent Law (NS) 226 for the various attitudes taken. and see *Haldane v. Haldane* (1975), (unrep.) (P.C.).

Section 11 (3) is important. Where subsection (2) is inapplicable and either there is no matrimonial home at all or, if there is, it is not owned by the husband or the wife or both of them, then the Court must award each spouse an equal share in such part of the matrimonial property as it thinks just in order to compensate for the absence of an interest in the matrimonial home.

Section 11 is subject to sections 12, 13, 14 and 16, which are discussed below: section 11 (4).

**(ii) HOMESTEADS AND SECTION 12**

Section 12 (1) provides that where the matrimonial home is a homestead which is owned by the husband or the wife or both of them, section 11 (1) (a) is not to apply. Each spouse instead shares equally in a sum of money equal to the equity of the husband or the wife or both or them in the homestead. Any spouse who does not have a beneficial interest in the land on which the homestead is situated will, until his or her share of that sum is paid or is otherwise satisfied, be deemed to be beneficially interested in that land.

For the purposes of subsection (1), the value of the homestead is to be determined in accordance with an apportionment of the capital value of the land on which the homestead is situated: see subsection 12 (2). This also provides that the apportionment is to be made and the capital value shall be determined by the Valuer-General on the requisition of either spouse as at the date of the making of the valuation. Either spouse may appeal to the Administrative Division of the Supreme Court against any apportionment made or any value determined by the Valuer-General under this section.

Section 12 is subject to sections 13, 14 and 16 of the Act: see subsection (3).

**(iii) MARRIAGE OF SHORT DURATION AND SECTION 13.**

A marriage of short duration is defined by section 13 (3) as meaning a marriage in which the spouses have lived together as husband and wife for a period of less than 3 years. In the computation thereof, any period of resumed cohabitation with the motive of reconciliation may be excluded if it lasts for not more than three months: *ibid*. If the Court, having regard to all the circumstances of the marriage considers it just, then a marriage may still be of short duration where the spouses have lived together as husband and wife for a period longer than 3 years: *ibid*. This provision would appear to have been prompted by a desire to preserve sufficient flexibility to take care, in particular, of problems created by the interpretations of the phrase "living together."

The point of this is that section 13 (1) states that where a marriage has been of short duration, sections 11 and 12 do not apply —

- (i) to any asset owned wholly or substantially by one spouse at the date of the marriage; or
- (ii) to any asset that has come to one spouse after the date of the marriage by succession or by survivorship or as the beneficiary under a trust or by gift from a third person; or

(iii) where the contribution of one spouse to the marriage partnership has clearly been disproportionately greater than that of the other spouse.

In every case to which subsection (1) applies, the share of each spouse in the matrimonial property must, on the division of that property, be determined in accordance with the contribution of each to the marriage partnership: section 13 (2). There therefore may be quite a departure from the usual equal sharing regime.<sup>23</sup>

(iv) **“EXTRAORDINARY CIRCUMSTANCES” AND SECTION 14.**

Where there are extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 applies (i.e. the matrimonial home, family chattels etc) or of any sum of money pursuant to section 12, then the share of each shall, notwithstanding anything in sections 11 or 12, be determined in accordance with the contribution of each to the marriage partnership. There may thus again be a departure from the equal sharing regime, and it is to be noted that the words “repugnant to justice” are strong words and were intended to be strong. It would appear that the equal-sharing rule is to be departed from in circumstances that really are truly extraordinary, and we shall have to see what interpretation the Courts will place upon the phrase. It is suggested that the words are designed to catch the really outrageous case of unequal effort, and not the girl in rags who is lucky enough to marry an established millionaire and then “pulls her weight”.

(v) **OTHER RULES CONCERNING THE DIVISION OF MATRIMONIAL PROPERTY.**

(a) **Dividing the balance of matrimonial property**

We have seen that sections 11 and 12 deal with the division of the matrimonial home and family chattels and a homestead. What, then, is to happen to the rest of the matrimonial property? Section 15 (1) states that each spouse is to share equally in it unless his or her contribution to the marriage partnership has clearly been greater than that of the other spouse. Where, pursuant to this rule, the spouses do not share equally in the matrimonial property or any part of the matrimonial property, the share of each in the matrimonial property or in that part of it is to be determined in accordance with the contribution of each to the marriage partnership: section 15 (2).

Section 15 is to be subject to sections 16 and 17, which are discussed immediately below: see subsection (3).

(b) **Making Adjustments when Each Spouse owns a Home at Date of Marriage.**

It is not by any means every homeownership man or woman who marries

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23. Cf. *Ferguson v. Ferguson* (1975) 1 NZ Recent Law (NS) 137; *Gawler v. Gawler* (1976) 2 NZ Recent Law (NS) 124.

another homeowner. However, it is possible that such might be the case. Consequently, section 16 provides that notwithstanding anything in sections 11 to 15, where, at the date of the marriage, each spouse owned a home capable of becoming a matrimonial home, but the home (or the proceeds of the sale thereof) of only one spouse is included in the matrimonial property at the time when the property falls to be divided under the 1976 Act, the Court may make such adjustments to the shares of the spouses in any of the matrimonial property (including the matrimonial home and the family chattels) as it thinks just to compensate for the inclusion of the home of only one spouse in the matrimonial property.

