Comparable sharing in practice: A pilot study of results under the Matrimonial Property Act of 1976

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This article reports results of research designed to assess the relative "success" of the legislative goals of the Matrimonial Property Act 1976 by determining its effect, primarily, on out of court settlements at marriage dissolution. The focus of structured interviews with twenty-eight judges, lawyers, and law faculty members was on division of the "balance" matrimonial property controlled by sections 15 and 18 of the Act. To a lesser extent questions also involved section 14, covering the matrimonial home and family chattels, and mediation in the Family Court.

The article discusses specific findings from both the structured interviews and informal discussions with a broader group of people, including Family Court Counselling Coordinators and policy makers in Parliament, the Department of Justice, and the Ministry of Women's Affairs. Responses described in numbers or percentages are based solely on the twenty-eight structured interviews, whereas the source of comments without a numerical basis may be from the wider group of people.

Three generalized conclusions are drawn from the study: (1) In one decade a minor social and legal revolution occurred in the acceptance of the major goals of the legislation; (2) It is now time to assess whether a second stage of legislation is in order; (3) That assessment should include more detailed research building on this pilot project.[1]

I. LEGISLATIVE GOALS

In response to an open ended question seeking the goals of this legislation lawyers, judges, faculty members, Justice Department personnel who had worked on drafting

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1 This was considered a pilot project for various reasons. Chief among them is that the sample of twenty-eight structured interviews is small, although they cover a broad spectrum. Second, on some of the topics we wished to avoid "prompting" answers so we asked open ended questions which often drew answers on other scheduled topics. Thus, the order of topics and wording of questions varied. Third, over time the interviews revealed other topics that should be explored.

the statute, and the member of parliament answered consistently that it was social legislation aimed to control the discretion of judges[2] in division of property. Three specific goals were indicated: (1) to require consideration of contributions to the marriage partnership rather than only directly to the property[3]; (2) to delineate clear guidelines for controlling discretion in division of property[4]; (3) to encourage settlement. Further inquiries were devoted to ascertaining whether the statutory language and ten years of litigation had clarified the guidelines sufficiently to encourage settlement and whether those settlements were in accord with the perceived goals and the statutory guidelines.

II. BASIC EFFECTS OF SECTIONS 15 AND 18 OF THE ACT

A. Persons Interested in Policy Making

We inquired about the significance of the presumption of equal division of the "balance" or "general" property[5], which the government's White Paper[6] had not recommended. The member of Parliament, members of the Department of Justice and Law Faculty members responded that the equal division presumption demonstrated the marriage partnership philosophy of the Act. They wished to know whether there is still debate concerning the partnership concept and the norm of equal division for the

2 One person said to control "older judges" while another said to control "upper middle class white male judges." One judge commented that they had brought it on themselves. The recognition that the Act was social legislation is consistent with the description in *Reid* v. *Reid*, [1979] 1 NZLR 572, 610 per Richardson J. that it is social legislation of the widest general application.

3 The reasoning expressed was that courts had not recognized that a homemaker's contribution to the family was an indirect contribution to property by freeing the other spouse to acquire income and assets for the family. The contributions section was attributed by one person to a "lack of legislative trust in the judiciary to apply contemporary standards of what constitutes a contribution to a marriage partnership." Thus, the responses were consistent with the White Paper's admonition that the homemaker's contributions being non-monetary were no less real for that. Government White Paper, supra, n. 1 and 5. The responses also accord with the notion that the statute incorporated Woodhouse's view of marital partnership contribution stated in *Hofman* v. *Hofman* [1965] NZLR 795, 800. Woodhouse described this in *Reid* v. *Reid* [1979] 1 NZLR 572, 584, "The provision of an efficient home base by a wife will leave the husband free to earn the family income and attend to a business enterprise or the investment of capital savings . . . so much his achievements be reflected in the increasing value of the correlative contribution of the wife".

4 Although no respondent initially offered that a goal of the statute was an equal division of property, many contrasted the former system under which a homemaker received little or, at most, one third of the property with the equal division presumption. They indicated that control of discretion was sought to limit the considerations which could justify a departure from an equal division. Consequently, we interpreted the stated goals as recognition of contributions to the marriage partnership and control of discretion, not equal division per se.

