# *Judicial attitudes to family property*

Rt Hon Justice Hardie Boys*

*In this article, Justice Hardie Boys explores a number of cases decided under the Matrimonial Property Act 1976, many of them at Court of Appeal level. These include cases on extraordinary circumstances, property located overseas, Maori land, and professional qualifications. He wonders whether a broader statement of principles from Parliament and broader discretion might not have done better justice. He also examines case law on de facto relationships and advances certain propositions as representing the position now reached by the courts.*

The title given to this session may suggest that I am to embark on an analysis of attitudes displayed by the sixty judges of the High Court and the Court of Appeal and the numerous judges of the District Courts who have held office since the Matrimonial Property Act 1976 came into force. Or perhaps that I would be even more expansive and go back to the time when family property matters first began to trouble the judicial mindset. But the brief I was given indicated that I could be less ambitious, and give a personal rather than a collegiate view (if there be such a thing) and that I should concentrate on a few aspects of the Matrimonial Property Act, and on the position on the collapse of a de facto relationship. Thus my paper has quite a narrow focus.

Eleven years ago, Sir Robin Cooke described the Matrimonial Property Act 1976 as "admirable in concept but difficult in some of its details"; with the result that its application had to be worked out by the judiciary partly by a process of trial and error.[1] He was referring to a process of trial and error in the High Court rather than in the Court of Appeal, where of course the errors are all put right. But it must be acknowledged that the process occurs even there: see *Dahya* v *Dahya* [2], where *Brown* v *Brown*[3] was overruled. This is not to say that difficulties do not remain. Yet it does seem that the Act so far as it goes is working satisfactorily. There was an initial settling in process, in which some judges shared with some sectors of the community, particularly farmers, a sense almost of outrage at its consequences. But for some time now the Act's principles have been generally understood and applied in the multitude of situations which arise. An indication of this is that the great majority of disputes are dealt with in the Family Courts, and very few reach the Court of Appeal. In the three years 1991-1993 we dealt with only nine substantive appeals under the 1976 Act and one under the 1963 Act; and so far this year there has been only one.

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1 *Walker* v *Walker* [1983] NZLR 560, 564.

2 [1991] 2 NZLR 150.

3 [1984] 1 NZLR 374.

Moreover, in contrast with judicial reaction to the 1963 Act (demonstrated in the Court of Appeal in *E* v *E*[4] and *Haldane* v *Haldane)*[5] there has overall been no lack of liberality, of appreciation of the spirit of the Act, in the approach the courts have taken. It is right to acknowledge the leadership given in particular by Sir Owen Woodhouse, Sir Robin Cooke and Sir Ivor Richardson in, for example, the landmark cases of 1979.[6]

Many of the difficulties to which Sir Robin Cooke was referring were due to the perhaps understandable legislative desire - becoming more and more apparent these days - to spell out in great detail how the courts are to go about their task, rather than entrust the judges with the exercise of discretion within broadly stated principles. For example the categorisation of matrimonial property (section 8) and of contributions (section 18) are not always easy, while I for one find section 20, innocuously headed "Matrimonial property and creditors" a virtual impossibility, and so remain grateful to Richardson J, with whom I sat in *Wilson* v *Wilson,*[7] for explaining much of it prior to and then in his judgment. The detail in the Act has resulted in many fine distinctions being argued and determined, and there is now a considerable body of case law on the Act; for its size, I wonder whether it has not engendered more than any other statute. And I wonder too whether it was all really necessary. Would a broader statement of principle and a broader discretion have done better justice?

Despite the desire to particularise, the legislature has of course left areas of discretion which have gratefully been availed of: prime examples are the section 2(2) discretion as to the date of valuation, utilised in *Meikle* v *Meikle*;[8] and the section 9(4) discretion as to after-acquired property, about which I shall have more to say. No judge wishes to do an injustice, unless statute or precedent leave no option. The long title to the Act encourages the search for other options, speaking as it does of "a just division" of matrimonial property. But one's perception of justice is a rather individual matter and so there will always be differences of opinion; as to whether (to take two other important discretions) there are extraordinary circumstances in terms of section 14, rendering the equal sharing of the matrimonial home and family chattels repugnant to justice; or whether the contribution of one spouse to the marriage partnership has been clearly greater than that of the other so as to displace the presumption of equal sharing of the balance of matrimonial property under section 15.

