

**ADDRESS TO THE FAMILY COURT CONFERENCE 2011**  
Copthorne Hotel, Oriental Bay, Wellington  
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\* Sian Elias

## **Separate Property – *Rose v Rose***

### **Introduction**

I should have known better than to give in to the Principal Judge's blandishments to agree to speak to you on the subject of what I persist in thinking of as "matrimonial property". In the first place, one of the great successes of the Family Court has been that appellate courts rarely see relationship property cases.<sup>1</sup> The Supreme Court, in the seven years of its existence, has seen only one where division of assets was directly in issue.<sup>2</sup> Perhaps that is just as well. The commentator on my paper, Professor Peart, has said of *Rose v Rose* that ten judges struggled "in vain" to make sense of the legislation.<sup>3</sup> Since half of those were judges of the Supreme Court, it does not say much for our effort. Now Professor Peart is very kind and (with Margaret Briggs) says that is because the Act is contradictory and lacking in coherent principle.<sup>4</sup> But, although I have some questions about the legislation myself, I am not quite as severe on the Act. So if the Supreme Court didn't manage to convince in *Rose v Rose*, I think we should accept fault. I am, however, conscious that I am out of my depth in this topic. And I know that I am addressing experts. At the outset, I wish to acknowledge the work you do as Family Court judges on a daily basis in applying this

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<sup>1</sup> The Supreme Court gave no substantive judgments on relationship property in 2008, handed down two judgments in 2009 (including *Rose v Rose*), delivered none in 2010 and has delivered none so far in 2011. The Court of Appeal has been only slightly busier: although it handed down no substantive judgments on relationship property in 2008, it delivered four in 2009, one in 2010, and has handed down three so far this year. The numbers in the High Court are higher - 18 substantive judgments on relationship property in 2008, 27 in 2009, 33 in 2010 and 9 so far in 2011 - but these numbers remain small compared to the High Court's workload in other areas of law. These numbers do not include judgments dealing with applications for leave or recall, judgments on costs or evidence, and judgments that touch only briefly on the Property (Relationships) Act 1976.

<sup>2</sup> *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

<sup>3</sup> This was noted in an article jointly written by Peart and Margaret Briggs: Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 2-3.

<sup>4</sup> *Ibid*, at 3.

important social legislation conscientiously to the circumstances of New Zealand couples, often in trying circumstances. Yours is important service to our community. And it is difficult service. And I express my admiration to you as a bench.

The second reason I should not have not accepted this invitation is that relationship property is a subject I have always approached with dread, as a practitioner and as a judge. The cases are, in my experience, invariably untidy. The ugly facts, which almost always emerge chaotically, always seem to slay the beautiful theories about no fault, clean break, equal treatment, and rules-based entitlement. Also, these cases require the judge to pick through the faded details of a failed relationship. There are no short cuts. So as an appellate judge I always approach relationship property cases with real reluctance. Very often the case is a moveable feast, bearing little resemblance in the Court of Appeal or Supreme Court to the way it was presented in the Family Court or on first appeal. *Rose v Rose*, the case I have been asked to talk about today, is itself an illustration.

*Rose v Rose* principally concerned ss 9A(1) and (2) of the Property (Relationships) Act 1976. For our overseas guests I need to explain these provisions. They are concerned with gains or increases in value to the separate property of one of the parties during the course of the relationship. The general rule is that such gains or increases in value are separate property in which the non-owning spouse has no interest. In two circumstances, those provided by the different subsections, the non-owning spouse gets to share in the gain. Under s 9A(1) the increase in value becomes relationship property, subject to the strong equal sharing presumption of the legislation<sup>5</sup> if the increase in value is attributable – in whole or in part – to the application of relationship property. If the non-owning partner has contributed to the gain, directly or indirectly, by his or her actions during the relationship, then the increase in value is divided between the partners according to their contribution under s 9A(2). These provisions for sharing therefore have very different consequences, and the application of each depends on demonstration of cause and effect between application of relationship property or actions of the non-owning spouse and the gain received. Although I am principally going to speak of these two provisions, I also want to touch on two other provisions of the Act, ss 15 and 15A, by which the Court can direct compensatory payments from relationship property (and sometimes from separate property) to a party whose earning capacity has been adversely affected by the division of functions within the marriage.

