MATRIMONIAL PROPERTY

AND DEATH

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"One of the main practical aspects of matrimonial property law is the ultimate destiny of the property after the dissolution of the marriage, and especially after the death of either spouse. Whether the widower's or widow's right to such property is a jus maritale or a jus successioris is of practical importance for the procedure of establishing title in the conflict of laws and above all, with reference to death duties.... The distinction (however) is legally necessary but socially irrelevant. Inequalities between husband and wife as regards their mutual rights of inheritance are objectionable to the modern mind for much the same reasons which prompt it to reject inequalities in matrimonial property law, and, in fact, they are inseparable from the latter."

O. Kahn-Freund in Matrimonial Property Law (ed.) W. Friedmann (1955), pp 281-282.

MATRIMONIAL PROPERTY AND DEATH

INTRODUCTION

In 1976 the Legislature enacted the Matrimonial Property Act founded on the concept of

> "marriage as a partnership of equal persons to which each spouse contributes in different ways according to his or her ability, and that the division of property acquired during the marriage when the marriage comes to an end should reflect this."(1)

Generally marriages end in divorce or death, with death the major cause of their dissolution.(2) The 1976 Act, however, is limited for the time being (except where expressly provided) to application only where both parties to a marriage or former marriage are still living.(3) There is therefore no presumption of an equal division of any property between spouses (or a spouse and deceased spouse's estate) where the marriage ends by death. The Government has recognized the need to correct this anomaly, and intends to bring legislation on the matter before the House this year (1977) to ameliorate the current situation in which a divorced spouse may have more extensive rights than a widowed one.(4)

Any such legislation will have important implications for our law of succession - it is in fact a question of policy whether the surviving spouse's rights will be dealt with in either matrimonial law or succession law (or perhaps both) - and it is intended in this paper to discuss firstly what rights a widowed spouse has at present to share in property built-up by a couple during their marriage, and after glancing at the systems in use overseas, to speculate on the kind of system which might be adopted here and what major policy questions might be involved.

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(1) Minister of Justice, N.Z. Parliamentary Debates, Vol. 408, 1976: 4565.
(2) At the time of the 1971 Census, in the population of persons aged 16 and over the percentage of married persons was 67.2, widowed persons 6.9, legally separated persons 1.4, and divorced persons 1.4. N.Z. Census of Population and Dwellings 1971, Vol. 2, p. 7.
(3) See s. 5 Matrimonial Property Act, 1976.
(4) N.Z. Parliamentary Debates supra 4566.

As well over half the widowed population in this country is female (72%)[5] a living spouse will generally be referred to as "she" or "her", although those terms should be understood in a reversal of normal practice, to mean "she or he", "her or him" i.e. the feminine embraces the masculine.

The position of separated or divorced spouses and their rights will not be mentioned except possibly in passing. Any legislation brought in will be designed to recognize and protect the interests of those whose marriages continued to their natural end in death; divorced spouses will have received their due share on divorce, and would have no further property claim on the estate of a deceased former spouse (although of course maintenance agreements might be enforceable against the estate as under sections 40 or 42 of the Matrimonial Proceedings Act 1963). A woman who has separated from her spouse pursuant to a separation order is treated on the intestate decease of that spouse as if she had predeceased him (section 24(2) Domestic Proceedings Act, 1968, and section 12(2) Matrimonial Proceedings Act 1963). This concept might logically be included in the new legislation, as will be mentioned in Part IV of the paper.

In addition the arguments for and against provision for de facto spouses will not be canvassed. The Legislature in omitting de facto spouses from ambit of the Matrimonial Property Act 1976 (although they were included in the original draft Bill) has reached its own conclusions about the value of the institution of marriage, and there is no doubt de facto spouses will not be included in any legislation dealing with matrimonial property and death.[6]

Finally the intricacies of Maori succession law will not be entered into here: suffice to say such a topic deserves a paper to itself.[17]

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(5) N.Z. Census supra loc. cit.

(6) For examples of recent judicial decisions accommodating wider social acceptance of de facto relationships see Gough v. Fraser [1977] 1 N.Z.L.R. 279, and Cooke v. Head [1972] 2 All E.R. 38.

(7) On this point note that Maori land is specifically, and to the writer's mind quite rightly, excluded from the 1976 Act - s.6.

1. CURRENT PROVISION FOR SURVIVING SPOUSES

In New Zealand being married does not necessarily mean that in the event of termination of the marriage by death, a surviving spouse will participate in any way in her deceased spouse's estate. Marital status does nevertheless affect the right of a person to receive property on intestacy distribution, and further may affect the capacity of a person to apply under the relevant statutes for provision from the estate.

In discussing existing property rights of a spouse it will be convenient to divide such rights into those open to persons who need not have been related to the deceased in any way, and those dependent on the survivor's past marriage to the deceased. Section 57(4) of the Matrimonial Property Act 1976 specifically "saves" for any widowed spouse the right to bring proceedings under other enactments.(8)

(i) Rights of a Spouse as Spouse:

A married woman may have a right to share in her spouse's estate grounded on a contributions claim under the Matrimonial Property Act 1963. In special circumstances, i.e. where the inter vivos dissolution of a marriage was pending but before completion one of the parties to a marriage died, the Matrimonial Property Act 1976 (ordinarily inapplicable on death) will continue to apply(9) and property will be distributed in accordance with the provisions of that Act. The difficulties inherent in any such distribution will be raised, briefly, later in this section of the paper. In addition to a matrimonial property claim (under the 1963 Matrimonial Property Act)(10) a spouse may have a claim based in succession law.

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(8) Although see Re Weck (1976) 2 N.Z. Recent Law (N.S.) 310 and later discussion.

(9) s.5 (3) Matrimonial Property Act 1976. Proceedings are "pending" when the Court has cognizance of them (e.g. on the filing of an application), but they are still undetermined A v. B [1969] N.Z.L.R. 534.

(10) Part VIII of the Matrimonial Proceedings Act 1963 also makes certain property rights available to spouses whose partners have died, but is limited to the matrimonial home and furniture and applies only where a marriage has been dissolved by divorce.

To begin with the latter, the law of succession in New Zealand is found in a variety of Statutes[11] together with a number of common law principles.[12] The order of intestate succession is governed by section 77 of the Administration Act 1969. Testate succession however is far more common;[13] the cornerstone of our succession law is therefore the will defined as

> "a statement by a person, called the testator, as to the disposition of his property and as to certain other matters, all to take effect after his death, made in the manner prescribed by law."[14]

Testamentary disposition is prima facie unfettered in substance, although regulated in form by the technical requirements of the Wills Act 1837 and its amendments. On intestacy a spouse may take a substantial portion of the deceased's estate.[15] Under a will a spouse may be completely disinherited. The gap between these two extremes is bridged by the Family Protection Act 1955, section 4 of which provides that where inadequate provision has been made in a will, (or is available on intestacy), for the "proper maintenance and support" of a spouse (or other family members - see s.3 of the Act) the Court may, on application, make a discretionary order against the estate for the benefit of the applicant. "Proper maintenance and support" must be treated as "elastic" but "cannot be pressed beyond their fair meaning" Dixon C.J. in Scale's case.[16]

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(11) In addition to the statutes mentioned in the text, see Simultaneous Deaths Act 1958, Joint Family Homes Act 1964, Part XVII Insolvency Act 1967, s.26 Aged and Infirm Persons Protection Act 1912, Part VII Mental Health Act 1969, s.24(2) Domestic Proceedings Act 1968, s.33 and ss.37-40 Property Law Act 1952. See also s.45 Tenancy Act, 1955.

(12) For example a testator may not dispose of his property so that it is of no use to anyone Brown v. Burdett (1882) 21 Ch.D. 667. Provision in a will may also be void on grounds of public policy.

(13) See P. Jenkins "Distribution on Intestacy" (1968) 3 N.Z.U.L.R. 169.

(14) Nevill's Concise Law of Trusts Wills and Administration in New Zealand 6th edition (1976) p. 192.

(15) The spouse takes personal chattels, $25,000 and $\frac{1}{3}$ of the residue of the estate if issue; if parents survive the spouse takes $\frac{2}{3}$ of the estate; if neither exist, the spouse takes the entire estate.

(16) Pontifical Society for the Propagation of the Faith v. Scales (1962) 107 C.L.R. 9, 19.

It is not merely the self-evidently "needy" spouse for whom provision is in fact made however. In a remarkable piece of judicial legislation the courts have imported into the section a "moral duty" test, breach of which may render a deceased's estate subject to the Act. Lip-service is generally paid to the maintenance criteria of section 4[17], nevertheless it is usually the moral duty of the testator to provide for his immediate family to which the court pays attention, rather than the financial standing of an applicant.[18] The Act, it was said, was "designed to enforce the moral obligation of the testator" to make such provision as a "just and wise father" would think it his duty to make for his widow and children.[19]

The application of a spouse under the Family Protection Act 1955 will be given preferential treatment,[20] however widowers may find it more difficult to satisfy the breach of moral duty test,[21] even though all claims are "balanced" by judicial review of the moral worth of competing claims, the size of the estate, and the financial obligations of applicants. The court is entitled to qualify or disallow an award under the Act on the basis of the applicant's character or conduct (section 5 of the Act), and may take into account evidence of a testator's reasons for disinheriting a member of his family (section 11). In practice the latter consideration is of little weight,[22] and the former is encompassed in the moral duty test.[23] Whatever the dictates of his will, a testator's spouse is almost always able to obtain maintenance from the testator's estate: clearly the principle of free testamentary disposition to which the common law subscribed is, in practical terms something of a myth.

(17) See Re Young [1965] N.Z.L.R. 294, 299.
(18) Re Harrison [1962] N.Z.L.R. 6, Re Hall [1955] N.Z.L.R. 133.
(19) per Salmond J. Allen v. Manchester [1922] N.Z.L.R. 218, 220.
(20) In re Rush (1901) 20 N.Z.L.R. 249, 253; Re Bevan [1954] N.Z.L.R. 1108 Intestacy).
(21) In re Williams [1953] N.Z.L.R. 151.
(22) In re Green [1951] N.Z.L.R. 135, 141.
(23) For a general discussion on the dubious basis of this test see G. Bale (1964) 42 Can. B.R. 367, L. McKay Family Law L.L.B. (Hons). Seminars 1969.

The emphasis of the Family Protection Act 1955 has been on periodic maintenance - lump sum awards while not prohibited under the Act, are judicially frowned upon.(24) Permissible in special circumstances, (for instance where the estate is so small periodic maintenance would be negligible), lump sum or capital maintenance has been unfavourably regarded as the transfer of assets from a deceased's estate against his wishes to his surviving spouse. The latter then has the right to dispose of those assets as she pleases, perhaps to the detriment of the deceased's original beneficiaries.(25) Under the Matrimonial Property Act 1963 (section 5), however, a widow may apply within one year of her husband's death for a share in the deceased's estate based on the applicant's contribution to assets in that estate. Such application naturally entails division and distribution of capital assets and is based on grounds rather different from an application under the Family Protection Act 1955.(26) The courts, nevertheless, have been somewhat confused in their approach to the two statutes. It should perhaps be noted at this point that judicial trends in decisions dealing with the relationship between the Acts are of importance not only for those spouses applying for awards during the interim before new legislation is brought forward, but also because they may be of influence in the future depending on how properly rights for surviving spouses are dealt with by the legislature. If, as is possible, the present Matrimonial Property Act 1976 is simply extended as it stands to marriages ended by death, and a Family Protection Act type claim retained as an additional measure, it may be that the courts will look to past cases for guidance on the effect of a Matrimonial Property Act 1976 claim on a Family Property Act 1955 application and vice-versa.

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(24) In re Williamson (1954) N.Z.L.R. 288, Re Hughes (1977) Current Law (N.Z.) 511.