The Court of Appeal has been very insistent that both these sections impose a rigorous test: one need look no further than the 1979 cases already mentioned. A recent affirmation in relation to section 14 is in *Wilson* v *Wilson,*[9] where it was observed that the fact that one spouse may have provided the home and most of the chattels, while the

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4 [1971] NZLR 859.

5 [1975] 1 NZLR 672.

6 *Martin* v *Martin* [1979] 1 NZLR 97, *Dalton* v *Dalton* [1979] 1 NZLR 113, *Williams* v *Williams* [1979] 1 NZLR 122, *Barton* v *Barton* [1979] 1 NZLR 130, *Meikle* v *Meikle* [1979] 137 and *Reid* v *Reid* [1979] 1 NZLR 572.

7 [1991] 1 NZLR 687.

8 Above n 6.

9 [1991] 1 NZLR 687.

other may have brought to the marriage very little in the way of material things, cannot be regarded as extraordinary. On the other hand, two 1993 cases show that while the test remains stringent, there is no restriction on the range of circumstances that may be taken into account. The first of the cases is *Joseph* v *Johansen.*[10] The husband was an alcoholic and as a result contributed little financially or in physical effort; but that would not of itself have been enough to meet the section 14 test. Additional factors, which brought the case within the section, were the wife's loyalty and all she was called on to do to maintain their life together in the face of his condition. Two points may be noted. The Court did not purport to apply (or misapply) section 18(3) (wrongful conduct): it properly treated alcoholism as an illness, the decision thus being consistent with *Park* v *Park.*[11] And despite the firm distinction that was drawn between extraordinary circumstances and disparate contributions, there are observations suggesting that this was one of those cases where a truly gross disparity in contribution will on its own satisfy the test.

The second case is *Pickering* v *Pickering.*[12] The husband was a solicitor who had misappropriated clients' funds. Following disclosure, and before he went to jail, the family home was sold and with half the equity another house was bought in the wife's name, he acknowledging in writing that it was her separate property. They divided equally the chattels, which were of roughly equivalent value to the house. All else went in expenses resulting from the offending. Prison could not have been entirely effective, for after his release he claimed a half share in the house. The claim failed. The Court held that section 14 applied. Criminal offending of that kind in that marriage (but apparently not in every marriage) was seen as an extraordinary circumstance; so too were its consequences for the marriage relationship, affecting both property and the functioning of the family. As the next step in the necessary reasoning, the Court held that repugnancy to justice was established by the de facto division of property that had been undertaken, and by the husband's acknowledgment that his share of the equity had gone in expenses due to his wrongdoing. It could perhaps be said that the decision goes contrary to section 18(3), which limits the relevance of misconduct to the determination of contributions and to the kind of order that should be made. That subsection was not mentioned in the judgment. Perhaps, despite the wide-ranging final part of the subsection introduced by a 1986 amendment, the whole is to be taken as referring only to the assessment of contributions, which is the subject matter of the remainder of the section. Or perhaps "misconduct" is to be given a meaning limited to wrongdoing within the family. Or it may be sufficient to treat the case as essentially based on the division arrangements the parties had made themselves, remembering always that the husband was a lawyer, and therefore presumed to know what he was doing. Whatever the explanation, would it not be desirable for the exact scope of the final part of section 18(3) to be clarified?

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10 (1993) 10 FRNZ 302.
11 [1980] 2 NZLR 278.
12 [1994] NZFLR 201.

