

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2004-404-2187**

IN THE MATTER OF      The Property (Relationships) Act 1976

BETWEEN                      B  
   Applicant

AND                              M  
   Respondent

Hearing:      13-17 September, 23,24 September 2004

Appearances: M W Vickerman for applicant  
                    D A T Hollings for respondent

Judgment:      17 December 2004

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**JUDGMENT OF ALLAN J**

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*Solicitors:*  
*Barrie Hopkins, PO Box 10 6027, Auckland for respondent*  
*Counsel*  
*M W Vickerman, [barrista@clear.net.nz](mailto:barrista@clear.net.nz)*  
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[1] Before the Court for determination are a number of applications relating to the financial affairs of the parties, who were formerly husband and wife. All applications have been transferred by consent from the Family Court.

[2] They are:

- a) An application pursuant to s 23 of the Property (Relationships) Act 1976 couched in wide terms, seeking orders as to the respective shares of the parties in their relationship property, declarations as to the status and ownership of any property of either party, not being relationship property, and orders vesting specific items of relationship property in either of the parties absolutely, or in the alternative, such orders as the Court deems just. This application is filed by the applicant husband (the husband).
- b) An application pursuant to s 182 of the Family Proceedings Act 1980 filed by the respondent (the wife);
- c) An application by the wife for spousal maintenance pursuant to s 64 of the Family Proceedings Act;
- d) An application filed by the wife pursuant to s 104 of the Child Support Act 1991, in respect of child support payable for the two children of the marriage.

[3] Despite their best endeavours, the parties have been unable to achieve agreement in respect of financial matters following their separation and divorce, and at the hearing of these applications, which occupied some seven days, a number of issues were vigorously contested.

[4] Two fundamental issues appear to lie at the heart of the parties' disagreement:

- a) The wife's claim that the level of "super-profit" derived by the husband from his law practice is such as to constitute relationship

property and to justify an award to the wife in respect of that property,  
and

- b) A disagreement as to whether the wife should by now be undertaking full time employment, despite her child care responsibilities.

### **History of the relationship**

[5] The parties met in October 1979. At that time the husband was completing his law degree and supporting himself by working in a freezing works. The wife was completing a thesis for a Master of Arts degree in sociology. At that stage, the husband contemplated utilising his law degree by working as a union advocate. The parties entered into a de facto relationship early in 1980. The period of approximately two years between the start of that relationship and their subsequent marriage is to be treated for relationship property purposes as if it were part of the period for which they were married: s 2B of the Property (Relationships) Act.

[6] In December 1980, upon completion of their university studies, the parties moved to Wellington. The wife had obtained a position with the Pay Research Unit which involved her in the design, management and analysis of research directed at establishing the level of remuneration attached to similar public and private sector positions. Once in Wellington the husband obtained a position with the Employers' Association. He was able to complete the professional requirements which are a precondition for admission to the bar. During this period, both parties were earning similar salaries.

[7] Subsequent to his admission to the bar, the husband obtained a fresh position with a small Wellington legal firm, where in his words "I did the whole gamut of Court work from criminal to family and civil".

[8] The parties married on 13 February 1982. The husband was 26 years of age and the wife 24.

[9] In 1983 the husband obtained a position with another established Wellington law firm, where he was involved in a variety of criminal and civil work.

[10] In April 1984 the parties moved to a provincial centre. There is a disagreement between them as to the reasons for the move, and as to the benefits and detriments which resulted. The husband says that the parties were agreed that they wished to leave the Wellington climate and further, that his Wellington employment appeared not to carry any significant prospects for advancement. The parties chose the city concerned because, the husband says, he was offered a position in an established law firm (the first firm) which seemed to carry good prospects of an early partnership. The wife plays down the extent of the agreement to leave Wellington for climatic reasons. She says she enjoyed Wellington (but not its climate), and that she would have been willing to stay there. The move brought to an end her position in the Statistics Department which she enjoyed, and which enabled her to utilise to some degree her tertiary qualifications.

[11] The husband duly took up his new position, but the wife was unable to find a position there which matched her qualifications. She took up a position with the Department of Labour which proved to be chiefly secretarial in nature, and lacked significant challenge. She undertook real estate examinations and became a real estate agent for a period of some six months. That initiative was also relatively unsuccessful. She then became a Court reporter, which in turn led to a period as probation officer. Work in that capacity she found stimulating and challenging, although stressful at times.

[12] She says that the period in the provinces, while advancing the husband's professional experience and fortunes considerably, did nothing for her own professional career, and to that extent while the parties as a couple probably gained from the husband's advancement in his first firm, she personally lost the opportunity to advance her career in Wellington.

[13] In April 1986, the husband was offered, and accepted, a partnership in the first firm. He stayed there until 1989, at which point his partnership profits were of the order of \$80,000 per annum. However, in 1988 two events occurred which

prompted the husband to leave the partnership. The first was a significant merger which had the effect of more than doubling the size of the firm. That produced a good deal of friction and difficulty. The second was the discovery of defalcation on the part of one of the partners in the firm. Inevitably, that took its toll on the partners, both financially and personally.

[14] Those issues, coupled with a level of burn-out on the husband's part, led to his decision to retire from the partnership. He had been undertaking a major workload, including an increasing amount of criminal defence work, which eventually began to undermine his general health.

[15] The parties decided to spend a period living and working in England. Again there is disagreement about the reasons and motives which underpinned that decision. The husband says that the wife was keen to spend a period living and working overseas, something which she had not previously done for any length of time. He was happy to make the move and it was a necessary consequence of the decision that he look for legal work in London. For her part, the wife says that she agreed to forego the substantial income which the first firm provided and their consequential comfortable lifestyle so that the husband could pursue his ambition to gain legal experience in London.

[16] In my view, that dispute is largely immaterial because the move to London resulted in the husband finding a challenging position which broadened his litigation experience, particularly in the area of criminal law, while at the same time the London sojourn enabled the wife to find work in market research in which she excelled. For his part, the husband obtained a position as a pupil in a prestigious set of criminal chambers in London, and having undertaken his pupillage, he succeeded in obtaining a tenancy in those chambers. Tenancies in good London chambers are difficult to obtain and the fact that he was successful in that respect provides some evidence of the abilities as an advocate which the husband was displaying at that relatively early stage.

[17] The wife likewise successfully undertook market research work in the pharmaceutical field, attaining a relatively senior position carrying heavy budgetary

responsibilities. The evidence establishes she was a dedicated and effective employee who in one financial year had achieved her financial budget with some months to spare.

[18] The parties had purchased a house in New Zealand and sold it on their move to England. With the proceeds they purchased a house in Fulham. They took in flatmates to assist in meeting the mortgage obligations. In the early stages, the wife's earnings carried the couple along financially, since the husband earned nothing during the period of his pupillage and thereafter there was a period when his cash flow was low because there were delays in obtaining payment of his fees.

[19] As time went on, his practice included a significant proportion of Crown related work and a higher proportion of his fees was paid promptly.

[20] Counsel for the wife laid some stress on the fact that the wife had a right of abode in England which carried with it a right to employment, extending to the husband. It was said that accordingly, the husband owed his ability to work in England to the wife's status. That was not disputed by the husband.

[21] On 17 September 1993, the wife gave birth to a son. She stopped full-time employment some six weeks prior to his birth. In 1994 the parties agreed that they should return to New Zealand. Early in 1995 the husband commenced work at a substantial Auckland law firm (his current firm). With the proceeds of sale of the Fulham property the parties purchased a house in Remuera, raising a mortgage to bridge the shortfall between their available funds and the purchase price. During 1995, the wife did some contracting work from home for a market research company. On 19 March 1996, the wife gave birth to a daughter.

[22] On 1 April 1997, the husband was made a salaried partner at his current firm. Earlier (in about November 1995), he had been asked to take over responsibility for leading the civil litigation team in the firm, consequent on the departure of the previous team leader to take up judicial office.

[23] In 1997 the parties established mirror trusts. The Remuera property was subsequently transferred to those trusts equally. The parties lent the purchase price to the trustees and took mortgages back. The husband explained the trusts as having been brought into existence for the purposes of creditor protection. He has already experienced the difficulties which ensue where a partner is in default and did not wish to expose the family assets to the possibility of a claim against the firm of which he was now a partner. The wife does not dispute that explanation.

[24] On 1 April 1999, the husband became an equity partner in his current firm. That entitled him to a share in profits which increased on a lock-step basis from year to year.

[25] In about February 2000, the parties commenced extensive renovations to the family home in Remuera. The evidence is that somewhere between \$200,000 and \$250,000 was spent. By then the only significant source of family income was the husband's earnings from his practice.

[26] On 2 September 2001 the parties separated. After a brief period the husband entered into a de facto relationship with another woman. That relationship continues. The wife remains living in the former family home with the children, although they stay with the husband for six nights each fortnight. The marriage was dissolved on 29 February 2004.

### **The scope of the hearing**

[27] Several important issues arise for determination. They were the subject of extensive evidence and submission. There was a measure of agreement with respect to a number of items of relationship property, although differing approaches resulted in disagreement over some items. I was invited to rule on the issues of principle arising in the proceeding, and to reserve leave to the parties to apply for further rulings in respect of matters of detail should that prove necessary.

[28] The issues of principle focused upon by the parties were whether:

- a) the husband's earnings from his law practice incorporated an element of super-profit and, if so, how that element ought to be valued and treated for relationship property purposes.
- b) the family home, owned by mirror trusts, was nevertheless relationship property of the parties.
- c) a major claim made against the first firm, of which the husband was formerly a partner, constituted a relationship debt and, if so, how it ought to be treated.
- d) an award ought to be made to the wife pursuant to the provisions of s 15 of the Act, and if so, what was the appropriate amount of such award;
- e) an order ought to be made under s 182 of the Family Proceedings Act with respect to the mirror trusts of the parties, having regard to other orders made in this proceeding;
- f) the wife was entitled to future spousal maintenance and if so, the amount of the appropriate award.
- g) A departure order ought to be made at the level sought by the wife in respect of the two children of the relationship, it being conceded by the husband that a departure order was appropriate.

[29] As noted above, the parties are agreed as to the extent of much of their relationship property. The agreed items are as follows:

Amounts owed in total by mirror trusts to the parties in respect of the family home	\$188,000.00
Lloyds Bank	639.30
Husband's pension (current value)	45,762.43
Wife's pension (current value)	7,150.00



AMP shares (current value)	1,858.00
AMP policy	3,774.00
Husband's undrawn income at separation	14,358.00
Husband's capital account in law firm at separation	56,800.00
Furniture in wife's possession	15,507.00
Furniture in husband's possession (unvalued)	
Wife's car (current value)	<u>500.00</u>
	<u>\$334,248.73</u>

[30] A further minor item which may be in dispute relates to an endowment policy which was sold for \$87,261.79. Of that sum, \$84,000 was applied to extinguish (or possibly reduce) an overdraft, but the balance has not been accounted for. The wife includes a figure of \$3,000 in her list of relationship assets to cover most of the difference. The husband does not do so, but complains that the wife is responsible for a drop in value of the endowment policy by reason of her alleged refusal to sell the policy at a more propitious time.

[31] I merely note the point. If it remains in issue then it can be raised pursuant to the leave reserved to apply further as to matters of detail.

[32] Relationship debts are agreed only in part. There is agreement that the following are relationship debts:

Account 6215-00 (tax account) as at separation date	\$10,011.45
Account 49442-92, value as at 6.9.04 (at separation \$121,846.96)	106,302.13
Capital account at separation (overdraft facility operated in parallel with the level from time to time of the husband's capital account in his firm)	56,800.00

[33] There appear to be three areas of disagreement between the parties in respect of the treatment of relationship debts. The first relates to the husband's tax liability at separation. He lists among relationship debts a figure of \$52,093.91, said to represent his outstanding liability at that time. The wife makes no corresponding deduction in respect of that debt. The matter was not raised at the hearing. If it is truly a matter in dispute then it can be dealt with pursuant to leave reserved.