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<sup>5</sup> Property (Relationships) Act 1976, s 11.

In *Rose v Rose* the claim by the wife to share in the increase in value of separate property was put forward in the Family Court in respect of the two farm properties in issue on the basis of s 9A, without differentiation between s 9A(1) or s 9A(2).<sup>6</sup> In the appellate courts, the two properties were dealt with under the separate provisions, although both were cases where there was application of relationship property to the separate property and so could have been dealt with under s 9A(1). The reason one was dealt with under s 9A(2), relying on the actions of the non-owning spouse, is because the contributions had continued for longer than the application of relationship property and most of the gain in value occurred before the application of the relationship property. And I want to come on to explain that the choice to rely on s 9A(2) was driven not by the text of the statute, but by judicial interpretation of it, which perhaps should be reassessed.

Part of what I want to say today is to express some doubt about whether we have been too deferential to precedents developed under different legislative provisions in this area of law. I want to query whether in social legislation such as this it is appropriate for courts, particularly appellate courts, to refine too much on the terms of the statute rather than simply applying it to the circumstances as they arise, and against the purposes and principles of the Act. (I have to acknowledge culpability in this respect myself). This is an area where appellate courts consciously set out in the 1980s to provide guidance. That may have detracted from a fresh look in response to the 2001 amendments.<sup>7</sup>

What is of course important to keep in mind is that the cases that require resolution through the courts are the exception. The presumption of equal sharing and the wide scope of relationship property in the Act are concepts relatively clear to understand and usually are easily applied in the vast majority of cases, where the assets of the parties are all relationship property. The legislation should be accounted a success. Before being a little more critical, it is important to remember how far we have come, and how fast. And the social revolution that has been accomplished both by the 1976 Act, and its 2001 amendments.

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<sup>6</sup> *Rose v Rose* FC Blenheim FAM-2003-006-000229, 6 July 2005.

<sup>7</sup> Property (Relationships) Amendment Act 2001. The amendments came into force on 1 February 2002.

## A little history

The year I started legal practice, the Court of Appeal decided *E v E*<sup>8</sup>. Other generations of young lawyers have had other causes. For young women practitioners, the injustice of matrimonial property division was the burning issue. It seems incomprehensible today that North P, asked to invoke the wide discretion under the 1963 Act<sup>9</sup> wrote in his judgment of the “wife who may be able to go into the arms of her lover well equipped with worldly possessions”.<sup>10</sup>

Our heroes then were the few judges who were not willing to look to contribution to each of the assets in the relationship (the absurdity of assessing contribution to “the sewing machine”, pointed out by Wild CJ in *E v E*)<sup>11</sup> and who considered that all forms of contribution to the marriage were of equal importance (as Woodhouse J was prepared to do in *Haldane v Haldane*).<sup>12</sup>

I participated in efforts to get the 1976 Act passed. It was publicly opposed by a number of senior judges. The reform was necessitated by the entrenched views of many of the judges, which clearly lagged behind community attitudes. And, as a result, it was an important policy of the 1976 Act that it set up a rule-based system rather than a system that relied on wide discretion for judges to come to a just division of property in the circumstances of the case.

The 1976 Act was of necessity a transitional measure. First, it was daring social legislation for which there was sufficient support for passage of the Act – but only containing reform up to a point. The separate property provisions of the Act were critical to its acceptance. It was a beachhead from which more thoroughgoing reform would be undertaken later. Widows and farms (the family farm being the paradigm of separate property) were too hard in 1976. And the presumption of equal sharing was weaker in relation to matrimonial assets other than the family home and chattels. In addition to the partial nature of the reform in its own terms, it occurred at a time that New Zealand society was undergoing great change. Those changes too meant that the reform accomplished in 1976 was overtaken by other social forces and its adaptation became inevitable within a decade. The increasing preference for de facto unions rather than marriage, and the rise of human rights consciousness (with proscription of discriminatory treatment)

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<sup>8</sup> *E v E* [1971] NZLR 859 (CA).