A different, and unsuccessful, attempt to do justice in relation to the matrimonial home occurred in *Samarawickrema* v *Samarawickrema*.[13] The parties were married in Sri Lanka, and lived there for some years in a substantial building, intended eventually to be a tourist hotel, erected on land owned by the husband before the marriage. The work was begun during the marriage, much of it being done by the husband, but with indirect assistance from the wife. Local assessments of its value at the time of separation ranged from $NZ77,800 to $NZ331,000. Before they separated, they came to New Zealand and bought a house here. The dispute was whether that house should be divided equally between them under section 11. It was not known whether under Sri Lankan law the wife had any claim to the property there. In the Family Court, upheld by the High Court, the perceived injustice of an equal division was avoided by vesting in the wife the home and other assets to a value of $77,800, the lowest of the values put on the Sri Lankan property, and directing her to sign a renunciation of any claim to that property to the extent of that sum. This was a seemingly sensible and just solution; but it had the obvious flaw that it assumed the wife was renouncing an interest in Sri Lanka of the same value as the husband's section 11 entitlement in New Zealand. The case could readily have been disposed of in the Court of Appeal by pointing out the flaw, and applying section 11, for no question of just division arises under that section except where section 14 can be invoked. The Family Court Judge had gone on to hold that the section 14 test was not satisfied, and that point was not pursued on appeal. But much argument focused on section 7(1) and it is here that the interest of the case lies.

Section 7(1)(a) declares that the Act applies to immovables which are situated in New Zealand. This, it is assumed, means that it does not apply to immovables situated outside New Zealand. In *Walker* v *Walker*[14] the husband, after divorce, transferred a half share in the only item of matrimonial property, a house in New Zealand, to his second wife in exchange for a half share in her house in England. The issue before the Court was whether the first wife was entitled to a half or only a quarter share in the New Zealand house. In the Court of Appeal, it was held that he was entitled to a half. It had been argued that this result could be achieved by treating the share in the English house as matrimonial property under section 8(f) (income or gains from matrimonial property) or section 9(4) (the discretion to treat after-acquired property as matrimonial property). But the majority (Cooke P, Sir Thaddeus McCarthy) held that this really amounted to applying the Act to a foreign immovable, treating it as existing matrimonial property available for division; and section 7(1) forbade that. They dealt with the case under sections 2(3) and 33(3), making an order that gave effect to the position at the time of separation. However Richardson J, who thought that approach impermissible, considered that section 7(1) did not force the Court to shut its eyes to the existence of property overseas. Where one spouse had acquired it from matrimonial property in New Zealand, the Court is entitled to recognise its existence and character when determining what order to make under section 8(f) or section 9(4) in relation to property remaining in New Zealand.

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13 [1994] NZFLR 913.

14 Above n 1.

In *Samarawickrema* the lower Court had taken the view that the Sri Lankan property could be taken into account provided it were not classified under the Act and no order were made affecting it directly or indirectly. But in the Court of Appeal it was pointed out that the order did in fact treat the Sri Lankan property as matrimonial property; and that in accordance with the majority judgment in *Walker* that was impermissible. For to classify a foreign immovable as matrimonial or separate property is to apply the Act to it, contrary to section 7(1).

The result may well have been unjust to the wife. The lack of information as to the law of Sri Lanka meant that any other result may have been unjust to the husband; but should the Court have been concerned about that? Moreover, where the foreign law is or can be known, why should the Court not have regard to the realities? Take for example *Enright* v *Fox*,[15] where a section 16 adjustment was sought because the wife at the time of the marriage owned her own home in Queensland, but came to live in the husband's home in New Zealand. Although for other reasons a section 16 adjustment was found to be unjustified, it was held that the existence of the Queensland property, and any dealing with it, could properly be taken into account for the purposes of section 16 and, indeed, of section 14. The point as to section 16, at least, was expressly left open in *Samarawickrema*. Take too *Lappos* v *Lappos*,[16] where the matrimonial home at the time of separation was in Australia and was owned by the wife but there was another house in New Zealand, which once had been the matrimonial home. The judge vested the latter in the husband on condition that he made no claim to the Australian property. In *Samarawickrema* it was said that that went too far because it purported to control the husband's rights in a foreign immovable. It might also be said that it assumed he had such rights; if he had none, was not the wife being wrongly deprived of her rights in the New Zealand property?