[34] There is also disagreement as to the extent of any adjustments which might need to be made for some other post-separation payments. The husband contends that mortgage principal reductions made separately by the parties ought to be brought to account. The wife disagrees. I note that the husband argues that his principal reductions since separation amount to \$10,346.96 and that the wife's reductions total approximately \$5,197.87.

[35] A further issue may also need to be resolved in respect of post-separation payments on the parties' endowment policies. A payment of \$6,994 was made on 1 March 2002, and a further payment of \$5,973 on 1 March 2003. The wife accepts that the latter payment ought to be brought to account, but in respect of the first there is a suggestion in the wife's schedule of assets (No.2), that the figure ought to be treated as maintenance. For his part, the husband contends that both payments ought to be brought to account. That is a matter which (along with any other like issues) can be resolved, if necessary, pursuant to leave reserved.

### **Property (Relationships) Act 1976: Purpose and Principles**

[36] Sections 1M and N of the Act respectively provide:

#### **1M The purpose of this Act**

##### **The purpose of this Act is—**

- (a) to reform the law relating to the property of married couples and of couples who live together in a de facto relationship:
- (b) to recognise the equal contribution of husband and wife to the marriage partnership, and of de facto partners to the de facto relationship partnership:

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

## **1N Principles**

The following principles are to guide the achievement of the purpose of this Act:

- (a) the principle that men and women have equal status, and their equality should be maintained and enhanced;
- (b) the principle that all forms of contribution to the marriage partnership, or the de facto relationship partnership, are treated as equal;
- (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or de facto partners arising from their marriage or de facto relationship or from the ending of their marriage or de facto relationship;
- (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[37] Ms Hollings for the wife submits that these sections constitute the starting point for decision making under the Act. That must be so; subject to the express provisions of the statute, the Court is enjoined to have regard to both the purposes of the Act as set out in s 1M and the principles set out in s 1N. In particular, the Court must have regard to:

- a) The equal contribution of husband and wife to the marriage partnership;
- b) The Act's purpose in providing for a just division of relationship property between the spouses, while taking account of the interests of the children of the marriage;
- c) The principle that men and women have equal status and equality should be maintained and enhanced;
- d) The principle that all forms of contribution to the marriage partnership are treated as equal;

- e) The principle that a just division of relationship property has regard to the economic advantages and disadvantages to the spouses arising from their marriage, or from the ending of their marriage.

[38] It is necessary to bear the foregoing purposes and principles in mind when exercising discretions conferred by the Act on the Court.

### **Super-profit**

[39] The husband is an equity partner in an established and highly regarded law firm. It is arguable that his earnings exceed those appropriate as remuneration for his experience, skills, responsibilities and future efforts. To that extent, it is also arguable that his future earnings will include an element of super-profit.

[40] The wife claims that the present value of such super-profits is relationship property. That claim is founded on the Court of Appeal decision in *Z v Z (No.2)* [1997] 2 NZLR 258. The facts of that well known case are to a degree similar to those which arise here. There the wife managed the home and cared for the children of the marriage. She supported her husband in the advancement of his career. The husband improved his position and eventually obtained a partnership in an international firm of accountants. At the time of separation, the husband was earning very substantial remuneration, a portion of which was referable to the established practice of the firm and its significant international clientele, rather than to the individual skills and efforts of the husband.

[41] The Court prefaced its analysis by discussing the systemic problem which commonly arose by reason of the division of functions between husband and wife in the context of the marriage relationship. It said:

There is growing recognition that the division of matrimonial property under the Matrimonial Property Act is operating harshly on those women who have forgone 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.

Hence, the essence of the criticism directed at the Matrimonial Property Act is that, while it achieves formal equality between the spouses in that the conventional items of property are divided equally, it does not achieve actual equality when the husband is left with the ability to earn a significant income and the wife is left with little or no ability to earn a living and possibly little or nothing in the way of material assets from the marriage to assist her. The relative hardship is likely to be exacerbated when the wife, as is likely, obtains custody of the children or is left to look after them by default. Such an outcome cannot be easily reconciled with the objectives of equality and justice underlying the Act. (p 275-276)

[42] The Court held that:

- a) Enhanced earning capacity post-separation is not relationship property;
- b) Earnings referable to future effort were not in any event property in existence at the time of separation. Such property is not “acquired” at the time of the proceeding;
- c) But in the case before it, the husband’s partnership, which included a substantial and established client base, produced income for the husband beyond that referable directly to his skills, experience and individual output. The valuation of that part of the husband’s income that might properly be regarded as relationship property called for an approach akin to that identifying super-profits to measure the extent, if any, by which the husband’s expected income as a partner will exceed the earnings appropriate as remuneration for his skills (which are his own), and future efforts.

- d) It might be possible in that way to determine whether the expected remuneration was higher than reasonably to be commanded by the husband for his skill and responsibilities.

[43] In *Z v Z* the Court of Appeal found it impossible on the material available to it, to make any determination of the extent (if any) to which the husband's earnings exceeded those directly referable to his own skills and responsibilities. The case was therefore remitted to the High Court for further evidence to be called.

[44] But although the Court of Appeal was unable to make its own determination, it offered a degree of guidance as to the approach to be adopted.

A starting point could be to ascertain whether it was reasonably to be expected at separation that the husband's share of profits from the partnership thereafter would include an element derived from his membership of the firm as distinct from his own earning capacity. The authorities already referred to in this section of this judgment indicate various approaches that might be considered – all variations of a super profit (excess earnings) method of valuation involving postulated comparative streams of income available to the husband or comparative costs of generating the same income in other ways. It may be possible to determine whether the expected remuneration is higher than that reasonably able to be commanded by the husband for his skill and responsibilities. It may be possible to identify a cost of replacing the husband's work and responsibilities by the employment of suitably qualified persons. The judgment in the New Jersey case of *Dugan v Dugan* (although directed to goodwill) is instructive on this aspect.

Alternatively, it might be that conventional methods of assessing a capital value for a business income stream, as for the purchase of small businesses, can be adapted to measure the value of the husband's future excess profits entitlement. Should there be a value attributable to the entitlement to excess profit shares in the partnership, that together with the entitlement to the expected retirement benefit, adjusted if considered appropriate for the other advantages and obligations while a member of the partnership and after retirement, will constitute the value of the bundle of rights acquired during the marriage.

By way of example only, should it emerge that 20 per cent of the husband's earnings is derived as "excess earnings" because of the benefits of partnership, that future income stream together with the expected retirement benefit would be given a value at the separation date. That would be the amount required at that date to produce the future income adjusted for contingencies and the impact of other benefits and obligations provided for in the partnership deed, including the obligations continuing after the date of retirement. That is an assessment akin to (but not the same as) that made of superannuation rights in *Haldane*. (p 292)

[45] A substantial proportion of the present case measured in both time and effort, was devoted to the question of whether an element of super-profit had been established in respect of the husband's earnings from his law practice, and the valuation of the element of super-profit claimed to exist.

[46] Before discussing the evidence on the point, it is necessary to deal with a threshold objection taken by Mr Vickerman for the husband. He argued that:

It is highly probable that the mischief that the claim in *Z v Z* attempted to address, and the remedy suggested by the Court, is now addressed in s 15 of the Property (Relationships) Act.

[47] Mr Vickerman developed that argument by pointing out that in *Z v Z* the Court of Appeal indicated that if the concept of property was to be expanded to embrace future earnings, an amendment to the Act would be required. The Act has now indeed been amended (by inter alia the inclusion of s 15) and Mr Vickerman submitted that Parliament has eschewed expanding the definition of property, but has instead sought to ameliorate the social disadvantages of the partner who stays at home by stipulating that where the division of functions within the relationship is likely to cause a significant disparity of income and living standards, the Court may make a compensatory award.

[48] The s 15 jurisdiction falls short of treating higher income earning capacity as an item of property: *McGregor v McGregor* (2002) 22 FRNZ 582 at para 50. Mr Vickerman submitted that the Legislature having amended the Act subsequent to *Z v Z* and in doing so having refrained from providing that future earnings shall constitute relationship property, the Court should now infer that the *Z v Z* approach to super-profits is no longer good law.

[49] For three quite separate reasons, in my view, Mr Vickerman's argument cannot be sustained. First, s 15(1) of the Act 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 or de facto relationship ends, the income and living standards of 1 spouse or de facto partner ( party B) are likely to be significantly higher than the other spouse or de facto partner

(party A) because of the effects of the division of functions within the marriage or de facto relationship while the parties were living together.

[50] It will be observed that the section applies “on the division of relationship property”. That is, the s 15 inquiry post-dates the division of relationship property. Section 15 should not influence or dictate the outcome of the application of the substantive provisions of the Act: see *de Malmanche v de Malmanche* [2002] 2 NZLR 838.

[51] Logically therefore, the exercise of determining whether super-profit in a given case might constitute relationship property is to be conducted before s 15 is deployed.

[52] Second, to uphold Mr Vickerman’s submission would be to confine a consideration of super-profit to cases in which an applicant can establish the disparity and causal nexus requirements imposed by s 15. There is simply no basis for doing that. The analysis and valuation of super-profit is called for in a given case as part of the exercise of identifying and valuing relationship property. The s 15 jurisdiction arises quite independently in an appropriate case as a means of repairing, at least to some degree, the disparity arising from the division of functions within the relationship.

[53] The third reason is closely associated with the second. The division of relationship property is mandatory, while the making of a s 15 order is discretionary. If Mr Vickerman is right, it is necessary to impute to Parliament an intention to make the division of super-profit discretionary, whereas prior to the enactment of s 15 it was mandatory. Such an outcome, dictated by statutory amendment, would need to be spelt out in the clearest language. There is in s 15 no such direction.

[54] Accordingly, I do not accept that the enactment of s 15 impacts upon the super-profit inquiry which arises in this case.

[55] The parties each instructed an eminent forensic accounting specialist to assist them in the proceeding and to give evidence on their behalf. The husband instructed Mr J C Hagen and the wife, Mr A N Frankham. On 24 August 2004, as directed by



the Court, Messrs Hagen and Frankham filed a joint report setting out the issues upon which they agreed, and those upon which they did not. They were largely agreed on the sequential steps which ought to be followed in the course of the exercise of valuing super-profits, but disagreed in material respects as to the results to be obtained when implementing those steps.

[56] The agreed approach can be summarised as follows:

- a) The likely future earnings of the husband in his current firm are determined;
- b) That portion of those earnings reasonably able to be commanded by the husband by reason of his own skill, experience and responsibilities is determined (by reference to what he would earn otherwise than as a partner in the firm);
- c) The future growth rate in earnings is established;
- d) The period of time during which the husband will earn the super-profits is determined;
- e) An allowance is made for the risk that the husband will not in fact receive super-profits over the period of time so fixed;
- f) An overall assessment of the reasonableness of the resulting calculation is made (Mr Hagen only; Mr Frankham dissents from this proposition);
- g) Any other entitlements available to the husband by reason of his partnership are then allowed for.

[57] The exercise, although simply described, is in practice fraught with difficulty. As Mr Hagen says:

The consequences of making relatively broad assumptions can be catastrophic in its effect on the division of relationship property. The cost of any error is very high.

[58] Mr Hagen's warning is in my view soundly based. Many of the factors to be taken into account as part of the valuation exercise are incapable of precise calculation. They must accordingly be the subject of broad and intuitive assessment. Given the number of such assessments to be made, it is theoretically possible to produce figures which are simply out of line with the husband's real earning prospects. It is therefore appropriate to check the result by reference to overall reasonableness and commercial reality.

[59] Ms Hollings formulates the issue somewhat differently. She submits that the overall test ought rather to be whether the figure adopted is such as to ensure that the wife "... receives a just settlement of relationship property following the failure of their marriage". If that submission suggests I should simply make a jury award in accordance with the justice of the wife's claim, then that proposition is too broadly stated. On the other hand, if the submission merely enjoins me to bear in mind the merits of the wife's claim, then I have less difficulty in accepting it, but it is of limited assistance.