**(c) The effect of sustenance or diminution of separate property.**

Section 17 is a kind of *jus talionis*. According to subsection (1), notwithstanding anything in sections 11 to 15, where the separate property of one spouse has been "sustained" by — (i) the application of matrimonial property; or (ii) the actions of the other spouse — the Court may increase the share to which the other spouse would otherwise be entitled in the matrimonial property. **Alternatively**, it may order that the spouse pay to the other a sum of money by way of compensation.

On the obverse side of the coin, we find that the wages of sin may be diminution of the guilty party's share, for subsection (2) provides that, notwithstanding anything in sections 11 to 15, where the separate property of one spouse has been materially diminished in value by the deliberate actions of the other spouse, the share to which the other spouse would otherwise be entitled in the matrimonial property **may** — not **must** — be diminished to such extent as the Court thinks just.

**L. THE EFFECT OF THE ACT WHILE PROPERTY IS UNDIVIDED.**

One might be pardoned for thinking that the Act prevents married people from dealing with matrimonial property and/or family chattels because their marriage has, as it were, "frozen" them. This is not in fact the case, for section 19 enacts that, except as otherwise expressly provided in the Act, **nothing in the Act is to (a) affect the title of any third person to any property, or affect the power of either spouse to acquire, deal with or dispose of any property or to enter into any contract or other legal transaction whatsoever as if the Act had not been passed** or; (b) limit or affect the operation of any mortgage, charge, or other security for the repayment of a debt given by either spouse over property owned by him or her and every such instrument is to have the same effect as if the 1976 Act had not been passed.

**M. CONTRACTING OUT, AND INTERSPOUSAL GIFTS**

Parliament appears to have realised that the régime laid down by the Act as to property sharing and the settlement of property disputes may not suit the books of all married couples — or, indeed, the legal advisers of some of them. The legislature has therefore enacted section 21. Subsection (1)



provides that, **subject to section 47** (whereunder certain agreements etc. to defeat creditors are void), **a husband and wife, or any two persons in contemplation of their marriage to each other, may, for the purposes of contracting out of the provisions of the 1976 Act, make such agreement with respect to the status, ownership and division of their property (including future property) as they think fit.** This would seem to encourage the making of a new form of marriage settlement.

The settlement of property disputes is positively encouraged by section 21 (2). **Again subject to section 47, a husband and wife may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the status, ownership and division of that property as they think fit.** Subsection (3) provides that, without limiting the generality of subsections (1) and (2), any such agreement may —

- (a) provide that any property or any class of property shall be matrimonial property or separate property; or
- (b) define the share of the matrimonial property or any part thereof that each spouse shall be entitled to upon the separation of the spouses or upon the dissolution of the marriage otherwise than by death; or
- (c) provide for the calculation of such share and prescribe the method by which the matrimonial property or any part thereof may be divided.

It is sad to think of starry-eyed newly-weds and engaged couples thus prognosticating trouble, or having trouble foreseen for them, but, if successful avoidance of litigation is to be aimed at, these provisions are worth it <sup>24</sup>

Certain very important conditions are, as might be anticipated, set out in the section. They are as follows:—

1. **Every agreement entered into under section 21 must be in writing and signed by both parties:** subsection (4).
2. **Each party to an agreement must have independent legal advice before signing the agreement:** subsection (5). <sup>25</sup>
3. **The signature of each party to an agreement must be witnessed as required by subsection 6.** Who is to witness depends on where the

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24. There is an important tail piece, appreciated only if one looks at the end of the Second Schedule to the Act. A new subsection (5) is added to section 79 of the Matrimonial Proceedings Act 1963 to the effect that the Court is not to exercise its powers under section 79 so as to defeat or vary any agreement entered into under section 21 of the 1976 Act between the spouses unless it is of the opinion that the interests of any child of the marriage so require. As to section 79, see Bromley & Webb, *op. cit.*, *supra*, pp. 700 et seq., and *Hammond v. Hammond* [1974] 1 NZLR 135, 137.

25. Quaere, from a practising New Zealand lawyer? What if the marriage takes place in Iceland between two expatriate New Zealanders desirous of contracting out in case, in years to come, they may decide to come home?

agreement is signed. If signed in New Zealand, the witness must be a solicitor of the Supreme Court of New Zealand; if in a Commonwealth country outside New Zealand, the witness must be a solicitor entitled to practise in that country or a notary public; if signed in a country that is not a Commonwealth country, the witness must be a notary public. In every case, the witness must certify that, before the party whose signature he has witnessed signed the agreement he has explained to that party the effect and implications of the agreement. <sup>26</sup>

It must be understood that subsections (4) to (6) are far from being empty verbiage. **An agreement will be void where these subsections have not been complied with, or when the Court is satisfied that it would be unjust to give effect to the agreement: section 21 (8): Nevertheless, under subsection (9), notwithstanding non-compliance with subsections (4) to (6), the Court may in the course of any proceedings under the Act, or on application made for the purpose, declare that an agreement shall have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.**

The next question obviously will be: In deciding whether it would be "unjust" to give effect to an agreement, what factors will the Court have regard to? Subsection (10) provides a list:—

- "(a) The provisions of the agreement;
- (b) The time that has elapsed since the agreement was entered into;
- (c) Whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was entered into. <sup>26a</sup>
- (d) Whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was entered into (whether or not those changes were foreseen by the parties <sup>27</sup>);
- (e) Any other matters that the Court considers relevant."