There are difficulties with either view of section 7(1)(a), but it may be that that favoured by the majority in *Walker* and now followed in *Samarawickrema*, is the more likely to produce injustice. With our increasingly mobile society, the matter may deserve further attention.

May I now turn to a much broader issue, to what seems to have become a fundamental principle of matrimonial law, the "clean break" principle. It is a principle that finds expression as to spousal maintenance in section 64(2) of the Family Proceedings Act 1980, and as to matrimonial property in the court's approach to such matters as the sale of the matrimonial home and the valuation of assets such as life insurance policies and superannuation entitlements: see for example *Haldane* v *Haldane*.[17] As Casey J observed in the High Court in *Ford* v *Ford*,[18] the overall policy of the Act is to enable the parties to draw a line across the past and make a fresh start as soon as possible after their marriage has ended. That is doubtless most desirable. But does the Act give the parties an equally fair start?

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15 (1989) 5 NZFLR 455.
16 [1990] NZFLR 223.
17 [1981] 1 NZLR 554.
18 (1984) 3 NZFLR 317, 319.

The judgments of the Court of Appeal in *Reid* v *Reid*[19] gave effect to the Act's philosophy concerning contribution. They recognised that the spouse who stays at home can contribute as much to the marriage as the one who goes out to work; so that in the usual case they should share equally in the physical assets that have resulted from their joint and several efforts. It could perhaps be argued that even so, the courts are too ready to acknowledge that a case is unusual, justifying an unequal sharing. Are we still too mesmerised by financial success? *Reid* is itself a case in point. The parties had virtually nothing when they married. Because the husband "was unusually successful in finding ways of harnessing his considerable latent talent" it was held that there should be an unequal division of "balance" matrimonial property which, after 21 years of marriage, was worth some $575,000 (1976 currency). The majority favoured 60:40: the third member of the Court 75:25. Some questions may be asked. Did the husband in this case really make a greater contribution to the marriage partnership than one who also uses his talents to the full but because they are modest is able to accumulate very little "balance" matrimonial property? Secondly, what talents did the wife have, and what opportunity did he have to use them? Section 18 recognises positive input, but not sacrifices (other than the foregoing of a higher standard of living). We all know of women of great ability who have devoted their lives to home and family. Is equality of division of the home and the presumption of equality in respect of other property enough? Consider where it leaves a wife when her successful husband finds domesticity a drag and goes off with a glamorous younger woman. He has made his mark in life, and built the basis of his prosperity, and while the need to share assets is inconvenient, his earning capacity is undiminished. The wife still has the children, and knows that once they are off her hands she will have to start from scratch in the workforce. Her share of the assets will not help her then, for the home will probably have to be sold and all that she receives may be needed for another.

There is no easy solution to this problem, particularly in view of the limits of spousal maintenance. But is there at least a case for the equal sharing of all matrimonial property, irrespective of contribution, perhaps not at once, but after the marriage has lasted a certain number of years; yet still with exceptions of the kind now recognised by section 14 and section 17?

A related issue is where one spouse provides the income and perhaps most of the domestic services while the other concentrates on obtaining a training or qualification; but they part company before any significant financial benefit accrues. One thus retains all the benefit of the other's sacrifice, while that other's sacrifice leaves him or (usually) her far behind in earning potential.

The Act recognises the problem to a limited extent, for section 18(1) includes as a contribution to the marriage partnership the giving of assistance and support to enable the acquisition of qualifications, as well as the foregoing of a higher standard of living than would otherwise have been available: section 18(1)(h)(i). But that is only a very partial solution, as is demonstrated by what must be a typical case, that of a doctor,

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19 Above n 6.

