

Part F -
What should
happen when
equal sharing
does not lead
to equality?

Chapter 18 – Does section 15 achieve post-separation equality?

Introduction

- 18.1 Section 15 of the PRA provides that a court can order one partner to compensate the other when there is likely to be a significant difference in income and living standards post-separation, as a result of the division of functions within the relationship. Broadly speaking, section 15 seeks to address situations where the general rule of equal sharing does not lead to a just division of property. Our preliminary view is that section 15 has had limited success in achieving this objective.
- 18.2 In this chapter we review the history of section 15 and analyse how it has been applied by the courts, including how the courts determine the amount of compensation payable when a section 15 claim succeeds. We also identify issues with how section 15 operates.
- 18.3 In Chapter 19 we discuss three potential options for reform. Option 1 focuses on improving the operation of section 15. Option 2 looks at how the objective of section 15 could be achieved by changing other PRA rules. Option 3 is to combine section 15 compensation payments and maintenance payments into one regime of “financial reconciliation” payments.
- 18.4 At the time of writing, a decision of the Supreme Court on the operation of section 15 is pending.¹ This is the first time section 15 has come before the Supreme Court. The Court’s decision is likely to have implications for interpreting and applying section 15 but at this point we can only take the lower courts’ decisions into account in our discussion.

¹ Leave to appeal and cross-appeal was granted in *Scott v Williams* [2016] NZSC 149. The case was heard by the Supreme Court in March 2017.

Historical background

18.5 The concerns that led to the enactment of section 15 in 2001 go back to 1988, when a Working Group was established to review the Matrimonial Property Act 1976.² The Working Group looked at the “considerable topical concern” that *equal* division of matrimonial property had failed to secure an *equitable* result.³ The heart of the debate about equality and equity, the Working Group said, was “the economic consequence of current sex roles in our society.”⁴ It did not, however, “see matrimonial property law as a feasible vehicle for securing equality of outcome between the sexes when a marriage breaks down.”⁵

18.6 In 1996 the Court of Appeal acknowledged the limitations of the Matrimonial Property Act in *Z v Z (No 2)*.⁶ The Court was asked to consider whether earning capacity was “property”, and whether enhanced earning capacity could be “matrimonial property” under the Act.⁷ The Court said that earning capacity did not fall within the Act’s definition of property, and that it was not Parliament’s intention to include enhanced earning capacity within the scope of matrimonial property to be divided at the end of a relationship.⁸ The Court reached this conclusion “notwithstanding the strength of the argument... that to treat enhanced earning capacity as matrimonial property is consistent with the policy and spirit of the legislation.”⁹

18.7 The Court noted that the Matrimonial Property Act had been harsh on women:¹⁰

² The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships. The Working Group was to deal with the broad policy issues, rather than to produce a blueprint for new legislation: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

³ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

⁴ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

⁵ Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 12. The Working Group did however recommend changes to the rules of division that “go some way towards alleviating the detrimental effects of marriage breakdown.” These recommendations included extending the general rule of equal sharing to all categories of relationship property (previously it only applied to the family home and family chattels). This effectively brought more assets into the pool of matrimonial property available for equal division (at 13).

⁶ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA). The decision was given by the full bench of seven judges of the Court of Appeal.

⁷ Pursuant to s 8(e) of the Matrimonial Property Act 1976.

⁸ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

⁹ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280–281.

¹⁰ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 275.

There is growing recognition that the division of matrimonial property under the Matrimonial Property Act is operating harshly on those women who have foregone their own participation in the workforce, other possibly than on a part-time or temporary basis, and who have supported the advancement of their husbands' careers by managing the household and caring for the children of the marriage. At the same time their husbands who have remained in employment, have acquired experience, skills or qualifications which have increased their earning capacity. At the time of the dissolution of the marriage they are then in the advantageous position of being able to recover from the effect of the division of the matrimonial assets and earn, sometimes in a relatively short time, a substantial income. By comparison, because of the role which she has assumed in the marriage, the wife is ill-equipped to rejoin the workforce and earn an income. Further, where the efforts of the couple during the marriage have been directed at building up the husband's income-earning potential, the wife's share of the matrimonial home and other matrimonial assets may not be significant. Many such wives, as in this case, become beneficiaries while their husbands continue to earn a substantial income.

- 18.8 Something more than an equal division of relationship property was required to ensure a just result. The Matrimonial Property Amendment Bill was introduced into Parliament in 1998, but it was not until a change of government in 1999 that amendments were made to the Bill addressing “the issue of economic disadvantage suffered by a non-career partner when a relationship breaks down.”¹¹ These amendments included section 15 and would permit departure from equal sharing where necessary to give effect to justice.¹²
- 18.9 The Parliamentary select committee considering the proposed amendments inserted a set of principles into the Matrimonial Property Act, now to be renamed the PRA. These included the principles that “men and women have equal status, and their equality should be maintained and enhanced”,¹³ that a “just division of relationship property has regard to the economic advantages or disadvantages” to the partners arising from their

¹¹ Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and 74-75.

¹² Other provisions that were inserted into the Property (Relationships) Act 1976 in order to address economic disadvantage suffered by a non-career partner were ss 9A(2) and 15A: Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71-72. These provisions are discussed in Chapter 10.

¹³ Property (Relationships) Act 1976, s 1N(a).

relationship or from the end of the relationship,¹⁴ and that “all forms of contribution to the... relationship are to be treated as equal.”¹⁵ Section 15 must be read in the context of these principles.¹⁶

- 18.10 The “underlying notion” in introducing section 15 was one of equity; “that it is sometimes fair to treat people differently to achieve a just outcome.”¹⁷

What is section 15 trying to achieve?

- 18.11 The PRA generally treats a qualifying relationship as a partnership or joint venture to which each partner contributes equally, although perhaps in different ways.¹⁸ Each partner’s contributions to the relationship result in an entitlement to an equal share in the property of the relationship.

- 18.12 Section 15 recognises that equal sharing will not always result in a just division of relationship property. One partner (**partner A**) can be compensated by the other partner (**partner B**) when the post-separation income and living standards of partner B are likely to be significantly higher than partner A because of the way the partners carried out their respective functions during the relationship. This is because it would be unjust for partner B to enjoy the full benefits of the relationship partnership or joint venture, in which both partners had worked and had expected to share into the future.

- 18.13 Section 15 is not about addressing post-separation *needs*. When partners cannot meet their own post-separation needs or those of their children, other “pillars of financial support” are available.¹⁹ These are maintenance, child support and State benefits. Each addresses a different issue and together with the PRA they establish a framework of financial support and influence post-

¹⁴ Property (Relationships) Act 1976, s 1N(c).

¹⁵ Property (Relationships) Act 1976, s 1N(b).

¹⁶ The policy and principles of the Property (Relationships) Act 1976 are discussed in Chapter 3.

¹⁷ Wendy Parker “Sameness and difference in the Property (Relationships) Act 1976” (2001) 3 NZFLJ 276.

¹⁸ This is reflected in the explicit and implicit principles of the PRA, discussed in Chapter 3.

¹⁹ See discussion in Chapter 2 and also Joanna Miles and Jens M Scherpe “The legal consequences of dissolution: property and financial support between spouses” in J Eekelaar and R George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) at 141.

separation financial recovery. We discuss maintenance in Chapter 19.²⁰

- 18.14 We continue to use the terms “partner A” and “partner B” throughout this Part. In keeping with the language of section 15, partner A is the applicant for an order under section 15 (or the “non-career partner”)²¹ and partner B is the other partner.

What is “economic disparity”?

- 18.15 The term “**economic disparity**” is often used in connection with section 15, even though it is not used or defined in the section itself.²² In this Part we use the term economic disparity in the narrow sense, to mean the requirement in section 15 that the income *and* living standards of partner B are likely to be *significantly* higher than partner A.
- 18.16 Economic disparity alone does not satisfy the requirements of section 15. The economic disparity must be caused by the effects of the division of the functions within the relationship while the partners were living together. We refer to this as the “**division of functions**”.

What is a “division of functions”?

- 18.17 The most common division of functions in section 15 cases is where partner A does not participate in the paid workforce and instead manages the household and raises the children while partner B performs paid work and provides the family income. We use the term “**household management**” as shorthand for the role of partner A in this scenario, for ease of reading.
- 18.18 There can, however, be many variations to this scenario. Partner A may:

²⁰ Although maintenance is outside the terms of reference for this project, its overlap with s 15 of the Property (Relationships) Act 1976 requires us to consider its role in addressing the economic disadvantages one partner may suffer at the end of a relationship.

²¹ The term “non-career partner” was used during Parliament’s consideration of the 2001 amendments. See for example Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

²² We note that s 15 does not expressly refer to the term “economic disparity”, although the heading of that sub-part of the Property (Relationships) Act 1976 is “Court may make orders to redress economic disparities.” The courts use the term “economic disparity” in different ways.

- (a) take just a few years off paid work in order to look after children or a dependant relative;
- (b) work part-time and also perform a household management role and support partner B in a high-stress occupation;
- (c) relocate to another region or country to accommodate partner B's work; or
- (d) work in a particular job to ensure income for the family while partner B is studying for a qualification that enhances longer term earning capacity.²³

18.19 A division of functions can lead to economic disparity in situations where the partners have no children. Men as well as women can be partner A or partner B.²⁴

When does section 15 apply?

18.20 In broad terms, divisions of functions result in two scenarios which may lead to economic disparity under section 15:

- (a) First, where partner A has suffered a loss arising from the division of functions. The loss can be viewed in several ways:
 - (i) a lost opportunity to develop a career or explore an economic opportunity;
 - (ii) loss as a result of performing an unpaid role in the relationship;
 - (iii) loss of income and living standards enjoyed during the relationship; or
 - (iv) loss arising from investing in partner B's career throughout the relationship and then losing the

²³ Where both partners continue to work a claim under s 15 of the Property (Relationships) Act 1976 has been harder to establish, as was the case in *A v A* [2008] NZFLR 2007 297 (HC) where both partners were teachers and worked throughout the marriage except for a two year maternity leave by partner A to have the partners' two children. At the date of hearing partner B was a principal and therefore receiving a much higher salary than partner A, who was a teacher. Despite acknowledging that partner A had greater responsibility for the children, it found that the disparity was not caused by the division of functions in the relationship.

²⁴ For cases where men in the position of partner A have brought claims under s 15 of the Property (Relationships) Act 1976 see, for example, *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC); *R v F* FC Rotorua FAM-2006-069-80, 4 August 2008; *H v H* FC Nelson FAM-2005-042-527, 29 March 2007; *G v G* FC Gisborne FAM-2010-016-232, 22 August 2011; *Van Amelsford v Leender* [2013] NZFC 8113; *Elliot v Elliot* [2005] NZFLR 313 (FC) (which was successful and the husband was awarded \$15,000 (adjusted for inflation) which was the lowest sum ever awarded in a s 15 claim); *J v D* FC North Shore FAM-2008-044-833, 13 May 2011 (a s 15A claim only); and *N v S* [2012] NZFC 7043.

benefits of that investment on separation.

- (b) Second, where partner B has advanced his or her career or other economic opportunity due to functions (such as household management and other support) performed by partner A. Of course, partner B's success may be in part due to factors intrinsic to partner B, such as a brilliant mind or individual talent. However as the Parliamentary select committee observed:²⁵

... although the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training, and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of functions during the relationship.

Partner B's success will therefore be a consequence of how the functions of the relationship were divided between the partners. After separation Partner B continues to benefit from the division of the functions within the relationship and partner A does not.

- 18.21 Both scenarios may occur simultaneously, potentially resulting in a "double loss" for partner A. As Lord Nicholls in the House of Lords in *McFarlane v McFarlane* said:²⁶

... the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution of her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as a home-maker and child-carer.

- 18.22 A typical scenario that section 15 was intended to address is in this case study:

²⁵ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 18-19.

²⁶ *McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 at [13] per Lord Nicholls of Birkenhead.

Case study: When section 15 is intended to apply

Victoria and Fergus met just as they both started work as junior lawyers. After five years together they married and soon after had their first child, Alice. Victoria left her job and remained at home to look after Alice and a second child, Bella, born three years later. Fergus continued working as a lawyer to provide the family income and he became a partner in a law firm. Victoria and Fergus separated when Alice was five and Bella two.

Fergus was earning a salary of \$350,000 and after the separation Victoria found a job as a junior solicitor earning \$40,000. The children lived with Victoria during the week and would stay with Fergus in the weekends. Their main asset was the mortgage-free family home. The value of the home was shared equally under the rules of the PRA. With her share of the equity Victoria purchased a new house, but could only afford a smaller home in a cheaper neighbourhood that was 30 minutes' drive away from Alice's school and 45 minutes' drive from her work. In order that Victoria could work, Bella was put into a private childcare facility (she was too young to go to kindergarten). Bella was not yet entitled to receive a subsidy for the costs of her childcare. The costs of the childcare were shared equally by Victoria and Fergus. Victoria's share amounts to a significant proportion of her salary.

Fergus also used his share in the equity from selling the family home to buy a new house. Because his salary was significantly higher, he was able to buy a similar sized house in the same neighbourhood in which the family had lived before the separation. Fergus's salary also made payment of the costs of childcare easy, and he had enough income to spend money on leisure activities for himself and the children. Victoria's standard of living dropped because of the reduced income into her household and the long commuting time each day, leaving less time and money for Victoria to maintain her home and care for the children as she would have liked, or participate in leisure activities herself.

When does section 15 not apply?

- 18.23 Section 15 does not capture all forms of financial inequality between the partners at the end of a relationship. Economic disparity is, as we discuss at paragraphs 18.31-18.43 below, a very narrow concept.
- 18.24 There will also be cases where there is economic disparity but it is not attributable to a division of functions. This is illustrated in the case study below:

Case study: When section 15 does not apply

Jo and Billie work in the same jobs they have had since they first met. Jo is a surgeon and Billie is a nurse. They have twin girls aged three. First Billie and then Jo took six weeks off when the twins were born. Jo and Billie have separated.

Billie has remained in the family home with the twins but is struggling to pay the mortgage and other bills. In this case Billie would not appear to have a claim under section 15 because any economic disparity between Jo and Billie is not due to the division of functions during the relationship. The economic disparity between them is more likely to be because Billie has a lower income and/or because she now has ongoing day to day care of the children.

18.25 In this case study, Billie might be entitled to maintenance and child support, but is unlikely to have a claim under section 15. We discuss the overlap between section 15 and maintenance in Chapter 19 with respect to option 3.

How does section 15 work in practice?

18.26 Section 15 provides:

15 Court may award lump sum payments or order transfer of property

- (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
- (2) In determining whether or not to make an order under this section, the court may have regard to—
 - (a) the likely earning capacity of each spouse or partner:
 - (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
 - (c) any other relevant circumstances.
- (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—
 - (a) order party B to pay party A a sum of money out of party B's relationship property:
 - (b) order party B to transfer to party A any other property out of party B's relationship property.
- (4) This section overrides sections 11 to 14A.

18.27 Section 15 applies “on the division of relationship property”, after the relationship ends. This suggests that partner A cannot make a section 15 claim independent of an application for orders dividing relationship property under section 25(1) of the PRA.²⁷

18.28 There is no onus of proof in the conventional sense on partner A.²⁸ Partner A does not carry the sole responsibility for proving to a court that he or she deserves compensation under section 15. A court can make its own determination on the evidence before it.²⁹ The Court of Appeal in *M v B* said that:³⁰

The imposition of an onus of proof would be a further impediment to the obtaining of just entitlements under the statutory regime given that, in many respects, the relevant evidence is more than likely in the possession of the titled partner (who more often than not is a man).

There is some validity in this concern. The Act is about property rights and entitlements. The Act, and the regulations which have been promulgated pursuant to it, make it clear that, although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.

18.29 A court must still be satisfied that the different elements of section 15 are satisfied. The Court of Appeal has described these as “hurdles” that “must be overcome” in order for partner A to succeed under section 15.³¹ These hurdles are:

- (a) a significant disparity in the income and living standards of partner A and partner B (which we call “economic disparity”);
- (b) the economic disparity was caused by the division of functions between partner A and partner B within the relationship; and

²⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.3]. This has several consequences. First, it means that a court cannot make an award under s 15 of the Property (Relationships) Act 1976 during a relationship. See by contrast s 25(3), which allows a court at any time to make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just. This difference risks an order being made pursuant to s 25(3) without regard to any potential award under s 15. Second, a s 15 claim cannot be brought after the partners’ relationship property has been divided.