<sup>9</sup> The Matrimonial Property Act 1963.

<sup>10</sup> *Ibid*, at 885.

<sup>11</sup> *Ibid*, at 865.

<sup>12</sup> *Haldane v Haldane* [1975] 1 NZLR 672 (CA) at 685–686.

necessitated further reform. Although legislative reform was in the end a long time coming, the amendments not being enacted until 2001, in the meantime the courts developed the concepts in the legislation and looked to other legal concepts to achieve comparable outcomes for couples outside marriage and (using the 1963 Act) to deal with matrimonial property after the death of one of the spouses.

I do not want to minimise the achievements of the Court of Appeal in the early years of the 1976 Act in settling its meaning and application. But the experience has been more mixed than is always acknowledged. And in some respects the decisions of the 1980s cast a shadow over the Act as amended in 2001 that may not always be helpful. The deference accorded to that very fine Court may have proved at times disabling. I will illustrate this by reference to *Rose v Rose*. But my point here is that in the case of social legislation which has to keep pace with changing conditions and expectations, particularly one that operates as a code,<sup>13</sup> I wonder about too much veneration for precedent. A similar point was made by Cooke P in respect of the New Zealand Bill of Rights Act 1990 when he said that with respect to such legislation precedent could not be allowed to be a straitjacket.<sup>14</sup>

The principles established by Parliament in legislation such as this come to be applied in changing conditions. It would be unwise to be too definite about the ends they dictate. And perhaps we need to query whether courts have approached legislative amendments with a mind-set derived from precedents adopted under earlier legislation which need reassessment. I know there is respectable academic support for the view that the legislation now in force is confused and inconsistent in part. But in preparing for this address, I have been left wondering whether the courts – including the Supreme Court in *Rose v Rose* – have tried hard enough to make the Act work as a whole.

### **Making the Act work**

I wonder whether in future cases it may be necessary to work a little harder at trying to make sense of the Act as a whole than was necessary in *Rose v Rose*. In some respects, that was an easy case of contribution because the wife had earned income which was important to the retention of the separate farm properties and was significant in its own terms.<sup>15</sup> In other cases where contribution is less readily quantifiable, it

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<sup>13</sup> Property (Relationships) Act 1976, s 4.

<sup>14</sup> See *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 270; *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 676.

<sup>15</sup> *Rose v Rose*, above n 2, at [44] and [50].

may be necessary to look further to the scheme and overall purpose of the Act if the end of just division is to be met in a particular case.

The purposes of the Act contained in s 1M are three:

(a) to reform the law relating to the property of married couples and civil union couples and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

The “principles” provided for in s 1N are “to guide the achievement of the purpose of this Act”:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

In *M v B*<sup>16</sup> the Court of Appeal was cautious about s 1M and 1N. Robertson J did not accept that the purposes and principles in s 1N and s 1M provided the court with “a generalised mandate which can avoid or obscure the structural framework which Parliament adopted”.<sup>17</sup> He considered that “[i]f a court, at the end of each relationship property case, is going to enter into a topping-up or discounting exercise in the name of being just, then parties and their advisers will not have

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<sup>16</sup> *M v B* [2006] 3 NZLR 660 (CA).

<sup>17</sup> *Ibid*, at [33].

confidence as to the outcome of litigation".<sup>18</sup> I have some doubts about how far this approach is available after the 2001 amendments, doubts shared by Hammond J in *M v B*<sup>19</sup> although there are statements supportive of the Robertson J view in *Rose v Rose*.<sup>20</sup>

### **The Act's internal consistency**

Subsections 9A(1) and (2) have been criticised as inconsistent with the philosophy of the 1976 Act in important respects.<sup>21</sup> In particular, it is suggested they undermine the concept of separate property, and reintroduce a role for wide discretion in respect of division of property under s 9A(2) (contrary to the rule-based approach consciously brought in with the 1976 Act).<sup>22</sup> It is also said that the courts are left without effective direction in the exercise of that discretion because, unlike the division of other property, s 9A(2) is concerned with division according to contribution not to the partnership but to the particular asset.<sup>23</sup> This was a criticism voiced by the Supreme Court in *Rose v Rose*:<sup>24</sup>