*Godfrey* v *Godfrey*.[20] That couple had only the most modest assets at separation, but the doctor husband was quickly able to earn a substantial income and acquire substantial assets. The wife argued that his qualifications were matrimonial property, but Casey J did not agree, holding that the Act deals only with tangible property rights, or those on which a money value can be placed. He declined to use his discretion under section 9(4), the after-acquired property provision, thinking that to do so would be to extend the operation of the Act throughout the former spouse's working life. He was not however prepared to say that section 9(4) could never be resorted to in such situations. In *Coombes* v *Heycoop*[21] Judge Keane found a solution in sections 14 and 15, holding it to be an extraordinary circumstance that "The marriage ceased before the respondent was able to obtain any benefit from that investment, and the applicant now has a personal attribute of enduring commercial value made possible by the respondent's investment".[22]

Resort to section 14 may not often be possible and although section 15 may present fewer difficulties, there may still be the problem demonstrated by *Godfrey* that there are no available assets at the time of separation. As Judge Keane pointed out, the matter has been considered in courts in North America, but with no clear and satisfactory solution. There has been little support for treating a qualification as property, although in some cases the doctrine of unjust enrichment has been invoked. See too the articles by Mr Rupert Granville Glover.[23]

The most obvious difficulty in treating a qualification as property is to put a value on it; the out of pocket expenses incurred in the course of study would hardly be a fair measure; and on what future earnings basis could a court proceed? For this reason alone, legislative change seems unlikely. In a case where sections 14 and 15, in combination with section 18(1)(h)(i) do not adequately meet a case, section 9(4) seems the only hope. There is probably room for a more liberal approach than the judge was prepared to take in *Godfrey*. I am not sure that his worry is justified, for an order must be made once and for all, there is the limitation period fixed by section 24, and the court is unlikely to accept jurisdiction over property not yet in existence. There however is the nub of the problem; for in most cases by the time the case comes to court the assets of the erstwhile student are unlikely to be substantial enough for a truly compensatory order to be made.

Here perhaps we come to one of the real inadequacies of the Act: the inability to make a compensatory order otherwise than out of assets existing at the date of hearing. Sections 8(f) and 9(4) enable recourse to separate property where matrimonial property has been used in its acquisition, the latter perhaps going even further; and *Walker* v *Walker* shows that there can in some cases be a remedy where matrimonial property has

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20 (1979) 3 MPC 64.

21 (1992) 9 FRNZ 559.

22 Above n 21, 567-568.

23 "Professional Education as Matrimonial Property" [1983] NZLJ 180, and "A question of degree: A further look at professional education as matrimonial property" [1984] NZLJ 360.

been removed from the jurisdiction. But means such as these are ineffective where there is no property within the jurisdiction or where the property within the jurisdiction is insufficient for the purpose of compensation. The problem is much more extensive than the kind of case illustrated by *Walker* and *Godfrey*. Very often, matrimonial property is lost or dissipated by one spouse after separation, and nothing in the Act can be called in aid. In *Walker* [24] Richardson J gave a number of examples. Another, of a different kind, can be taken from *Brown* v *Brown*.[25] There, the husband and his brother farmed in partnership, each living in a separate house on the commonly owned property. The majority of the Court of Appeal held that the house in which the parties lived could not be a matrimonial home (and that the homestead provision (section 12) could not apply) because the wording of section 11(1) presupposes that the entire beneficial interest in the home rests in one or both of the spouses. Because there was no other matrimonial property, the wife after nine years of marriage, and rearing two children, obtained nothing. The reasoning that led to that most unjust conclusion was overruled in *Dahya* v *Dahya*.[26] But what if the farm had been owned by the brother's father? The problem will always be at its most acute when the parties do not own their own home. That they may have no other assets may be a circumstance which it is right that they should share. But if it is the fault of one of them, ought not the other, who has contributed to the marriage as fully as possible, be compensated?