²⁸ See also the discussion of onus of proof in Chapters 6 and 25.

²⁹ The Court of Appeal clarified in *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [96] that “there must be material before the Court from which a Judge can determine that the threshold disparity has been met.”

³⁰ *M v B* [2006] 3 NZLR 660 (CA) at [38] and [39].

³¹ *M v B* [2006] 3 NZLR 660 (CA) at [125].

(c) compensation is just in the circumstances.

18.30 The discussion in this section is based on our review of the case law, and that undertaken by Green³² and Henaghan.³³ Section 15 claims have come before the Court of Appeal only four times, the last decision being in 2016,³⁴ and the Supreme Court only once, in March 2017 (decision pending).³⁵

Hurdle one – economic disparity

18.31 For a claim to succeed under section 15, there must be economic disparity between partner A and partner B. Disparity must exist in both income and living standards. In looking at what the income and living standards of the partners are “likely” to be, the assessment is prospective, or forward-looking. A court must therefore speculate based on the information provided to it. Evidence on each partner’s future income and living standards is usually provided by experts, such as forensic accountants or actuaries who can provide, for example, a valuation of potential pay-scales for a foregone career.³⁶ Expert evidence assists the court, but the cost and time associated with preparing such evidence is considerable and can place section 15 beyond the reach of potential claimants.

The overlap between income and living standards

18.32 A section 15 claim will fail unless a significant difference in both income and living standards is established. Section 15 does not indicate whether income or living standards are more important and it is unclear why establishing disparity in both elements is required.

18.33 In *X v X* the Court of Appeal recognised that in reality there is often an overlap between income and living standards.³⁷ A high

³² Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013). Green analysed section 15 cases and surveyed legal practitioners around New Zealand about their views on section 15.

³³ Mark Henaghan “Exceptions to 50/50 Sharing of Relationship Property” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

³⁴ *N v N* [2005] 3 NZLR 46 (CA); *M v B* [2006] 3 NZLR 660 (CA); *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; and *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499.

³⁵ *Scott v Williams* [2016] NZSC 149 (granting leave to appeal to the Supreme Court).

³⁶ See for example *M v B* [2006] 3 NZLR 660 (CA); and *X v X* [2009] NZCA 399, [2010] 1 NZLR 601.

³⁷ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [79].

income usually means a high standard of living and if there is a significant disparity in income then there is usually a significant disparity in living standards. The Court considered that a separate analysis of income and living standards was not usually required, although both must be established.³⁸

- 18.34 It might not always be the case, however, that a higher income means a higher standard of living. The partners might have different incomes but not different living standards. For example, partner A may have a lower income than partner B, but may inherit a substantial sum of money or enter a new relationship with a new partner who can support a standard of living at least equivalent to that of partner B. It is also possible that partners have equivalent incomes but different living standards. For example, if partner A has responsibility for the ongoing care of a dependant parent his or her living standards may be lower, or if partner B inherited a substantial sum of money his or her living standards may be higher.
- 18.35 It is also possible that partner B could suffer a drop in living standards, despite having a larger income than partner A. This was the case in *L v B* where the Family Court said there was no disparity.³⁹ The Court referred to ongoing maintenance commitments, the need to support Partner B's new wife and expected child, the long term occupation of the family home by Partner A, and that Partner B could not rehouse himself from relationship property proceeds.

What is “income”?

- 18.36 Income is not defined in the PRA but was described by the Court of Appeal as something to be “considered in the round, [and] includes all periodic streams of money.”⁴⁰ So income as assessed for taxation is only one measure and regard may be had further afield, for example, to losses that may be written off by a self-employed partner.
- 18.37 If partner B is unemployed but has previously been in employment, a court may consider clear evidence of partner

³⁸ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [81].

³⁹ *L v B* [2012] NZFC 9534.

⁴⁰ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [88].

B's ability to find employment at a comparable pay rate to that previously held.⁴¹

What is meant by “living standards”?

- 18.38 “Living standards” is different to “lifestyle.”⁴² The exact boundaries of what can be considered “living standards” are not clear. Factors considered relevant have included: ownership of one’s own home, ability to work, amount of leisure time, flexibility in time free to work, ability to make lifestyle choices regarding work, care of children and living arrangements, holiday opportunities, the ability to save money, and any separate property owned.⁴³ In *K v K* the Family Court found that the fact the husband chose to live with his parents meant he had higher living standards than the wife who had limited financial resources, restricting the choices she was able to make.⁴⁴
- 18.39 St John suggests that living standards are affected by a number of factors, not determined solely by income.⁴⁵ Relevant questions may include how many people are being supported by each partner’s income, the relevance of economies of scale, assets at the disposal of each partner, the utility of assets at a partner’s disposal (for example a house which a partner cannot maintain), whether third parties (such as parents) are able to assist in the day-to-day running of the house, “perceptions of fairness”, and “intangibles such as enjoyment of children.”⁴⁶

Date of assessment

- 18.40 The date at which the likely future income and living standards are to be assessed is the date of separation, as this is when the division of functions within the relationship ends. The High Court in *X v X [Economic Disparity]* stated that:⁴⁷

⁴¹ *S v S* FC North Shore FAM 2004-044-1890, 12 May 2006 at [55].

⁴² *V v V* [2002] NZFLR 1105 at [12]; *N v N* [2003] NZLR 46 (FC) at [3].

⁴³ See as examples *K v K* FC Papakura FAM-2003-055-406, 3 July 2007; *Smith v Smith* [2007] NZFLR 33 (FC); and *S v S* FC North Shore FAM 2004-044-1890, 12 May 2006 at [66].

⁴⁴ *K v K* FC Papakura FAM-2003-055-406, 3 July 2007.

⁴⁵ Susan St John “Economist’s Perspective: Prospects for Equality” (paper presented to the Property (Relationships) Act 1976 Spotlight Seminar, Wellington, August 2001) at 4.

⁴⁶ Susan St John “Economist’s Perspective: Prospects for Equality” (paper presented to the Property (Relationships) Act 1976 Spotlight Seminar, Wellington, August 2001) at 5.

⁴⁷ *X v X [Economic Disparity]* [2007] NZFLR 502 (HC) at [88].

at separation the division of functions in the marriage has come to an end. That is the point as which its effects must be judged, using whatever evidence is available at the time of the hearing to inform the process.

- 18.41 As we discuss at paragraph 18.701, the partners’ post-separation division of functions is largely irrelevant under section 15.
- 18.42 The disparity period continues until either there is no longer a significant difference in income or living standards or the difference is no longer caused by the division of functions in the relationship.⁴⁸

“Significant” disparity

- 18.43 Use of the word “significant” in section 15 “denotes a more than trivial disparity.”⁴⁹ What amounts to significant disparity requires a subjective assessment and is a “factual question.”⁵⁰ What appears to be a small difference for high income earners (for example a difference in income of \$8,000) could be significant for low income earners. Disparity is assessed relative to the partners. If both partners’ incomes are low then the disparity may be significant even if there is a small difference between the incomes. For partners with significant wealth and income then a significant disparity would require a large gap in income. Where a gap in income is very large, a gap in living standards will “inevitably” be found.⁵¹

Hurdle two – the economic disparity is caused by the division of functions

- 18.44 The second hurdle is that the economic disparity must have been caused by the division of functions within the relationship (the causation hurdle). Based on our review of the cases, we estimate that approximately 20 per cent of claims under section 15 do not meet this hurdle.

⁴⁸ *X v X [Economic Disparity]* [2007] NZFLR 502 (HC).

⁴⁹ *X v X* [2009] NZCA 399 at [77]. It was described as “noteworthy or important” in *P v P* [2003] NZFLR 925 (FC) and “somewhere between clearly greater and disproportionately greater” in *N v N* [2003] NZLR 46 (FC).

⁵⁰ *X v X* [2009] NZCA 399 at [83].

⁵¹ *B v M* [2005] NZFLR 730 at [120].

The division of functions does not have to be the sole cause of economic disparity

18.45 In early decisions under section 15 the courts indicated that the division of functions must be the principal or dominant cause of economic disparity for a section 15 award to be made. More recent decisions, however, take a different approach. Although a clear, causal link must be established, it need not be the only causative link. In *M v B* the Court of Appeal said:⁵²

In G v G [2003] NZFLR 289 (FC) Judge Ellis (in the context of a claim for a compensatory award under s 15) stated at [127] that the test for causation was that “the ‘division of functions’ must not only be a ‘real and substantial cause’ but must be the principal cause of the economic disparity.” This puts the jurisdictional bar too high. The “principal cause” of the husband’s present earning capacity is his skill as a lawyer. But that consideration alone does not preclude a redistributive award.

18.46 This was applied in *S v C*, where the High Court overturned the Family Court’s decision rejecting partner A’s section 15 claim.⁵³ The High Court held that, although other factors had played a role in the economic disparity, such as partner B’s qualifications and partner A’s “emotional difficulties following the marital breakdown”, which “might have delayed her ability to begin work”, so did the division of functions within the marriage.⁵⁴ The Court was satisfied that partner A had suffered reduced earning capacity and this was caused by the division of functions in the relationship.⁵⁵

18.47 A similar approach is taken to assessing eligibility for maintenance under sections 63 and 64 of the Family Proceedings Act 1980. Those sections allow a court to consider the ability of a partner to become self-supporting, having regard to “the effects of the division of functions” within the relationship.⁵⁶ In that context the Court of Appeal in *Slater v Slater* said there could be more than one operative cause.⁵⁷

⁵² *M v B* [2006] 3 NZLR 660 (CA) at [201] per Young P.

⁵³ *S v C* [2007] NZFLR 472 (HC) at [27].

⁵⁴ *S v C* [2007] NZFLR 472 (HC) at [32]–[35].

⁵⁵ *S v C* [2007] NZFLR 472 (HC) at [35].

⁵⁶ Family Proceedings Act 1980, ss 63(2)(a)(i) and 64(2)(a)(i).

⁵⁷ *Slater v Slater* [1983] NZLR 166 (CA) at 174.

Does the decision relating to how the functions are divided in the relationship have to be mutual?

18.48 A second uncertainty, now resolved by the courts, was whether the division of functions within the relationship had to be agreed upon. Arguably a unilateral choice by one partner not to undertake paid work would cause economic disparity, rather than the division of functions. During our preliminary consultation we were told that it is not uncommon for partner B to argue that partner A chose to stay at home and that partner B did not agree with that choice. There may also be cases where partner A stopped paid work without there being a conscious decision by the partners for this to happen, for example if partner A was made redundant.

18.49 In *X v X* the Court of Appeal considered whether a decision not to work should be assumed to be mutual or whether a court should hear evidence that one person could have furthered their career but unilaterally chose not to.⁵⁸ Before *X v X*, there were cases where partner B disputed that the decision was mutual and this was sometimes treated as a reason not to make a section 15 award.⁵⁹

18.50 The Court of Appeal in *X v X* said to “ensure that the reality of decision-making in relationships is reflected, it should be presumed that functions within a marriage are agreed to by both parties.”⁶⁰ Reversing that presumption would require compelling evidence to the contrary.⁶¹ The Court also said that the merits of the partners’ decision as to the division of functions is irrelevant under section 15.⁶²

⁵⁸ *X v X* [2009] NZCA 399, [2010] NZLR 601 at [101]–[105]. In that case Mr X had argued at [68(c)] that throughout the marriage Mrs X was not motivated to work and chose to remain out of the workforce when that was not necessary for the maintenance of the family relationship.

⁵⁹ In *K v K* FC Auckland FAM-2004-004-509, 27 August 2008 and on appeal *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009 the husband claimed that the wife insisted on taking exclusive care of the children and that was not his preference. The High Court (reversing the approach of the Family Court) took the approach that the decisions were a part of the choices of the relationship such as having children and regardless that the wife had stopped work against the wishes of the husband, the result was a qualifying division of functions. However, the Court then took the unusual step of dismissing the claim on the basis it was unconvinced by the evidence put forward as to what the wife would have earned but for the division of functions. In the context of a significant disparity and a clear division of functions it would seem that this should have been a question of quantum rather than causation. In *M v M* FC Wellington FAM-2007-091-767, 23 September 2009 the Family Court dismissed the application and included amongst other factors that the wife had not pursued her career for a number of years of the marriage before the partners had children.

⁶⁰ *X v X* [2009] NZCA 399, [2010] NZLR 601 at [105].

⁶¹ *X v X* [2009] NZCA 399, [2010] NZLR 601 at [105]. In that case the court observed that there was “no compelling evidence” that the decision that Mrs X not return to the workforce was not a mutual one. The presumption of mutual decision-making had to be “meaningfully impugned” if it is to be overturned.

⁶² *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [104].

I reject any suggestion that an enquiry ought or needs to be made into the merits of a decision made by the parties as to the division of domestic roles for a causal relationship under s 15 to be established. [The applicant] was correct to submit that where a state of affairs exists – namely, in this case, Mrs X’s protracted absence from the workforce and her support of the children and Mr X – there is a presumption, in the absence of clear evidence to the contrary, that it was pursued by both parties to the marriage. Evidence that a party did not return to the workforce when they could have, or chose to pursue a domestic life instead of a professional career, may, however, be relevant to the Court’s exercise of its discretion under s 15(3).

Establishing causation requires a retrospective assessment

- 18.51 When assessing causation, a court must look back at what happened during the relationship. Causation is more easily established where there is evidence that the division of functions in the relationship clearly affected partner A’s and/or partner B’s earning capacity. Examples of evidence that might establish causation include evidence relating to partner B’s absence from the household due to employment, partner A’s relocation to support partner B’s career, or sacrifice of partner A’s professional career.
- 18.52 Claims where partner A seeks to show that the economic disparity arises from a loss in potential earnings because of the division of functions (referred to as “diminished earnings claims”) have generally had the most success. Claims that seek to show the disparity arises from the enhancement of partner B’s earning potential due to the division of functions (referred to as “enhancement claims”) have been more difficult to establish.⁶³

⁶³

We have identified from our research that approximately 20 per cent of cases under s 15 of the Property (Relationships) Act 1976 discussed the prospect of an enhancement award and in just under 10 per cent of s 15 claims an enhancement award was made. Note however the decision in *W v W FC Auckland FAM-2007-004-663*, 12 December 2007 where the Family Court said that such enhancement awards should not be available at all, stating

*“I find as a matter of law that s15 is only available to compensate party A for diminished income and living standards caused by the division of functions within the marriage or relationship. It is not available to compensate based on enhanced future earnings. I am bound by the Court of Appeal decision in *Z v Z*. If Parliament intended to change the law established in *Z v Z* it should have specifically said so, or amended the definition of “property” or altered ss 8(e), 8(ee) and 9(4). I therefore do not accept the submissions ... that compensation is available on a redistributive basis.”*

This was founded on the reasoning that s 15 provided for compensation, not for treating future earning potential as property, and therefore conceptually it could only provide for losses rather than to redistribute benefits. The Court could not see any way of granting a payment for enhancement that did not treat enhanced income as relationship property. This has not been the approach in other cases, probably because a simple application of s 15 allows for an order of transfer of property for any disparity caused by a division of functions in the relationship, regardless of what the conceptual basis for that order would otherwise be.

18.53 Both types of awards are, however, possible. In *P v P* the High Court said:⁶⁴

We are satisfied that in principle both the depression of A's earning capacity and the enhancement of B's earning capacity are relevant in the s 15 context. Essentially this conclusion reflects the terms of s 15(1) whereby jurisdiction is dependent upon the likelihood that party B's income and living standards will be significantly higher than those of party A. In light of this jurisdictional requirement we think there is no basis to exclude an enhanced income position from consideration provided, of course, the relevant causative nexus is also made out.

18.54 In *M v B* the Court of Appeal was open to the argument there may be a redistributive quality to section 15. The Court said that “both compensatory and redistributive exercises may be appropriate under s 15”, a view which “accords with *P v P*”,⁶⁵ and that in some circumstances “an enhancement of earning capacity will properly be redistributable under s 15.”⁶⁶ The possibility of enhancement awards was also recognised by the Court of Appeal in *X v X*.⁶⁷

If there had been evidence in this case that the effect of the division of roles during the relationship was to enhance the income capacity or living standards of Mr X on an ongoing basis after separation, the section 15 award would have needed to reflect that.