(25) This is of particular importance where there are children of former marriages who might have benefitted under the original will, or might benefit under the survivor's will - see for example the facts on Re Snow (1976) 2 N.Z. Recent Law (N.S.) p. 13, and Re McNaughton (1976) 2 N.Z.L.R. 538, 541.

(26) Compare at this point the comments of the Privy Council in Haldane v. Haldane (1976) 2 N.Z.L.R. 715, 721-722.

In the foundation case in this area, Re Edkins[27] decided soon after the Matrimonial Property Act 1963 came into force (1 January 1965), the court was called upon to conclude whether the principles applicable to a capital distribution under the Matrimonial Property Act 1963 could be invoked to support a capital award under the Family Protection Act 1955. It was argued for the applicant that following the passing of the 1963 Act the general basis for the reluctance to make capital grants to widows had disappeared, and especially that capital could now revert as a "reward" to a dutiful wife. Hardie Boys J. firmly rejected the argument and declared that although the Matrimonial Property Act 1963 might seem to indicate a "modern view of marriage as a partnership with rights akin to that of partners in the partnership property,"[28] without clear legislative direction to the contrary, such principles could not be said to apply to a Family Protection Act application. Not only did His Honour find there was binding precedent for a refusal to award capital maintenance,[29] there was also held to be no breach of the testator's moral duty to make adequate provision for his widow (the latter had received a life-interest in the family home free of outgoings, plus an annuity of £600). Here dutiful conduct as a spouse was not sufficient to justify a successful application. With respect it is submitted Hardie Boys J. in declining to make an award under the Family Protection Act 1955 on the basis of criteria in the Matrimonial Property Act 1963 was maintaining a commendable distinction between the two enactments.[30] The dangers of overlooking this distinction can be seen in the recent cases of Re McNaughton[31] and Re Weck.[32]

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(27) (1965) N.Z.L.R. 916 (and see s.7(6) of the 1963 Act).
(28) ibid p. 920.
(29) In re Williamson supra.
(30) The reliance on the "moral duty" test is unfortunate - see later discussion for (arguably) preferable reasons for maintaining the distinction.
(31) Supra
(32) (1976) 2 N.Z. Recent Law 310.

Preceding these decisions was that of Cooke J. in Re Snow.[33] As in Re Edkins, an application had been made under the Family Protection Act 1955 for an award of capital on the basis of factors taken into account under the Matrimonial Property Act 1963. Despite the Edkins decision it was submitted for the applicant that the testator, on weighing his obligations in the light of changing social attitudes, should have borne in mind his wife's contributions to the marriage over many years, for instance the care she gave him during his illnesses. Cooke J. recognized that judicial attitudes towards capital maintenance had become more liberal since Edkins[34] and that Re Williamson[35] no longer held "its former sway". However while considering that not all Hardie Boys J's reasons for refusing a capital award in Edkins would still be influential today, (for example the principles for the award of capital maintenance under the Matrimonial Proceedings Act 1963 are clearer now than they were in 1965), Cooke J. preferred to follow Edkins in holding that it was for the legislature or the Court of Appeal to decide whether the administration of the Family Protection Act 1955 should be modified in the light of the Matrimonial Property Act 1963. In an important passage he commented.

> "In the main, however, the Matrimonial Property Act is a measure designed to resolve property disputes between spouses in their common lifetime. The typical case in which the Act is used, is of course, the breakdown of a marriage. The Act gives major significance to contributions, particularly to contributions to the matrimonial home; though contributions are not the only factors to be weighed. While partly inspired by the idea of moral duty, the Matrimonial Property Act jurisdiction has some affinity with the principles as to implied, constructive or resulting trusts discussed in Gissing v. Gissing [1971] A.C. 886, [1970] 2 All E.R. 780. An interest under the Act does not arise unless the court makes a discretionary order, but in effect the Act is a fetter on or a qualification of the property rights of spouses. The relevance of moral duty is limited by s.6A excluding, as it does, wrongful conduct from consideration in determining the amount of share under s.5 if the conduct is not related to the acquisition, extent or value of the property in dispute. On the other hand the idea

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(33) (1976) 2 N.Z. Recent Law (N.S.) p. 13.
(34) Re Wilson [1973] 2 N.Z.L.R. 359 was cited in support, but see the recent decision in Re Hughes supra. Re Wilson was cited to the court in Re Hughes.
(35) Supra.

> traditionally treated as underlying the Family Protection Act is that the testator has a moral duty to make adequate provision for the applicant's proper maintenance and support from his own resources." (36)

As a corollary it was held "undesirable to allow the lines between the Matrimonial Property Act now and the Family Protection Act to be blurred," and that if the testator's wife did have Matrimonial Property Act rights they should be pursued in proceedings under that Act. Yet in a curious about-face His Honour did make, ultimately, an award of a modest capital sum ($1,050) in the widow's favour. It is not easy to determine exactly what the legal grounds were for making the award: the widow had received a life interest in the home (worth $28,000), furniture, £500, plus the net annual income from the residue of the estate (worth approximately $8,000). In addition she received superannuation from two different sources. There was evidence that the deceased had intended to leave $1,050 to his widow "for a holiday"; however strictly speaking the Family Protection Act 1955 under either the "adequate maintenance" or the "breach of moral duty" test would not seem to justify any further award to the applicant. Despite his assertion that matrimonial property rights should be pursued under the appropriate Act, it is difficult to set aside the suspicion that Cooke J. was rewarding the widow for contributions in a Matrimonial Property Act 1963 sense while nominally invoking the Family Protection Act 1955.(37) The result may have been just in this case; it is less certain it was good law both because the grounds for making the award under the Family Protection Act 1955 are somewhat sketchy, and for the possibility that a "modest" capital award under the one Act may replace a proper investigation of due capital rights in matrimonial property under the other. This, in effect, occurred in Re McNaughton (in which Re Snow was discussed at length by Beattie J.), where the Court was confronted with applications under both the Matrimonial Property Act 1963 and the Family Protection Act 1955. It was held to be impractical

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(36) quoted in Re McNaughton supra at pp. 542-543.
(37) It could be argued the award here was very like toe "reward" for dutiful conduct turned down in Edkins.

to look at Matrimonial Property Act applications "away from the terms of the will", and further, that where there had been a harmonious marriage and adequate provision made for the widow, "it would be wrong to erode the principles of family protection law by allowing such applications."(38) While admitting the validity of Beattie J's point that it is often difficult under the Matrimonial Property Act 1963 for a legal personal representative to refute claims normally made inter vivos, it is submitted that to consider a successful Matrimonial Property Act claim an "erosion" of family protection law principles is to "blur" the distinction between the two Statutes and confuse the purposes(39) for which they were designed. Nor does the harmoniousness or otherwise of a marriage have enormous relevance once that marriage has ended. It is the fact that property formerly regarded and treated as "pooled" between spouses has become claimed as "his" or "hers" whether on divorce or through death that raises a "question" between spouses or their representatives, and the harmoniousness of a marriage prior to that time is not in point.(40) In Re McNaughton the Matrimonial Property Act 1963 application was brushed aside.(41) An award (of capital) to cover outgoings on the house was made however under the Family Protection Act 1955 on the grounds that inadequate provision had been made in the testator's will. Again in Re Weck(42) the Court was forced to consider matrimonial property and family protection claims, and again the Court preferred the latter to the former. It may be that Weck will be of rather limited application for the Court was careful to point out that it was dealing with an unusual marriage and a peculiar fact situation.(43) Nevertheless the case is of present

(38) Re McNaughton supra at p. 543.
(39) See comments by Cooke J. in Re Snow quoted earlier. It is interesting to see both here and in Re Weck that far from modifying the Family Protection Act 1955 the administration of the Matrimonial Property Act 1963 has itself been modified by the 1955 Act.
(40) See Re Weck on this point where it was accepted that spouses might have different attitudes towards matrimonial property depending on whether the marriage was still in existence, ending in divorce or ended by death. (p.10 of judgment, 26 August 1976, C.A. 11/75).
(41) "Apart from the matter of outgoings, the provision in the will for the plaintiff is adequate and in all the circumstances it is not just to make any provision under the Matrimonial Property Act application. (Beattie J. Re McNaughton supra at p. 543).
(42) (1976) Current Law (N.Z.) 720.
(43) p. 10 of the judgment. The applicant husband had provided the finance, his wife the business and renovating skill in redecorating old houses which were sold for profit.

importance not only because the Court included Cooke J. (who had presided in Re Snow as a Supreme Court judge), but because it is a recent unanimous decision of the Court of Appeal. Neither Williamson nor Snow are mentioned in the judgment, nor did the Court attempt any exhaustive analysis of the relationship between matrimonial property and family protection claims. In dealing with the former however a distinction was drawn between a common intention the parties might have had concerning their property while the marriage subsisted, and what they might have expected to happen to it after the death of one of the spouses. On the facts it was held any inter vivos common intention about property rights the deceased's extend to disposition of the property after the deceased's death, so the Court had "a discretion to do what is just." The exercise of that discretion extended not merely to a weighing of the parties' contributions to property of the marriage, but included other "relevant considerations" notably that the Court had power to enforce the testator's moral duty under the Family Protection Act. It was concluded that

> "On the particular circumstances it seems to us justice will be best served by refraining from exercising the discretion in the husband's favour under the Matrimonial Property Act and considering the case simply in terms of what is adequate provision for his proper maintenance and support under the Family Protection Act."(44)

Does this mean that there is now little point in making an application under the Matrimonial Property Act 1963? Re Weck was decided some months prior to the Privy Council decision in Haldane v. Haldane.(45) It is possible since Haldane that the courts may be obliged to spend more time on matrimonial property claims: the remarks of Beattie J. in Re McNaughton for example that "notwithstanding the services and prudent management of the wife" the purchase price for the house (in which the wife claimed a share) came from the testator's father and this was a reason to compel scrutiny of the Matrimonial Property Act 1963 claim(46) may now be of little moment. Further, is it enough for the courts to announce justice may best be done by ordering an award under

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(44) p. 11 of the judgment.

(45) [1976] 2 N.Z.L.R. 715

the Family Protection Act 1955? How does the court know until it has looked at the matrimonial property claim on its own merits?

Re Weck and Re McNaughton display to the writer's mind an undesirable judicial tendency, despite the advice in Re Snow, to "blur" the lines between the Matrimonial Property Act 1963 and the Family Protection Act 1955. While presented simply with applications under the latter Act the courts, (in their reasoning at least), managed to keep separate the principles applicable to the administration of the 1963 and 1955 Acts. On being faced with applications under both Acts the courts(47) have been inclined to treat the disposition of property under a will (and the effect of later judicial awards on the rights of other beneficiaries(48) as relevant to the justice of a matrimonial property claim. Practically the result of such an attitude may have little effect on any consequent award to a spouse(49): conceptually an applicant is forced to receive as a supplicant under the one Act property which may be rightfully hers under the other.

The correct approach, it is submitted, is to treat applications under the Acts as quite separate matters as suggested in Re Snow. If a court on dealing with an application under the Matrimonial Property Act 1963 discovers a wife has contributed towards assets in the estate in such a way as to entitle her to a share in those assets, the share should be awarded without regard to any rights or duties arising under other pieces of legislation.(50) It is then open to the courts to examine the deceased's estate (after the Matrimonial Property Act division has taken place) to see whether the surviving spouse has received adequate provision from the estate. If the courts had adhered to the legislative test of need in section 4 of the

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(47) Not in every case, of course, see Olausen [1977] Recent Law 109 mentioned below.

(48) See remarks of Cooke J. in Re Snow quoted in Re McNaughton supra at p. 543.

(49) See however earlier comments about the replacement of matrimonial property rights with a modest capital maintenance award.

(50) See Morris v. Miles [1976] N.Z.L.R. 630, 653 for a liberal approach to the spirit of the 1963 Act.