[60] The first step in the calculation is to assess the husband's future earnings. The current firm, although having a significant number of partners, is run on relatively informal lines. Partners are generally admitted on a salaried basis for the first two years, and thereafter progress to full equity partnership on a lock-step basis, their earnings increasing by 20% per annum. There appears to be no fixed age for retirement. In the evidence there is a suggestion that 72 might have been acknowledged as an appropriate retirement age, but that has apparently been honoured in the breach.

[61] [Excluded from this version of the judgment on confidentiality grounds.]

[62] In an affidavit sworn in October 2003, Mr Frankham, the wife's expert witness, assessed the husband's likely future earnings at [\$X] pa, in excess of historical earnings of an average of about [\$90%X] pa. In July 2004, Mr Frankham

increased his assessment to [\$115%X] pa. By then, actual earnings by full equity partners for the years ending 31 March 2003 and 2004 had become available. They were [\$122%X] in 2003 and [\$122.2%X] in 2004. The husband attained a full equity partnership in the latter year.

[63] Mr Hagen assesses likely future earnings at [\$X] pa. The difference between the experts is largely to be explained by the extent to which they are prepared to engage in hindsight.

[64] Save in exceptional circumstances, the valuation of a bundle of rights such as exists in the present case, must be undertaken as at the date of separation. It is the bundle of rights which existed at that date which must be isolated and valued. But it is permissible to look at known events which have occurred since the separation date, which must have been in contemplation at the date of separation as possible, and were reasonably to be expected as at that date: *Clark v Clark* [1987] 2 NZLR 385.

[65] The wife relies heavily on the judgment of Gault J in *Hartley v Hartley* [1989] 2 NZLR 240 in which the Judge held it was “quite unrealistic” to disregard the figure at which shares had been sold post-separation. However, that was an unusual case in which there were gaps in the valuation evidence, and where the Judge found it necessary to make an assessment without the usual valuation assistance. He relied upon a post-separation sale price because it was the only concrete evidence available. Moreover this decision was reversed on appeal: *Hartley v Hartley* [1991] 1 NZLR 446. Although the Court of Appeal adopted an approach which did not require it to review in detail the available valuation evidence, some care must be exercised in relying on the High Court judgment as an example of ordinary assessment principles.

[66] The general principle is set out in *Clark v Clark*. The effect of that decision is that it is possible to look at subsequent events to check the validity of assumptions made at the time of valuation, which is a quite different thing from substituting subsequent events for what was known at separation. The importance of the

distinction was under-scored by Judge Inglis QC in *McRae v McRae* [1996] NZFLR 213, 216-217, a case dealing with the valuation of shares.

...all the factors relevant to valuation of the shares in the company are to be assessed in the light of the circumstances as they were at the date of separation.

...

Choice of the separation date valuation obviously confines the valuation exercise to the relevant aspects of the company situation as they were at that date and to any reasonable predictions based on the state of affairs existing at the date affecting the future performance of the company's business.

...

The danger in taking post separation events into account, is that the cut off point for matrimonial property purposes is unjustifiably and unfairly moved forward and what was intended to be a separation date valuation becomes translated into a hearing date valuation.

...

It has to be remembered that if events following the separation lead to enhancement of the value of what has been notionally purchased at the date of separation, that enhancement may in fact owe nothing to the pre-separation contributions of the vendor's marriage partner. The result will be that a valuation for matrimonial property purposes as at the date of separation which takes post separation events into account is degraded by hindsight.

...

Post separation events may sometimes be taken as confirmation that a prediction as at the date of separation was realistic or, (as in *Haldane*) might properly have been made (see per Somers J at 571-2), but the process does not work the other way so that post separation efforts are allowed to colour a prediction that is supposed to be made at the date of separation, without knowledge of those post separation events. There is a clear difference between an informed prediction of what is likely to happen and a prediction informed by what has actually happened. The latter is not a prediction at all.

[67] Mr Hagen assesses at about [\$X] per annum the reasonable level of expected earnings for the husband, during the post-separation period for which he might continue as an equity partner at the 100% equity level. In so doing, he takes into account the earnings history of the firm and its relatively steady profit performance. If the assessment had been made solely on the information available at the date of separation (September 2001), then his assessment of future earnings levels would have been [\$88%X], because firm earnings were remarkably stable over the

preceding five years. He has however, tested that figure by reference to information likely to have been available as at the date of separation, and fixes his final assessment at [\$X] accordingly.

[68] For the wife, Mr Frankham initially also adopted [\$X] per annum, which he said was above the firm's historical earnings of [\$90%X] pa for 100% equity partners, but considerably less than the firm's 2004 budgeted income for a full parity partner of [\$120%X]. He subsequently (in a later affidavit) increased that figure to [\$115%X] pa, having regard to evidence of actual full parity partner profits exceeding [\$120%X] for the financial years ending 31 March 2003 and 2004 respectively.

[69] The process of assessing likely future income over a period of some years into the future is necessarily difficult. It is simply impossible to undertake the exercise in an arithmetical fashion. A number of broad considerations must be taken into account.

[70] As at September 2001, it was possible to make soundly based assumptions about a number of matters:

- a) The firm, having enjoyed stable profits over a period of some years was likely to continue to do so;
- b) The husband was likely to progress to full equity partnership in terms of the firm's lock-step regime, and thereafter to remain a full equity partner for some time;
- c) It was highly probable that at least two senior partners would retire from the partnership, having regard to their age at September 2001. The effect of that would be to increase profits for the remaining partners;
- d) The firm's decision to increase its leverage would be likely to improve profitability over time;

- e) The firm's intention to build up the strength of its commercial property practice would be likely to have, in time, some positive effect on profitability, although commercial property work can be cyclical and care should be taken as to the extent to which this factor ought to be brought to account;
- f) Just as partners are likely to retire from a firm, new partners would be added (especially in the light of the firm's increased leverage) with the result that profitability gains from partner retirements might be offset at least to some degree by new partner admissions.

[71] Of necessity, assessment must be made in the round. I adopt a figure of [\$X] per annum. That is the figure used by Mr Hagen. It is also the figure initially adopted by Mr Frankham before his amendment in the light of more recent actual earnings. The long period of stable historical earnings must be accorded significant weight. While enhanced recent profits cannot be ignored, it is necessary to bear in mind that they have occurred post-separation and that there is no certainty that profits will remain at that level.

[72] The next step is perhaps the most difficult. It is the assessment of the earnings reasonably able to be commanded by the husband, by reason of his skill and experience, otherwise than as a partner in the firm. To express the issue in the language used by the Court of Appeal in *Z v Z (No.2)*:

The Court must ... measure the extent, if any, by which the husband's expected income as a partner will exceed the earnings appropriate as remuneration for his skills (which are his own) and future efforts. (p 290)

[73] For the wife, it was submitted that I ought, in assessing the income likely to be derived by the husband otherwise than as a partner in the firm, to have regard to a range of other positions which might be considered appropriate comparitors. These included a salaried partner in the firm, a staff solicitor in the firm, and a position at the separate bar. Ms Hollings also contended that I ought to have regard to the margin between the husband's personal billings in the firm and his profit, and also to the level of the base draw ([\$30%X] per annum) paid by the firm to the partners prior to any further profit distribution.

[74] I immediately put aside from consideration these last two alternatives. It seems to me that the husband's personal billings in a highly leveraged and reasonably large firm are not likely to bear any real relationship to the contribution he makes to the firm by the provision of skill, experience and expertise and the assumption of responsibilities. It overlooks entirely selection, training and supervision of staff, the maintenance of relationships with clients and a multitude of other responsibilities assumed by partners. Likewise, the fact the firm chooses to distribute about [30%] p.a. as base drawings appears to me to have no relevance to the issue at hand. It is a commonplace for professional firms to distribute a proportion of the eventual profit on a regular basis to partners, to enable them to meet day to day living expenses. The figure concerned would not ordinarily bear any relationship to the contributions of individual partners.

[75] Neither do I accept that comparison with the salaries paid to professional staff is a valid one. As Mr Vickerman submits, the contribution of a staff solicitor is quite different from that made by a full equity partner. Had the husband been performing at broadly the same level as a salaried staff solicitor, then he would presumably not have been elevated to the partnership. As earlier observed, a partner is expected to make a contribution in areas which do not fall to the lot of a staff solicitor in ordinary circumstances. Examples are staff training and supervision, the responsibility to clients for the conduct of the firm's practice, and the assumption of responsibility for the firm's liabilities.

[76] Neither do I think that a comparison with the income of a salaried partner is appropriate. A salaried partner in this particular firm has an expectation, but no guarantee, of rising to full partnership. Moreover, the husband was once, but is not now, a salaried partner. It is some years since he joined the partnership on a salaried basis. It is artificial to compare the husband, who is presently a full equity partner, with a salaried partner who, almost by definition, will be a person of lesser experience, responsibilities and/or ability.

[77] In this context Ms Hollings referred to *Robinson v Robinson* HC AK AP108/01 18.3.02 Randerson J, in which in reliance on *Z v Z* the Court used a salary

allowance in order to calculate the value of super-profit. The facts of that case were quite different from this.

[78] There the issue was (as effectively it was in *Dugan v Dugan* a US case mentioned in *Z v Z*) the value to be attributed to goodwill in a sole practitioner practice. That raises different considerations from the present case, when the husband cannot assess the firm's goodwill and has no right to share in it.

[79] In *Robinson*, the expert accounting witnesses were agreed that an assessment based on deduction of a notional salary was appropriate, having regard to the unusual factual matrix involving a sole practitioner earning significant profits without a significant contribution in terms of personal involvement in the practice.

[80] Here the remaining alternative, not so far discussed, is a notional comparison with the husband's likely net earnings at the bar. That represents, in my view, the most accurate (although necessarily still broad) technique for assessing the husband's ability to earn alternative income by utilising his legal knowledge, experience and skills.

[81] The parties plainly believed that such a comparison was appropriate, because each called expert evidence directed at establishing the husband's likely earnings, were he to leave the firm and go to the separate bar. The witnesses concerned were all senior members of the profession specialising in litigation, some in the criminal field, others in civil work, and others yet again, in both. Each gave evidence directed at establishing the husband's likely earnings were he now to leave the firm and set up as a barrister at the independent bar. Each was very extensively cross-examined on that issue.

[82] I have found this evidence of only limited assistance. Of necessity the evidence itself is replete with qualifications and reservations arising partly by reason of the lack of familiarity by witnesses in some instances with the detail of the husband's recent practice, and partly because none of the witnesses was able to speak in anything but general terms as to levels of earnings at the bar. There was a measure of agreement between witnesses to the effect that, for the most part,



members of the independent bar do not share information regarding their earnings. Rather more importantly, however, the evidence was of limited help simply because it addressed, in my view, the wrong question. It was directed at the level of income which the husband might enjoy, were he now to leave the firm and set up in practice at the bar, taking with him such work as he was able from his firm, together of course with the skills and experience acquired by him over the whole of his period in practice, including his extensive experience as a partner in the firm.

[83] I believe that approach fails to address the real question, which is whether the husband's experience, knowledge and skills, would enable him as a practising barrister, to command an income of the same order as he enjoys as a partner in the firm. That question is not, in my view, to be judged by reference to what might befall him were he now to leave the firm and set up at age 48, as a barrister at the independent bar. Rather than join the firm in 1995, one must assume he had at that time commenced practice at the bar, and so by separation would have had some six years experience there.

[84] To assume a move to the independent bar at or about the date of separation is I believe, to penalise the husband in two respects. First, it would necessarily leave out of consideration those skills and that experience derived by him as a partner in the firm which are not portable. Examples would be personal relationships within the firm, the training and supervision responsibilities undertaken by him and the responsibility for clients of the firm who would remain with the firm after his departure.

