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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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*Preliminary Paper 44*

THE FUTURE OF  
THE JOINT FAMILY HOMES ACT

*A discussion paper*

*The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.*

These should be forwarded to the Law Commission  
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by 31 October 2001

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## Preface

**T**HIS DISCUSSION PAPER is published in response to the following ministerial reference:

The Commission shall consider and report on:

- whether, taking subsequent law changes into account, there remains a need for the continued existence of the Joint Family Homes Act 1964; and
- if there is a need for its continued existence, whether the Act should extend to de facto (including same sex) relationships, and, if so, whether any other amendments are necessary to minimise the potential for misuse to defeat creditors.

The Commissioner responsible for this project is DF Dugdale. The researcher is David Thompson.

The Law Commission invites comments on this paper by 31 October 2001.

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# 1

## History and purpose

### EARLIER LEGISLATION

1 THE PREAMBLE TO THE Family Home Protection Act 1895 recited that “it is desirable to make provision for securing homes for the people and for preventing such homes from being sold for debt or otherwise”. That legislation provided protection against unsecured creditors and the Official Assignee in Bankruptcy, along with a total exemption from death duty.<sup>1</sup> Like its successor legislation, it was available only to married couples who were buying a home or already owned one. In the 1908 consolidation, the 1895 Act was re-enacted as Part I of the Family Protection Act 1908. Under that statute, a property could be settled only if its capital value was £1500 or under (a limit never reviewed) and only if the property were not mortgaged (which tended to exclude the less well-to-do). The price of the protection was twofold:

- The change in status had to be advertised in advance to give creditors and potential creditors an opportunity to be informed of the change.
- The property could not be alienated during the lifetime of the settlor prior to all the settlor’s children reaching the age of 21 years or sooner dying (unless with the leave of the Supreme Court under the legislation relating to settled land).

It is not surprising that the total number of settlements under the statute did not ever exceed a number variously estimated by EC Adams, a sometime Registrar-General of Land who was a respected writer on land law topics, as “not more than a dozen”<sup>2</sup> and “not more than a score”.<sup>3</sup> Even allowing for an element of rhetorical understatement in these estimates, it is plain that the legislation was not widely used.

2 Part I of the Family Protection Act 1908 remained in force until the whole Act was repealed and Part II replaced by the Family Protection Act 1955. Even today, by virtue of section 16(2) of the 1955 Act, Part I of the 1908 Act is preserved in respect of any family homes registered under it. In the interests of keeping the statute book uncluttered by spent provisions, a repeal of section 16(2) would not be premature.

### THE JOINT FAMILY HOMES ACT 1950

3 Although the ancestry described in the previous paragraphs can be clearly detected in various features of the Joint Family Homes Act 1950, the new statute

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<sup>1</sup> In this paper “creditors” will mean unsecured creditors unless specified otherwise.

<sup>2</sup> “Family Protection: Family Homes” (1949) 25 NZLJ 266.

<sup>3</sup> “The Joint Family Homes Act, 1950” (1950) 26 NZLJ 333.

remedied the fundamental flaws that had rendered the old legislation virtually a dead letter.<sup>4</sup>

- 4 The purpose of the 1950 statute can be gathered readily enough from the second reading speech of the Minister (TC Webb) who introduced it:

I think it is true to say that family life is the basis of our civilisation, at any rate so far as the Western nations are concerned, and the object of this Bill is to help in promoting and maintaining the happiness of married life . . .<sup>5</sup>

One does not want to be pessimistic about modern trends, but there are too many divorces going through our Courts – a surprisingly large number for the size of New Zealand go through at every sitting of the Supreme Court. If this Bill is the success that we believe it will be then it will, to some extent, reverse a trend which I think everyone who has given the matter consideration regards as somewhat disturbing in our modern life.<sup>6</sup>

- 5 The Minister was supported by EH Halstead, a Government backbencher later a Minister. He described the Bill as:

. . . part of our family welfare programme. Recognising that the family unit is the keystone of our Christian society, the National Government, ever since it assumed office, has been working on a family welfare programme. We recognise that the health, economic security, and spiritual values inherent in happy family life must be safeguarded . . .<sup>7</sup>

- 6 The Opposition, though supporting the Bill, was less sanguine than the Minister about its effect on family ties. It thought the Minister was confusing cause and effect. HGR Mason said:

I confess that I do not share his high hopes in that respect, because what is due in respect of the title to the land follows rather from the sentiments and affections of the parties concerned rather than the other way round . . .<sup>8</sup>

. . . I do not want to minimise the importance of doing everything possible to sustain our homes and make them what they ought to be, but these legal arrangements are rather the expression of family sentiments than the cause and support of them.<sup>9</sup>

- 7 The Joint Family Homes Act 1950 increased to £4000 the upper limit of value for a home to be eligible for settlement. It was protected from creditors and death duties to the limit of £2000 (these were not un-substantial amounts in the currency of the day).<sup>10</sup> Mortgaged property could be settled, with a spouse not an original party to the mortgage assuming personal liability to the mortgagee on settlement. The spouses became co-owners as joint tenants. Neither had the power to dispose of

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<sup>4</sup> See Appendix A to this paper: “Annual Registrations of Joint Family Homes”.

<sup>5</sup> (1950) 292 NZPD 3490.

<sup>6</sup> (1950) 292 NZPD 3498.

<sup>7</sup> (1950) 292 NZPD 3501.

<sup>8</sup> (1950) 292 NZPD 3499.