Family Protection Act 1955 and their own rule strictly to examine an applicant's assets[51] there would be no question of confusing the two Acts: after an order under the Matrimonial Property Act 1963 a wife might still have received too little from the deceased to support her adequately, thereby qualifying for an award under the Family Protection Act 1955. Equally a wife might, after the Matrimonial Property Act award, be no longer in need of support from the deceased's estate and a Family Protection Act application refused. Under the moral duty test, however, a spouse might still pursue a Family Protection Act claim although her financial position no longer really justified it. In Olausen v. Olausen[52] O'Regan J. did remind himself that applications under the two Acts shoul be dealt with separately. His Honour (following In re Petty[53] and Re Snow) considered first the matrimonial property application and ordered the widow applicant (who had been granted a right to occupy the home during her widowhood) a half-share in the family home.[54] The residue of the estate had been left to the deceased's son of a former marriage. The Judge, considering the deceased "justified" in wishing to pass his property on to his son, refused the widow's application under the Family Protection Act 1955. Perhaps the use of the word "justified" to describe the disposition of the residue of the estate implies that the will, on the face of it, satisfied both the "adequate provision" and "moral duty" tests in relation to all beneficiaries. At this point it can be argued the "moral duty" test under the Family Protection Act has outlived its usefulness. The evolvement of the test is understandable as a judicial expression of a social desire to ensure a testator in the absence of matrimonial property claims recognized in the disposition of his property the moral and financial claims of his

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(51) See Stout C.J. In re Allardice (1910) 29 N.Z.L.R. 59, 70.
(52) Supra.
(53) [1977] Recent Law 86.
(54) The couple had been married 23 years, during 20 of which the wife had worked.

family to a certain proportion of that property. Nevertheless today the moral obligation is primarily enforced through the matrimonial property provisions, while the Family Protection Act underpins the financial obligation. The possibility that a widow in receipt of capital shares under the Matrimonial Property Act 1963 and adequately (although perhaps not generously) provided for in a will might yet allege a breach of moral duty to make greater provision, and apply under the Family Protection Act 1955 may lead to the demise of the test, at least vis-à-vis the surviving spouse. Certainly the acceptance of spouses as entitled to equal shares for the most part in matrimonial property(55) together with the growing number of women entering the work-force(56) will reduce the necessity for reliance on moral duty to restrict the testator's power of disposition of his own property by will.

Before passing to the rights of a person to obtain property from an estate in a capacity other than that of the deceased's spouse, it is necessary to look at the effect of section 5(3) of the Matrimonial Property Act 1976 on the distribution of an estate. The Minister of Justice has cited as one reason for the omission of dissolution of a marriage by death from the Matrimonial Property Act 1976 the problem as to how existing wills would be treated, if the principles of the Act extended after death.(57) Although no case has yet arisen for decision under section 5(3) it is likely, should one do so, it will provide a practical answer to the Minister's problem.

Example: Testator T. and spouse S initiate proceedings under the Act, T then dies before determination of the proceedings. His estate is dealt with under the Matrimonial Property Act 1976. Possibly counsel might be appointed to represent the interests of beneficiaries under T's will;(58) possibly T's legal personal representative might protect their interests.(59)

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(55) At the very least the "global approach" to contributions to assets accumulated during a marriage advocated in Haldane has freed the 1963 Matrimonial Property Act from the narrow interpretations of E. v E [1971] N.Z.L.R. 859 and its ilk.

(56) See Department of Labour Estimates 1975.

(57) In a speech on the Matrimonial Property Act 1976 delivered on 15 June 1977 to the Timaru Women's Branch of the National Party.

(58) In Byfield v. The Public Trustee [1976] 2 N.Z.L.R. 442 for instance the court heard counsel for a grandchild beneficiary. (P.T.O.)

(59) There is no provision for such representation in the Matrimonial Property Act 1976 (compare s.5(7) of the 1963 Act) although s.48 does contemplate orders made under the Act being enforced against a personal representative of a deceased spouse. See also s.27(3).

Assuming section 14 is not applicable, and the presumption of equal shares in matrimonial property in section 15 is, the quantum of T's estate to which he has legal title (and which he has disposed of in his will) may be considerably reduced. The will would be read subject to the matrimonial property distribution to his spouse, and logically all legacies would abate rateably as and where necessary.

The above example is of course too simplified: if S. had contested equal division of the value of the home and chattels under section 14, or claimed more than a 50 per cent share of other matrimonial property under s.15, the Court is handicapped by being able to hear in full the allegations of only one party to the marriage. It might indeed be difficult in such circumstances to assess the extent of the contributions made by the respective spouses to the marriage partnership.(60) Further, there would be difficulties in distributing an estate according to a will drafted with no thought of matrimonial property division in mind: a wife may receive a considerable portion of a testator's estate on the matrimonial property division, and then, where the testator had omitted to change his will in the light of separation proceedings, receive still more property from the estate. Children might have been left adequate provision for their support in the testator's will, but because of the matrimonial property distribution, in fact receive little or nothing from the estate. Could they claim under the Family Protection Act 1955? The courts in an endeavour to do justice would probably fall back on the principle that a testator should have taken into account the effect of the Matrimonial Property Act on his disposable estate and have rewritten his will accordingly.

(ii) Rights of a Spouse in General:

Apart from her status as a married person a spouse may have rights in the deceased's property arising under a constructive or resulting trust,(61)

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(60) See earlier remarks in relation to Beattie J's comments in Re McNaughton supra. Distribution under the Matrimonial Property Act 1976 raises problems of policy (for example should a spouse be able to use section 14 on death?) discussed later in the paper. There is no difficulties about enforcing orders against a personal representative - see s.48 for example.

(61) It is not intended here to deal with how much trusts may arise, see Nevill supra p. 62-69, and Gissing v. Gissing [1970] 2 All E.R. 780.

or in the law of contract. The capacity of a testator to make contracts to leave property by will can be exercised in a manner favourable to a spouse, or against her interests. Exercise of it unfavourably will be mentioned later, in the spouse's favour however is the ability of the testator to enter a valid contractual arrangement with the spouse to leave his estate or part of it to her in his will. Such a contract could conceivably be entered into as part of a marriage settlement, the "consideration" being the spouse's consent to the marriage. Any contract made will now override any Family Protection Act claims which may be put forward, for example, by the testator's children.(62) In addition to ordinary contractual claims, persons may claim provision from an estate under the Law Reform (Testamentary Promises) Act 1949 designed to allow contracting parties, typically housekeepers and testators, to pursue satisfaction of a promise by a testator to leave property in a will in return for services rendered during the testator's life-time. It is likely since the recent decisions in Schaefer and Re Webster that the Act will be little used where a claimant can show a valid contract made with the deceased, as claims under the Act are "weighed" by the Court in consideration with claims on an estate by members of the testator's family. It does enable a person who can show a promise to reward (although not a contractually enforceable one) to obtain satisfaction.(63)

A further contractual means of obtaining a deceased's property is to prove an agreement to make mutual wills. Mutual promises to make "wills" constitute reciprocal consideration",(64) however clear proof of the agreement would be necessary, and where the contract was intended to apply to land as well as other property, the provisions of the Contracts Enforcement Act 1956 would require more than a mere oral promise on the deceased's part to dispose of the land in his spouse's favour.

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(62) Re Webster [1976] 2 N.Z.L.R. 304 following the Privy Council in Schaefer v Schumann [1972] A.C. 672, and not following an earlier Privy Council decision to the contrary in Dillon v. The Public Trustee [1941] A.C. 294. For an interesting article on the effect of Re Webster see R.J. Sutton (1977) N.Z.L.J. 57.

(63) s.2 of the Act allows a claim to be made for remuneration "whether or not a claim for each such remuneration could have been enforced in the lifetime of the deceased."

(64) per Cooke J. in Re Weck at p. 11 of the judgment.

(iii) Avoidance of a Surviving Spouse's Rights:

Despite the variety of claims which a surviving spouse may lodge against an estate, there are a numerous ways in which a testator may arrange his affairs deliberately or otherwise, to defeat claims lodged after his death against his estate.

Apart from the provision in the Family Protection Act 1955 relating to donatio mortis causa (section 2(5)),there is no restraint on inter vivos dispositions of property by a testator. While it is ordinarily unlikely a person will dispose absolutely of large amounts of property during his lifetime when he might otherwise need that property for emergencies in his own life (or simply wish to enjoy its benefits), by use of a carefully drawn trust (such as those devised to avoid the imposition of estate duty)[65] it is possible for a testator to alienate the corpus of his property or some of it while retaining income for life from capital assets, powers of appointment and powers to apply income. Palmer v. B.N.S.W.[66] reveals that it is further possible to defeat a testamentary promise by transactions inter vivos. There the deceased had promised to leave his estate to the appellants in his will in return for their caring for him until his death. This will was not revoked, but some years prior to his death, the deceased opened a joint bank account with another on terms including the power in either party to withdraw all the monies from the account at any time, and the right for the entire account to pass to the survivor. At the deceased's death the balance in the account was $10,000, two-thirds of which he had contributed. The High Court of Australia, in dealing with the appellant's claim to the deceased's contributions to the account, found that there was no breach of the testamentary promise made by the testator to the appellants to leave his estate to them in his will. Nor was there an equity to nullify the agreement to open the joint bank account with a stranger for it was a transaction inter vivos which was not in itself a breach of the testamentary

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(65) See L. McKay "Estate and Gift Duties Act 1968" (1977) N.Z.L.J. 97 and R. Sutton supra at p. 64. It is interesting to note also that in a Canadian case a husband transferred his realty to a company to avoid post mortem claims, Re Corl et (1942) 3 D.L.R. 72.

(66) (1975) 7 A.L.R. 671 (H.C.A.).

promise merely because it was the promisor's intention to deplete the estate. The significance of the decision for a surviving spouse is that the courts have sanctioned this means of draining an estate even where it is clearly used to defeat the rights of persons entitled to claim on an estate after the owner's death. It would be impossible to allow a post mortem review of all inter vivos dispositions by a deceased during his life-time however.(67) It is, as one commentator has said, necessary to reconcile different social interests:

> "There is the interest in protecting dependents against inter vivos transfers which have the effect of depriving them of adequate maintenance after the death of the spouse. There is the interest in permitting as wide a scope as possible to freedom of alienation. There is also the interest in maintaining maximum security of transaction and security of title in order that trade and commerce might not be impeded."(68)

The answer to the problem adopted in England has been to give the courts power to investigate dispositions made within six years of the deceased's death with the intention of defeating a family protection claim.(69) An analogous provision in the New Zealand Estate and Gift Duties Act 1968 (section 10) shows that the adoption of a similar concept in this country would not be a novelty.

A mutual wills agreement may also provide a vehicle for disinheriting a spouse. A testator may enter a mutual wills agreement with a third party, for example his de facto spouse, with the ultimate intention of making prpvision for others (for example any children he and his de facto spouse may have).(70) A survivor of any such arrangement cannot revoke his will: the beneficiaries' interests arise as soon as one of the testator's dies,

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(67) Although the civil systems do go some way in this direction.

(68) G. Bale "Limitation on Testamentary Disposition in Canada" (1964) 42 Can. B.R. 367-384.

(69) s.10, Inheritance (Provision for Family and Dependants) Act 1975. The deceased's intention is ascertained on the basis of a balance of probabilities.

