This copy has been supplied by the Library of the University of Otago on the understanding that the following conditions will be observed:

1. To comply with s56 of the Copyright Act 1994 [NZ], this thesis copy must only be used for the purposes of research or private study.

2. The author's permission must be obtained before any material in the thesis is reproduced, unless such reproduction falls within the fair dealing guidelines of the Copyright Act 1994. Due acknowledgement must be made to the author in any citation.

3. No further copies may be made without the permission of the Librarian of the University of Otago.
Title: THE DIVISION OF FARMS AND RELATED PROPERTY UNDER THE MATRIMONIAL PROPERTY ACT 1976

Author: MICHAEL W. FRAWLEY

A thesis submitted for the degree of

MASTERS OF LAW (LLM)

at the University of Otago, Dunedin

New Zealand.

Date: 29th October 1985
There are a number of inherent difficulties in the application of the Matrimonial Property Act 1976 to farms and related property. This Thesis has undertaken an examination of the effect of that Act on such farm property and in particular to:

(a) The effect of having the matrimonial home on the farm property and the effect of Section 12.

(b) What factors determine whether the farm property is to be classified as matrimonial property, which is prima facie divided equally between the spouses, or separate property, which prima facie remains the property of the owner spouse.

(c) The effect of increases in value of the separate farm property, either with or without the influence of the non-owning spouse.

(d) The effect and implications of estate planning and gifting programmes and the influence the Matrimonial Property Act has.

(e) The effect of livestocks value, numbers during the marriage and the classification of such livestock.

(f) What factors are taken into account in the division and valuation of the various types of matrimonial property and what policies effect the date of that division.

It was concluded after an examination of the various Sections of the Act and related cases that if either or both spouses own the land upon which the homestead stands, that is the matrimonial home and its related area, that homestead will be divided equally between the spouses after deducting any allowable debts. Any divergence from equal sharing would be rare.

Likewise the remainder of the farm property will usually be classified as matrimonial property and subject to equal sharing, if it has been acquired directly or indirectly by the joint or several efforts of the spouses during the marriage.
If the remainder of the farm property was acquired prior to the marriage or acquired by way of a gift or inheritance during the marriage, that proportion of the farm property will remain the separate property of the owner or donee spouse so long as it does not become intermingled with matrimonial property.

An exception in this area, is that property past for valid consideration during the marriage will be classified as matrimonial property, and therefore liable to equal sharing as the vital gift element of Section 10 is absent.

The Courts have countered this position by classifying such property as a greater contribution to the marriage partnership in favour of the donee spouse which in turn justifies that spouse in receiving a greater percentage of the matrimonial property on division.

Any increase in the value of any farm property during the marriage due to the use of matrimonial property farm income or due to the efforts of the non-owner spouse will usually result in that increase of value being classified as matrimonial property and therefore subject to equal sharing.

In a marriage of substantial duration, where the farm has been actively farmed by either or both spouses, it will usually be impossible for any livestock to retain its original designation as separate property, due to its natural turnover in numbers and sales, especially where that livestock has been mixed with matrimonial property livestock.

Finally, it was concluded that the date for the division of the matrimonial farm property between the spouses will not be substantially postponed by the Court unless there are special mitigating factors.

It is submitted that this Thesis provides a framework or guideline which maybe used by the layman or professional alike to determine the effect of the Matrimonial Property Act 1976 on farms and related property.
I wish to thank the following people and/or institutions for their encouragement and assistance during the completion of this thesis.

First and foremost Gayle Waghorn, my friend, advisor and chief key pusher of a sometimes temperamental word processor. She showed incredible patience in the typing of this thesis and its related drafts, I will always be in her debt.

Secondly, Mr. Mark Henaghan, senior Lecturer in Law, University of Otago for personal guidance and motivation.

Thirdly Mr. Peter Churchman, Mr. Warwick Deuchrass, Mr. Jackson, Mr. David Lamont, Mr. Garth Lucas, and Mr. Alistair Paterson, the partners of Caudwells, Solicitors in Dunedin, my bosses. They gave me the topic, the time, support, encouragement and the facilities and their experience which allowed me to complete this masters.

Finally Ms Kathrine Hughes and Jeda, my family, they had to tolerate my ravings to the end of this thesis and beyond.
TABLE OF CONTENTS

(References are to page numbers)

THE DIVISION OF FARMS AND RELATED PROPERTY UNDER THE MATRIMONIAL PROPERTY ACT 1976

Title Page i.
Declaration Concerning Thesis ii.
Abstract iii.
Preface v.
Table of Contents vi.
Table of Cases x.
Table of New Zealand Statues xv.

CHAPTER 1


Introduction 1.

CHAPTER 2

MATRIMONIAL HOME OR HOMESTEAD 5.

A. Matrimonial Homes Generally 5.
B. The Homestead And Its Relationship To The Matrimonial Home 6.
C. What Constitues The Homestead 8.
CHAPTER 3

THE CLASSIFICATION OF FARMS AND RELATED PROPERTY AS EITHER

MATRIMONIAL OR SEPARATE PROPERTY

A. The Classification Of Farms And Related
Property as Matrimonial Property

(i) Farm Property Acquired After Marriage

B. The Classification of Farms And Related
Property As Separate Property

(i) Farm Property Acquired Before Marriage.

(a) farm property acquired in contemplation
of marriage.

(b) farm property intended for the common
use and benefit of the spouses.

(ii) Farm Property Acquired After Separation

(a) the conflict between Section 9(4)
and Sections 8 & 12

(iii) Farm Property Acquired After A Court Order

(iv) Gratuitous Farm Property From This Parties Such
As Parents

(a) the time of the gift

(b) the farm property must have been acquired
by succession, survivorship, trust or gift

(c) conversion of farm property from separate
property to matrimonial property due
to intermingling

C. Proceeds, Increases, Income And Gains To Separate
Farm Property Pursuant To Section 9(3)

CHAPTER 4

ESTATE PLANNING AND GIFTING PROGRAMMES AND THEIR
IMPLICATIONS ON FARM PROPERTY
CHAPTER 5

INTER-SPouse GIFTING OF FARM PROPERTY 49.
A. Gifting Of Farm Property Without A Formal Agreement 49.
   (i) The Inter-relationship Between Section 10(1) And Section 10(2) 55.
B. Gifting Of Farm Property By Way Of A Formal Agreement 56.
   (ii) Void Or Unenforceable Agreements 63.

CHAPTER 6

FARMING PARTNERSHIPS 65.
A. Partnerships With A Third Party 65.
B. Partnerships Between Spouses 67.

CHAPTER 7

LIVESTOCK, NATURAL INCREASES AND VALUATIONS 71.
A. Livestock And The Effect Of Natural Increases And Turnover 71.
B. Increases In The Livestocks Value 72.
C. Livestock Valuations 76.

CHAPTER 8

THE DIVISION OF FARMS AND ASSOCIATED PROPERTY 79.
A. Types Of Farm Property And Its Valuations 79.
   (i) Homesteads 79.
      (a) valuation and equity of homesteads 79.
      (b) the type of interest in the homestead 82.
   (ii) Farm Land And Plant 83.
      (a) matrimonial or separate property 83.
(b) nexus between a spouses domestic activities
and the others asset making activities 87.
(c) the valuation of farms 89.
(iii) Livestock And Balance Of Property 89.

B. Deduction Of Farm Debts 90.

C. The Factors Affecting The Division Of The
Matrimonial Farm Property 94.
(i) Contributions To The Marriage Partnership 96.
(ii) Farms Acquired By The Joint Effort Of The
Spouses 97.
(iii) The Effect Of Mills v Dowdall And Subsequent
Cases Involving A Determination of Section 10 99.
(iv) Other Factors Affecting The Division Of
Farm Property 103.

D. The Time Of The Division 104.

CHAPTER 9

Conclusion 110.

BIBLIOGRAPHY

Sources and References Material Consulted 113.

APPENDICES

APPENDIX A 116.


A. The Matrimonial Proceedings Act 1963 And
B. The Matrimonial Property Act 1976 120.
## TABLE OF CASES
(References are to page numbers)

### A.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANDERSON v ANDERSON</td>
<td>1980</td>
<td>52</td>
</tr>
<tr>
<td>APPLETON v APPLETON</td>
<td>1980</td>
<td>119</td>
</tr>
<tr>
<td>AUSTIN v AUSTIN</td>
<td>1980</td>
<td>71, 72</td>
</tr>
</tbody>
</table>

### B.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BADDELEY v BADDELEY</td>
<td>1978</td>
<td>94, 96, 106</td>
</tr>
<tr>
<td>BARTON v BARTON</td>
<td>1977</td>
<td>18, 55</td>
</tr>
<tr>
<td>BEESON v BEESON</td>
<td>1977</td>
<td>7, 9</td>
</tr>
<tr>
<td>BELCHER v BELCHER</td>
<td>1980</td>
<td>13, 21</td>
</tr>
<tr>
<td>BELL v BELL</td>
<td>1981</td>
<td>76, 80, 83</td>
</tr>
<tr>
<td>BENNETT v BENNETT</td>
<td>1981</td>
<td>39, 72, 85, 86</td>
</tr>
<tr>
<td>BEST v BEST</td>
<td>1981</td>
<td>13, 14, 19, 20, 83</td>
</tr>
<tr>
<td>BLACK v BLACK</td>
<td>1977</td>
<td>17</td>
</tr>
<tr>
<td>BLACK v BLACK</td>
<td>1980</td>
<td>23</td>
</tr>
<tr>
<td>BLEAKLEY v BLEAKLEY</td>
<td>1978</td>
<td>29, 32, 80, 91, 93, 94, 96</td>
</tr>
<tr>
<td>BOLGER v BOLGER</td>
<td>1979</td>
<td>33</td>
</tr>
<tr>
<td>BOOKER v BOOKER</td>
<td>1978</td>
<td>62</td>
</tr>
<tr>
<td>BOWEN v BOWEN</td>
<td>1981</td>
<td>34, 66, 72</td>
</tr>
<tr>
<td>BOWLING v BOWLING</td>
<td>1975</td>
<td>59</td>
</tr>
<tr>
<td>BOYDE v BOYDE</td>
<td>1984</td>
<td>95</td>
</tr>
<tr>
<td>BRADLEY v BRADLEY</td>
<td>1979</td>
<td>61, 63</td>
</tr>
<tr>
<td>BROWN v BROWN</td>
<td>1982</td>
<td>21, 23, 66</td>
</tr>
<tr>
<td>BROWN v BROWN</td>
<td>1984</td>
<td>5</td>
</tr>
<tr>
<td>BUCKMAN v BUCKMAN</td>
<td>1979</td>
<td>40, 74, 84, 86, 89, 93</td>
</tr>
<tr>
<td>BUCKTHOUGHT v BUCKTHOUGHT</td>
<td>1977</td>
<td>58</td>
</tr>
</tbody>
</table>

### C.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAMPBELL v CAMPBELL</td>
<td>1978</td>
<td>17, 18, 54</td>
</tr>
<tr>
<td>CLARK v CLARK</td>
<td>1937</td>
<td>63</td>
</tr>
<tr>
<td>COLLIE v COLLIE</td>
<td>1981</td>
<td>49, 87</td>
</tr>
<tr>
<td>COOK v COOK</td>
<td>1979</td>
<td>7</td>
</tr>
<tr>
<td>COOK v COOK</td>
<td>1981</td>
<td>30, 31, 108</td>
</tr>
<tr>
<td>CORMACK v CORMACK</td>
<td>1981</td>
<td>31</td>
</tr>
<tr>
<td>CROSS v CROSS</td>
<td>1984</td>
<td>99, 100, 102</td>
</tr>
</tbody>
</table>

### D.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DENNIS v DENNIS</td>
<td>1983</td>
<td>60, 77</td>
</tr>
<tr>
<td>DENYER v DENYER</td>
<td>1979</td>
<td>74</td>
</tr>
<tr>
<td>DOCHERTY v DOCHERTY</td>
<td>1983</td>
<td>60</td>
</tr>
<tr>
<td>DUFF v DUFF</td>
<td>1979</td>
<td>33, 69, 70</td>
</tr>
<tr>
<td>DUNCAN v SOMLIA</td>
<td>1962</td>
<td>60</td>
</tr>
</tbody>
</table>
### E.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>E, Re</td>
<td>(1978)</td>
<td>126.</td>
</tr>
<tr>
<td>EATON v EATON</td>
<td>(1979)</td>
<td>97.</td>
</tr>
<tr>
<td>EDWARDS v EDWARDS</td>
<td>(1977)</td>
<td>23.</td>
</tr>
<tr>
<td>EDWARDS v EDWARDS</td>
<td>(1979)</td>
<td>62.</td>
</tr>
</tbody>
</table>

### F.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>FORNA v FORNA</td>
<td>(1979)</td>
<td>9, 51.</td>
</tr>
<tr>
<td>FORRESTER v FORRESTER</td>
<td>(1980)</td>
<td>40, 86.</td>
</tr>
<tr>
<td>FOSS v FOSS</td>
<td>(1977)</td>
<td>105.</td>
</tr>
<tr>
<td>FULLER v FULLER</td>
<td>(1978)</td>
<td>18, 81.</td>
</tr>
</tbody>
</table>

### G.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>GALLAGHER v GALLAGHER</td>
<td>(1980)</td>
<td>35.</td>
</tr>
<tr>
<td>GERBIC v GERBIC</td>
<td>(1978)</td>
<td>31, 33, 36.</td>
</tr>
<tr>
<td>GISSING v GISSING</td>
<td>(1971)</td>
<td>119.</td>
</tr>
<tr>
<td>GREER v GREER</td>
<td>(1978)</td>
<td>17, 18.</td>
</tr>
<tr>
<td>GRIFFITHS, In the Matter of</td>
<td>(1979)</td>
<td>125.</td>
</tr>
</tbody>
</table>

### H.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>HAAS v HAAS</td>
<td>(1948)</td>
<td>63.</td>
</tr>
<tr>
<td>HACKETT v HACKETT</td>
<td>(1977)</td>
<td>106.</td>
</tr>
<tr>
<td>HAGGIE v HAGGIE</td>
<td>(1978)</td>
<td>18.</td>
</tr>
<tr>
<td>HALDANE v HALDANE</td>
<td>(1976)</td>
<td>118, 120, 121.</td>
</tr>
<tr>
<td>HARNETT v HARNETT</td>
<td>(1978)</td>
<td>26, 91.</td>
</tr>
<tr>
<td>HARREX v HARREX</td>
<td>(1979)</td>
<td>127.</td>
</tr>
<tr>
<td>HAYDEN v HAYDEN</td>
<td>(1980)</td>
<td>23, 71, 73, 86.</td>
</tr>
<tr>
<td>HENDERSON v HENDERSON</td>
<td>(1978)</td>
<td>23.</td>
</tr>
<tr>
<td>HINE v HINE</td>
<td>(1962)</td>
<td>119.</td>
</tr>
<tr>
<td>HOFMAN v HOFMAN</td>
<td>(1976)</td>
<td>120.</td>
</tr>
<tr>
<td>HOLLINGSHEAD v HOLLINGSHEAD</td>
<td>(1977)</td>
<td>20.</td>
</tr>
</tbody>
</table>

### I.

<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case</td>
<td>Year(s)</td>
<td>Pages</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>--------------</td>
<td>-------</td>
</tr>
<tr>
<td>Jackson v Jackson</td>
<td>1975</td>
<td>35</td>
</tr>
<tr>
<td>Jackson v Jackson</td>
<td>1982</td>
<td>35</td>
</tr>
<tr>
<td>Johnston v Johnston</td>
<td>1980</td>
<td>98, 107</td>
</tr>
<tr>
<td>Johnston v Johnston</td>
<td>1984</td>
<td>98</td>
</tr>
<tr>
<td>Jones v Jones</td>
<td>1975</td>
<td>63</td>
</tr>
<tr>
<td>K v K</td>
<td>1976</td>
<td>59</td>
</tr>
<tr>
<td>Knatchbull v Hallett</td>
<td>1880</td>
<td>30</td>
</tr>
<tr>
<td>Krempaski v Krempaski</td>
<td>1979</td>
<td>25</td>
</tr>
<tr>
<td>Le Gale v Le Gale</td>
<td>1979</td>
<td>23</td>
</tr>
<tr>
<td>Letica v Letica</td>
<td>1978</td>
<td>22, 23</td>
</tr>
<tr>
<td>Long v Long</td>
<td>1973</td>
<td>73</td>
</tr>
<tr>
<td>McAllister v McAllister</td>
<td>1979</td>
<td>23</td>
</tr>
<tr>
<td>McIndoe v McIndoe</td>
<td>1978</td>
<td>46, 47</td>
</tr>
<tr>
<td>McKinstry v McKinstry (No.1)</td>
<td>1980</td>
<td>105</td>
</tr>
<tr>
<td>McKinstry v McKinstry (No.2)</td>
<td>1981</td>
<td>76</td>
</tr>
<tr>
<td>M v M</td>
<td>1980</td>
<td>127</td>
</tr>
<tr>
<td>Madden v Madden</td>
<td>1978</td>
<td>123</td>
</tr>
<tr>
<td>Madden v Madden</td>
<td>1981</td>
<td>60, 63</td>
</tr>
<tr>
<td>Manuel v Manuel</td>
<td>1978</td>
<td>38, 39, 40, 84, 86, 94, 96</td>
</tr>
<tr>
<td>Martin v Martin</td>
<td>1979</td>
<td>1</td>
</tr>
<tr>
<td>Maunsell v Olins</td>
<td>1975</td>
<td>47</td>
</tr>
<tr>
<td>Maw v Maw</td>
<td>1981</td>
<td>66, 69, 93, 97</td>
</tr>
<tr>
<td>Mills v Dowdall</td>
<td>1983</td>
<td>29, 37, 45, 49, 99, 100, 101, 102</td>
</tr>
<tr>
<td>Ministry of Health v Simpson</td>
<td>1951</td>
<td>30</td>
</tr>
<tr>
<td>Morton v Morton</td>
<td>1982</td>
<td>109</td>
</tr>
<tr>
<td>Moyle v Moyle</td>
<td>1982</td>
<td>23, 67</td>
</tr>
<tr>
<td>Oakley v Oakley</td>
<td>1980</td>
<td>17</td>
</tr>
<tr>
<td>Owens v Owens</td>
<td>1979</td>
<td>28, 44</td>
</tr>
<tr>
<td>..................................................</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reference</td>
<td>Title</td>
<td>Year</td>
</tr>
<tr>
<td>-----------</td>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>PARSONS v PARSONS</td>
<td>(1977)</td>
<td>33.</td>
</tr>
<tr>
<td>PLIMMER v PLIMMER</td>
<td>(1979)</td>
<td>16.</td>
</tr>
<tr>
<td>PURVIS v PURVIS</td>
<td>(1977)</td>
<td>105.</td>
</tr>
<tr>
<td>REED v REED</td>
<td>(1978)</td>
<td>105.</td>
</tr>
<tr>
<td>REID v REID</td>
<td>(1979)</td>
<td>1, 13, 34, 35, 42</td>
</tr>
<tr>
<td></td>
<td></td>
<td>47, 95, 96.</td>
</tr>
<tr>
<td>REID v REID</td>
<td>(1979)</td>
<td>47.</td>
</tr>
<tr>
<td>REID v REID</td>
<td>(1980)</td>
<td>27, 66.</td>
</tr>
<tr>
<td>RIDGWAY v RIDGWAY</td>
<td>(1980)</td>
<td>86.</td>
</tr>
<tr>
<td>RIDLING v RIDLING</td>
<td>(1978)</td>
<td>7, 9.</td>
</tr>
<tr>
<td>ROSE v SCOTT</td>
<td>(1979)</td>
<td>31, 36.</td>
</tr>
<tr>
<td>SAXTON v SAXTON</td>
<td>(1978)</td>
<td>25, 94, 105.</td>
</tr>
<tr>
<td>SCOTT v SCOTT</td>
<td>(1980)</td>
<td>28, 34, 68, 73, 92, 94.</td>
</tr>
<tr>
<td>Shearing v Shearing</td>
<td>(1980)</td>
<td>74, 75, 81, 89, 93.</td>
</tr>
<tr>
<td>Sims v Sims</td>
<td>(1975)</td>
<td>63.</td>
</tr>
<tr>
<td>Smith v Heappey</td>
<td>(1980)</td>
<td>16, 82.</td>
</tr>
<tr>
<td>Stallinger v Stallinger</td>
<td>(1977)</td>
<td>17.</td>
</tr>
<tr>
<td>Stocker v Stocker</td>
<td>(1978)</td>
<td>126.</td>
</tr>
<tr>
<td>Strachan v Strachan</td>
<td>(1978)</td>
<td>127.</td>
</tr>
<tr>
<td>Sykes v Sykes</td>
<td>(1979)</td>
<td>51.</td>
</tr>
<tr>
<td>Syme v Syme</td>
<td>(1978)</td>
<td>35.</td>
</tr>
</tbody>
</table>
T. continued:

THORNEYCROFT v THORNEYCROFT (1978) 29.
TICKLE v TICKLE (1978) 74, 75, 89.
TONKIN v TONKIN (1978) 8.