<sup>9</sup> (1950) 292 NZPD 3500.

<sup>10</sup> For the history of the protected amount from 1950 to the present, see Appendix D to this paper.



his or her separate interest while both were alive. There was (as under the predecessor legislation) a requirement that creditors be alerted to an intended settlement by advertisement. Where both parties agreed to a sale there were no restrictions on alienation comparable to those in the earlier legislation.

- 8 This statute was amended in 1951, 1952, 1955, 1957, 1959 and 1960. As well as amendments designed to achieve technical tidying, the 1951 amendment made advertising optional (the advantage of electing to advertise was that the protection against creditors became effective sooner).<sup>11</sup> The valuation limit was increased to £5000 in 1951 and removed entirely in 1955, so that after that time all family homes of any value could be settled.<sup>12</sup> The 1959 amendment provided for enlarging existing settlements to cover contiguous land acquired later.<sup>13</sup>

## THE CURRENT STATUTE

- 9 The Joint Family Homes Act 1964 consolidated the much-amended Act of 1950 and made further changes. The Minister of Justice (JR Hanan) commented that the new provisions facilitated and encouraged settlement as a way of furthering the purpose of the predecessor statute. That purpose was “to encourage joint ownership of the matrimonial home as a means of promoting stability and security in family life”.<sup>14</sup> Although the purpose would be articulated in slightly different ways during debates on the amendments of the next 10 years, it is plain from Hansard that, throughout this decade, administrations of both colours viewed the legislation as beneficent, non-partisan social engineering to be promoted and widened.<sup>15</sup>
- 10 The Joint Family Homes Act 1964 provided for the settlement of flats where they were held under the company system or where a separate title could be given – both recent conveyancing developments. It simplified registration by eliminating the Joint Family Home Certificate and closed other, minor, gaps: couples could register up to six months before taking up residence and a surviving spouse could register an application signed by the deceased within two months of such signing. Settlement of Māori land no longer required consent of the Māori Land Court. The death duty exemption rose to £4000 but protection from unsecured creditors stayed at £2000.
- 11 The 1964 statute has been amended five times: in 1965, 1968, 1971, 1972 and 1974. The 1968 amendment raised the protection against creditors

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<sup>11</sup> Joint Family Homes Amendment Act 1951 s 5.

<sup>12</sup> Joint Family Homes Act Amendment Act 1955 s 3(1).

<sup>13</sup> Joint Family Homes Amendment Act 1959 s 2. The main factor limiting the amount of land to be settled was and still is that the couple must use the dwelling house and land principally as their home: Joint Family Homes Act 1950 s 3(1)(a) and Joint Family Homes Act 1964 s 3(1)(a).

<sup>14</sup> (1964) 340 NZPD 2994.

<sup>15</sup> (1964) 340 NZPD 3000 Sir Leslie Munro (Government) MP, 3001 Matiu Rata MP on behalf of the Opposition.

for the first time, from \$4000 (as translated into the new currency) to \$8000.<sup>16</sup> In the 1972 amendment, the exemption from estate duty went up from \$8000 to \$12 000.<sup>17</sup>

- 12 The Joint Family Homes Amendment Act 1974 brought extensive changes. Before the amendment, where a joint family home was sold or the settlement otherwise cancelled, the couple ceased to be joint owners and the property reverted to the settlor. Under the amending Act, proceeds of a sale would be split equally between husband and wife, and joint ownership would persist if they retained the property but cancelled settlement.<sup>18</sup> The 1974 amending statute also inserted the “portability” provisions.<sup>19</sup> These meant that within six months of disposing of a joint family home, a couple could transfer that joint family home status with its protection against creditors to a different property. The 1974 Act also introduced the second proviso to section 9(2)(d). That proviso excludes from the definition of “Property” in the Insolvency Act 1967 the proceeds up to the protected limit from the sale, transfer or other disposition of the home.<sup>20</sup> Protection against creditors was increased to \$10 000, and there was a provision that future adjustments to this “specified sum” would be set by Order in Council.<sup>21</sup>
- 13 Parliamentary debates elicited more statements about the purpose of joint family homes legislation. Introducing the 1974 Bill, the Minister of Justice (Dr AM Finlay) began:

Joint family homes serve two primary purposes: first, they protect the family unit by preserving the common family home in circumstances of financial adversity; and second, they promote the unity of the marriage by giving wives a share in the family home, or indeed it could be husbands.<sup>22</sup>

He had earlier stated that Labour had always regarded the statute’s purpose as to give a degree of protection to “typical wage earners”.<sup>23</sup> The prime object was “to obtain protection of a family asset and put it beyond the reach of creditors”.<sup>24</sup>

## THE MATRIMONIAL PROPERTY ACT 1976

- 14 In introducing the Bill that became the Joint Family Homes Amendment Act 1974, Dr Finlay expressed the hope that the equal share presumption, which that Act provided for upon cancellation of registration, would

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<sup>16</sup> Joint Family Homes Amendment Act 1968 s 4.

<sup>17</sup> Joint Family Homes Amendment Act 1972 s 3.

<sup>18</sup> Joint Family Homes Amendment Act 1974 s 7. However, distribution of property on breakdown of the marriage is regulated by the Matrimonial Property Act 1976.

<sup>19</sup> Joint Family Homes Amendment Act 1974 s 8.

