SHARING THE INCREASE IN VALUE OF SEPARATE PROPERTY UNDER THE PROPERTY (RELATIONSHIPS) ACT 1976: A CONCEPTUAL CONUNDRUM

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In 2001 Parliament enacted some far-reaching amendments to the Property (Relationships) Act aimed at bolstering the equal sharing regime and removing obstacles to equality to secure an equitable outcome for spouses and partners. However, the changes made to s 9A—the provision that enables increases in value of separate property to be converted to relationship property—fail in this regard. This article will demonstrate that s 9A is now conceptually incoherent, internally inconsistent and incompatible with the aims and principles of the Property (Relationships) Act. Indeed, the amendments to s 9A are a retrograde step that have undermined the coherent approach to the classification and division of increases in value of separate property that the courts had already begun to develop prior to the 2001 amendments.

I. INTRODUCTION

The Property (Relationships) Act 1976 distinguishes between separate property and relationship property. This distinction is one of the cornerstones of the Act. Relationship property is shared, whereas separate property is not. Relationship property is exhaustively defined in ss 8 to 10 of the Act. In broad terms, it comprises the family home and family chattels whenever and however acquired, as well as any other property that the parties have acquired through their joint efforts.

The underlying policy of the Act is that marriages, civil unions and de facto relationships are seen as partnerships to which each partner is presumed to contribute equally. Accordingly, they should share equally in the fruits of their partnership. Separate property is not a product of the partnership and is therefore retained by the owner. Any increase in the value of separate property

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1 Property (Relationships) Act 1976, s 11.
2 Property (Relationships) Act 1976, ss 1M and 1N.
is also separate property, unless the increase in value is attributable to the application of relationship property or the actions of the non-owning spouse or partner. If the increase in value is attributable to either of these causes, the increase in value is converted into relationship property and subject to division between the parties to the relationship.

Under s 9(3) Matrimonial Property Act 1976 the increase in value was divided according to the ordinary rules applicable to matrimonial property, regardless of whether the increase was attributable to the application of matrimonial property or the actions of the non-owning spouse. As the increase in value normally related to non-domestic assets, it was not equally shared if one of the spouses had made clearly greater contributions to the marriage partnership than the other spouse. In that case the increase in value was divided in accordance with each spouse’s contribution to the partnership. This gave the Court discretion to award a greater share of the increase in value to the owner, thereby giving effect to the concept of separate property as a key element of the statutory regime.

Radical as the Matrimonial Property Act was at the time of its introduction, it soon became apparent that the Act was failing to secure an equitable division of the fruits of the marriage. To this end, the Act was substantially amended in 2001 and renamed the Property (Relationships) Act 1976 to recognise the inclusion of de facto partners. As part of the amendments, the rules pertaining to the division of increases in value of separate property were also changed. Section 9A makes two significant alterations to the old s 9(3). First, the provision now expressly provides that both direct and indirect actions of the non-owning spouse to the separate property of the other spouse or partner can convert the increase in value into relationship property. Second, the division of an increase in value distinguishes between the causes of the increase in value. The ordinary rules of division apply to an increase in value attributable to the application of relationship property, whereas an increase in value that is attributable to the actions of the non-owning spouse or partner is divided according to the contributions of each spouse to the increase in value.

While the amendments in 2001 were aimed at bolstering the equal sharing regime and removing obstacles to equality to secure an equitable outcome for spouses and partners, the amendments in s 9A do not meet that aim. They will not produce an equitable outcome because the provision is conceptually incoherent, internally inconsistent and incompatible with the aims and principles of the Act. Furthermore, by dividing the increase in value on the basis of contributions to property, Parliament has taken us back to the days before 1976. The facts of Rose v Rose, in which four courts and ten judges

5 Property (Relationships) Act 1976, s 9A.
6 Domestic assets were equally shared under s 11, even if they were pre-marital assets, unless the parties formally agreed otherwise under s 21 of the Act. See for example, de Malmanche v de Malmanche [2002] 2 NZLR 838 (HC).
7 Matrimonial Property Act 1976, s 15.
9 Property (Relationships) Act 1976, s 9A(1).
June 2010  Sharing the Increase in Value of Separate Property

tried in vain to make sense of this provision, provide the perfect setting to demonstrate the conceptual muddle that Parliament has created.¹⁰

This paper commences with a brief overview of the law under s 9(3) of the Matrimonial Property Act. That will show that when s 9A was enacted in 2001, the Courts were already developing a coherent approach to the classification and division of increases in value of separate property that reflected the aims and principles of the Act’s equal sharing regime. That development was arrested when s 9A was adopted, as will become evident from an in-depth analysis of that provision in the latter part of the paper.

II. SECTION 9(3) OF THE MATRIMONIAL PROPERTY ACT 1976

Section 9(3) of the Matrimonial Property Act 1976 provided:

Subject to subsection (6) of this section, any increase in 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 actions of the other spouse; or

(b) To the application of matrimonial property.—

in either of which events the increase in value or the income or gains (as the case may be) shall be matrimonial property.

This section merely classified the increase in value. It was silent on the division. The ordinary rules of division therefore applied to any increase in value that became matrimonial property. As the matrimonial home and family chattels were always matrimonial property, unless the parties had formally agreed otherwise, s 9(3) was normally concerned with non-domestic assets. If those assets were classified as matrimonial property, then s 15 provided that they would be shared equally unless the owner’s contribution to the marriage partnership had been clearly greater than that of the other spouse, in which case the property would be divided according to the respective contributions of each spouse to the partnership.