(70) Leaving aside any moral question of whether the de facto spouse might either need or "deserve" the testator's estate more than his legal wife. See on this point Re Manson (1976) Current Law 214 in which the deceased (legally separated from his wife) left his de facto wife the balance of his estate including $\frac{2}{3}$ of the family home occupied by wife and two sons of the deceased and de facto wife. The latter had nursed the deceased through a terminal illness. The court awarded the share in home to the legal wife but allowed legacy of $1,000 to the de facto wife.

and the property of the deceased is held on trust in accordance with the terms of the agreement. Should the married testator die first the third party would be able on the basis of her contractual rights to defeat any Family Protection Act claim the testator's dejure wife might bring (Re Webster).[71]

It is the question of whether contractual claims should in general be preferred to Family Protection Act claims which raises both the most interesting and most important issues (in practical terms) in the area of avoidance. It is established that spouses (and presumably parents and their children) may not contract with each other not to claim under the Family Protection Act 1955 - "the Act is a declaration of State policy and as such it is paramount to all contracts".[72] In Dillon v. The Public Trustee[73] the Privy Council dealing with both contractual and family protection claims advanced in the same proceedings by a testator's children paid attention only to the family protection claims. The broad result was creditors whose contracts were honoured by the testator might rank behind claims lodged by members of the testator's family. Thirty years later in a complete volte face the Privy Council decided in Schaefer v. Schumann[74] that family protection claims affected only the estate with which a testator was free to deal, i.e. where a testator incurred a debt in his lifetime which he had promised to repay upon his death, the property set aside for such purpose would not be part of his estate out of which he had failed or might fail to make provision for his family. Certainly the Family Protection Act 1955 was originally designed partly (but not primarily) to avoid the capricious voluntary dispositions of a testator who could and (absent reasonable excuse) ought to have provided for his family. The Legislature did not contemplate testamentary disposition pursuant to contractual promises. The Privy Council having decided that such contractual obligations are to be preferred, even where a testator's family may be left in want, has sanctioned a means for doing injustice to the family in two ways: firstly there is the danger that a testator might deliberately and for nominal consideration

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(71) Supra.
(72) Chapman J. in Gardiner v. Boag [1923] N.Z.L.R. 739, 745.
(73) [1941] A.C. 294.
(74) Supra.

bind his estate by contract to defeat his family's expectations of inheritance; secondly there is the probably more realistic danger that a testator (such as Mrs Webster in Re Webster) might leave property in his will of sufficient consideration at the time the will was drafted for services rendered during life, but fail to alter his will to take account of inflation or other intervening circumstances.(75) At the time of death the property might then be worth far more than the services actually rendered.

The Dillon decision had been heavily criticised(76) (for preferring family claims to creditors rights) both in the possibilities it opened up to defraud creditors and for its limitation on contractual capacity on a testator's part. It was further argued that an estate was not depleted if a testator received adequate consideration for the property left to the promisee in his will. This argument cannot be sustained however where the consideration was personal to the testator (for example nursing care) and had no beneficial effect in real terms on the testator's estate. The New Zealand courts, to avoid the injustice which might flow from the arbitrary decisions in both Dillon and Schaefer did have a middle path marked out in the "balancing" test available under the Law Reform (Testamentary Promises) Act 1949. It is clearly legislative policy to have contractual claims considered in the light of family members' claims. A decision at first instance such as Re Webster would naturally be heavily influenced by a Privy Council decision on similar legislation in another Commonwealth country.(77) However the Chief Justice described the Law Reform (Testamentary Promises) Act 1949 as providing remedies "supplemental" to those available in ordinary contract law.(78) If this is so (and it will need a Court of Appeal decision to settle the point) there is now a considerable discrepancy between legislative and judicial attitudes to the central

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(75) For example an advantageous zoning change affecting a house left in a will.
(76) Bale article supra, and see p. 592 of Schaefer.
(77) See R.J. Sutton too, supra.
(78) Re Webster supra at p. 309.

problems of creditor's rights.

The preceding outline has shown that a surviving spouse, even where disinherited by will, is not entirely without means of recourse to the deceased's estate. Equally it appears that that estate may be dissipated both through dispositions carried out by the deceased during his lifetime, and actions which take effect after his death. There is no guarantee therefore, firstly that there will be any estate or significant portion of an estate left after a deceased's death against which claims may be lodged, and secondly, under the Family Protection Act 1955 an award made by a judge is discretionary and of uncertain extent even bearing in mind that judicial policy over the years will have settled approximate outer limits for some prediction to be made on the quantum of an order before a case is heard. In theory therefore the present position of a surviving spouse is not a strong one. The arguments in favour of a community of property regime on death or after statutory recognition of a survivor's interest in matrimonial property are therefore all the more persuasive.

II. PAST AND PRESENT ATTITUDES TO PROPERTY, FAMILIES AND DEATH

In order to speculate on how the legislature may react to improve a wife's position when widowed, it may be useful to see how the legislature (and judiciary) have reacted in the past to changes in social attitudes towards the family, property, and death.

Prior to 1900 complete freedom of testation existed in this country. A widow's claim to one-third of her husband's personalty had lingered in England until 1924; her claim to dower (a life interest in one-third of her husband's realty) until the Dower Act 1933.(79) The latter specifically permitted a husband to alienate the "dower" share by will. New Zealand, officially under British Sovereignty from 1840 (and therefore apparently subject to England's laws) narrowly missed adopting the "dower" share as part of its legislation.(80) Freedom to make a will for all married persons

(79) 3 & 4 Will, 4, c.105. See generally Pollock & Maitland History of English Law II, A; Guest "Family Provision and the Legitume Portio" (1957) 73 L.Q.R. 74; J. Gold "Freedom of Testation: The Inheritance (Family Provision) Bill (1938) M.L.R. 296.

(80) The British Commonwealth v. 4 New Zealand (ed) J. Robson (1967) 2nd ed. p. 5, and English Laws Act 1858.

over the age of twenty-one existed only from 1884 when the Married Women's Property Act enabled a married woman to acquire and hold property as her separate property and to dispose of it by will. The New Zealand Act was merely a measure to "keep in step" with the recent Married Women's Property Act (U.K.) 1882.

The election of a Liberal Ministry in the 1890s marked a break in the New Zealand legislative programme from adherence to innovations in the English legal system, and under the influence of J.S. Mill, a move towards a more enlightened attitude towards women.(81) The latter received the right to vote in 1893. Three years later a mere fifty-six years after freedom of testation had been adopted, and 40 years before equivalent legislation was enacted in England, Sir Robert Stout introduced a Limitation of the Powers of Disposition by Will Bill (1896).(82) The Bill, and its successor (similarly named and introduced the following year) were sympathetically received, but not accepted in the form in which they were drafted. The eventual product of Sir Robert's industry was the Testator's Family Maintenance Act 1900, the forerunner of the Family Protection Act 1955, and unique in the common law world.

Under the Testator's Family Maintenance Act 1900 a spouse's estate stood charged with the obligation to provide maintenance for the support of a dependent spouse and children where no, or insufficient, provision had been made for the latter in the deceased's will. The legislature clearly recognized that "unlimited testamentary disposition" was an oddity in the legal systems of the world; the power to dispose freely of property itself was not to be directly limited nevertheless. The innovatory element in the legislation was the rejection of the civil law concept of provision for a family through the use of fixed or forced shares in a deceased's estate, and the introduction, in the dependants' interests, of a judicial

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(81) See The Subjection of Women (1869); A History of New Zealand, K. Sinclair 2nd ed. (1969) Pt. 2, Ch. II.

(82) N.Z. Parliamentary Debates, Vol. 92, 1896: 386, 586.

discretion to interfere with the stated wishes of a testator for the disposal of his property. It was apparent "unlimited testamentary disposition" might lead to extraordinarily unjust results; Sir Robert Stout claimed in moving the second of his Limitation Bills that he knew of cases of a "most glaring character",(83) however, as the debates on its enactments and provisions show,(84) the 1900 Act was designed merely to extend the maintenance obligations a man (in particular) incurred towards dependents during life to a duty to make provision for their maintenance after his death. Edwards J. in Rush v. Rush(85) declared a widow had a claim on her husband's estate "at least as great as if he had deserted her during life". Those it was felt who might have claimed under the Destitute Persons Act 1884 for maintenance upon a testator's desertion of his spouse, might equally claim such maintenance after his death. Desertion, death, and dependency were clearly linked in the judicial and legislative minds.

The Testator's Family Maintenance Act 1900 was revised and consolidated in the Family Protection Act 1908. The emphasis in the legislation upon the need of applicants and the duty of a deceased to provide maintenance for his family was retained (and is still of course the basis of the existing 1955 Family Protection Act). Judicially, however, a change had taken place: the courts by 1910(86) had ~~been~~ begun to reject the notion of an obligation to provide for dependants only and to formulate the concept of a moral duty in the testator to provide for members of his family irrespective of their actual needs. An essential element in the passing of the Testator's Family Maintenance Act 1900 had been the desire to avoid the possibility that destitute families might need to turn to the state for their upkeep, as a result of the capriciousness of their former provider in his directions for the disposition of his property after death. The new judicial trend showed the beginning of a recognition of a family unit as a minature community of interests and obligations extending beyond mere

(83) N.Z. Parliamentary Debates Vols 97 & 98, 1897 : 546.
(84) N.Z. Parliamentary Debates Vol. 111, 1900 : 503.
(85) (1901) 20 N.Z.L.R. 249.
(86) See In re Allardice (1910) 29 N.Z.L.R. 959.

material dependancy. It signified a response to a growing belief that a spouse and children had an interest in a testator's property to be preferred to that of outsiders or even that of the testator himself. The latter was not, in reality, to be permitted to do on death what he might freely do in life - deal with his property as he would.

Meanwhile, in the analogous field of dissolution of a marriage by divorce legislative attitudes to the family and property remained firmly grounded in the notion of separate estates. There was no question of a destitute divorced wife, for example, having a claim upon the property of her former husband flowing purely from her status as his wife. In property terms (apart from the obligation to support) the family, as a unit, did not generally exist. Again the courts moved ahead of the legislation in recognizing that strict rules of legal or equitable ownership might and should give way to family obligations and needs: by use of section 19 of the Married Women's Property Act 1952 orders might be made for the possession of a family home by a person (usually the wife) other than the legal owner (usually the husband).(87)

The economic realities of marriage, that one spouse, generally the wife, gives up for a number of years the opportunity to earn an income and obtain promotion in order to raise a family, and may consequently be forced to make a contribution to a marriage in an intangible and therefore untraceable way were belatedly(88) recognized in the 1963 Matrimonial Proceedings and Matrimonial Property Acts. Further, the legislation was expressly designed to make just provision for the spouse at home who

> "'thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits'...
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> This is the spirit in which our Matrimonial Property Act (1963) was conceived....."(89)

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(87) Masters v. Masters [1954] N.Z.L.R. 82; Reeves v. Reeves [1958] N.Z.L.R. 317.

(88) cf J. Mill supra; G.B. Shaw Getting Married (Preface).

(89) Minister of Justice (Hon. R. Hanan) during second reading of 1963 Act, N.Z. Parliamentary debates Vol. 358, 1963: 3393, cited in Matrimonial Property Report of a Special Committee 1972, p. 8. The Minister is quoting Sir Jocelyn Simon (now Lord Simon of Glaisdale).

The inherent gap between the concept of property as rights of disposition belonging to and vested in or held for legal or beneficial owners, and the reality of a family as a community of users and contributors to family property irrespective of actual ownership proved a little difficult for the judiciary (after a promising start) to reconcile.(90) That reconciliation undertaken by the legislature in the Matrimonial Property Act 1976 and, at the last minute and to a lesser extent, by the Privy Council in Haldane v. Haldane(91) has entrenched for the time being new concepts of the inter-relationship between the family (in particular spouses), property, and death.(92) For the first time there is meaning in the phrase "matrimonial property". For the most part the phrase has in the past been something of a misnomer. Prior to the 1976 Act property remained the property of individuals who might happen to be married, but who otherwise noticed little lasting effect from their change in marital status upon their property. Now, with the acceptance of the idea that married persons should share equally in what Woodhouse J. called the "working capital of the marriage partnership",(93) it is logical to extend the general principle of spousal shares in jointly used property to the dissolution of marriage by death. The widowed spouse may clearly be just as much a victim of the "functional division of co-operative labour"(94) as the divorced spouse. It is in the legislative acceptance of the economic disadvantage in which the spouse who stays at home during a marriage may be placed, and in the further acceptance of that spouse's claim as of right to a share in the matrimonial property that the justification for the provision for a widow of more than the present purely discretionary share in a deceased spouses's estate is found. This is not to deny that increasingly wives who remained at home are being released from full time housekeeping duties: the Select Committee on Women's Rights noted that

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(90) cf Hofman v. Hofman [1965] N.Z.L.R. 795 with the classic E v. E [1971].
(91) [1976] 2 N.Z.L.R. 715.
(92) The Haldane decision would affect claims under s.5 of the Matrimonial Property Act 1963 by a spouse against a deceased spouse's estate.
(93) Hofman supra p. 795.
(94) per Lord Simon of Glaisdale Schaefer v. Schuhmann [1972] A.C. 527.