<sup>20</sup> Insolvency Act 1967 s 2 “Property”. See also the Insolvency Act 1967, s 3(2): “Nothing in this Act shall affect the provisions of the Joint Family Homes Act 1964”.

<sup>21</sup> Joint Family Homes Amendment Act 1974 s 9. See Appendix D for the history of the specified sum.

<sup>22</sup> (1974) 394 NZPD 4833.

<sup>23</sup> (1974) 390 NZPD 940.

<sup>24</sup> (1974) 390 NZPD 1504.

foreshadow a similar provision in a Matrimonial Property Bill then waiting in the wings.<sup>25</sup> That Bill, as adapted by the next Government, became the Matrimonial Property Act 1976, but its effect proved to be to a large extent to *overshadow* the existing legislation. The Matrimonial Property Act 1976 in many ways superseded the Joint Family Homes Act 1964. That was at least the view of DS Thomson, who had succeeded Dr Finlay as Minister of Justice. In the second reading debate he described the Bill as it was to be enacted in the following terms:

The Committee has followed the analogy of the Joint Family Homes Act in proposing a protected interest in the matrimonial home for each spouse against the creditors of the other spouse – *not, I add, against his or her own creditors*. As the Bill stands, the protected interest is \$10,000 or half the equity in the home, whichever is greater. It has been pointed out, however, that this could give *more protection than was justified* . . . Accordingly, I shall be moving an amendment in Committee the result of which will be to limit the protected interest to \$10,000 or half the equity in the home, *whichever is the lesser*. I see this “protected interest” as a most significant piece of social legislation in its own right, giving as it does a modest degree of protection and security for the family and the family home. As I have said, this is not a new concept either in New Zealand or overseas. *Essentially, it is an enlargement and fulfilment of the principles of the Joint Family Homes Act.*<sup>26</sup> [Emphases added]

- 15 The Property (Relationships) Amendment Act 2001 section 5 changes the name of the Matrimonial Property Act 1976 to the Property (Relationships) Act 1976, but section 5 does not come into force until 1 February 2002. Until that date, the correct short title of the statute remains the Matrimonial Property Act 1976, and that is the name we use in this paper. Section 20 of the 2001 statute, which also does not come into force until 1 February 2002, will substitute new sections 20–20F for the existing section 20, but the substitution (although it modifies the calculation in the way set out in footnote 56) will not alter the thrust of so much of the existing section 20 as is discussed in the present paper.

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<sup>25</sup> (1974) 395 NZPD 5657.

<sup>26</sup> (1976) 408 NZPD 4565.

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## 2

# The benefits of settlement

### ORIGINAL BENEFITS

- 16 **T**HE BENEFITS WHICH SETTLEMENT initially afforded couples were:
- a simple means, exempt from liability for stamp<sup>27</sup> or gift<sup>28</sup> duty, of converting a home from sole ownership or ownership as tenants in common to joint ownership. A consequence of joint ownership is a right of automatic succession by the survivor;
  - a degree of exemption from duty payable in respect of the estate of the first joint owner to die;<sup>29</sup>
  - simplification of the administration of the estate of the settlor if the home is the only substantial asset and the settlor dies first; and
  - some protection from creditors.<sup>30</sup>

### EVAPORATION OF ALMOST ALL BENEFITS

- 17 Of the benefits listed above, the following have gone:
- Instruments required for any of the purposes of the Matrimonial Property Act were exempted from stamp duty.<sup>31</sup> Stamp duty has since ceased altogether, and the relevant section of the Joint Family Homes Act has been repealed.<sup>32</sup>
  - Exemption from gift duty: whether or not a home is a joint family home, no gift duty is payable on dispositions of matrimonial property under agreements made pursuant to the contracting out provisions of the Matrimonial Property Act to the extent that the transferee spouse does not end up with more than 50 per cent of the matrimonial property.<sup>33</sup>
  - The comfort of the protection which joint ownership confers against acts of the other spouse is largely equated by the provisions of the

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<sup>27</sup> Joint Family Homes Act 1964 s 23 (rpld).

<sup>28</sup> Joint Family Homes Act 1964 s 21.

<sup>29</sup> Joint Family Homes Act 1964 s 22 (rpld).

<sup>30</sup> Joint Family Homes Act 1964 s 9(2)(d) and s 9(2)(d) second proviso.

<sup>31</sup> Stamp and Cheque Duties Act 1971 s 11 2(o) inserted by the Matrimonial Property Act 1976.

<sup>32</sup> Stamp Duty Abolition Act 1999 ss 5 and 6. The Schedule repealed the Joint Family Homes Act 1964 s 23.

<sup>33</sup> Estate and Gift Duties Act 1968 s 75A.

Matrimonial Property Act conferring on the spouse who is not on the title a deferred sharing entitlement coupled in appropriate situations with the Notice of Claim procedure under that statute.<sup>34</sup>

- Exemption from estate duty: from 1976 a special allowance<sup>35</sup> applied to all matrimonial homes.<sup>36</sup> There are now no duties payable at all in respect of the estate of anyone who died on or after 17 December 1993.<sup>37</sup> The relevant provision of the Joint Family Homes Act has been repealed.<sup>38</sup>