There are other miscellaneous matters arising out of this section. One question which will obviously spring to mind is that of the minor's capacity to contract out. The legal position is to be found in subsection (7). **An agreement entered into by a minor, and every instrument executed by any minor for the purpose of giving effect to any such agreement, is as valid and effectual as if the minor were of full age. However, where the minor has not attained the age of 18 and is not, and has not been, married, an agreement will not be valid without the Court's approval. This may be given, upon**

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26. One can imagine the difficulty of, say, a Belgian notary in Brussels not versed in New Zealand law explaining the 1976 Act to a client who has asked him to witness an agreement under this section.

26a Cf *Richards v. Richards* [1972] NZLR 222.

27. See the discussion in Bromley & Webb, *Op. cit. supra*, pp. 619-621.

**application by the minor, before or after the agreement has been signed by the parties.**

It is also to be noted that nothing in subsections (8) or (10), which were referred to above, is to limit or affect any enactment or rule of law or of equity whereby a contract is void, voidable or unenforceable on any other ground: subsection (11). **In the event of an agreement purporting to be made under this section being void or avoided or unenforceable the provisions of the Act (other than the section under review) are to have effect as if the agreement had never been made:** subsection (12).

Nothing in the section is to limit or affect the capacity of a husband or a wife to agree to acquire or hold any property jointly or in common, whether or not together with any other person, and whether legally or beneficially: subsection (13).

Subsection (14) is of extreme importance in the context of interspousal gifts. **Nothing in the section is to limit or affect the power of a husband and a wife to make gifts to each other; and notwithstanding any rule of law a gift between spouses may be made orally or in writing and does not require to be made by deed or by delivery.** There would seem to be likely to be difficulties of proof here, at any rate in the case of oral gifts. <sup>28</sup>

**Any matrimonial property to which an agreement under the section does not apply will be subject to the provisions of the Act:** subsection (15).

Lastly, it must be understood that there is one situation in which an agreement under this section can be overridden. **An order under section 26 of the Act (ordering a settlement of matrimonial property on children of the marriage) may be made and is to have effect notwithstanding any agreement under section 21:** subsection (16).

## **N. IN WHAT COURT WILL PROCEEDINGS UNDER THE ACT BE TAKEN?**

The basic idea is that there is to be concurrent jurisdiction. By section 22 (1) **the Supreme Court and a Magistrate's Court are each to have jurisdiction in proceedings under the 1976 Act, but a Magistrate's Court is not to have jurisdiction to entertain any application in respect of any matrimonial property where proceedings under the Act relating to or**

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28. For the law as to gifts of chattels, see Bromley & Webb, *op. cit.*, supra, pp. 780-783, and especially the case of *Re Cole* [1964] Ch. 175 (CA) (oral "gift" of furniture in a house by husband to wife held invalid for lack of delivery), which would seem now to cease to be good law in New Zealand as to interspousal gifts *inter vivos*. Consider also *Spellman v. Spellman* [1961] 2 All E.R. 497 (CA). It might well be thought that such an important provision should have been contained in a section of its own and not have been "tucked away" here. However, we should be grateful for the fact that, once any problems of proof is dispelled, a genuine interspousal gift will now not be stultified by the rather artificial rules with which we have become familiar. No doubt the Courts will look hard at allegations of large gifts.

**affecting that property are pending in the Supreme Court at the date at which the application is made.** <sup>29</sup>

This notwithstanding, however, if a Magistrate is of the opinion that any proceedings under the Act, or any question in any such proceedings would be more appropriately dealt with in the Supreme Court, he may, under subsection (2), upon application by any party to the proceedings or without any such application, refer the proceedings or the question <sup>30</sup> to that Court.

By subsection (3), the Supreme Court, upon application by any party to proceedings pending under the 1976 Act in a Magistrate's Court, **must** order the removal of the proceedings into the Supreme Court unless it is satisfied that the proceedings would be more appropriately dealt with in a Magistrate's Court. Where the proceedings are removed in this way, they are to be continued in the Supreme Court as if properly and duly started there.

#### **O. WHO MAY APPLY?**

**An application may be made to the Court under the Act by the persons listed in section 23. They are:—**

- (i) Either spouse;**
- (ii) Both spouses jointly;**
- (iii) The Official Assignee in Bankruptcy of the property of either spouse;**
- (iv) Any person on whom conflicting claims in respect of property are made by the husband and the wife, e.g. a bank with which the spouses have a joint account about which there is a dispute.**

#### **P. THE TIME FOR COMMENCEMENT OF PROCEEDINGS.**

Obviously there has to be some kind of limitation rule and it appears in section 24. By subsection (1), an application made after a marriage has been dissolved by divorce or dissolution of a voidable marriage or after a decree of nullity of a void marriage has been made has got to be made before the expiration of **twelve months** after the date of the making of the decree absolute of divorce or of dissolution of voidable marriage or the decree of nullity. Subsection (2) enables the Court nevertheless to extend the time for making an application after hearing the applicant and such other persons having an interest in the property that would be affected by the order as the Court thinks necessary. This power will extend to cases where the time for

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29. See *Maniadis v. Maniadis* [1967] NZLR 885.