5 The *Matrimonial Property Act 1976* s. 15 (1).

6 *Matrimonial Property — Comparable Sharing. An Explanation of the Matrimonial Property Bill 1975"* (Government White Paper, 1975).

"balance" property, as well as the matrimonial home. They also wished to know whether lawyers and judges were using checklists or rules of thumb for division.

B. Revolutionary Change Accomplished

Everyone with whom we spoke indicated that a revolutionary (our term) change had been accomplished by the Act and, particularly, by the norm of equal division of matrimonial property in sections 14, 15 and 18. There was no debate. Perhaps surprisingly, all of the twenty-eight interviewed who commented considered the overall division of property better or more fair than under the former system. None expressed preference for the former law generally, even though some of our interviewees were persons who had originally opposed the Act. However, three lawyers believed that the change would have occurred eventually under the stimulus of *Haldane* v. *Haldane.*[7] Many persons referred to early resistance to the Act's mandates and believed the resistance was overcome by the Court of Appeal's decision in *Reid* v. *Reid.*[8]

Our interviewees perceived acceptance of the Act as extending across many segments of society. Some stated that the legislature had forced a change in social attitudes. A number of lawyers said community acceptance was exhibited by their clients, male and female, coming in to their office and saying, "I want my half."

Judges indicated the effect of the Act on their decision making by stating that they start considering division at 50/50 rather than zero in the non-titled spouse and 100% in the spouse with title. Judges also said the equality presumption and contribution guidelines have narrowed their discretion significantly.

Lawyers credited the Act, the 1980 Family Proceedings Act and the possibility of earning a respectable fee for development of a specialized bar with expertise and a new attitude favoring settlements. Some lawyers indicated they litigate only half as often as previously. Ten lawyers said they settle 90% of cases, one said 80% and two said at least 75%.[9] Two rules of thumb for division in settlement were frequently mentioned. All lawyers who commented gave 50/50 as the rule in the "run of the mill", typical, or normal situation. This was often described as the family owning a house, husband's superannuation benefits,[10] a car, a little beach house, and modest savings or investments. Interestingly, some of the lawyers categorized property divided this way as the "core" family assets including the section 14 property and all "balance" property except businesses and farms. All but one who commented gave 60/40 as the rule when a farm or business was divided unequally (usually when acquired or operated by one

7 [1977] AC 673, [1976] 2 NZLR 715.

8 Supra n. 2.

9 Judges, lawyers and the two Counselling Co-ordinators were agreed that approximately 10% of divorcing people are so intractable that nothing could bring them to settle. Because barristers enter the picture after initial failure of settlement, they represent high percentage of the intractables, so that their settlement rate would be less.

10 Some lawyers refused to include superannuation benefits under this rule of thumb, revealing a split among the bar in how they are treated.

spouse). One said 75/25 was the basis for dividing the latter. The Act was said to be responsible for these significant changes from property division prior to 1976. One lawyer commented that the Act's equality norm even protected a spouse from a poor lawyer who might not otherwise achieve so much for the client.

If increased settlements and increased portions of the property acquired during the marriage for homemakers are the criteria for acceptance of the Act's philosophy and achievement of its goals, the Act has been a smashing success. However, as discussed, infra, more detailed responses suggested that unusual income or property production is valued more highly than homemaking. This may or may not be consistent with the Act's goals.

III. SPECIFIC APPLICATIONS OF SECTIONS 15 AND 18

A. Contribution to Marriage only Justification for Unequal Division

1. Recognition of the statutory mandate

Section 15 of the Act establishes a presumption of equal division of matrimonial property by mandating that "each spouse shall share equally in it unless his or her contribution to the marriage partnership has been clearly greater than that of the other spouse."[11] The fact that lawyers report typical cases are settled on a 50/50 basis attests to the recognition of the equality presumption. Twenty-two of the persons in structured interviews indicated, directly or indirectly, that the contribution to marriage concept is utilized.