## REMAINING BENEFITS

- 18 Where the settlor dies first and the estate consists largely of the home, joint ownership enables registration of title into the sole name of the surviving spouse by the simple process of registering a transmission by survivorship, so avoiding the more expensive process of probate and full administration. The simplest way to secure joint ownership of a matrimonial home, not already so vested, is to settle it as a joint family home. (An alternative, but usually more expensive, procedure is a transfer made in accordance with an agreement under the Matrimonial Property Act.)
- 19 This assumes that the original title-holder will die first. If the other spouse dies first, there will have been no gain from the exercise and a small expenditure of time and money. A related advantage exists. It appears that at least one organisation, the Public Trust Office, offers a zero commission on administering the estate of the predeceasing spouse provided that the home is owned jointly. These advantages are small and specific and ought not to determine whether the Joint Family Homes Act should be retained. In the rest of this paper we treat only the Act's asset protection provisions as a benefit that may justify its retention.
- 20 The significant remaining advantage of vesting a home as a joint family home is the protection it gives against creditors. In the next chapter we summarise the Act's asset protection scheme before weighing it against the comparable regime of the Matrimonial Property Act and against the increasingly popular family trust. The Matrimonial Property Act provides a regime that applies if the matrimonial home is not a joint family home. Where the home is registered as a joint family home, the relevant sections of the Matrimonial Property Act (which is otherwise a code)<sup>39</sup> are expressly made subject to the Joint Family Homes Act.<sup>40</sup>

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<sup>34</sup> Matrimonial Property Act 1976 s 42.

<sup>35</sup> Estate and Gift Duties Act 1968 s 17A.

<sup>36</sup> Matrimonial Property Act 1976 s 2 (1) "Matrimonial home" (b).

<sup>37</sup> Estate Duty Abolition Act 1993 s 3.

<sup>38</sup> Estate Duty Repeal Act 1999 Schedule Part 1 repealed the Joint Family Homes Act 1964 s 22.

<sup>39</sup> Matrimonial Property Act 1976 s 4.

<sup>40</sup> Matrimonial Property Act 1976 s 20(8), to be restated as s 20F.

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### 3

## Different modes of protection against creditors

### JOINT FAMILY HOMES ACT PROTECTION

- 21 **T**HE JOINT FAMILY HOMES ACT confers a largely (but not totally) watertight protection against creditors of the interest of both the spouses (or the survivor spouse) in the settled property (subject to a cap to be referred to). In particular, the Act protects against sale of the property at the behest of execution creditors or the Official Assignee.<sup>41</sup> The spouses' interests are excluded from the definition of "Property" in the Insolvency Act 1967.<sup>42</sup>
- 22 If the net equity exceeds the specified sum, the Court has a discretion to grant some or all of that excess to creditors or the Official Assignee upon application.<sup>43</sup> The Court may either direct partial cancellation of the settlement or order mortgage or sale of the whole of the settled property, with a distribution of the money borrowed or the proceeds in accordance with the Act. Nevertheless, the sums available to creditors under those remedies must leave the spouses an "absolute" protected entitlement which, subject to limited exceptions, is equal to the specified sum.
- 23 It should be made clear that the statute protects the position of creditors in ways additional to the right to apply discussed in the previous paragraph:
- Creditors may oppose an advertised settlement.
  - A settlement following an undisclosed application does not bind the Official Assignee in Bankruptcy if the settlor spouse is adjudicated bankrupt within two years of the property being settled.<sup>44</sup>

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<sup>41</sup> Joint Family Homes Act 1964 s 9(2)(d).

<sup>42</sup> Joint Family Homes Act 1964 s 9(2)(d) Second Proviso, referring to Insolvency Act 1967 s 2 "Property". As noted at above n 20, Insolvency Act 1967 s 3(2) correspondingly provides that the Act does not affect the Joint Family Homes Act 1964.

<sup>43</sup> Joint Family Homes Act 1964 s 16(2). In *Official Assignee of Pannell v Pannell* [1966] NZLR 324, 326 (HC), the Court held that the policy of the Act was that, except in special circumstances, a joint family home should be preserved for the benefit of the registered proprietors and their family. However, in *Official Assignee v Lawford* [1984] 2 NZLR 257, 264, Somers J, with whom Eichelbaum and Cooke JJ agreed, held that the Court had an unfettered judicial discretion to permit sale of the home without the need for defined special circumstances.

<sup>44</sup> Joint Family Homes Act 1964 s 9(2)(d) third proviso. This creates an exception to the second proviso, whereby property does not fall within the reach of the Insolvency Act 1967.

- A creditor is entitled to challenge the validity of settlement,<sup>45</sup> in particular on the grounds that the settlor was (or the settlors were) insolvent at the time of application.<sup>46</sup>
- The property remains subject to certain statutory liabilities, in particular rates and costs of the boundary fences are protected.<sup>47</sup>
- Secured creditors are protected.

It is, of course, open to anyone from whom a registered proprietor seeks credit to check whether or not the applicant's home is registered as a joint family home.

- 24 Settlement under the Joint Family Homes Act can have disadvantages. First, husbands, or more commonly wives, who consent to the settlement of mortgaged or otherwise encumbered property may undertake considerable risk in having to assume personal liability to the mortgagee (if the property proves to have negative equity for example).
- 25 Secondly, asset protection under the Matrimonial Property Act is immediate and unconditional. By contrast, a joint family home settlement has to withstand the opposition of creditors for three months if advertised.<sup>48</sup> If the spouses do not advertise, settlement can be cancelled upon bankruptcy within two years<sup>49</sup> if the settlor was (or settlors were) insolvent at the time of settlement.<sup>50</sup> We have been told that “nowadays” only about 10 per cent of applicants advertise.