It is of course easy to state a problem, but more difficult to be precise as to what the solution should be. In general terms, what is needed is the power to order the payment of money, perhaps by a fixed future date, perhaps by instalments over a set period, depending always on the circumstances. That would be contrary to the clean break principle; but should the principle prevail over the clear justice of a particular case? In any event there is precedent in what often has to be done in the case of life insurance or superannuation, where a deed providing for payment in the future may be required: see *Haldane* v *Haldane*.[27]

Let me turn briefly to a different topic. Section 6 declares that nothing in the Act applies to Maori land, as defined now in Te Ture Whenua Maori, or Maori Land, Act 1993. I do not know to what extent the general philosophy of the Matrimonial Property Act is compatible with tikanga Maori, Maori customary values and practices. But if it is - and the Act certainly applies to Maori with respect to other matrimonial assets - is it just that it should not apply to Maori land?

It is the clear policy of the Maori Land Act that Maori freehold land is to be retained in the hands of its owners, their whanau and their hapu; and there are provisions restricting the alienation of such land accordingly. If the vesting of matrimonial property, the home in particular, breaches this principle, it can do so only during the lifetime of the spouse concerned, for the restriction on alienation would apply thereafter. Moreover, vesting is not the only means of affording relief. There can be an order for

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24 Above n 1, 572.
25 [1984] 1 NZLR 374.
26 [1991] 2 NZLR 150.
27 [1981] 1 NZLR 554, 572 per Somer J.

sale or for the payment of money. I raise the matter because of a judgment recently delivered in the Court of Appeal, *Grace* v *Grace*.[28] Being unable to claim under the Matrimonial Property Act, the wife, in High Court proceedings, sought a half share in the husband's Maori land interest, which included the land on which their home stood. Alleging substantial contributions to the marriage and the family, she invoked the old alternatives of common intention of equal beneficial ownership or a resulting trust based on her contributions or a constructive trust based on unjust enrichment. But recognising the statutory policy with regard to Maori land, she sought monetary compensation and not vesting orders. The husband applied to have her claim struck out, contending that the Maori Land Court had exclusive jurisdiction. That contention was not sustained. The Maori Land Court is expressly given exclusive jurisdiction in certain matters; the concurrent jurisdiction of other courts is expressly recognised by a power to transfer proceedings from the Maori Land Court; and there is therefore no reason to think that the exclusive jurisdiction extends further than is actually provided.

I am not for the moment concerned with the jurisdictional question but with the more fundamental one, whether it is right that where Maori land is concerned a spouse should be denied the benefits of the Matrimonial Property Act, in particular its presumptions of equality and its liberal concepts of contributions, and be forced to rely on the law of trusts which, notwithstanding the way in which it has been developed since its inadequacies resulted in the first Matrimonial Property Act, is still likely to provide a less than adequate remedy. Cannot the Matrimonial Property Act be fitted into the scheme and objectives of the Maori Land Act?

I now turn to my second topic, which I suppose is one of the most lively contemporary issues in relation to family property: that of property in a de facto relationship. At an early, and perhaps more innocent, stage of my judicial career I wrote in *Hankinson* v *Kyle*[29] that if the principles of the Matrimonial Property Act are to be applied to de facto relationships, that must be a matter for the legislature; until it intervenes, property disputes between unmarried couples must be decided according to established principles of equity (by which I meant that of actual or inferred common intention enunciated in *Gissing v Gissing).*[30] There has been considerable evolution since then of what I called the established principles, but I think the basic proposition is still valid. The same view has twice recently been expressed by Cooke P, first in *Gillies* v *Keogh*,[31] and secondly in *Phillips* v *Phillips*.[32] The President's reference in the latter case to the possibility that in a strong case a long de facto union where the claimant's contributions had been particularly meritorious might for property sharing purposes be treated as the equivalent of a marriage, does not detract from the proposition.

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28 [1994] NZFLR 961.
29 (1982) 1 NZFLR 353.
30 [1971] AC 88.
31 [1989] 2 NZLR 327, 332.
32 [1993] 3 NZLR 159, 171.

By the evolution of established principles, I have three aspects in mind: the factual circumstances in which a remedy will be provided, the justification in law for providing a remedy, and the nature of the remedy itself. These aspects are not entirely severable, but the distinction between the second and third particularly may be important; a point made by Professor Charles Rickett in a note entitled "Causes of action and remedies - getting it clear!"[33] If there be a lack of clarity (of which I am not convinced), it has I think resulted from an observation of Cooke P in *Gillies* v *Keogh*:[34]

> Normally it makes no practical difference in the result whether one talks of constructive trusts, unjust enrichment, imputed common intention or estoppel. In deciding whether any of these are established it is necessary to take into account the same factors.