[85] Second, the husband is penalised because the assumption made by the witnesses has been that he joins the bar at 48 as a newly independent barrister, taking with him only such clients as he is able to persuade to brief him, and facing the need to establish afresh a reputation as a barrister, rather than as an equity partner in an established firm. To take that line is to deny the husband the notional benefits of a reputation which he would have established over a period of some years, had it been assumed that he commenced at the independent bar in 1995. Apples are not being compared with apples. To the extent that the evidence assumes (as much of it does), that the husband leaves the firm in 2004 to join the independent bar is to proceed on

a wrong principle, and to the extent that that assumption is made, the consequential evidence is of limited value.

[86] Mr Vickerman submitted that although the lawyer witnesses were clearly expert in the field of practice at the independent bar, and were therefore “experts” in a strict sense, nevertheless the evidence before the Court was so speculative (and barristerial earnings varied so widely) that the Court ought to proceed with great caution before relying upon that evidence. Mr Vickerman also reminded me of Mr Hagen’s warning regarding the catastrophic consequences of an error at this point of the assessment, and complained in a broad fashion about the absence of survey evidence in respect of barristerial earnings and the “blatant hearsay” of some of the material relied upon by expert witnesses in the course of expressing their opinions.

[87] There is something in those submissions, and the difficulties are compounded because as I have held, much of the expert evidence was directed at the wrong question.

[88] There was however, some expert evidence which went more directly to the important issue of the extent to which the husband was likely to succeed long term in practice at the bar. It is plain the husband has a reputation as an effective advocate and is a sound lawyer. He has extensive criminal experience, together with a certain amount of civil experience. He must have impressed the partners at his current firm when he joined in 1995, because an offer of partnership followed within two years of his arrival there. Moreover, he quickly gained a partnership in his first firm at an earlier stage of his professional career and the grant of a tenancy in prestigious criminal chambers in London provides further objective evidence of his standing as a barrister. That material was corroborated by each of the expert witnesses called to give evidence, who all said the husband was a lawyer of considerable ability, who had something of a flair for trial work and would enjoy a successful career at the bar.

[89] The evidence was by no means uniform however, as to his likely earnings there. Several of the witnesses agreed that given the right circumstances the husband was capable of equalling or exceeding at the bar, the income which he currently enjoys from the firm. None of them directly addressed the question of the husband’s

likely income at the bar now, upon assumption that he commenced practice as a barrister in 1995, rather than taking up employment at his current firm.

[90] To a certain extent the Court's role in proceedings under the Property (Relationships) Act is inquisitorial. But while there is no general onus of proof on a party (often as here it will largely be a procedural accident as to which party initiates the proceeding), an onus of proof does remain where a party seeks to establish, in the face of opposition, that a particular asset exists: *Y v Y* [1977] 2 NZLR 385, 395.

[91] In the present case the wife contends that the husband's future earnings from his law practice will include an element of super-profit which constitutes relationship property. Accordingly, the wife bears the onus of establishing that proposition.

[92] I have simply been unable to conclude that it has been established that the husband currently enjoys a level of profits which so exceeds his likely earnings at the independent bar, that his current earnings must incorporate a level of super-profit. Accordingly, I find that the husband's likely future remuneration is no higher than that reasonably able to be commanded by him by reason of his skill, experience, knowledge and responsibility, and that therefore none of that remuneration constitutes relationship property.

### **The family home – relationship property?**

[93] In 1998 the family home at Remuera was transferred to the mirror trusts referred to earlier in the judgment. Each party established a family trust. Each trust became an equal owner of the property. The parties took acknowledgements of debt for the amounts owed by the trusts in respect of the transfer. A total of \$188,000 remains owing by the trusts to the settlors (\$94,000 in respect of each trust). The property is valued at about \$900,000 and subject to a mortgage of about \$105,000. The trusts have no other assets and the mortgage payments are being met by the parties.

[94] The trusts have the following common features:

- a) Each trust is settled by one of the parties;
- b) The parties are respectively trustees of the trusts settled by them, along with close family members;
- c) The settlors have the power to appoint and remove trustees;
- d) The settlors have the power to appoint and remove discretionary beneficiaries;
- e) All decisions of the trustees are required to be unanimous;
- f) Discretionary beneficiaries include the spouse other than the settlor, the children of the parties, along with their issue, and various charitable institutions and sporting organisations connected to the family in some way.
- g) The final beneficiaries are the spouse other than the settlor, together with the children of the parties and their issue. The distribution date is 70 years from the date of the trust deed.

[95] The parties are thus both discretionary and final beneficiaries under the trusts established respectively by the other of them.

[96] Ms Hollings submits that the definition of the term “property” in the Property (Relationships) Act is broad enough to cover the interests of the parties both as discretionary beneficiaries under the respective trusts and as final beneficiaries. The definition of the term “property” in s 2 of that Act reads as follows:

property includes—

- (a) real property:
- (b) personal property:
- (c) any estate or interest in any real property or personal property:
- (d) any debt or any thing in action:
- (e) any other right or interest

[97] In *Hunt v Muollo* [2003] 2 NZLR 322, the Court of Appeal held, in the context of an application under R 621 of the High Court Rules, for an order for examination of a judgment debtor, that a discretionary beneficiary has no interest, legal or equitable in the assets of a trust, and only acquires an interest in property on the making of a distribution, and then only to the extent of the distribution.

[98] Ms Hollings argues that “... conventional property law cases as to the rights of a discretionary beneficiary under a trust are of no assistance.” I think that submission takes the matter too far, but it is certainly arguable that the definition of the term “property” in s 2 is sufficiently wide to cover the rights and interests of a spouse as a beneficiary under a discretionary trust. The difficulty lies in the valuation of that interest.

[99] The authors of *Trusts and Relationship Property* (Ayres and Helmore) (p 56) express the view that while discretionary beneficiaries do not hold an equitable interest in the trust fund, and that the rights of such beneficiaries do not constitute conventional property, nevertheless those rights do constitute “property” under the Act, which explicitly states that such “property” includes rights. To the contrary effect is a passage in *Fisher on Matrimonial and Relationship Property* (2002 Lexis Nexis) at para 4.47 in which the learned authors state:

If a partner is merely one of a number of beneficiaries to whom trustees may, in the exercise of a future discretion, from time to time appoint income or capital, it is submitted that the interest of the partner is not ‘property’ as defined in the Act.

[100] The authors of *Fisher*, and Mr Vickerman in this case, rely upon *Gartside v IRC* [1968] AC 553 in which it was held that the expectations of discretionary beneficiaries in a testamentary trust were not rights to or interest in the capital of the trust fund.

[101] The position of the parties as final beneficiaries is different. Those rights are vested and therefore fall within the definition of “property” in s 2, but given the distribution date of 2068, it is difficult to ascribe a present value to those interests and the parties did not call evidence to that end.

[102] Despite the absence of valuation evidence, Ms Hollings submitted that the Court might nevertheless value the interests of the parties as discretionary beneficiaries, by taking account of the following factors:

- a) The size of the distributable fund;
- b) The number and range of objects;
- c) The nature of any criteria available provided by the settlor by way of guidance to the trustees in the exercise of their discretion;
- d) The number and nature of any takers in default;
- e) The nature of the trustees' powers of distribution;
- f) The nature of any powers (and who holds them) to add or remove potential beneficiaries and to revoke appointments.

[103] She further submitted that in this particular case I ought to take account of the following matters:

- a) The mirror trusts represent the assets of a long marriage;
- b) The sole asset is the family home;
- c) The home represents the fruits of the parties' professional lives;
- d) It was intended to be preserved in an efficient manner for the parties and their children;
- e) The beneficiaries are all family members;
- f) The powers are all closely held by family members;
- g) The trust fund is a large one;

- h) Each spouse has power to appoint and remove trustees and beneficiaries;
- i) The powers both parties hold ensure nothing occurs in a trust without both parties' knowledge and agreement;

[104] Finally, she submitted that having taken those matters into account the Court should value the joint interests of the parties in the trust funds at the amount of the equity in the home, including the debt owed by the trusts to each party. Ms Hollings further submitted that in the circumstances of the case, it would be appropriate to transfer all the husband's rights and interests, including the debt owed to him by the trustees under the mirror trusts, to the wife.

[105] I am not prepared to take that course. Ms Hollings did not provide any basis for her contention that the wife ought to have the whole of the family home. I am left to infer that the submission was based upon the assumption that the exercise of calculating alleged super-profit in the husband's law practice would produce a capital sum sufficient to justify the transfer of the home to the wife as part of the exercise of dividing relationship property between the parties. Whether or not that is so, there is a jurisdictional barrier to the course proposed by Ms Hollings. Her argument requires the Court, in effect, to treat the asset of the trusts as itself relationship property and, indeed, as the "family home" as defined in s 2, even though the asset is not owned by the parties.

[106] I agree with Mr Vickerman's submission that the Act provides for the identification and division of property owned by the parties. It does not mandate the division of rights and interests owned, not by the parties, but by other entities.

[107] In summary, the interests of the parties as discretionary beneficiaries are limited. It is arguable that their rights and interests as discretionary beneficiaries may fall within the definition of the term "property" in the Act, but it is not necessary to decide that point for present purposes. There is no evidence of the value of those interests, nor of the interests of the parties as final beneficiaries.

There is no warrant for simply treating the asset of the trusts as those of the parties and dividing it between the parties.

[108] Ms Hollings mounted an alternative argument based upon the proposition that if the interests of the parties as beneficiaries under the trusts did not fall under the Act, then the principles relating to constructive trusts applied; that the wife had reasonable expectations which ought to be recognised by the imposition of a constructive trust, and that those expectations ought to be reflected by an award of 50% of the value of the trust asset. That argument is not tenable. There is no room for the imposition of a constructive trust. The parties have elected to organise their affairs by establishing express trusts. Their rights fall for determination under the applicable legislation, or under the terms of those express trusts.

#### **Status of husband's debts**

[109] Some time after he left his first firm, the husband became aware of a claim by a client against that firm for alleged negligence by a former partner. Proceedings appear to have been commenced by that client in 1994, but the claim has expanded and developed to the point where it covers a number of issues not initially pleaded. Moreover, the amount claimed has grown significantly. The plaintiff now seeks a figure of the order of \$15 million. The firm's professional indemnity cover provides indemnity for a fraction only of that sum.

[110] Earlier this year the Court struck out the plaintiff's claim as being statute barred. The plaintiff proposes to have that decision reviewed in the Court of Appeal, but, a hearing in the Court of Appeal has been deferred pending a hearing in that Court of an appeal from the judgment of this Court in *Primosso Holdings Ltd v Alpers* [2004] 3 NZLR 521, which raises similar issues.

[111] The husband argues that his contingent liability in respect of this claim is a relationship debt. The wife does not argue that the liability (if any) did not arise in the context of the parties' relationship, but claims that it is not a "debt" because the amount of the liability is uncertain: *Ogdens Limited v Weinberg* (1906) 95 LT 567. In effect, the wife's claim is that the debt was not "incurred" in the context of the



marriage relationship. Ms Hollings further argues that the husband must establish the certainty of his liability to pay the claim, or a portion of it, together with the amount of that liability, before the alleged debt can be taken into account.

[112] While allowing that it might be possible to value the contingent debt by reference to the plaintiff's prospects of success, she submitted that there is no such valuation evidence here, and accordingly, the debt had not been proved to constitute relationship property. *Fisher on Matrimonial and Relationship Property* at paragraph 15.6, suggests the broad objectives of the Act as set out in s 1M(b) should as far as possible lead to a general balancing of the benefits and burdens in the partnership ledger without fine regard to technicalities and that this approach should govern the classification of liabilities as "debts" for the purposes of s 20D. Here, it is not in dispute that the debt, contingent as it is at the present time, was incurred by the husband in the course of his practice as a partner in the first firm. That firm was a primary source of the parties' income during that period, and would have assisted in the acquisition and sustenance of the family home, which was purchased at the time.