## MATRIMONIAL PROPERTY ACT PROTECTION

- 26 Section 20(2) of the Matrimonial Property Act (by way of exception to the general rule that that statute does not affect the rights of creditors of the spouses or either of them) prevents the non-debtor's “protected interest” in the matrimonial home from being used to meet the unsecured “personal debts” of the other spouse.<sup>51</sup>
- 27 The definition of “matrimonial home” here implicitly includes a home-  
stead, the proceeds of sale, or appropriate other property if no home exists – all of which are provided for earlier in the Act.<sup>52</sup> We shall refer to these as the “equivalents” of the basic matrimonial home.

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<sup>45</sup> Joint Family Homes Act 1964 s 10(1)(f).

<sup>46</sup> This would be contrary to Joint Family Homes Act 1964 s 3(1)(b).

<sup>47</sup> Joint Family Homes Act 1964 s 15; some of these debts are quasi-secured.

<sup>48</sup> Joint Family Homes Act 1964 s 6.

<sup>49</sup> Joint Family Homes Act 1964 s 9(2)(d) third proviso.

<sup>50</sup> Joint Family Homes Act 1964 ss 3(1)(b) and 10(f).

<sup>51</sup> Matrimonial Property Act 1976 s 20 will become the amended ss 20–20F. Section 20B(2) will protect the non-debtor, not against the unsecured *personal* debts of the spouse or de facto partner, but against the latter's unsecured debts other than those incurred by the spouses or de facto partners jointly, or by the spouse or partner subsequently declared bankrupt for the purpose of acquiring, improving or repairing the family home.

<sup>52</sup> Matrimonial Property Act 1976 ss 11 and 12. These provisions will be restated as ss 11A, 11B, 12 and 12A.

- 28 The Act defines “personal debts” as those incurred other than by the couple jointly, or in the course of an enterprise they carry on jointly, or for the purpose of acquiring, improving or repairing the matrimonial home or chattels, or in managing household affairs for the benefit of the spouse or the children of their marriage.<sup>53</sup>
- 29 The value of the protected interest is the least amount of any of the following:
- the “specified sum”. (In practice, this is kept equal with the specified sum under the Joint Family Homes Act);<sup>54</sup>
  - half the equity in the matrimonial home or half of its equivalent. (By contrast, under the Joint Family Homes Act it is the *whole* equity that is considered against the specified sum); and
  - the extent of the share which the non-debtor could obtain under the Act as between the spouses themselves. (This may sometimes be less than half; for example in a marriage of short duration, one of the spouses will often be entitled to less than a half share of property.)<sup>55</sup>
- 30 However, the term “protected interest” is misleading. The figure thus derived is subject to further reduction, significantly by deducting the unsecured personal debts of the debtor spouse.<sup>56</sup> After all deductions, the resultant sum, if any, is the “absolute” protected value or interest. The absolute value is what really matters. It is also the correct amount to be compared with the absolute protected value under the Joint Family Homes Act. In the case of the Matrimonial Property Act, the absolute value may often fall well below the specified sum. Although the specified sums under the Matrimonial Property Act and the Joint Family Homes Act are kept equal, the absolute protected value under the latter is usually higher because of the ways that the respective statutes apply the specified sum to derive the absolute value.
- 31 Protection of married couples under the Joint Family Homes Act is thus more extensive than under the Matrimonial Property Act:
- the Joint Family Homes Act covers the debtor as well as non-debtor spouse’s shares. However, under the Joint Family Homes Act, the Official Assignee or creditors may apply to the Court to order the partial cancellation of the settlement or mortgage or sale of the home;
  - where one spouse has died, the Joint Family Homes Act also covers the survivor spouse;

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<sup>53</sup> Matrimonial Property Act 1976 s 20(7). Section 20(1) of the amended Act will define “personal debts” as debts that are not, or insofar as they are not, “relationship debts”. Relationship debts are the same as those debts listed in this paragraph, except that they include debts incurred for the purpose of acquiring, improving or maintaining any relationship property, not just the family home.

<sup>54</sup> Compare currently Matrimonial Property (Specified Sum) Order 1996 SR 1996/176 and Joint Family Homes (Specified Sum) Order 1996 SR 1996/175.

<sup>55</sup> See for instance Matrimonial Property Act 1976 ss 13, 14, 16 and 17. See also *Walsh v New Zealand Law Society & Powell* (1982) 1 NZFLR 103, 109.

<sup>56</sup> From 1 February 2001, instead of deducting all the non-debtor spouse’s unsecured matrimonial debts, the Act will deduct only those which were incurred jointly or for the purpose of acquiring, improving or repairing the family home. This increases the absolute protected value.



- under the Joint Family Homes Act, the absolute protected value is almost always greater for the reasons already stated; and
- the debtor spouse's interest in the home does not vest in the Official Assignee.

## PROTECTION BY MEANS OF A TRUST

- 32 The family trust is an increasingly popular method of protecting assets. It can protect the home – and other property – to full value, which is particularly useful in the case of high-value properties. A trust may also be tailored to avoid asset-tested State benefits, confer tax advantages, and protect the settlor's children or other family, especially upon a subsequent marriage or de facto relationship. Protection of children has always been an implicit goal of joint family home legislation, but the Joint Family Homes Act is a blunt instrument by comparison. The downside is the difficulty of disentitlement from a trust if circumstances change.
- 33 Such trusts are popular for those with sufficient wealth to justify them, means to afford them, and sophistication to seek them. But the trust is not a true alternative to a joint family home for couples with modest means, such as tradespeople owning their own small businesses or Dr Finlay's "typical wage earners"<sup>57</sup> who may well have a net equity in their homes not much above the absolute protected value, hence not worth the expense of placing in a trust. To the less well-to-do, the Joint Family Homes Act therefore affords more accessible and cheaper if less comprehensive protection.