30. It is not easy now to say what will be a "question" under this Act. It could very well have a wider meaning than it had under the repealed Act of 1963. Accordingly what is said in *Bromley & Webb*, op. cit., supra, at pp. 817-818 and in cases decided after those pages were written, may have to be read with this condition in mind.

applying has already expired, including cases where it expired before the commencement of the 1976 Act.<sup>31</sup>

#### **Q. WHAT ARE THE CIRCUMSTANCES IN WHICH THE COURT MAY MAKE AN ORDER?**

Where the Court is applied to under section 23, it may, subject to the provisions of the Act, make, under section (1); (a) such order as it considers just determining the respective shares of each spouse in the matrimonial property or any part thereof, or dividing the matrimonial property or any part thereof between the husband and the wife; (b) any other order that it is empowered to make by any provision of the Act.

The Court cannot, however, make an order under subsection (1) unless it is satisfied that subsection (2) is complied with. This requires that (a) the spouses are living apart (whether or not they have continued to live in the same residence) or are separated; or (b) the marriage of the spouses has been dissolved; or (c) one spouse is, by gross mismanagement or by wilful or reckless dissipation of property or earnings, endangering the matrimonial property or seriously diminishing its value; or, (d), the husband or the wife is an undischarged bankrupt. These rules are subject to the provisions of subsection (3). The idea behind section 25 (2) (c) comes from Sweden, and has much to commend it.

It is, by virtue of subsection (3), permissible for the Court at any time, subject to the provisions of the Act, to make such declaration or order relating to the status, ownership, vesting, or possession of any specific property as it considers just — and this notwithstanding anything in subsection (2).

#### **R. ORDERS THAT MAY BE MADE UNDER OTHER SECTIONS OF THE 1976 ACT.**

##### **(i) Section 26 and Children**

Subsection (1) requires the Court to have regard to the interests of any minor or dependent children of the marriage. If it considers it just, the Court may make an order settling the matrimonial property or any part of it for the benefit of the children of the marriage or of any of them, and

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31. Cf section 5A of the former Matrimonial Property Act 1963, (which also dealt with applications made after the death of one or both spouses where the marriage had not been terminated or annulled). As to proceedings out of time, see *Erickson v. Erickson* [1972] Recent Law 203; *Wynd v Langl* [1974] Recent Law 323.

There is no need to deal with post mortem applications in the section under review because of the terms of section 5 of the Act, which have already been examined.

**reserving such interest (if any) of the husband or wife or both in the property as the Court considers just.** <sup>32</sup>

By virtue of subsection (2), if, in the Court's opinion, there are special circumstances which render it necessary or expedient that any minor or dependent children of the marriage be represented in any proceedings under the 1976 Act, the Court is empowered to appoint a solicitor or counsel to represent such children. Where any solicitor or counsel is thus appointed, his fees and expenses are to be paid by such party or parties to the proceedings as the Court shall order, or, if the Court so decides, shall be paid out of money appropriated for the purpose by Parliament. <sup>33</sup>

**(ii) Occupation Orders**

Section 27 (1) permits the Court to make an order granting to the husband or the wife, for such period <sup>34</sup> or periods and on such terms and subject to such conditions as the Court thinks fit, the right personally to occupy the matrimonial home or any other premises forming part of the matrimonial property. According to subsection (2), where such an order is made, the person in whose favour it is made is to be entitled, to the exclusion of the other spouse, personally to occupy the matrimonial home or the other premises to which the order relates. An order made under subsection (1) against the husband or wife is, by virtue of subsection (3), to be enforceable against the personal representative of the person against whom it is made, unless the Court otherwise directs — and this

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32. This new power must not be confused with the Court's power to order a settlement of a husband or wife's property on the children of the marriage under section 53 of the Matrimonial Proceedings Act 1963, which remains unaffected; as to this, see Bromley & Webb, *op. cit.*, supra, pp. 755-757. Note, however, the new subsection (5) added to section 79 of the Matrimonial Proceedings Act 1963.

33. Cf. the similar provisions in section 54 of the Matrimonial Proceedings Act 1963 and section 30 of the Guardianship Act 1968.

34. e.g. 2 years, as in *Foley v. Foley* [1973] Recent Law 175.

35. This section replaces section 57 of the Matrimonial Proceedings Act 1963 and is a much simpler version of it. Cf also section 44 of the Domestic Proceedings Act 1968. The whole of Part VIII of the 1963 Act and the whole of Part V of the 1968 Act have been repealed outright by the 1976 Act.

As to the factors likely to influence a Court asked to make an occupation order, see Bromley & Webb, *op. cit.* supra, pp. 791-793.

**An order made under subsection (1) of the section under review by a Magistrate's Court is to be enforceable as if it were an order for recovery of land made under section 31 (1) (d) of the Magistrates' Courts Act 1947:** section 27 (4). Note that there is no provision for registering a Supreme Court order in the Magistrates' Courts for the purposes of enforcement.