W.

WALKER v WALKER (1966) 119.
WALKER v WALKER (1983) 23.
WALSH v WALSH (1984) 37, 38, 39, 44, 71, 72, 73, 100, 101, 102.
WICKHAM v WICKHAM (1981) 60.
WINTER v WINTER (1977) 23, 5C.
WISENEWSKI v WISENEWSKI (1978) 7, 23.

Y.

YAKICH v YAKICH (1982) 78, 97
TABLE OF NEW ZEALAND STATUTES
(References are to page numbers)

MATRIMONIAL PROPERTY ACT 1976

<table>
<thead>
<tr>
<th>Section</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (2)</td>
<td>116</td>
</tr>
<tr>
<td>2</td>
<td>5, 16</td>
</tr>
<tr>
<td>2 (1)</td>
<td>6, 10, 27</td>
</tr>
<tr>
<td>2 (2)</td>
<td>20, 63, 74, 89</td>
</tr>
<tr>
<td>4 (1)</td>
<td>57, 68</td>
</tr>
<tr>
<td>4 (2)</td>
<td>51</td>
</tr>
<tr>
<td>4 (4)</td>
<td>62</td>
</tr>
<tr>
<td>8</td>
<td>5, 11, 22, 42, 55, 73, 124</td>
</tr>
<tr>
<td>8 (a)</td>
<td>5, 12, 22, 42</td>
</tr>
<tr>
<td>8 (b)</td>
<td>12, 22, 42</td>
</tr>
<tr>
<td>8 (c)</td>
<td>12, 42, 69</td>
</tr>
<tr>
<td>8 (d)</td>
<td>12, 15, 16, 17, 18, 20, 42, 44, 52, 54</td>
</tr>
<tr>
<td>8 (e)</td>
<td>12, 13, 14, 15, 22, 32, 38, 41, 42, 45, 49, 50, 66, 83, 84, 87, 99, 124</td>
</tr>
<tr>
<td>8 (ee)</td>
<td>12, 15, 18, 22, 42, 52, 54, 124</td>
</tr>
<tr>
<td>8 (f)</td>
<td>22, 23, 24, 42, 45, 82</td>
</tr>
<tr>
<td>8 (g)</td>
<td>11, 15, 42</td>
</tr>
<tr>
<td>8 (h)</td>
<td>42</td>
</tr>
<tr>
<td>8 (i)</td>
<td>11, 15, 42</td>
</tr>
<tr>
<td>8 (j)</td>
<td>42</td>
</tr>
<tr>
<td>9</td>
<td>11, 14, 55, 73</td>
</tr>
<tr>
<td>9 (1)</td>
<td>15, 26, 84</td>
</tr>
<tr>
<td>9 (2)</td>
<td>13, 14, 15, 34, 72, 124</td>
</tr>
<tr>
<td>9 (3)</td>
<td>12, 22, 36, 37, 38, 39, 40, 41, 42, 71, 72, 84, 86, 87, 89</td>
</tr>
<tr>
<td>9 (4)</td>
<td>15, 20, 21, 22, 23, 24, 63, 66, 74</td>
</tr>
<tr>
<td>9 (5)</td>
<td>15, 22, 25</td>
</tr>
<tr>
<td>9 (6)</td>
<td>12, 22, 29, 42</td>
</tr>
<tr>
<td>10</td>
<td>11, 14, 26, 27, 42, 73, 99, 124</td>
</tr>
<tr>
<td>10 (1)</td>
<td>12, 15, 26, 27, 29, 32, 33, 36, 43, 45, 46, 47, 48, 49, 55, 84, 91, 102, 103</td>
</tr>
<tr>
<td>10 (2)</td>
<td>12, 15, 18, 28, 49, 50, 51, 52, 53, 54, 55</td>
</tr>
<tr>
<td>10 (3)</td>
<td>55</td>
</tr>
<tr>
<td>11</td>
<td>12, 124</td>
</tr>
<tr>
<td>11 (3)</td>
<td>5, 63</td>
</tr>
<tr>
<td>12</td>
<td>3, 10, 12, 16, 19, 20, 22, 79, 83</td>
</tr>
<tr>
<td>12 (1)</td>
<td>6, 80, 82</td>
</tr>
<tr>
<td>12 (2)</td>
<td>6, 79</td>
</tr>
<tr>
<td>13</td>
<td>103</td>
</tr>
<tr>
<td>13 (3)</td>
<td>63</td>
</tr>
<tr>
<td>14</td>
<td>63, 122</td>
</tr>
<tr>
<td>Section</td>
<td>15</td>
</tr>
<tr>
<td>---------</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>18 (1)</td>
</tr>
<tr>
<td></td>
<td>18 (2)</td>
</tr>
<tr>
<td></td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>20 (2)</td>
</tr>
<tr>
<td></td>
<td>20 (5)</td>
</tr>
<tr>
<td></td>
<td>20 (6)</td>
</tr>
<tr>
<td></td>
<td>20 (7)</td>
</tr>
<tr>
<td></td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>21 (3)</td>
</tr>
<tr>
<td></td>
<td>21 (4)</td>
</tr>
<tr>
<td></td>
<td>21 (5)</td>
</tr>
<tr>
<td></td>
<td>21 (6)</td>
</tr>
<tr>
<td></td>
<td>21 (8)</td>
</tr>
<tr>
<td></td>
<td>21 (9)</td>
</tr>
<tr>
<td></td>
<td>21 (10)</td>
</tr>
<tr>
<td></td>
<td>21 (12)</td>
</tr>
<tr>
<td></td>
<td>23 (b)</td>
</tr>
<tr>
<td></td>
<td>25 (2)</td>
</tr>
<tr>
<td></td>
<td>25 (3)</td>
</tr>
<tr>
<td></td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>28 A</td>
</tr>
<tr>
<td></td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>55 (1)</td>
</tr>
<tr>
<td></td>
<td>55 (2)</td>
</tr>
<tr>
<td></td>
<td>55 (3)</td>
</tr>
<tr>
<td></td>
<td>57 (5)</td>
</tr>
</tbody>
</table>

MATRIMONIAL PROPERTY AMENDMENT ACT 1980

Section: 2 13.

MATRIMONIAL PROPERTY AMENDMENT ACT (No 2) 1983

Section: 3 25.

ESTATE AND GIFT DUTIES ACT 1968
### PARTNERSHIP ACT 1908

Section: 23 70.

### MATRIMONIAL PROPERTY ACT 1963

<table>
<thead>
<tr>
<th>Section</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>2</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>5 (2)(a)</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>5 (2)(b)</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>5 (2)(c)</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>5 (2)(d)</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>5 (3)</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>5 (7)</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>6 (2)</td>
<td></td>
<td>117, 119.</td>
</tr>
<tr>
<td>7</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>8</td>
<td></td>
<td>117.</td>
</tr>
</tbody>
</table>

### MATRIMONIAL PROCEEDINGS ACT 1963

<table>
<thead>
<tr>
<th>Section</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>55</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>56</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>57</td>
<td></td>
<td>117.</td>
</tr>
<tr>
<td>58</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>59</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>60</td>
<td></td>
<td>117, 118.</td>
</tr>
<tr>
<td>63</td>
<td></td>
<td>117, 118.</td>
</tr>
</tbody>
</table>
CHAPTER 1

THE DIVISION OF FARMS AND RELATED PROPERTY UNDER THE MATRIMONIAL PROPERTY ACT 1976

INTRODUCTION

The Matrimonial Property Act 1976 has been in force for nearly nine years 1. Over this period of time not surprisingly, it has generated a large volume of litigation, and no doubt it will continue to do so for many years to come. However, most of the areas of uncertainty that have arisen under the Act have been resolved by the Court of Appeal. For example, the case of Martin v Martin 2 has made it very difficult to argue against the equal division of the matrimonial home and family chattles. This case was followed by Reid v Reid 3, which construed the Act in favour of finding property to be matrimonial rather than separate and indicated that significant departures from the equal sharing principle would be rare.

1. A discussion of the previous Acts and their relationship with the Matrimonial Property Act 1976 may be found in the Appendix to this thesis.

2. [1979] 1 NZLR 97.

One area that is creating an ever-increasing volume of litigation under the Matrimonial Property Act is that of farm property disputes between spouses and as such it is not uncommon for such disputes to be litigated all the way up to the Court of Appeal. There are a number of reasons for the propensity for litigation in the area of farms.
The first is that there are inherent difficulties in the application of the various sections of the Act to farm property. The second is that any percentage increase or decrease in a spouses share of the farm property may involve thousands of dollars, thus making litigation a viable and attractive proposition.
The third and final reason is that the division of farm property may have far reaching effects on the spouse who wishes to retain the farm intact. Such a spouse is encouraged to try and postpone, by court order, the date of division.
It is the object of this thesis to examine the inherent difficulties that arise from the application of the Matrimonial Property Act 1976 to the division farm property. As well as examine the extent to which division may be delayed so as to allow, the spouse in possesion of the farm to continue the status quo.
The willingness of people to litigate so as to increase or retain their share of matrimonial property is a sociological problem related to human nature and as such beyond the scope of this work.
Accordingly the major areas this thesis will examine are as
follows;

(a) The effect of having the matrimonial home on the farm property, and the effect of Section 12.

(b) What factors determine whether the property in question is to be classified as matrimonial or separate property and the effects of such classifications.

(c) What effect does the increase in value of separate farm property have, either with or without the influence of the non-owning spouse.

(d) What is the effect of Estate planning and gifting programmes.

(e) What is the effect of interspouse gifts, either by formal or informal agreements, and the effect of the contracting out provisions of the Act.

(f) What is the position of farming partnership agreements between spouses and/or third parties.

(g) What factors determine whether livestock is classified as matrimonial or separate property and how does natural increases or turnover of stock numbers affect those classifications.

(h) What factors are taken into account in the division and valuation of the various types of matrimonial farm property and what policies affect the date of that division.

It is hoped that in the light of the discussions under the above heads, that not only will a general pattern evolve, but that this thesis will be such that it may be used as a guideline by the academic lawyer or layman alike, to determine the possible
outcome of any particular dispute between the spouses involving farm land, without the necessity of working through voluminous cases, books and reference materials.
CHAPTER 2

MATRIMONIAL HOME OR HOMESTEAD?

A. MATRIMONIAL HOMES GENERALLY

Section 2 defines a matrimonial home as the dwellinghouse used habitually as the only or principal family residence together with any land, buildings or improvements appurtenant to the dwellinghouse used wholly or principally for the purposes of the household. By virtue of section 8 of the Matrimonial Property Act 1976 the matrimonial home is matrimonial property whenever and however acquired, and as such shall be proportioned under the sections of the Act.

The Court of Appeal, has however ruled that the dwellinghouse used by a couple can only be matrimonial property if it is owned wholly by one or both of the spouses. The decision 2 was based on a reading section 8(a) in conjunction with section 11(3)(b)(ii). The parties lived in a house on a farm owned by the husband and his brother as tenants in common in equal shares. All the property had been acquired before the marriage and as such was classed as separate property. The result was that there

1. All references to Sections of the Act, are to the Matrimonial Property Act 1976 unless otherwise stated.

2. Brown (unreported(10.5.84) CA170/82) Somers, Richardson JJ; Cooke J. dissenting.
was no matrimonial property to which the wife after nine years of marriage had rights to.

B. THE HOMESTEAD AND ITS RELATIONSHIP TO THE MATRIMONIAL HOME

Where the dwelling house is situated on unsubdivided land, such as a farm, that is not being used wholly or principally for the purposes of the household, section 12 3 declares that dwelling as a homestead. This categorisation means that where the homestead is owned by the husband or the wife or both, each is prima facie entitled to half the value of the equity 4.

It seems clear both from section 12(1) itself and from the definition of homestead under section 2(1) that before there can be an "homestead" there must be a "matrimonial home".

Before even turning to the question of homesteads, it therefore seems necessary to establish all the essential elements of a "matrimonial home" defined under Section 2(1). Among other things this includes the requirement that there must be a dwelling house used as the principle family residence and incorporates appurtenances used principally for the purposes of the homestead.

In deciding this question as to the existence and extent of the "matrimonial home", it seems doubtful whether any assistance can

3. For parallel provisions see Estate and Gift Duties Act 1968 s 17A as inserted by the Estate and Gift Duties Amendment Act 1976 s6.

be gained from the definition of "homestead" 5.
Thus the question whether the homestead provisions of section 12
have any application to a 7.5 acre farmlet 6 or to a large
residential section containing residential buildings and a
workshop 7, seems to turn solely upon whether or not the
principle family residence and appurtenances are used principally
for the purposes of the household in terms of the definition of
"matrimonial home".
If the whole of the unsubdivided land in question falls within
the definition of "matrimonial home", that would seem to end the
matter and any consideration of the "homestead" provisions would
then be redundant. If on the other hand, the owner discharges
the onus of proving that only a portion of the unsubdivided land

5. The difficulties expressed in Beeson (1977) 1MPC 17; Cook
(1979) 4MPC 42, might, with respect, have been reduced if the
definition of "matrimonial Home" had first been applied in
isolation from any question as to homesteads.
6. Beeson (supra) a house situated on 7.5 acres used by the
family to run, on a part-time basis a chicken farm and some
sheep, was held, after an examination of farm accounts and
the extent and nature of farming on the property to be a
in questions satisfies the "matrimonial home" definition, it would seem necessary to go on to consider the definition of "homestead".

C. WHAT CONSTITUTES THE HOMESTEAD

The only element added by the definition of "homestead" to that of the "matrimonial home" is that the residence must be "situated on an unsubdivided part of the land that is not used wholly or principally for the purposes of the household". Theoretically, therefore it might be submitted that land comprising 10 acres could be used principally for the purposes of the household when considered as a whole even though only 9 acres satisfy the definition of a "matrimonial home"; this situation would not fall within either definition.

A better approach would be that whenever there is unsubdivided land, only the parts that satisfy the definition of "matrimonial home" of the "homestead" definition is intended to apply. That result would be achieved by treating any area of unsubdivided land as a single unit for the purpose of ascertaining its principal use. If the principal family residence and the rest of the unsubdivided land is considered as a whole and used principally for household purposes then the whole of the land

8. Tonkin (1978) 1 MPC, Barker J; "I think it is incumbent on the party who seeks to ascertain that part only of the land should be set aside as a "homestead", to demonstrate that this part only was regarded as the matrimonial home and not the whole property"
would be treated as a "matrimonial home" and the homestead provisions will have no relevance. Conversely, if the unsubdivided land, taken as a whole, is not used as the principal household, some other principal use must exist. The secondary use, as a matrimonial home, will then be confined to the homestead portion.

This approach of assessing the purpose of unsubdivided land taken as a whole was considered in Ridling 9 where a portion of a large residential section was used as a workshop for the husband's business but it was held that taking the land as a whole the land was used for the purposes of the household and therefore a matrimonial home.

Likewise in S v S 10 Chilwell J held that a large old villa type home, a portion of which was used for a horticultural and motor mower repair business was, when taken as a whole, a matrimonial home.

Since the definition of "homestead" relates back to that of


10. (1978) 2 MPC 178. Applying this approach to Beeson (supra) application of the homestead provision would only be appropriate if the principal purpose of the 7.5 acres, taken as a whole was farming and the use of the part of it as the family residence was only of second importance.

It maybe questionable whether a large block of urban land has any other use than that of residence. But if the land is contained in two certificates of title the homestead problem does not arise. See Forna (1979) 2 MPC 104 at 106.
"matrimonial home" under section 2(1), it includes any land, buildings, or improvements appurtenant to the dwelling house used wholly or principally for the purposes of the household. On most farms this test is satisfied by the area of lawns, gardens, orchard or such like surrounding the house and enclosed by a fence or hedge. However, this simplistic solution should not obscure the ultimate "purpose of the household" as in some circumstances the area will need to be extended beyond the immediate physical enclosure; for example, where the family keeps domesticated animals for pleasure in some other defined area. In other cases that area maybe less than the immediate physical enclosure; for example, where the area contains certain outbuildings used exclusively for farming purposes. In cases of disputes the exact metes and bounds may need to be judicially determined as a preliminary to valuation. If either or both spouses own the land on which the homesteads stands, the homestead will be subject to separate valuation and equal division under section 12 11, for this purpose, arriving at the equity by appropriate apportionment of the mortgages secured over the whole of the farm.

11. See Chapter 8 as to the valuation of Homesteads as well as Fisher on Matrimonial Property (2nd edition) pages 379-382 for and inclusive discussion of section 12 and the valuation of homesteads.
CHAPTER 3

THE CLASSIFICATION OF FARMS AND RELATED PROPERTY AS EITHER MATRIMONIAL OR SEPARATE PROPERTY

Sections 8, 9, and 10 contain twenty-one provisions which together form a subcode for distinguishing between matrimonial property and separate property. The overall legislative purpose behind these provisions is, or should be, an aid to interpretation in areas of doubt.