> "We are mindful that in an increasing number of cases women will in fact be in a position to contribute financially to the total family assets. With the implementation of equal pay it can be expected that in more marriages the wife's income may be greater than her husband's".(95)

The Government-appointed Committee on Women in 1976 revealed that one-third of New Zealand's work force of 1.3 million(96) were women, 75% of whom worked more than 30 hours per week. It may be that eventually new "economic realities" of marriage in which the spouse who rears the children remains in the home only while the children are very young and is not handicapped by a short absence from the work force(97) will result in a return to separate property concepts as has occurred in Sweden.(98) In the meantime households are primarily maintained by the income of a man working full time to support his dependants, and it is his income which generally makes possible the purchase of the major capital assets (car, home, often furniture) accumulated during the course of a marriage.

It is not the validity of the claim a surviving spouse has upon property acquired during a marriage, but the nature of the share, its extent and the affect it may or should have on associated legislation (fro example the intestacy provisions) which gives rise to the possibility of diverging opinions. Should the surviving spouse's share be based in matrimonial law or succession law? If in the latter should the present family protection system be retained perhaps in an limited form, or should a system of forced rights or fixed rights be introduced as is usual in many civil law jurisdictions?

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(95) The Role of Women in New Zealand Societies. Report of the Select Committee on Women's Rights, June 1975, Parl. Paper I. 13, p. 76.

(96) see Department of Labour Estimates 1975 also.

(97) Positive discrimination in favour of pregnant women and those requiring "maternity treatment" is specifically permitted under cl. 27 of the Human Rights Commission Bill, and a Parental Leave Bill is currently under consideration in the Department of Labour. It will deal with paid maternity leave, and probably introduce special measures to enable re-education of those forced to leave the work-force to care for dependants.

(98) See J. Smalberg "Recent Changes in Swedish Family Law" (1975) 23 Am. J. Comp. Law, 34; Glendon "Is there a Future for Separate Property?" (1974) 8 Family L. Q. 315.

What implications for the Estate and Gift Duties Act 1968 might there be if the claim is founded in succession law? Should children have protected rights or a right to claim against a parent's estate, and if so to what extent? How are creditor's interests to be protected? These are amongst the most important questions which fall to be settled and will form the basis of the rest of this paper.

Jus Maritale or Jus Successioris?

The New Zealand legislature is preented with an interesting range of solutions in confronting the problem of how to provide for a surviving spouse. Systems in force abroad reveal it is possible to use merely the matrimonial regime (as in France) to provide for a spouse primarily in succession law (as Scotland), or to compose an elaborate system of interlocking claims in both matrimonial and succession law, as in Germany. Nor does it follow that common law and civil law regimes may not be combined in a workable fashion in the one legal system as the discussion of the Scottish approach below makes clear. Finally, it is possible to update and streamline the family protection system as has been done in England. The following section will describe samples of the various systems of provision for a surviving spouse in use abroad with a view to discovering what might be adopted for use in this country, and what should be rejected as uncongenial or workable. France, Scotland and Germany have been selected for study and the Inheritance (Provision for Family and Dependants) Act 1975 recently enacted in England will also be looked at.

III. OVERSEAS SYSTEMS FOR PROVISIONS FOR SPOUSES

Matrimonial Regime - France:

The French method of providing for a surviving spouse has been selected for description because it presents an example of a system relying for its purpose almost entirely on the matrimonial regime. The latter is based on a full community of acquests i.e. property acquired during a marriage, with certain administrative powers vested in one spouse purely to facilitate business transactions.(99) There is no distinction (in terms of property

(99) The intricacies of French matrimonial law will not be dealt with; see A. Kiralfy Comparative Law of Matrimonial Property (1972), or Amos & Walton's Introduction to French Law 3rd ed. (1967).

division) between the dissolution of a marriage by divorce or death. On the concurrence of either the community fund (after payment of all debts including, where relevant, funeral expenses) is divided equally between spouses or between surviving spouse and the estate of a deceased spouse. This equal division of property acquired during the marriage is the sole statutory property provision for a widow. Additionally, in succession law (or rather, arising as a result of dissolution of the marriage by death), a spouse will have the right to be supported by the community fund (that is food and lodging will be paid for or provided for nine months after the death of the deceased spouse). As the community is half owned by the surviving spouse this right is not as generous as it may at first seem; where the community is insufficient to support the survivor, and generally where a spouse is in need, she may apply to court for maintenance enforceable against the estate. There is therefore a type of family protection claim available, dependent, as in New Zealand upon need and the court's discretion as to quantum, yet enforced not against a testator's will but against the statutory forced shares for "privileged heirs". French succession law provides that certain members of a deceased's family (his ascendants and descendants) will automatically be heirs to a portion of his estate.(100) The amount of freely disposable property on testacy varies according to the number of statutory or privileged heirs: for example where a deceased had three or more children living at his death, his freely disposable estate will be reduced to quarter of the whole.(101) He may of course will this quarter to his spouse. Equally he may completely disinherit her, or as a result of changes to the law passed in 1963 he may leave a quarter of his property outright to his spouse (i.e. the minimum freely disposable quantity) and the usufruct of the residue, or the usufruct

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(100) See K. Ryan Introduction to Civil Law (1965) pp. 195-196 for more details on the organisation in France and Germany of inheritance.

(101) Glendon "Comparative Matrimonial Property" (1975) 49 Tul. L.R. 21. Heirs may be displaced for "unworthiness" in a number of unlikely circumstances, for example if condemned for killing or attempting to kill the deceased.

of all his estate.[102] In fact the majority of French citizens die intestate.[103] Upon intestacy the estate devolves upon the statutory heirs, leaving a spouse with an interest in the income from a quarter of the estate. The number of persons dying intestate indicates, according to Amos & Walton, a considerable measure of satisfaction with statutory provision for the devolution of estates. Others might see intestacy as a tacit acceptance that testamentary power is so limited as to be almost illusory. W. Thatcher[104] points out that an Englishman who amasses a "fortune may dispose of every penny of it inter vivos by way of trust or otherwise to any person or for any purpose he wishes.[105] Similarly, subject to estate duty and the ordering of "reasonable financial provision" for his dependants, he may dispose of it by will as he chooses. A Frenchman by contrast holds half his fortune on behalf of his wife (i.e. she is beneficial owner of half the property, if as most French couples are, they are subject to the community property regime). Where there are three or more children in the family, on the Frenchman's death his inter vivos donations are collected with his half of the property and the children are entitled to three quarters of the whole. The Frenchman is therefore absolute owner of only one eighth of the fortunae. The restrictions on testamentary disposition in France were imposed in the Code Civil of 1804. The recent revamping of succession law (1963) and re-structuring of matrimonial law

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(102) Code Civile Art. 1094. The children may have the usufruct turned into an annuity if sufficient security to guarantee the annuity is available. See Glendon supra.

(103) Amos & Walton supra; the figure is roughly 4/5.

(104) Trusts Ch. 11 of vol. VI Property in International Encyclopaedia of Comparative Law, pp. 90-91.

(105) Dispositions within 65 years of death may now be subject to investigation under the Inheritance (Provision for Family & Dependants) Act 1975; see later comments.

(1965) did not reveal a widespread desire to ease restrictions on testamentary disposition however. In summary, from the widow's point of view, half the property acquired during a marriage will be received, plus possibly half or less of an estate by will, and probably the usufruct of quarter of an estate on intestacy.(106)

Historically the concern has been in French succession law to protect the bloodline of the deceased,(107) and the succession rights of a spouse, more particularly a wife (who may of course inherit property elsewhere as a daughter) have been subordinated to those of children or ancestors.

The adoption of provision for only a surviving spouse in a matrimonial regime would be quite feasible in New Zealand (that will be looked at later), however elimination of the spouse from our succession law, both on intestacy and judicially from her prominence in family protection claims would be an innovation, and possibly uncongenial in its complete break with our tradition of regarding widows, particularly, as deserving preferential treatment. Additionally New Zealand lacks a "full community" matrimonial regime, and there is no presumption in this country that where there is room for dispute or no clear indication of the time or purpose of an acquisition, property should automatically be considered matrimonial. It would, of course, be possible to combine the matrimonial share with a system of family protection type claims against the succession as is done in France. In this way the certainty of a share based on fixed principles is combined with the flexibility of a discretionary award in needy cases. Further, as the English Law Commission has pointed out,(108) matrimonial-regime shares operate on the

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(106) There are a number of other ways in which a spouse may while living make provision for his spouse after his death for example "donations" or gifts. These are made by deed and are frequently used as a way of transferring property to a spouse on death. It may include future property, but the gift remains revocable until the donor's death. Ante nuptial contracts may also provide for specific devolution on death. The donor does not have the use of his property but forfeits the right to dispose of it without adequate consideration. Property included in the contract cannot be touched by creditors. It is a succession right. Legacies between spouses for amounts greater than the freely disposable portion are also kindly treated by the legislature. See Amos & Walton supra p.336.

(107) See Glendon supra. p. 10.

(108) Family Property Law Published Working Paper No. 42. (1971) p. 309.

assets of both the living and the deceased spouse, and are fairer therefore than a fixed right in the deceased's estate. It is however the simplicity and conceptual tidiness of the French system which is one of its most attractive elements: there is little overlap between matrimonial and succession law claims and rights and no possibility of confusing principles applicable in the one with awards possible under the other.(109) The consequence is a certain measure of inflexibility nevertheless, an inability in the legal provisions to operate in the fairest way in the variation of abnormal cases of property division which might arise. The German system in this respect is both more complex and more flexible.

Fixed Succession Share - Germany:

The German system of provision for spouses is of particular interest now for New Zealand as the matrimonial regime applying there ("deferred community") is based on much the same principles as our Matrimonial Property Act 1976.(110) The system of provision for a widowed spouse however is akin neither to our family protection system nor the Matrimonial provision in France. On divorce the gains acquired during the marriage by each spouse are totalled and an equalizing payment made by the spouse with the greater total gain to his marriage partner.(111) On dissolution of the marriage by death there is usually no direct reference to matrimonial property law at all. A spouse is almost completely provided for in the law of succession. Intestacy, as in France, is considerably more common than testate succession. On intestacy a spouse takes one quarter of a deceased's estate where there are children of the marriage. If there are no issue a spouse takes half (para 1931 BGB).(112) In addition a spouse obtains a further quarter of the

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(110) See Angelo & Atkin "A Conceptual And Structural Overview of the Matrimonial Property Act 1976" 7 N.Z.U.L.R. (1977) p. 237 for a detailed study of the classification of the 1976 Act.

(111) See A. Kiralfy supra; W. Müller-Freifel "Family Law and the Law of Succession on Germany" 16 Int & Comp. L.Q. (1967) p. 409; Manual German Law vol. 1 2nd ed. (1968), E. Cohn.

(112) See Burgerliches Gesetzbuch (BGB), The German Civil Code trans. I. Forrester, S. Goren, H-M. Ilgen (1975).