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

Briggs and Peart also criticise the disparity in result between s 9A(1) and s (2): if the gain is attributable in part to the application of separate property, the gain becomes relationship property and is shared equally; if the gain is attributable in part to the actions of the non-owning spouse, the gain is divided according to contribution.<sup>25</sup>

These criticisms may perhaps be overstated. The policy in the separation of outcome between ss 9A(1) and (2) seems to be that the application of relationship property causative of increase in value is

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<sup>18</sup> Ibid, at [36].

<sup>19</sup> Ibid, at [227].

<sup>20</sup> See, for example, *Rose v Rose*, above n 2, at [46].

<sup>21</sup> Briggs and Peart, above n 3, at 18–19.

<sup>22</sup> Ibid, at 18.

<sup>23</sup> Ibid.

<sup>24</sup> *Rose v Rose*, above n 2, at [46].

<sup>25</sup> Briggs and Peart, above n 3, at 14–15.

treated as a form of intermingling (similar to that provided for in s 10). The policy in respect of direct and indirect contributions (a vexed and much litigated question under the original s 9(3) in the 1976 Act, which the courts had been reluctant to apply especially in relation to family farms unless the contribution was tangible and measurable in money or money's worth), was to recognise indirect contributions, in reform of the law. I think it is important to note that s 9A(2) is not a discretionary remedy. The Act requires division according to contribution to value; a judgment, not a discretion. This last is a different concept than is applied in the Act as a whole, which looks to contribution to the domestic partnership and it is difficult to know how the contribution provisions relating to the relationship are to be used in this context. And it is true that there is a high risk that the "hypnotic influence of money" will skew the assessment of contribution without care.<sup>26</sup> But the legislative tools are there. And if the Act cannot be made to work in the spirit intended, the fault will be that of the judges.

### **A more coherent approach to causation in the relationship property context**

A particular difficulty with the provisions dealing with the gain in value of separate property in a relationship has been causation. Family farms and businesses have always caused particular difficulty in relation to issues of causation, both in the application of the former s 9(3) and in the application of its successor provision, s 9A (the section in issue in *Rose v Rose*). The cases on s 9(3) required proof of direct causality between the non-owner spouse's actions or application of matrimonial property and the increase in value. That link is maintained in application of s 9A.

In *Hartley v Hartley*, Somers J expressed the view (not explicitly joined in by other members of the Court and arguably obiter) that "attributable" meant "owing to or produced by" so that increase in value *before* the application of matrimonial property (or spousal contribution) was excluded from the gain available for division.<sup>27</sup> The continued application of *Hartley* was assumed in *Rose v Rose*<sup>28</sup> and seems to have been the reason why the wife's claim in respect of Cloverlea, the property with which she had the longest association, was put forward on the basis of contribution, rather than the application of relationship property (which occurred at a later stage). Whether s 9A is limited to increases in value *after* contribution or application of separate property may require further

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<sup>26</sup> *Reid v Reid* [1979] 1 NZLR 572 (CA) at 581 per Woodhouse J.

<sup>27</sup> *Hartley v Hartley* [1986] 2 NZLR 64 (CA) at 75.

<sup>28</sup> See *Rose v Rose*, above n 2, at [29].

consideration in a case where it arises on the contention of the parties, a matter I discuss further shortly.

Under the former s 9(3) indirect actions of the non-owner spouse were treated as insufficient to establish a causal link with increase in value. Thus, in *Palmer v Palmer*,<sup>29</sup> the wife's domestic contribution was held too indirect to be causative of increase in value of the shares in the husband's company. In *Walsh v Walsh*,<sup>30</sup> *Cross v Cross*<sup>31</sup> and *French v French*<sup>32</sup> it was held that the non-owning spouse had not shown that her work on the farm had increased its value. Cooke P in *French v French* said that the wife's work was "no more creative than that of a farm labourer" and that her efforts had not "significantly enhanced the assets".<sup>33</sup> The Court of Appeal was more comfortable with treating the farm work of a wife as "sustenance" of separate property under s 17, paving the way for the payment of compensation as a matter of discretion, instead of treating the increase as matrimonial property under s 9(3) (in respect of which there would be equal sharing under s 15 unless the owner's contribution to the marriage partnership was clearly greater).<sup>34</sup>