Professor Rickett points out that constructive trust is a remedy, the others are causes of action.

Thus far the remedy of constructive trust has I think been the only one accorded to a de facto partner; although entitlement to that remedy having been established, the court may be prepared to give effect to it by a monetary award: as for example in *Nash* v *Nash*.[35] The real point the President was making in *Gillies* v *Keogh* was that the foundation for the remedy can be expressed in the same way whatever the cause of action. He said: "Whatever legal label or rubric cases in this field are placed under, reasonable expectations in the light of the conduct of the parties are at the heart of the matter."[36] He went on to say that the imposition of a constructive trust to give effect to reasonable expectations is but an application of the equitable jurisdiction to interfere where the assertion of strict legal rights is found by the court to be unconscionable. Perhaps such an assertion is the primary cause of action. That seems the Australian approach.[37] The denial of reasonable expectations may amount to the same thing. It certainly seems to be developing in this country as a cause of action in its own right. Cooke P in *Gillies* v *Keogh* did not treat it as such. He thought it unnecessary to go beyond reasonable expectations because he saw that as fundamental to the various means by which courts in the Commonwealth have sought to counter unconscionable conduct. In other words, there was no need to specify any particular cause of action. Casey J and Bisson J did not dissent, although the former expressed concern lest the approach be applied too widely, into other than "conventional de facto situations". Richardson J however thought a more principled approach was required, which he found in estoppel, founded nonetheless on reasonable expectations. *Phillips* v *Phillips* followed the majority approach in *Gillies* v *Keogh*, while in *Nash* v *Nash* the Court increased an award based simply on an allegation of reasonable expectations without commenting on that basis. Need to clarify the cause of action may well arise when the court is asked to make a monetary award in circumstances where the remedy of constructive trust is not available for domestic services alone. In *Gillies* v *Keogh* Cooke P said that he saw no

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33 [1994] NZLJ 207.
34 Above n 31, 330.
35 [1994] NZFLR 921.
36 Above n 31, 331.
37 *Baumgartner* v *Baumgartner* (1987) 1 Fam LR 915.

reason not to award monetary compensation in appropriate cases, as the Canadian do.[38] But of course the Canadians approach these matters on the basis of unjust enrichment, and the question may arise whether the reasonable expectations approach can be equally accommodating. Thus far it has been formulated purely with a view to the remedy of constructive trust.

The formulation is perhaps not yet complete, but I think certain propositions are clear. The plaintiff must have contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly; and in all the circumstances the parties must be taken reasonably to have expected that the plaintiff would share in them as a result. By contributions to assets one is not referring to those contributions to a common household that are adequately compensated by the benefits the relationship itself confers. The contribution must manifestly exceed the benefits. Putting it in conventional estoppel terms, the plaintiff's contributions must have been to his or her detriment; or in Canadian terms they must have resulted by the end of the relationship in the enrichment of one to the juristically unjustified deprivation of the other. Further, the contributions need not be in money; they may be in services or in any other respect. But there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets. A claim to a constructive trust being a proprietary claim, the contributions must have been made to assets; not necessarily to particular assets, but certainly to the defendant's assets in general. The contributions may then be recognised by the imposition of a trust over a particular asset or particular assets.

That I think is as far as one can go at present, and some of my colleagues may think it too far. It is open to the criticism that it is all too subjective and uncertain, too dependent on the individual judge's assessment of what is reasonable. But unless and until Parliament is prepared to legislate, the community will simply have to tolerate in this, as in other areas, the idiosyncrasies of its judges.

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38 *Sorochan* v *Sorochan* (1986) 29 DLR (4th) 1, *Peter* v *Beblow* (1993) 101 DLR (4th) 621.