[113] The claim was notified to the husband long before the parties separated. The fact that the claim has not yet been determined and indeed at present stands struck out, is not in my view sufficient to take the debt outside the definition of "relationship debt" which appears in s 20. It would be inconsistent with the broad policy of the Act to exclude a debt such as this simply because, by the date of separation, the husband's liability has not been confirmed, nor has the amount of that liability been fixed.

[114] I am of the view therefore, that the debt is a relationship debt. The potential quantum of the husband's liability is such as to extinguish completely all relationship property. That being so, it is difficult to conceive of any appropriate order which might be made at this stage. Given the current status of the claim against the first firm, it may well be that the husband will never be called upon to meet the claim. The appropriate course at this point is simply to reserve leave to the parties to apply further in the event that the future involvement of the Court is required.

## **Economic disparity**

[115] The wife applies for an order pursuant to s 15 of the Property (Relationships) Act requiring the husband to pay to her a sum of money out of his share of relationship property. The section 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 or de facto relationship ends, the income and living standards of 1 spouse or de facto partner (party B) are likely to be significantly higher than the other spouse or de facto partner (party A) because of the effects of the division of functions within the marriage 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 de facto partner:
- (b) the responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or, as the case requires, any minor or dependent children of the 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

[116] The Court's jurisdiction under s 15 was the subject of a helpful analysis in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 where Priestley J at paragraphs [151]-[168] reviewed extensively the jurisdictional issues which arise in the context of s 15. That analysis was adopted by Salmon J in *B v B* HC AK CIV 2001-404-4028 26 June 2003, and by O'Regan J in *Cunningham v Cunningham* HC AK CIV 2001-404-2392 28 November 2003.

[117] A number of jurisdictional principles emerge from those authorities:

- a) The inquiry must focus on the income and living standards of the parties “not one of those benchmarks in isolation”: *de Malmanche* paragraph [151]. Moreover the section requires an assessment of likely income followed by a separate assessment of likely living standards. It is not correct to consider income and living standards in combination: *Cunningham* at paragraph [45].
- b) The income and living standards of one party must not be merely higher, but “significantly” higher;
- c) The disparity of income and living standards must be the result of a causal relationship or nexus between both those effects and the division of functions within the relationship. When economic disparity is caused by a number of factors of which the division of function is but one, then the causative effect of that one factor will have to be weighed in the exercise of the discretion to make a just compensation order: *de Malmanche* paragraph [166].
- d) There must be evidence to satisfy the Court that one party's income is likely to be significantly higher than that of the other party. The requirement that the Court be so “satisfied” imports an onus of proof on the civil standard of the balance of probabilities;
- e) It does not matter whether the significantly higher income and living standards arise from a division of functions which denies one party economic opportunity and potential or, alternatively, enhances that of the other party.
- f) If these jurisdictional requirements are satisfied, the Court must have regard to the matters specified in s 15(2) when it exercises its discretion. Likely earning capacity and child-care responsibilities are stipulated factors, but “any other relevant circumstances” may be taken into account.

- g) A discretionary compensation order must be directed at redressing prospective, not past, economic disparity.
- h) Any such order is discretionary: it is to be made if the Court considers it just.

[118] The section plainly accommodates claims based both in respect of enhanced earning capacity on the part of the husband, and diminished earning capacity on the part of the wife. The wife says that both situations arise here. Ms Hollings informed the Court that there has not yet been a case in which an award has been made on account of enhanced earning capacity.

[119] I am satisfied that the wife has established, on the balance of probabilities, that the income and living standards of her husband are likely to be significantly higher than hers. So far as income is concerned the disparity is self-evident. The husband's earnings from his law practice have, for the last two financial years, exceeded [\$120%X] pa. Prior to that, over a period of some years, the firm had earned an average profit per equity partner which exceeded [\$80%X] pa. It is common ground that the wife's earnings, albeit part time, are less than 5% of the husband's recent actual earnings. On any view that is a "significant" disparity.

[120] There is an inevitable degree of over-lap between income and living standards because the former may be an important component of the latter: see *Cunningham* at paragraph [46]. A contemplation of future living standards must necessarily entail a consideration of likely future income. The level of income disparity in this case is so great that the husband's living standards will inevitably be significantly higher than those of the wife. This will be so even if the assumption is made that the wife will progress towards full time employment. Moreover, while the wife has not re-partnered, the husband has for several years been living with a new partner, a professional woman in receipt of a substantial income in her own right. She has assets of her own. The husband is able to achieve significant savings in living costs by sharing them with his new partner.

[121] Next, it is necessary to consider whether the necessary causal nexus exists in relation to the disparity between the parties in respect of income and living standards and the division of functions within the marriage. For the wife, this question is argued on two separate grounds. It is claimed that the wife assisted the husband in building his career at three points during the marriage. First, it is said that by resigning her position in Wellington and moving with him to the provincial centre where he obtained a partnership in a law firm at the age of 30, she subordinated her own career prospects in the interests of accelerating his. Second, it is claimed that the move to London where the husband obtained a position in a prestigious set of criminal chambers, enhanced his earnings and accelerated his progress in the law, and that his ability to work in London was dependent upon her right of abode there. Third, it is argued that by undertaking the primary child care role on the parties' return to Auckland, the wife enabled the husband to devote himself full time to the pursuit of his law practice, with the result that he obtained a partnership within a very short time, and thereafter became entitled to very substantial earnings.

[122] These considerations are summarised on behalf of the wife as being crucial to the husband's career. It is claimed that without the wife's contribution he would not have obtained his Auckland partnership.

[123] I am unable to accept that submission, which involves the making of a number of assumptions and is ultimately speculative. The extensive evidence adduced in this case demonstrates that the husband, while possessed of a relatively ordinary academic record, is nevertheless a practitioner of significant ability. He has acquired extensive experience and is a skilful advocate. The likelihood is that he would, in due course, have obtained a lucrative partnership without necessarily undertaking the move from Wellington and then to London. As a matter of causation, I do not believe the wife's involvement had the effect claimed.

[124] Additionally, it is said that the wife's care of the children set the husband free to pursue his law career full time, and that had he been required to assume an equal share of child rearing responsibilities he would not have attained his current partnership. The wife points to the fact that equity partners in the husband's firm have not, at least for the most part, undertaken major family commitments, and that

at least most of them have a partner who is not engaged in paid employment. The husband denies he would not have achieved his partnership in the absence of the wife's family rearing contribution.

[125] Given the rapidity of the husband's rise to partnership in his present firm, the evidence from a number of Auckland legal practitioners as to the husband's skills and abilities and the wife's own evidence of the high regard in which the husband was held by a senior partner in the firm, I do not believe I would be justified in finding that the husband was unlikely to have secured a partnership had he been obliged to assist more directly with the care of the children.

[126] But I consider the wife is on stronger ground when she argues that the division of functions within the marriage has detrimentally affected her own ability to earn a significant income. There was evidence that the wife is an intelligent, hard working and articulate woman, who had the ability to make a substantial impact in her chosen field of market research. That much is not in dispute. Her Masters Degree in Sociology is of itself evidence of her abilities. While she undertook work generally within her preferred area while in Wellington, the subsequent period in the provinces was occupied by a variety of jobs. It was really during her time in London that she displayed the qualities which justify her being regarded as a high achiever.

[127] Mr Coke, who is an English marketing research consultant, deposed to having employed the wife as a research assistant in 1989, and to her "diligent approach", her "quiet determination" and "a toughness of spirit underneath a pleasant and friendly manner". He further spoke of the ease with which she achieved her budgetary targets and the seniority of the executives in major conglomerates with whom she dealt. He said "... when she left the company to return to New Zealand, there was a considerable gap in the company to manage the clients she had successfully developed, and this was not entirely filled by her replacement who did not have her skill set. I consider that [the wife] demonstrated exceptional skill in management organisation and client service techniques during her time at ...".

[128] Ms Meyer-Smith, an independent expert called by the wife, is an associate director of Human Resources at A C Nielsen. She confirmed that the best indication of the wife's abilities would, in the circumstances of this case, be likely to be found by considering the wife's performance in England prior to the arrival of children. She also confirmed that on the basis of Mr Coke's affidavit, the wife could be regarded as a high performer.

[129] Mr Angove, another independent expert called by the wife, confirmed that on the evidence, she could be regarded as well above average in her chosen field.

[130] To all intents and purposes, the wife left the workforce in September 1993, at the time of the birth of her son, so by the date of separation, she had been out of the workforce for some eight years.

[131] The wife also points to some degree to the period of five years during which the husband worked in his first firm, and ultimately obtained a partnership. She says that move had the effect of opening up opportunities for the husband at the expense of her ability to pursue her chosen career.

[132] I do not think this period can properly be regarded as relevant for s 15 purposes. Any set-back in the wife's career was simply the result of a choice to move away from Wellington, rather than arising from the division of functions within the marriage.

[133] But overall the division of functions, involving the wife in full time child care with consequent serious disruption to her professional career, does give rise to a significant disparity in income and living standards, which it is necessary to quantify in terms of s 15. Three expert witnesses were called to that end. Mr Angove explained that the salary band for market research professionals in New Zealand ranged between \$32,000 and \$120,000 plus. In his opinion, given the wife's qualifications, experience and undoubted ability, in the course of an uninterrupted career she would have obtained the upper reaches of her profession. But he was unable to say how far she might now go if she recommenced full time employment, nor how long it would take her to get there.

[134] Of rather greater assistance was the evidence of Ms Kean. It was similar to that of Mr Angove in that she said a high performer actively driven and at the peak of her career, would be likely to earn \$110,000-\$120,000 pa. Ms Kean is the director of a company operating in the career management/human resource consulting field. She further said that new graduates generally take 10-12 years to reach middle management in this field, but that the wife's "life experience" meant that she would perform at a higher level than a new graduate and would therefore be likely to progress faster than a younger person. She indicated that she thought if the wife were to resume full time work she might earn a salary in the range of \$40,000-\$45,000 before tax, but that if she had worked continuously since 1984 until now in the market research area using her Masters degree, she would have been likely to have reached at least middle-management level, which would entail a salary of \$60,000-70,000 pa in the public sector, or \$70,000-\$90,000 pa in the private sector.

[135] A third expert witness was Ms Meyer-Smith, associate director of human resources at A C Neilsen, the largest market research company in New Zealand. She believes the wife to be sufficiently qualified and experienced to gain employment as a manager of client services, earning at present about \$50,000-\$55,000 pa. Ordinarily it would be expected that the wife would take about 10 years to progress to the level of associate director, at which point a salary of between \$80,000-\$90,000 might be expected, but that given the wife's previous experience and her undoubted ability, a more rapid progression might be possible.

[136] The expert evidence necessarily focused upon the position at separation. Some three years have now passed. The wife has worked part-time during that period but never full time. She contends that it is necessary that she be at home by mid-afternoon to care for her children on their return from school. Had she worked full time since separation, she would have made greater progress in her career than has been possible since separation, while working part-time.

[137] The husband argues that, to the extent that post-separation disparity results from the wife's decision not to work full time post-separation, the disparity ceases to result from the division of functions within the marriage, but is simply the outcome of that decision. It is accordingly argued that had the wife commenced full time



work soon after separation, the extent of the economic disparity should have been much reduced by now, and she should not have the full amount of an award which would otherwise be appropriate.

[138] Moreover, it is argued, the provision of spousal maintenance post-separation should be taken into account in the exercise of any s 15 discretion: *de Malmanche* paragraph 167, *Speller v Chong* (2002) 23 FRNZ 291 at paragraphs 33-35; *V v V* (2002) 22 FRNZ 466.

[139] There is substance in the points taken for the husband. I deal with them during the course of the following discussion of the expert evidence on the point.