There was a mixed range of opinions about the degree of judicial acceptance. Although two judges said that this section required judges to justify an unequal division by giving reasons or listing factors in terms of differing contributions to the marriage, two others said, "We do not consciously evaluate the contribution factors." Lawyers' comments about the judiciary indicated that "talking in these terms helps"; that judges are coming to accept the concept; that judges try to follow the statutory direction. However, a stringent criticism from one faculty member was that many judges, especially in the High Court, do not accept partnership principles and instead do what "seems fair" which, in turn, varies with the degree of belief in the marriage partnership theory.

2. Bases for variation from equal division

Section 18(1) of the Act defines contribution to the marriage partnership as one or more of eight actions:[12] (a) care of child, relative or dependant; (b) household management and performance of household duties; (c) provision of money for purposes of the partnership; (d) acquisition or creation of matrimonial property; (e) payment of money affecting value of property; (f) performance of work affecting value of property;

11 The Act, supra n. 5, as amended in 1983.

12 Fisher considers this list exclusive. Fisher *Fisher on Matrimonial Property* (2 ed Wellington, Butterworths, 1984) (cited in this article as Fisher) Section 13.23.

(g) foregoing higher standard of living; (h) giving assistance or support to other spouse. We wished to determine whether or not these contributions were the basis for unequal settlement division. In the twenty eight structured interviews we asked the open ended question, "What factors influence unequal division?" Since settlement rules of thumb are influenced by court decisions, discussion of the determining factors usually included opinions about judicial use of the contributions as well. In addition, we learned that a number of non-statutory factors have significant practical influence toward unequal division.

(a) Source of property and income

The source of matrimonial property obviously was the most influential factor in an agreed unequal division of property. Broadly, this includes statutory contributions (c) through (g).

(i) Source outside the marriage

Twenty persons of the twenty eight interviewees or 71% gave acquisition of capital from outside the marriage partnership as a factor influencing unequal division. This is consistent with Fisher's analysis of court decisions and his definition of "external property."[13] He describes external property as that acquired prior to the marriage or by inheritance or gift and that acquired by purchase on favorable terms (less than market value or with a gifting program to reduce the indebtedness) from relatives.

Much of this property, especially that purchased on favorable terms from relatives, is farm property. All but one of the lawyers and a number of the judges we interviewed who gave a rule of thumb for dividing farms unequally gave 60/40 or half again as much to one spouse. Although lawyers assessed acquisition from an outside source as a prime factor in unequal division, they did not state a more unbalanced rule of thumb for division than 60/40. We asked whether *Cross* v. *Cross*[14] and *Walsh* v. *Walsh*[15] set a new stage for more recognition of this type contribution in dividing property.[16] The

13 "By far the most common ground for unequal sharing . . . has been the unilateral introduction of capital to the marriage from a source external to the operations of the marriage partnership." Fisher, supra n. 12 at 441.

14 (1984) 2 NZFLR 433.

15 (1984) 3 NZFLR 23.

16 Both of these cases involved farm property bought on favorable terms from relatives. The Court of Appeals recognized a special contribution by the related spouse in the acquisition of the property. In both cases the Court of Appeals approved a 75/25 division which required finding contributions of the propertied spouse to the marriage three times as much as the other's. As one lawyer said, "*Walsh* set the cat among the pigeons." Academics Atkins and Bridge severely criticized the decisions for various reasons, but primarily for over-emphasizing contribution in the form of acquisition from outside sources at the expense of all other forms of contribution during marriages lasting 16 and 10 years respectively. Bridge expressed the concern that the cases were departing from the norm of equality expressed in recent years and had gone full circle back to the early days of the Act when 75/25 divisions had been considered appropriate, at least in situations involving property from outside the marriage. See, W. R. Atkin "Matrimonial Property: Time to Take Stock" [1985] NZLJ 25; C. Bridge "Division of Farms Under the Matrimonial Property Act: A further Review" [1985] NZLJ 292.

responses were unanimous in minimizing the effects of *Cross* and *Walsh*. Several judges said that the Court of Appeal was not going to allow the High Court to use old values. The Chief Judge of the Family Court responded to our question by producing from his desk a copy of the decision in *Haslam* v. *Haslam*.[17] Without suggestion from us, lawyers in each of the four cities gave *Haslam* as their response to our query, saying that *Walsh* was the high point away from 50/50 and that *Haslam* was sending a message to the High Court, that acquisition of a particular asset from outside the marriage should not be valued at three to four times the other contributions to the marriage partnership. No more than a three to two ratio as a rule of thumb, even when the property is very valuable, appears more in keeping with the Act's equality norm which values heavily other forms of contribution such as homemaking.