A. The Early Years

In the years following the enactment of the Matrimonial Property Act 1976, the High Court and, later, the Court of Appeal heard a number of cases on various aspects of the interpretation and application of s 9(3). In the early High Court decisions, it soon became apparent that the non-owner was expected to meet a high standard of causation. The majority of cases concerned assets of a non-domestic nature, such as farms or businesses, and the reason relied upon for the increase in value was generally the actions of the non-owner, rather than the application of matrimonial property.¹¹ In such cases, the High Court


¹¹ See Portar v Portar (1982) 5 MPC 120 (HC), for an example of a case involving the application of matrimonial property rather than the actions of the non-owner. In that case, the husband already owned what became the matrimonial home after the marriage. The couple
adopted an inflexible interpretation of s 9(3), requiring proof of a direct link between the non-owner’s actions and the increase in value and its consequences.\(^{12}\) The Court disregarded indirect actions, such as the non-owner’s efforts on the domestic front that freed-up the owner to spend more time developing his or her separate property. There was no appreciation then of Lord Simon of Glaisdale’s famous comment in 1964 that “[t]he cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it.”\(^{13}\)

Even if the non-owner could establish direct actions, the contribution had to be reasonably substantial in order for the Court to recognise it as an attributing factor in terms of s 9(3).\(^{14}\) \(\text{Palmer v Palmer}\) is a paradigm example of the high threshold set by the High Court.\(^{15}\) There, the wife argued that her efficient management of the household as well as her unpaid efforts in her husband’s business had contributed to the increase in value of shares in the company. Hardie Boys J observed, however, that while household support and the like “are clearly contributions to the marriage partnership ... they are too indirect to be regarded as causative of any increase in value of the shares.”\(^{16}\)

Rather, “in view of the consequences that follow when a contribution to increase in value is established ... the Court must look not only for a direct contribution but also a reasonably clear and substantial contribution”.\(^{16}\) The Court was clearly concerned to guard the concept of separate property against the corrosive consequences of s 9(3).

In those cases where the Court was satisfied of a sufficient causal nexus between the non-owner’s actions and the increase in value, unequal division of the increase was commonplace. Consistent with the policy and principles of the Act, unequal division was based on contributions to the partnership, not the property. Thus, in \(\text{Bowen v Bowen}\), where the marriage had lasted for 17 years, the increases in the value of a farm owned by the husband before the marriage were held to be matrimonial property, but by applying s 15, the Court split the increases 70:30 in favour of the husband.\(^{17}\)

In \(\text{Thomson v Thomson}\) the marriage lasted for 31 years, but even then, the increase in value of the farm lived at the property for 15 years before moving to another house, at which point the original property reverted to being the husband’s separate property. The wife’s claim to a share in the increase in value of the first home based on the application of matrimonial property was successful. Holland J, at 121, found that there was “no dispute that the wife [was] entitled to 50 per cent of the figure to be assessed in accordance with s 9(3) of the Act”.

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12 See the discussion in Bill Atkin and Wendy Parker \(\text{Relationship Property in New Zealand}\) (2nd ed, LexisNexis, Wellington, 2009) at 69–70. Bill Atkin “Matrimonial Property; Time to take stock” \(\text{NZ LJ} 25\).

13 Lord Simon of Glaisdale “With All My Worldly Goods” (lecture to the Holdsworth Club, University of Birmingham, 20 March 1964) at 32.

14 \(\text{Palmer v Palmer}\) (1982) 5 MPC 116 (HC).

15 Ibid, at 117.

16 Ibid, at 118. Hardie Boys J held that her unpaid efforts in the business did not cause an increase in value of sufficient substance for the Court to take cognizance of it. Nor did s 17 apply on the facts. Section 17 empowers the Court to compensate a non-owner for sustaining the owner’s separate property. See also n 43 in regard to the use of s 17.

17 \(\text{Bowen v Bowen}\) (1981) 4 MPC 22 (HC).
that the husband had initially brought to the marriage was divided 60:40 in his favour.¹⁸

The Court of Appeal initially took a similarly rigorous approach to that adopted by the High Court. In the first two Court of Appeal cases to consider s 9(3), Walsh v Walsh (1984)¹⁹ and Cross v Cross (1984),²⁰ the non-owner wives failed in their claims to get a share of the increase in value of their husbands’ separate property farms. Both women argued that their actions had contributed to an increase in the value of the farms. In each case, however, the Court found that the claimants had failed to demonstrate that their work had in a “clear and appreciable manner” contributed not just to the earning of income but also to the increase in value of the farms.²¹ The claims in respect of other matrimonial property were not particularly successful either. Apart from the homesteads—which had to be divided equally—shares in the remaining non-domestic matrimonial property were split unequally in accordance with s 15. In both cases, the Court awarded the wives 25 percent and the husbands 75 per cent of the balance.

B. Subsequent Developments

By the mid-1980s concerns had also been raised in the lower courts as to whether the total increases in value were matrimonial property under s 9(3), or only that part of the increase directly produced by the application of matrimonial property or the actions of the non-owning spouse.²² In 1986 the Court of Appeal in Hartley v Hartley²³ took the opportunity to resolve the matter. Somers J found that “attributable” meant “owing to or produced by”, with the effect that only the increase in value or gains wholly or in part owing to or produced by one of the factors in s 9(3) would become matrimonial property.²⁴ However, where the increase was due to a mix of factors such as the actions of the non-owner as well as those of the owner and/or inflation, the whole increase was matrimonial property.²⁵