Establishing causation in enhancement claims can be difficult

18.55 In enhancement claims, partner A is claiming that the division of functions has “freed up” partner B. Partner B is able to develop work skills and experience thereby enhancing his or her earning potential. A good example is the case of *Williams v Scott* in the Family Court.⁶⁸ Mr Williams developed a successful law firm. Ms Scott was credited with “providing care to the parties’ sick son, hosting functions with real estate agent offices, building up the

⁶⁴ *P v P* [2005] NZFLR 689 (HC) at [56].

⁶⁵ *M v B* [2006] NZFLR 641 (CA) at [199] per Young P citing *P v P* [2005] NZFLR 689 (HC) at [56] and *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [164]. In that case the High Court found that causation had not been established and that the disparity was due to the applicant husband's age (21 years older than the wife) and his redundancy. See also *J v J* [2014] NZHC 1495 at [41] where the High Court said:

the discussion can be reduced to the simple proposition outlined in X v X: “Did [the wife] support [the husband] to obtain his qualification and gain the experience that provided him with an enhanced earning capacity?”

⁶⁶ *M v B* [2006] NZFLR 641 (CA) at [200] per Young P.

⁶⁷ *X v X* [2009] NZCA 399 at [237].

⁶⁸ *Williams v Scott* [2014] NZFC 7616 at [317]; *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355; and *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499. Judgment of the Supreme Court pending.

firm’s strong conveyancing business, and carrying out significant accounting tasks.”⁶⁹ These latter contributions added value to the law firm and enhanced Mr Williams’ income. In the Family Court Ms Scott received an award under section 15 for enhancement on this basis.⁷⁰

- 18.56 Where the enhancement is less clear a section 15 claim is harder to establish. In *P v P* the High Court said that “some comparative evidence was necessary to enable Mr P’s earnings pattern to be assessed against that of others” in a similar career.⁷¹ Without that evidence the Court was reluctant to make an order under section 15.⁷² In *M v B* the court observed:⁷³

A woman who stays at home and looks after children frees up her partner’s time and energy, and in this way, may facilitate an enhancement of his earning capacity. Thinking along these lines is reflected in s 15 and in some circumstances, such an enhancement of earning capacity will properly be redistributable under s 15. But, as this case illustrates, it is not always easy to move from the general to the specific.

- 18.57 In *E v E* the Family Court said that section 15 “requires circumstances that are truly causative, not merely permissive.”⁷⁴ In that case the Court found no enhancement despite agreeing that partner A had “released [partner B] from family duties” meaning partner B “was not hampered in the pursuit of his career.” Other cases focus on specific sacrifices or steps taken by partner A that benefited partner B. In *H v S* and *J v J* choices to move overseas to support partner B’s career were critical.⁷⁵ In *H v H [Economic Disparity]* the husband’s maritime career depended on him not having to be at home and in *C v C* the wife had contributed to the administration of the husband’s business.⁷⁶

- 18.58 Other cases hint at a more relaxed approach to the relationship between the division of functions and enhancement. In *C v C*

⁶⁹ *Williams v Scott* [2014] NZFC 7616 at [317]. Judgment of the Supreme Court pending.

⁷⁰ The award was confirmed in the High Court and Court of Appeal although the amount awarded in the Family Court (\$850,000) was reduced to \$280,000 in the High Court and then raised to \$470,000 in the Court of Appeal. This case is currently on appeal to the Supreme Court.

⁷¹ *P v P* [2005] NZFLR 689 (HC) at [61].

⁷² *P v P* [2005] NZFLR 689 (HC) at [61].

⁷³ *M v B* [2006] NZFLR 641 (CA) at [199]–[200] per Young P.

⁷⁴ *E v E* [2012] NZFC 830 at [140].

⁷⁵ *H v S* [2012] NZFC 7543; and *J v J* [2014] NZHC 1495.

⁷⁶ *H v H [Economic Disparity]* [2007] NZFLR 711 (HC); and *C v C* FC Lower Hutt FAM-2007-032-170, 25 September 2008.

[*Economic Disparity*] the High Court noted in finding causation that “the division of roles assisted Mr C to pursue his professional career free of day to day child care responsibilities.”⁷⁷ In *W v H* the Family Court found that:⁷⁸

[Mr W] was able to commit himself to a fulltime position with [X firm] at an important stage of his working life... Household duties or childcare duties or the other spouse’s career did not impact on him because this couple had made a joint decision that [Ms H] would manage those functions... I accept Mr Higgins evidence that it is likely that his salary was enhanced by his ability to commit to a fulltime position and to enhance his skills through training.

18.59 Both cases resulted in successful enhancement claims.

The courts take different approaches to determine causation

18.60 There is inconsistency in the way causation is dealt with by the courts. In a few cases, the courts will assume causation where there is economic disparity and the division of functions is clear, particularly where children are involved. More often, however, the courts require evidence of loss of earning ability by partner A or enhancement of partner B’s earning capacity. This might include evidence about the career partner A would have pursued, evidence of an abandoned career or other additional factors.⁷⁹

18.61 There are striking examples. One is *CH v GH*.⁸⁰ The husband and wife married and had children at a very young age (the wife became pregnant with their first child at age 16). They had two more children. The husband became an electrician and the wife committed her time to household management and looking after the children. It took a long time post-separation for an application to be made (and ultimately 13 years before the dispute was heard by the Family Court).⁸¹ The Family Court looked at the actions of the wife in the interim period, where she largely continued as an active mother and grandmother while working part-time. The Court concluded that because the wife’s first child had been born

⁷⁷ *C v C* [Economic Disparity] HC Auckland CIV-2003-404-002392, 28 November 2003.

⁷⁸ *W v H* [2015] NZFC 3413 at [85].

⁷⁹ *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009 where the claim failed because there was no evidence of what job the wife might have had if she had been able to work.

⁸⁰ *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.

⁸¹ The primary issue for the Family Court was whether there was a valid settlement agreement between the partners that the Court should give effect to either wholly or in part, pursuant to section 21H of the Property (Relationships) Act 1976.

when the wife was so young she had had no opportunity to start a career and “it is therefore very difficult for her to show that there is a detrimental effect on a career development because she did not have one in which to develop.”⁸² The Court found no causation, even though there was a very significant disparity as the husband had accumulated “approximately \$1 million” post-separation while the wife had “increasingly gone into debt.”⁸³ The Court noted that there was no evidence of enhancement.⁸⁴

- 18.62 This decision is in stark contrast with *H v H [Economic Disparity]*.⁸⁵ In that case the wife left school at age 15 when she became pregnant with their first child. They had two more children. The husband was a fisherman and ultimately the skipper of a vessel while the wife remained at home and raised the children. After the partners separated there was a large disparity in income and living standards. The High Court considered that causation was overwhelming as both partners had started with no qualifications and the husband had pursued his career while his wife “exclusively looked after the three children and cared for the household until the parties separated.”⁸⁶ The Court found that partner A had enhanced partner B’s career prospects, stating that “[w]ithout his wife...it was unlikely that he would have been able to build up his maritime experience and qualifications to the same degree.”⁸⁷ The Court calling it “added value.”⁸⁸
- 18.63 The key difference between these two cases is that in *H v H [Economic Disparity]*, the husband’s job as a fisherman required him to be away from home for large amounts of time. Otherwise the facts are similar.
- 18.64 Another example is *Douglas v Douglas*.⁸⁹ Partner A brought four dependent children into the marriage from a former relationship. The marriage lasted 17 years.⁹⁰ The Family Court emphasised the fact of a clear division of functions and how partner A supported

⁸² *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [49].

⁸³ *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [50].

⁸⁴ *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [51].

⁸⁵ *H v H [Economic Disparity]* [2007] NZFLR 711 (HC).

⁸⁶ *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 711.

⁸⁷ *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 712.

⁸⁸ *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 717.

⁸⁹ *Douglas v Douglas* [2013] NZHC 3022. The case was known in the Family Court as *A v A* [2012] NZFC 10192.

⁹⁰ Partner A had five children from a previous relationship but only four were dependent. The partners also fostered another child on and off throughout the relationship.

partner B's career through the relationship, including partner B's ability to train for a three year apprenticeship.⁹¹ Overall there was a clear commitment to prioritise partner B's career over partner A's. The Family Court also stated that:⁹²

*In general where one partner has stayed home and has had a protracted absence from the work force in support of the children there will need to be compelling evidence in order for a court to determine that the disparity has **not** been caused by the division of functions.*

18.65 This statement was not repeated in the High Court on appeal. The fact partner A brought four dependent children into the relationship influenced the High Court's reasoning. The Court found partner A would likely have done the exact same thing (work part-time while mostly committing to looking after the children) if there had been no relationship. The High Court overturned the section 15 award of \$63,000 in the Family Court.

18.66 The two decisions in *Douglas* reflect the two approaches taken by the courts. One is to view the purpose of the "division of functions" requirement as being to ensure awards are made if there is a division of functions and resulting economic disparity. Questions of loss of earning ability by partner A in diminished earnings claims, or earning enhancement by partner B in enhancement claims, are not important. The alternative approach emphasises the causal relationship between the division of functions and lost earning potential or earning enhancement. This approach requires more of partner A in presenting evidence, and invites argument on whether work options were available, how choices were made within the relationship and whether there is evidence of an alternative career the applicant would have pursued.⁹³ A higher evidential burden (and the costs involved in presenting that evidence) can render section 15 an unattractive option in seeking a departure from equal sharing.

⁹¹ *A v A* [2012] NZFC 10192.

⁹² *A v A* [2012] NZFC 10192 at [50] (emphasis added).

⁹³ Other cases where there has been a significant disparity and a clear division of functions but an award was declined due to lack of evidence of an alternative career include *K v K* FC Auckland FAM-2004-004-509, 27 August 2008; *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009; *M v M* FC Dunedin FAM-2003-005-66, 27 November 2006; and *H v [LC]* FC North Shore FAM-2009-044-966, 27 April 2011. In *L v L* FC Christchurch FAM-2007-009-504, 28 November 2008 the Family Court dismissed the claim due to lack of evidence of an alternative career. Similarly, in *Walker v Walker* [2006] NZFLR 768 (HC), the High Court dismissed the case for causation reasons noting "a paucity of evidence about career paths, current opportunities, pay scales, and available positions". Although it was not the only reason for dismissing the claim, in *H v H* [2012] NZFC 4543 the Family Court noted at [63] that "there is no evidence about the wife's work or prospects before the parties were married or when she stopped work to have children". The lack of an alternative career was a significant factor (amongst some others) in the Court refusing to give an award in *L v B* [2012] NZFC 9534.

Consequences of different approaches relating to the causation hurdle

18.67 Different approaches to the causation hurdle risks inconsistency between cases. It also risks decisions failing to fulfil the purpose of section 15. Green suggests that:⁹⁴

The court decisions... indicate the inherent difficulty of applying the provision, particularly in achieving the correct balance between being unduly restrictive, rarely finding that the economic disparity was a result of the division of functions, to lowering the jurisdictional bar so that the causation test is effectively meaningless.

18.68 The differing approaches to the causation hurdle illustrates that section 15 is insufficiently clear as to the proper approach.

18.69 An underlying issue is whether the causation hurdle creates a distracting and unnecessary level of analysis. The burden it places on partner A can be significant in terms of the evidence that may be required. A difficulty that often arises is that the courts find there is insufficient evidence to establish a link between the role of party A within the relationship, such as household management, and his or her low earning capacity post-separation. This means that the current application of section 15 does not necessarily lead to compensation for cases where economic disparity and a division of functions is established, unless detailed evidence is presented of a hypothetical career partner A could have enjoyed, but for the division of functions.

18.70 The causation hurdle means that not all cases of economic disparity will be recognised and addressed under section 15. The risk of failing to capture otherwise valid claims also arises because section 15 emphasises the division of functions *during* the relationship. This fails to recognise that the roles played by the partners can continue after the relationship. This is notable where the partners have dependent children. What happens if partner A is pregnant with the partners' first child at the end of the relationship? There has not been a "division of functions in the relationship" (partner A has not yet undertaken childcare responsibilities) that caused the economic disparity (for the period when partner A stays at home to care for the child). This raises the question of whether it is more in keeping with

⁹⁴ Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 55.

the policy and principles of the PRA to address any economic disadvantages arising from the end of the relationship, not just those directly caused by a division of functions within it.

Hurdle three – compensation must be just in the circumstances

18.71 If a court is satisfied there is economic disparity caused by the division of functions in the relationship, then it may make an order under section 15(3) “if it considers it just.”⁹⁵ In *X v X* the Court of Appeal said:⁹⁶

The s 15(3) discretionary assessment is not amenable to a prescribed formula, and the justice of an award in any particular case will depend on a comprehensive assessment of the parties’ respective financial positions, their earning prospects going forward, their current obligations in respect of any children of the partnership, and other matters that go to the overall fairness of an award.

18.72 Section 15(2) provides that a court in deciding whether to make an order may have regard to:⁹⁷

- (a) the likely earning capacity of each partner;
- (b) the responsibilities of each partner for ongoing daily care of any children of the relationship; and
- (c) any other relevant circumstances.

Cases where the court considered an order under section 15 was not just

18.73 There are cases where the Family Court has indicated it would not have exercised its discretion to make an award under section

⁹⁵ In *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002393, 28 November 2003, the High Court found that failing to exercise the discretion was an error.

⁹⁶ *X v X* [2009] NZCA 399, NZFLR 985 at [115], per Robertson J. This judgment was quoted directly in *K v B* FC Lower Hutt FAM-2009-032-92, 5 October 2010. In *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672 the High Court also referenced Robertson J but did not offer additional discussion about the exercise of the discretion in that case.

⁹⁷ Although s 15(2) of the Property (Relationships) Act 1976 envisages a comprehensive assessment and indicates that a court can be wide-reaching in its inquiries, there are certain factors that are not relevant. In *X v X* the Court of Appeal confirmed that the intrinsic benefits arising from the relationship, for example the wealth of the partners which led to a high living standard, were not relevant, nor was a large distribution of relationship property: *X v X* [2009] NZCA 399, NZFLR 985 at [114]. This is logical where the focus is on recognising and addressing the disparity between the partners themselves. In other words, the fact that partner A has a relationship property entitlement worth several million dollars and will therefore be significantly wealthy compared to most other people is not relevant when partner A is in a position of economic disparity in relation to partner B.

15 even if the other hurdles had been met. In *M v M* the Family Court said that even if the economic disparity was caused by the division of functions, it would have hesitated to exercise its discretion.⁹⁸ This was due (among other things) to the property partner A would receive from the division of relationship property, her lack of good faith in some dealings, her ill health hindering work efforts, and the relatively low relevance of the division of functions to any disparity.⁹⁹ Another case is *Wills v Catsburg*, where the Family Court said it would not have exercised its discretion to make an award under section 15 because partner A had made a lifestyle choice not to work in paid employment.¹⁰⁰

18.74 In *E v E* the Family Court did not make an award under section 15 despite concluding there would be economic disparity caused by the division of functions for a period of four years when partner A would be looking after the child of the relationship, requiring her to work part-time instead of full-time.¹⁰¹ The Court considered, however, that the money lost would be “significantly less” than the \$64,000 claimed. It factored in the impact of a section 15 award on partner B’s living standards and partner B’s contribution of separate property at the start of the relationship, from which partner A derived a benefit.¹⁰²

18.75 In *L v B* the Family Court’s reasons why an award under section 15 was not just appear to undermine the compensation purpose of section 15.¹⁰³ In that case the Court was not satisfied that there was either economic disparity or a causal link to the division of functions, but went on to say:¹⁰⁴

If I am wrong in the above findings, if I stand back and look at the overall discretion and determine whether an award for economic disparity is just, I am not persuaded that such an award is just. I take into account the deferment of the sale of the home, the ongoing requirement for child support and spousal maintenance and the fact that the Court has declared the D Street property to be the wife’s separate property, albeit with her obligations to the family, with their consent, this could

⁹⁸ *M v M* FC Wellington FAM-2007-091-767, 23 September 2009.

⁹⁹ *M v M* FC Wellington FAM-2007-091-767, 23 September 2009 at [61].

¹⁰⁰ *Wills v Catsburg* [2016] NZFC 851 at [52].