A. THE CLASSIFICATION OF FARMS AND RELATED PROPERTY AS MATRIMONIAL PROPERTY

In Haldane 1 Somers J stated that "while the general policy of the act is to treat as matrimonial property the fruits of the endeavours of the partners to the marriage during its subsistence and property employed in it sustenance the provisions of section 8(g) and (i) go further. That those provisions may sometimes occasion injustice seems clear".

This statement envisages that farms and related assets will usually be defined as matrimonial property if they have one or two elements. The first is, that an asset will normally be matrimonial property if the circumstances of its acquisition, ownership, use or intermingling with other matrimonial property

have brought that farm or related asset into some form of
association with both spouses; for example the matrimonial home
2 if the homestead provisions of Section 12 do not apply 3, and
family chattels 4. These sections do not in any obvious way seem
calculated "to recognise the equal contribution of husband and
wife to the marriage partnership" in terms of the long title to
the act. Equal division under sections 11 and 12 are, for the
most part unaffected by contribution. Rather, the purpose seems
to turn on its common association with both spouses.
The same notion appears to underly designation as matrimonial
property where there is co-ownership 5, property acquired in
contemplation of marriage for common use and benefit 6, and
property acquired for common use and benefit out of pre marriage
property 7.
Secondly, a farm or related asset is likely to be regarded as
matrimonial property if it is directly or indirectly produced by
the joint or several efforts of the spouses during their
effective marriage; for example, increases in the value of a
separate property farm due to the actions of the non-owner spouse
8.

2. S.8(a).
4. S.8(b).
5. S.8(c).
6. S.8(d).
7. S.8(ee) see also Ss.9(6), 10(1) and (2).
8. S.9(3)(a).
(i) Farm Property Acquired After Marriage

Subsequent to the decision in Reid 9 which held that property acquired after the marriage will be matrimonial property irrespective of whether that property originated from separate property, a new section 8(e) was introduced which made section 8(e) subject to section 9(2) and classified as matrimonial property "all property acquired by either the husband or wife after the marriage" 10. For the present purposes, property is acquired when a spouse obtains a beneficial interest in it. Of all the ways in which property is acquired during a marriage, the most common is through the joint and several efforts of the spouses whether by earning income to acquire property or by building and creating the property itself 11. Farms or related assets acquired in this way are always matrimonial property. Section 8(e) may also extend to property acquired from the proceeds of separate property, while a direct purchase from the proceeds of separate property normally result in further separate property pursuant to section 9(2). It was held in Best's 12

11. The decision of Vautier J in Belcher (1980) 3 MPC 8 seems unaffected by the 1980 amendment. In that case a truck and equipment purchased in the course of the marriage was held to be matrimonial property.
Case that once the chain of purchases has at some stage included matrimonial property; for example, due to an acquisition for common use and benefit, subsequent purchases fall outside section 9(2) on the ground that they do not constitute "property acquired out of separate property".

In Best's Case 13 the husband after the marriage had sold an orchard acquired by him before the marriage and had purchased the "Wairakau farm" for the common use and benefit of himself and his wife. Subsequently the Wairakau farm was sold and a number of other properties and assets were acquired with the proceeds. Greig J held that the Wairakau farm was matrimonial property as it had been purchased for the common use and benefit of the parties. The subsequent assets, although not purchased for the common use and benefit of the parties were held to fall under section 8(e) and not section 9(2), as that property had been acquired out of matrimonial property.

After having substracted those assets subject to some form of common association, and those assets which constitute the product of the marriage, they will prima facie be divided equally between the parties. The remainder of the property not falling under the above principals will in general be separate property as defined by sections 9 and 10 and as such will prima facie be retained by the owner spouse.

13. Supra.
B. THE CLASSIFICATION OF FARMS AND RELATED PROPERTY AS SEPARATE PROPERTY

In general all the farms and related assets not covered by the above heads are prima facie separate property 14, and usually fall under 4 categories. They are

(i) property acquired before marriage 15;
(ii) property acquired after separation 16;
(iii) property acquired after a court order under the Act 17;
(iv) property acquire gratuitously 18;

There are a number of qualifications that affect the above classifications and they will be discussed under each of the above headings as they relate to farm properties and related assets acquired at various times.

(i) Farm Property Acquired Before Marriage

As we have seen the date at which property is "acquired" is critical to the classification of an asset as matrimonial or separate property under sections 8(d),(e) and (ee), 9(2),(4) and (5) and 10(1) and (2). In general farm property and related assets acquired before the marriage by one or other of the spouses remains separate property and is therefore immune to section 11.

14. S.9(1) and Ss, 8(g) and (i).
15. S.9(1).
17. S.9(5).
18. S.10(1) and 10(2).
However, there are exceptions; the first is where the separate property is a homestead as defined by section 2. As we have seen 19 if either or both spouses own the land on which the homestead stands, the homestead will be subject to separate valuation and equal division under section 12.

The second qualification to the above proposition is section 8(d); which states that property that was owned immediately before the marriage by the husband or wife but was (a) "acquired in contemplation of his or her marriage to the other" and was (b) "intended for the common use and benefit" of both the husband and the wife will be classified as matrimonial property.

(a) Farm property acquired in contemplation of marriage

The meaning of the word "acquired" in section 8(d) is significant because it determines the date at which marriage must have been contemplated and this by its definition requires a serious expectation that marriage will occur. For example, in Smith v Heappey 20 Prichard J held that: "in my view the expression 'in contemplation of marriage' connotes something more than simply that marriage was in contemplation at the time when the property was acquired; it carries the implication of a connection other than a mere coincidence in time between the contemplated marriage and the acquisition of the property. Adopting that view, I have come to the conclusion on the evidence that there was, in this


case, a nexus between the acquisition of the farm and the contemplated marriage - indeed it seems likely that it was because of the prospect of his sons marriage that the father took the property off the market and sold it to his son".

The fact that the couple may have been living in a de facto marriage does not necessarily mean that property acquired during such a period was in contemplation of marriage 21, although in such circumstances the couple often intend to marry as soon as they are both free to do so 22. In most cases a formal engagement to marry will usually suffice 23.

21. Stallinger [1977] 1 NZLR 559: Where a vacant section acquired by the wife during a de facto relationship with her future husband was held not to have been purchased in contemplation of marriage.

22. Greer (1978) 2 MPC 71: Where a drapery business purchased by the husband during a de facto relationship but marriage delayed until husbands divorce was obtained was held to be matrimonial property under s 8(d) as it was intended for the common use and benefit of both; Cf Black (1977) 1 MPC 28.

23. Campbell (1978) 2 MPC 33: Where during the engagement the intended husband purchased a fish business. On the facts it was held to have been purchased in contemplation of marriage, but s 8(d) did not apply due to the absence of the requisite intention as to common use; Cf Oakley (1980) 3 MPC 127.
(b) Farm property intended for the common use and benefit of the spouses

The other requirement of section 8(d) is that the acquisition must have also been accompanied by an intention that both spouses have "the common use and benefit" of the property. It must be intended that both spouses will share in the use of the property itself, as distinct from the use of income and other benefits derived from it 24. The concept of common use and benefit is reasonably easy to apply to property of a physical nature such as a dwelling. For example a seaside cottage intended for intermittent occupation by both spouses falls within section 8(d) 25; while investments flats intended to be occupied by other tenants does not 26.

The language of the section is more difficult to apply to farms and businesses. Here the requirement seems to be an intention that both spouses will actually work on the farm or at the business 27 as distinct from merely sharing the income from it 28.

As we have already seen 29 a question may also arise as to the severability of property when determining the extent to which common use and benefit applies to the whole of a large and

24. Similar wording is found in ss.8(ee) and 10(2).
25. Haggie (1978) 1 MPC 98 at 100; Barton (1977) 1 MPC 15.
27. Greer (1978) 2 MPC 71 an analogous business case.
29. See Chapter 2.
complex asset such as a farm or business. For example; in Best 30 it was held that a farm purchased with the intention that the farm income would be enjoyed by the family as a whole (common benefit) and with the intention that the homestead on the farm would be occupied by the husband and wife (common use) converted the whole of the farm to matrimonial property. Greig J stated that "I am unable to separate the use of the homestead and its benefit and the use of an benefit of the farm as a whole. No doubt the statute makes particular provision for homesteads but that it is because of the difficulties in identifying a matrimonial home and in fixing a value for it. The provisions of section 12 are special provisions for a special situation but they do not, in my view, alter by implication the nature or quality of the farm as a whole. There may well be cases when a farm or a farm property can be considered separate and apart and although acquired after marriage is not to be treated as being for both the common use and benefit of the husband and wife. That could well be the case where an additional farm is purchased even though it might be adjacent to the "home farm". In this case then notwithstanding the business aspect of the farming enterprise I hold that this farm was acquired after marriage for the common use and benefit of both the husband and the wife. That property then was matrimonial property..." 31.

While in the other legal context a farm maybe regarded as one

31. Ibid at p15 - 16.
indivisible asset, in the special context of the Matrimonial Property Act, with its severance of the homestead under Section 12 for division purposes. It is arguable that to come within section 8(d) the intended common use would need to extend beyond the homestead to the remainder of the farm.

(ii) Farm Property Acquired After Separation
The second area where a farm will be classified as separate property is where it is acquired after the parties are separated.

There are three requirements before section 9(4) is invoked:
First, the post-separation acquisition must be "property" 33. Secondly the property must have been "acquired" 34, this can be significant. If the capital gained after separation is to be regarded as essentially an increase in the value of an existing matrimonial property assets such as a farm, rather than the acquisition of a fresh asset, the appropriate jurisdiction is section 2(2) rather than section 9(4) 35. The third requirement is that the farm or related asset in question be acquired by either spouse "while they are not living together as husband and wife", though permanent termination of cohabitation is not necessary under this section 36.

32. s.9(4).
33. s.2(1).
34. Ibid.
36. Hollingshead (1977) 1 MPC 108.
The effect of invoking section 9(4) is that the acquisition is presumed to be separate property subject to a discretion "to treat such property or any part thereof as matrimonial property". In the exercise of this discretion, an asset acquired after separation will normally be treated as separate property except to the extent that its acquisition was directly or indirectly due to past or present matrimonial property, or where the owner should be held responsible for the loss of matrimonial property since separation. Likewise, due recognition must be given to post-separation contribution from one spouse. Consequently, there is jurisdiction to declare only part of an asset matrimonial property, leaving the presumption that the remainder is separate property 37. For example, by analogy from Brown 38, where a spouse after separation sells the matrimonial farm and applies those proceeds to increase the value of his separate property farm or uses the proceeds to purchase a new farm, those nett proceeds from the sale would be matrimonial property pursuant to Section 9(4). Likewise any purchase or

37. Brown [1982] 1 NZLR 513 (CA) where the matrimonial home was sold by the husband following separation, and the proceeds were applied in the reduction of a debt owed in respect of fresh property purchased by him since the date of separation. A portion of the post-separation assets were declared matrimonial property under s.9(4) to the extent of $22,763.0 being the nett proceeds of the sale of the matrimonial home. Cf Belcher (1980) 3 MPC 8.

38. Ibid.
increase due to their application would also be matrimonial property.

In general therefore post-separation increases in the value of existing matrimonial property are classified as matrimonial property, just as a new asset is classified as matrimonial property if it is pre-existing matrimonial property capital in a new form.

(a) The conflict between Section 9(4) and Sections 8 and 12

There is an inherent conflict between section 9(4) and section 8. Section 8 treats as matrimonial property assets having certain characteristics while section 9(4) presumptively treats the same assets as separate property if acquired after separation. The conflict is readily resolved in the case of matrimonial homes and family chattels since under section 8(a) and (b) a house or chattel cannot qualify as a matrimonial home or family chattel without a subsequent return to co-habitation. Likewise, there is no conflict between Section 12 and 9(4) due to the matrimonial home element in the definition of homestead.

A potential conflict arises between sections 9(4) and 8(f) in the case of income and gains from matrimonial property. On the one

39. There is no conflict between s.3(e) and 8(ee) as they are expressed to be subject to subsections (3) to (6) of s.9.

40. Letica (1979) 2 MPC 112 at 113.

41. See Chapter 2.
hand the income, gains or proceeds from the matrimonial property fall within the wording of section 8(f); which declares any such income or gain to be matrimonial property. On the other hand, the resultant property is "property acquired" after separation within the wording of section 9(4) and accordingly separate property.

The decisions on the point are inconclusive, but it has usually been accepted that if the income, gains or proceeds have been used to acquire further property, section 9(4) prevails. However, a number of other cases have held that so long as the capital in question retains its original form as income, gains or proceeds from matrimonial property section 8(f) applies. It is submitted that a better approach would be to hold that section 9(4) applies to all acquisitions after separation, including income, gains and proceeds from matrimonial property. Support for this proposition maybe found in a number of authorities. For example Moyle where the husband at the date of separation had a matrimonial property interest in a accountancy partnership from which he had retired and was receiving payment of his share in the partnership assets by

44. (1982) 5MPC 103 at 104(CA); see also Hayden (1980) 4MPC 97 Wisnewski (1977) 1MPC 234.
instalments. It was held that the wife was entitled to share equally in the sums received by the husband from the former partnership and the Registrar was appointed "to enquire into the sum received and/or to be received by the respondent (the husband) from the partnership". As to the jurisdiction for this Richardson J stated "Mr Goddard suggested that the High Court had no jurisdiction to direct that the wife's share is the sums received by the husband before the hearing in the High Court. We reject this submission, we have not doubt that had the point been raised before him the Judge would have invoked section 9(4) of the Matrimonial Property Act and given a direction in respect of those sums."

Perhaps the strongest submission to support the above proposition is that the result which might be achieved under Section 8(f) can always be produced under the discretion in Section 9(4). However, the converse does not apply as under Section 8(f) classification as matrimonial property is mandatory and inflexible. Section 9(4) is also wider in other aspects. Not only is jurisdiction unaffected by the fact that the original income, gains or proceeds may have been utilised in the acquisition of fresh assets, but it can also be used to convert other post separation assets to matrimonial property where the income, gains or proceeds have been lost altogether. It could be for this reason that the Courts often seem to have been prepared to award to a claimant half the nett post separation income from matrimonial property without ascertaining whether the income has been retained in the form of one or more assets to which the jurisdiction to divide specifically identified assets could then
(iii) Farm Property Acquired After A Court Order

There are three qualifications to Section 9(5) which classifies as separate property "all property acquired by either the husband or the wife after an order of the Court has been made defining their respective interest in the matrimonial property, or dividing or providing for the division of the property". The first qualification is that the parties may by an appropriate agreement under Section 21 determine otherwise.

Secondly, Section 9(5) does apply to orders made under Section 25(3) 46. Orders dividing particular assets between amicably married couples for estate planning purposes do not seem to nullify the continued application of the act.

Finally, where matrimonial property is divided on bankruptcy, any homestead and family chattels acquired thereafter, and any property acquired after discharge from bankruptcy "may" be matrimonial property. It is not clear whether the use of the word "may" in this respect is intended to confer a judicial discretion.

45. Paal (unreported, High Court, Christchurch. 17th February 1981, M412-78, Roper J.); Krempaski (1979) 3 MPC 98; Saxton (1978) 2MPC 166.

46. S 3 of the Matrimonial Property Amendment Act (No2) 1983 expressly excluded orders under S 25(3), although this result seems to have followed in any event from reference to "the" matrimonial property in the earlier version of S 9(5).
(iv) Gratuitous Farm Property From Third Parties Such As Parents
As a general rule, Section 10(1) when read with Section 9(1), classifies as separate property those assets which have been "acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person" together with the proceeds and acquisitions therefrom. By stipulating that in general such property "shall not be matrimonial property", Section 10(1) invokes Section 9(1), pursuant to which separate property is all the property of either spouse which is not matrimonial property.

(a) The time of the gift
Section 10(1) does not specifically specify whether the relevant transaction should have taken place prior to or during the marriage itself. The distinction can be important in view of the special treatment afforded to property falling within Section 10 as compared with that afforded to property owned since before the marriage 47.

There are no express words in Section 10(1) limiting its scope to transactions occurring during the marriage in particular, the word "spouse" seems to be addressed to status at the time that consent to intermingling was given or to status at the time of the hearing rather than to the status at the time of the original acquisition. For example in Harnett's case 48, 25 cows were gifted by the father of the husband prior to the marriage were

47. Ss 8(ee), 9(1) and 9(2).
held not to be separate property under Section 10(1). Chilwell J stated that "assets owned before marriage cannot be owned by a spouse. The position must be looked at at the time of or after the marriage...the definition of "husband and wife" and "spouse" in Section 2(1) are not compatible with facts occurring and assets acquired before marriage" 49.

Although the point has not yet been fully argued there is authoritative support for the broader interpretation that pre-marriage transactions are included in Section 10. For example see Reid's case 50, where farm land transferred to the husband prior to the marriage, by a gifting arrangement by his father, was treated as a gift under section 10(1) and accordingly held to be separate property 51.

(b) The farm property must have been acquired by succession, survivorship, trust or gift.

The property concerned must be acquired by succession, survivorship, trust or gift. For the most part, such

49. Ibid at 105.
51. See also Reid [1980] 2NZLR 270 (CA), where tools gifted to the husband prior to the marriage were treated as matrimonial property only because it was intermingled;

Walsh (1982) 4 MPC 178: Where Pritchard J stated at 179 that "S.10(1) applies and it is immaterial that the gift was made in two bites- one before the marriage and one during the subsistance of the marriage".
transactions will be gratuitous although in theory the recipient spouse could offer consideration in the first three cases. There is some ambiguity as to whether "from a third person" qualifies only the word gift or all four of the transactions. It is probable that the latter is intended since only gifts are singled out for special treatment under Section 10(2) where no third person is involved.

What the meaning of "gift" is, is not defined in the Act, but it appears to have the usual meaning of a disposition of property without consideration flowing from the recipient. This must be distinguished from dispositions where there is mere inadequacy of consideration. In Owens case 52 the husband purchased a farm from his father via an agreement for sale and purchase under which he paid an initial cash sum and the rest was mortgaged back to his father. Subsequently the father reduced or extinguished the amount owing by successive partial releases by way of gift. Mahon J held that the farm was not a gift although "as when some part of the mortgage debt was forgiven by the vendor, then the value of the gift was separate property received by the husband, so that the farm always retained the status of matrimonial property with the equity divisible between the husband and the wife equally, after first giving the husband credit for the total amount of the gifts received" 53.

Likewise in Scott's case 54 the husband purchased livestock from

52. (1979) 4 MPC 153.
53. Ibid at 153.
54. (1980) 3MPC 162.
his father for $6,372.00, subsequently the husband paid $1,000.00 and the father via a deed of forgiveness forgave the balance of $5,372.00. It was held that the gift was not one of livestock but one of money, in the form of a forgiveness of a debt and accordingly no property was represented.

As can been seen from the above cases property acquired by a purchase from a parent at a price demonstrably below its market value is not separate property under Section 10(1) 55. In the recent case of Rodgers v Rodgers 56 the Court of Appeal dismissed a husband's appeal against a High Court ruling that shares transferred to the husband by his father without payment was really consideration for past, low paid, work in the family business and therefore not a "gift" within Section 10(1) but matrimonial property.