## PROBLEMS WITH THE SPECIFIED SUM

- 34 It has long been recognised that the specified sum under both the Joint Family Homes Act and later the Matrimonial Property Act takes no account of regional disparities.<sup>58</sup> Appendix E shows median house sale prices for several areas in March 2001 along with the national median. The criterion for determining the amount of protection from creditors by Order in Council was described by the Minister introducing the Bill making provision for such periodic adjustments as "the amount of equity requisite for a house of reasonable minimum standard". The sum is set by Order in Council from time to time but not more often than every two years.<sup>59</sup> Appendix D records the history of the specified sum. Since 1996 it has been \$82,000.<sup>60</sup> In 1989 and 1992 the methodology employed for setting the specified sum was to halve the average sales price across main urban centres. The Official Assignee for New Zealand was also consulted.

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<sup>57</sup> See above para 13.

<sup>58</sup> See for example the discussion by ESF Holland at (1974) 390 NZPD 940, 941.

<sup>59</sup> (1974) 394 NZPD 4833, Introduction of the Joint Family Homes Amendment Bill 1974 by Minister of Justice, Hon Dr AM Finlay. The requirement of an interval of at least two years is contained in s 16(6).

<sup>60</sup> Joint Family Homes (Specified Sum) Order 1996 SR 1996/175.

For many, an amount so calculated does not provide the equity for a home of “reasonable minimum standard” in the area where they live. Those with poor credit ratings are likely in practice to face difficulties raising mortgages.

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## 4

# The Joint Family Homes Act in practice

### THE RISE AND FALL OF REGISTRATIONS UNDER THE ACT

35 HAVING LOOKED AT THE THEORETICAL BENEFITS of the Joint Family Homes Act, we now look at how often couples take advantage of those benefits in practice. Appendix A shows the annual numbers of registrations under both the Joint Family Homes Act 1964 and its 1950 predecessor. The precise number for the final year (to 30 June 2000) for which we have statistics is 1589. Because of the number of causative factors it is not possible to tease out with any precision the reason for the fluctuations that the graph discloses. However, it is safe to venture some observations:

- The spike in the graph between 1972 and 1975 coincides with the term of the Third Labour Government, and is likely to be a consequence of that administration's expansionary housing measures. The number of settlements reflects the number of new homes being built. New building permits, for instance, soared from some 25 000 in 1972 to 40 000 in 1974, before falling back to 25 000 in 1978.
- Settlements from 1959 to 1987 were inflated by the then requirement to settle a joint family home if a couple wished to capitalise the family benefit. Family benefit capitalisation ended in 1987.<sup>61</sup> In Appendix B we set out the numbers of family benefit capitalisations. Other State Advances Corporation housing loans were also subject to a requirement that the home be jointly owned.<sup>62</sup>
- Settlements have decreased markedly since the passage of the Matrimonial Property Act.
- The rise of trusts may account for some of the downturn, but probably not much.
- The "pool" of potential settlers is the number of married couples buying or building homes to dwell in. The marriage rate has dropped consistently since the early 1970s (see Appendix C). Of total partnerships in 1996, 236 394 or 14.8 per cent were de facto.<sup>63</sup>

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<sup>61</sup> Family Benefits (Home Ownership) Act 1950 s 6(b); Family Benefits (Home Ownership) Act 1964 s 7(1)(b).

<sup>62</sup> Notably the Home Ownership Savings Scheme introduced by the 1972–1975 Labour Government, which continued to have a significant number of accounts until about 1980.

<sup>63</sup> Statistics New Zealand *National Summary: 1996 New Zealand Census of Population and Dwellings* (Wellington, 1997) 52, Table 11.

There are no figures for the number of homes currently settled under the Joint Family Homes Act. Some 70 000 settlements have been registered in the last 15 years and it can be assumed that a substantial proportion of this 70 000 survives uncanceled.

#### ACTUAL EFFECTIVENESS OF SETTLEMENTS AGAINST CREDITORS AND THE OFFICIAL ASSIGNEE

- 36 Several long-serving Official Assignees and other senior members of the Insolvency and Trustee Service assisted us with anecdotal material based on their experience (as did a number of private insolvency practitioners and credit managers) of the part played by the Joint Family Homes Act in practice in the winding up of bankrupt estates. They say that today compared with 10–15 years ago they seldom encounter joint family homes. Our respondents cited as reasons the fall of registrations and the rise of trusts. More basically, bankruptcies were increasingly (60–70 per cent) consumer bankruptcies of persons with no assets worth attacking. Because of high modern lending ratios, homes tend to be so heavily encumbered that after discharging secured monies, the net equity would be less than the specified sum. Negative equity is not unheard of. In those circumstances the Official Assignee commonly disclaims the home without the issue of the effect of joint family home registration coming into the decision.
- 37 Nevertheless, there remain a very small number of cases (in Christchurch perhaps 10 a year) where the Official Assignee sells a home the sale of which could have been avoided had it been registered as a joint family home. It appears that the typical property where there is enough equity to warrant intervention tends to be a quite modest family home worth around \$50 000–60 000 and having a net equity of half that.
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## 5 Where to?