In 1997 the Court of Appeal in *Hight v Hight*<sup>35</sup> adhered to the causative approach taken in *French v French*, over the dissent of Thomas J, saying that the wife's contribution would have to take the form of something tangible, such as construction of new improvements, to justify application of s 9(3). Although in *Rose v Rose* the Supreme Court continued to require the non-owning spouse to prove that the increase in value was attributable to his or her actions, it at least departed from the standard of "clear and appreciable" contribution used in earlier cases such as *Walsh* and *Cross* and allowed that any impact beyond the trivial would be sufficient.

The 2001 amendments meant that indirect contributions were required to be taken into account, pensioning off the notion that contribution had to be tangible. In *Rose v Rose* it was recognised that the new subsection 9A(2) was intended to overcome the problem that the actions of the non-owner spouse could be considered too remote from any increase in the value of separate property where there was no direct physical connection between the activity and the increase in value.<sup>36</sup>

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<sup>29</sup> *Palmer v Palmer* (1982) 5 MPC 116 (HC).

<sup>30</sup> *Walsh v Walsh* (1984) 3 NZFLR 23 (CA).

<sup>31</sup> *Cross v Cross* (1984) 2 NZFLR 433 (CA).

<sup>32</sup> *French v French* [1988] 1 NZLR 62 (CA).

<sup>33</sup> *Ibid*, at 66.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Hight v Hight* [1997] 3 NZLR 396 (CA) at 408–409.

<sup>36</sup> *Rose v Rose*, above n 2, at [44].

It follows that an increase in value is divisible between the parties unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way. That may be the situation in the case of a purely passive investment but, with an asset like a farm or other business in which the owning spouse works, it will often be likely that some conduct of the non-owning spouse will have had some direct or indirect influence on any increase in value ... By her attentions to the household and the children and by defraying a significant proportion of the family's domestic expenses by means of her earnings from employment, Mrs Rose enabled her husband to spend very long hours on the affairs of the partnership and allowed him to moderate his drawings so that more labour and more money ... was available to the partners ... If it had not been for her financial contribution produced by working off the farm, it is very likely all of Cloverlea would have been sold and the opportunity of later developing the vineyard would not have existed.

The Supreme Court agreed with the Court of Appeal's division of the increase in value in respect of Cloverlea (40% to the wife and 60% to the husband) because of the husband's contributions in the acquisition of the land (and allowing him credit for the inflation and the general increase in the value of viticulture land over the period of the wife's contributions).<sup>37</sup>

Briggs and Peart have questioned the Supreme Court's adoption of a low, and largely impressionistic, threshold for acceptance of contribution to value. They suggest that the Court effectively starts with a presumption of contribution, at least in the case of the sort of division of functions within the Rose marriage, if gains have been more than would be expected from a passive investment. It is said that in *Rose v Rose* the Supreme Court presumes that an increase in value is relationship property "unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way", as in the case of a purely passive investment.<sup>38</sup> It is suggested that this appears to remove the former onus on the non-owner to prove actions and their direct or indirect causal connection to the increase in value and puts the boot "on the other foot".<sup>39</sup>

It will be up to the owner to provide evidence that the increase in value is unrelated to the non-owner's actions, for example by showing that the increase is solely or almost entirely due to inflation or market forces.

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<sup>37</sup> *Rose v Rose*, above n 2, at [51].

<sup>38</sup> Briggs and Peart, above n 3, at 16, citing from *Rose v Rose*, above n 2, at [44].