¹⁹ Walsh v Walsh (1984) 3 NZFLR 23 (CA).
²¹ Note that Hardie Boys J, who had decided Palmer v Palmer (1982) 5 MPC 116 (HC) (discussed above), was now a member of the Court of Appeal, and sat on the bench in both Walsh and Cross. Shares in the matrimonial property were split unequally in terms of ss 15 and 18 in both cases, the wives receiving 25 per cent and the husbands 75 per cent of the property.
²³ Hartley v Hartley [1986] 2 NZLR 64 (CA).
²⁴ Ibid, at 75 per Somers J.
²⁵ Ibid, at 76 per Somers J. The Court of Appeal took the opportunity to make some observations regarding the underlying policies and principles of the Matrimonial Property Act 1976. Casey J, at 72, considered that s 9(3) concerned classification, not division, of matrimonial
Two years later, in French v French\(^{26}\) the Court of Appeal again rejected the s 9(3) claim made by the non-owner wife, making it clear that if the non-owner expected to share in the increase in value, he or she would have to do more than merely work on the owner’s separate property. In French, the couple were married for less than four years, but during that time the husband’s separate property farm increased in value by $112,000. The wife had taken part in the farming activities, doing much of the farm labour. The Court of Appeal overturned the decision of the High Court, which awarded the wife half of the increase in value. According to Cooke P, the wife’s work was “no more creative than that of a farm labourer”\(^{27}\) and her efforts had not “significantly enhanced the assets”\(^{28}\). Instead, the Court exercised the discretion in s17 of the Act to compensate the wife for sustaining her husband’s separate property. Cooke P went so far as to observe that “a reasonably liberal use of the power under s 17 to compensate for sustenance should go far to exclude any injustice.”\(^{29}\) The $56,000 awarded in the High Court was reduced to $30,000 under s17.

It took another decade before there was any discernible shift in attitude to s 9(3). In 1997 Hight v Hight\(^{30}\) heralded the first signs of a more relaxed approach to the non-owner’s indirect contributions to their spouse’s separate property. The new judicial approach never had time to reach its full potential, however, being overtaken by the introduction of the Property (Relationships) Act in 2001.

The property at issue in Hight comprised a dairy farm in Taranaki and, later, a property in Tauranga. A company owned the properties, and the husband held shares in the company, which were his separate property. Mr and Mrs Hight worked the Taranaki farm for several years, the wife playing a significant part in the upkeep and day-to-day running of the farm. When the couple moved to Tauranga, the wife took up paid employment, and her earnings contributed significant cash flow for the family, which enabled the husband to concentrate on the development of the Tauranga property and kiwifruit orchard. The wife also put the proceeds of a life insurance policy towards the cost of building the kitchen in the new home.

In the High Court, Elias J (as she then was) held that by her actions the wife had made substantial and direct contributions to the assets held in the company and that she was entitled to half the increase in the value of the

\(^{27}\) Ibid, at 66.
\(^{28}\) Ibid.
\(^{29}\) Ibid.
shares. Elias J thought that the type of conduct that may enhance separate property should not be viewed narrowly. Provided there was a causal connection which was more than "trivial", then s 9(3) should apply. Her Honour was prepared to consider different forms of contributions such as those of a domestic nature, reflecting a division of labour within the marriage. For example, foregoing a higher standard of living or accepting more modest family chattels or family home may be actions that could contribute to an increase in value of separate property. In relation to the Tauranga property, Elias J considered that "to the extent that the wife's income precluded the need to draw income from the company or realise assets, she contributed directly to the value of the shares."\(^{33}\)

Professing to be "in general agreement with the approach adopted by Elias J",\(^{34}\) the majority of the Court of Appeal (Richardson P, Gault, Keith and Blanchard JJ) took a different approach, preferring to treat the increases in value to the Taranaki and Tauranga properties as quite separate matters. In regard to the Taranaki property, the majority followed the conservative approach in French v French,\(^{35}\) finding that there was "nothing to show that any of her efforts translated themselves into an increase in value".\(^{36}\) While the farm had been competently maintained, the majority thought more than that was needed, such as construction of new improvements or development work.\(^{36}\)

Yet again, causation was the stumbling block for the Court.

In regard to the Tauranga property, however, the majority concluded that the wife's contributions, particularly her use of the proceeds of her life insurance to help construct the kitchen, must surely have added more than trivial value.\(^{37}\) Furthermore, from 1988 onwards, the wife's income was significant at a time when the company was under financial pressure. Her income was used to avoid drawing from the company and was also used for domestic expenditure and school fees. In that respect, the majority agreed with Elias J that this constituted a significant action to which the increase in value in the 1990s was attributable: \(^{38}\)

\[\text{The fact that the contribution was also of a domestic nature does not disqualify it from consideration under s 9(3).}\]

\[\text{We are satisfied that the wife's actions when the house was being built and in becoming a breadwinner for the family and thereby enabling Mr Hight to devote his energies to salvaging the finances of the company, are recognisable elements in the current value of the husband's bonus shares and that ... the increase in the value of the bonus shares themselves, is matrimonial property.}\]


\(^{32}\) Hight v Hight HC Tauranga M58/94, 9 October 1996 at 29.

\(^{33}\) Ibid, at 33.

\(^{34}\) Hight v Hight [1997] 3 NZLR 396 (CA) at 407.

\(^{35}\) Ibid, at 408.

\(^{36}\) Ibid.

\(^{37}\) Ibid, at 408.

\(^{38}\) Ibid, at 408-409.
The fifth member of the Court, Thomas J, dissented on the basis that the majority had placed an unnecessarily restrictive construction on s 9(3). Thomas J thought that Elias J’s approach was justified by s 9(3), which merely requires an “increase in value”. It was the approach of the majority that thus created an anomaly. While accepting that the concept of separate property was as much a policy of the legislation as the equal division of assets, Thomas J expressed concern that the majority decision unduly favoured “the concept of separate property at the expense of the fundamental objective and underlying philosophy of the Act, namely, to recognise the equal contribution of husband and wife to the marriage partnership and to provide for a just division of the matrimonial property between the spouses when a marriage ends”.