(ii) Length of marriage

Eleven of the respondents or 39% volunteered that length of marriage was a factor in assessing unequal division. Although not listed in the Act, we classify this as within the statutory factors because it reflects an adjustment of the significance of contributions of property from outside the marriage. The interviewees said that outside contributions were less important as the time of contribution receded into the past. This is a particular application of the principle that the entire range of contributions over the whole span of time together are considered along with the special contribution of property.[18] As that span of time lengthens, the early special contribution diminishes.[19]

(iii) Unusual efforts producing property

Effort in producing property or income is an important factor affecting unequal division at settlement. Interpretation of our data suggest that it becomes influential when the amount produced exceeds that of a typical, middle class family. The Act in Section 18 defines "earning of income" or "acquisition or creation of matrimonial property" as contribution to the marriage, but forbids a presumption that a monetary contribution is of greater value than a non-monetary one. Thirteen of the respondents

17 (1985) 3 NZFLR 546. In *Haslam* the High Court had divided a farm 80/20 in favor of the wife because she had acquired it from her father and she had managed it. The Court of Appeals acknowledged that acquisition from a relative is a special contribution for which that spouse should get credit, but held that since it was only one contribution among all contributions by the parties to the marriage over a 12 year period, shares were to be fixed at 60/40 in favor of the wife. An overall adjustment of the parties interests in regard to the farm favored the wife much more than the 60/40 division. The court permitted a change in valuation date which favored the wife, recognized that the husband remained obligated on the mortgage which was still outstanding and granted the wife $60,000 for her management contributions after the parties' separation.

18 This consideration at settlement is in accord with the judicial approach. *Haslam* v. *Haslam* (1985) 3 NZFLR 545, 551, per Richardson; Fisher, supra note 12 at 443.

19 Dissatisfaction with the three year rule in regard to the matrimonial home, s.14 of the Act, was expressed by a few respondents. They believed that contributions in only three years of marriage should not preclude the special contribution as a basis for unequal division. They mentioned that clients who had brought the home from a previous marriage were particularly disturbed by this restriction.

or 46% gave unusual effort or genius of one of the spouses in producing property as an influential factor in unequal division. Four of these specified an unusual quality or genius in effort as the factor, carefully describing this consideration as influential only when the effort was exceptionally talented. One said production by working eighteen hours a day should not be considered since that throws a burden on the other spouse, but "genius" should count.[20]

In contrast, nine of the respondents described merely "producing property" as the factor. Numerous interviewees, particularly when asked about the efficacy of the contribution to marriage concept, had made comments that contributions in money or property are often given more credit than homemaking. For example, a barrister said that lawyers for both parties credit the male producer more; both a lawyer and an academic said that fairness in the judges' view emphasizes source of property; a lawyer said that a man's contribution in money is worth more. At first these statements were mystifying to us because we noted a discrepancy with the stated 50/50 rule of thumb for typical divisions. The apparent inconsistency was clarified when one lawyer said, "We develop a feel for the magic threshold at which the 50/50 rule disappears." Since the 50/50 rule had been described as applicable in a typical or "run of the mill" marriage, we believe the threshold is reached when the amount of income earned or property acquired exceeds that of a typical, middle class family. At that point, we believe lawyers for both parties in arriving at settlements begin to credit effort in providing income or property as a contribution to the marriage which exceeds the value of homemaking effort. To the extent this is done, above average or atypical property production, rather than only genius production, is a factor causing unequal division. Thus, the 60/40 rule of thumb for unequal division of businesses and farms could be based on perceptions of unequal effort as well as outside contributions.[21] Our opinion is that the homemaking spouse in an affluent marriage will seldom obtain half the property in settlement. However, our data is too tentative to draw these conclusions firmly, but suggests that this particular question should be explored further.[22]

20 He cited *Reid* v. *Reid* [1979] 1 NZLR 572, in which the Court of Appeals favored the husband 60/40 due to his unusual genius in developing a company while maintaining significant personal contact with his family.