¹⁰¹ *E v E* FC New Plymouth FAM-2007-043-396, 18 December 2009.

¹⁰² *E v E* FC New Plymouth FAM-2007-043-396, 18 December 2009 at [83].

¹⁰³ *L v B* [2012] NZFC 9534.

¹⁰⁴ *L v B* [2012] NZFC 9534 at [70].

provide a source of income for her on an ongoing basis. I do not consider that it would be fair to make a substantial redistributive award. I consider that the wife will be able to plan to re-enter the workforce as a result of this judgment and will be able to either upskill, or retrain or alternatively enter the workforce now. I take into account that the clean break principle in a sense is being deferred and that provides ongoing support for the wife. While she has the ongoing responsibility for the children she will now be able to phase in and plan for the reintegration back with the workforce. Taking her age into account that will still be achievable. I do not consider it is appropriate to compensate from the husband's share of relationship property for any adjustment. I take into account that there has been reasonably significant spousal maintenance paid by the husband post-separation and child support. I accept that he should not be rewarded for doing what he is responsible for doing in the first place but on the other hand I have to acknowledge that it has been paid and that there is going to be continued liability. I also take into account the ages of the children.

18.76 Factors taken into account in that case, such as maintenance and child support, are to meet the financial needs of the partner and children, not to compensate partner A for the economic disadvantages he or she suffered as a result of the division of functions. By taking these payments into account the Court essentially conflated the two separate concepts of needs and compensation.¹⁰⁵

Is the reasoning used by the courts consistent with the purpose of section 15?

18.77 The decision in *L v B* is not a one-off example of a court considering factors that seem inconsistent with the compensation purpose of section 15. In other cases the courts have also considered:¹⁰⁶

- (a) whether economic disparity is likely to be long-term or short-term;¹⁰⁷

¹⁰⁵ We consider the overlap between s 15 of the Property (Relationships) Act 1976 and maintenance in Chapter 19 with respect to option 3.

¹⁰⁶ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR15.15].

¹⁰⁷ *Monks v Monks* [2006] NZFLR 161 (HC).

- (b) whether there are causative factors other than the division of functions and the weight of those other factors;¹⁰⁸
- (c) the clean break concept;¹⁰⁹
- (d) availability of part-time rather than full-time work for partner A;¹¹⁰
- (e) post-separation support such as mortgage payments;¹¹¹
- (f) voluntary payment of spousal maintenance;¹¹² and
- (g) age of the partners and the number of years left in the workforce.

18.78 The courts' consideration of these factors suggests a disinclination to find that a section 15 claim has been established. It is hard to see how many of these factors are relevant to compensation for economic disparity. For example, whether or not partner B *voluntarily* paid maintenance as opposed to being forced to pay maintenance by a court order seems irrelevant to whether economic disparity caused by the division of functions should be compensated. While the age of the partners and the length of the economic disparity may indicate a level of need (perhaps caused by the economic disparity and perhaps not), section 15 is focused on compensation. Meeting needs is a separate issue that is dealt with under maintenance and child support where relevant. We discuss the overlap between section 15 and maintenance in Chapter 19 with respect to option 3.

18.79 The discretion under section 15(3) is broad and we consider that its exercise has resulted in cases where an award was not made or was reduced for reasons unrelated to compensating for economic disparity resulting from the division of functions.

Ability to review the court's discretion under section 15(3)

18.80 Because a court's decision to make a section 15 award is an exercise in discretion, the extent to which a higher court can

¹⁰⁸ *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC).

¹⁰⁹ *M v B* [2006] NZFLR 641 (CA); and *L v B* [2012] NZFC 9534 at [70].

¹¹⁰ *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003.

¹¹¹ *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003.

¹¹² *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003 at [63].

review it is limited.¹¹³ A higher court can only intervene if the lower court had:¹¹⁴

- (a) made an error of law or principle;
- (b) took into account an irrelevant consideration;
- (c) failed to take account of relevant considerations; or
- (d) made a decision that was plainly wrong.

Determining the amount of section 15 awards

18.81 If the three hurdles in section 15 are satisfied a court may order partner B to transfer a sum of money or any other property from partner B's share of relationship property to partner A.¹¹⁵ This is most commonly implemented by adjusting each partner's share of the pool of relationship property (for example partner A receives 65 per cent and partner B receives 35 per cent of the relationship property pool). After the court has made the monetary award the relationship property is then shared equally.

Overview of amounts awarded under section 15

18.82 Our research identified approximately 100 cases in which a court decided a claim under section 15.¹¹⁶ Roughly 40 per cent of claims were successful, resulting in a compensatory award under section 15. The amount awarded ranged from \$15,000 to \$470,000. The largest amount awarded was in *Scott v Williams*, but in that case the Family Court had originally awarded \$850,000, which was lowered to \$470,000 on appeal.¹¹⁷ On average, the amount awarded was approximately \$96,000.¹¹⁸

¹¹³ The High Court in *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [50] stated that:

If the threshold requirements of s 15(1) are established, s 15(3) enables the Court to make an economic disparity award "if it considers it just" to do so. This involves the exercise of a discretion and therefore the limits on an appeal in respect of the exercise of a discretion apply, as earlier discussed.

¹¹⁴ *J v J* [2014] NZHC 1495 at [24] and [80]; see also *Simon v Wright* [2013] NZHC 1809 at [42].

¹¹⁵ Property (Relationships) Act 1976, s 15(3).

¹¹⁶ "Case" in this context means that a unique application was made under s 15 of the Property (Relationships) Act 1976. Thus each "case" includes any appeals in that matter.

¹¹⁷ The amount awarded in the Family Court (\$850,000) was reduced to \$280,000 in the High Court and then raised to \$470,000 in the Court of Appeal. This case is currently on appeal to the Supreme Court

¹¹⁸ See Vivienne Crawshaw "Section 15 – A Satellite Overview" (2009) 6 NZFLJ 155 for an earlier review of the case law.

18.83 We could not determine, in every case, the amount of the section 15 award as a proportion of the overall relationship property pool.¹¹⁹ While in some cases the amount awarded was given as a percentage of the relationship property pool, in others the amount awarded was given as a monetary sum and the value of the relationship property pool was not stated. In some cases the value of a large asset (such as a house) was given and we nominated a maximum proportion based on that figure.

18.84 Of the cases we could measure, the section 15 award was, on average, 7.4 per cent of the overall relationship property pool. The amount awarded in *Scott v Williams*, while the largest monetary sum on record, represented just 5.2 per cent of the overall relationship property pool.¹²⁰ We identified eight cases where the proportion was above 10 per cent, and two cases in which the section 15 award represented a much larger percentage of the relationship property pool. In *J v J* the award amounted to 30 per cent of the relationship property pool,¹²¹ and in *Fischbach v Bonnar*, the first reported case to consider section 15, the award amounted to 21 per cent.¹²² The lowest proportion we identified was in *M v M*, where the award of \$31,000 (adjusted for inflation) amounted to 1.4 per cent of the relationship property pool.¹²³

How the courts calculate the award

18.85 The PRA itself offers little guidance on how a section 15 award should be determined, beyond stating that the purpose of the award is to compensate partner A. The Court of Appeal has noted that calculations of section 15 awards “have not exactly been a model of clarity.”¹²⁴ In *M v B* the Court of Appeal said that

¹¹⁹ Miles says that there is “anecdotal evidence” that in a “big money” case where an equal division gives each party a substantial tranche of assets, “judges would be unlikely to exercise their discretion under s 15 of the Property (Relationships) Act 1976, even if jurisdiction is made out”: Joanna Miles “Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZULR 267 at 296-297. Such an outcome:

subverts the entitlement plus compensation rationale of the Act with a needs-based approach. The fifty per cent is awarded on the basis of entitlement, not need. Compensation is awarded on the basis that one party remains substantively better off than the other, and does so because the functioning of the relationship has generated compensable losses.

¹²⁰ *Scott v Williams* [2016] NZCA 356. Judgment of the Supreme Court pending.

¹²¹ *J v J* [2014] NZHC 1495. Awarded in the Family Court and upheld on appeal in the High Court. The wife received 70 per cent of the relationship property pool in total.

¹²² *Fischbach v Bonnar* [2002] NZFLR 705 (FC). The wife received 65 per cent of the relationship property pool in total. The award in *Waters v Waters* FC Hamilton FP-2003-019-815, 25 August 2004 was 16 per cent of the relationship property pool in total.

¹²³ *M v M* FC Papakura FAM-2004-055-398, 15 June 2006.

¹²⁴ *M v B* [2006] 3 NZFLR 660 (CA) at [721].

compensation should be determined by reference to what partner A could have earned after the relationship but for the effect of the division of functions during the relationship.¹²⁵

18.86 The majority of the Court of Appeal in *X v X* said that “the statutory requirement is that the award be just, and that is the overriding consideration.”¹²⁶ It endorsed the methodology adopted in the Family Court,¹²⁷ which was as follows:¹²⁸

- (a) calculate the difference between the income partner A would have been earning but for the division of functions, and what partner A is projected to actually earn working to the full extent of his or her capacity (known as the “but for” income);
- (b) make any necessary deductions to the “but for” income to reflect the time value of money and the chances of non-collection of future income (because of reduced time in the workforce for reasons such as death, deteriorating health, changes in personal priorities, re-partnering or early retirement); and
- (c) halve the resulting net present value of the “but for” income (this is the “halving step”, which is discussed below).

18.87 The majority considered that such an approach could offer “value in providing some structure for the exercise that judges are required to undertake, which should enhance the predictability of awards.”¹²⁹ It was emphasised that the formula was not the only approach that could be taken recognising that “the judge is required to make judgements on matters which are inherently imprecise.”¹³⁰ The methodology is not suitable where partner A had no career prior to the relationship. An example of this would be where the partners met when they were young and had children

¹²⁵ *M v B* [2006] NZFLR 641 (CA) at [206] per Young P.

¹²⁶ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [175] per O’Regan and Ellen France JJ.

¹²⁷ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [172]–[176] per O’Regan and Ellen France JJ. Other lower court decisions that had used comparable methodologies were: *V v V* [2002] NZFLR 1105 (FC); *McGregor v McGregor* (No 2) [2003] NZFLR 596 (FC); *P v P* [2005] NZFLR 689 (HC); *T v T* [*Economic disparity*] [2007] NZFLR 754 (FC); and *W v W* FC Auckland FAM 2007-004-663, 12 December 2007.

¹²⁸ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [172] per O’Regan and Ellen France JJ.

¹²⁹ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [175]. It is noted however that the use of independent experts may be necessary to give effect to the formula, for example in valuing and identifying career projections.

¹³⁰ A similar approach had been used in earlier cases including *V v V* [2002] NZFLR 1105 (FC); *McGregor v McGregor* (No 2) [2003] NZFLR 596 (FC); *P v P* [2005] NZFLR 689 (HC); *T v T* [*Economic disparity*] [2007] NZFLR 754 (FC); and *W v W* FC Auckland FAM 2007-004-663 12 December 2007.

early on so partner A never had the opportunity to build a career (as in *CH v GH*).¹³¹

- 18.88 In his minority decision in *X v X*, Robertson J considered that section 15 “should not be locked into any particular prescription”¹³² and cited his own judgment in *M v B* where he said that “section 15 awards are necessarily a matter of impression and rote applications of a formula will not be appropriate.”¹³³ Robertson J preferred that the approach to determining the amount of compensation was to have regard to all the facts and that the approach was discretionary and not formulaic.
- 18.89 Since *X v X* several cases have taken a less formulaic approach and instead relied on a more comprehensive analysis of the particular facts. In *Williams v Scott* the Family Court considered factors such as partner A’s IQ and income earning potential when assessing what loss she may have incurred.¹³⁴
- 18.90 In *H v S* partner A had no established career as she had stayed at home to take care of the children, although toward the end of the relationship she had begun a teaching career with some success.¹³⁵ The Family Court said that a more comprehensive approach allowed it to consider the fact that both partners were close to retirement. There was little evidence on what earning potential partner A could have had, so the Court assessed the likely future “but for” income as \$80,000 per annum, her actual income as \$60,000 per annum and decided that compensation should be available to reflect a disparity period of five years.¹³⁶ From that the Court deducted sums for tax, the time value of money and contingencies to reach a sum of \$41,000 adjusted for inflation. Although this still involved more calculation, the Court was prepared to substitute intuition for precise evidence on what partner A would have earned in an alternative career.
- 18.91 In *J v J* partner A had a career as a nurse and had a child from a former relationship.¹³⁷ The High Court said that caring for that child had not impacted on her career, but there were two children

¹³¹ *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.

¹³² *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [125].

¹³³ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [125] citing *M v B* [2006] 3 NZFLR 660 (CA) at [147].

¹³⁴ *Williams v Scott* [2014] NZFC 7616.

¹³⁵ *H v S* [2012] NZFC 7543.

¹³⁶ *H v S* [2012] NZFC 7543 at [76]–[78].

¹³⁷ *J v J* [2014] NZHC 1495.

of the marriage that partner A gave up work to care for. Partner A also relocated to support partner B's career. The Family Court awarded partner A an additional 30 per cent of the relationship property pool, by far the highest proportion ever awarded in a section 15 case. This resulted from a "broad brush approach."¹³⁸ The Court identified the factors relevant to a just award, including how the division of functions led to the disparity and other factors including the size of the property pool and each partner's age, stage of career and income, and partner A's continued responsibility for one child.

18.92 This decision was upheld on appeal. The High Court noted that:¹³⁹

While the loss sustained by [partner A] could have been calculated with more precision by reference to the income she could be expected to earn as an enrolled nurse and her remaining years in the workforce before retirement, the loss she sustained as a result of her foregone career is not the main operating factor in the disparity.

18.93 The final phrase in the above quote highlights a shift away from the formulaic approach that relied on past and potential income to look more broadly at all the circumstances when calculating the section 15 award. The Court then said that:¹⁴⁰

The justice of the situation is influenced by the position of the parties upon entering the relationship, the length of the marriage, the size of economic disparity and the marked inequality of income earning capacity.

18.94 The Family Court in *Williams v Scott*¹⁴¹ followed a similar approach and made an award of 10 per cent of the relationship property pool. On appeal, the High Court and Court of Appeal shifted back towards an approach involving specific calculation. A further appeal in this case is being considered by the Supreme Court.¹⁴²

¹³⁸ *M v B* [2006] 3 NZLR 660 (CA).

¹³⁹ *J v J* [2014] NZHC 1495 at [82] (emphasis added).

¹⁴⁰ *J v J* [2014] NZHC 1495 at [83].

¹⁴¹ *Williams v Scott* [2014] NZFC 7616.

¹⁴² At the time the proceedings were started the older child was 17 years old and the younger child 15 years old. However by the time of the Family Court judgment *Williams v Scott* [2014] NZFC 7616 they would have been around 24 and 22 years old respectively.

Adjustments for contingencies (provision for possible future events)

18.95 Based on our review of the cases, approximately 20 per cent of awards under section 15 included some reduction to allow for contingencies. The reduction varies significantly, from five per cent in *Woodman v Woodman* to 50 per cent in *S v S* and *K v B*.¹⁴³

18.96 A reduction or discount for contingencies is made by a court to recognise possible future changes to circumstances. The discount appears to depend on several factors. One is the estimated length of time the economic disparity will continue for (disparity period). Usually when partner A has only been out of the workforce for a short time it will not take long for him or her to regain full earning potential. The courts have made discounts to awards to reflect the lengths of the estimated disparity periods. There is no consistency as to the discount applied for similar time periods, as demonstrated in the table below.

DISCOUNTS APPLIED AND ESTIMATED PERIOD OF DISPARITY			
Case	Year	Estimated period of disparity	Discount applied
<i>McGregor v McGregor</i> ¹⁴⁴	2003	One and a half years	7.5 per cent
<i>Humphrey v Humphrey</i> ¹⁴⁵	2003	Three and a half years	25 per cent
<i>P v P</i> ¹⁴⁶	2005	Seven years	25 per cent
<i>S v S</i> ¹⁴⁷	2006	Five years	50 per cent ¹⁴⁸
<i>H v K</i> ¹⁴⁹	2009	Seven years	25 per cent ¹⁵⁰
<i>K v B</i> ¹⁵¹	2010	Seven years	50 per cent ¹⁵²
<i>H v S</i> ¹⁵³	2012	Five years	25 per cent

¹⁴³ *Woodman v Woodman* FC Auckland FP004/598/02C, 28 July 2004; *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006 and *K v B* FC Wellington FAM-2009-032-92, 5 October 2010.