Hight made several general propositions regarding the application of s 9(3). It confirmed earlier case law that where any part of the increase is traceable to the non-owner’s actions or the application of matrimonial property, then the whole of the increase occurring upon or after the first such action or application becomes matrimonial property. However, in other respects, the Court’s views diverged from earlier cases. The Court downplayed the degree of input required from the non-owner spouse. Only actions or applications of a trivial nature were to be disregarded because they would make no clearly measurable difference to subsequent value and could not be said to be causative of any increase. That may be compared with Walsh and Cross (above), where in 1984 the Court of Appeal required that the non-owner show their work had clearly and appreciably contributed to the increase in value.

While Hight v Hight lacked a unified judicial stance, it nonetheless isolated some critical questions both in relation to s 9(3) and, in a more general sense, tested the traditional inviolability of separate property under the Matrimonial Property Act 1976. This challenge to “separate property” was not confined to the Matrimonial Property Act 1976. A parallel shift was occurring at much the same time in the treatment of widows’ claims under the old Matrimonial Property Act 1963 and in de facto property cases. Both jurisdictions relied on contributions to property by the non-owning spouse or partner and underwent a similar development in relation to causation. Thus, in Re Mora (deceased) the Court of Appeal held that:

39 Ibid, at 411.
40 Ibid.
41 Ibid, at 406. The Court also noted that the onus of proof is on the non-owner spouse.
42 Ibid.
43 Note, however, that Hight rejected the suggestion made by Cooke P in French v French [1988] 1 NZLR 62 (CA), that liberal use of s 17 could avoid injustice to the non-owner. In Hight Blanchard J, at 409, thought that approach would effectively undermine the concept of separate property basic to the Matrimonial Property Act. Nonetheless, under the Property (Relationships) Act, s 17 has been used where the increase in value was not caused by factors covered by s 9A, but the non-owner has assisted directly or indirectly to sustain the property. For example, O v O FC Hamilton FAM-2001-019-1355, 4 May 2006; V v V (Relationship Property) [2007] NZFLR 350 (FC); B v Adams (2005) 25 FRNZ 778 (FC).
44 Matrimonial Property Act 1963, ss 5 and 6, which continued to apply to marriages ending on death. Gillies v Keogh [1989] 2 NZLR 327 (CA) is the leading decision on property disputes between former de facto partners.
45 Re Mora (Deceased) [1988] 1 NZLR 214 (CA).
[Mrs Mora's] prudent management and hard work in the home and on the farm enabled substantial savings to be made, without which her husband might have found it far more difficult or even impossible to make the purchase [of the farm] from his parents.

Similarly, in Lankow v Rose the Court of Appeal stated that domestic contributions of a de facto partner could be indirectly linked to the acquisition or retention of property by the owning partner. Both of those jurisdictions were discretionary in nature, leaving scope for the courts to develop the jurisprudence in response to changing social values. The Matrimonial Property Act 1976, on the other hand, was a code of rules with little flexibility. That may explain the Court's reticence in widening the scope of s 9(3) too far. Nonetheless, it seems that by then the seed sown by Lord Simon's appeal to the cockbird feathering his nest was finally taking root.

The shifting judicial stance on s 9(3) towards the end of the Matrimonial Property Act's life foreshadowed some of the changes made to s 9A in 2001. Recognition that the actions of the non-owner may free up the owner to work on their separate property is tantamount to the statutory recognition now accorded to the "indirect" actions of the non-owner by s 9A(2) of the Property (Relationships) Act. Other judicial developments were not disturbed by s 9A, such as a more than trivial causation sufficing, instead of a clear and substantial cause, and the conversion of separate property only from the first causative application of matrimonial property or spousal action. Any injustice that might result from dividing the increase in value was softened by the availability of s 15. As the increase in value usually related to non-domestic assets, the Court had considerable latitude to divide such property unequally by treating the owner's introduction of separate property and efforts in relation to that property as (usually) his contribution to the partnership. This enabled the Court to achieve a just division of matrimonial property whilst at the same time upholding the concept of separate property, thus striking a fine balance between these two conflicting interests.

This approach to s 9(3) was validated by the first reform proposals introduced by the National Government in 1998. There was no proposal to amend s 9(3). The Government Administration Committee received submissions to broaden the scope of the section, inter alia by including indirect actions by the non-owning spouse, but it recommended by a majority that s 9(3) remain unchanged to avoid inconsistency with the Act's separate property concepts. It was not until the newly elected Labour Government introduced a Supplementary Order Paper in 2000 that s 9(3) was amended to provide explicitly for an indirect causal connection between the actions of the

47 The Matrimonial Property Amendment Bill 1998 as originally introduced, did not include any amendments to s 9(3), even though the amendments were largely drawn from the recommendations of the Report of the Working Group on Matrimonial Property and Family Protection (1988); see Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i.
48 Matrimonial Property Amendment Bill (109-2) (commentary from the Government Administration Committee) at ix.
non-owning spouse or partner and the increase in value of the owner’s separate property. 49

III. SECTION 9A PROPERTY (RELATIONSHIPS) ACT 1976, AS AMENDED IN 2001

In 2001 Parliament radically changed the entitlement of a non-owner to share in the increase in value of separate property of his or her spouse or partner. Section 9A replaces s 9(3) and provides:

9A When separate property becomes relationship property

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.

(2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—

(a) the increase in value or (as the case requires) the income or gains are relationship property; but

(b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.

(3) Any separate property, or any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property, is relationship property if that separate property or (as the case requires) those proceeds or the increase in value or the income or gains are used—

(a) with the express or implied consent of the spouse or partner that owns, receives, or is entitled to them; and

(b) for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either spouse or de facto partner in, any property referred to in section 8(1).

(4) Subsection (3) is subject to section 10.