21 Review of the responses shows that concern for outside property as a source predominates in the farm cases and concern for unusual effort predominates in the business cases, although there is overlap. This hypothesis is consistent with Fisher's observation that in court decisions an unequal quality of effort "seems to have been the principal factor in the conferring of an increased share upon unusually successful businessmen and property speculators," Fisher, supra n.12 at 448.

22 Our data shows clearly a 60/40 rule of thumb for unequal division of farms and businesses if property from outside the marriage is a significant part of its value. However, we did not ask specifically when, if at all, farms or businesses in the absence of outside property were divided equally. Three lawyers suggested that a moderately valued business would be split evenly, but that if it were a "substantial" business developed by one of them, it would not be divided equally. If the latter is a common result, it would confirm our hypothesis that homemaking effort is equated only with typical or modest monetary production.

(iv) Foregoing higher standard of living

Two persons specifically mentioned foregoing a higher standard of living as a factor influencing division. They envisaged a situation in which one party had contributed unequally such as by efforts in development of a business with the result that more than half the property might be allocated to that person; however, the homemaker spouse had not only contributed normal household services but had foregone a higher standard of living in order to pour more capital into the business. We could only conclude that at least to the extent of equalizing the division this statutory factor occasionally is considered a contribution to the marriage.

(b) Misconduct; Service to the family

The statutory contributions (a), (b), and (h) encompass primarily non-monetary efforts or service to the family or to the other spouse. Section 18(3) of the Act precludes diminishing a spouse's contributions for misconduct unless the misconduct was "gross and palpable" and affected the "extent or value of the matrimonial property". Seven respondents mentioned either unusual positive service or misconduct as a factor in unequal division. Negative conduct such as alcoholism or abandonment was described as increasing the effort of the other spouse and in that way justifying a larger share for the extra contributions.

Since the statute specifically lists three forms of service contribution to the marriage, we considered why, in contrast to the provision of property, these factors were mentioned so seldom. We believe several strongly expressed opinions are most significant. One lawyer and one judge stated emphatically that differences in service to the family could not be demonstrated. The judge said, "Each feels that he or she did it all." Another lawyer volunteered that it would be dangerous to present testimony of efforts within the home because it would anger the judge and lessen the lawyer's credibility. We interpret these attitudes as underlying a common assumption that each partner does pull his or her weight in the home and on the job and that, ordinarily, it is simply not worth the time and effort to look behind that assumption. Additionally, a few comments could be interpreted as indicating the difficulty of valuing such evidence and the unpleasantness of presenting or hearing it. Again, our data is insufficient to draw firm conclusions on this issue. However, the data suggests that in the typical or normal family situation, as in the affluent one, the homemaker spouse is not likely to obtain more than half the assets. This is because, overall, it is only contributions in the form of unusual income or property, rather than family service, that tip the balance and the spouse working outside the home most often makes this contribution.

(c) Non-statutory factors

Non-legal considerations are often the ultimate factor in arriving at a settlement. One lawyer went so far as to say, "Settlements are not based on the law." Surely, evaluating success of legislation concerning matters so private as the dissolution of marriage must take into account the non-legal factors operating on settlements.

(i) Emotional factors

Eleven persons said that factors such as guilt or caring affected unequal divisions. In either case, the spouse acting upon guilt or concern for the other party may make concessions not legally required. Guilt descriptions included the party who ran off with his neighbor's wife and, therefore, was more anxious to be done with the process. Caring was evidenced by clients who declined a larger amount or any share because "It's his ... he earned it," or because "I don't want to force a division if it will harm the business." Although generosity and caring ordinarily should be encouraged, concern about the dire economic effects of dissolution on homemakers and children, discussed infra, may raise questions about the extent to which lawyers should encourage or allow their clients to sell for less than the legislation contemplates. This is another area which future study could consider.