<sup>39</sup> *Ibid.*

It is the case that in *Rose v Rose* the impression is given that the contribution of the owning spouse to gain above that which can be expected of a passive investment must be demonstrated. Without demonstrated additional contribution, it may not be difficult to infer that the non-owning spouse's contribution which has freed up effort that would otherwise be gained for the partnership is equal. I do not see this as a legal presumption. But I do think it is an available inference on the facts, at least in the case of the joint efforts in the marriage undertaken by Mr and Mrs Rose. Nor do I think assessing the facts in this way is to undermine the Act's policy in separate property. It recognises that, within this partnership, the opportunity for gain from separate property was an opportunity created by the division of responsibilities and the management of expectations between the partners, as will very often be the case. That seems to me to be an available view of the facts based on common experience.

That is not to say there is not help to be obtained from the policies and scheme of the Act in considering what may amount to an indirect contribution and how it may cause an increase in value of separate property. The insistence in the 2001 reforms that indirect contribution may contribute to the value of separate assets requires a more contextual reading of s 9A(2), which may be critical in a case where the non-owning partner cannot point to the financial contribution made by Mrs Rose.

In *Rose v Rose*, the Supreme Court, adhering to the view that causal connection with increase in value had to be established, suggested that little help in the application of s 9A(2) was to be obtained from the s 18 identification of "contribution" to the partnership and, given that division was to be in accordance with contribution to the increase in value, from the purpose and principles described in ss 1M and 1N, introduced into the Act in 2001.<sup>40</sup> It may be that in *Rose v Rose* some of the statements may be too definite on this point.

It seems to me that "indirect" contribution to value must be assessed in the context of the Act as a whole and that ss 1M and 1N and s 18 do bear on what is indirect contribution, although it must be one capable of adding value to separate property. It seems appropriate to look to the forms of contribution to the partnership identified in s 18 as guides for the manner in which indirect contribution may be made.

Thus, the forgoing of a higher standard of living than would otherwise have been available, or the giving of assistance to the partner that aids

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<sup>40</sup> *Rose v Rose*, above n 2, at [46].

the owning spouse in the carrying on of his occupation or business, if it has an indirect impact on the increase in value of separate property (because for example the labour of the owning spouse can be applied to building up the separate assets), is properly subject to s 9A(2). Relevant too is the purpose that relationships are ones between equals who make equal contribution and the principle that all forms of contribution to the partnership are to be treated as equal. The scheme of the Act recognises the interconnectedness of effort within the partnership. Where it enables one spouse to obtain gains from separate property, the Act requires such gain to be divided according to contribution.

It would be inconsistent with the Act as a whole for that contribution to be assessed only in terms of contribution in money's worth. The concept of indirect contribution necessarily imports a judgment based on all the circumstances, as a matter of substantive outcome, because the forms of contribution cannot be exactly quantified. And, in an Act that has a policy of achieving outcomes that are "just",<sup>41</sup> it does not seem right to leave out a concern to achieve a just division under s 9A(2). It is therefore inevitable that an assessment be in part impressionistic. The forms of contribution are not susceptible to exact comparison. Such approach is also justified by the principle that resolution of questions about relationship property must be as inexpensive, simple, and speedy as is consistent with justice. The Courts are right to avoid requiring the parties to provide the sort of evidence which is disproportionate to the value at stake (a point made in New Zealand in *M v B*,<sup>42</sup> and in the United Kingdom in *Miller v Miller*).<sup>43</sup>

A more relaxed view of causation of increase in value may leave the award of compensation for increased share for sustenance of separate property under s 17 to apply principally in those cases where property has not increased in value but its retention and maintenance has been assisted by the efforts of the non-owning spouse. The division under s 9A(2), by contrast, aims not to compensate for effort, but to recognise an entitlement to property through contribution to the gain in separate property.

### **The correct approach to application of relationship property or contribution**

I have suggested that in an appropriate case it may be necessary to reconsider whether it is only gain from the date of first application of relationship property or other contribution that comes within the gain

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<sup>41</sup> Property (Relationships) Act 1976, s 1M(c).

<sup>42</sup> *M v B*, above n 16, at [167].