[140] Once again, Messrs Frankham (for the wife) and Hagen (for the husband) gave expert evidence as to the extent of the disparity said to flow from the division of functions within the marriage. Mr Frankham assessed an appropriate economic disparity payment attributable to the wife's reduced earnings in the range of \$99,000-\$143,000 with a mid point of \$121,000. Mr Hagen assessed an appropriate award at \$41,500. Both adopted a similar discounted cash flow methodology in assessing the value for economic disparity and both made a similar assessment for the risk of non-collection of future income, although their approach in conducting that exercise differed slightly.

[141] But they differed on a number of issues:

- a) Mr Frankham assumed that, but for the division of functions within the marriage the wife's income in 2004 dollars was likely to have been in the range \$70,000-\$90,000 pa (\$80,000 mid point), based on the evidence of Ms Kean. Mr Hagen, on the other hand, assumed that the wife's current income was likely to have been approximately \$60,000 pa.
- b) Mr Frankham assumed that the wife's likely gross income (if she now works full time), would be approximately \$42,500 pa (again based on

Ms Kean's evidence), while Mr Hagen assumed that income to be approximately \$35,000 pa.

- c) Mr Frankham assumed an allowance for growth in future income of 4% pa, which takes into account inflation and a notional allowance for such factors as promotions and pay increases above inflation. Mr Hagen allowed for inflationary growth of 2% in his assessment.
- d) Mr Frankham assumed that the period of disadvantage will continue for eight years from the date of separation, again based on Ms Kean's evidence. Mr Hagen assumed a period of disadvantage of five years from the date of separation.
- e) Mr Frankham assumed that the wife will have primary responsibility for the children, which impacts on her income generating ability during the school term. Mr Hagen assumed the parties would share child care costs and responsibilities equally.

[142] In some of the cases in which an award has been made under s 15, it has been possible for the Court to carry out a detailed calculation of the award necessary to make good the disparity and that will, in the generality of cases, be the preferred course. It is not possible to do that in this case, by reason of the imprecision of the evidence as to the wife's likely future prospects and the salary she might earn in the years to come. Expert accounting witnesses have necessarily made broad assessments only in the course of gathering together a number of general assumptions, some of which in turn are based upon the evidence of the expert witnesses in the market research field.

[143] Mr Hagen assumed the wife's ultimate future earning level at about \$60,000 pa, and her current full time earning level at about \$35,000 pa. On the other hand, Mr Frankham put her likely current full time salary at \$40,000-45,000 pa, and her likely full time income, but for the division of functions within the marriage, at \$70,000-\$90,000 pa.

[144] I think the weight of evidence tends to justify Mr Frankham's approach, rather than that of Mr Hagen. On the other hand, Mr Frankham assesses the appropriate period of disparity at eight years, while Mr Hagen selects five years. The latter figure appears accurate, and I propose to adopt it. I do so because I believe it necessary to take into account the fact that since separation the husband has paid substantial sums to the wife by way of spousal maintenance, and in effect, he has substantially reduced the disparity for the period since separation.

[145] I do not have figures which would enable me to calculate with precision the arithmetical outcome of the approach outlined above, but in broad terms an award of \$75,000 (which is approximately five-eighths of Mr Frankham's assessed mid-point disparity figure of \$121,000), is, I believe, justified. In terms of s 15(3) I direct that this sum is to be paid by the husband to the wife from his share of relationship property.

### **Child support**

[146] The wife applies for a departure order, pursuant to the Child Support Act 1991. At this point it is convenient to set out a summary of the maintenance and child support payments made by the husband to the wife since separation. For the period up to and including March 2002 (that is, for the first six months of the period following separation) the husband paid the monthly sum of \$4000 into a joint account of the parties. The wife was able to draw from that account for the purpose of paying her own living expenses and those of the children. Between April 2002 and March 2004, the husband paid to the wife for her own maintenance the sum of \$2,500 per month. He stopped making these payments with effect from March 2004. The wife then made an application for spousal maintenance and by way of interim settlement of that claim, pending the hearing in this Court, the husband agreed to pay to the wife for her own maintenance the sum of \$347 per week. Consequent on that agreement, he had paid to the wife by the date of the hearing in this Court a further \$7,735.

[147] In respect of the children, the husband paid to the wife between April 2002 and March 2003 inclusive, the sum of \$1,675 per month. From April 2003 to May

2004 he paid the reduced amount of \$1,125 per month. Consequent on the wife's application for a departure order, he entered into an interim arrangement with the wife to pay \$324 per week for child support, pending the hearing of the application for a departure order in this Court.

[148] The reduction in child support, commencing from April 2003, was effected by reason of an arrangement under which the husband had the children with him for six nights of each 14. The husband also initially met interest and principal payments on the mortgage over the family home, and has throughout paid interest on the overdraft maintained by the parties. The wife became responsible for servicing the mortgage in September 2003.

[149] The statutory purposes for which the Child Support Act was enacted are set out in s 4:

**4. Objects**

The objects of this Act are—

- (a) To affirm the right of children to be maintained by their parents:
- (b) To affirm the obligation of parents to maintain their children:
- (c) To affirm the right of caregivers of children to receive financial support in respect of those children from non-custodial parents of the children:
- (d) To provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support:
- (e) To ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support:
- (f) To provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined:
- (g) To enable caregivers of children to receive support in respect of those children from parents without the need to resort to Court proceedings:
- (h) To ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children:
- (i) To ensure that obligations to birth and adopted children are not extinguished by obligations to stepchildren:
- (j) To ensure that the costs to the State of providing an adequate level of financial support for children and their custodians is offset by the collection of a fair contribution from non-custodial parents:
- (k) To provide a system whereby child support and spousal maintenance payments can be collected by the Crown, and paid by the Crown to those entitled to the money.

[150] Relevant to the present application are ss 104, 105, 106, 108 and 109 of the Act. They provide:

**104. Application for departure from formula assessment in special circumstances**

- (1) A qualifying custodian or a liable parent may apply to a Family Court for an order that all or some of the provisions of this Act relating to the formula assessment of child support be departed from in relation to a child.
- (2) An application may be made only if—
  - (a) A formula assessment is in force in relation to the child, the qualifying custodian, and the liable parent concerned; and
  - (b) Either—
    - (i) The Commissioner has made a determination under Part 6A of this Act in relation to the matter; or
    - (ii) The Commissioner has refused to make a determination under that Part in relation to the matter; or
    - (iii) The qualifying custodian or the liable parent are parties to another application pending in a Family Court and the Court is satisfied that it would be appropriate for the Court to consider an application made under this section at the same time as it hears the other application; or
    - (iv) The application relates, wholly or in part, to child support payable in the child support year ending on the 31st day of March 1994 or any earlier child support year.]
- (3) Subject to section 125 of this Act, the parties to the application are the liable parent and the qualifying custodian.
- (4) Subject to section 117 of this Act, the fact that an application is made by any person under this section does not suspend, interfere with, or affect—
  - (a) Any formula assessment made in relation to the person; or
  - (b) The obligation to pay child support; or
  - (c) The right of the Commissioner to receive and recover any child support.

**105 Matters as to which Court must be satisfied before making order**

- (1) Where an application is made to a Family Court under section 104 of this Act for an order in relation to a child and the Court is satisfied that—
  - (a) One or more of the grounds for departure mentioned in subsection (2) of this section exists or exist; and
  - (b) It would be—
    - (i) Just and equitable as regards the child, the qualifying custodian, and the liable parent; and
    - (ii) Otherwise proper,—  
to make a particular order of the type specified in section 106 of this Act,—  
the Court may make the order.
- (2) For the purposes of subsection (1)(a) of this section, the grounds for departure are as follows:
  - (a) That, by virtue of special circumstances, the capacity of either parent to provide financial support for the child is significantly reduced because of—
    - (i) The duty of the parent to maintain any other child or another person; or
    - (ii) Special needs of any other child or another person that the parent has a duty to maintain; or
    - (iii) Commitments of the parent necessary to enable the parent to support—
      - (A) Himself or herself; or
      - (B) Any other child or another person whom the parent has a duty to maintain; or

- (b) That, in the special circumstances of the case, the costs of maintaining the child are significantly affected because—
  - (i) Of high costs incurred by a liable parent or a qualifying custodian in enabling that liable parent access to the child; or
  - (ii) Of special needs of the child; or
  - (iii) The child is being cared for, educated, or trained in the manner that was expected by either of his or her parents; or
- (c) That, by virtue of special circumstances, application in relation to the child of the provisions of this Act relating to formula assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of—
  - (i) The income, earning capacity, property, and financial resources of either parent or the child; or
  - (ii) Any payments, and any transfer or settlement of property, previously made (whether under this Act, the [Property (Relationships) Act 1976] or otherwise) by the liable parent to the child, to the qualifying custodian, or to any other person for the benefit of the child; or
  - (iii) An entitlement of the custodian to the continued occupancy of a property in which the liable parent has a financial interest.
- (3) For the purposes of subsection (2)(b)(i) of this section, costs incurred in enabling a liable parent access to the child are not to be taken to be high unless the total of those costs during a child support year is more than 5 percent of the child support income amount for the year in relation to the person concerned.
- (4) In determining whether it would be just and equitable as regards the child, the qualifying custodian, and the liable parent to make a particular order of the type specified in section 106 of this Act, the Court shall have regard to—
  - (a) The objects of this Act, and, in particular, the nature of the duty of a parent to maintain a child and the fact that it is the parents of a child themselves who have the primary duty to maintain the child; and
  - (b) The proper needs of the child, having regard to—
    - (i) The manner in which the child is being, and in which the parents expect the child to be, cared for, educated, or trained; and
    - (ii) Any special needs of the child; and
  - (c) The income, earning capacity, property, and financial resources of the child; and
  - (d) The income, earning capacity, property, and financial resources of each parent who is a party to the proceeding; and
  - (e) The commitments of each parent who is a party to the proceeding that are necessary to enable the parent to support—
    - (i) Himself or herself; or
    - (ii) Any other child or another person that the parent has a duty to maintain; and
  - (f) The direct and indirect costs incurred by the qualifying custodian in providing care for the child, including the income and earning capacity foregone by the qualifying custodian in providing that care; and
  - (g) Any hardship that would be caused to—
    - (i) The child or the qualifying custodian by the making of, or the refusal to make, the order; or
    - (ii) The liable parent, or any other child or another person that the liable parent has a duty to support, by the making of, or the refusal to make, the order.
- (5) In having regard to the income, earning capacity, property, and financial resources of the child or a parent of the child, the Court must—

- (a) Have regard to the capacity of the child or parent to earn or derive income, including having regard to any assets of, under the control of, or held for the benefit of, the child or parent that do not produce, but are capable of producing, income; and
- (b) Disregard the income, earning capacity, property, and financial resources of any person who does not have a duty to maintain the child, or who has such a duty but is not a party to the proceeding, unless, in the special circumstances of the case, the Court considers that it is appropriate to have regard to them.
- (6) The Court may have regard to other matters beyond those specified in subsections (4) and (5) of this section.

#### **106 Orders that may be made**

- (1) In determining an application made under section 104 of this Act, a Court may make either one, or both, of the following orders:
  - (a) An order varying the child support percentage, child support income amount, or living allowance of the liable parent; or
  - (b) An order directing that the child support income amount of a liable parent in respect of any relevant child support year shall, notwithstanding paragraph (b) of the definition of “child support income amount”, be defined as being equal to the taxable income of the liable parent for the year that, in relation to that child support year [and to that liable parent], is the last relevant income year [; or
  - (c) An order that the provisions of this Act relating to formula assessment of child support should not be departed from in relation to the child].
- (2) An order under this section may make different provision in relation to different child support years and in relation to different parts of a child support year.
- (3) Subject to section 98(2) of this Act, an order made under this section shall not operate so as to increase or reduce the amount of child support payable in relation to any child to whom the order does not apply, and the child support payable in relation to any such other child shall be calculated as if the order had not been made.
- (4) Every order made under this section shall specify the period of time in which the order is to apply or specify the event the occurrence of which will cause the order to terminate.