¹⁴⁴ *McGregor v McGregor* [2003] NZFLR 596 (DC).

¹⁴⁵ *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005.

¹⁴⁶ *P v P* [2005] NZFLR 689 (HC).

¹⁴⁷ *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006.

¹⁴⁸ This discount encompassed “tax, mortality, loss of employment, re-partnering, illness and other contingencies”: *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006 at [91].

¹⁴⁹ *H v K* FC Whangarei FAM-2006-088-712, 27 October 2009.

¹⁵⁰ This discount took into account other factors including the range of possible career paths for the applicant: *H v K* FC Whangarei FAM-2006-088-712, 27 October 2009 at [78].

¹⁵¹ *K v B* FC Wellington FAM-2009-032-92, 5 October 2010.

¹⁵² In this case there was an additional “contingency” because the applicant had pursued a different, potentially less lucrative, career than before: *K v B* FC Wellington FAM-2009-032-92, 5 October 2010 at [147].

¹⁵³ *H v S* [2012] NZFC 7543.

18.97 Some judges appear more sceptical of discounts for contingencies than others. The High Court in *S v C* declined to make a discount for contingencies, “which in the absence of evidence of any specific contingencies must be regarded as neutral.”¹⁵⁴ Another example is in *Woodman v Woodman*, where the Family Court applied a five per cent discount for “genuine contingencies (such as death)” and dismissed other contingencies as speculative, noting that examples raised included re-partnering and winning Lotto.¹⁵⁵

The halving step

18.98 We identified 11 cases where the halving step was applied. There is mixed academic opinion on the halving step, which is to take the resulting value of a section 15 award, treat it as relationship property and therefore halve it. Atkin has argued that:¹⁵⁶

... we need to ensure that in curing one injustice we do not create another. Whatever the claimant receives by way of compensation comes from the other party – as the claimant goes up, the other party goes down. By halving the final figure, we make sure that both meet half way. Failing to halve may mean that the other party incurs a loss that creates a disparity in the other direction.

18.99 Caldwell has pointed out there is nothing in the wording of section 15 to require that awards made under section 15 should be halved. He notes that to halve an award risks preserving an existing disparity.¹⁵⁷

18.100 This part of the calculation exercise has something of a controversial history. Its early evolution is traced back in *P v P*:¹⁵⁸

[43] In my decision in V v V [2002] NZFLR 1105 I calculated an amount for s 15 compensation and reduced it by 50%. That is because I approached the matter upon the basis that the reduction in the applicant’s income earning ability was not the result of any wrong that had been done to her by the other party: it was the effect of the division of functions between them. Accordingly I took the view that the claim should be compensated

¹⁵⁴ *S v C* [2007] NZFLR 472 (HC) at [40].

¹⁵⁵ *Woodman v Woodman* FC Auckland FP004/598/02C, 28 July 2004.

¹⁵⁶ Bill Atkin “The Disparity in Economic Disparity” (paper presented to New Zealand Law Society Family Law Conference, October 2005) at 220.

¹⁵⁷ John Caldwell “The Various Disparities of section 15” (paper presented to Family Court Judges’ Conference, Gisborne, 24 October 2008).

¹⁵⁸ *P v M* FC Manukau FAM-2004-092-924, 29 May 2006.

out of the relationship property pool. That approach to the matter does not sit completely easily with the words of s 15 which speak baldly of compensating Party A by ordering Party B to pay Party A a sum of money out of Party B's relationship property. The ongoing negative financial impact of the relationship upon Party A was caused by the division of functions between the parties, not by something that was done to Party A by Party B.

[44] That approach has not generally been followed. For example it was not part of the process applied in P v P [2005] NZFLR 689, nor by the Court of Appeal in M v B.

[45] My view of this matter has been nudged forward by the broad discussion of the historical development of this legislation contained in the judgment of Hammond J in M v B. I now regard it as reasonably just that the respondent in this case should be compensated by the applicant in respect of the ongoing financial curb which their division of relationship functions places upon her.

18.101 In *W v W* the Family Court discussed the halving step and rejected it in diminished earnings claims, acknowledging that it would be more suited to enhancement claims.¹⁵⁹ However, the courts applied the halving step more often after *P v P*. It was applied in five further cases before the leading case, *X v X*.¹⁶⁰ There the Court of Appeal was split on the issue. The majority supported the halving step but Robertson J did not.¹⁶¹

18.102 The majority in *X v X* explained the rationale for the halving step as follows:¹⁶²

[232] During the relationship, the economic consequence of the decision is that there is no earnings contribution by one partner (or a lower contribution than would otherwise be the case), and the cost of that is borne by the relationship partners. In some cases, there will be no overall cost to the partners because the division of roles allows the earning partner to increase his or her earnings by more than the non-earning partner would have contributed. To the extent that the foregone income impacts on the relationship property available at the end of the

¹⁵⁹ *W v W* FC Auckland FAM-2007-004-663, 12 December 2007.

¹⁶⁰ *X v X* [2009] NZCA 399, [2010] 1 NZLR 601.

¹⁶¹ Judge Robertson noted where the halving step had been rejected as “it was fallacious to characterise the s 15 award as an item of relationship property...when it is a unique kind of compensatory award”: *McGregor v McGregor* [2003] NZFLR 596 (DC); see also *Fischbach v Bonnar* where the Family Court calculated the award as a percentage of the respondent husband's relationship property (the wife received a total of 65 per cent of the relationship property which included 40 per cent of the husband's portion of the relationship property pool) thus the question did not arise: *Fischbach v Bonnar* [2002] NZFLR 705 (FC).

¹⁶² *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [232]-[233].

relationship, the cost is also shared through the 50/50 regime for division of relationship property. If the relationship endured, the consequences of the disadvantaged partner's diminished income-earning capacity would continue to be shared. The end of the relationship prevents that sharing from occurring unless the Court intervenes under s 15.

[233] The object of the award under s 15 should be to ensure that the disadvantaged partner is not worse off after the end of the relationship than he or she was during the relationship. In effect, what he or she has lost is the ability to continue the position that applied during the relationship, ie the sharing of the ongoing consequences to the disadvantaged partner as a result of the division of roles. In principle, therefore, we consider that it is appropriate that the income shortfall amount derived from the methodology used in this case should be halved. That means that Mr X, as the advantaged partner, is required to pay his share of the loss represented by the reduced future income-earning capacity of Mrs X.

18.103 Since *X v X* we have only seen the halving step used in two cases: *E v E*¹⁶³ and *Scott v Williams*.¹⁶⁴ In *J v J* the High Court rejected the halving step, referring to the Court of Appeal's emphasis in *X v X* that the halving step was not always necessary, and noting that the Court of Appeal's primary consideration, that the disparity could be shifted from Mrs X to Mr X, did not arise in that case.¹⁶⁵

Other issues with section 15

Cost of making a section 15 application

18.104 We understand from our preliminary consultation that lawyers will advise clients that a section 15 application is only worthwhile if the income discrepancy is large (for example if partner B's income is at least two times the income of partner A) or if the relationship property pool is significant, so that even an award of a small percentage of the relationship property pool would merit the time and cost involved. The cost of making an application would otherwise mean that any compensation awarded under section 15 would not make it worthwhile.

¹⁶³ *E v E* [2012] NZFC 830.

¹⁶⁴ *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499.

¹⁶⁵ *J v J* [2014] NZHC 1495 at [85].

18.105 Section 15 claims that proceed to hearing can incur significant legal fees and fees for expert evidence from actuaries and forensic accountants. Despite the guidance in *X v X* on how to determine the amount of an award, there is still room for argument and this can cause significant costs. Green noted in her thesis:¹⁶⁶

In practice the evidence of experts, human resource consultants and accountants has become the means to gather the requisite evidence required...this approach may have a flow-on effect that creates problems in practice that are associated with additional costs, uncertainty regarding projections, and extensive input from experts.

18.106 As noted at paragraph 18.278 above, it seems unlikely that a partner can make an application under 15 without also applying for orders dividing relationship property under section 25(1) of the PRA.¹⁶⁷ This might involve significant additional costs, such as preparing valuation evidence for different items of relationship property.

18.107 An unsuccessful claim will also risk an order for costs against the applicant. The courts' approach to costs in PRA cases is discussed in Chapter 25.

Length of time for section 15 applications to be decided

18.108 We have tried to estimate how long section 15 applications take to be finally determined.¹⁶⁸ Keeping the limitations of the method in mind, we estimate that the average time it takes to determine a case that includes a section 15 application is approximately three years. We found only one case which was determined in the same year it was filed.¹⁶⁹ The majority of cases took two to three years. The longest time taken (excluding a 14-year case struck out for time delay) is *Scott v Williams*, which has so far taken eight years

¹⁶⁶ Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 50. We note from lawyers that the reference to human resource consultants is outdated as these are seldom used now.

¹⁶⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.3].

¹⁶⁸ This was done by comparing the year in the filing number with the year of the date of judgment. There are clearly some problems with this approach. We do not know what time of year applications were filed so it is possible that applications take a longer or shorter time than the year number indicates. We have not always been able to find the Family Court judgment so we were unable to find the length of time for some appeal decisions. This may mean the average provided here is lower than the true average as appeals extend the length of time it takes to reach a final outcome. Finally, the filing date represents the original application rather than the specific application under s 15 of the Property (Relationships) Act 1976.

¹⁶⁹ *W v W* FC Auckland FAM-2007-004-663, 12 December 2007.

with the case being heard by the Supreme Court in March 2017 and the decision pending. These findings are broadly consistent with case disposal data from the Family Court. As we discuss in Chapter 25, half of all PRA cases disposed of in 2015 had taken over two years.¹⁷⁰

18.109 A key consequence of the time it takes to obtain a decision under section 15 is that it can leave partner A with reduced economic resources for a long time. Simply having the resources to pay for legal assistance to bring a section 15 claim can be difficult.

18.110 There will be an unknown number of cases where section 15 compensation is agreed between the partners (often on the advice of their respective lawyers as to likely outcomes).

Section 15 awards are restricted to the relationship property pool

18.111 Section 15 awards can only be paid from partner B's share of the pool of relationship property.¹⁷¹ This is problematic when the size of the relationship property pool is limited. Take for example the partners who stay together for a decade and during that period partner A manages the household and looks after the children, supporting partner B who undertakes studies to become a surgeon. During this period income is limited and the partners cannot accumulate any assets. At the date of separation, partner B has just signed an employment contract worth \$300,000 a year (expected to rise rapidly). A section 15 claim is established but the relationship property pool is minimal, so partner A receives very little. partner B however retains the benefit of his or her future income. There is no ability under the PRA to order future payments to partner A from partner B's income. This leaves the potential for an otherwise established section 15 claim to go without an effective remedy.

18.112 It is difficult to say how often this restriction hampers an otherwise strong section 15 claim, as a claim in this scenario is unlikely to ever make it to court. As discussed at paragraph 18.1045 above, a lawyer would likely advise their client that it is not worthwhile making a section 15 claim if the relationship

¹⁷⁰ This refers to cases that proceeded to a hearing. In 2015, 93 per cent of cases took more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016).

¹⁷¹ Property (Relationships) Act 1976, s 15(3).

property pool is minimal. In her research, Green identified that such a scenario was “not isolated.”¹⁷² Green referred to the reasoning of Lord Nicholls in the House of Lords in *McFarlane v McFarlane* when he said:¹⁷³

If one party’s earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.

18.113 The widespread use of trusts in New Zealand is discussed in Part G. We note that the use of trusts may remove assets which would otherwise be in the pool of relationship property. This has the potential to negatively affect the scope of relationship property, undermining the ability of section 15 to address economic disparity.

¹⁷² Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013) at 320.

¹⁷³ *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 per Lord Nicholls of Birkenhead at [32].

Chapter 19 – Options for reform

Is reform needed?

- 19.1 Our preliminary view is that section 15 is failing to achieve its objective of providing for a just division of property in circumstances where equal sharing would not lead to an equitable result. Reform is needed. As Green concludes “New Zealand needs a practical, solution-based outlook to solve economic disparity.”¹⁷⁴

Is there still a need for section 15 or a replacement adjustment mechanism?

- 19.2 Relationships that are characterised by a division of functions into income-earning and household management roles are common. In 2016, 33 per cent of couples with children were characterised by one partner working full-time and with the other partner not in paid employment.¹⁷⁵ While some socio-economic groups may be experiencing a generational shift, with more partners sharing the functions within a relationship more equally (such as more women remaining in the workforce after having children and more men taking on greater childcare responsibilities),¹⁷⁶ there remains a strong correlation between having children and reduced workforce participation for women. As discussed in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (Study Paper),¹⁷⁷ women are more likely to leave the workforce or work part-time when they have children, while men tend to remain in work and provide the family income.¹⁷⁸

¹⁷⁴ Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013) at 327.

¹⁷⁵ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 6 citing Bryan Perry *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2016* (Ministry of Social Development, July 2017) at 147.

¹⁷⁶ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 6.

¹⁷⁷ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

¹⁷⁸ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 6.

- 19.3 There will also always be relationships where, for a range of reasons, partner A stops work or takes a sideways or backwards move in his or her career in order to support partner B’s career. For example, partner A might relocate so partner B can take up a job opportunity.
- 19.4 We think that there remains a need to provide for situations where the division of functions within a relationship results in an economic disadvantage for partner A and/or economic advantage for partner B.

Summary of options

- 19.5 In this chapter we set out three options for reform:
- (a) **Option 1: Retain section 15 but lower the hurdles that partner A must overcome for a claim to succeed.** Under this option the need to establish economic disparity would be replaced with a simpler requirement to show “financial inequality” at the end of the relationship. The requirement to establish causation would also be replaced with a rebuttable presumptive entitlement to compensation if there was financial inequality and a division of functions within the relationship. We also explore options for satisfying a section 15 award from future income, rather than being limited to the relationship property pool.
 - (b) **Option 2: Repeal section 15 and address financial inequality in other PRA rules.** Here we consider whether financial inequality attributable to the relationship is better addressed elsewhere in the PRA. Specifically, whether the PRA should treat the earning capacity of partner B as “property” that can then be divided equally as relationship property to the extent it has been enhanced by the relationship.
 - (c) **Option 3: Replace section 15 with financial reconciliation orders.** These orders would be a hybrid of compensating loss and meeting needs. Such orders would likely replace maintenance at the end of a relationship.
- 19.6 Our preliminary preference is for option 3. We express this view mindful of the significant further work required to develop any of

the options presented, and the possibility that other viable reform options may be identified during consultation.

- 19.7 Before exploring these options we first set out some common objectives and characteristics of any option for reform.

Common objectives and characteristics of section 15 reform

Replacing the narrow concept of economic disparity with financial inequality

- 19.8 Section 15 currently only applies where the income and living standards of partner B are likely to be significantly higher than partner A. We refer to this as “economic disparity.”
- 19.9 As explained in Chapter 18 the concept of economic disparity is not sufficiently wide enough to cover every scenario of financial inequality between the partners at the end of the relationship. We consider in particular that the requirement to demonstrate a significant disparity in living standards in section 15 is not useful. Living standards imply choice. If, for example, partner A chooses to invest in a large house rather than to rent a modest property and invest the resulting savings for future use, then partner A’s living standards might differ. We doubt the value of comparing choices about living standards in the context of section 15. We consider the focus should be on disparity in income or other financial resources, not on living standards. We refer to this as “financial inequality.”

Balancing a clean break with a just result – the case for future payments

- 19.10 Currently section 15 awards are limited to partner B’s share of relationship property. An important consideration in these options is whether the property pool for any payments or transfers of property to address financial inequality should be broadened to include separate property and/or future income.

19.11 Broadening the scope of section 15 or a replacement adjustment mechanism to include future income may offend the concept of a “clean break.” While we acknowledge the general attraction of a clean break in property matters, we consider it is less relevant when there are children of the relationship or the end of the relationship gives rise to financial inequality due to the division of functions. In these circumstances we consider the clean break concept is a secondary consideration. As Lord Hope stated in *McFarlane v McFarlane*:¹⁷⁹

...achieving a clean break in the event of a divorce remains desirable, but if this means that one party must adjust to a lower standard of living then this result is that the clean break is being achieved at the expense of fairness. Why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up as his share of the bargain that they entered into?