(c) Conversion of farm property from separate property to matrimonial property due to intermingling

A further requirement of Section 10(1) is that there must be consent before intermingling results in conversion from separate property to matrimonial property. The wording of Section 10(1) also puts the requirement that the consent precedes the intermingling 57. Without such consent the Courts must evidently


56. (unreported (25.3.85) CA 69-82).

57. A similar requirement may be found in the wording S.9(6).
unravel the intermingled separate property from the matrimonial property even where it may be "unreasonable or impracticable" to do so.

Even where consent is given this does not result in matrimonial property unless the resulting intermingling makes the designation as separate property unreasonable or impracticable. The process resembles the equitable principle of tracing 58 but the Courts prefer to look at the substance of intermingling rather than the strict equitable principles as to form. Thorpe J stated "I have also noted the complete absence of any indication that the Courts think it appropriate to apply the tracing doctrines of equity or such principles as the rule in Claytons case, let alone apply the type of principles which the FIFO/LIFO debate on identification on stock on hand in a continuing business...The Courts have repeatedly indicated that in considering interests in matrimonial property they are more concerned with substance than with form or technicality. Thus it has more than once been held that the fact that monies are paid into a blended fund does not automatically involve loss of identity or such intermingling as to require the application of Section 10(1); see example Syme v Wilson (1977) 2MPC 185 and Cook (1981) 4 MPC 43. Further, there

have been many cases where the Courts have regarded the "broad brush" approach as appropriate in this area. A typical example is Rose v Scott (1979) 3MPC 153, in which Speight J at page 154, considering the application of proceeds of sale of a business and the absence of full records, described the Courts task as being making an informed guess" 59.

Fundamentally, the question to be determined is whether the identity of the original separate property is recognisable in its new form. Although this question is of an evidentiary 60 nature a number of discernible elements are evident. First, intermingling is based on what actually happened to the separate property and not on what the parties intended. "A mere intention to use such funds to repay a debt to the other spouse could not amount to intermingling. I think an actual physical intermingling is required, for the Section does say "have been so intermingled". Acceptance of a notional intermingling as satisfying the Section could raise some very difficult problems" 61.

Secondly, the fact that a disposition for inadequate consideration results in matrimonial property can be explained on

60. See Cormack (1981) 4MPC 45 at 47.
61. Cook (1981) 4MPC 43 at 44 per Roper J. In this case the wife inherited $1,100.00 and paid it into a Bank account already containing a small credit of matrimonial property funds. It was held that the $1,100.00 was clearly identifiable and therefore separate property.
the basis of intermingling rather than from the meaning of "gift" already discussed. For example in Bleakley 62 a farm was sold by the father to the son at $25,000.00 less than its market value. It was held by Speight J that even regarding the farm as a gift it was so intermingled the rest of the matrimonial farm that it was indistinguishable and accordingly matrimonial property.

Thirdly, it is the identity of the property that is to be determined when considering intermingling. Accordingly the use to which the property is used or the securities over it can never be taken into account. For example in Reid 63 the husband had acquired two blocks of land, one by gift before the marriage and therefore separate property under Section 10(1) and the other purchased after the marriage and accordingly matrimonial property pursuant to Section 8(e). Both were farmed as one operation and they both were mortgaged under one document. Greig J held that the above factors did not affect the identity of the property and therefore the separate property was not matrimonial property due to intermingling. Fourthly, a loan or debt incurred by the purchaser of a property represents a chose in action distinguishable from the property purchased. Consequently, a loan from one spouse to the other to enable the latter to purchase property does not result in the funds represented by the loan and the property purchased from being intermingled. In


Duff's case 64 the husband inherited the farm and a half share in
the plant, which was subsequently sold by him to his wife for
$9,072.00 so as to enable a farming partnership between them. On
separation the wife owed to the husband the sum of $5,072.00
being the outstanding purchase price and as such was held to be
separate property and the chose in action of the husband.
Fifthly, in establishing the use to which a mixed fund has been
put, there is no presumption that household expenses have been
paid from earned income 65.
Finally, once separate property has been intermingled with
matrimonial property, there is no onus upon the spouse alleging
conversion to matrimonial property emanating from a matrimonial
source; this would negate the proviso to Section 10(1).
Apart from the above elements and questions of evidence there
also seems to be an element of judicial discretion as to the
point at which identification is to be regarded as "unreasonable
or impracticable". For example when separate funds are swallowed
into the working capital of the household its separate identity
is likely to be lost. Likewise chattels will not normally be
regarded as irretrievably intermingled so that the individual

64. (1979) 3 MPC 45; see also Parsons (1977) 1 MPC 153; Bolger
(1979) 2 MPC 18.
65. Gerbic (supra) at page 41.
chattels continue to be physically identifiable. But it would be otherwise if they had been absorbed, without trace, into a large collection of plant and equipment or as is common in the farming area, separate property livestock are over a lengthy period of time replaced by purchases and natural increases and replacements. For example in Scott's case the husband's father had sold livestock to his son during the marriage for a modest payment and a forgiveness of the balance of the purchase price. It was held by Ongley J that even if the livestock was a gift it was not traceable to the present herd and was therefore matrimonial property.

Where a block of separate property land is farmed in conjunction with an adjoining block of matrimonial property land there has

66. S v S (1978) 2 MPC 178: Where gifted chattels were keep in a locked trunk, the key being in the possession of the husband and accordingly held to be separate property as it could not be intermingled.

67. Reid [1979] 1 NZLR 572 (CA): Where shares in the husband's business built up from separate property gifted to him by his mother was held to be matrimonial property due to intermingling. Per Cooke J at 597 Line 25.

68. (1980) 3 MPC 162.

69. Compare the position under S9 (2) in respect of premarriage assets which are not subject to the intermingling provision; Bowen (1981) 4 MPC 22.
been no difficulty in maintaining the separate identities 70, nor
where a spouse owning a separate property half interest as a
tenant in common has subsequently purchased the other half
interest as matrimonial property 71.
There is also a general readiness by the Courts to trace separate
property where both separate property and matrimonial property
funds have been used in the purchase of a single asset, on the
basis that the separate property component is established as a
proportion of the original cash contributions 72.
Tracing has even been extended to cover the situation where
separate property has been used to repay a loan incurred from the
acquisition of matrimonial property 73. It may appear that there
is little difference between tracing separate property
contributions to a blended fund in this way and tracing similar
contributions of separate property livestock to a larger herd.
These differences are not explainable solely on evidential
grounds.
In a statute whose primary object is to recognise the equal
contribution of husband and wife there maybe compelling reasons
for the sharing between the spouses inherited or gifted assets
which have not been produced by the efforts of either spouse
during the marriage partnership. There may be a good deal to be

70. Reid (supra).
71. Jackson (1984) 7/7 Capital Letter (CA) reversing Jackson
(1982) 5 MPC 68.
said for the broad approach to tracing which is concerned with the question whether the separate property capital can be traced to a blended asset, in the sense that an identifiable proportion of it is attributable to the separate property contribution. A liberal interpretation of the phrase "unreasonable or unpracticable" would give the Courts ample scope in which to achieve this result 74.

C. PROCEEDS, INCREASES, INCOME AND GAINS TO SEPARATE FARM PROPERTY PURSUANT TO SECTION 9(3)

All that remains for discussion under Section 10(1), is that it does not expressly preserve as separate property, increases in value, income or gains resulting to or from the separate property.

It seems probable that these are governed by Section 9(3) which states inter alia, "any increases in the value of separate property, and any income or gains derived from such property, shall be separate property unless the increase in value or the income or gains (as the case may be) were attributable wholly or in part-

(a) To the actions of the other spouse; or
(b) To the application of matrimonial property;

in either of which event the increases in value or the income or gains (as the case may be) shall be matrimonial property."

74. The broad approach was favoured by Speight J in Rose v Scott (1979) 3 MPC 153 at page 154 and by Thorp J in Gerbic (1982) 5 MPC 40 at page 42.
This Section was discussed in the Court of Appeal case of Walsh 75. In that case half of a family farm was held to be the husband's separate property, as it had been acquired prior to the marriage. The second half of the farm was held to be matrimonial property pursuant to the decision in Mills v Dowdall 76. The wife relied on the two limbs of Section 9(3) to argue that the increase in the value of the husband's separate property was due either to the application of matrimonial property or to the actions of herself, and therefore that increase in value should be classified as matrimonial property.

Such a submission was significant when one realises that the Walsh farm had increased from $16,228.00 at the date of purchase to $950,736.00 at the date of hearing.

During the marriage the mortgage on the whole of the farm was reduced by $15,340.00, the payment of which it was submitted, was made from income earned during the marriage. This application of matrimonial property resulted in an increase in value to the husband's separate property.

The Court of Appeal rejected this submission, pursuant to Section 9(3)(a), on the basis that while the husband's equity in the farm may have been increased, the value of the farm itself had not increased by the reduction of the mortgage. Any payments of the mortgage in this way had to be dealt with under Section 20 of the Act.

It was not argued, and perhaps fatally, that the income used to reduce the mortgage was matrimonial property pursuant to Section 8(e). Such a submission would be difficult to establish, as a farmer does not take a regular income analogous to wages and salaries, but ploughs back some of the money into the farming enterprise.

The Court concluded that under Section 9(3)(a) it had to "be shown not just that the income has been applied to the farm but also that it has been applied so as to increase its value" 77. Therefore it must be established, by evidence, that there was a connection between the use of matrimonial income or property and the increase in value.

In contrast with Walsh 78 is Manuel 79 where Moller J held that "all the income derived by the husband from his farming operations was property acquired by him after the marriage for the common use and benefit of them both and so must be treated as matrimonial property within Section 8(e)... and there is, upon the evidence, no doubt that a very significant amount of that income was used, in one way or another, to improve the home farm, and so, in part, contributed to its increased value. Consequently I hold that the increase in value [of the separate

77. Supra at page 30.
78. Supra.
property farm] must be treated as matrimonial property."
The conflict between the cases can only be explained on the basis of the evidentiary connection between the use of matrimonial property and the increase in value being established in Manuel 80 but not in Walsh 81.
The second submission by the wife in Walsh 82 was that the increase in the farms value was attributable in part to her actions pursuant to Section 9(3)(h).
Prichard J in the High Court stated that there was no doubt that for the first two and a half years of the marriage until the children began to arrive, Mrs. Walsh took a very active part in the farm work 83.
The Court of Appeal held that Mrs. Walsh had to show not only that she worked on the farm, but also that "her work contributed in a clear and appreciable manner to the increase in value of the farm land." 84
In the case of Bennett 85, it was held that "much of it [the increase in the value of the separate property farm] is due to inflation and a general rise in farm prices since 1954, as well as to Mr. Bennett's hard work. Mr. Bennett was and is a competent and hard working farmer and did not need his wife's

80. Supra.
81. Supra.
82. Supra.
84. Supra at 30.
85. (1981) 4 MPC 12 at 13 per Casey J.
help with the property for his farming. Her activities in the domestic field - boarding the farm workers, growing vegetables, selling eggs, etc - certainly helped their income and living standards but added nothing to the value of the property or affected its preservation, and therefore the increase in value remained the husband's separate property. 86.

As under Section 9(3)(a) there is an onus on the spouse alleging that his/her actions caused an increase in the value of the other spouses separate property.

Where a farm is already well established and productive, it will be hard to prove that the increase in the value of that separate property farm was due to anything other than inflation.

On the other hand, if the spouse can show that his/her activities turned marginal land into a productive unit, that spouses chances of succeeding under Section 9(3) are much higher, as the increase in value is not due just to inflation but to the increased productivity of the farm itself.

Another reason for a spouse, who performs work on an already established farm, failing under Section 9(3) is that parliament may have intended to resolve the discrepancy by the use of Section 17, whereby an adjustment can be made where the actions of a spouse have helped "sustain" separate property.

Unfortunately the Courts have via decisions such as Buckman 87, have interpreted "sustain" as meaning in effect "saving from


87. Supra.
ruin". Thus the use of Section 17 by a farming spouse in normal circumstances is minimal.

There has been only one reported example of a farmer's wife successfully establishing that the increase in the value of a separate property farm was partly attributable to her actions. That case was Thomson 88 where the husband farmer had suffered a motor accident leaving him physically and mentally impaired, as a consequence the wife's contribution went beyond the supplementary assistance to her husband, to the sole taking over of the general management of the farm as well as the physical work on it. Accordingly the increase in value was attributable to her efforts.

In conflict with these above authorities over the nexus between a spouses domestic activities and the other spouses asset making activities and its relation to the increase in value of separate property under Section 9(3), is the long title the 1976 Act, which is an Act "to recognise the equal contribution of a husband and wife to the marriage partnership."

Recognition of this nexus is also evidenced by the treatment of other acquisitions produced by effort during the marriage as matrimonial property, pursuant to Section 8(e), as well as the inherent equality of the various forms of contributions to the marriage partnership pursuant to Section 18.

There is no doubt that Section 9(3) is drafted more narrowly than Section 18. Section 18 is important for determining the parties

respective shares in the matrimonial property and embraces the fundamental principle that all contributions to the marriage partnership as a whole must be taken into account.

The difficulty with Section 9(3) is that it is re-introducing the discredited trend under the 1963 Matrimonial Property Act, that actual contributions to the particular property in question had to be shown 89. Such a trend, as submitted earlier, goes against the policy of the 1976 Act and against the principles as outlined in Reid 90.

In conclusion it must be remembered that Section 9(3) is expressly made subject to Section 9(6) which reads:

"subject to Section 10 of this Act, 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 of this Act shall be matrimonial property."

This Section suggests that income derived from and inherent investment will be converted to matrimonial property if it is used to benefit any of the property covered by Sections 8(a) to (j).


90. [1979] 1 NZLR 572 at pages 580-583.
CHAPTER 4

ESTATE PLANNING AND GIFTING PROGRAMMES AND THEIR IMPLICATIONS ON FARM PROPERTY

There is a trend in the area of large family farms or businesses for parents to sell property to their children for consideration in the form of a mortgage or other debt followed by one or more gratuitous releases until the debt is extinguished so as to avoid gift duty. For revenue purposes, the exercise is carried out so as to avoid gift duty by showing that the initial disposition of the property is a purchase and not a gift.

As we have seen above, when these exercises are looked at in the context of matrimonial property rights the property is classified as property acquired via a purchase and not a gift and accordingly is classified as matrimonial property under Section 8(e) and not as separate property under Section 10(1).

Accordingly not many parents or receiving spouses are happy with this result.

Two possible solutions have been suggested. The first is to regard each individual forgiveness of the debt as a gift under the terms of Section 10(1) which divorces the gift from the
initial purchase of the property itself. A refinement of this approach was discussed in Walsh 2 where each individual forgiveness was regarded as an increase in the equity in the property.

In Walsh, the husband prior to the marriage had acquired half the family's Waikato Farm from his father. The purchase price was $16,282.00 subject to a mortgage of $12,742.00 which the husband took over. The balance of the purchase price was eventually forgiven by the father. The marriage took place some six months after the acquisition. No submission were raised over whether or not this half of the farm was matrimonial property under Section 8(d), that is that it was property acquired in contemplation of marriage for the joint use and benefit of the parties. Accordingly the Judge held that this half was prima facie separate property as it was property acquired before the marriage.

The second half of the farm was acquired by the husband four years after he had married. This was purchased from his father for $52,050.00 but the greater portion of the sum was subject to a mortgage back to his father with the debt forgiven as the tax laws permitted. In the High Court 3, the husband had successfully argued that this was separate property under the

1. This was the approach taken by Mahon J in Owens (No1) (1979) 4 MPC 153; although he did not state the means by which it was achieved under the specific provisions of the Act.
gift exemption in Section 10(1) of the Act. However, between the
decision of the High Court and the hearing in the Court of
Appeal, Mills v Dowdall 4 had been decided and so the second
half of the Walsh farm had to be treated as matrimonial.
The original approach by the High Court in Walsh was also
inconsistent with the Matrimonial Property Acts treatment of
"property", "owner", increments to matrimonial property (Section
8(f)) and debts (Section 20(5)). Not to mention that it failed
to provide an answer for the situation where the intitial debt to
the vendor had been left unsecured.
The second solution suggested was to go behind the immediate form
of the transactions so as to determine what the intention was.
By this means it was suggested that if there was a preconceived
plan to gift property, albeit in the form of a sale followed by

4. (1983) 2 NZFLR 210: In this case the husband purchased from
his father during the marriage, shares in the family
company. He was informed by his father at the time of his
purchase that his father intended to forgive the debt on the
same day as the purchase. It was held that there was
insufficient evidence to show that the two transactions
could be read together. Also during the marriage the
husband had purchased a house from his mother, the whole of
the purchase price being secured by a mortgage back. Part
of the principal had been forgiven by the date of the
hearing. Both of the transactions were regarded as
purchases rather than gifts and therefore in each case the
property was matrimonial under S.8(e).
the forgiveness of the debt, the transaction taken as a whole could be regarded as a gift.

In McIndoe 5 the father satisfied by successive releases of a debt the sum of $26,941.00 owed by his son to him for the purchase of company shares. Clear evidence given by a solicitor, an accountant, as well as from the husband and the father showed that there was a preconceived gifting intention which was subsequently implemented over a period of eight years. Jefferies J held that "within the context of this Act, which is to do justice between spouses at the end of their marriage, a Court ought to look at, and make a decision on, the substance or purpose. I do not think that forensic casuistry to say that Mr J.L. McIndoe set out to make a gift by way of sale and purchase and a subsequent forgiveness of debt... The purpose has been fulfilled precisely, almost, in the manner envisaged. I do not regard the apparent exception of the crediting of dividends on the shares back to Mr. J.L. McIndoe as affecting the central purpose. The opportunity is there to decide upon their true intention by examining what has in fact taken place over the lengthy period of eight years from inception to the last forgiveness. In my view the transaction was a gift within the meaning of Section 10(1) of the Act, and remains separate property." 6.

5. (1978) 1 MPC 133.

6. See also Reid (1980) 4 MPC 170 Greig J; where a father continued...
The above approach has gained some support from the notions that:

(i) the meaning of the word "gift" is ultimately to be derived from the legislative intention evident in the particular statute under consideration;

(ii) because of the above reason it would be possible to give different meanings to the word "gift" in the Estate and Gift Duties Act and the Matrimonial Property Act;

(iii) that the Matrimonial Property Act is essentially social legislation which should not be interpretated in an overly technical manner;

"where a statute is dealing with people in their everyday lives, the language is presumed to be used in its ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction." 7.

continued...

6. transferred farm land to the husband "as a gift and by payment of the sum of $2,935.00. That monetary consideration was secured by a mortgage back to the father which was discharged by way of a gift in 1958." Accordingly the land was treated as a gift under S.10(1); Reid (unreported, High Court Wellington, M503/79) where Greig J applied McIndoe (supra).

(iv) that the spirit of section 10(1) is to preserve as separate property, capital acquired gratuitously from third parties.