#### **108 Application for order for provision of child support in form of lump sum**

- (1) Where a qualifying custodian wants a liable parent to provide, or a liable parent wants to provide, child support for a child otherwise than in the form of periodic amounts paid to the qualifying custodian, the qualifying custodian or the liable parent may apply to a Family Court for an order that the liable parent provide child support for the child otherwise than in the form of periodic amounts paid to the qualifying custodian.
- (2) An application—
  - (a) May be made only if a formula assessment is in force in relation to the child, the qualifying custodian, and the liable parent; and
  - (b) May be made by the qualifying custodian or the liable parent.
- (3) The Court may not hear the application until any pending application to the Commissioner under section 96B of this Act or to the Court under section 104 of this Act has been heard and determined.
- (4) Subject to section 125 of this Act, the parties to the application are the qualifying custodian and the liable parent.

**109 Orders for provision of child support in form of lump sum**

- (1) Where a qualifying custodian or a liable parent makes an application to a Family Court under section 108 of this Act and the Court is satisfied that it would be—
- (a) Just and equitable as regards the child, the qualifying custodian, and the liable parent; and
  - (b) Otherwise proper,—  
to make an order that the liable parent pay a lump sum towards the support of the child, the Court may make the order.
- (2) The Family Court may make either one, or both, of the following orders under this section:
- (a) An order directing the respondent to pay such lump sum towards the future support of the child as the Court thinks fit;
  - (b) An order directing the respondent to pay such lump sum towards the past support of the child as the Court thinks fit.
- (3) In determining the application, the Court must have regard to—
- (a) The formula assessment in force in relation to the child, the qualifying custodian, and the liable parent; and
  - (aa) Any determination in force under Part 6A of this Act in relation to the child, the qualifying custodian, and the liable parent; and
  - (b) Any order in force under section 106 of this Act in relation to the child, the qualifying custodian, and the liable parent; and
  - (c) The matters mentioned in section 105(4) and (5) of this Act; and
  - (d) The relationship between any lump sum order and any liability to pay child support under a formula assessment, as determined in accordance with section 110 of this Act.
- (4) The Court may have regard to other matters beyond those specified in subsection (3) of this section.
- (5) The Commissioner shall, as soon as practicable, take such action as is necessary to give effect to any order made under this section.

[151] Section 105 sets out a series of steps which the Court must take in determining whether an application for a departure order should be granted. The Court must first be satisfied that one or more of the grounds for departure set out in s 105(2) have been met. If so, the Court must then decide whether it is just and equitable, as regards the parties involved, and otherwise proper, to make an order: s 105(1)(b).

[152] Section 105(2) set out the three grounds upon which departure orders may be made. They all entail the requirement of establishing special circumstances. Currently, the husband's formal liability under the formula prescribed by s 29 is of the order of \$1007 per month. That is a net amount which takes into account the wife's corresponding liability to contribute to the support of the children. Under s 29 the formula is determined by taking the liable parent's child support income and subtracting from it a living allowance, and then multiplying the result by a



percentage according to the number of children, here 24% in respect of two children. Qualifying income is capped at \$92,000.

[153] Section 35 recognises that child care and associated costs may be shared and provides that where care is indeed shared the child support percentage applicable is 18% for two children.

[154] The inter-relationship of the Child Support Act, the Family Proceedings Act and the Property (Relationships) Act is dealt with in s 32 of the Property (Relationships) Act, which provides:

**32. Orders relating to maintenance and child support**

- (1) In any proceedings, the Court must have regard to—
  - (a) any order made under the Family Proceedings Act 1980 for the maintenance of a spouse or de facto partner; and
  - (b) any child support payable by 1 spouse or de facto partner, under a formula assessment under the Child Support Act 1991, for a child of the marriage or, as the case requires, a child of the de facto relationship; and
  - (c) any voluntary agreement, whether or not the agreement has been accepted under Part 3 of the Child Support Act 1991.
- (2) In any proceedings, the Court, if it considers it just, may—
  - (a) make an order under the Family Proceedings Act 1980 for the maintenance of a spouse or de facto partner:
  - (b) discharge, vary, extend, or suspend an order made under the Family Proceedings Act 1980 for the maintenance of a spouse or de facto partner:
  - (c) make any order in relation to child support that may be made under section 106 or section 109 or section 112 of the Child Support Act 1991, as if an application had been made under section 104 or (as the case requires) section 108 or section 112 of that Act:
  - (d) cancel, vary, extend, or suspend a voluntary agreement.
- (3) An order made under this Act in respect of relationship property is not sufficient by itself to support—
  - (a) an application under section 99 of the Family Proceedings Act 1980 for the discharge, variation, extension, or suspension of an order for the maintenance of a spouse or de facto partner; or
  - (b) an application for an order under Part 7 of the Child Support Act 1991; or
  - (c) the cancellation, variation, extension, or suspension of a voluntary agreement.

[155] The wife submits that the capacity of the husband to pay financial support for the children is significantly above the maximum child support amounts stipulated in s 29 of the Child Support Act, and that therefore the requirements of s 105(2)(c)(i) are complied with. If the level of income of one party is sufficiently high to make the application of the formula against the children's demonstrated needs an unjust

and inequitable determination of the level of financial support to be provided by that party, that will constitute a special circumstance, for the purposes of s 105(2)(c)(i): *D v C* (2001) 21 FRNZ 547, 560 at paras 29-30.

[156] The wife also relies on s 105(2)(b)(iii) and says that the costs of maintaining the children are significantly affected, because they are being cared for, educated and trained in the manner that was expected by the parents. That level of care, education and training, and the general level of expenditure incurred in respect of the children are not seriously in dispute between the parties.

[157] The parties made several submissions on matters which were said to go to the question of whether it was “just and equitable” or “otherwise proper” to make an order pursuant to s 106.

[158] For the wife it was argued that the husband’s new partner, being financially self-sufficient, was able to contribute towards the costs of running her common household with the husband, and that accordingly her financial capacity should be taken into account. That factor is of relevance only in that it reduces the extent of the husband’s commitment to support himself (see s 105(4)(e)(i)). The Court is otherwise required to disregard the income, earning capacity, property and financial resources of any person who does not have a duty to maintain a child: Section 105(5)(b).

[159] The wife also referred to “the unusual circumstances of the children in fact being with the mother every school day after school, and simply spending from 6.30 pm to the following morning in the care of their father”. It is argued that the formula approach is therefore unjust and inequitable because it impacts on the wife’s earning capacity but not the husband’s.

[160] On this point the parties are far apart. The wife believes that the best interests of the children are served only by the certainty that she will be at home by the time they return from school. For his part, the husband contends that a nanny or some other caregiver would serve just as well, and that although child care costs may

well be incurred if that course were adopted, it would nevertheless set the wife free to work full time and so to resume her career in a meaningful fashion.

[161] That issue is also relevant to spousal maintenance. For present purposes it is sufficient to note that the wife argues that her involvement with the children after school (even on those nights where they sleep over with the husband), is a significant contribution to their upbringing, to her own financial detriment, and it is a contribution to be taken into account in determining what is just and equitable.

[162] The wife also reminded the Court that the husband's strong financial position is relevant not just to the question of whether grounds are made out under s 105(2)(c)(i), but also to the question of whether it has been established that it is just and equitable to make an order. In *Ewing v Ewing* (1993) 11 FRNZ 364, Tipping J held that the greater the amount by which the income of the liable parent exceeded the cap, the more likely the Court was to find that it would be just and equitable to make a departure order.

[163] Mr Vickerman pointed out that the Court must, in determining what was just and equitable, have regard to the financial and non-financial contributions already being made by the husband. During term time the children are with him six nights out of every 14, and during holiday periods they are with him for half of the time. He bears the costs of their care while they are with him. Mr Vickerman also referred to the wife's current employment position and to the strictures of O'Regan J in *Johnson v CIR* [2002] 2 NZLR 816, 836 at paragraph 95:

Clearly a liable parent has unutilised earning capacity where that parent has the skills and opportunity to earn a higher income, which would allow for higher child support contributions, but is not willing to use those skills or pursue those opportunities. It is equally clear, however, that only the reasonable abilities of the liable parent and the opportunities reasonably available to him or her are to be assessed. The Act requires parents to focus on providing support to their children, using their present abilities and skills and taking up the opportunities which are available to them, or would be available if they made reasonable efforts to seek them out.

[164] I conclude that special circumstances exist, for the purposes of s 105(2), and that it is just and equitable in the light of the matters set out in s 105(4), to make an order under s 106. Indeed, it was not in reality disputed by the husband that it was

appropriate to make an order. The real contest is as to the terms of that order. In that regard, neither the policy of the Act nor its objects nor its language supports a rigid and mathematical approach: *D v C* at p 558 (para 24). Counsel's submissions were concentrated on matters of principle, and I was not supplied with detailed arithmetical calculations other than an undisputed budget of the children's needs.

[165] As will appear when I deal with the issue of spousal maintenance, the time is fast approaching at which I believe the wife will need to secure full time employment. That is so, despite the advantages of her being at home when the children return from school and the costs which might be entailed in organising child care for the children for several hours each school day. But it is necessary that the wife resume her career. To do so is in her own interests both personally and financially. She is not working full time at present, and I believe she needs time to re-organise her life in order to undertake full time employment. The departure order which I propose to make is capable of review from time to time, and accordingly I address only the immediate future.

[166] The husband's income has previously been set out. He is able to pay any figure which might reasonably be fixed in respect of child support. The wife's budget discloses likely net wages on an annual basis of \$16,500, together with rent from a boarder of \$7,400. A formula assessment conducted earlier this year resulted in a minuscule figure being fixed for her contribution to child support. The budget produced in evidence provided for annual expenditure allocated to the children of \$29,746, including \$6,821 in respect of a one-half share of servicing costs on the mortgage over the family home. That figure ought to be deducted from the total because I believe it should be considered as part of the wife's expenditure. The balance in respect of the children's costs is \$22,925.

[167] Ms Hollings simply contended that the husband ought to pay \$30,000 pa, or 2.5 times the formula rate. That submission is obviously based upon a budget for the children which includes an allowance in respect of mortgage payments. I consider the better course is to leave mortgage payments aside in calculating the children's requirements. On the basis of a budget for the children of \$22,925 pa, a demand for \$30,000 is plainly excessive.

[168] Mr Vickerman made no submission as to the precise amount I should order to be paid by his client. Neither was I taken by either counsel to the manner in which an order of the Court ought to be structured for the purposes of s 106, which authorises the Court to make an order varying the child support percentage, child support income amount (as defined by s 29 of the Child Support Act), or living allowance of a liable parent. In those circumstances, I consider the appropriate course is to indicate the annual amount which ought to be paid by the husband to the wife in respect of child support, and to reserve leave to the parties to make submissions as to the manner in which that amount ought to be expressed for the purposes of compliance with s 106(1)(a).

[169] In the light of the financial position of the parties as they now stand, the husband ought, I think, to be responsible for child support in the sum of \$22,000 pa, or \$1,833 per month. That figure reflects the proportion of child support costs which I consider it proper he should pay at the present time. The wife will need to take steps, over the course of the next 15 months, to obtain full time employment. At the point that has been achieved it will be necessary for the parties to reconsider the proportions in which they bear child support costs.

[170] In arriving at the child support figure, I have not overlooked the fact that the children are with the husband for six of each 14 nights, and half the holidays, but the reality of the present financial position demands that the husband make a contribution to child support at the level ordered. Indeed, in evidence he accepted it was not unreasonable that he make a contribution of that order.

[171] I have already disallowed the mortgage repayments as part of the child support budget because that item is more properly regarded as attributable to the wife, and should be taken into account in its entirety in respect of her budget. Several other items which appear in the budget for the children one might also expect to find in the wife's budget. They relate to the sustenance and maintenance of the family home itself. However, no objection was taken by the husband to the way in which the budget was apportioned by the wife. Objection to the inclusion of mortgage payments in the children's expenses was taken by the husband, on the ground that the family home was likely to be sold in the near future, and it was

therefore inappropriate for it to appear in a budget which had on-going application. I deal with that point as part of the discussion on spousal maintenance.