19.12 While we do not consider the clean break concept should be a paramount concern in cases of financial inequality, we are however interested in an option that will help the partners to move on with their lives as quickly as possible.

Any reform must promote the principles of the PRA

19.13 In Chapter 3 we set out the explicit and implicit principles of the PRA. Any reform of section 15 must promote the principle that:¹⁸⁰

... 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:

19.14 The following principles should also underpin any option for reform:

- (a) Questions arising under the PRA should be resolved “as inexpensively, simply, and speedily as is consistent with justice.”¹⁸¹

¹⁷⁹ *McFarlane v McFarlane* [2006] UKHL 24, 2 AC 618 at [120] per Lord Hope.

¹⁸⁰ Property (Relationships) Act 1976, s 1N(c).

¹⁸¹ Property (Relationships) Act 1976, s 1N(d).

- (b) Men and women have equal status, and their equality should be maintained and enhanced.¹⁸²
- (c) A just division of relationship property should have regard to the interests of children of the relationship.¹⁸³
- (d) All forms of contribution to the relationship are to be treated as equal.¹⁸⁴

19.15 Green observes that “research findings are conclusive: traditionally the non-monetary contributions of one partner are under-valued or disregarded.”¹⁸⁵ To the extent that section 15 fails to treat monetary and non-monetary contributions equally, this should be addressed in any option for reform.

Simple and inexpensive enforcement mechanisms may be needed

19.16 We are aware from our preliminary consultation that one of the principal concerns in relation to any reform is enforceability. Child support and maintenance payments are deducted from a payee’s salary at source if there is a child support or maintenance debt. Any enforcement measure will have associated costs and resource implications to be borne in mind. Our preliminary view is that any option ultimately recommended should have built-in enforcement mechanisms. This may require the State to play a role, as it does in the child support and maintenance recovery regimes.

The need to provide clear guidance for the courts

19.17 The courts’ approach to section 15 cases over the last 16 years has been at times inconsistent and generally conservative, resulting in few awards of small amounts. This is in part due to the lack of statutory guidance on key issues such as the requirement to establish causation (the causation hurdle) and the appropriate method for deciding the amount of a section 15 award.

¹⁸² Property (Relationships) Act 1976, s 1N(a).

¹⁸³ We refer to this as an implicit principle of the Property (Relationships) Act 1976, as is reflected in ss 1M(c) and 26(1).

¹⁸⁴ Property (Relationships) Act 1976, s 1N(b).

¹⁸⁵ Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013) at 293.

- 19.18 Any change to the law must provide clear direction on how Parliament intends any discretion within section 15 or its replacement to be exercised and how the discretion should be used in order to give effect to the policy of the PRA. One potential solution is to include examples or case studies after the relevant statutory provisions to illustrate the statutory objective.

How should the amount of an award for financial inequality be decided?

- 19.19 One key consideration for further development is how to determine the amount of a financial inequality award. Effective implementation of the options below would “require the development of proxy measures of economic loss that will inevitably involve some sacrifice of accuracy and theoretical purity.”¹⁸⁶ To avoid using extensive expert evidence (with its associated costs), our preliminary view is that it would be preferable to have adaptable measures to quantify the loss and determine the increased share of property or payment to be taken by partner A.

Consideration needed of children’s interests and interaction with child support

- 19.20 Whether the options should be conditional on there being children of the relationship is another matter that requires further consideration. A variation on this would be to impose a higher threshold for qualifying for an adjustment in the share of relationship property if there were no dependent children. If a distinction was drawn on this basis issues under human rights law may arise.¹⁸⁷
- 19.21 How any reform would interact with child support will also require consideration.

¹⁸⁶ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 7.

¹⁸⁷ See our discussion in Chapter 2 on New Zealand’s human rights obligations.

Option 1: Retain section 15 but lower the hurdles that partner A must overcome

19.22 This option retains section 15 but makes some important changes to:

- (a) remove reference to living standards, and focus instead on financial inequality (see paragraph 19.9 above);
- (b) replace the causation requirement with a rebuttable presumptive entitlement to compensation if there are both financial inequality and a division of functions;
- (c) broaden the property that can be used to satisfy a section 15 award.

Replacing the causation requirement with a rebuttable presumption

19.23 A key issue undermining the effectiveness of section 15 is the difficulty in establishing causation. One solution would be to remove the causation test and replace it with a rebuttable presumptive entitlement to compensation. The section 15 hurdles would then be:

- (a) financial inequality between the partners at the end of the relationship;
- (b) a division of functions during the relationship (that is, partner A was responsible for the household management or made some other contribution to the relationship that reduced partner A's earning capacity or enhanced partner B's earning capacity); and
- (c) compensation is just in the circumstances.

19.24 Replacing causation with a presumptive entitlement may help reduce litigation. It sends the clear signal that if partner A was responsible for the household management or made some other contribution to the relationship and at the end of the relationship there was financial inequality between the partners, then partner B must pay compensation. The key question that remains is how much that compensation should be. Without a clear indicator, the

question of how much to pay will continue to lead to disputes, including the need to go to court to resolve the issue.

- 19.25 Consideration would be required as to when it would not be just in the circumstances to award compensation. Without clear guidance, this test could itself lead to an increase in litigation.
- 19.26 Compensation could then take one of two forms:
- (a) a share of partner B's future income for a specified period; or
 - (b) an increased share of the relationship property.

Presumptive entitlement to a share of partner B's future income

19.27 We have identified three advantages with this approach:

- (a) It addresses scenarios where the payment of a capital sum may not be possible due to a limited relationship property pool.
- (b) Periodic payment awards do not require speculation about future contingencies because they can more easily be altered in response to a change in circumstances.
- (c) We understand from our preliminary consultation that ongoing payments may be more palatable than lump sum payments, especially when there are children of the relationship.

19.28 We have also identified four disadvantages of this approach:

- (a) To the extent it is of concern, this approach undermines the concept of a clean break. Future periodic payments from one party to the other create an ongoing tie. This may build resentment. Should partner A enter a new relationship, partner B may feel resentful about having to continue to provide payments. Should partner B enter a new relationship there is the potential for resentment to broaden, and there will likely be greater burdens on partner B's income.
- (b) This approach may risk incentivising improper behaviour in order to avoid having to share income,

such as leaving the work force or taking a lower paid job.

- (c) If variation of the order was needed and could not be agreed upon by the parties then returning to court would take additional time and cost more money. Issues of enforcement may also arise.
- (d) Having to continue to rely on a former partner for money can be demoralising and negatively affect an ongoing relationship between the former partners, especially as parents. We have heard about partners using the threat of non-payment of money to intimidate and “punish” the other party. If there are children of the relationship then the negative relationship between the partners can have flow-on effects to the children.¹⁸⁸

Presumptive entitlement to an increased share of the relationship property

19.29 The second approach is to adjust the relationship property division based on a percentage that reflects the financial inequality.¹⁸⁹ For example, an additional 2.5 per cent of the relationship property pool could be given to partner A for every year spent not in paid work up to a set maximum of the total relationship property pool (partner A being entitled to 50 per cent of the relationship property pool in any event).

19.30 We have identified three advantages with this approach:

- (a) Over time these percentage bands could become established and be used by lawyers and their clients in negotiations, avoiding the need to go to court.¹⁹⁰
- (b) It provides the partners with a clean break.
- (c) It may also address some issues highlighted elsewhere in this Issues Paper in relation to the interests of children of the relationship.¹⁹¹ For example, if the

¹⁸⁸ For more on this discussion see Chapter 3.

¹⁸⁹ This approach is discussed in Mark Henaghan “Sharing Family Finances at the end of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁹⁰ Claire Green “The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (PhD Thesis, University of Otago, 2013) at 331.

¹⁹¹ See Part I.

primary caregiver received a greater proportion of the relationship property he or she might be able to keep the family home.

- 19.31 The main disadvantage that we have identified with this option is that it may fail to achieve a just outcome if the relationship property pool is small, but partner B's future earning capacity is significant. A small relationship property pool would mean little improvement in partner A's situation.

Option 2: Repeal section 15 and address financial inequality in other PRA rules

- 19.32 Some commentators suggest that a solution to the problem of financial inequality is to include earning capacity as property in its own right. It could then be divided equally alongside the partners' other relationship property.¹⁹²
- 19.33 In Chapter 9 we considered whether a partner's income earning capacity should be treated as an item of property for the purposes of the PRA. In Chapter 11 we then considered whether a partner's earning capacity should be divisible as relationship property to the extent it had been enhanced by the relationship. We outlined the advantages and disadvantages for each question.
- 19.34 In addition to the advantages identified in the earlier chapters, treating enhanced earning capacity as relationship property could address many of the problems section 15 was intended to resolve. In many relationships, partner B's earning capacity is the main economic resource the partners have been able to build up, due in part to the efforts of partner A who performed household management functions.¹⁹³ Dividing partner B's earning capacity as relationship property to the extent it has been enhanced by the relationship allows both partners to share equally in the economic advantages the relationship has bestowed on partner B. Conversely, equal sharing of the enhanced earning capacity may address the disparity and economic disadvantages partner

¹⁹² Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming); and Carolyn Frantz and Hanoch Dagan "Properties of Marriage" (2004) 104 Colum L Rev 75.

¹⁹³ Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

A suffers from sacrificing paid work in order to support the relationship.

- 19.35 By considering a partner’s enhanced earning capacity as property divisible between the partners, the PRA would actively implement the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from the relationship.¹⁹⁴
- 19.36 Also, the PRA’s equal sharing rules would apply. Many of the problematic elements of section 15, such as establishing a division of functions, disparity and causation, and then persuading the court it is just to award compensation, would be avoided.
- 19.37 On the other hand, in Chapter 11 we identified some major challenges which, in our preliminary view, mean on balance it is not feasible to treat a partner’s enhanced earning capacity as relationship property. These challenges include the complexities and imprecision of valuing enhanced earning capacity and the difficulties of measuring the extent to which the relationship has enhanced a partner’s earning capacity.
- 19.38 An alternative approach could be to give the court power to adjust the partners’ shares in relationship property when the court is satisfied that equal sharing of relationship property does not fairly allocate the economic and advantages a partner derives from the relationship and the economic disadvantage a partner suffers from the relationship. Scotland takes a similar approach.¹⁹⁵ The aim of the Scottish law is to equalise any imbalances in the economic impact of the partners’ contributions to the relationship.¹⁹⁶
- 19.39 When assessing economic advantages and disadvantages, the court will take into account any gains in income and in earning capacity a partner receives during the relationship.¹⁹⁷ Importantly, the court does not divide the partner’s earning capacity as if it were an item of property. Rather, the court divides the partners’ conventional property but with regard to the partners’ relative earning capacities.

¹⁹⁴ Property (Relationships) Act 1976, s 1N(c); Mark Henaghan “Sharing Family Finances at the end of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁹⁵ Family Law (Scotland) Act 1985, s 9(1)(b); Family Law (Scotland) Act 2006, s 28(3) (which applies to cohabiting couples rather than married couples).

¹⁹⁶ Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 73.

¹⁹⁷ Family Law (Scotland) Act 1985, s 9(2); and Family Law (Scotland) Act 2006, s 28(9).

19.40 It is likely, however, that the option would suffer from similar difficulties as section 15 or if earning capacity were to be treated as property. Partners would still be required to prove they suffer economic disadvantages, or that the other partner unfairly enjoys economic advantages, because of the relationship. When deciding a fair adjustment of shares in relationship property, a court would probably have to measure the respective advantages and disadvantages each partner faces after the relationship.¹⁹⁸ This will require an assessment of future earning capacity which is subject to the same speculation and imprecision.¹⁹⁹

Option 3: Replace section 15 with financial reconciliation orders

19.41 The third option is to introduce a regime of “financial reconciliation payments” to support partner A until the financial inequality resulting from the division of functions during, and after, the relationship, ends. This combines the functions of section 15 awards and maintenance payments under the Family Proceedings Act 1980.²⁰⁰

19.42 We propose this option in recognition of the practical difficulties the courts have grappled with in trying to compartmentalise the different roles of section 15 and maintenance. In reality both can achieve the same outcome of transferring value from the partner with a higher income to the partner with the lower or no income. As Miles notes:²⁰¹

¹⁹⁸ In the Scottish case *C v C* 2004 Fam LR 2 (CSOH) the wife claimed that she had suffered economic disadvantage because she had given up her career to care for the children and household. The court relied on evidence on what the wife would have been earning had she not left her career. The court noted that the wife would receive half the couple’s matrimonial property based on the general principle of equal sharing of matrimonial property. The wife’s half share would give her substantial property which, if invested, could have provided the wife the same income as if she had maintained her career. The court was satisfied that any economic disadvantage would be corrected by the equalisation process: at [72]. Similarly, the court rejected the argument that the husband had derived economic advantages because the wife gave up her career. The court held that had the wife continued to work the husband would have had needed to hire help for childcare and household management. But the court noted at [38] that if the wife had worked she would have brought more income to the household. The proper measure, the court said, was whether the husband’s position had been advantaged beyond what it would have been had he not been married. The court was not satisfied it was: at [39].

¹⁹⁹ In an empirical study of family law practitioners’ views on the Family Law (Scotland) Act 1985 and Family Law (Scotland) Act 2006, researchers found that there was a perception that it was hard to obtain a departure from equal sharing in order to address economic disadvantages. The practitioners responded that claims were complex to argue and difficult to prove given the difficulties of quantifying economic advantages and disadvantages: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 75.

²⁰⁰ Since 2001 maintenance has been available to de facto partners as well as married (and now civil union) partners. In this Issues Paper we refer to “maintenance” rather than “spousal maintenance” as it is commonly termed.

²⁰¹ Joanna Miles “Principle or Pragmatism in Ancillary Relief: The virtues of flirting with academic theories and other jurisdictions” (2005) 19(2) *JLPPF* 242 at 252.

Where claimants seek compensation these claims will often correspond with claimants' needs. Where this is so, whether the claim is conceptualised in terms of need or compensation will make no practical difference...

- 19.43 Financial reconciliation orders would have a dual function: to meet partner A's reasonable needs post-separation, and to compensate partner A for the loss suffered as a result of the end of the relationship.
- 19.44 We start with a brief summary of what we know about the financial needs that arise when a relationship ends. We then give a brief overview of maintenance and discuss the overlap between section 15 and maintenance before outlining what it would look like to unite the two concepts. We also discuss the Canadian experience of spousal support (similar to maintenance in New Zealand) which addresses both financial need and financial inequality.

Financial needs that arise when a relationship ends

- 19.45 The end of a relationship almost always has negative financial consequences for both partners, as the resources that were used to support one household must now support two. The benefits from economies of scale will be lost, and the costs of establishing a new household and rearranging lives (such as increased childcare costs to meet longer hours at work, or reduced work hours and income to facilitate childcare arrangements) need to be met.
- 19.46 We explore the economic cost of separation in our Study Paper.²⁰² Recent research by Fletcher into the economic consequences of separation among couples with children confirms that on average total family incomes decline substantially for both men and women following separation.²⁰³ On average women experience a reduction in family income by 41 per cent and for men the

²⁰² Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper) at Chapter 8.

²⁰³ *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 183. This research was limited to opposite-sex couples who separated in 2009. It looked at the short to medium term financial consequences of separation by analysing the incomes of over 15,000 people in the Working for Families dataset who separated in 2009 and who, prior to separating had at least one child living with them, and comparing outcomes with similar, still partnered individuals. For further information about this dataset see Study Paper at Chapter 8.

reduction is 39 per cent in the first year after separation.²⁰⁴

However because men on average experience a larger reduction in family size post-separation compared to women (reflecting the care arrangements for children) their available income needs to be shared among fewer people. After equivalising family incomes to account for differences in family composition women are substantially worse off post-separation, and on average experience a drop in equivalised income of 19 per cent.²⁰⁵ In contrast, men are on average better off, experiencing a rise in equivalised income of 16 per cent.²⁰⁶ Beyond those averages, however, lies a wide dispersion of incomes and effects. Among both men and women, some are significantly better off and some are significantly worse off.²⁰⁷ These results are broadly consistent with studies carried out in other countries.²⁰⁸

19.47 Fletcher also compared the relative financial consequences of separation between partners.²⁰⁹ He identified that:

- (a) It is rare for separation not to be associated with a significant financial impact for at least one of the partners.²¹⁰ In only 3 per cent of cases neither partner

²⁰⁴ This analysis compares a person's income in 2008 (the year prior to separation) with their income in 2010 (the year following separation): see *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122 and 183.