As under s 9(3), there are two avenues through which the increase in value in separate property can become relationship property: first, by the application of relationship property and, second, by actions of the non-owning spouse or partner. As before, if either of these two causes exists the increase in value is classified as relationship property. But unlike s 9(3), s 9A treats increases in value resulting from the application of relationship property differently from increases attributable to actions of the non-owning spouse or partner. Parliament also repealed s 15, thereby removing the liberal exception to equal

49 Section 9A was first inserted by clause 10 Supplementary Order Paper 2000 (25), which was introduced on 16 May 2000. That proposal was endorsed by the select committee’s Report of Justice and Electoral Committee on the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 (109-3) at 15.
division of non-domestic property that the Court had relied on frequently in conjunction with s 9(3). The consequences of these changes were considered in *Rose v Rose*, a farming case, which went all the way to the Supreme Court.

### A. Rose v Rose

#### 1. Facts

Mr and Mrs Rose married in 1979 and separated in 2003. At the time of the marriage, Mr Rose already owned a farm known as Cloverlea, which he farmed in partnership with his father and brother. They also farmed two further properties together: Poplars, owned by his father, and Brentwood, which his brother owned. The partnership farmed, but did not own the properties. At various times from the late 1980s onwards, the brothers sold substantial parts of their respective farms to reduce debt levels. Recognising the potential of the remaining land for grape growing, they later developed vineyards on their properties. When their father died in 1995, the two brothers inherited Poplars as tenants-in-common. From 2000, grapevine planting was also commenced on part of Poplars.

When Mr and Mrs Rose separated in 2003, Mrs Rose made claims in respect of both Poplars and Cloverlea. She claimed a share of the increase in the value of Poplars from the date of the vineyard development, arguing under s 9A(1) that the increase in value was at least in part attributable to the application of relationship property, namely, the partnership funds used to develop the vineyard.

Mrs Rose's claim in respect of Cloverlea was under s 9A(2). She argued that the increase in the value of Cloverlea was at least partly attributable to her indirect actions. She had never worked on the farm, but she claimed that her work in the home, raising the family, and her income from outside employment were contributions to the marriage partnership which freed up her husband to work for the benefit of his separate property. She further argued that she had prevented the farm debt from reaching an unsustainable level with the end result that the farm could be retained.

#### 2. Family Court

The Family Court dealt briefly with s 9A and did not specifically distinguish between subsections (1) and (2). Judge Grace found that the increases in value had in part occurred due to the application of partnership funds, of which the husband's share was relationship property. Mrs Rose had also contributed both directly and indirectly to the increases. Mrs Rose's share in both farms was fixed at half of the identified increases. Mr Rose appealed.

#### 3. High Court

On appeal, Wild J distinguished between the two limbs of s 9A. His Honour concluded that no relationship property had been applied to either Poplars or Cloverlea and that the Family Court had been wrong to find that Mrs Rose had

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51 In respect of Poplars, Mrs Rose's share was 25 per cent of the total increase in value because her husband owned 50 per cent of the farm.
a claim under s 9A(1). His Honour held that neither the gross income of the partnership nor its borrowings from the bank were relationship property. They belonged to the partnership, not to either party.

Wild J found that Cloverlea would have been in “jeopardy” but for Mrs Rose’s contributions, but nonetheless rejected the claim under s 9A(2) because he was unable to conclude that her actions had contributed to the increase in the value. Rather, it was attributable to inflation and the demand for land for viticulture. Wild J determined that Mrs Rose’s financial contribution was more than “merely rendering assistance” and her actions sustained the property in part in terms of s 17. She was awarded $75,000 for sustenance of her husband’s separate property. As a result of the High Court decision, she received about $238,000, while the husband received about $2.16m.

4. Court of Appeal

The Court of Appeal set aside the order made by the High Court, and instead made orders in favour of Mrs Rose under both ss 9A(1) and (2). In terms of s 9A(1), the Court considered that there had been an application of relationship property. Mr Rose’s interest in the assets of the partnership acquired after the date of the marriage was relationship property. The application of the partnership funds to Poplars attributed at least in part to the increase in value. Mrs Rose was awarded $283,000 under s9A(l), being one half of her husband’s share in Poplars.

The Court also allowed the appeal under s 9A(2) in respect of Cloverlea. Valuations showed that the land had increased from an estimated $300,000 in 1979 when Mr and Mrs Rose married, to $1.5m in 2005 at the hearing date. In response to Mr Rose’s argument that any increase in value was the result of inflation, the Court noted that the matter had to be considered in the round in the context of a marriage of over 20 years duration in which both parties had put their efforts into maintaining the household. Those circumstances did not mean, however, that a claim under s 9A(2) could succeed where there was no increase in value, nor where the increase was not attributable in some way (directly or indirectly) to the actions of the non-owning spouse. If all of the increase was clearly related to inflationary matters there could be no link as required by s 9A. However, the Court though that it was open to it “to infer that at least some of the increase must relate to the development of the land. We do not see s 9A in the present circumstances as requiring evidence as to how much of that increase relates to inflation and how much to other matters.” In the Court’s opinion, Mr Rose’s contributions to the increase in value were greater than his wife’s because he had brought the house and the farmland to the marriage. The Court made an assessment that Mrs Rose’s share based on her contributions to the increase in value should be put at 40 per cent.

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54 Ibid, at [80].
55 Ibid, at [81]. See also the obiter comments on s 17 at [83]–[85].
5. Supreme Court

The Supreme Court upheld the finding of the Court of Appeal that the husband’s interest in the partnership was relationship property and that it had been used to increase the value of Poplars. Mr Rose was thus entitled to a half share of the increase in value of Poplars since 2000. The Court noted that while some of the increase in the value of Poplars “may well have been the product of inflation or a general rise in the value of land in Marlborough suitable for viticulture ... that does not defeat a claim under s 9A(1) if some part of the increase (excluding anything which is merely trivial or minimal) is attributable to the application of relationship property.” The Court thus affirmed the Court of Appeal’s dictum in *Hight v Hight* that the connection need not be substantial. The Court further observed that “[o]nce a causative link is established between the application of relationship property and some such increase in value, the whole of the increase, howsoever the balance of the increase arose, is required by subs (1) to be treated as relationship property.”