- 38 **A** GAINST THIS BACKGROUND, we solicit submissions on the various relevant issues. First, can there be any justification for the continued existence of the Joint Family Homes Act, given:
- an annual number of settlements of only 1500 or so and the anecdotal suggestions that in only a very few bankruptcies do the Joint Family Home Act provisions make a difference;
  - the existence of a degree of protection against creditors (admittedly less than that under the Joint Family Homes Act) provided by the Matrimonial Property Act;
  - the strong possibility that a substantial proportion of the 1500 registrations is driven by Public Trust Office advice aimed at simplifying the administration of small estates, a worthy enough objective but insufficient by itself to justify the statute's continued existence;
  - the widespread adoption by couples of informal relationships in preference to marriages de jure;
  - the impossibility of devising a specified sum that is fair nationwide; and
  - the difficulty in justifying as a matter of policy the provision to married couples of a means of protection against creditors that is not available to other home owner(s) (a matter we discuss more fully below).
- 39 If it is believed (contrary to what is suggested in the third bullet point of the previous paragraph) that there is a social advantage in encouraging the vesting of homes in partners as joint tenants, would provision of a simple procedure for this (there would need to be a gift duty exemption) be preferable to the continued existence of the Joint Family Homes Act?
- 40 If the Joint Family Homes Act were to be repealed, should it be preserved to govern rights and obligations in relation to properties currently registered (as was done in the case of Part I of the Family Protection Act 1908)?
- 41 If the Joint Family Homes Act is to be preserved, should it also be available to de facto partners as defined in the Property (Relationships) Amendment Act 2001? There would seem to be two main arguments against this. One is that this may be thought to be a long way from the object of promoting traditional family values of the originators of the statute that we have described in paragraphs 4–6. The other is an essentially practical one. The issue married or not is clear-cut. Under the Act as it stands, the answer is provided by the production of a marriage certificate. With de facto relationships the issue is far more complicated. We invite consideration of

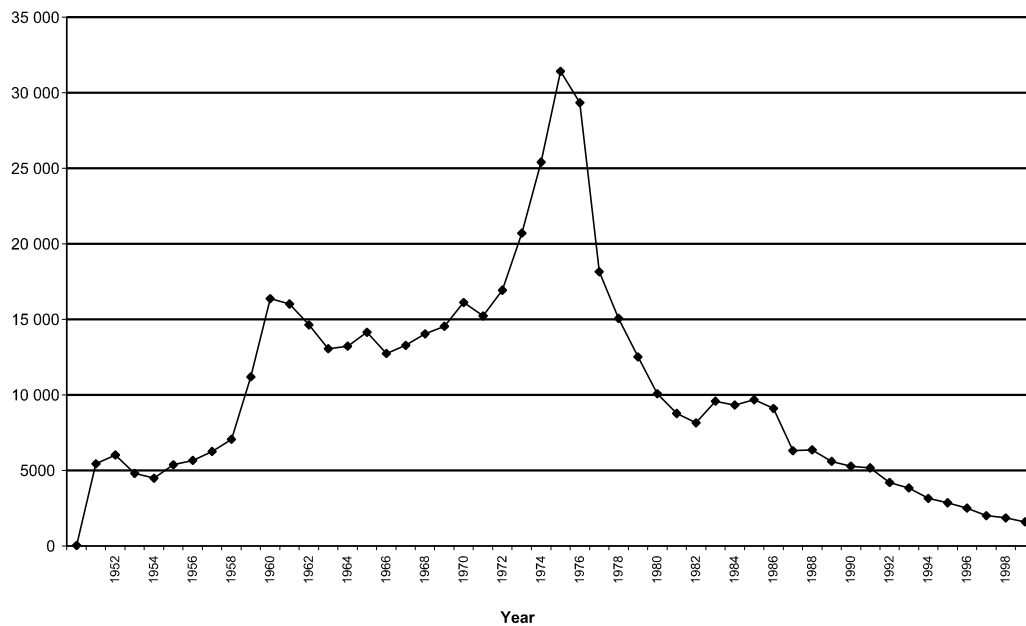
the list of criteria in section 2(B)(2) of the Property (Relationships) Act 1976 and of the question of how land registry officers are to determine whether according to that formula two persons are living together “as a couple”. And if the Land Registry Office is so persuaded, how in practice can an Official Assignee minded to challenge the registration obtain the factual information (as to, for example, “whether or not a sexual relationship exists” or “the degree of mutual commitment to a shared life”) to do so? And if these practical difficulties are insuperable so that an extension of the Act to de facto partners is not feasible, is not the consequent disparity in the entitlement of couples in de jure and de facto relationships a strong argument for repealing the Joint Family Homes Act altogether?