Despite the above, the glaring contrast between the treatment of the same transaction under the two statutes would have called for a particularly benign interpretation under the Matrimonial Property Act. This interpretation has been authoritatively rejected in Mills v Dowdall 8 which means that an estate plan involving an agreement for sale and purchase followed by a forgiveness of the debt, secured or otherwise, results in a purchase and therefore matrimonial property under Section 8(e) and not a gift and therefore separate property under Section 10(1).

The only possible qualification to this arises where the transfer of property for a stated consideration is accompanied by an immediate forgiveness of the entire debt by deed 9. Here it would be possible to regard the two documents as essentially recording one transaction, the character of which is a gift. The benefit of such a transaction from an estate planning point of view would be of little consequence.

CHAPTER 5

INTER-SPOUSE GIFTING OF FARM PROPERTY

There are two ways in which inter-spouse gifting may take place, the first, and most common is where one spouse gives the other spouse a present or a gift in the absence of any formal agreement. The second is where a spouse may gift something over to the other by way of a Deed or Matrimonial Property Agreement. The latter form of gifting is usually carried out with the intent to either avoid the application of the Matrimonial Property Act or for some estate, tax or gift duty avoidance purpose.

A. GIFTING OF FARM PROPERTY WITHOUT A FORMAL AGREEMENT

The straight gifting of property between the spouses, without a formal agreement, is covered by Section 10(2). Section 10(2) classifies as separate property "property acquired by gift from the other spouse". As in the case of Section 10(1), gifts effected before the marriage are probably included. Appropriately Section 10(2) seems to apply to where one spouse makes a gift of a personal nature, such as jewellery 1 and

1. Collie (1981) 4 MPC 40: Where two diamond rings given by the husband to the wife were held to be separate property under S.10 (2). Cf Taylor (1978) 1 MPC 206.
other personally used chattels. However, numerous cases such as Taylor have held that the Section is entirely applicable to such substantial gifts of cash, investments, or gifts of land made for estate planning or other reasons. In Taylor's case the husband gifted shares in a Hairdressing Company, which was operated by him and provided his income, to his wife. O'Regan J drew a distinction between the use and benefit of the assets of the Company and the shares themselves and held that "the property for my consideration is a parcel of shares in the company which themselves produce no benefit and they fall for consideration distinct from the assets and undertakings of the company itself. In my view they are the separate property of the wife."

Accordingly, a husband who makes a gift of half his farm income of $200,000.00 earned during the marriage, to his wife, will not only find on separation that he has no claim on the $100,000.00 gifted to his wife due to the prima facie application of Section 10(2) but that he must also share the remaining $100,000.00 due to the application of Section 8(e). This can lead to some rather interesting injustices under Section 10(2) but the Courts have understandably been unsympathetic to gifting spouses

---

2. Pike (1981) 4 MPC 165; Where the husband gave the wife a horse, saddles and riding gear.


5. Per Prichard J in Hutchings (1982) 5 MPC 65,
who try and reneg on the gift. This has led to a striking contrast between the general readiness to preserve pre-marriage assets and third-party gifts as separate property and the reluctance to recognise the separate property character of inter-spouse gifts even when dealing with seemingly similar tests imposed by the Act.

Section 10(2) does not outline the principles upon which inter-spouse gifts are to be determined; presumably it is necessary to resort to the principles of common law and equity, as qualified by Section 4(2). Here the Courts have a broad discretion as the principle question is what the expressed intention of the donor was as to the destination of the beneficial interest in the property in question. A mere transfer of legal title or possession may not suffice, especially where the parties have already separated at the time of the transaction. This makes it difficult to establish that a disposition effected without obvious consideration was made with an intention to effect a gift as distinct from a reorganisation of assets in anticipation of the ultimate resolution of property under the Matrimonial Property Act.

In *Pike* 6 the wife following separation purchased a dwelling from the proceeds derived from selling the matrimonial home. The wife alleged that her husband had gifted the proceeds of the sale to her after the separation. Hardie Boys J held "According to the wife,

the husband was anxious to offer his family the security of a home and proposed at one stage that he give her the Manuka Street house and at another that he give her the proceeds of sale of the Christchurch house so that she could purchase something else. When the latter course was finally decided upon, she said that there was no question of a loan and that as far as she was concerned it was a gift. He on the other hand said that neither of them really applied their minds to the basis on which she was to receive the money. Neither received independant advice, indeed it seem the matter may not have been discussed at all with the solicitor handling the sale. He was merely instructed to draw the cheques. In these circumstances and having regard to Section 21 of the Act, I think Mr Tuohy was right in concluding that his client would be unable to discharge the onus which lay on her of proving that a gift had been made." Accordingly Section 10(2) did not apply.

A gift will not be designated as separate property under Section 10(2) where the "gift is used for the benefit of both the husband and wife". Under other Sections such as Section 8(d) or (ee), separate property is not converted to matrimonial property unless there is relevant use of the original separate property itself, as distinct from mere income from it or funds raised upon its security.

Decisions such as Hutchings 7 suggest that the mere common

enjoyment of income from the gift is sufficient under Section 10(2), it might be difficult to justify widely different interpretations of the meaning of the word "use" in such closely connected statutory provisions.

In *Hutchings*, the husband ran a family building company, initially he held 999 shares of the company and his wife held 1. He subsequently transferred 170 shares of the company to his wife by way of gift. Prichard J held after acknowledging the validity of the distinction between use of assets owned by the company and the use of the shares itself that "notwithstanding that distinction, it is in my view that in the context of the Matrimonial Property Act 1976, recognition must be given to the realities of the situation - to the fact that a share is a right to a specified proportion of the capital of the company, carrying with it rights and liabilities both while the company is a going concern and in its winding up. When that company is a family concern and is the source of the family income, it seems to me that ownership of the shares has to be regarded as ownership of the company and that not only the company and its capital but also the shares are "used" for the benefit of both the husband and the wife. Accordingly I hold that the 1000 shares in

---

9. Supra.
B.A. Hutchings Limited are matrimonial property."

There are two other differences which arise in Section 10(2) as compared with Section 8(d) and (ee). The first, is that Section 10(2) does not require the "common" use and benefit of both but merely that the property be "used for the benefit of both". This seems to indicate that the use by one spouse alone is sufficient so long as that unilateral use is of benefit to both. For example, by analogy from Campbell's case 11; where a husband's use of farm or business produces income for himself and his wife. Secondly, the intention with which the property is acquired under Section 10(2) is irrelevant. It is clearly the actual use which matters.

One dilemma under Section 10(2) is whether the use of a gift for the benefit of both spouses is sufficient for conversion to matrimonial property or merely an essential pre-requisite. Probably the former is the case, since common use and benefit seems to be an underlining, if somewhat inconsistently applied, rationale of designation of matrimonial property. This suggests that if a wife gives her husband a block of farm land which they both use, the joint use and benefit is sufficient for conversion

11. (1978) 2 MPC 33; Where during the parties engagement the husband purchased a fish business it was held that the business was purchased in contemplation of the marriage and that it was intended for the common use and benefit in the sense that both would enjoy the income from it.
to matrimonial property without the added requirement that the land also satisfy one of the categories in Section 8; for example co-ownership 12.

(i) The Inter-relationship Between Section 10(1) and Section 10(2)

Section 10(2) shares with Section 10(1): 13 four possible qualifications as to designation as separate property. The first qualification is that where there is one indivisible disposition, a mere inadequacy of consideration is insufficient to classify the disposition as a gift.

The second is that the gifts use as domestic property converts the gift to matrimonial property under Section 10(3).

Thirdly, there is an unresolved conflict between the designation as separate property under Section 10(2) and certain provisions of Sections 8 and 9.

Finally, the proceeds of the disposition of a gift probably remains subject to the separate property protection of Section 10(2), while incoming gains derived therefrom probably do not.

On the strict wording of Section 10(1) and (2) it maybe difficult to justify the different approaches adopted between the two sub-sections. It maybe expected that there will probably

13. See discussion of Section 10(1) under chapters 3 and 4 hereto.
be a strong difference of judicial sympathy between the separate property treatment of the third party gifts and the separate property treatment of gifts between spouses.

B. GIFTING OF FARM PROPERTY BY WAY OF A FORMAL AGREEMENT

Within prescribed limits, actual or intended, spouses can contract out of the Matrimonial Property Act 1976. By virtue of an Agreement made pursuant to Section 21 they can exclude or modify the statutory regime under the Act, which would otherwise apply to their marriage.

In New Zealand there is an increasing trend for farming couples to contract out of the Matrimonial Property Act; the purpose for contracting out maybe for any one of the following reasons:

(i) Second marriage 14;

14. In an American study sighted by Cripps: Contracting out of the Matrimonial Property Act 1976 (1978) VUW Law Review 101 at 118 taken from Gamble "The Ante Nuptial Agreement" (1972) 26 Univ Miami L.Rev 692 at 730: of 54 contracts 80% involved men from previous marriages and 70% involved women from previous marriages of these second or subsequent marriage, 90% of the men and 94% of the women had children from the former marriage, providing at least one obvious motive for contracting out. In a survey conducted 7 months after the introduction of the Act, it was found that approximately 200 con\continued...
(ii) marriages in which either or both spouses bring substantial wealth to the marriage or the expectation of substantial third party gifts or inheritances;

(iii) marriages in which the income or property acquisitions of one of the spouses is quite out of the ordinary;

(iv) marriages in which the financial affairs of one of the spouses are inextricably bound up with the affairs of a third party in trusts, partnerships, or companys, and;

(v) to avoid the effect of revenue, income or gift duty taxes.

Most of the reasons for contracting out can be traced directly or indirectly to the desire to protect pre-marriage assets and third party gifts and inheritances or to gain some pecuniary tax advantage.

The sudden withdrawal of capital from a farm or business on the division of the matrimonial property may threaten the viability of the venture or embarrass relationships with third parties.

(i) Contracting Out Of The Matrimonial Property Act 1976

Since the Act is a Code pursuant to Section 4(1), there is not an unrestricted right to contract out of it. Section 21 provides four limiting factors which are apparent in practice.

14. contracting out agreements had already been entered into in the Wellington area alone; Cripps Op cit at 118. The writer has been advising on average two to three clients per month as to the legal implications as to such agreements.
The first is that there are inherent limitations in the wording of Section 21(1) and (3). Section 21(1) expressly permits contracting out but only as to "the status, ownership, and divisions of their property (including future property)". Section 21(3) amplifies this to allow provisions classifying assets as matrimonial property or separate property, defining and calculating shares and prescribing the method by which the matrimonial property is to be divided. It is submitted that Section 21 does not permit the parties to contract out of the provisions relating to the distinct field of family support such as the Courts powers in respect of maintenance under Section 32 or occupation of the matrimonial home under Section 27. These Sections do not involve "the status, ownership and division" of property nor "the method by which the matrimonial property or any part thereof maybe divided". An attempt to contract out of the above provisions maybe void on the grounds that it falls outside the enabling provisions of Section 21; not to mention that the contract purporting to contract out from a mandatory provision of the Act could conceivably undermine the whole agreement on the grounds that it represents an unseverable and void part of the consideration 15.

The second limitation, is that under Section 21(5), the agreement must be subject to the independent legal advice which the other spouse, or prospective spouse, should receive before

the agreement is signed. Moller J held in Williams 16 that "I have decided... that the "independent legal advice" referred to in sub-section (5) must be given, in New Zealand, by a Solicitor, and that advice from a unqualified legal executive does not meet the requirements of the Legislation. I have also decided, after reading sub-section (5) and (6) together, that the certificate required by the latter must, in the case of an agreement signed in New Zealand, be that of the Solicitor giving the independent legal advice." 17. The mandatory form of Section 21(5) indicates that an agreement will not be saved merely on the grounds that a spouse has been advised to seek independent legal advice but has refused to take it 18. Such a party would need to be told that without independent legal advice there could be no effective agreement.

The third limitation is that there is no point in negotiating a contracting out agreement which is overly favourable to one party to the detriment of the other so that it will later be set aside under Section 21(8)(b) as unjust.

17. Ibid at 201.
18. Cf Bowling v Bowling (1975) 1 NZ Recent Law (NS) 66: Where an agreement was declared void as the wife when advised to seek independent legal advice refused to do so; K v K [1976] 2 NZLR 31: Where the agreement was set aside as the wife was not independently advised, although told that she was at liberty to be so advised.
In deciding whether it would be unjust the Court is required to have regard to the criteria specified in Section 21(10). They are the provisions of the contract, the time which has elapsed since the agreement was entered into, whether the agreement was unfair, whether it was unreasonable, whether the agreement has become unfair or unreasonable due to change in circumstances and any other matters that the Court may consider relevant. In the end, the ultimate question will still be whether the Court "is satisfied that it would be unjust" to give effect to the agreement. In practice it seems likely that this will often come down to balancing the desirability of certainty in contracts on the one hand, against the possibility that the agreement lacked a free and informed consent in the full sense and/or was not supported by adequate consideration and/or has been rendered inappropriate due to a change in circumstances in a manner not originally contemplated by the parties.

In Gerards case 19 for example, Casey J set the agreement aside notwithstanding that it had been two and a half years since the agreement had been executed as there was an unanticipated increase in the value of the farm retained by the husband under the agreement and accordingly it would have been unjust to uphold the arrangement.

The fourth and final limitation, is that the agreement is subject to the overriding interests of the children of the marriage.

pursuant to Sections 26 and 28A of the Act.

In the light of the above limitations cases such as *Bradley* v *Bradley* 20 may be examined. The spouses in this case entered into an agreement after the commencement of the Act which complied with the requirements of Section 21. It stated inter alia that it was in full and final settlement of all the matrimonial property questions between them. By this agreement the parties had concurred that their home should be sold and that they should share the "nett equity" in equal shares. The husband then sought an order that a Judgment debt against him to the sum of $6,489.00, which had been incurred in relation to the liquidation of a family business should be paid out of the proceeds of the sale of the house. Barker J took the expression "nett equity" to mean the amount left over after the secured debts such as the mortgages, and the general expenses of the sale had been deducted. He held that the spouses had contracted effectively out of the Act so that they could not have intended that the debt should be deducted in order to ascertain the nett equity. For an agreement, to be unjust, unfair, or unreasonable, an agreement reached by the parties would have to be out of all proportion to the settlement which, on the facts, the Court would have awarded it had an application been made to it.

Non compliance with the Rules as to formality is not necessarily fatal to a contracting out agreement as the Court may uphold such

an agreement under Section 21(9). The principal role of a contracting out agreement, as we have seen, is to modify the matrimonial property regime imposed by the Matrimonial Property Act. Where the contracting out agreement forms an integral part of the process of determining the parties rights under the Matrimonial Property Act, the matter, pursuant to Section 4(4) is to be determined under the Matrimonial Property Act and not under other Civil Proceedings. Section 4(4) only applies so long as the agreement leaves "matrimonial property" in existence. Where the contracting out agreement classifies all the assets as the separate property of one spouse or the other as opposed to matrimonial property shares on a percentage basis, Section 4(4) does not make it mandatory for the Court to apply the Act. The parties are left with a choice as to whether proceedings are to be brought under the Matrimonial Property Act with respect to specific separate property assets under Section 25(3) and orders for enforcement in terms of Section 33, or whether they be brought under conventional civil proceedings for enforcement by way of specific performance, damages and other similiar remedies under the general law of contract. The legal implication for agreements not effecting the statutory regime of the Matrimonial Property Act, such as farming partnership agreements between spouses, will be governed by the conventional law of contract.

(ii) Void Or Unenforceable Agreements

Where an agreement purported to have been made under Section 21 is held to be void, avoided or unenforceable, Section 21(12) requires that the provisions of the Matrimonial Property Act should apply as if the agreement had never been made 22.

Despite Section 21(12) broad scope it is subject to two qualifications. The first is that Section 21(12) must be subject to Section 21(9) if the latter provision is to have any effect. Thus an agreement held to be void under Section 21(8) due to non compliance with the formalities under Section 21 maybe saved by Section 21(9).

Secondly, although Section 21(12) requires that the statutory regime of the Matrimonial Property Act come into force when an agreement is avoided, there is nothing to prevent the Court from taking the agreement into account as one of the factors relevant to the exercise of its statutory discretions 23. The Courts have in the past derived considerable assistance from void agreements in determining the intention of the parties in maintenance 24 and property 25 matters. It would be unfortunate if an agreement rendered partially obsolete, such as in Gerards case

22. Bradley (supra).

23. For example under Ss.2(2), 9(4), 11(3), 13(3), 14, 16, 27 or 33.


26 must be entirely dismissed from further consideration even in matters of discretion.

26. Supra.
As we have seen in the previous chapter, the legal implications of agreements not purporting to affect the statutory matrimonial regime, such as farming partnerships and inter-spouse loans, are generally governed by the conventional laws of contract. Farming partnerships or partnerships in general can be divided into two types, the first is a partnership involving a third party and the second is a partnership between the spouses. In both cases a farm or large business maybe governed by one of the above types of partnership agreements, depending on which type of agreement involved determines the form and value of the property in question.

A. PARTNERSHIPS WITH A THIRD PARTY

In the case of businesses and farms involving a partnership with a third party a convenient starting point, for the identification and valuation of a spouses interest, will usually be the last balance sheet. This will normally record the assets and liabilities of the partnership as well as the capital interest that the spouse or spouses have invested in that partnership. After the appropriate adjustments have been made to the book values, the recorded capital can be used as a convenient summary
of the value of the spouses interest in the partnership 1. However, for the purpose of classifying the assets under the Matrimonial Property Act, the nature and origin of each asset and liability of the partnership must be considered individually. This is due to each partnership having a beneficial interest in the partnerships assets, despite the beneficial interest being dependant on and regulated by the provisions of the Partnership Act and by the provisions of the partnership agreement itself 2. Likewise, each of the parties are liable in respects of the partnerships debts. Accordingly, where a partnership of which the spouse is a member, acquires assets after the marriage, as was the case in Maw 3, the spouses interest in the new assets are subject to the same rules as to the classification, of matrimonial property under Section 8(e), as those which apply to any other acquisition by the spouse even though the interest in the partnership may have been antedated the marriage.

The above may not always be the case as was pointed out in Bowen 4, where the husband prior to his marriage was in partnership with his brother, which involved farmland and livestock. During the marriage the partnership acquired more land, a motor

1. For a case in point see Reid [1980] 2 NZLR 270 (CA).
3. Ibid.
4. (1981) 4 MPC 22; Cf Brown (1982) 5 MPC 7: Where acquisitions by a farming partnership, of which the husband was a partner, were held to be separate property under S 9(2).
car and $14,500.00. When the partnership was dissolved the husband took over the interest in the land and the chattels. It was agreed at the hearing that the assets were the husband's separate property, presumably due to his interest in the partnership having been acquired prior to the marriage.

Upon dissolution or retirement from the partnership, and subject to any express agreement to the contrary, and after the realization of the partnerships assets and after the payment of the partnerships debts and liabilities, each partner takes a proportionate share of the remainder 5. For this purpose the partnerships assets include the goodwill of the partnership 6. Consequently, where a husband is a qualified accountant who withdraws from an accountancy partnership, his share of the partnerships goodwill constitutes matrimonial property against which his wife may claim 7.