(ii) Avoiding litigation

Litigation is not only expensive in dollars, but in the matrimonial property cases it also exacts an emotional cost that most persons, especially those feeling guilt for the marriage failure, want to avoid. Eight of our respondents mentioned avoiding litigation as an independent factor leading to unequal division of matrimonial property. As one lawyer put it, "$20,000 is not worth going to court." Although, theoretically, this should affect both parties, lawyers usually discussed it as though it was the homemaker who would take less than half in order to avoid court, saying, "She just wants out." Perhaps future data collection would indicate whether homemakers are more affected and why: greater guilt for failure of the marriage? lack of experience outside the home? lack of funds?

(iii) Relative economic situation of the parties

Ten respondents stated that the total value of the assets influenced unequal division and five respondents stated economic need of one spouse was a factor influencing division. More intriguing were ten responses that indicated the percentage received by the homemaker spouse in settlements varied inversely with the total value of the assets. This was related to "need" by several comments: "She settles for enough to satisfy her;" "We give her enough from a farm or business to satisfy her so that it does not have to be sold"; "They will settle if both has enough to be reasonable comfortable." In short, if the value of matrimonial property is large, a rather small percentage of it may be sufficient to "satisfy" or meet the "needs" of the homemaker spouse.[23] This is particularly true if that amount will allow the homemaker spouse and children to live close to the same standard that had been maintained during the marriage. One barrister showed his approval of shared percentages varying inversely with total value by stating, "Judges fall into a trap by determining percentages to share before assessing valuation."

23 Two lawyers either did not understand our question or denied that the total value of the estate would effect the percentage divisions.

Since the statute does not authorize differential percentages dependent upon the size of the overall estate, a non-statutory factor could be exerting significant influence. An academic described this as property division based on economic considerations, not on contributions to the marriage. However, an unspoken credit for contribution to the marriage through direct production of the property could be the overriding influence operating here. If the latter, then the larger the estate produced, the less credit the homemaker is accorded for its acquisition. The latter explanation would be consistent, as well, with the hypothesis that a homemaker almost never shares equally in the property of an affluent family.

B. Quantifying and Comparing Contributions

Section 15 (1) of the Act applies the equal division presumption unless the contributions of one spouse to the marriage have been clearly greater than those of the other spouse. Subsection (2) provides that, if not sharing equally, the spouses shall share the property "in accordance with the contribution of each to the marriage partnership."

1. Agreement on basic rules

Everyone with whom we spoke credited Woodhouse and the Court of Appeal with clarifying the following basic guidelines which appeared to be utilized by both judges and lawyers: equal division is the starting point; variation occurs only if one spouse has contributed a clearly greater amount, minimally a ten percent or 55/45 difference, to the marriage; relevant contributions are to the marriage or family over the entire span of the couple's life together rather than to the acquisition of particular assets one by one. Judges, especially, were wont to say that they made a "global determination." A logical interpretation is that they meant a determination of relative contributions to the marriage which they applied "in toto" to the entire conglomeration of matrimonial property. This would be in accord with the opinion so recently in their minds, *Haslam* v. *Haslam,* which forcefully held that the asset by asset approach is not permissible.

2. No consensus on methodology for quantifying contributions

The statute gives no guidance on methodology for quantifying or weighing the relative contributions of the spouses in regard to each statutory contribution. Total discretion is given to the judiciary. Some judges purport to measure relative contribution item by item.[24] Others make only a determination of overall contribution.[25]

24 After *Reid* v. *Reid,* supra n. 2, Quilliam J. displayed this approach in *Wakely* v. *Wakely* (1982) 5 MPC 169, 171; *Jackson* v. *Jackson* (1982) 5 MPC 68, 70; *Buckman* v. *Buckman* (1980) 3 MPC 21, 23. Our source for this information is an excellent research paper, "Contributions to the Marriage Partnership," submitted in July, 1985 by Suzanne M. Janissen in partial fulfillment of the requirements for a degree of Bachelor of Laws at University of Otago.

25 See, for example, Prichard J. in *Walsh* v. *Walsh,* (1982) 5 MPC 178, 180 summarizing: "I will not detail the various matters which I have considered in applying ss15 and 18." Fisher, supra n.12 at 445, comments that such "robust apportionment" does not lend itself to appellate attack.