- 42 In the final bullet point in paragraph 38 we refer to the absence of clear policy justification for giving married couples a means of protection against creditors not available to any other home owners. Why should a couple whether their relationship is de jure or de facto and in the latter case whether it is heterosexual or homosexual have available protections that are not available to those who live alone?
  - 43 Indeed, under section 21(1)(b) of the Human Rights Act 1993, marital status is a prohibited ground of discrimination.
  - 44 Of course, the problems that we have raised in relation to the Joint Family Homes Act protection in the second-to-last bullet point in paragraph 38 (relating to the specified sum) and in paragraph 41 are equally applicable to the Matrimonial Property Act protection, but the last statute has been carefully excluded from our terms of reference so we say no more about it.
  - 45 If there is to continue to be protection of homes against creditors, would the simplest solution be to repeal the Joint Family Homes Act (and logic would suggest the Matrimonial Property Act protection also) and replace it with a blanket protection (up to the amount of the specified sum) of a bankrupt’s principal dwelling house, roughly analogous in effect to the protection of necessary tools of trade and necessary household furniture and effects to be found in the Insolvency Act 1967 section 52? This would preserve the protection that is the principal current *raison d’être* of the Joint Family Homes Act, avoid the problems of definition that would arise if the Joint Family Homes Act were to be extended to de facto relationships and remove the reproach of discrimination against single home-owners that we refer to in paragraphs 41 and 42.
  - 46 We look forward to receiving submissions.
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APPENDIX A  
Settlements registered under the  
Joint Family Homes Acts  
1950 and 1964

Number of homes



*Notes:*

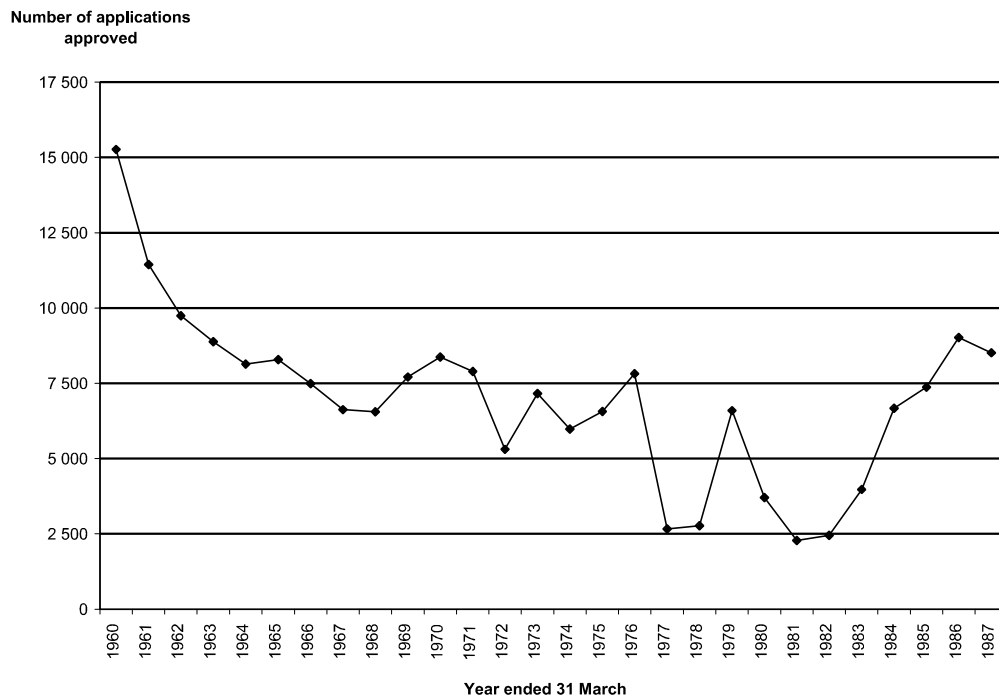
1. Figures from 1951–1989 are for the financial year ended 31 March. Figures from 1990 onwards are for the financial year ended 30 June.
2. The numbers for the years ended 1997 and 1998 are estimates.

*Source:* Land Information New Zealand.

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## APPENDIX B

### Applications approved for capitalisation of the family benefit



Source: Department of Statistics, New Zealand Official Yearbooks.



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APPENDIX C  
Annual rate of new marriages  
1961–1998



*Note:* Rate is per 1000 estimated mean not-married population aged 16 years and over.

*Source:* Statistics New Zealand.

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APPENDIX D  
Evolution of the “specified sum”  
for the Joint Family Homes  
Act 1964

Legislation	Specified sum or equivalent
Joint Family Homes Act 1950	£2000
Joint Family Homes Amendment Act 1968	\$4000
Joint Family Homes Amendment Act 1974	\$10 000
Joint Family Homes (Specified Sum) Order 1978	\$15 000
Joint Family Homes (Specified Sum) Order 1982	\$21 500
Joint Family Homes (Specified Sum) Order 1985	\$34 000
Joint Family Homes (Specified Sum) Order 1987	\$44 000
Joint Family Homes (Specified Sum) Order 1989	\$58 000
Joint Family Homes (Specified Sum) Order 1992	\$61 000
Joint Family Homes (Specified Sum) Order 1996	\$82 000

*Note:* The term “specified sum” was introduced by the Joint Family Homes Amendment Act 1974 s 9.

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APPENDIX E  
Median house sales prices by  
area, March 2001

Region	Dwellings	Sections
Northland	\$150 000	\$95 000
Auckland	\$248 500	\$125 000
Waikato/Bay of Plenty/Gisborne	\$165 000	\$72 250
Hawkes Bay	\$128 000	\$73 000
Manawatu/Wanganui	\$109 000	\$43 500
Taranaki	\$106 500	\$62 000
Wellington	\$195 000	\$72 000
Nelson/Marlborough	\$147 500	\$72 000
Canterbury/Westland	\$135 000	\$77 500
Otago	\$99 250	\$68 000
Southland	\$96 000	\$85 500
<b>New Zealand</b>	<b>\$178 000</b>	

*Source:* Real Estate Institute of New Zealand (Inc) *Housing Facts* March 2001.

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