B. PARTNERSHIPS BETWEEN SPOUSES

Partnership agreements made between spouses are usually made for some other purpose other than for the determination of matrimonial property shares. For example, for revenue or tax purposes or for the determination of the relationships to third parties. As a general rule, once the statutory matrimonial property regime is invoked the Act overrides the right which

6. Ibid.
7. Ibid.
would otherwise flow from common law and equity principles 8.

There are, however a number of exceptions to this rule, outlines of which are as follows:

(i) If the partnership agreement is intended to contract out of certain provisions of the Act, it may be enforceable under Section 21 if it complies with the formalities set down by Sub Sections (4)-(6) of Section 21 or by discretionary validation pursuant to Section 21(9).

(ii) The Court is required to have regard to any partnership agreement entered into between the spouses prior to the 1st day of February 1977 pursuant to Section 55(1). In such a case, the fact that the spouses have been parties to a farming partnership agreement may provide a guide which will help in the assessment of their respective contributions to the operation of the farm. For example, in Scott 9 Ongley J took into account, pursuant to Section 55(1), a farming partnership agreement made between the husband and the wife prior to the 1st day of February 1977 so as to determine their respective contributions to the farming partnership and consequently to the marriage partnership as a whole.

(iii) The effect of the partnership agreement may be to create a debt owed by one spouse to the other. For example in,

8. S.4(1) of the Matrimonial Property Act.

Duff's case 10, the husband during the marriage inherited a farm and livestock which he used as capital for a farming partnership with his wife. Pursuant to the partnership deed the wife's half share in the capital acquired from the husband constituted a debt amounting to $9,072.00 owed by her to her husband. The husband subsequently released by way of gift the sum of $4,000.00 which left the balance of $5,072.00 owing at the date of separation. This debt of $5,072.00 was taken into account in the husbands favour in the overall division of marriage property.

Such debts can effect the result of applying the statutory matrimonial property regime.

(iv) A partnership agreement may confer upon one spouse a beneficial interest in property which would otherwise be solely owned by the other spouse 11. When the statutory matrimonial property regime is applied, this beneficial interest may result in the conversion of separate property to matrimonial property due to joint ownership pursuant to Section 8(c) 12 or allow the beneficial owner to deduct

10. (1979) 3 MPC 45.

11. Maw [1981] 1 NZLR 25 (CA); see earlier discussion of this case under part A of this chapter.

12. Duff (supra); Where the wife gained a half share in the partnerships capital and therefore the partnerships assets were divisible in equal shares.
pursuant to Section 20(5), the personally debts of the owner spouse.

In some cases it might be crucial to decide whether the property used in the partnership business operations has become part of the partnership's capital or whether it has remained the sole property of one of the partners. The test for this is essentially one of contractual intention, that is, did the partners expressly or impliedly agree that the assets would become the property of the partnership 13. If a positive answer is given to this question, one would expect to see some form of consideration given for the owner's loss of a half share in the property, whether in the form of an immediate cash payment from the other partner or as was in the case in Duff 14 an acknowledgement of debt.


14. Supra.
CHAPTER 7

LIVESTOCK, NATURAL INCREASES AND VALUATION

A. LIVESTOCK AND THE EFFECT OF NATURAL INCREASES AND TURNOVER

In Walsh v, it was submitted on the behalf of the husband that the existing sheep on the husband's farm could be traced back to the stock already owned before the marriage. The Court rejected this submission and applied the deminimis rule to exclude the possibility of some sheep still being alive which were in fact owned by the husband prior to the marriage. The livestock in this case was valued at $37,540.00, and farm income was used to keep the stock numbers up, thus raising the possibility for argument under Section 9(3). This argument was not however pursued in the case.

As can been seen from the above case a characteristic feature of livestock is the rapid turnover and numerical changes due to sales, purchases and natural events. The effect upon the classification of livestock acquired prior to the marriage or via gift or inheritance after the marriage, which in some cases can amount to a substantial sum, is wrought with complications. It maybe submitted that the value of the original pre-marriage or separate property livestock which has since been effected by

sales purchases and/or natural increases and decreases, may be traced to a separate property proportion of the current livestock pursuant to Section 9(2). Although the increase in numbers and value during the marriage is likely to be converted to matrimonial property pursuant to the matrimonial property provisions of Section 9(3). 2

Cases such as Bennett 3 and Austin 4 have regarded the progeny of separate property livestock as a "gain" from separate property and accordingly subject to possible conversion to matrimonial property pursuant to Section 9(3). In Austin's case, 5, for example, the use of matrimonial property funds for the payment of stud fees in respect of the wife's separate property mares, as well as the husband's assistance in transporting and feeding them meant that they were classified by the Court as matrimonial property.

B. INCREASES IN THE LIVESTOCKS VALUE

Once livestock falls within the scope of Section 9(3), it appears that it would be readily converted to matrimonial property by the Courts, since it is likely that its increased value is attributable to their grazing upon matrimonial property farm

2. Bowen (1981) 4 MPC 22; Cf Walsh (supra).
5. Ibid.
land 6, servicing by matrimonial property livestock 7, the use of matrimonial funds or efforts of the other spouse. It would also appear that livestock originally acquired by gift or inheritance from a third party are likely to lose their designation as separate property due to the intermingling with matrimonial livestock 8 as well as to the effects referred above. In the light of Walsh's case 9, it would appear that in a marriage of substantial duration where the farm is actively farmed by either or both spouses, the livestock would be incapable of retaining its original designation as separate property except for its value or numbers of livestock held at the date of marriage. In each case a detailed application of Sections 8, 9 and 10 will be necessary.

A possible complication may arise during the period following separation. If the spouse who has remained in occupation of the farm can demonstrate that the number or values of the livestock have increased since separation due to his or her unilateral efforts which have gone unrewarded in other respects, the

7. Ibid.
8. Scott (1980) 3 MPC 42; Where the husband's father sold livestock to his son, during the marriage, for a modest cash deposit and a forgiveness of the balance. Ongley J held that even if the livestock was a gift it was not traceable to the present herd in view of purchases and the natural changes over a lengthy period of time.
9. Supra.
discretions in Section 2(2) and 9(4) may warrant the adoption of a value, or part classification as separate property, to appropriately reward the spouse in occupation.

Some of the complications that may arise were demonstrated in Tickle's case 10 where the husband had remained in occupation of the farm after the separation, both the farm itself and the livestock increased in value. It was held that the wife should share equally in any increase in the value of the farm due to the use of her capital but "any increase in stock numbers and stock values will be as much due to the day to day care and expert judgment of the man on the farm as it is to the process of natural increase" therefore the stock numbers and values were to be assessed from the date of separation and any gains were to be credited to the husband 11.

The above case should be compared to Shearing 12 where a flock of sheep remained at 2,300 from the date of separation in 1974 and the hearing in 1980, but the flocks value increased from $30,300.00 to $57,330.00 over the six year period. Casey J held that "Mr Orchard has a point when he says the stock should be

11. Ibid per McMullin J at 195.
12. (1980) 3 MPC 166; Denyer (1979) 2 MPC 49: Where post separation increases in livestock numbers were regarded as part of the farming profit and therefore prima facie matrimonial property, although some allowance was made to the husband for post separation effort in respect of farming on the property.
treated as capital stock in trade as in any on going business, and while it is true that its maintenance - and perhaps some increase in value - is due to Mr Shearing's work and judgment. He has been paid for it from the income produced, much of the rise can be attributed to market increases and inflation. On the other hand, Mr Savage said it would be unjust for Mrs Shearing to receive the benefit of his work and care for the stock over these years. McMullin J recognised this in Tickle (1978) 2 MPC 195 when he fixed the date of separation as the time for valuing the stock and directed that the husband (who remained on the farm) should have the increase in numbers and values. Here there has been no increase in number, and in the absence of evidence that Mr Shearing has done anything more than the normal work of a good farmer, I see no reason to depart from the valuation, so that she gets the benefit of the market increase on her share in the stock, of which Mr Shearing has had the free use.¹³.

The general rule of thumb which maybe used to resolve the conflict between Tickle ¹⁴ and Shearing ¹⁵, is if the spouse in possession can show that the increase in the value of the property after separation was due solely to his or her activity in relation to that property then that spouse should be entitled to the increase. In Tickle the Judge was persuaded that the increase in value was due to the husbands expertise and in

---

¹³. Ibid per Casey J at 166.

¹⁴. Supra.

¹⁵. Supra.
Shearing the Judge was not persuaded that the increase in value was due to anything other than the effects of inflation.

C. LIVESTOCK VALUATION

A current market valuation of the livestock will normally be required, so as to met the disparity between the standard values recorded in the balance sheet for income tax purposes and the true market value. In some cases the Court maybe prepared to act on a broad estimate of value in the absence of better evidence. For example, in Bell 16 the market value of the livestock at the relevant time was arrived at by noting the proportion which the standard value bore to known sale values at another date and extrapolating the value on the basis of the same proportions.

One difficulty that arises under the Matrimonial Property Act in regards to the valuation of livestock, is whether an allowance can be made for the taxable difference between the standard values and the market values, so as to allow for the possible disposal of the herd at some time in the future. A potential tax liability does not seem to amount to a "debt proved" permitting the deduction of the gross value of the livestock before arriving at the nett devisible matrimonial property. In McKinstry 17 for example, the husband had to sell part of the livestock so as to meet his wives claim. Hardy Boys J held that Section 20(5) was not applicable to potential rather than present liabilities.

17. (No.2) (1981) 4 MPC 140.
but "I cannot imagine that the legislature intended reality to be ignored so that where, as will happen here, stock is to be sold, allowance should not be made for the taxation incidence of that, as the valuers have done. However, where the liability will only arise at some unascertainable time in the future, it maybe that the Court must regard it as too remote to be taken into account." On this basis, in the absence of any specific evidence of a forthcoming sale of the livestock, the potential tax liability is too remote to be taken into account for the purposes of the matrimonial property division.

Accordingly, since the livestock might never need to be disposed of in a taxable manner, for example, due to a transfer to the owners children, deduction of the full amount of the tax which would be payable in the event of an immediate sale would be unwarranted. Effectively, it would limit the valuation to immediate realization, an approach which in other contexts such as superannuation, has been dismissed as too narrow 18. Likewise, to ignore the potential tax liability in it entirety would seem unfair to the owner since it assumes the outcome of the contingency in his favour 19.

It is in the light of these two extremes that the Court has to assess the amount of income tax potentially payable, and the likelihood of it in fact being paid in whole or in part; the Court then makes any deductions (if in fact any) from the full

market value as it deems appropriate. Hence in Yakich 20, Holland J arrived at the nett value for the livestock after "making some allowance for the incidence of taxation."

Before the assets of a farm can be divided in accordance with the statutory regime they have to be identified, classified and valued by the principles outlined in the previous chapters.

A. TYPES OF FARM PROPERTY AND ITS VALUATION

(i) Homesteads

To summarise, if either or both spouses own the land on which the homestead stands, the homestead will be subject to separate valuation and equal division pursuant to Section 12.

(a) Valuation and equity of homesteads

The value of the homestead is to be determined by taking an appropriate apportionment of the capital value of the whole unsubdivided land 1. The responsibility for making the valuation rests with the Valuer-General, although in Reid 2 the parties obtained an independant valuation. Despite the Act being vaguely drafted on the point, it is submitted that the parties are not obliged to use the Valuer-General, but in the event of competing

valuations, the Valuer-General's valuation should prevail. Difficulties in determining what is the equity in the homestead may arise where debts or mortgages exist over the whole property or enterprise. Three approaches seem possible when determining which of the debts are relevant and must be deducted so as to arrive at the "equity" for the purposes of Section 12(1). The first is to interpret "equity" as a reference to the traditional mortgagors equity of redemption, that is, the right which a mortgagor has on payment of his mortgage with interest and costs to redeem his mortgaged estate. On this basis the equity referred to in Section 12(1) is simply the gross value of the homestead less all sums charged against the property, where necessary apportioned with the remainder of unsubdivided land and other property included in the security in proportion to relative gross values can without regard to Section 20(5). This approach was followed in Bell 3 though without reference to Section 20(5). The second is to regard the sum of money in question, under Section 12(1), as the residue remaining after deducting from the gross value of the homesteads both secured debts (inherent in the traditional meaning of equity) and unsecured debts (inherent in the divisible value of the homestead as determined by Section 20(5)). For example, in Bleakley 4 Speight J in arriving at the homesteads valuation deducted both the mortgage and the husband's

unsecured debt, owed to his father, and apportioned the amount between the homestead and the remainder of the farm so as to arrive at a relative gross value.

The above approach has some technical justification in that "equity" as a valueing concept has a well established meaning while a "homestead" is undoubtably matrimonial property to which, Section 20(5) appears to apply. However this approach maybe both complicated and oppressive to the non-owner spouse. The latter would suffer from the worst of both worlds if the divisible residue is arrived at after the deduction of both secured personal debts and unsecured non-personal debts.

The third possibility is to regard the word "equity", in the particular context in which it appears in the Matrimonial Property Act, as exclusively a reference to Section 20(5). This approach was applied in Shearing 5 where the homestead's equity was arrived at by deducting from the homestead's value, the whole of a loan secured over the farm incurred for the purposes of carrying out improvements to the house, and excluding entirely from the homestead any deductions for other liabilities secured over the whole farm but incurred for the purpose of acquiring further farm land and other generally farming purposes. The approach has the merit of being consistent with the treatment of all the other forms of matrimonial property under the Act but

---

represents an extended use of the historical meaning of "equity". Once the value of the homestead has been determined the shares of the parties in the homestead will be calculated on the same basis as if it was an ordinary matrimonial home. Thus the parties will be entitled to an equal share unless the exceptions relating to marriages of short duration and extraordinary circumstances apply. For example, in Smith v Heappey 6 where the homestead was divided equally between the parties, but the husband was awarded 90% of the farm and associated property as he had acquired the farm from his father prior to the marriage upon favourable terms and the marriage had only lasted three years and ten months.

(b) The type of interest in the homestead

In the case of a homestead, however, the parties are not to share in the homestead itself, but in a sum of money equal to the equity in the homestead 7. The non-owing spouse automatically receives a beneficial interest in the land, so long as the sum remains outstanding.

"In the circumstances it appears to me that what falls to be divided is that proportion of the proceeds of the sale which can fairly be attributed to the homestead. This will accord with Section 8(f) and also with Section 12(1) which provides that until the wife's share of the equity in the homestead is paid or satisfied, she is deemed to be beneficially

7. S.12(1).
interested in the land." 8

(ii) Farm Land and Plant

(a) Matrimonial or separate property

The remainder of the farm will normally be matrimonial Property if it was acquired directly or indirectly by the joint or several efforts of the spouses during the marriage 9. For example, in Best 10 Greig J held that "I am unable to separate the use of the homestead and its benefit and the use of and benefit of the farm as a whole. No doubt the Statute makes particular provision for homesteads but that is because of the difficulties in identifying a matrimonial home and in fixing a value for it. The provisions of Section 12 are special provisions for a special situation but they do not, in my view, alter by way of implication the nature or quality of the farm as a whole. There may well be cases when a farm or a farm property can be considered separate and apart and although acquired after marriage is not be treated as being for both the common use and benefit of the husband and wife. That could well be the case where an additional farm is purchased even though it might be adjacent to the "home farm." In this case then, notwithstanding the business aspect the farming enterprise I hold that this farm was acquired after marriage for the common use and benefit of

8. Bell (1981) 4 MPC 7 at 8; per Prichard J.
9. S. 8(e).
both the husband and the wife. That property then was matrimonial property 
"If the farm was acquired prior to the marriage by one of the spouses then it will generally be the separate property of that spouse pursuant to Section 9(1). Likewise, if it was acquired by gift or inheritance during the marriage it will also be separate property pursuant to Section 10(1). For example in Buckman 11 a one hundred and eighty acre farm owned by the husband prior to the marriage, but excluding the homestead portion was held to be separate property under Section 9(1).
However any increase in the value of such separate property during the marriage is usually converted to matrimonial property due to the use of the matrimonial property farm income for improvements in the course of the marriage or the efforts of the wife 12.
In Manuel 13 Moller J held that "all the income derived by the husband from his farming operations was property acquired by him after the marriage for the common use and benefit of them both and so must be treated as matrimonial property within Section 8(e) ... and there is, upon the evidence, no doubt that a very significant amount of that income was used, in one way or another, to improve the home farm, and so, in part, contributed

12. S.9 (3).
to its increased value. Consequently I hold that the increase in value [of the separate property farm] must be treated as matrimonial property."

However in Bennett 14 it was held that "much of it [the increase in the value of the separate property farm] is due to inflation and a general rise in farm prices since 1954, as well as to Mr. Bennett's hard work. Mr. Bennett was and is a competent and hardworking farmer and did not need his wife's help with the property for his farming. Her activities in the domestic field - boarding the farm workers, growing vegetables, selling eggs etc - certainly helped their income and living standards but added nothing to the value of the property or affected its preservation." and therefore the increase in value remained the husband's separate property.

There has been only one reported example of a farmer's wife successfully establishing that the increase in the value of a separate property farm was partly attributable to her actions. That case was Thomson 15 where the husband farmer had suffered a motor accident leaving him physically and mentally impaired, as a consequence the wife's contribution went beyond the supplementary assistance to her husband, to the sole taking over of the general management of the farm as well as the physical work on it. Accordingly the increase in value was attributed to her efforts.

In almost all of the other cases a wife's efforts have been

14. (1981) 4 MPC 12 at 13 per Casey J.
regarded as no more than "contributions to the marriage partnership" 16 or as channelled into the production of income and maintenance of living standards 17 or dismissed as minimal 18. To be fair, husbands have not fared any better in the attempt to show that indirect or modest assistance justifies invoking the second limb of Section 9(3).19

16. Bennett (supra); Forrester (1980) 3 MPC 54.
17. Buckman (1979) 3 MPC 20 per Quilliam J: "There is no evidence to indicate whether the actions of the wife assisted in any way in increasing the value of the one hundred and eighty acre property. They may have assisted in the production of the income but this need have had no effect at all on the value of the land."; Manuel (1978) 1 MPC 136 per Mollier J at 137: "In respect of what she did by way of assistance on the farm, her actions contributed, to some small extent, to the income that arose from the farming operations in years during which she carried out such work, but I cannot see how these actions simpliciter contributed at all to the increase in the value of the property. And I certainly do not think that the performance of her duties as wife, housekeeper, and mother can be used to assist her claim in this context."
19. Ridgway (1980) 3 MPC 150; Where the husband worked on his wives separate property house namely levelling and developing the section and painting and plastering the house, but... continued...
(b) Nexus between a spouse's domestic activities and the others' asset making activities

In conflict with these above authorities over the nexus between a wife's domestic activities and her husband's asset making activities and its relation to the increase in value of separate property under Section 9(3) is the long title to the 1976 Act, which is an Act "to recognise the equal contribution of a husband and wife to the marriage partnership." Recognition of this nexus is also evidenced by the treatment of other acquisitions produced by effort during the marriage as matrimonial property, pursuant to Section 8(e) as well as the inherent equality of the various forms of contribution to the marriage partnership pursuant to Section 18. These considerations suggest that notwithstanding the weight of the present authority, the matter may still be open to discussion.