²⁰⁵ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122.

²⁰⁶ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122.

²⁰⁷ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 184–185.

²⁰⁸ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 184–185.

²⁰⁹ Outcomes for 7,749 couples were analysed for the first post-separation year, and 5,781 couples for the three post-separation years: see *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 128–129.

²¹⁰ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

experienced a change in income of at least 10 per cent in the first year after separation.²¹¹

- (b) The impact of separation on incomes persists over the medium term, in the three years' following separation.²¹²
- (c) The most common scenario is where the woman is worse off after separation while her former partner is better off.²¹³ In 35 per cent of cases the woman's equivalised income *reduced* by more than 10 per cent and her partner's income *increased* by more than 10 per cent. These couples were characterised by a high average income before separation which came primarily from the man's earnings. After separation the average number of children living with the man had fallen substantially (from 1.99 to 0.16 children), and while the woman's post-separation earnings increased substantially, this is insufficient to offset the loss of her partner's income.²¹⁴ This group had the largest gap in terms of the average number of children living with the partners in 2010 (1.4 for women and 0.16 for men).²¹⁵
- (d) Another way of analysing post-separation outcomes is to compare the *relative* consequences of separation, irrespective of whether individuals are better or worse off compared to their own situation prior to separation. On this analysis, Fletcher identified that 70 per cent of men had equivalised incomes that were higher than

²¹¹ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

²¹² Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 187.

²¹³ This accounts for 46 per cent of cases. Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 131.

²¹⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 186.

²¹⁵ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 134-135.

their partners, and 25 per cent of men had equivalised incomes more than double their partner's.²¹⁶

- (e) Child support payments provide little support to many separated partners with the primary care of children.²¹⁷ Of those partners receiving child support, average receipts were \$2,367 for women and \$709 for the men per annum.²¹⁸
- (f) Separation significantly increases benefit uptake in the short and medium term. In the first year following separation, 24 per cent of men and of 47 per cent of women received a benefit.²¹⁹
- (g) Separated partners are also more likely to be in poverty. The estimated impact of separation was to raise the poverty rate by 9 per cent for men and by 16 per cent for women.²²⁰

19.48 Overall, Fletcher identified that average total family income (that is, the combined income of the former partners) rises by \$14,600 (23 per cent) in the year following separation.²²¹ This is due to a combination of increased workforce earnings, benefit receipt²²² and child support. However this increase is not sufficient to avoid

²¹⁶ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 140-141.

²¹⁷ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 137-138 and 152.

²¹⁸ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 138.

²¹⁹ Compared to 15.3% of all families in the dataset who received a benefit: Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 143.

²²⁰ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 144 and 186.

²²¹ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 148-149.

²²² A key State benefit that can meet post-separation financial needs is Sole Parent Support. This replaced the Domestic Purposes Benefit in 2013. Sole Parent Support is available to a single parent or caregiver with a youngest dependent child under age 14. At the end of March 2017, 92 per cent of Sole Parent Support recipients were female and 76.2 per cent of recipients had been receiving Sole Parent Support for more than one year: Ministry of Social Development *Sole Parent Support - March 2017 quarter* (March 2017) at 1.

an overall decline in average equivalised incomes across both households.²²³ Men are, on average, approximately \$5,000 better off in equivalised income terms and women are approximately \$7,000 worse off.²²⁴

19.49 Fletcher also identified that couples where the woman was significantly better off and the man worse off post-separation were characterised by more equal sharing of pre-separation earning and a reasonable combined level of income.²²⁵ It is possible that as full-time employment becomes more common among women with dependent children, this pattern of outcomes will become more common.²²⁶

19.50 We recognise there are also societal factors (unrelated to any particular relationship) that mean the negative financial consequences of a relationship breakdown can be harsher and longer-lasting for women.²²⁷ This includes the “gender pay gap”, which was last assessed by Statistics New Zealand as 9.4 per cent, and the “motherhood penalty”, last assessed at 12 per cent.²²⁸ Another factor is the availability of subsidised childcare. In New Zealand there is no universal entitlement to subsidised childcare for children under the age of three. Childcare can be a significant post-separation cost, especially when those costs are borne by one partner. Caregivers who work shift work or non-standard hours face additional challenges in organising and paying for childcare.

²²³ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 149.

²²⁴ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 148.

²²⁵ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

²²⁶ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

²²⁷ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 7.

²²⁸ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017) at Chapter 7 citing Statistics New Zealand “Gender pay gap smallest since 2012” (press release, 1 September 2017); and Statistics New Zealand and Ministry for Women *Effect of motherhood on pay – summary of results: June 2016 quarter* (February 2017) at 5. The gender pay gap is the difference between median hourly earnings of men and women in full-time and part-time work. The motherhood penalty is the difference between the pay gap between male parents and female parents, and the pay gap between male non-parents and female non-parents.

The role of maintenance in addressing financial inequality

19.51 Maintenance is available at the end of a marriage, civil union or de facto relationship²²⁹ when one partner cannot meet his or her reasonable needs because of one or more of the circumstances listed in sections 63 and 64 of the Family Proceedings Act 1980.²³⁰ These circumstances include the division of functions within the relationship, ongoing responsibility for daily care of any minor or dependent children, the standard of living of the partners when they were together and any undertaking of training by a partner to eliminate the need for maintenance of that partner.

19.52 Maintenance seeks to give temporary relief to enable the applicant to construct a new life after separation.²³¹ Section 64A of the Family Proceedings Act is, on the face of it, an adoption of the clean break concept.²³² Section 64A(1)(a) provides that:

each spouse, civil union partner, or de facto partner must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs;

²²⁹ De facto partners are treated differently to married and civil union partners under the maintenance provisions in the Family Proceedings Act 1980. First, the factors listed as affecting “ability” to be self-supporting under s 63(2)(a) that apply to marriages and civil unions are different to those in s 64(2)(a) that apply after dissolution of a marriage or civil union or where a de facto relationship ends. For example, in the former, personal disability and the labour market may affect ability to work whereas in the latter they do not. Second, the requirement in s 64A that parties must assume responsibility for meeting their needs within a reasonable time does not apply to a marriage or civil union that has not been dissolved. Third, maintenance is not available at the end of a short-term de facto relationship (lasting less than three years) unless the test in s 70B is met. No such test applies to short-term marriages and civil unions. Fourth, maintenance is available during a marriage or civil union under s 63. No such entitlement exists for de facto relationships.

²³⁰ Section 2 of the Family Proceedings Act 1980 defines maintenance as the provision of money, property and services and includes, in respect of a child, provision for the child’s education and training to the extent of the child’s ability and talents, and in respect of a deceased person, the cost of the deceased person’s funeral.

²³¹ The courts have confirmed that maintenance is a temporary entitlement. In *Slater v Slater* [1983] NZLR 166 (CA) at 174 maintenance was described as for a “transitional period” and at [176]: “Maintenance is ordinarily...a bridge to assist the party concerned while he or she is consciously moving towards self-sufficiency.” Similar sentiments were expressed in *C v G [Maintenance of Former Partner: Period of Liability]* [2010] NZFLR 497 (CA) at [31] and [32]. The Court of Appeal cautioned in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 293 and 295 that nothing “requires this objective to be carried through to the point where the provisions operate unfairly and harshly on one or other of the spouses”, cautioning against “undue rigidity” in applying the principles expressed in *Slater v Slater*.

²³² Joanna Miles has commented that the clean break concept has nonetheless influenced the size of maintenance awards which she describes as “quite parsimonious”: Joanna Miles “Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation” (2004) 21 NZULR 267 at 301 expressly referencing *B v B* [2004] NZFLR 127 (FC). See also John Caldwell “Maintenance – Time for a Clean Break?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

- 19.53 Yet section 64(2) provides such broad exceptions as to undermine that policy intention. Any “relevant circumstances” may be grounds for extending the temporary nature of maintenance.²³³
- 19.54 A court may order interim maintenance. We understand that this is a vital source of aid for many applicants as it gives them access to funds for daily living and for paying legal fees while relationship property matters are being resolved. We understand, however, that there can be delays in applications being heard. The fact that interim maintenance can only be ordered for a maximum of six months (after which a further application is needed) places a heavy burden on the applicant and his or her lawyer to make ongoing applications.
- 19.55 Partners may also enter a maintenance agreement, which can be administered by the Inland Revenue Department. Such an agreement does not preclude a party from applying for maintenance from the Family Court. The Family and District Courts have a wide power to vary, discharge or suspend any existing maintenance order.
- 19.56 A court may order maintenance to be paid as periodic payments or as a lump sum (in instalments if needed). A court must have regard to the following factors in determining how much maintenance is to be paid:²³⁴
- (a) the means of each partner, including potential earning capacity, and means derived from any division of property under the PRA;
 - (b) the reasonable needs of each partner, having regard to the standard of living of the partners while they were living together;²³⁵
 - (c) the financial and other responsibilities of each including support of any other person;
 - (d) conduct by the applicant to prolong the inability to meet his or her reasonable needs or misconduct that would make granting maintenance repugnant to justice; and

²³³ Family Proceedings Act 1980, s 64A.

²³⁴ Family Proceedings Act 1980, ss 65(2) and 66.

²³⁵ Family Proceedings Act 1980, s 65(5).

- (e) any other circumstances that make one party liable to maintain the other.

19.57 Although maintenance is collected and enforced by the Inland Revenue Department, it is separate from child support. Section 62 of the Family Proceedings Act also confirms that “the liability to maintain any person under this Act is not extinguished by reason of the fact that the person’s reasonable needs are being met by a domestic benefit.” The Court of Appeal confirmed in *Richardson v Richardson* that the domestic purposes benefit and Working for Families Tax Credits are not to be considered when assessing maintenance.²³⁶

19.58 There are several key points of difference between section 15 and maintenance:

- (a) Maintenance focuses on the present needs of the applicant without requiring reference to the history of the relationship.
- (b) Maintenance is a response to unmet needs whereas section 15 compensates for economic disparity, whether or not the applicant has financial needs.
- (c) At least *in theory*, maintenance and section 15 applications are considered at different times. Interim maintenance can be ordered soon after an application is made (with final orders being made at a later stage) whereas a section 15 application takes a notoriously long time to be heard and it is made at the time relationship property is divided. We have also been told that interim maintenance applications can take a long time to prepare and several weeks, if not months, to be heard.

The overlap between section 15 and maintenance

19.59 Despite being in different statutes and with different statutory objectives, there is a clear link between section 15 and maintenance.²³⁷

²³⁶ *Richardson v Richardson* [2011] NZCA 652, [2012] 1 NZLR 796.

²³⁷ The overlap of policies and complementarity between the Property (Relationships) Act 1976 and Part 6 of the Family Proceedings Act 1980 was judicially acknowledged in *N v N* (1984) 3 NZFLR 277 (HC) at 280 and in *M v B [Economic Disparity]* [2006] NZFLR 641 (CA) at [220].

19.60 Claims to maintenance are often conflated with section 15 claims. During our preliminary consultation we were told that in practice when partner A makes a claim under section 15, partner B may be more inclined to resolve that claim out of court by making a lump sum payment, which partner B is likely to view as similar to a payment for maintenance. Section 15 claims may also be resolved where partner B agrees to pay periodic maintenance. In these cases, partner A's financial needs may be met and he or she may be less inclined to pursue a section 15 claim.

19.61 These observations suggest that people may perceive section 15 claims as directed toward addressing post-separation financial need, rather than compensating partner A for economic disparity caused by the division of functions within the relationship. This perception raises two questions:

- (a) Do New Zealanders prefer a response to post-separation financial inequality that addresses need (often with the children as indirect recipients of the payment) rather than providing compensation to partner A for loss linked to the division of functions in the relationship?
- (b) Or is the willingness to pay for and accept a maintenance-based sum only a pragmatic reflection of the time, cost and uncertainty involved with pursuing a section 15 claim?

19.62 Empirical research by Green also indicates that in practice maintenance is often relied upon to do the job of section 15.²³⁸ This results in a mixing of the tests for meeting needs (maintenance) and compensating for financial inequality (section 15).

19.63 One approach is simply to merge the two and deal with them together.²³⁹

²³⁸ Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013).

²³⁹ A key question that would need to be considered if this option were to be developed and considered in the future is whether a separate maintenance regime would be required in certain circumstances, for example, as is currently the case under section 63 of the Family Proceedings Act.

Case law dealing with maintenance and section 15

19.64 We have identified 14 cases in which both a section 15 award and maintenance were ordered.²⁴⁰ The approach taken by the courts in considering the overlap and procedural ordering of maintenance and a claim under section 15 is inconsistent.

19.65 In *Williams v Scott* the Family Court traversed the case law on the relationship between maintenance orders and section 15 awards, providing a useful summary. The key points are:²⁴¹

- (a) An award under section 15 should not be capitalised maintenance.
- (b) A decision on whether partner A should receive a section 15 award should be made before any assessment of the need for maintenance.
- (c) A court must have regard to any means deriving from relationship property in determining whether partner A cannot meet their own reasonable needs.
- (d) An assessment of partner A's reasonable needs cannot be made until relationship property is divided.

19.66 There are several cases where, as occurred in *Williams v Scott*, an adjustment to one award has been made in light of the other.²⁴² For example, in *Barnett v Barnett* the Family Court declined an application for ongoing maintenance, and one reason given was the existence of a section 15 award which provided recognition of the lower living standards the wife would enjoy post separation and compared to during the marriage.²⁴³ In other cases, such as *Monks v Monks*, maintenance has been determined entirely independently of a section 15 award.²⁴⁴ In *E v E* there was a lump

²⁴⁰ The cases that are recognised as authoritative on the relationship between maintenance and section 15 awards are: *M v B* [2006] 3 NZLR 660 (CA); *P v P* [2005] NZFLR 689 (HC); and *S v C* [2007] NZFLR 472 (HC).

²⁴¹ *Williams v Scott* [2014] NZFC 7616 at [471]–[472]. The law as stated in *Williams v Scott* is not a complete picture. In *M v B* [2006] 3 NZLR 660 (CA) Young J took a different view to Robertson J, indicating that he did not think the order in which the applications for maintenance and a claim under s 15 of the Property (Relationships) Act 1976 were determined made a difference. Hammond J did not indicate a view.

²⁴² Under s 32(1)(a) of the Property (Relationships) Act 1976, a court must have regard to any maintenance order made under the Family Proceedings Act 1980. Under s 65(2)(a)(ii) of the Family Proceedings Act 1980 a court must have regard to means derived from a division of property under the Property (Relationships) Act 1976 when determining the amount of maintenance payable.

²⁴³ *Barnett v Barnett* [2004] NZFLR 653 (FC). In *V v V* [2002] NZFLR 1105 (FC) the Family Court made a maintenance award but deemed the award under s 15 of the Property (Relationships) Act 1976 to be part of the wife's income for the purposes of calculating the required sum. In *Smith v Smith* [2007] NZFLR 33 (FC) the court factored in the s 15 award in giving a small past maintenance award.

²⁴⁴ *Monks v Monks* [2006] NZFLR 161 (HC), although this was solely for past maintenance as it was for a period after separation it still overlapped with the period for which the award under s 15 of the Property (Relationships) Act 1976

sum section 15 award of \$170,000 but this was not considered in calculating maintenance.²⁴⁵

19.67 Crawshaw observes that “it is questionable whether Parliament intended that a section 15 claim would be thwarted by the payment of maintenance or a statutory period of occupation, especially at the stage of determination of living standards. Importantly, Parliament has not made spousal maintenance and [section] 15 mutually exclusive.”²⁴⁶

Uniting maintenance and section 15

19.68 In 1988 the Working Group established to review the Matrimonial Property Act 1976 dismissed the role of maintenance to remedy financial inequality. The Working Group said that “a move to reinstate long term periodical maintenance would bring about no improvement in the situation of women.”²⁴⁷ It raised criticisms that continue to apply to the maintenance regime in 2017, namely:²⁴⁸

- (a) the practical financial difficulty of supporting two households on one income;
- (b) the resentment felt by one partner (and potentially his or her new partner) over the legal obligation to provide permanent maintenance to a former partner; and
- (c) difficulties in enforcing payments by unwilling payers.