<sup>43</sup> *Miller v Miller* [2006] 2 AC 618 (HL) at [26].

divided under s 9A(1) or 9A(2), as reliance on *Hartley* suggests. The point may not be of practical significance in application of s 9A(2) because of the requirement that division of the gain is according to the respective contributions of the spouses to it (because a lift in value shown to result from other reasons than can be attributable to the contribution of the non-owning spouse will not count). But the question of timing is of considerable practical importance in the application of s 9A(1).

In *Rose v Rose*, for example, the application of relationship property (the partnership assets applied in the development of Cloverlea) came at a relatively late stage in the marriage. The wife's contributions, by contrast, had begun with her marriage, more than 20 years before.<sup>44</sup> She received 40% of the increase in value of the property over the course of the marriage under s 9A(2).<sup>45</sup> The wife would have received 50% if the gain had been treated as relationship property under s 9A(1), but on the approach of Somers J in *Hartley v Hartley* the period of gain would have been from the first application of relationship property, a matter of a few years only before the marriage ended.

It may also be necessary to question further the view that the increase in value shared is the increase after the first application of matrimonial property or the actions of the non-owning spouse. This was accepted by the Supreme Court, in application of *Hight v Hight* itself, despite Somers J in *Hartley*.<sup>46</sup> The approach was not challenged by the wife (and explains her reliance on s 9A(2) in relation to Cloverlea, although the same conditions of application of relationship property – the partnership assets – were present as in relation to Poplars).

As indicated, I think it may be necessary to reconsider this approach. There is no direct textual support for it in s 9A(1) and, indeed, the reference to “in whole or in part” may be thought to be against it. It may lead to anomalous results if a non-trivial application of relationship property is made at an early stage or at any rate before significant gain in value unrelated to the application of relationship property. On the other hand, a strictly causative inquiry may justify the *Hartley* approach. I do not however think the matter is as self-evident as it has been treated. And if the policy is based on a notion like intermingling, it may not be conceptually sound.

### **Entitlement to share in property and claims to compensation**

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<sup>44</sup> *Rose v Rose*, above n 2, at [10].

<sup>45</sup> *Ibid*, at [51].

<sup>46</sup> *Ibid*, at [29].

The significant reforms introduced in 2001 responded to widespread recognition that equal division of relationship property, even with share in the gain to separate property where the non-owning spouse contributes to it or it is achieved with application of relationship property, may not result in just outcomes. Two aspects were of particular concern: the recognition that the division of responsibilities within the partnership may have adversely impacted on the earning capacity of one of the partners, and the recognition that such detriment might have been in circumstances where a non-owning and disadvantaged partner had contributed to the increase in value of the separate property of the owning partner. Sections 15 and 15A were enacted to address this perceived unfairness. Some commentators have criticised this development as contrary to the policies of the Act because they introduce discretionary redistribution of property which cuts across the entitlement rules.<sup>47</sup> Other commentators have suggested that the combination of entitlements and compensation is imaginative and appropriate.<sup>48</sup>

Under ss 15 and 15A, the Court may, as the heading to these provisions makes clear, “make orders to redress economic disparities” through payment of lump sums or transfer of property. Both of these sections “overrid[e] sections 11 to 14A”.<sup>49</sup> These are the sections which provide for equal division of relationship property and establish a high threshold (“extraordinary circumstances that make equal sharing ... repugnant to justice”).<sup>50</sup> The scheme of the Act is arguably that the orders to redress economic disparity, where the conditions for such orders are met, are more important than equal sharing, at the end of the day.

This scheme may have been the trade off for not placing an economic value on future earnings, as had been discussed but rejected in the 1988 Working Group which preceded the 2001 reforms.<sup>51</sup> The limitation of compensation to the existing assets means that it is not inconsistent with a principle of clean break and remains a property division (which looks to the future economic position of the parties) rather than an attempt to distribute future earnings.

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<sup>47</sup> Bill Atkin “The Legal World of Unmarried Couples – Does the New Zealand Approach Shed Any Light on the Future?” (13th World Conference of the International Society of Family Law, Vienna, 2008); see also Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2008) 39 VUWLR 813 at 828.

<sup>48</sup> Joanna Miles “Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976” [2003] NZ L Rev 535 at 567.