One may now hope that the difficulties revealed by *Kilkelly v. Nikoloff* [1969] NZLR 842 have now been dissipated. For a recent case in which exclusive possession was given to a wife, until such time as one of four specified events should occur, see *Coffey v. Coffey* [1976] 2 NZLR 629.

notwithstanding section 5 of the Act.

**(iii) Orders with Respect to Vesting Tenancies.**

The notion of vesting the tenancy of a dwelling house, being a dwelling house within the meaning of the Tenancy Act 1955, in either the husband or wife is not new. It was to be found in section 60 of the Matrimonial Proceedings Act 1963, and also in section 40 of the Domestic Proceedings Act 1968. Both these provisions are now replaced by section 28 of the 1976 Act, which obviously owes much to the former repealed section. There is a welter of detail in the new provision and it must suffice to state here that **subsection (1) enables the Court, notwithstanding the provisions of section 23, to make a vesting order at any time on application by the husband or the wife.**

**(iv) Orders in Respect of Property Subject to H.P. Agreements etc.**

Under section 29, where any property which is the subject of an application under the Act is in the possession of the husband or the wife or both of them under a hire purchase agreement or conditional sale agreement, or under an agreement to hire or lease, the Court may make an order vesting the rights and obligations under the agreement in either spouse and any such order shall have effect notwithstanding anything in any agreement.<sup>36</sup>

**(v) Orders in Relation to Assurance and Insurance Policies.**

According to section 30, where an application relates to any policy of assurance or insurance, several possibilities are open to the Court. It may vest the policy in either spouse subject to such conditions (including the payment of premiums by either spouse) as it thinks just. It may direct the payment of a proportion of the surrender value or paid-up value from one spouse to the other. Lastly, it may make such other order as it thinks just.

**(vi) Orders Where Superannuation Rights are Concerned.**

If the matrimonial property to which any application under the Act relates includes property of the kind described in section 8 (i) (i.e. pension rights), the Court may make any order under the 1976 Act, or any provision of any such order, conditional on the husband or wife entering into an arrangement or deed of covenant designed to ensure that the other spouse receives his or her appropriate share of that property, and every arrangement or deed entered into pursuant to any such condition is to have effect according to its tenor: section 31 (1).<sup>37</sup>

Subsection (2) states that a copy of any arrangement or deed entered into pursuant to subsection (1) may be served on the manager of the relevant superannuation scheme. He appears to have no option, because, by virtue of

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36. This obviously derives from section 62 (4) of the Matrimonial Proceedings Act 1963, now repealed.

37. Cf. the position in the English divorce case, *Parker v. Parker* [1972] Fam. 116.

subsection (3), once he is so served, notwithstanding the provisions of any Act, deed or rules governing the scheme, he is bound by the provisions of the arrangement or deed.

**(vii) Orders in Relation to Existing Maintenance Orders.**

**Section 32 (1) enjoins the Court in any proceedings under the Act to pay regard to any maintenance order already made against one spouse in favour of the other one or in favour of any child of the marriage and to any maintenance agreement.**<sup>38</sup> It should be noted that a maintenance agreement is defined by subsection (3) as meaning any written agreement made between a husband and his wife, and providing for the periodical payment to either party of sums of money towards the maintenance of the other party or of any child of the marriage.

**Under subsection (1), the Court may, if it considers it just, discharge, suspend or vary any such order, whether made in the Supreme Court or a Magistrate's Court, and may cancel, suspend, or vary any maintenance agreement whether or not registered pursuant to Part VII of the Domestic Proceedings Act 1968.**

A point to watch is made by subsection (2). **The fact that an order has been made under the 1976 Act in respect of matrimonial property is not to be sufficient to support an application for discharge, variation, or suspension of a maintenance order pursuant to section 47 of the Matrimonial Proceedings Act 1963 or section 85 of the Domestic Proceedings Act 1968. Nor will it be sufficient to support one for the cancellation, suspension, or variation of a maintenance agreement pursuant to the latter section.**

What was wanted was to have maintenance matters adjusted in the light of a matrimonial property order when that order was made and not left to separate proceedings.

**(viii) The Courts' Ancillary Powers**

**The Court is empowered by section 33 (1) to make all such other orders and give such directions as may be necessary or expedient to give effect, or better effect, to any order made under any of the provisions of sections 25 to 32 inclusive. Subsection (2) permits the Court, at any time it thinks fit, to extend, vary, cancel or discharge any order made under any of the provisions of sections 26 to 32 inclusive, and to vary any terms or conditions upon or subject to which any such order was made. An order made under section 25 cannot, therefore, be altered.**

It will be remembered that section 5 (2) of the former Matrimonial Property Act 1963 set out a small number of possible orders that the Court might make. **It is now provided by section 33 (3) of the 1976 Act that, in particular, but without limiting the generality of subsections (1) and (2), the**

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38. Cf. *Barton v. Barton* (1975) 1 N.Z. Recent Law (NS) 276 (CA).