It follows that an increase in value is divisible between the parties unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way. That may be the situation in the case of a purely passive investment but, with an asset like a farm or other business in which the owning spouse works, it will often be likely that some conduct of the non-owning spouse will have had some direct or indirect influence on any increase in value.

Mrs Rose’s efforts in the home and with the children, together with her meeting a significant proportion of the family’s domestic expenses through her earnings, enabled her husband to dedicate himself to the business partnership and allowed him to moderate his drawings so that more labour and more money (or in reality more borrowing capacity) was available to the partners for the development of the vineyards, including the vineyard on Cloverlea. Had it not been for Mrs Rose’s financial contribution produced by working off the farm, the Court concluded that it would have been likely that all of Cloverlea would have been sold and the opportunity of later development of the vineyard would not have existed. These findings echo the comments made by the Court of Appeal in *Hight v Hight* in relation to Mrs Hight’s contributions to the Tauranga property.

The Supreme Court agreed with the Court of Appeal’s unequal division of the increase in value in favour of Mr Rose. That was justified because on all
the evidence his contributions to the increase in value, with credit for the inflation and the general increase in the value of viticultural land, were greater than those of the wife.\textsuperscript{61} However, the Court was critical of s 9A(2).\textsuperscript{62}

Section 9A(2) gives no guidance about how this task [of evaluating contributions to the increase in value] is to be performed but a significantly different approach from that under subs (1) is plainly required. The principles found in s 1N ... have little or no application under s 9A(2)(b). Nor does s 18 which deals with contributions to the marriage, rather than contributions to an increase in value of a particular piece of separate property. The circumstances in which that increase occurred require careful assessment but arithmetical exactitude cannot be achieved and in the end the evaluation of the relative contributions is likely to be a matter of general impression.

The Court was concerned that in cases where a major portion of the increase in value is due to inflation or a general rise in value of a certain type of property (as in the case of land suitable for viticulture), there is an issue as to how such increases should be treated. The difficulty is that inflationary increases and the like have not resulted from the actions of either party. Yet s 9A(2) requires them to be weighed as contributions. The Court concluded that the best approach is that the ownership of the separate property from which the increase has arisen be treated under s 9A(2)(b) as a contribution made by the owner spouse. The Court would evaluate that contribution together with other contributions to the increase in value made by the owner spouse. The Court should then weight the aggregate of those contributions against the identified contributions of the non-owner to that increase.\textsuperscript{63}

B. Analysis of Section 9A

The Supreme Court decision raises several issues in relation to both s 9A(1) and s 9A(2). In view of the significant differences between the two limbs, they will be analysed separately, beginning with s 9A(1).

1. Section 9A(1)

The wording of s 9A(1) is substantively identical to s 9(3). As before, if the increase in value of separate property is attributable to the application of relationship property, then the increase in value becomes relationship property.\textsuperscript{64} So, provided there is more than a trivial or minimal causal connection, all of the increase in value from the first causative contribution is converted into relationship property even if the balance of the increase arises from inflation or some other factor external to the parties. This provision is problematic in regard to both classification and division.

(a) Classification

There is now a curious distinction between the two limbs of s 9A. Whereas s 9A(2) was amended to include indirect actions by the non-owning spouse or partner, no such change was made to s 9A(1). A contextual interpretative

\textsuperscript{61} Ibid, at [51].

\textsuperscript{62} Ibid, at [46].

\textsuperscript{63} Ibid, at [47].

\textsuperscript{64} See Blanchard J's comments in \textit{Rose v Rose}: ibid, at [30].
approach suggests that the application of relationship property must therefore be directly linked to the increase in value. If Mrs Rose had contributed her income to reducing debt of the farming partnership rather than covering expenses of the household, Cloverlea’s increase in value would have come under s 9A(1), rather than 9A(2). That is, Cloverlea’s increase in value would have resulted from an application of relationship property and would have entitled Mrs Rose to an equal share of the increase. By separating s 9A into two limbs and providing for an indirect causal link only in the second limb, Parliament has created a dichotomy that is inexplicable. The income Mrs Rose used to support the household was relationship property and indirectly attributed to the farm’s increase in value by allowing Mr Rose to moderate his drawings from the partnership to support his family and retain the farm. Without Mrs Rose’s financial contribution, it was very likely that Cloverlea would have been sold and the opportunity of later developing the vineyard would not have existed. In spite of that close connection and the nature of Mrs Rose’s contribution, it was too remote for purposes of s 9A(1) and the use of Mrs Rose’s income was instead classified as an indirect action.

Whether the increase in value arose from the application of relationship property or the non-owner’s actions would not have mattered on the Hight v Hight analysis, because the consequence of classifying the increase as matrimonial property would have been the same whichever of the two causes was applicable or if there was a combination of causations. But under s 9A, the distinction is crucial to the division of the increase in value.

(b) Division

As in s 9(3), s 9A(1) does not stipulate how the increase in value is to be divided between the parties. The normal equal sharing rules therefore apply. This introduces a further dichotomy between the two limbs of s 9A. Because s 15 of the Matrimonial Property Act has been repealed, any increase in value attributable to the application of relationship property is now divided equally between the parties unless the parties’ relationship was of short duration or there are extraordinary circumstances which make equal sharing repugnant to justice. The latter exception sets a very high threshold. Equal sharing is therefore the norm in relationships of three or more years’ duration. This means that the non-owner will not only share equally in the increase in value caused by the application of relationship property, but also in the increase generated by inflation and the owner’s own actions. Section 9A(1) thus represents a substantial inroad into the separate property concept.