In Thomson 20 Hardie Boys J referred to the indirect connection between a husband's efforts in running a farm and the increase in value due primarily to inflation and continued "If his efforts are properly to be regarded as having made a contribution, so should those of others who have worked with him, in proportion to

continued...

19. "...whatever he did resulted in no more than a negligible increase in the value of the property" and therefore he had no claim in the increase in value during the marriage which amounted to some $27,000.00. Cf Collie (1981) 4 MPC 40.

the degree of effort each has displayed. If this is the correct approach in such cases, as I believe it is, direct proof of the causative connection between the wife's actions and increases in value will be virtually impossible to adduce. By the same token, it maybe equally impossible for the husband to prove that connection in relation to his actions should it be necessary for him to do so. For the same reasons it will in practice be extremely difficult if not impossible to make the distinction the Section draws between an increase in value on the one hand and income and gains on the other. So often they are completely merged... What might be thought a stricter, but in my view a less realistic, approach could cause grave injustice. Assume two long married farming couples, each of whose only substantial asset is the farm, owned in each case by the husband before the marriage. In one case, the wife looks after the house and the family but does nothing on the farm. She plays golf and bridge. In the other case, the wife not only looks after the house and family but she works on the farm too. The first would only receive half the value of the homestead. Should the second, being unable to point to a direct cause or connection between her efforts and the increase to farm value, be treated no differently? To regard her effort as more properly a contribution to the marriage partnership would avail her nothing; for unless Section 14 was stretched far beyond its property limits, there would be no matrimonial property from which the contribution could be rewarded. I am confident that such a result is not the intention
of this legislation." 21 In Thomson 22 an increase in the farms value by $115,000.00 during a marriage over 31 years was held to be matrimonial property pursuant to Section 9(3) due to the wife's assistance on the farm.

(c) The valuation of farms

If classification as matrimonial property is even a possibility, the current market value of the farm will be required, as set out by Section 2(2). Current values will be needed for current assets and liabilities including bank accounts, Dairy Company credits, stock and station agents debts, producer shares, farm income equalisation accounts. As we have seen in Tickle 23, if the spouse claims that improvements and increases in value are due to his or her unilateral efforts since separation, evidence to that effect, and values at the date of separation will be required.

Where Section 9(3) is in question, evidence will also be needed as to values at the date of the marriage or acquisition and at the date of separation.

(iii) Livestock And Balance Of Property

As we have seen in the previous chapters, livestock often presents its own special problems as to its classification and

21. Ibid at 160.
22. Ibid.
23. Supra, see also Buckman (1979) 3 MPC 20 and Shearing (1980) 3 MPC 166.
valuation, both subject having already been covered satisfactorily.

Enquiries will also need to be made as to assets not customarily appearing in a farm balance sheet; for example household furniture, life insurance, holiday homes, and investments. These are usually classified and divided pursuant to the principles as discussed above.

B. DEDUCTION OF FARM DEBTS

Once the various types of farm property have been classified as matrimonial or separate property and the values have been determined, the deductible debts of each spouse must be deducted from the gross value of his or her assets in order to arrive at the nett value available for division between the parties.

In cases where the marriage partnership has benefited from capital, loans or assistance from relatives or acquaintances, the first step is to analyse the transaction itself. If it was a loan or sale made on prevailing commercial practice, such as a mortgage, which would have been equally available from other lenders on the open market, there will be no reason for attaching significance to the fact that the lender may have been a relative of one of the spouses. Accordingly, such a loan secured over the matrimonial property will generally be deducted prima facie 50/50 pursuant to Section 20.

Even where such a loan is unsecured, there will normally be a corresponding reduction in the value of the debtor spouses visible matrimonial property under Section 20(5). The occasion for regarding such a loan as a contribution by one spouse or the
other will not normally arise in that situation.

In the majority of the cases involving secured and unsecured loans from relations there is an element of gift. The questions that arises in relation to gifts is the identity of the intended donee, this is usually determined according to the conventional principles of common law or equity. Usually it is found that the gift was intended to benefit only one of the spouses and accordingly that spouse is given the sole credit for the gift when comparing contributions to the partnership. The reason for this is that the gifted property is usually treated as separate property pursuant to Section 10(1). For example in Bleakley 24 the husband had purchased a farm property from his father with a substantial amount of the purchase price being forgiven by the father. Speight J held that the farm was an extra contribution by the husband pursuant to Section 18(1)(d) and accordingly awarded him 75% of the property.

What can be demonstrated from the above case is that the subsequent transitions of the property into matrimonial property is regarded as a contribution to the marriage partnership with due weight to be given to the original donee pursuant to Section 18(1)(d). In the absence of anything to the contrary, it would usually be a reasonable inference that the primary beneficiary intended by a donor parent will be that parents child rather than both spouses. In Harnett 25 the husband acquired, during a ten

---

year marriage, shares in the farm owning family company due largely to his fathers sale of the farm to the company at its government valuation. The husband was awarded a 70% interest in the shares, together with 50 cows owned at the date of marriage and a cottage erected by the husband on his fathers land due to the gift being intended for himself rather than both spouses. It maybe, that the facts and circumstances indicated, that despite the blood relationship to one of the spouses, the donor parent intended that both spouses share equally in the gift. In that situation the subsequent use of the gift for the purposes of the marriage partnership appears to constitute an equal contribution by each spouse. For example in Scott 26 the husbands father sold his farm to his son and his sons wife on generous terms but the sale was on the basis that the spouses were tenants-in-common; Ongley J treated the capital contribution to the marriage partnership as equal between the two spouses. In the division of property between the spouses the chief significance of an unpaid debt, either to a relative or not, is that in some circumstances there can be deducted from the value of the debtors property or from the matrimonial property pursuant to Section 20(5). The function of Section 20(5) is to establish "the value of the matrimonial property that maybe divided between husband and wife pursuant to the Act." Generally where the debt is owned by both spouses, there is no

difficulty as each spouse shares equally in the debt and it is
subtracted 50/50 from the matrimonial property in question. In
all other cases five factors must be satisfied before there can
be a deduction of the debt. Briefly they are:

(i) There must be a "debt" owed within the meaning of those
terms as they are used in Section 20(5).

(ii) The debt must be, or have been, owing at the relevant
time, usually the date of hearing.

(iii) The debt must be owed by a spouse who owns matrimonial
property having at least the value of the debt.

(iv) Once the debt has been categorised as "personal" or
"non-personal" under Section 20(7), the debt must then
satisfy the relevant requirement of Section 20(5) as to
any security for the debt and the value of the debtors
separate property; and

(v) Where the debtor spouse has more than one relevant asset,
the debt must be deducted from the appropriate assets in
the appropriate proportions. For example, in Maw 27 the
mortgages were secured over the separate property farm and
over two matrimonial property farms, one of which
contained the homestead. Casey J held that the total
mortgage indebtedness was to be apportioned between the
three categories according to their respective values.

27. (1978) 2 MPC 126, this point was not appealed against. See
also Shearing (1980) 3 MPC 166; Bleakley (1978) 1 MPC 31;
Buckman (1979) 3 MPC 20.
C. THE FACTORS AFFECTING THE DIVISION OF THE MATRIMONIAL FARM PROPERTY

Once the allowable debts over the matrimonial farm property have been deducted pursuant to the above principles; the spouses, prima facie, share equally in the remainder pursuant to Section 15.

This presumption of equally sharing pursuant to Section 15 of the Act was a clear departure from the Matrimonial Proceedings Act. The earlier Act, while introducing the concept of contribution, placed a great deal of weight on the monetary evaluation of the domestic contributions and demanded reasonable proof of those contributions to specific items of property 28.

Subsequently, therefore, it was not surprising to find that when the 1976 Act was enacted, the Courts placed a fair amount of weight on the contributions to the property in question rather than to contributions to the "marriage partnership" as a whole 29.


29. Refer to the early Estate Planning Cases; such as Baddeley (1978) 1 MPC 10; Bleakley (1978) 1 MPC 31; Manuel (1978) 1 MPC 136 and Forde (1978) 2 MPC 58: all of which awarded the husband 75% of the farm property in question. Cf the later cases of Saxton (1978) 2 MPC 166 and Scott (1980) 3 MPC 162: which awarded equal sharing, but this was not on the basis of "equal contributions to the marriage partnership", but continued...
The presumption of equal sharing was later rebutted by the Courts finding pursuant to Section 18, that one spouse's contribution to the marriage partnership had been clearly greater due to the external introduction of capital into the marriage 30.

It was not until the Court of Appeal case of Reid v Reid 31, that the presumption of equal sharing pursuant to Section 15 was confirmed as a principle of Law. Furthermore, it was held that any departure from this principle would be rare and the circumstances would have to be wholly exceptional to justify

29. because of legal arrangements as to the joint ownership of the property in question.

30. The principle, that monetary contributions are not entitled to any greater weight that non-monetary contributions, was considered in Hartman (unreported (677/82) 12/84): in that case the wife had contributed all the money to a Deer Farm, but it was held by Barker J that this contribution was equal by the husband's hard work and accordingly equal sharing was appropriate; Cf Paterson (unreported (M99/82) 1984): where the husband was awarded 53% of the farm property because "justice requires some recognition to be made in respect of this husband's original capital contribution (some $2,000.00 made in 1946) and that accordingly his contribution has clearly been greater than that of the wife." Cf Boyde (unreported (M234/84) 1984).

ranking ones contribution as several times that of the other 32.

(i) Contributions To The Marriage Partnership

Section 18 of the Act outlines the factors that are to be taken into account by the Court when assessing whether one spouse's contribution to the marriage was clearly greater than that of the other. It is clear on the face of Section 18(2), that there "shall be no presumption that a contribution of a monetary nature is of a greater value that a contribution of a non-monetary nature."

In the farming context is it common, in the creation of matrimonial property, for the farm land or part of it to have been acquired from the relatives of one of the spouses on favourable terms. As we have seen 33, this special type of contribution was usually construed in favour of the donee spouse, and where all things were equal, this contribution was clearly greater.

The case of Reid 34 took into account this special contribution as one of the two justifications for inequality. However, in the three years following the decision in Reid, there has been a greater equality in the division of such farms.

32. Ibid at 612.

33. Baddeley (supra); Bleakley (supra); Manuel (supra); Forde (supra).

34. Supra.
In the later cases of Reid 35 and Eaton 36, the husband had made a special contribution by acquiring land from relatives on generous terms. In both cases the Court awarded equal sharing. In other cases the Courts have awarded a greater percentage to the spouse who has made a contribution prior to the marriage. For example in Searle 37 the husband was awarded 60% of the property in question, in recognition of twelve years of work in improving the family farm prior to the marriage. In Maw 38 a third of a farm was awarded to the wife as the land had been acquired as a result of the husbands pre-marital interest in a farming partnership.

These cases, it is submitted, demonstrate an emerging trend towards greater equality and towards a lessening of the weight given to purely financial contribution 39.

(ii) Farms Acquired By The Joint Effort Of The Spouses

Where the farm had been acquired after marriage with no special family contributions or pre-marital assets or assistance; and where the wife has been a normal farming wife, there is little

39. The only exception to this run of cases was White (1981) 4 MPC 213. Though the principle of equality was confirmed in the subsequent case of Yakich (1982) 5 MPC 191.
point in challenging the presumption of equality of sharing.

Only one case involving a challenge to this state of affairs has been heard over the last couple of years that case was Wakely 40, where the Court upheld the policy of equal sharing and awarded equal division of the farm in question. The Court came to this decision after comparing the long hard work hours and total financial support of the husband, with the wife's care of the husband and a handicapped child. Although the wife was not able to work at farming duties, the Court held that her work in the home enabled the husband to work hard on the farm.

This policy was confirmed in the subsequent case of Johnston 41, where Roper J awarded the husband 60% of the balance matrimonial property 42, due to his having made a special financial contribution to the marriage. His Honour after stating that it would be rare to not award equal sharing held "that if the circumstances of this case do not justify unequal sharing then it is very difficult to envisage circumstances that would."

The facts of Johnston are that over a period of fifteen years the wife had been a "good mother" and "an able housekeeper", in terms of helping on the farm she "was there when needed". Balanced against these contributions to the marriage as a whole was the special financial contribution of the husband. The balance matrimonial property in question consisted of a farming partnership between the husband and his father, together with


42. The homestead being divided equally.
shares in the farming Company which owned and leased the farm land to the partnership. The capital which Roper J considered a special financial contribution was that that had been contributed by the husband to the partnership by way of a gift from his father, and was technically separate property.

(iii) The Effect of Mills v Dowdall And Subsequent Cases

Involving A Determination Of Section 10

The above stable state of affairs has to a certain extent been undermined by two subsequent Court of Appeal cases, both having to be determined on Appeal in the light of Mills v Dowdall 43. Mills v Dowdall held that where property has been transferred to one spouse for value with a mortgage back to the vendor, that property is to be regarded as matrimonial property pursuant to Section 8(e), even though it may have been the first step in a gifting programme.

As a consequence of this decision the "Golden Stairs" block of land in the Court of Appeal case of Cross 44, was held to be matrimonial property, while two further blocks, that had been clearly gifted by the husband's father remained separate property.

During the marriage in Cross, the wife had worked on the "Golden Stairs", and accordingly claimed that she was entitled to an award pursuant to Section 17 and 18 that recognised her contribution.

The Court of Appeal held that while there was no presumption that contributions of a monetary nature are of a greater value than those of a non-monetary kind. The circumstances of the case for the Court, where such that the husband had clearly made a greater contribution to the marriage partnership. The husband had provided the financial resources of the marriage, the farming expertise and did the greater part of the farming work.

The wife on the other hand "came and went from the farm as she liked", took overseas trips, and had "free rein" and generally taking a negative attitude towards the members of her husband's family. Accordingly the Court awarded the husband a 75% interest in the "Golden Stairs" as well as 50% share in the homestead and he retained to two other blocks as his separate property.

In Cross it appears that the Court of Appeal disapproved of Mrs. Cross's conduct, the judgment is laddened with value statements such as "free rein". Nowhere in the Sections of the Act is there the power to make such moralistic statements, and at no time should they influence the Court in deciding the division of the property pursuant to that Act.

The second Court of Appeal case to be heard soon after Mills v Dowdall 45 was Walsh v Walsh 46. In that case half of a family farm was held to be the husband's separate property, as it was acquired before marriage, while the second half was held to be

45. Supra.

matrimonial property pursuant to the decision in Mills v Dowdall

47. The matrimonial property half of the farm, had a market value of half a million dollars, and as such the wife argued that on the basis of Section 15, she was prima facie entitled to a half share in it.

The Court of Appeal, on the other hand, held that "when a item of major significance to the marriage partnership is reclassified, it becomes necessary to re-examine contributions overall to determine whether in the new situation the contribution of one spouse has in the terms of Section 15(1) clearly been greater than that of the other" 48.

The Court after embarking on a comparative exercise of the spouses contributions to the marriage partnership; concluded that the husband's contribution to the marriage was three times greater than that of the wife and accordingly awarded the husband a 75% share in the property.

The results in these cases seem to fly not only in the face of the Court of Appeal decision of Reid 49, but also in the face of Section 18 and the Courts own statement in Walsh 50 that "care is required to ensure that material contributions of any number or kind are not given undue prominence" 51.

As Ms Bridge stated recently "The decisions in cases such as

47. Supra.
48. Ibid at 31.
49. Supra.
50. Supra.
51. Ibid at 31.
Cross 52 and Walsh 53 raise questions of whether the Courts do believe in and accept the principle of equality of the marriage partnership; the inherent equality of all contributions to that partnership; and ultimately the equality of asset division on marriage breakdown. 54

To a certain degree these decisions have made the presumption of equal sharing harder to determine. But it must be remembered that in both Cross 55 and Walsh 56 the non-donee spouse had already received a 50/50 share in the homestead proportion of the property which is indisputable subject to equal sharing.

Secondly, but for the decision in Mills v Dowdall 57, the property in question would have been classified as separate property, which prima facie remains the property of the owner spouse. It is not suggested that Mills v Dowdall is wrong, if anything, in the light of Section 10(1) it is a very secure decision based on the reading of the Section 58. However, the Courts have had to counter what they see as an unjust application of Sections 15 and 18, by using Section 18 as a means of establishing what the Court perceives as fair. On a pure reading

52. Supra.
53. Supra.
55. Supra.
56. Supra.
57. Supra.
58. See Chapter 3.
of Sections 15 and 18 such an approach is technically incorrect. Only time will establish whether the Courts will pursue this approach, in regard to property falling for determination and division under Section 10(1).

It is safe to assume that the status quo of equal sharing for other types of matrimonial property will be preserved.

(iv) Other Factors Affecting The Division of Farm Property
Other factors which may displace the presumption of equal sharing are:

(a) Whether two homes were available for use as a matrimonial home (homestead) at the date of the marriage, in which case the division of the property is adjusted pursuant to Section 16.

(b) Whether the separate property of one spouse has been sustained or diminished by the other, and accordingly the Court has a discretion pursuant to Section 17 to either compensate or penalise the non-owner spouse, depending on the circumstances, by adjusting the shares of each spouse in the matrimonial property.

(c) Whether a personal debt of one of the spouses has been satisfied from the matrimonial property, in such a case the Court may made the appropriate adjustment pursuant to Section 20(6).

(d) Whether the marriage was one of short duration which is defined pursuant to Section 13 as a marriage lasting less than three years.
The full extent to which a spouse's share in the farm property, maybe affected by the above factors turns on the facts of each individual case.

In the area of farm disputes, it must be keep in mind that each percentage increase or decrease in our spouses share may mean many thousands of dollars. It is for this reason that matrimonial property disputes involving farms are usually highly litigious.

An other factor which is very important in the farming context is the date of the division of the assets, this will be examined under the next head.

D. THE TIME OF DIVISION

With all things being equal, it is clearly undesirable to jeopardise the financial existence of a farm by overdrawing on its capital in order to pay the departing spouses share of the matrimonial property division. This and the related underlying policy of the Courts to protect New Zealand's farming heritage and financial existence is presented in an acute form in the case of farms where there is a low cash income to invested capital ratio which leads to major difficulties in the raising and servicing the finance necessary to pay out a major proportion of the capital.