Court may make any one or more of a whole host of possible orders. They are as follows:—

- “(a) An order for the sale of the matrimonial property or any part thereof, and for the division, vesting, or settlement of the proceeds:**
- (b) Any order vesting any property owned by both the husband and the wife jointly in both the husband and the wife in common in such shares as the Court considers just:**
- (c) An order vesting the matrimonial property or any part thereof in the husband or the wife:**
- (d) An order postponing the vesting of any share in the matrimonial property, or any part of such share, until such future date or until the occurrence of such future event as may be specified in the order:**
- (e) An order for the partition<sup>39</sup> or vesting of any property:**
- (f) An order vesting any property owned by one spouse in both spouses jointly or in common in such shares as the Court considers just:**
- (g) An order vesting any property owned by both spouses, jointly or in common, in one spouse:**
- (h) An order for the cancellation of the settlement of a joint family home:**
- (i) An order for the payment of a sum of money by one spouse to the other spouse:**
- (j) An order for the transfer of land, or of any interest in land, including a lease, licence, or tenancy:**
- (k) An order for the transfer of shares or stock, or of mortgages, charges, debentures, or other securities, or of the title or documents of title of any property:**
- (l) An order for the transfer of rights or obligations under any instrument or contract, and any such order shall have effect notwithstanding any provision or term of the instrument or contract:**
- (m) An order varying the terms of any trust or settlement, not being a trust under a will or other testamentary disposition:**
- (n) An order requiring one spouse to pay a sum of money, or transfer any other property to the other spouse, the money or property being part of the separate property of the first-mentioned spouse.**

It will be seen from the above that the payment of what has customarily been called a “capital sum” or a “lump sum” has been provided for. So, in effect also, has ordering a settlement been catered for. Consequently, there is no more need for the provisions of the Matrimonial Proceedings Act 1963 and the Domestic Proceedings Act 1968 relating to these matters, and they have been repealed or amended.<sup>40</sup>

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39. See *Mayo v. Mayo* [1966] NZLR 849.

See overleaf for Footnote 40.

## S. OTHER POINTS RELATING TO ORDERS

- (i) Any order under the 1976 Act may, subject to the provisions of the Act, be made on such terms and subject to such conditions (if any) as the Court thinks fit: section 33 (6).<sup>41</sup>
- (ii) It is provided in subsection (4) that, where under any order made under the Act one spouse is or may become liable to pay to the other a sum of money, the Court may direct that it shall be paid either in one sum or in instalments, and either with or without security, and otherwise in such manner and subject to such conditions (including a condition requiring the payment of interest) as the Court thinks fit.<sup>42</sup>
- (iii) As always, there must be provision for dealing with the recalcitrant. Consequently, subsection (5) states that: "Where, pursuant to this Act, the Court makes an order for the sale of any matrimonial property and for the division, application, or settlement of the proceeds, the Court may appoint a person to sell the property and divide, apply or settle the proceeds accordingly; and the execution of any instrument by the person so appointed shall have the same force and validity as if it had been executed by the person in whom the property is vested."

No doubt this provision will also be useful where the applicant's spouse is not to be found.

### (iv) **The Courts' Discretion as to Orders.**

Where application is made to the Court for any order under any provision of the 1976 Act, the Court may, under section 34, subject to the provisions of the Act, make any other order under the Act which could have been made if application for that other order had been made when the first-mentioned application was made. In short, **if the Court thinks the order sought was not an appropriate one, it can make the order which it considers is appropriate.**<sup>43</sup>

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40. The whole of section 41 of the 1963 Act (capital sums and settlement for wives) is repealed, as is section 43 (c), which refers back to section 41. Section 44 (on the matter of husband's maintenance) has been rewritten: see the second and third schedules to the 1976 Act. Sections 26 (1) (c) and 31 (1) (c) of the 1968 Act are repealed. Note also the removal of the words "or the payment of a capital sum" from section 80 (4) of that Act.

There may also be noted incidentally the repeal of section 12 (4) of the 1963 Act and section 24 (4) of the 1968 Act on the topic of necessities.

41. For a case where a condition was imposed, see *Rutherford v. Rutherford* [1970] NZLJ 294; [1970] Recent Law 134.

42. As to suspending a condition, see *Rutherford v. Rutherford* [1970] NZLJ 294; [1970] Recent Law 134.

43. This is based on section 78 of the Matrimonial Proceedings Act 1963 (from which incidentally, the reference to Part VIII of the Act has now been deleted by the present Act).

**(v) Persons Entitled to be Heard.**

It is provided by section 37 that, before any order is made under the Act, such notice as the Court directs must be given to any person having an interest in the property which would be affected by the order, and any such person is to be entitled to appear and be heard in the matter as a party to the application. Such person might be a landlord of a dwelling house or, where there is a hire purchase agreement, the owner of the goods.<sup>44</sup>

**(vi) The Registration of Orders**

From the conveyancing point of view, some provision had to be made for the registration of orders made under the Act which related to any estate or interest in land. It was also necessary to state when an order ceases to have effect and to ensure that the register is endorsed accordingly. This is achieved by section 41 (1) - (3) inclusive. Section 41 (4) deals with the position where the order relates to stocks, shares or other company securities or to other property the title to which passes on registration, or is evidenced by registration.<sup>45</sup>

**(vii) Inquiries, and Settling Schemes.**

(a) On any application under the Act, the Court may, under section 38 (1), appoint the Registrar of the Court — or such other person as the Court thinks fit — to make an inquiry into the matters of fact in issue between the parties, and to report to the Court thereon. This could certainly prove to be a time-saver for the Court, e.g. where there are complicated accounts to go into.