The repeal of s 15 was a significant change. But the effect of this change on s 9A(1) received no attention during the legislative process. Applications under s 9(3) were principally concerned with domestic actions of wives in relation to increases in value of their husband’s farm or business. There were very few cases in which the application of relationship property was the cause of the increase in value. That may explain Parliament’s focus on spousal actions and the consequences that should flow from them. The lack of comment on s 9A(1)

65 Ibid, at [44].
suggests that Parliament may have overlooked the effect of repealing s 15 on s 9A(1). The concern to protect the separate property concept where the increase in value results from actions was not replicated in s 9A(1).

2. Section 9A(2)

The second limb of s 9A changes both the classification requirements and the consequences, but in opposing directions. While the classification requirements have been liberalised to include indirect actions, the division of any consequential increase in value is based on contributions to the property. In contrast to s 9A(1), there is no presumption of equal sharing. Nor do contributions to the partnership determine division.

(a) Classification

By expressly including indirect actions of the non-owning spouse or partner as a causative element, s 9A(2) implements a recommendation of the 1988 Working Group on Matrimonial Property and Family Protection. It found that a direct link excluded important assets from the matrimonial property pool and recommended that actions amounting to a contribution to the marriage partnership, rather than to the property itself, should be relevant in establishing the causal link. 67 That is now the case. All the contributions listed in s 18 are relevant.

However, in Rose v Rose the Supreme Court goes a step further. It presumes that an increase in value is relationship property “unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way”, as in the case of a purely passive investment. 68 This appears to remove the onus on the non-owner to prove actions and their direct or indirect causal connection to the increase in value. If so, the boot is now on the other foot. It will be up to the owner to provide evidence that the increase in value is unrelated to the non-owner’s actions, for example by showing that the increase is solely or almost entirely due to inflation or market forces.

As before, only the increase in value from the time of the non-owner’s relevant actions will be converted into relationship property, even if the balance of the increase is substantial and attributable to the actions of the owner or simply the result of inflation or a general increase in the value of the property in question. This rule goes back to the Court of Appeal’s decision in Hartley v Hartley. While this rule may be workable in relation to direct actions, the presumption referred to above may make it difficult to disprove the causal link in relation to indirect actions, particularly in long relationships.

(b) Division

If the increase in value is attributable to the actions of the non-owning spouse or partner, then s 9A(2) provides that the increase in value is divided according to each party’s contribution to the increase in value. This change addresses the concern that division under s 9(3) undermined the concept of separate property. The aim of s 9A(2) is to preserve that concept by restricting the non-owner’s share to the increase resulting from his or her actions only. It is in sharp contrast to the division under s 9A(1), where the presumption of equal

sharing applies to all of the increase in value. This is a further example of s 9A's internal inconsistency in relation to what should be shared and what should remain separate property.

Furthermore, s 9A(2) is the only provision in the Act where division is based on contributions to property rather than the partnership. This is not in keeping with the Act's purpose and principles of dividing property on the basis of contributions to the partnership. It harks back to the Matrimonial Property Act 1963 and the constructive trust jurisdiction employed to resolve property disputes between de facto partners prior to their inclusion in the Property (Relationships) Act. As both of these jurisdictions were thought to produce unjust and unpredictable results, it is surprising that Parliament chose to use property contributions as the basis for dividing increases in value of separate property. Section 9A(2) is also internally inconsistent, because jurisdiction is determined by contributions to the relationship whereas division is based on contributions to the property.

(c) Actions of the owning spouse or partner

When the changes to what is now s 9A were being debated, the Law Society suggested that actions of the owning spouse or partner during the relationship should also convert the increase in value into relationship property. It argued that an owner could devote all his or her time and effort during the relationship to a separate property business and retain the profits as separate property. If the profits were received as salary or wages, they would be relationship property. That suggestion was rejected on grounds of inconsistency with the separate property concepts in the Act. However, s 15A goes some way to addressing the problem identified by the Law Society, as part of the economic disparity remedies. It empowers the Court to compensate the non-owning spouse or partner if the increase in value of the owner's separate property was attributable to his or her direct or indirect actions during the relationship and the non-owner's income and living standards are likely to be significantly lower because of the division of functions within the relationship. The purpose is to compensate the non-owner for the increase in value of the owner's separate property.

Although s 15A is in some respects the companion of s 9A, it differs from s 9A in significant respects. For a start, the increase in value is not converted into relationship property. It remains the separate property of the owning spouse or partner. Secondly, there are additional jurisdictional requirements. Not only must there be an increase in value which is attributable to the owner's direct or indirect actions, the non-owner's future income and living standards must also be significantly lower than those of the owner as a result of the division of functions. Those additional economic disparity requirements are not easily satisfied. None of the applicants in the three cases where s 15A has

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69 Property (Relationships) Act 1976, ss 1M and 1N.
70 This point was recognised by Bill Atkin and Wendy Parker Relationship Property in New Zealand (Butterworths, Wellington, 2001) at 65.
71 Matrimonial Property Amendment Bill (109-2) (commentary from the Government Administration Committee) at ix.
been invoked was able to meet these requirements. Even if they had established jurisdiction, they would not have been entitled as of right to a share of the increase in value, as they would if their claim came under s 9A. Compensation under s 15A is at the discretion of the Court and may be ordered from any part of the owner’s separate property or relationship property.

IV. CONCLUSIONS

Section 9A is conceptually problematic, because it is inconsistent with the aims and principles of the Act in several respects. First, it undermines the concept of separate property by converting the entire increase in value into relationship property, even when part of the increase is not attributable to the application of relationship property or the actions of the non-owner.

Second, s 9A differentiates between monetary and non-monetary contributions by attaching different consequences to each. This breaches the principle in s 1N(b) that all forms of contribution to the partnership are treated as equal. Section 18(2) gives explicit effect to that principle by stating that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. Yet, s 9A makes exactly that distinction. No justification for drawing this distinction is provided in any of the parliamentary debates or committee reports. If the rationale of s 9A(2) was to preserve the separate property concept, then why should that not apply equally to s 9A(1)? The distinction could in some cases produce bizarre results. The application of a small, but not trivial, amount of relationship property would entitle the non-owning spouse or partner to share equally in the consequential increase in value, whereas substantial actions by the non owner are unlikely to result in equal sharing of the increase in value. It is difficult to see how this sort of outcome satisfies the Act’s purpose of a just division of the fruits of the partnership.