(109)

estate in lieu of the equalizing claim available on divorce (para 1371 BGB). There is a statutory legacy for a survivor of household chattels and wedding presents (para 1932 BGB). Free testation exists coupled with provision for a claim to a fixed share (Pflichlteil) where a spouse is disinherited (para 2303 BGB). The latter may claim a fixed portion equal to half her share on intestacy, and in addition may invoke the matrimonial equalization claim. Similarly a spouse succeeding on intestacy may discover that it would be more advantageous to claim property under the matrimonial regime than to accept the quarter succession share by which it is replaced. The survivor may in such cases disclaim the succession law share in favour of the equalization claim. The survivor is still entitled to the Pflichlteil i.e. half the share she would have received on intestacy whichever law her subsequent claim is based upon. The Pflichlteil, it should be explained, is not a claim to particular assets, but a right in the spouse and descendants to enforce a money claim against the testamentary heirs (or other statutory heirs where relevant). The assets of an estate remain vested in the heirs; the Pflichlteil ranks as a debt.

From one drafting point of view (i.e. that which favours comprehensive legislation dealing separately with each topic) the spouse's rights are scattered in piecemeal fashion through the code. Paras 1931 and 1932 are found in the first section ("Order of Succession") in Book 5, Law of Succession. Similarly para 2303 occurs in the fifth section ("Compulsory Portion") of Book 5. Para 1371 on the other hand falls into Book 4 ("Family Law") on Marital Property Rights. The decision to allot an extra succession law share to a surviving spouse in place of the equalizing claim was an attempt to avoid the complications of determining whether an asset was acquired during the marriage when one of the parties to the marriage was not able to assent to to or contest the claims of the other. The result is, however, that in order to obtain a measure of flexibility the right to claim the equalization share has been retained - a retention which adds to the complexity of the system.(113)

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(113) I have omitted details of the complicated compensation payments possible under German law see E. Cohn Manual of German Law, vol. 1. (2nd ed.) P.T.O.

(1968). Where e.g. an heir receives more than the Pflichlteil but less than the intestacy share compensation claims may be in order.

Despite this complexity there are certain attrative elements in the German scheme of provision: free testamentary power of disposition is maintained even if rarely used. Equally a spouse has a certain share in the estate which can not be avoided and is not dependent on a Judge's discretion. In addition there is the choice available between the equalization claim or the extra succession claim, the option between which is voluntary but will very likely depend on whether the deceased acquired most of his estate during the marriage. An equalization claim in the latter case would probably yield more than a quarter of the total estate. Arguments for and against fixed or forced rights in general however will be canvassed after the Scottish system has been described.

Forced Share - Scotland:

The Scottish legislation(114) regulating a widow's property rights has been selected for inclusion both because it offers an example of a system of "forced shares" or "legal rights"(115) to provision from a deceased estate for spouse and children, and because Scottish legal history is one of the co-existence within one legal system of Continental Roman law principles with the common law precedents and statutes current in England. Our matrimonial property law has moved closer to that obtaining in many European countries; our succession law, grounded as it is on "free" testamentary provision, follows the common law pattern. The Scottish legal system shows that it would not be unprecedented to import elements of Roman or European succession law into a predominantly common law legal structure.

Scottish matrimonial law is based on the common law pattern of separate property and thus makes little or no provision for a spouse on dissolution of the marriage by death. In cotrast with its English neighbour Scotland has an elaborate system of provision for such a spouse in succession law however.(116) In Scottish succession law all property is divided into heritables

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(114) The Succession (Scotland) Act 1964 see M. Meston The succession (Scotland) Act 1964 (1964).

(115) See Law Commission Working Paper No. 42 (1971), p. 216, supra for a list of the various names given to these obligatory shares.

(116) The Scots succession law provision was once common in England in the period after the Norman Conquest. See Plucknett A Concise History of the Common Law (5th ed.) 1956; B. Kulzer "Law and the Housewife" (1975), 28 U. of Fla. L.R. p.1, 28.

(approximating to realty) and moveables (personlty). It is to the latter that the spouses' legal rights attach. At death property vests in an administrator in accordance with the common law tradition (in France and Germany property vests in the heirs of a person immediately upon the latter's death). All debts including funeral expenses are then disposed of after which a spouse's legal right to a portion of the moveables becomes effective. Where there are issue the spouse is entitled to one-third of the deceased's personalty; where there are no issue issue the spouse takes half. The spouse's right is to payment from the estate (as with the Pflichlteil in Germany), not to any particular asset and exists both on intestacy and testacy. Where legal rights are insufficient to support a spouse she has a maintenance claim on the estate which may be levied on capital.

On intestacy in addition to and in fact preceding the legal rights a spouse has certain statutory fixed rights to the family home (up to the value of £30,000) or a sum of money in lieu where the home is part of a business concern, and in any other case to £30,000 and to furniture up to the value pf £8.000. These rights accrue only when the property falls into the intestate estate. Further, there is a lump sum provision of several tousand pounds from the estate, variable in amount depending on whether there are issue. A spouse then takes her legal rights in one-third of the personalty and the residue is apportioned successively amongst the children, surviving parents and siblings. If none, the surviving spouse takes all.

A testator may only dispose of one-third of his moveables and all his heritable property. Where a spouse receives testamentary legacies expressly or impliedly in place of legal rights the spouse may elect whether to take under the will, or to renounce the legacy and claim legal rights. In any event a spouse cannot receive less than one-third of the personalty and may on intestacy receive a great deal more. The provision is not remarkedly generous: firstly there is nothing in the legislation to prevent a spouse from disposing of his personalty during his lifetime even where this is done expressly to defeat a claim under succession law; secondly the claim is

restricted to moveables. In the smaller estates it is often the house which is of greatest value, and of greatest use to a surviving spouse, and this together with any other real property may be left by will as the testator wishes. The restriction of a spouse's legal rights to a claim on personalty is a relic of the primogeniture rules of the feudal system[117] and doubtless would not be adopted in New Zealand. The institution of forced or fixed rights in general, however, is of more pressing interest both because it is used in some form or other in many European legal systems[118] and in that it may or may not be combined with community of property regimes in matrimonial law.[119]

Forced Shares or Not?

The system of forced provision for spouses has a number of factors in its favour: the dominant element is the certainty it offers that there will be some provision made for a surviving spouse - provision nor dependent on need or judicial discretion, but purely on the status of being married to the deceased at the time of his death. There would be statutory acknowledgement (as distinct from the judicial and somewhat limited recognition in this country), of the responsibility on a spouse to dispose of at least a portion of his property in favour of the members of the family unit to which he was bound by ties of blood, social and legal obligation and sentiment. The family's community of interst in property would thus be recognized. It would however be a policy decision for any legislature proposing to adopt a legal rights system to choose between the Scottish arrangement of forced shares i.e. an absolute limit on the power to test, and the German solution of free testation with statutory provision for a spouse to claim a fixed share from the estate.

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(117) See A. Guest article & Kulzer supra.
(118) Scotland, Germany, Denmark, Italy, Ireland.
(119) In Scotland legal rights do not exist with a community of property regime; in Denmark they do, as in Germany.

The latter would be the more attractive choice in a jurisdiction traditionally based on "free" testamentary disposition. It would, in practical terms, involve merely "fixing" the already existing family protection claims at a statutorily enumerated level, and removing the obligation to prove need or breach of moral duty. The mere fact that a spouse belonged to the testator's family and had not been provided for in a will, (a situation which the moral duty test in practice closely approaches), would be enought to justify a claim. Yet pegging a fixed share at a particular level implies a certain rigidity in application which is a drawback of the legal rights system. The legal rights claim operates, (as mentioned earlier) on the assets of only the deceased: it is not flexible enough to cope with need so that a wealthy survivor may receive (unwanted perhaps) one-third of a deceased's estate, and a needy spouse be forced to share an estate with adult, non-dependent children. More importantly it has been pointed out(120) that factors such as the length of marriage, life-expectancy of the survivor at the date of the deceased's death, the survivor's prospects of remarriage, the deceased's moral obligations to others, and the survivor's conduct during the marriage might need to be considered. It is submitted that these matters are secondary to making provision for a survivor. It is hard to see, for example, why a survivor's conduct should affect a legal right to a certain share in the deceased's estate. It may be an over-simplification to say the deceased had the chance to bring the marriage to an end while alive, and on failing to do so must be assumed to have wished his spouse to share in his estate. Nevertheless to return to the "moral duty" or "moral worth" test inherent in any examination of past conduct in this context is to risk falling back on the kind of problem of assessment which arises under the Family Protection Act that is, that discretion about conduct and its effect on property rights must be vested in some neutral body (probably the courts) and there is only one party living to assent to or contradict any allegations concerning conduct on the basis of personal knowledge. Further, to relate property shares to conduct would be an

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(120) Family Property Law Published Working Paper No. 42, Pt IV. supra.

infringement of the spirit behind such rules in New Zealand legislation as s. 18(3) of the Matrimonial Property Act 1976 or the Haldane decision.[121] Rather than adopt the complicated German system in lieu of the Scots "forced share" it seems a feasible alternative to combine the fixed share and a family protection type claim. The fixed share for maximum fairness would be set at a low percentage of an estate's value, supplemented by the right in a spouse[122] to claim further maintenance (capital or periodic) where necessary.

Another alternative is to retain and expand the present Family Protection system as has been done in England.

Family Protection or Provision - England:

Retention of the present family protection system has been advocated by one or two practitioners in New Zealand, with (as a gesture towards new attitudes concerning marriage) a "broadening" of its principles. Just such a retention and "broadening" of principles, and more importantly an updating of safeguards for an estate has taken place recently in England. The Inheritance (Provision for Family and Dependants) Act 1975 replaces the Inheritance (Family Provision) Act 1938 modelled on the original New Zealand legislation. The new Act introduces several radical changes into the original family protection concept: de facto spouses, or rather persons maintained wholly or partly by the deceased at the time of his death, are now entitled to claim from his estate. Further a de jure spouse is given a right to claim "reasonable financial provision" and is not limited to maintenance from the estate. The test is to be whether provision is reasonable in all the circumstances and not whether a deceased acted unreasonably.[123] As a safeguard for the corpus of an estate, where a deceased within six years of his death disposed of property without adequate consideration and with the intention of defeating a claim under the Act, a court

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(121) [1976] 2 N.Z.L.R. 715 (P.C.) Even the 1963 Matrimonial Property Act permits conduct to be relevant only where it has affected the value or extent of the property in question, s.64.

(122) Children's rights will be dealt with briefly later.

(123) Millward v. Shenton [1972] 2 All E.R. 1025.

is entitled as a general rule to order the donee of such property to provide a sum of money, or other property, for the purpose of making financial provision.(124) Intention is tested on a balance of probabilities. If a contract is made to leave property by will a court may order a sum of money to be paid, or property to be transferred, for the purpose of making financial provision for an applicant under the Act, even where there was no intention to defeat a claim under the Act.(125) In the absence of proof of such intention any repayment ordered can affect only property left to the promises in excess of any valuable consideration rendered for that property.

These provisions go some way towards ameliorating a number of the weaknesses associated with the present Family Protection system and could be incorporated into the New Zealand legislation. It is probable however that any vision of the present Family Protection Act 1955 in this country would need to include special rules relating to the home and chattels to bring a widowed spouse's rights into line with those of a divorced spouse. One suggestion is to empower the court on application by a spouse automatically to allocate the house and chattels to that spouse perhaps on the basis of a life interest, or to award a half interest in the house together with a right of occupancy. Where allocation of a house and/or chattels was impracticable(126) an equivalent sum of money or property could be awarded instead.(127) Any application should be judged, as in England, on the existence or lack of reasonable financial provision for a spouse, not on a breach of moral duty by the deceased in failing to make adequate provision for a spouse.

And yet is the above "tinkering" with the Family Protection Act enough? The English system of provision has lost, since the passing of the Matrimonial Property Act 1976 in New Zealand, much of its interest for this country.