19.69 The Parliamentary select committee considering the 2001 amendments viewed maintenance as “complementary” to section 15.²⁴⁹ The 2001 amendments extended coverage of maintenance to include de facto partners and to provide the courts greater flexibility when awarding maintenance.²⁵⁰ The committee

was relevant.

²⁴⁵ *E v E* [2012] NZFC 830. Similarly, in *T v T [Economic disparity]* [2007] NZFLR 754 (FC) an award for maintenance in arrears was treated independently of the claim under s 15 of the Property (Relationships) Act 1976.

²⁴⁶ Vivienne Crawshaw “Section 15 Refined” (paper presented to the New Zealand Law Society Family Law Conference, October 2015) at 471–472.

²⁴⁷ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

²⁴⁸ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12–13

²⁴⁹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3) (select committee report) at 20.

²⁵⁰ The select committee noted that while s 64 of the Family Proceedings Act 1980 applies to married and civil union couples as well as de facto couples, s 63 does not. It explained that the difference is because de facto relationships end on separation and do not need to wait for a two year period prior to dissolution, in which maintenance still may be required: Ministry of Justice *SOP to Matrimonial Property Amendment Bill Departmental Report* (August 2000) at 21–22. This

noted that the “maintenance provisions list more factors than the new economic disparity sections for the court to consider when determining whether to make an award.”²⁵¹ Given that maintenance was viewed as complementary but ultimately different to section 15, the committee did not believe that “the factors governing the exercise of the Court’s discretion need[ed] to be parallel.”²⁵²

19.70 Uniting section 15 and maintenance into one doctrine could, however, help address existing problems. There are parallels between section 15 and maintenance; however an approach that combines them would be new to New Zealand. Such an approach would not solely be focused on either needs or compensation, nor would it be limited to the short term; rather it would be a hybrid of meeting needs and compensating loss and could continue indefinitely if appropriate. This approach is taken in Canada.

19.71 We have looked with interest at the Canadian experience for two reasons. First, maintenance (or spousal support, as it is known in Canada) is used to address both financial inequality arising from the division of functions in the marriage and financial needs arising at the end of a marriage. Second, non-binding guidelines have been developed to enable lawyers and couples to determine how much spousal support is to be paid without the need to go to court.

The Canadian experience – spousal maintenance and the spousal support guidelines

19.72 Canada deals with the division of relationship property separately to maintenance. Every Canadian province has its own laws to

does not account for the fact that s 63 allows maintenance to be awarded whether a married or civil union couple have separated or not. The effect is that de facto couples do not have the same entitlement to maintenance as married and civil union couples. This difference is aggravated due to the grounds in s 64 being narrower than those in s 63, as they do not include physical or mental disability or the inability to obtain work (being grounds unrelated to the relationship).

²⁵¹ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3) (select committee report) at 17.

²⁵² Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3)(select committee report) at 17.

address the division of matrimonial property.²⁵³ Spousal support is dealt with by federal law, under the Divorce Act 1985.²⁵⁴

19.73 The Divorce Act provides that a court may make an order (including an interim order) requiring a spouse²⁵⁵ to pay such lump sum or periodic sums as the court thinks reasonable for the support of the other spouse.²⁵⁶ There are four statutory objectives of spousal support and these cover both compensation for disparity and meeting financial needs.²⁵⁷ The objectives are to:²⁵⁸

- (a) recognise any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

19.74 To achieve these objectives when ordering spousal support, a court must consider the condition, means, needs and other circumstances of each spouse, including:²⁵⁹

- (a) the length of time the spouses lived together;

²⁵³ Whether or not the legislative scheme dealing with property applies to de facto relationships (often referred to as “common-law couples”) varies between provinces. In Alberta, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Québec and Yukon the legislative schemes granting rights for property sharing upon marriage breakdown or divorce do not apply to de facto couples. Further, the Canadian Supreme Court has held that common-law couples are unable to invoke section 15 of the Canadian Charter of Rights and Freedoms which provides Canadians with rights of equality in order to claim these property rights: *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61. In provinces where legislative schemes do not apply to them, common-law couples must make a claim under the common law doctrine of unjust enrichment in order to receive a share of relationship property upon the dissolution of a relationship. However, an award for unjust enrichment does not trigger a presumption of equal sharing of property as do statutory schemes for spouses.

²⁵⁴ Divorce Act RSC 1985 c 3.

²⁵⁵ The rights of common-law (or de facto couples) to spousal support depends on the province. For example in Ontario common-law spouses have the same right to spousal support provided they have been living together for at least three years.

²⁵⁶ Divorce Act RSC 1985 c 3, s 15.2(1).

²⁵⁷ Reflecting the two approaches taken in the Supreme Court in *Moge v Moge* [1992] 3 SCR 813 and *Bracklow v Bracklow* [1999] 1 SCR 420.

²⁵⁸ Divorce Act RSC 1985 c 3, s 15.2(6).

²⁵⁹ Divorce Act RSC 1985 c 3, s 15.2(4).

- (b) the functions performed by each spouse when living together; and
- (c) any order, agreement or arrangement relating to support of either spouse.

The Canadian Spousal Support Guidelines

19.75 In 2008 the Canadian Spousal Support Advisory Guidelines (the Guidelines) were prepared for the Canadian Department of Justice to provide a framework for determining the *amount* and *duration* of spousal support in any given case. This was in response to “growing concern expressed by lawyers and judges that the highly discretionary nature of the current law of spousal support had created an unacceptable degree of uncertainty and unpredictability.”²⁶⁰ The Guidelines and the formulas underlying them are not based on any particular theory; instead they reflected the practice of the courts at the time they were drafted.²⁶¹ The formulas typically generate relatively wide ranges for amount and duration of spousal support, rather than precise figures, necessitating a fact-specific determination in each case.²⁶² Amount and duration can be traded off against each other, to front-end load support or to convert it into a lump sum.²⁶³ The Guidelines do not have legal force, are advisory only and provide a starting point for negotiation between the partners or for use by the courts. They have, however, been judicially endorsed.²⁶⁴ The Guidelines were revised in 2016.²⁶⁵

19.76 The Guidelines take one of two approaches, depending on whether there are children of the relationship. If there are no children the formula is based on two factors: the gross income difference

²⁶⁰ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 9.

²⁶¹ Advice to the Law Commission from Carol Rogerson and Rollie Thompson (February 2017), on file with the Law Commission.

²⁶² Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 252.

²⁶³ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 252.

²⁶⁴ They have been cited in over 230 appeal court decisions and over 2,900 trial decisions: Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User’s Guide* (Department of Justice Canada, April 2016) at 1.

²⁶⁵ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User’s Guide* (Department of Justice Canada, April 2016) were earlier revised in 2010: Carol Rogerson and Rollie Thompson *The Spousal Support Advisory Guidelines: A New and Improved User’s Guide to the Final Version* (Department of Justice Canada, March 2010).

between the spouses and the length of the marriage.²⁶⁶ Both the amount and duration of spousal support increase incrementally as the length of the marriage increases.²⁶⁷ This reflects the premise that as a marriage lengthens, spouses increasingly merge their economic and non-economic lives in direct and indirect ways.²⁶⁸ The longer the marriage, the more intertwined the life choices of the spouses are with the expectation of sharing benefits accrued during the marriage.

- 19.77 A different formula applies when there are children. This formula reflects the distinct concerns in cases involving children. First priority is given to child support over spousal support, with the result that there is usually reduced ability to pay spousal support.²⁶⁹ The formula is based around sharing the net pool of income after tax and child support. The basis for spousal support when there are children is also different, captured by the concept of “parental partnership.”²⁷⁰ The Guidelines state:²⁷¹

On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, but also after separation.

²⁶⁶ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) Example 7.1 at 52: Arthur and Ellen have separated after a 20-year marriage and one child. During the marriage Arthur, who had just finished his commerce degree when the two met, worked for a bank, rising through the ranks and eventually becoming a branch manager. He was transferred several times during the course of the marriage. His gross annual income is now \$90,000. Ellen worked for a few years early in the marriage as a bank teller, then stayed home until their son was in school full time. She worked part-time as a store clerk until he finished high school. Their son is now independent. Ellen now works full-time as a receptionist earning \$30,000 gross per year. Both Arthur and Ellen are in their mid-forties. Assuming entitlement has been established in this case, here is how support would be determined under the without child support formula. To determine the amount of support: determine the gross income difference between the parties: \$90,000 - \$30,000 = \$60,000. Determine the applicable percentage by multiplying the length of the marriage by 1.5–2 percent per year: 1.5 x 20 years = 30 per cent to 2 x 20 years = 40 per cent. Apply the applicable percentage to the income difference: 30 per cent of \$60,000 = \$18,000/year (\$1,500/month) to 40 per cent of \$60,000 = \$24,000/year (\$2,000/month).

²⁶⁷ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 253.

²⁶⁸ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 254.

²⁶⁹ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 255.

²⁷⁰ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 255–256.

²⁷¹ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at [3.3.4]. The authors of the Guidelines, Rogerson and Thompson, further explain in Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241 at 256 that:

The formula is profoundly compensatory in nature, reflecting the need in these cases, not only to compensate for the economic disadvantages that result from past care-giving roles, but also the continuing, indirect costs of childcare on the custodial or primary-care parent.

- 19.78 The length of the marriage is considered, but it does not play as large a role under this formula. Other factors such as the number and ages of the children and shared care arrangements are considered. There is a different, hybrid formula for cases where spousal support is paid by the spouse who is the primary caregiver. The Guidelines are also adaptable to situations involving stepchildren²⁷² and provide for variation in response to changing circumstances such as changes in income, re-marriage and subsequent children.²⁷³
- 19.79 Because the Guidelines are non-binding it is easy to amend an agreement if there is a change of circumstances. In order to reduce the risk of an agreement being set aside by a court, the Guidelines provide a list of exceptions to help lawyers and partners assess and deal with any necessary departure from the formulas provided by the Guidelines.²⁷⁴
- 19.80 An example adapted from the Guidelines illustrates how the formula works to give an indicative range of what spousal support should be paid:²⁷⁵

Case study: The Canadian Spousal Support Guidelines – with children

Ted and Alice separated after 11 years of marriage. Ted earns \$80,000 per year. During the marriage Alice stayed at home with the two children, now aged 8 and 10. After the separation the children live with Alice and she finds a part-time job earning \$20,000 per year. Alice's mother provides after-school care for the children. Ted pays child support in accordance with the formula calculation every month. Using the Guidelines, Ted would also be paying spousal support in the range of \$474 to \$1,025 per month. This means that Alice and the children would receive between 52 to 57 per cent of the combined family income (being the combined incomes of Ted and Alice). If Ted and Alice had only one child, the spousal support range would be higher (reflecting Ted's reduced child support obligations), and if there were three children Ted's ability to pay spousal support would be reduced further. The spousal support figure would also be adapted to take into account

²⁷² Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 8.

²⁷³ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 14.

²⁷⁴ Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 12. Exceptions include payment of debts, special needs of a child, illness or disability of partner A, and an exception for shorter marriages.

²⁷⁵ Adapted from Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Example 8.1 at 79. See n 266 for an example of the without children formula.

various factors such as childcare. If Alice was paying for after-school care and Ted was paying his share then the range of spousal support would reduce further.

19.81 Canada has taken a pragmatic approach to dealing with the financial need and financial inequality that can arise when partners separate. As is always the case when an approach taken in another country seems attractive, care and consideration must be given to ensure whether this approach would be compatible with the unique attributes of the New Zealand context. A key point to consider would be how such an approach would work with the current child support regime; although we note that in Canada spousal support likewise sits alongside a formula child support regime.

19.82 The authors of the Guidelines, Rogerson and Thompson, note that spousal support is “undoubtedly a contentious remedy.”²⁷⁶ Legal systems around the world have struggled with the difficult question of the appropriate role, if any, for spousal support given the basic principles and values of modern family law.²⁷⁷ The Canadian approach has answered this question by shifting away from the “clean break” concept and recognising a basis for spousal support on both compensatory and needs-based grounds.²⁷⁸ Rogerson and Thompson highlight the cultural acceptance of this approach in Canada.²⁷⁹ Any disputes tend to relate to the amount of spousal support to be paid rather than whether spousal support should be paid at all. There is not necessarily the same acceptance of paying maintenance in New Zealand. Section 64A of the Family Proceedings Act directs that a partner “must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her

²⁷⁶ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 Family Law Quarterly 241 at 246.

²⁷⁷ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 Family Law Quarterly 241 at 246.

²⁷⁸ Carol Rogerson and Rollie Thompson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 Family Law Quarterly 241 at 242. The Supreme Court of Canada rejected the clean break concept as a model of spousal support in *Moge v Moge* [1992] 3 SCR 813. In that case emphasis was placed on compensation for the loss of economic opportunity as the key premise of spousal support. The Court said:

“[w]hile spouses would still have an obligation after the marriage breakdown to contribute to their own support in a manner commensurate with their abilities, the ultimate goal is to alleviate the disadvantaged spouse’s economic losses as completely as possible, taking into account all the circumstances of the parties, including the advantages conferred on the other spouse during the marriage.”

In *Bracklow v Bracklow* [1999] 1 SCR 420 the Supreme Court noted there was no single theory underpinning spousal support, which must instead retain the flexibility to adapt to the varied circumstances of relationships. See also discussion in Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 7–9.

²⁷⁹ Advice to the Law Commission from Professor Carol Rogerson and Professor Rollie Thompson (February 2017), on file with the Law Commission.

own needs.” In contrast section 15(6)(d) of the Divorce Act 1985 (Canada) provides that an order for spousal support should “so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period.”

Could financial reconciliation orders replace section 15 and maintenance in New Zealand?

- 19.83 Whether the Canadian approach is appropriate for New Zealand requires consideration of first, whether there is an appetite in New Zealand for financial reconciliation orders as a concept and second, what financial reconciliation orders would comprise; notably what the test for qualifying for an order would be and how the amount of any award would be assessed. Consideration would also need to be given to the utility of developing guidelines or a formula that could be used by practitioners and partners themselves to enable an agreement to be reached without going to court.
- 19.84 A court could be required to consider an interim application for financial reconciliation orders within a specified timeframe, such as within six weeks from the date of application.²⁸⁰ If, on final resolution and distribution of relationship property, there was an ongoing financial inequality, a final financial reconciliation order could be made.
- 19.85 We do not explore here the different methodologies that could apply to the calculation of financial reconciliation payments, or factors that should be taken into account.²⁸¹ Significant further work would be needed if this option is preferred.
- 19.86 The development of guidelines to help partners manage and negotiate the amount and duration of any financial reconciliation payments by themselves, or with the help of their lawyers, would

²⁸⁰ Also see Chapter 14 for a discussion on interim distributions of property under the Property (Relationships) Act 1976.

²⁸¹ In Mark Henaghan “Sharing Family Finances at the end of a Relationship” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming) Henaghan proposes that a better way of quantifying a claim under s 15 of the Property (Relationships) Act 1976 would be via the implementation of a combined “income equalisation payment approach.” Such an approach might be adopted for financial reconciliation orders. This involves determining the parties’ respective future incomes for the 12-month period after their relationship ended and then adding these two figures together to determine the parties’ total combined annual income. The parties’ total combined income is then divided equally between them, which means the economically stronger party will need to top up the other partner’s income until it reaches half of the parties’ total combined annual income figure. This annual income equalisation payment should then be multiplied by half of the number of years the parties have been together, up to a maximum of 10 years. Once the annual equalisation payment has been established, the court must use its discretion to make allowances for relevant contingencies such as the parties’ respective age, length of time before retirement, health and stability of employments. The final figure might be awarded as a lump sum or be paid on a periodic basis.

greatly aid the effective implementation of financial reconciliation orders.

CONSULTATION QUESTIONS

- F1 Should partner A be entitled to more than an equal share of the relationship property pool if there is financial inequality at the end of the relationship as a result of the division of functions in the relationship?
- F2 Does your view depend on whether the partners have children?
- F3 Do you agree that reform or replacement of section 15 is required?
- F4 Which option do you prefer and why?
- F5 If option 3 is adopted, do you think there should be a maximum duration for financial reconciliation orders? If yes, should the maximum duration be one year, two years, five years or ten years?
- F6 Are there any other options we should consider?