<sup>49</sup> Property (Relationships) Act 1976, subs 15(4) and 15A(4).

<sup>50</sup> Ibid, subs 13(1).

<sup>51</sup> “Report of the Working Group on Matrimonial Property and Family Protection” (Department of Justice, Wellington, 1988) [“Report of the Working Group”] at 8–9.

Wild J's view in *Rose v Rose* that the conditions for exercise of the discretion under s 15A mirror those in s 9A(2)<sup>52</sup> has been criticised as failing to appreciate that it is the actions of the owning partner during the partnership that must have contributed to the value of separate property, not the actions of the non-owning partner.<sup>53</sup> It is the case however that there may be some overlap in that indirect contributions of the non-owning spouse may have freed the owning spouse to increase the value of separate property. The point that is of importance is that recourse to s 15A may be maintained in parallel with an application under s 9A(2). The claims are not exclusive of each other.

The s 9A(2) claim is one of entitlement (with the share to be received however a matter for assessment by reference to the contribution of the non-owning partner to the increase in value of separate property).<sup>54</sup> The s 15A claim, by contrast, is one for discretionary relief to provide compensation to redress economic disparities. Like the claim under s 15, also for discretionary relief, jurisdiction to make an order depends on demonstration that there will be significant disparity in income and living standards between the spouses after their separation because of the effects of the division of functions within the marriage.

The difference between the two provisions is that under s 15 the limit to the redistribution of property by way of compensation is the relationship property, whereas under s 15A it can extend to the separate property if gain in the value of the property resulted from the effort of the owning partner while the couple lived together. The freedom to make money on his or her own account is therefore itself recognised as a division of function within the marriage which it is proper to recognise by making what would otherwise be separate property available for the purposes of compensation.

To date, applications under s 15A have met with little success. Nor have lump sum payments under s 15 been generous, even when the amount of relationship property is significant. And there have been attempts from time to time to make invidious inquiries about whether the disadvantaged spouse chose not to work or wanted to play tennis. (As Baroness Hale remarked in *Miller*, no one ever seems to complain that the earning spouse enjoyed his or her work.)<sup>55</sup>

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<sup>52</sup> *Rose v Rose* HC Blenheim CIV 2005-406-155, 14 October 2005 at [94].

<sup>53</sup> Nicola Peart (ed) *Brookers Family Law – Family Property* (looseleaf ed, Brookers) at [PR15A.03].

<sup>54</sup> Joanna Miles “Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZULR 268 at 292.

<sup>55</sup> *Miller v Miller*, above n 43, at [154].

I am not sure why these provisions seem to be regarded with disfavour. It may be that if the courts are not willing to use these provisions, that the pressure for further legislative reform (perhaps through a community of surplus regime attaching to separate property – such as was urged by one member of the 1988 Working Party)<sup>56</sup> will build up. It is likely that, lacking it, the courts will continue to be faced with claims for recognition of earning capacity enhanced during the marriage, as a species of property. It seems to me that we should first make conscientious use of the powers Parliament has provided, in the spirit intended.

## Conclusion

It would be a pity if the solutions arrived at by Parliament in the 2001 amendments are not given a fair chance. No solution will ever yield perfect justice. But it does seem to me that the combination of entitlement and compensation (limited by the existing assets) provides opportunity to address most injustice. It is true that the compensatory payments introduce more discretion. But the discretion is not imposed on the proper area of entitlement. And once that fails to yield substantive justice, there is no real option to discretion. And although there is some conceptual awkwardness (as the 1988 Working Group thought in considering a combined entitlement and compensatory regime) in using property division to serve the ends of future needs, the disabling effects of relationship division of responsibility on the non-earning spouse and the corresponding asset represented by the income-earning capacity of the earning spouse, enhanced during marriage, are rightly compensated by departure from equal sharing rather than maintenance, allowing the partner with the greater earning capacity or the income-generating separate property to rebuild later. *Rose v Rose* isn't any sort of destination. But it is a step along the way to achieving just outcomes in the separation of property following the breakdown of a relationship.

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<sup>56</sup> “Report of the Working Group”, above n 51, at 15–16.