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(124) s.10 of the Act.
(125) s.11 of the Act.
(126) For example where the house was rented, or formed an integral part of a flourishing business.
(127) This might pose difficulties where the house was included in part of a business to be continued by the children of the deceased, if there were insufficient liquid funds to pay the survivor a sum equivalent to the value of the house, the court would need power to order a lump sum plus instalments for a certain period.

The Inheritance (Provision for Family and Dependants) Act 1975 is designed to march with a matrimonial regime based on separate property. There is no statutory recognition of marriage as a partnership, nor of equal division of matrimonial property. "Reasonable financial provision" would not alleviate the present placing of a premium on divorce which both major political parties here wish to avoid.(128) To a Government committed to upholding the "institution of marriage and the family unit"(129) it is unsatisfactory to entertain even the possibility that a divorced spouse may have rights superior to those of a spouse whose marriage lasted until death. There is a serious conceptual discrepancy between the presumption that generally on divorce or other inter vivos dissolution of a marriage both spouses will share equally in the matrimonial property, and the fact that on death a surviving spouse must take pot-luck. The Family Protection Act 1955 in its original form in 1900 was a revolutionary piece of legislation. It now belongs with the matrimonial legislation of the past. It perpetuates the role of the surviving spouse as a suppliant dependent on the discretion of a court in much the same way (albeit on the basis of a different test) as the Matrimonial Property Act 1963. It is hardly in keeping with the concept of marriage as a partnership, all the less so if the court remains entitled to consider whether the moral character or conduct of a widow should affect the success of her application, or merely follows the English test of"reasonable financial provision".(130)

On the basis of the above it seems reasonable to argue the Family Protection Act 1955 and its concept of maintenance has now for the most part outlived its usefulness, and it is time to consider a completely different approach towards provision for a surviving spouse, an approach reflecting in an equitable manner the equal contributions (where relevant) of both spouses to their marriage.

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(128) See p.13 White Paper Comparable Sharing (1975) which accompanied the Labour-introduced Matrimonial Property Bill 1975, and Thomson speech quoted in the Introduction.

(129) Election manifesto (1975) Law & Order, Part II, p. 3.

(130) The court is directed to look at a number of factors mentioned earlier, for example, age of the applicant, duration of the marriage. The most important consideration from the New Zealand point of view is that requiring regard to be paid to what the applicant would have received on divorce. The court is not required to equal that in the death situation, however, which points up the limitation on any "broadening" of the Family Protection Act 1955.

IV. FUTURE LEGISLATION IN NEW ZEALAND

Using Existing Legislation:

It was advocated in a number of submission[131] to the Select Committee studying the Matrimonial Property Bill in 1976 that the principles of the Bill be extended to the death situation. The proposal is attractive for several reasons. Firstly, it maintains a clear distinction between succession law and matrimonial law, a distinction of little interest to married couples themselves, (as Professor Kahn-Freund points out)[132] but of importance in conceptual analyses of the law,[133] and with implications for the levying of estate and gift duty. Secondly, extension of the Matrimonial Property Act 1976 would avoid the need for further major legislation, and would quite evidently place widowed spouses on an equal footing (in theoretical terms) with divorced spouses.

Extension of the Act would clearly entail provision for the division of matrimonial property on the death of a spouse in the same way as if the spouses had been divorced.[134] Matrimonial property would be ascertained and divided between the deceased's estate and the surviving spouse. The deceased's share in the matrimonial property would then fall into his estate to be distributed along with any separate property he might have, in accordance with his will or the intestacy rules. However, apart from the necessary minor amendments to the 1976 Act itself and to other legislation[135] a number of important policy matters would require consideration on the extension of

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(131) For example those of WEL, Federated Farmers and Angelo & Atkin.
(132) See quote at beginning of the Paper.
(133) The distinction would therefore possibly be of assistance in any case to be decided by the exercise of judicial discretion, witness the confused obiter dicta and judgments emerging from cases such as Re Snow and Re Weck (discussed in Part I) owing to the lack of such distinction.
(134) A statement of the obvious, but arguments against treating in a similar way marriage ended by divorce or death will be raised later.
(135) s.5 of the Act would need repeal and possibly s.4(3)(b). The Administration Act 1969 would need consequential amendments, in particular s.77.

community-regime principles to marriages ended by death.

Disposition of the matrimonial home, raises one of the most pressing problems. The present Matrimonial Property Act 1976 allocates as a general rule half shares in the former family home to each spouse (section 11 and see section 12). The necessity for a statute such as the Joint Family Homes Act 1964 under which houses registered as joint family home pass entirely to the surviving spouse would seem to be considerably reduced. Yet from a policy point of view it would need to be decided whether the entire family home (ownership and occupancy) should pass to the surviving spouse as under Joint Family Homes Act 1964 or a mere half interest as under the Matrimonial Property Act 1976.(136) In many estates the family home is the most substantial asset.(137) Should a surviving spouse take the home entirely, to the detriment of beneficiaries of the deceased's estate? Such a provision could operate unfairly against the estates of the present generation of older married women who may have very little property to leave apart from their "half share" in the home. Nevertheless security of home and chattels is of fundamental importance to the majority of spouses. The more equitable apporach might to award half-shares in the home to both the surviving spouse and the deceased's estate, together with a life-occupancy for the survivor and an option to sell and divide the proceeds of sale with the deceased's estate. It would still, of course, be possible for a couple to hold their home in a joint tenancy. Where the home was attached to a business it would probably be desirable to

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(136) Note there is also a tax advantage in registration of a home under the 1964 Act. Estate planners may advise their clients to register their homes as joint family homes and subsequently cancel registration. On cancellation the property is held in equal shares by each spouse (s.11 Joint Family Homes Act 1964 as amended by s.7 Joint Family Homes Amendment Act 1974). In this way a home formerly owned by one spouse can be "gifted" for up to 50% of its value to the other spouse without attracting duty. Subsequent sale of the home and division of the proceeds places a cash sum in each spouses hands, and if a further home is bought the matrimonial home allowance may be claimed, s.17A Estate and Gift Duties Act 1968 as inserted by s.6 Estate and Gift Duties Amendment Act, 1976. In this way a wealthy spouse may redistribute his property legitimately and tax free.

(137) The average net value of certified estates in 1973-74 was $28,838 (males) N.Z. Official Yearbook 1976, p. 735.

provide that the spouse should first offer her share in the home for sale to the deceased's beneficiaries. Such provision would mean more than a little alteration to the existing section 11 of the Act. It might further be necessary to make section 11 (as far as it related to disposition on death) exempt from attack under section 14 of the Act which dictates that where equal division of the home and chattels would be "repugnant to justice" unequal division may be permitted. To allow a challenge of the equal division principle would raise the familiar problem of how to deal with allegations concerning a party who is not able to present and defend his own case.(138) Yet another difficulty would arise over the exact extent of the spouse's "half share" in the home (if half shares were adopted). Would the share be in the value of the home itself or in the equity of the property? Section 11 of the Matrimonial Property Act 1976 provides for equal division of the home; section 12 for equal division of the equity in a homestead.(139) Further, should a widow take her share subject to paying the outgoings, or should their payment be shared with the deceased's estate? The latter seems fairer, however, an adjustment of shares might be considered necessary where during the marriage the deceased had voluntarily paid all mortgage outgoings and on his death the widow had both rather less than half of the mortgage to pay off, and little available income with which to pay it. In such a case the capacity to sell the property would be of assistance.

Corresponding to the drawbacks attending the use of section 14 in disputes concerning property distribution on death would be the problems raised by any challenge of the presumption of equal division of general matrimonial property under section 15 of the Act. The latter provides that the equal shares presumption may be set aside where one spouse has contributed more to the marriage partnership than the other. It could be argued nevertheless that

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(138) See discussion in Part I and remarks of Beattie J. in Re McNaughton [1976] 2 N.Z.L.R. 538.

(139) cf s.20(2) Matrimonial Property Act 1976 also.

fact the marriage had subsisted until death could be taken as indication (in the absence of an agreement to the contrary under section 21),[140] that equal sharing was accepted by both parties. Spouses legally separated before the time of death would however constitute a law requiring special treatment under the Act. There could be no conclusion in their case that property should be equally divided. The home and chattels in this situation might be awarded to the widow if she were caring for dependant children. The terms of any will might then become effective, and on intestacy, provisions similar to those contained in section 24(2) of the Domestic Proceedings Act 1968 might be invoked.[141] It is interesting to see that the legal fiction employed in section 24(2) of treating the surviving spouse as having pre-deceased the deceased has been adopted in the Wills Amendment Bill 1977 (clause 2(i)(c)). The clause would come into operation where a deceased had been divorced at the time of his death, but failed to alter his will (in which his former spouse might be a major beneficiary) to reflect his change in marital status.[142]

The above difficulties would, of course, arise only in exceptional cases. It would still be possible for a deceased spouse to "will" his share in the home to his widow, and this apparently is done in the majority of cases.[143]

The effect on the intestacy rules of providing a matrimonial half share for a widow would be an important point for the Legislature to consider. The present rules, under which a spouse takes a substantial portion of an estate[144]

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(140) See later comments on the complications involved in extending agreements to post mortem property distributions.

(141) See Introduction.

(142) cf. The Effect of Divorce on Testate Succession, Report of the Property Law and Equity Reform Committee 1973, favourably commented on in Report on The Impact of Divorce on Existing Wills Ontario Law Reform Commission Report 1977. Clause 2 (2) (b) permits testamentary dispositions to be expressed as effective notwithstanding a divorce.

(143) Refer to "Distribution of Intestacy" P. Jenkin (1968) J N.Z.U.L.R. The Joint Family Homes Act 1964 has not been widely used (see White Paper Comparable Sharing 1975 p. 4) perhaps through apathy or ignorance rather than an active dislike of its provisions.

(144) See footnote 15 supra for details on provision under the section.

were drafted before any system of community property was ever contemplated in this country. They reflect a legislative presumption about the way a deceased would have wished his his estate to be distributed.(145) With the interests of dependent children in mind, (especially, for example, dependent children of a previous marriage of the deceased, it is unlikely on the extension of the Matrimonial Property Act 1976 to marriages ended by death the current intestacy provisions would be retained. The English Law Commission(145) suggested two possible approaches that could be adopted in this situation: either the survivor on intestacy could be treated as having no matrimonial property claim and intestacy rights adjusted to maintain parity with spouses taking property under a will, or a claim under the matrimonial property regime could be regarded as completely replacing any provision for a surviving souse in the intestacy rules. The latter suggestion appears to be the to be the more attractive in that it would merely require an editing out of any reference to a "surviving husband or wife" in the existing rules. However the present allotment of "personal chattels" to a sirviving spouse under the Administration Act 1969 is not identical to the survivor's rights to Family Chattels under the Matrimonial Property Act 1976.(147) It might be considered politic to include in the matrimonial property division rules a proviso that on intestacy a surviving spouse should take in addition to family chattels, all other articles which would be classed as personal chattels under the Administration Act 1969.