Some Family Court judges might have meant this when they told us they divided the property "globally." No one with whom we spoke offered an accepted methodology for measuring how much each spouse contributed of each statutory type. Belief that differences in family services could not be demonstrated suggests that, normally, relative contributions are compared only when easily measurable in dollars. If so, only the spouse acquiring or producing income or property is able to tip the balance from equality.

Neither does the statute provide guidance in totalling or combining the differences from all the separate types of contribution or in valuing certain contributions relative to others. The only restraint on judicial discretion is the prohibition against presuming that monetary contributions are worth more than non-monetary ones. There were a number of statements and sometimes criticisms from our respondents that: homemaking contributions are not given equal value with income production. The factors which influence unequal division compel the conclusion stated previously: homemaking and typical or normal income production are given relatively equal value in settlements, but income or property creation in excess of typical amounts often is given a value exceeding that of homemaking. However, we found no overt consciousness that this has become a "rule" for quantifying different types of contributions.

3. No consensus on methodology for comparing the two parties' relative contributions

The statute gives no method for comparing the differential contributions of the two spouses. Again, judicial discretion is unfettered. In *Reid* v. *Reid*[26] Woodhouse stated the ultimate inquiry concerning contributions should be to what extent one party contributed *more than* the other to the marriage, i.e., after establishing a clearly greater contribution, the inquiry should be *how many times as much* has one party contributed than the other. In this context he said that seldom would one party's contributions be twice as much, i.e. 66/33, as the other spouse.

Others, including Richardson as recently prior to our interviews as *Haslam* v. *Haslam*,[27] have reiterated this idea. A contrasting methodology would be to inquire what percentage of the total contribution was made by each party, i.e. what percentage of 100% did each provide. We believe that the psychological effect of using these different methods of comparison will be significantly different and will be reflected in the final percentage division of property.

Using the Woodhouse "times as much" approach highlights that twice as much in contribution means that one spouse contributed 100% more than the other to the marriage over their whole life together, an extreme differential in itself. The "times as much" test sharpens awareness that each percentage point away from 50% is two percentage points between the parties. For example, concentrating on twice as much highlights that a 66/33 percentage split in dividing the property reflects a 100%

26 Supra, n. 2.
27 Supra, n. 17.

difference in contribution. In contrast, when one begins to measure the total percentage contribution of one party as a portion of 100%, one exacerbates a tendency to think of departures from 50% as only a difference as large as the percentage above or below 50%, rather than a difference double that. It is, therefore, easier to find that one party has contributed 66% because it is erroneously thought of as only 16% more, rather than twice as much. Likewise, a finding of 75% contribution is incorrectly thought of as 25% more when it is actually three times as much as the other's contribution. Using the percentage of 100% approach, therefore, results in a tendency to divide the property more unequally than using the "times as much" approach.

We asked our interviewees which method was used and what difference in effect the method would have. We tried when asking this question to refer to Woodhouse's "three times as much" test in *Reid* v. *Reid*[28] and to inquire whether that or merely a percentage of 100% were used. The responses were equivocal. Seven persons articulated a recognition of the "times as much" concept, but no one clearly indicated whether one or the other approach was followed generally. Some persons responded with the reference to "global division" which we interpreted to mean the percentage of 100% approach. Four persons deflected the questions and avoided any direct response. Two persons did not understand the inquiry at all; one of them was unfamiliar with the *Reid* case. One person said flatly that the "times as much" approach was not followed. One respondent, who otherwise praised Woodhouse's opinions, remarked that this was merely, "Woody waxing lyrical." Our data does not reveal whether we failed to ask the question clearly in other interviews or whether the subject managed to divert us from the topic without our making note of it. Because we believe the methodology for comparing contribution can result in a significant difference in dividing property, we recommend this topic for more definitive research.

4. Significance in achieving statutory goals

Our data indicates that the absence of statutory guidelines for quantifying and comparing the value of the spouses' respective contributions allows a wide range of judicial discretion which is reflected in the practicalities of settlement. We believe the most salient effects on court decisions and in settlements are: (1) ordinarily, unusual skill or effort in producing property is valued more than homemaking effort, thus the division favors the property producer; and (2) at least occasionally when the source of the property is from outside the marriage or from unusual effort, the disparity in division of property is greater than the decisionmaking participants realize. These effects are not necessarily incompatible with the goals of the Act. The rebuttable presumption of equal division and the absence of direction for quantifying and comparing contributions to the marriage allow this result.