Third, by dividing the increase in value in s 9A(2) on the basis of contributions to property, the provision abandons the Act’s fundamental premise of focusing on contributions to the partnership. The whole point of the 1976 Act was to move away from the 1963 Act’s property focus because it did not achieve a just division of the fruits of the marriage partnership. Section 9A(2) reverts to this rejected and outdated notion. The section provides no guidance as to how such contributions are to be assessed. It is also the only provision in the Act where division is property based. None of the exceptions to equal sharing rely on property contributions to determine division. Both the short duration and extraordinary circumstances exceptions divide relationship property according to contributions to the relationship. Even short duration de facto relationships, which are not normally covered by the Act, come within

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72 The husband in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) could not establish the required causal nexus. Mrs Nation failed to establish both the nexus and the disparity requirements: *Nation v Nation* (2002) 22 FRNZ 636 (FC) affirmed on appeal: [2005] 3 NZLR 46 (CA). The de facto partner in *LAN v RJL* FC Gore FAM-2004-017-21, 18 August 2006, failed for the same reasons.

73 Property (Relationships) Act 1976, ss 13 and 14–14AA.
the jurisdiction based on substantial contributions to the partnership.\textsuperscript{74} Section 9A is therefore wholly at odds with the aims and principles of the Act.

Some of these inconsistencies may be explained by reference to the legislative history of s 9A. The parliamentary debates and select committee reports suggest that s 9A may not have been viewed holistically.\textsuperscript{75} The concern with s 9(3) Matrimonial Property Act was that only direct actions of the non-owning spouse converted an increase in value of separate property into relationship property. No concern was expressed in relation to the application of matrimonial property as a causative element. Not surprisingly, perhaps, attention in the reform process centred on the need to broaden the qualifying actions, but restrict the consequences of reclassification to avoid undermining the separate property concept. That was in keeping with the general thrust of the 2001 reforms. However, as a result of this legislative myopia, the inconsistencies between the two limbs of s 9A appear to have been missed. Concern to preserve the separate property concept may explain a contributions-based division, but it does not explain a property-based division. Despite being so fundamentally at odds with the Act's purpose and principles, it is hard to see how it can be explained as a drafting error as is the case with some other errors in the Act.\textsuperscript{76}

Whatever the explanation, reform of s 9A is needed if the conceptual conundrum is to be resolved and increases in the value of separate property are to be divided in accordance with the Act's purpose and principles. Two reform options are presented for consideration.

The first option would amend s 9A(1) and (2) as follows:

9A \textbf{When separate property becomes relationship property}

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable wholly or in part, directly or indirectly, to the application of relationship property or the contributions of the non-owning spouse or partner, then the increase in value or (as the case requires) the income or gains are relationship property.

(2) In every case to which subsection (1) applies, sections 11(1), 11A, 11B and 12 do not apply and the share of each spouse or partner in the increase in value that has become relationship property is to be determined in accordance with the contribution of each spouse or partner to the relationship.

Subsection (1) would classify the increase in value and remove the current distinction in regard to causation. Both causative elements would be treated alike, thus reflecting the principle that all forms of contributions should be treated alike.\textsuperscript{77} While this has the potential to capture external causative factors, such as inflation, any threat to the concept of separate property can be addressed through unequal division provided for in subsection (2).

Subsection (2) deals with division of the increase in value and, again, does not distinguish between the causative elements. But it excludes the

\textsuperscript{74} Property (Relationships) Act 1976, ss 14A and 85.

\textsuperscript{75} For example, the amendments to s 8.

\textsuperscript{76} For example, the omission of a time limit in s 89(1)(b) and the recently inserted s 2BAA, accidentally omitted when civil unions were inserted into the Act.

\textsuperscript{77} Section 1M.
presumption of equal sharing and divides the increase in value in accordance with the parties' contributions to the relationship. This idea is not new. It is already the basis upon which relationship property is divided where there are extraordinary circumstances that make equal sharing repugnant to justice (s 13), and also where the relationship is one of short duration (ss 14 to 14AA). It does not preclude equal division, but it recognises that other factors may militate against it, such as the duration of the relationship and the inclusion of inflation and other external factors. If re-drafted in this way, s 9A would create a "third exception" to equal sharing.

An alternative, and arguably more principled, option would be to adopt a narrow causative approach to classification, but to apply the ordinary presumption of equal sharing to relationship property. There would be no need for a clause dealing with division, merely one dealing with classification. Section 9A(1) would then read as follows:

9A When separate property becomes relationship property

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable directly or indirectly to the application of relationship property or the contributions of the non-owning spouse or partner, then that part of the increase in value or (as the case requires) the income or gains are relationship property.

As with option one, this provision removes the current distinction in regard to causation. However, the clause omits the words "wholly or in part" in the current s 9A. In consequence, only the increase in value attributable to the application of relationship property or contributions by the non-owning spouse or partner is classified as relationship property. By not including external factors, such as inflation, in the reclassification, full recognition is accorded to the separate property concept. On the other hand, the exclusion of such external factors may in some circumstances not do full justice to the non-owner, particularly in long relationships. For example, in Rose v Rose, Mr Rose would not have been able to retain the land without the contributions of his wife and thus benefit from the increase in value due to inflation.

While we accept that these options may not resolve all of the problems inherent in s 9A as it is currently worded, they better reflect the purpose and principles of the Property (Relationships) Act and redress the conceptual conundrum that s 9A is today.