On removal of the spouse from the intestacy provisions, the beneficiaries thereunder would typically be the children of the deceased. Jenkin, in his study of the correspondence between the statutory provisions of section 77 and common practice in testamentary disposition,(148) concluded that section 77

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(145) See Jenkins supra.
(146) Published Working Paper No. 42 supra p. 302.
(147) Books and articles of personal use or ornament, for example, pass to the survivor as personal chattels, but are not so distributed under the Matrimonial Property Act 1976.
(148) "Distribution on Intestacy" supra.

generally reflected the inctates of testators. More specifically it was found that most spouses leave the major portion of their estates (whether absolutely or by way of life-interest to their widows, and contemplate distribution of the residue amongst their children. It is possible therefore that a deceased's estate might pass on intestacy, (after the matrimonial regime division) entirely to his children, if non to the surviving spouse.(149) Provision for a widow would consequently, in the common case, be grounded in jus maritale. As a supplementary enclosure it would seem desirable that a type of family protection provision be retained for a widow where matrimonial, estate or intestate provision was inadequate for her immediate support.(150) It is however debatable whether the family protection claim should be retained for independent children, or grandchildren. John Stuart Mill forcefully put the case against non-testamentary inheritance rights for children by arguing that parents incurred an obligation to raise and educate their children, but

> "whatever fortune a parent may have inherited, or still more, may have acquired, I cannot admit that he owes to his children, merely because they are his children, to leave them rich."(51)

There would be no quarrel with regarding both parents as responsible (where the marriage was dissolved by death) for the maintenance of their dependent children. Extension of the Matrimonial Property Act 1976 to marriages ended by death would render section 26 of the Act applicable to the distribution of matrimonial property. The court would thus be empowered to order that any or all matrimonial property be settled for the benefit of minor or dependent children. The deceased's share of matrimonial property would naturally be available for the childrens' support. In addition a family protection claim against the deceased's separate property might also reasonably be provided for a surviving spouse raising dependent children,(152) where

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(149) Jenkin also discovered that where a spouse or issue survivied the deceased there was no likelihood provision would be made for any surviving parents of the deceased (cf. s.77 (i) (a) (ii).

(150) See earlier comments on provision for widows in France. Note: even there, where provision is made for a survivor in matrimonial law, there are ancillary maintenance rights in succession law.

P.T.O.

(151) Principles of Political Economy Vol. 1 Book II, Ch. II, p. 137 (People's Edition Longmans, Green & Co.) (1865), emphasis added. Provision for children in intestacy rules differ of course from providing a "moral duty" claim for disinherited children against a deceased's estate. The intestacy provision, as earlier mentioned, attempt to dispose of the deceased's estate as he might have disposed of it on drafting a will.

(152) Subject to the obligation on natural parents to maintain their children, it would seem desirable to permit such claims even where the dependent children were those of the surviving spouse. From a former marriage, if the children had been regarded by the deceased as members of his family.

testamentary provision was inadequate, If children are no longer dependent on their parents for support, however, it does not seem necessary to confer upon them a right to claim from their parents' estates (as is in practice currently possible under the Family Protection Act 1955) simply because they are descended from the deceased.(154) On the children's attaining financial independence, or their majority, whichever is the sooner, it is submitted any "moral duty" to provide for their support is satisfied.

In addition to the matters mentioned above, a number of other problems would attend the extension of the 1976 Act to the death situation. Firstly, it would need to be decided how far agreements to vary the statutory provision of property provided for in section 21 of the Act should affect distribution of matrimonial property after the death of a spouse. Such agreements do not at present apply where marriages are dissolved by death:(155) were they to do so it might be difficult to distinguish agreement from wills. Should the technical requirements of the latter apply to the former? What would occur where an agreement and will were in conflict? How would the survivng spouse's family protection claim be affected? As far as the latter is concerned, it appears unequitable on the one hand to permit a spouse who has received independent legal advice on the consequences of an agreement(156) later to claim support against its terms, on the other hand it has been considered undesirable on the grounds of public policy to allow a spouse to contract out of a statutory right to lodge a family protection application.(157)

Secondly, an extension of the 1976 Act has been seen as entailing an application to court on the dissolution of a marriage by death(158) with resulting costs liable to drain an estate and inconvenience caused for court staff and beneficiaries alike. It is argued that on the division of property

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(154) See for example Re Nicholson (1975) Current Law (N.Z.) 1101. cf Re Downing (1975) 1 N.Z. L.R. 385.

(155) s.21(3)(b).

(156) Such advice for each spouse is requested by the terms of s.21(5).

(157) See Gardiner v. Boag (1923) N.Z.L.R. 739, 745.

(158) See for example WEL. submissions and speech of Minister of Justice in Timaru this year supra.

into matrimonial and separate property the legal personal representative of a deceased is at a disadvantage by vitue of his obligation to act in a judiciary way in the interests of the beneficiaries of the deceased's estates. It is though he may be unable as a result of this obligation to compromise with the surviving spouse over the division of property and quantification of the deceased's share without rendering himself liable to account to the beneficiaries unless a court order is obtained concerning property division. Against this it can be pointed out that a personal representative is similarly bound by judiciary obligations(159) at present and may equally be forced to compromise with a spouse over the legal ownership of or on a matrimonial share in) arti les of property.

Altogether aside from the problems raised by extension of the existing Act, it may be that a different conceptual view point for the regulation of the distribution of matrimonial property after death is required. The Matrimonial Property Act was devised to enable distribution of property between living persons going their separate ways to be settled if not amicably, at least by independent arbitration. The distribution of matrimonial property where a spouse has died, is a different matter, for in that situation the marriage continued as a unity until its natural end and was not deliberately terminated.(160

An Alternative Aporoach

On the basis of the above comments, and assuming from the fact the marriage subsisted until death that mutual use of or benefit from all property of the marriage was still in yhr contemplation of the couple, there are grounds for arguing a new legislature starting point is necessary. In line with the concept of the marriage as a partnership unvoluntarily in this context dissolved it may be that all matrimonial property should pass to the survivor. The property, after all it may be said, was (in the common case) jointly useed by the couple with no intention it should be divided or the partnership dissolved. Statutorily to provide for the transfer of all property of the marriage to the survivor thus preserving it complete would place the widowed spouse in a postion superior

(159) cf s. 47(4) Administration Act 1969.
(160) This idea emerged from discussions with officers of the Department of Justice.

to that of divorced spouse. Politically the decision to pursue such a course would naturally depend on the philosophy of the government of the day.(161)

Creditors' rights of course would need to be catered for whichever scheme was finally adopted. The maximum it is unlikely that as under the Matrimonial Prpperty Act 1976 at present(162) the separate property of spouses would be liable for their personal debts and matrimonial property available to settle debts of the marriage. Further, in line with the (somewhat limited) protection afforded a spouse's share in the matrimonial home in inter vivos transaction it would be necessary to preserve the matrimonial home or a certain proportion of its value against creditors' claims.

As an alternative to the foregoing suggestion that all matrimonial property pass to the survivor and in keeping with the presumption of equal division of the matrimonial property applicable on divorce, the scheme for division of property drawn up by the Ontario Law Reform Commission is of interest.(163) The scheme calls for compensation payments where necessary by the deceased, to the surviving spouse.(164) The net estates of each spouse would be calculated and where approriate an equalising payment made. On intestacy, if there were issue, the survivor would be entitled to preferential treatment if the equalising payment in the survivor's favour did not exceed $50,00. The net value of the matrimonial home would be divided between and added to each spouse's estate for valuation purposes. Again this political philosophy of the government of the day would affect the introduction of a similar scheme in this country. We do not have such completely equal sharing provisions on

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(161) It may, for example, appeal to the present Government to legislate such provision as a means of underlining their commitment to the institution of marriage and stable family units.

(162) See s. 20 of the Act especially s.20(7). Funeral debts should probably be treated as a debt of the marriage.

(163) Report on Family Law Part IV Ontario Law Reform Commission 1974. See inter aliapp 88-89.

(164) No such payment would be made by the survivors to the deceased's estate, partly because in the normalcase, under either intestacy or testamentary distribution, it is liable to return to the paying spouse, and because there may be dependent children relying on the survivors for support. Note the English Law Commission (Working Paper No. 42 supra at p. 301) printed out that "by the accident of dying first" a deceased could be prevented from providing for his own beneficiaries (e.g. children of a former marriage) from property he had worked to acquire.

divorce and it may be that divorve and death rights will be placed merely on an euqal basis as far as possible.

A Note on Estate Duty

Finally the question of estate duty and how it should affect the transfer of property between spouses would probably fail to be reconsidered. At present section 4(5)(b) of the Matrimonial Property Act 1976 provides that nothing in the Act is to affect the imposition of estate duty. Extension of the existing Act to the death situation should, conceptually, by founding the widow's claim in matrimonial law, absolve her share of the matrimonial property from estate duty.(165) The deceased's share would, on division, fall into his estate and become taxable in the normal way on transfer by will or intestacy. The "normal way" currently extends comprehensive relief from estate duty to a widow: first, estates with a final balance of less than $25,000 are not subject to duty at all;(166) second, relief for a surviving spouse is provided for up to $60,000;(167), third, as mentioned earlier, the matrimonial home or its equivalent in value is excluded from the computation of the dutiable estate of the deceased.(168) It is but a short step to Regulating for complete exemption from estate duty of all property passing from a deceased to a survivng spouse. Such complete exception is in accord with the concept of estate duty as a wealth tax imposed once per generation.(169) Moreover, it is clear that overseas, conceptions of taxation and its effect on families are undergoing radical

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(165) See s. 7 - 16 of the Estate and Gift Duties Act 1968 for an outline of the property which constitutes the dutiable estate of a deceased. s.7(1), the priiary definition, provides that "the dutiable estate shall include all property of the deceased which passes under his will or intestacy except property held by him as trustee for another person." Note slso that s.48(4) of the Matrimonial Property Act 1976 exempts from estate duty any order of the court made against a deceased's personal representative.

(166) New 1st Schedule to the Estate and Gift Duties Act 1968 inserted 1976.

(167) s.s.36 and 37 of the Estate and Gift Duties Act 1968.

(168) s.17A of the Estate and Gift Duties Act 1968.

are undergoing radical reconsideration.(170) The possible restructuring of the estate and gift duty system of taxation in this country is a subject for discussion beyond the scope of this paper. It should be noted however that should complete abolition of estate duty on property received by a surviving spouse be politically a somewhat touchy subject, several suggested alternative schemes based, for example, on a reducing scale of tax according to the age of the beneficiary have been put forward and could be examined for their suitability for New Zealand conditions.(271)

Duty is, of course, also imposed to raise revenue. Last ye ar estate duty totalled $50, 523, 762,(172) not in itself unimportant, but overshadowed by income tax ($2,295,847,410)(172) as a major source of revenue. In view of the extensive exemptions and reliefs from estate duty available to a surviving spouse, and the fact that most large estates are the subject of elaborate schemes to avoid duty,(173) the revenue implications of abolishing estate duty on interspousal property transfers may not be very significant.

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(170) See Carter Report, Report of the Royal Commission on Taxation (Canada) 1966 on general taxation of the family as a unit; Green Paper 1972 Taxation of Capital on Death (Cmnd 4930) and the Finance Act 1975 (U.K.) which abolished estate and gift duty tax as separate taxes and imposed a capital transfer tax.

(171) See "Whither Death Duties" G. Bale (1974) Public Law 121 and "Death, Taxes and Family Property" Group Discussion reported in (1977) American Bar Association Journal 86. Bale comments that one possible variation might be to tax a recipient spouse on a normal scale where there was a 25 year or more age gap between deceased or surviving spouse to ensure taxing at least once per generation.

(172) Annual Report of the Inland Revenue Department 1977, Parl. Paper B.23, p. 9.

(173) See "The Estate and Gift Duties Act 1968" L. McKay (1977) N.Z.L.J. 97.

Conclusion

It is clear there is a need for revision of surviving spouses' inheritance rights in this country in the immediate future. Our present system, with its roots in legislation formulated at the beginning of this century has worked reasonably well for over fifty years to provide some guaranteed support for widows and children of a deceased. The guarantees of that support now appear in 1977 to rest on somewhat shaky foundations;(174) further, social attitudes concerning non-financial contributions of spouses to marriages have altered considerably since 1908 (the year of the first Family Protection Act): obligations to maintain, with their connotations of dependency in the recipients of such maintenance have been replaced by concepts of an absolute spousal right to a proportion of the assets of a marriage. It remains to be seen which path the Legislature will take in catering for these changes vis-a-vis surviving spouses.

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(174) See, for example, discussion on Part I on the effect of contracts to leave property by will.

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