A copy of every such report must be given to the solicitor or counsel appearing for each party to the proceedings or, if any party is not represented by solicitor or counsel, to that party. Any party may tender evidence on any matter referred to in such report.<sup>46</sup>

(b) On any application under the Act, the Court may, with the parties' consent, appoint the Registrar of the Court, or such other person as the Court thinks fit, to settle a scheme in respect of the property comprised in the application and to submit it for approval to the Court: subsection (3).<sup>47</sup>

**(viii) Incidence of Orders Against Personal Representative of a Spouse.**

This is a matter that is really more concerned with the administration of

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44. This derives from section 7 (1) of the Matrimonial Property Act 1963. Cf. also the now repealed section 61 of the Matrimonial Proceedings Act 1963 and section 41 of the Domestic Proceedings Act 1968, also repealed as being part of Part V of that Act.

45. This provision derives from section 57 (9) - (11) inclusive and section 59 (4) of the Matrimonial Proceedings Act 1963.

46. Cf. Domestic Proceedings Act 1968, section 8; Guardianship Act 1968, section 29; Matrimonial Proceedings Act 1963, section 50.

See overleaf for Footnote 47.

a deceased spouse's estate and is thus outside the scope of this paper. The general rule is laid down in section 48 (1). **The incidence of any order under the Act made against a deceased spouse's personal representative will fall rateably upon such part of the estate of the deceased as consists of matrimonial property. There, is though, power to order that the incidence of the order shall (a) fall rateably on the whole estate of the deceased or (b) fall on any specified portion of the estate or upon any specified property:** *ibid.* 48.

## **T. PROTECTING SPOUSE'S RIGHTS**

### **(i) Notice of Interest Against Title to Land**

Section 42 sets out an adapted procedure that will particularly interest conveyancers whereunder the husband or the wife may register a notice claiming an interest in any land, whether or not it is Land Transfer land. Subsections (1) — (4) inclusive should be consulted for the detail. The notice may be registered notwithstanding that no proceedings under the Act are pending or in contemplation, and notwithstanding that there is no dispute between the parties: subsection (5).

The form of notice is to be found in the First Schedule to the Act.

It seems a pity that this system could not be extended to cover stocks, shares and debentures, at any rate where the appropriate register is kept in New Zealand.

### **(ii) Restraining Dispositions**

Practitioners will be familiar with the spouse who is about to dispose of his or her property with a view to defeating an anticipated maintenance order. They will accordingly also be familiar with the provisions of section 80 of the Matrimonial Proceedings Act 1963<sup>49</sup> whereby such a disposition may be restrained.

This type of person is equally capable of setting out to defeat the claim or

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47. The fees and expenses of a person (other than the Registrar) appointed under subsection (1) and (3) are to be paid out of the Consolidated Revenue Account from money from time to time appropriated for that purpose by Parliament. However, if the Court thinks proper, it may order any party to refund to the Crown such amount as the Court specifies in respect of those fees and expenses. Such amount is to be recoverable in any Court of competent jurisdiction as a debt due to the Crown: subsection (4).

Compare the concept of settling schemes under the Charitable Trusts legislation, the making and approval of proposals under the Insolvency legislation and the referring of matters for report under sections 62 and 62A of the Magistrates' Courts Act 1947.

48. The section is based on section 8A of the Matrimonial Property Act 1963. The whole section must be studied by those specialising in the winding-up of deceased's estates and by estate duty experts, especially subsection (4).

49. See Bromley & Webb, *op. cit. supra*, pp. 719-720. The rewording of section 80 by the Second Schedule of the 1976 Act should be noted.

rights of any person under the Matrimonial Property Act 1976. Parliament has accordingly enacted section 43, which is based firmly on section 80 of the Matrimonial Proceedings Act 1963.

The result now is that section 43 (1) permits the Court to restrain the making of the offending disposition or may order any proceeds of the disposition to be paid into Court to be dealt with as the Court directs. Such notice must be given as the Court directs.

**(iii) Setting Aside Dispositions.**

Practitioners will have also come across the spouse who has already disposed of assets in order to be able to reduce the amount of property available to meet any order that the Supreme Court might make. It is well-known that the Court is empowered by section 81 of the Matrimonial Proceedings Act 1963 to make certain types of order for the setting aside of dispositions of this kind.<sup>50</sup>

There will obviously be those who will be bent on defeating the claims or rights of persons under the 1976 Act in the same fashion. Consequently Parliament has enacted section 44 of the 1976 Act to enable the Court to set aside, subject to due safeguards, dispositions made to defeat such rights or claims. The section is based on section 81 of the 1963 Act.<sup>51</sup>

**(iv) Family Chattels Not to Be Disposed Of**

Another possible ploy on the part of one bent on subverting the 1976 Act could be to make away with the family chattels knowing that proceedings are pending under the Act. Section 45 (1) contains the necessary preventative measure, by stating that, **where proceedings are pending under the Act, no party knowing that the proceedings are pending shall, without the leave of a Judge, or a Magistrate or a Registrar, or the consent in writing of the other party, sell, charge or dispose of any of the family chattels or (except in an emergency) remove from the matrimonial home or homes any of the family chattels which are household appliances or effects or which form part of the furniture of that home or those homes.**

Any person who does any act in contravention of the provisions of this section commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding four hundred dollars, or to both: subsection (2)<sup>52</sup>

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50. See Bromley & Webb, op. cit. supra, p.721.