28 Supra, n. 2.

IV. SPECIFIC PROBLEM AREAS

Difficulties in implementing the Act were often described during our interviews. Some of these can be classified by type of property: 14 persons mentioned farms and 10 businesses; 7 persons mentioned superannuation; 14 indicated the matrimonial home. For farms, businesses and superannuation the problems were primarily: difficulty in valuation and difficulty in dividing without destroying the enterprise or burdening the spouse who retained it with immense money payments.

Some respondents said that two substantive clarifications were needed: allocation of debts and validity of section 21 agreements. Two topics beyond the scope of our interviews involved classification of separate and matrimonial property. Some respondents believed: the amount of superannuation earned prior to the marriage should be separate property and increase in value of separate property due to efforts of the spouses should be matrimonial property.

The matrimonial home issue was described as a dilemma: inability to give possession for the benefit of children without depriving the non-possessory spouse of his/her monetary share for a long period of time. Immediate sale was seen as an inadequate solution unless there were sufficient equity for both parties to start afresh with suitable housing. Perhaps the frustration expressed by the respondents was due to a perceived lack of direction in the courts. Half those who responded said that immediate sale was occurring more often and half said that possession for the children with delay in sale was occurring more often. A few indicated the recent trend was toward possession and delay of payment.

Problems with the matrimonial home blended into a more generalized social problem discussed by ten of the lawyers and judges in structured interviews and, also, by the participants in a meeting at the Ministry of Womens' Affairs: the negative economic effects of marriage dissolution on women and children. Many of them stated that women are not as economically self sufficient as men. They said that women cannot get on as well as men because they had been working in the home, not wage earning, during the marriage. Since custody goes to the mother most often, the children share the economic problem. The inability to obtain maintenance for the ex-wife and the minimal obligation of fathers for child maintenance were given as reasons for dissolution burdening women more than men. In short, the standard of living for women and children is lowered more than that of men after a marriage dissolution. Equal property division does not correct the imbalance. Some persons described the property division as achieving, "Equality in law, but inequality in fact." They said the husband took the income producing business and the wife and children were left with a mortgaged home and an old car. These responses suggest that it is time for research and public policy

debate on the economic effects of marriage dissolution[29] as well as on the more specific issues of the Matrimonial Property Act.

V. CONCLUSION

The Matrimonial Property Act 1976 sought "to recognize the equal contribution of husband and wife to the marriage partnership."[30] The extent to which that goal is being achieved is subject to differing opinion. Data from interviews with policy makers, judges and lawyers show that property division is settled in approximately 90% of marriage dissolutions. Wives receive a much larger share of property accumulated during the marriage than was the case under prior law. The equality norm of the Act causes these settlements to divide typical or "run of the mill" property of a marriage equally between the marriage partners. However, the data also indicate that various interrelated factors, some statutory and others independent, influence settlements to favor the income producer, ordinarily the husband, when the value of the matrimonial property exceeds average or typical amounts.

29 The Australian Law Revision Commission, after studying the New Zealand property division law, tentatively favored a similar system of presumptively equal division with two important differences designed to aid economically disadvantaged women. it suggested an adjustment in the property shares by reference to disparity in earning capacity because of service to the family and maintenance when needed even after taking into account the property division. "Matrimonial Property Law", Discussion Paper No. 22, sections 149-159, The Australian Law Reform Commission (June 1985). In the United States, Professor Weitzman completed a ten year study of the economic effect of divorce in California where the community property must be divided equally. She concluded that women and children were suffering economically in contrast to men and she recommended a system which, if possible, would provide from the property and maintenance a home for children and compensation for differential effects of the marriage on earning capacities. Weitzman *The Divorce Revolution* (Collier Macmillan, 1985). Our respondents did not cite these studies, but were expressing similar concerns arising from their own experience in New Zealand. The coincidental relationship suggests that research in New Zealand may be warranted.

30 The title to the Matrimonial Property Act 1976.