In such cases the Courts will usually endeavour to find other means, other than a forced sale, such a generous adjournments for the exploration of raising funds and the appropriation of
disposible assets to the departing spouse 59.
In the end, though, it maybe impossible to arrive at a form of
implementation which both retains the property for one spouse and
gives half of it to the other.
If the principle object, as outlined by the long title to the
Act, is to recognise the equal contributions of the husband and
the wife to the marriage partnership, the departing spouse cannot
ordinarily be denied his or her share for more than an interim
period to permit reorganisation. The whole rationale of the Act
is that ordinarily both spouses have in their own ways been
equally responsible for the production of the property in
question and accordingly each should therefore be entitled to the
fruits of his or her labours. The mere fact that a farm must be
sold in order to implement the division has not itself normally
been judged sufficient to warrant postponement. For example in
Wesselingh 60 the wife was awarded a half share in a farming
company whose nett assets amounted to $200,000.00. In the Court
at first instance the husband was to pay $40,000.00 in cash to
his wife with the balance being secured by way of a mortgage with
the term to be agreed on or fixed by the parties. On appeal the
order of the District Court was varied so as to allow the husband
an option to purchase the wife's half interest within 28 days
from the date of valuation, failing which the shares were to be

59. See for example Foss [1977] 2 NZLR 185 at 190.
60. (1981) 4 MPC 210; Purvis (1977) 1 MPC 168; Saxton (1978) 2
MPC 166; Reed (1978) 2 MPC 156; McKinstry (No.1) (1980) 4
MPC 138.
realised. Hardie Boys J held that "it is in my view clearly settled that the intention of the Act is that the parties should obtain their shares in a matrimonial property as promptly as possible. To delay might defeat the primary direction, which is that there be equal division. In Hackett [1977] 2 NZLR 429, Jefferies J held that for this the onus to justify postponement rests on the party asking for it. In Poole (1980) 3 MPC 144, Roper J said that it was "always a matter for determining what will best do justice between the parties in the particular circumstances". That approach has frequently been adopted but in no way effects the validity of what Jefferies J said. In the present case I do not consider that the husband can justify deferment. His sole ground is that if there is no deferment he may have to sell. Without additional factors that cannot in my view be sufficient in itself." 61

This case can be compared to the earlier case of Baddeley 62 where the wife was entitled to $45,542.00, $20,000.00 of which was to be paid within 2 months with the balance payable by annual instalments of $3,000.00 secured by way of mortgage and interest being charged at 8%. It is the comments of Mahon J that are of interest for the present discussion, they are: "If the Respondent in the present case finds in the end that he cannot meet the heavy capital liability imposed by this judgment, and that his farm must be sold, either by him or by his mortgagee, with the consequent destruction of an enterprise to which he has devoted

61. Ibid at 211.

the whole of his working life, then I can only repeat that this is a consequence directed by Parliament, not by me" - the possibility that the husband might be - "driven to the necessity of having to sell his farm which, is in the final result, the reward for the years of his hard manual labour as a poorly paid employee of the family partnership" - and the possibility that under the new act a wife could leave the husband for another man and would be - "able to bring to the new marriage a handsome dowry representing half the business assets of her previous husband; while she is basking in the affluent warmth of a last romantic springtime, her deserted exhusband is back on the farm struggling with the lawful demands of his mortgagee, his stock, and his bank." 63 It is be submitted that this case cannot be reliable authority as to the exercise of judicial discretion under the Act as it ignores the basic concept of recognising the equal contributions to the marriage partnership, and the assets that that partnership has produced, not to mention that the moral fibre of the decision is questionable in todays society.

Only in isolated and exceptional cases such as;

(i) Clear matrimonial misconduct as for example in Johnston 64 where a wife who deserted her husband so as to continue an association which had caused the breakdown of the marriage was entitled to $72,000.00 from the farmer husband pursuant to a District Court Order. $10,000.00 of which was payable immediately, $5,000.00 after 18 months and the

63. Ibid at 10.

64. (1980) 4 MPC 122.
balance being suspended on further order for a minimum of 3 years with no interest payable, as the wife was living in a defacto relationship with joint earnings of $29,000.00 and the defacto husband owning substantial assets. Roper J on Appeal held that "it was impossible to say that the learned Magistrate exercised his discretion to delay settlement on wrong principles" although "as for the non-payment of interest, this aspect of the case has given me some concern." But he upheld the Magistrates decision.

(ii) Where there has been a defalcation by a servant of a company which the husband should be given an opportunity to overcome. Such was the case in Cook 65 where the wife was entitled to assets worth $30,661.00 of which $16,000.00 was to be paid to her immediately. Payment of the balance was to be postponed for 4 years, 3 of which were to bear interest at 7%, as the husbands business had been the subject of a recent defalcation by a servant of the company thus creating a precarious liquidity position and "In the light of the history of this marriage and its close association of its property situation with the company it seems to me that Mr. Cook should be give the opportunity to re-establish the company's prosperity." 66 does it seem likely that substantial postponements in the payment


66. Ibid at 43 per Roper J.
of the departing spouses share will be permitted. In Morton 67 the husband farmer, with a farm worth $400,000.00, was required to pay out approximately $100,000.00 to his departing wife. In the Court at first instance it was ordered that the wife receive $20,000.00 at the expiration of 3 years without interest being added, and the balance was to be paid by instalments of principal and interest over 25 years due to the Judges "concern that Mr. Morton should not be driven from the farm by an inability to find the money to meet Mrs. Morton's share." On Appeal the Court of Appeal ordered that she receive half of her share in cash after 3 months, balance to be secured by a mortgage and payable over a period of 3 years at rates payable on second mortgages of farm property, as there was an absence of exceptional mitigating factors which would allow the postponement of her share for the lengthy period of 25 years. The Court of Appeal also criticised the 25 year mortgage period because it would have resulted in the wife receiving in real terms much less than what she was entitled to.

CHAPTER 9

CONCLUSION

In general the following pattern emerges from the application of the Matrimonial Property Act 1976 to farm property. If either or both spouses own the land upon which the homestead stands, that is the matrimonial home and its associated area, that homestead will be subject to a separate valuation from the balance of the farm. The resulting equity, after the appropriate apportionment of the mortgages secured over the farm as a whole, will be divided equally between the spouses. Any divergence from equal sharing in this case would be rare. Likewise the remainder of the farm will usually be classified as matrimonial property, and subject to equal sharing, if it has been acquired directly or indirectly by the joint or several efforts of the spouses during the marriage. If the remainder of the farm was acquired prior to the marriage or acquired by way of a gift or inheritance during the marriage, that proportion of the farm will remain the separate property of the owner or donee spouse.

An interesting development in the area of farm property is the effect of Estate Planning Programmes. The latest cases on the subject have indicated that where property has been passed to a
donee spouse or valid consideration, that property will not be classified as a gift but as matrimonial property, and therefore subject prima facie to equal sharing. The Courts to counter this position have used Section 18 so as to give the donee spouse a greater share of that property on the basis that he has made a greater contribution to the marriage partnership by having that property passed to him.

Any increase in the value of any farm property during the marriage due to the use of matrimonial property farm income or due to the efforts of the non-owner spouse will usually result in that increase in value being classified as matrimonial property and therefore subject to equal sharing.

Before any classification of farm property can be possible the current market value of the farm property will be required, together with the value of the property at the date of the marriage and/or acquisition and its value at the date of separation. Likewise any allowable debts of the spouses for example, mortgages, would have to be deducted so as to determine the divisible equity.

If one of the spouses claims to have increased the value of the farm property since separation, that spouse must produce evidence to show that such an increase was due only to that spouse's unilateral efforts. That spouse will also have to produce evidence of the value of that property at the date of separation together with evidence of the amount of the increase.

In general in a marriage of substantial duration where the farm is actively farmed by either or both spouses, it will be impossible for any livestock to retain its original designation.
as separate property, due to its natural turnover due to deaths, births and sales, especially when they have been mixed with matrimonial property livestock.

Finally the date for the division of the farm property between the spouse remaining on the property and the departing spouse will not be substantially postponed by the Courts unless there are special mitigating factors.

It has been held by many writers that farming wives have been generally prejudiced by the Courts application of the Matrimonial Property Act 1976. Whether this is true or not will always be open to debate by the various factions. It is hoped that this thesis has outlined impartially the application of the Matrimonial Property Act as it currently stands in relation to farm property. Likewise it is hoped that this thesis has provided a guideline of the current law and principles that will be of use and of interest to the layman or professional alike.
BIBLIOGRAPHY

BOOKS

Butterworths  

Butterworths  

Fisher  

Ludbrook  

Webb  

Webb  

REPORTS

ARTICLES


<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Source</th>
</tr>
</thead>
</table>

**SPEACHES**

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Venue</th>
</tr>
</thead>
</table>
APPENDIX A

THE EVOLUTION OF THE MATRIMONIAL PROPERTY ACT 1976

The provisions of the Matrimonial Property Act 1976 came into force on the 1st day of February 1977. It has general application to all marriages, whether performed before or after that date.

A. THE MATRIMONIAL PROCEEDINGS ACT 1963 AND MATRIMONIAL PROPERTY ACT 1963

Prior to the 1st day of February 1977 the division of matrimonial property was governed by the Matrimonial Property Act 1963 and the Matrimonial Proceedings Act 1963.

Any examination of these early Acts is almost of an academic nature only. There are however, three situations where these Acts may still have an effect. The first is where proceedings have already been commenced under the Matrimonial Property Act 1963, and the Matrimonial Proceedings Act 1963, with the result that those proceedings continue to be governed by those Acts in their original form unless there is an agreement to the contrary.

Secondly where an application relates to the property of a marriage which took place before the 1st day of February 1977, the Court must have regard to any agreement entered into by the spouses before that date 4.

Finally, matrimonial property compromises entered into before the 1st day of February 1977 continue to be binding notwithstanding the new Act 5.

When the Matrimonial Property Act 1963 6 was read in conjunction with the Matrimonial Proceedings Act 1963, 7 the Court was empowered on the making of a decree of divorce or at a later time, to make an order as to the occupation of the matrimonial home. Such an order was enforceable against the personal representatives of the party named in the order 8. The Court was also empowered either to direct the sale of the matrimonial home and to divide the proceeds in such proportions as it saw fit 9 or make an order for one party to pay to the other, by instalments or otherwise, such sums as the Court thought reasonable, in return for the contributions made by each to

4. S 55 (1) Matrimonial Property Act 1976. This overrides the formal requirements of s 21 which would otherwise exclude the consideration of such agreements.


the house 10.

When the Court had made an order as to the matrimonial home under the terms of the 1963 Acts, the common law or equitable rights of a party to the marriage to remain in possession where abrogated

11. In 1963 those cases where the statutory powers were exercised, there could be no controversy as to the basis of occupation. The scope for further development of the "equity" in favour of the wife was overly restricted by this provision.

In considering any of the above matters the Court was directed have regard to the respective contributions of the husband and wife to the property in dispute, whether those contributions were in the form of money payments, services or prudent management 12.

At the same time the Court was not to exercise its powers as to defeat any common intention which was expressed by the


12. S 6 Matrimonial Property Act 1963; s 58 Matrimonial Proceedings Act 1963; see Haldane v Haldane (1976) 2 NZLR 715 (PC) where the Privy Council held that a wife's performance of domestic duties in the matrimonial home was regarded by the legislature as a contribution to the matrimonial home.
husband and wife 13.

In practice, despite temporary English attempts to suggest otherwise 14, the substantive principles on which ownership of matrimonial property was to be determined were those of conventional law and equity 15. Financial contribution to property remained the most important determinant of ownership. This frequently gave the property-owning capacity of a wife a shallow meaning. The nature of her domestic work in the home usually denied her the money-earning opportunities of her husband, yet it was her work in the home which left the husband free to earn:

"The cock bird can feather his nest precisely

13. S 6 (2) Matrimonial Property Act 1963; for example when subsequently to the creation of a joint tenancy the parties have solemnly expressed their intention as to the future of the property, for example in a separation agreement, that (common) intention becomes an important factor influencing the Courts decision Walker v Walker (1966) NZLR 754.


15. Pettit and Gissing (supra). This was always the approach in New Zealand - see the useful survey by North P in E v E (1971) NZLR 859 at 871 - 872.
because he is not required to spend most of his time sitting in it" 16

B. THE MATRIMONIAL PROPERTY ACT 1976

In 1975 a fresh Matrimonial Bill was introduced. It applied only to inter vivos matrimonial property rights, the Matrimonial Property Act 1963 being left to govern Matrimonial property rights after the death of one of the spouses pending further reform in that area 17. The accompanying White Paper 18

16. Per Lord Simon of Glaisdale, a former President of the Family Division of the English High Court "With All My Worldly Goods..." (address to the Holdsworth Club, University of Birmingham 20th March 1964) p32. The same theme was developed by Woodhouse J in one of the earliest decisions under the 1963 Act Hofman [1965] NZLR 795, 798 - 800 and more recently by Lord Simon in Haldane (supra).

17. See the White Paper 'Matrimonial Property' - Comparable Sharing 1975 p13 "The Government believes that the rights of a widow (or a widower) should not be inferior in any way to those of a divorced or separated spouse" at p14 "we are nevertheless committed to Legislating for a just and equitable division of the matrimonial property on death. Departmental officers will be studying the problems in consultation with persons of experience in this field to determine how best they can be overcome. We intend to continued...
referred to five problems with the 1963 Act.

(i) The applicant, usually the wife, had the onus of proving specific contributions to property.

(ii) The breadth of the judicial discretion led to uncertainty.

(iii) Awards to wives tended to be less than generous, with wives sometimes receiving no more than a one-quarter or one third share in the matrimonial home after many years of hard work.

(iv) Contributions had to be traced to specific items of property and

(v) There was an unsatisfactory overlap between the two 1963 Acts.

Ironically many of these difficulties were cured shortly afterwards by the Privy Council decision in Haldane 19 but by this stage the Bill had gathered force and after some criticism 20 was passed so as to become Law on the 1st day of February 1977.

Despite the above criticisms the Matrimonial Property Act 1963, allowed a Court a freer discretion in deciding the division of matrimonial property between the parties. Justice under the

continued...

17. introduce a comprehensive measure to deal with this aspect of matrimonial property as soon as possible".

18. Ibid.


former Act was achieved by a refined weighing of merits on each side, and the solution reached was individual. The judgment of the Court was custom made with the passing of the 1976 Act under which a fundamentally different system of justice was introduced. The Act directs that for matrimonial property division, equal sharing is the just way to share the property, and that direction must have been intended to cover a variety of circumstances which would encompass disparities of merit, contribution, conduct, and other factors. It can easily be seen that the legislators considered equal sharing, which is mechanical and arbitrary, would nevertheless better serve the ends of justice because it reaches out to a larger purpose described in the long title to the act 21. However, the legislators did not allow the concept of equal sharing complete reign and enacted [inter alia] section 14 22"...The principle of equal sharing is not to be overthrown when there is discerned

21. The long title reads "An Act to reform the law of matrimonial property, to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce, and in certain other circumstances, while taking account of the interests of any children to the marriage; and to reaffirm the legal capacity of married women."

22. There are no less than 44 cases in Volume 1 of Matrimonial continued ...
disparity of merit and unfairness which might have ben weight under the former Act."

It is submitted that the new Act is to be interpreted according to what has been said to be its intention, that is that it is designed to accommodate a wide spread of circumstances passing by a considerable diversity of individual merit. To put the issue in blunt terms, equal sharing is "rough justice", which implies a "hidden hand" distributing punishments and rewards. "When it is a problem the kernel of it is the application of an impersonal solution to personal circumstances" 23.

The principal object of the Matrimonial Property Act 1976 is to recognise the equal contribution of husband and wife to the marriage partnership. Thus the Act has instituted a scheme of deferred property sharing in the marriage.

The Scheme divides the relationship of married persons into two phases. During the marriage itself property rights have as their general foundation the principles of conventional property common to the rest of the community. The concept of community means that by virtue of their marriage 24 and subject only to

continued...

22. Property Cases (hereinafter MPC) and 29 cases in Volume 2.

Not to mention the numbers in the New Zealand Family Law Reports (hereinafter NZFLR).

23. Madden v Madden (1978) 1 MPC 134, at 135 per Jeffries J.

24. The Act does not apply to defacto relationships, s.2 Matrimonial Property Act 1976.
the possibility of contracting out of the Act, the goods of a
couple acquired in contemplation of or during the marriage, 25
except those acquired by inheritance or gift 26 or with separate
property, 27 are automatically placed in the community and are
prima facie subject to equal sharing on any division of the
property 28.

The above sharing regime rests on the assumption that in general
there should be equal division of commonly owned or used
property, and such property may properly be regarded as the
product of the marriage. The remainder of the spouses property
should in general remain with the existing owner as determined by
conventional property principles.

The Matrimonial Property Act 1976, is however, ambiguous as to
whether it provides each spouse with a propriety interest in the
community from the time of the marriage or whether the interest
comes into existence only when a right exists to apply for a
division of the property pursuant to section 25(2).

Section 25(2) provides that the Court may only make an order
determining the shares of the spouses in the property when;
"...it is satisfied that (a) The husband and wife are living
apart (whether or not they have continued to live in the same

27. Ss 8(e); 8(ee) and 9(2) of the Matrimonial Property Act
   1976.
residence) or are separated; or (b) The marriage of the husband
and the wife has been dissolved; or (c) One spouse is, by gross
mismanagement or by wilful or reckless dissipation of property or
earning, endangering the matrimonial property or seriously
diminishing its value; or (d) The husband or the wife is an
undischarged bankrupt."

Section 19 protects the title of third parties to any matrimonial
property and retains, subject to any express provision to the
contrary in the Act, the right of the spouses to deal with any
property over which they have title, therefore, within the
limits imposed by section 20(2) and sections 43 and 44 29. This
allows a spouse to mortgage or dispose of any or all of the
matrimonial property over which they have control.

The case of In the Matter of Griffiths 30 supports the view that
the community interest does not arise until an application for
division pursuant to section 25 is made. Quilliam J in this case
held that the Official Assignee of a bankrupt husband had no
rights in relation to property in the wife's name while the
spouses were living together as the husband had made no
application for a division of the property. Section 23 (b) was

29. S.43 and 44 gives the Court jurisdiction to make orders
restraining or setting aside dispositions made to defeat a
claim under the Act. The jurisdiction is not qualified by
any requirement that proceedings to protect the claim be
pending: cf.s.45.

held not to give the Official Assignee a general subrogated right to act in the place of the bankrupt spouse. It is submitted, that this is a very narrow reading of the combined effect of section 25(2)(d) and section 23(b). However as submitted in Ludbrook 31 there is some indication that a proprietary right in the community comes into existence with the community and is not deferred until division. For example section 25(3) gives the Court jurisdiction to make at any time a declaration or order relating to the status, ownership, or possession of any specific property. However, the width of the discretion granted by section 25(3) is somewhat uncertain. It has been held to be insufficient to give jurisdiction for the granting of exclusive possession of matrimonial home to the wife where the parties were still living together and no separation order was in effect. Roper J commented that the discretion must be exercised in accordance with the provisions of the Act and therefore its proper exercise would only be related to property disputes 32.

However, O'Regan J in Re E 33 has made an order crystallising the interests of a cohabiting couple in their matrimonial property pursuant to a joint application under the subsection. The parties asked for an equal division of property with specified property to be vested in each spouse. His Honour stated that,

32. Stocker (1978) 1 MPC 200.
within the terms of the Act, an equal division was justified 34. If, as the above suggest, each spouse has a proprietary interest in the community from its inception the interest may well be traceable if one spouse purports to dispose of the matrimonial property to, for example, a family trust.

34. See to same effect Harrex (1979) 3 MPC 77; Ireland (1980) 3 MPC 89; M v M (1980) 3 MPC 114; Strachan (1980) 3 MPC 77.