51. *Meadows v. Meadows* (1971) 13 MCD 99 is now defunct. A Magistrate's Court can now clearly apply both sections 43 and 44 of the new Act whatever may have been the position under the Matrimonial Property Act 1963.

52. This section derives from the amended version of section 43 of the Domestic Proceedings Act 1968, repealed by the 1976 Act.

## **U. SOME MATTERS ARISING OUT OF THE REPEAL OF THE MARRIED WOMEN'S PROPERTY ACT 1952.**

### **(i) Legal Capacity of Married Women.**

The 1976 Act repeals the whole of the Married Women's Property Act 1952. It was therefore necessary to restate the law as to the legal capacity of married women. Accordingly section 49 (1) provides that, except as provided in any enactment, the rights, privileges, powers, capacities, duties and liabilities of a married woman shall, for all the purposes of the law of New Zealand (whether substantive, procedural or otherwise) be the same in all respects as those of a married man, whether she is acting in a personal, official, representative, or fiduciary capacity. There is thus virtual equality for both sexes.

According to subsection (2), the above provision applies to every married woman whether she was married before or after the commencement of the Act, and whether or not the marriage was solemnised in New Zealand, and whether or not she is or was at any relevant time domiciled in New Zealand.

### **(ii) Restraints Upon Anticipation**

This is hardly an everyday matter<sup>53</sup> but draftsmen will need to note that section 50 enacts that, as from the commencement of the 1976 Act, no restriction upon anticipation or alienation attached to the enjoyment of any property, being a restriction preserved by section 4 of the 1952 Act, is to be operative or have any effect.

### **(iii) Proceedings between spouses in tort**

Though the 1952 Act was concerned, inter alia, with proceedings in tort between spouses (see section 9), the law relating to this matter was, until the commencement of the 1976 Act, to be found in section 4 (1) — (4) inclusive of the Matrimonial Proceedings Act 1963. These subsections are re-enacted with appropriate minor amendments by section 51 of the 1976 Act, to which tort lawyers should refer for the detail.

### **(iv) Other Matters**

Conveyancers should note that section 13 of the 1952 Act, which dealt with powers of attorney, has been refurbished and inserted into the Property Law Act 1952 as section 134A. Insurance experts will notice that section 17 of the 1952 Act reappears now as section 75A of the Life Insurance Act 1908.

## **V. CONSEQUENTIAL AMENDMENTS, REPEALS AND SAVINGS.**

Various enactments required amendment as a result of the passing of the 1976 Act. A number of these have been pointed out above, but reference

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53. See Bromley & Webb, op. cit. supra, pp. 190, 231 and, especially, pp. 766-767.

should be made to section 56 of the Act and the Second Schedule to ascertain the precise details.

**Certain enactments have been repealed outright, notably the Married Women's Property Act 1952 and the Matrimonial Property Act 1963 and all its amendments.** Section 57 (1) and the Third Schedule should be consulted for the exact detail.

There are, however, **three important savings** which ought to be noted:—

- (a) Section 57 (2) states that nothing in the 1976 Act is to affect any order made before its commencement under sections 41 or 44 of the Matrimonial Proceedings Act 1963, and the provisions of that Act are to have effect in relation to any such order as if the 1976 Act had not been passed.
- (b) Nothing in the 1976 Act is to invalidate any payment made or any act or thing done in good faith before the commencement of the 1976 Act by the personal representative of a deceased spouse: subsection (3).
- (c) Nothing in the 1976 Act is, according to section 57 (4), to affect any right that a widow or widower has to bring proceedings under any enactment. It does not matter whether the right arises before or after the commencement of the 1976 Act. For the purpose of section 5 (1) of the Act and of any such proceedings, every enactment — including the Matrimonial Property Act 1963 and Part VIII of the Matrimonial Proceedings Act 1963 — is to continue to operate and apply as if the 1976 Act had not been passed: subsection (4). This provision is a response to fears that the Matrimonial Property Act 1963 in particular, might not be treated as continuing to apply after death.<sup>54</sup>

## **W. EXEMPTION FROM STAMP DUTY.**

It will be recalled that section 11 (2) of the Stamp and Cheque Duties Act 1971 provides that no stamp duty need be paid on any instrument required for any of the purposes of certain Acts of Parliament. Section 54 of the Matrimonial Property Act 1976 amends section 11 (2) of the 1971 Act by adding the Matrimonial Property Act 1976 to the list contained in subsection 11 (2).<sup>55</sup>

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54. But See *Re Weck* (1976) 2 NZ Recent Law (N.S.) 310.

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