[172] I am required by s 106(4) to specify the period of time during which the order is to apply, or the event, the occurrence of which will cause the order to terminate. The appropriate course is to fix 31 March 2006 as the termination date of the period during which the order now made is have effect. That is a little over a year. The intervening period will be sufficient to enable the parties to take stock of matrimonial property issues, to organise their affairs accordingly, and for the wife to secure full time employment.

[173] The wife, having applied under s 108 for the making of a lump sum order, seeks payment by the husband of a lump sum towards the past support of the children. Section 109(1) provides that such an order may be made where the Court is satisfied that it would be:

- a) Just and equitable as regards the child, the qualifying custodian and the liable parent, and
  - b) Otherwise proper
- to make an order.

[174] In or about April 2003 the husband unilaterally reduced his child support payments from \$1675 to \$1125 per month. At about that time, arrangements were made between the parties for the children to stay overnight with the husband for six nights each fortnight, and so the husband assumed thereby greater financial and general parenting responsibilities. While that provides an understandable backdrop to the decision to reduce child support payments, nevertheless, the husband ought, from April 2003 to have met child support obligations at a level comparable with the order made above in respect of future child support.

[175] For the reasons discussed, in respect of past child support, the requirements of s 109(1) have been met. It is impossible to be precise as to the quantum of the appropriate order because payments during this year have varied. In all the

circumstances I fix a lump sum of \$9000. In so doing, I have taken into account the matters set out in s 109(3) to which the Court must have regard.

### **Spousal maintenance**

[176] The former marriage between the parties was dissolved on 29 February 2004. The wife applies for an order against the husband in respect of her own maintenance. The starting point is the principle that former spouses must assume responsibility for their own needs within a reasonable time, (Family Proceedings Act 1980, s 64A(1)) subject to the considerations set out in that Act.

[177] Section 64A reads as follows:

**Spousal or de facto partners must assume responsibility for own needs within reasonable time**

- (1) If a marriage is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together,—
  - (a) each spouse 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; and
  - (b) on the expiry of that period of time, neither spouse or de facto partner is liable to maintain the other under section 64.
- (2) Regardless of subsection (1), if a marriage is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together, 1 spouse or de facto partner ( party A) is liable to maintain the other spouse or de facto partner (party B) under section 64, to the extent that such maintenance is necessary to meet the reasonable needs of party B if, having regard to the matters referred to in subsection (3),—
  - (a) it is unreasonable to require party B to do without maintenance from party A; and
  - (b) it is reasonable to require party A to provide maintenance to party B.
- (3) The matters referred to in subsection (2) are as follows:
  - (a) the ages of the spouses or de facto partners:
  - (b) the duration of the marriage or de facto relationship:
  - (c) the ability of the spouses or de facto partners to become self-supporting, having regard to—
    - (i) the effects of the division of functions within the marriage or de facto relationship while the spouses or de facto partners were living together:
    - (ii) the likely earning capacity of each spouse or de facto partner:
    - (iii) the responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or (as the case requires) any minor or dependent children of the de facto relationship after the

dissolution of the marriage or (as the case requires) after the de facto partners ceased to live together:

- (iv) any other relevant circumstances.
- (4) If the marriage was immediately preceded by a de facto relationship between the husband and wife,—
  - (a) for the purposes of subsection (3)(b), the de facto relationship must be treated as if it were part of the marriage; and
  - (b) for the purposes of subsection (3)(c)(i), the effects of the division of functions within the marriage include the effects of the division of functions within that de facto relationship

[178] Section 64, which is subject to s 64A provides as follows:

**64. Maintenance after marriage dissolved or de facto relationship ends**

- (1) Subject to section 64A, after the dissolution of a marriage or, in the case of a de facto relationship, after the de facto partners cease to live together, each spouse or de facto partner is liable to maintain the other spouse or de facto partner to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse or de facto partner, where the other spouse or de facto partner cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).
- (2) The circumstances referred to in subsection (1) are as follows:
  - (a) the ability of the spouses or de facto partners to become self-supporting, having regard to—
    - (i) the effects of the division of functions within the marriage or de facto relationship while the spouses or de facto partners lived together;
    - (ii) the likely earning capacity of each spouse or de facto partner;
    - (iii) any other relevant circumstances;
  - (b) the responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or (as the case requires) the de facto partners ceased to live together;
  - (c) the standard of living of the spouses or de facto partners while they lived together;
  - (d) the undertaking by a spouse or de facto partner of a reasonable period of education or training designed to increase the earning capacity of that spouse or de facto partner or to reduce or eliminate the need of that spouse or de facto partner for maintenance from the other spouse or de facto partner if it would be unfair, in all the circumstances, for the reasonable needs of the spouse or de facto partner undertaking that education or training to be met immediately by that spouse or de facto partner—
    - (i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that spouse or de facto partner; or



- (ii) because that spouse or de facto partner has previously maintained or contributed to the maintenance of the other spouse or de facto partner during a period of education or training.
- (3) For the purposes of subsection (2)(a)(i), if the marriage was immediately preceded by a de facto relationship between the husband and wife, the effects of the division of functions within the marriage include the effects of the division of functions within that de facto relationship.
- (4) Except as provided in this section and section 64A,—
  - (a) neither party to a marriage is liable to maintain the other party after the dissolution of the marriage:
  - (b) neither party to a de facto relationship is liable to maintain the other de facto partner after the de facto partners cease to live together.

[179] Where a Court finds that a party is entitled to a maintenance order against a former spouse, the provisions of s 65 apply to the assessment of the amount payable.

[180] That section provides:

**65 Assessment of maintenance payable to spouse or de facto partner**

- (1) This section sets out the matters that a Court must have regard to in determining the amount payable,—
  - (a) in the case of a marriage, by 1 spouse for the maintenance of the other spouse (whether during the marriage or after its dissolution):
  - (b) in the case of a de facto relationship, by 1 de facto partner for the maintenance of the other de facto partner after the de facto partners cease to live together.
- (2) The matters that the Court must have regard to are as follows:
  - (a) the means of each spouse or de facto partner, including—
    - (i) potential earning capacity:
    - (ii) means derived from any division of property between the spouses or de facto partners under the Property (Relationships) Act 1976:
  - (b) the reasonable needs of each spouse or de facto partner:
  - (c) the fact that the spouse or de facto partner by whom maintenance is payable is supporting any other person:
  - (d) the financial and other responsibilities of each spouse or de facto partner:
  - (e) any other circumstances that make 1 spouse or de facto partner liable to maintain the other.
- (3) In considering the potential earning capacity of each spouse or de facto partner under subsection (2)(a)(i), the Court must have regard to the effects of the division of functions within the marriage or the de facto relationship while the spouses or de facto partners were living together.
- (4) For the purposes of subsection (3), where the marriage was immediately preceded by a de facto relationship between the husband and

wife, the effects of the division of functions within the marriage include the effects of the division of functions within that de facto relationship.

(5) In considering the reasonable needs of each spouse or de facto partner under subsection (2)(b), the Court may have regard to the standard of living of the spouses or de facto partners while they were living together.

[181] In determining the liability of a spouse to pay maintenance and the amount of that liability, the Court is also entitled, in limited circumstances, to take account of the conduct of the parties; s 66 provides:

**66. Relevance of conduct to maintenance of spouses or de facto partners**

(1) The Court may have regard to the matters set out in subsection (2) in considering,—

(a) in the case of a marriage, the liability of 1 spouse to maintain the other spouse, and the amount of the maintenance, whether during the marriage or after its dissolution:

(b) in the case of a de facto relationship, the liability of 1 de facto partner to maintain the other de facto partner, and the amount of the maintenance, after the de facto partners cease to live together.

(2) The matters referred to in subsection (1) are as follows:

(a) conduct of the spouse or de facto partner seeking to be maintained that amounts to a device to prolong his or her inability to meet his or her reasonable needs:

(b) misconduct of the spouse or de facto partner seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other spouse or de facto partner to pay maintenance.

[182] The parties are wide apart in respect of spousal maintenance. Ms Hollings contends that the Court ought to make an order of at least \$500 per week in favour of the wife. Mr Vickerman argues that any liability on the part of the husband to maintain the wife has been exhausted. It is necessary to examine the competing contentions of the parties.

[183] Ms Hollings commenced by placing reliance on s 64(2)(a)(i) which focuses upon the effects of the division of functions within the marriage. That factor may impact upon the ability of a spouse to become self-supporting, and the other spouse may become liable to maintain the disadvantaged spouse, to the extent that maintenance is necessary to meet the reasonable needs of the disadvantaged spouse: see the discussion on this point in *Weir v Weir* (1991) 8 FRNZ 592, 595-6 by Fisher J. The division of functions within the marriage may also have the effect of

depriving a spouse of critical work experience: *Cavanagh v Cavanagh* [1994] NZFLR 365, 375.

[184] In the present case however, I do not believe that the division of functions within the marriage does impact in a permanent fashion upon the wife's ability to meet her own needs. Earlier I set out the history of the marriage and of the wife's work experience. I have had the advantage of seeing her under cross-examination in the witness box, and of hearing from expert witnesses as to the work opportunities likely to be available to her, having regard to her age and experience. Although this was a relatively long marriage, the wife worked full time for a significant proportion of it and I do not consider that the division of functions within the marriage operates in a permanent manner, so as to prevent the wife in time from assuming responsibility for her own needs.

[185] Ms Hollings also points to s 64(2)(b) and submits that because it is necessary for the wife to be at home when the children return from school each afternoon, she is in effect restricted to part time work. She has been working between 20-22 hours per week and earning of the order of \$15,000-\$16,000 net per year, although she became redundant during the course of the hearing. I do not regard that redundancy as a factor of particular note, and it was not so argued. The case for the wife has been run on the basis that she will be able to find appropriate work. She simply says that appropriate work is part time work. The husband argues it ought to be full time.

[186] Ms Hollings further submitted that s 64(2)(a)(iii) which entitles the Court to have regard to "any other relevant circumstances" means that "the Court can look at almost any factors to determine whether liability to maintain ought to be extended": *Hertzog v Hertzog* FC NSD FP589/98 Judge Ryan. The apparent width of the entitlement to consider "any other relevant circumstances" is under-scored in the judgment of Judge Boshier in *Redit v Redit* FC Auckland FP004/1430-D/01 3 May 2002, dealing with s 63 (which is in identical terms).

[187] Ms Hollings invited the Court to take account of a very wide range of factors, some of which are plainly irrelevant. Those which may be regarded as of some relevance were:

- a) The wife's age (expressly referred to in any event in s 64A(3)(a));
- b) The wife's custodial responsibilities (although this is covered expressly in s 64(2)(b) and s 64A(3)(c)(iii));
- c) The husband's obvious ability to meet any reasonable order (expressly referred to in s 64A(3)(c)(ii));
- d) The efforts made by the wife to date in obtaining part time work and taking in a flatmate/boarder (a step which the wife in evidence said was solely referable to her financial needs – she would prefer not to have done so);
- e) The decision of the parties during their marriage that the wife would be a full time mother to their children;
- f) The sacrifices which the wife had made during the marriage for the purpose of supporting the husband in his career.

[188] I take these matters broadly into account. It must be borne in mind that the s 15 order made in this judgment is intended to reflect the economic disparity of the parties following their separation. To some degree that order subsumes certain of the factors listed above. The s 15 order is particularly relevant to the next consideration relied upon on behalf of the wife, namely the standard of living of the spouses while they lived together: section 64(2)(c). The s 15 order is intended to redress to some degree the imbalance between likely living standards post-separation. Moreover, the husband does not contend that the budgeted expenses proffered by the wife are unreasonable. They are not contested at all, so the assumed standard of living which underpins the wife's budget is not in issue. Rather, the husband contends that with appropriate child support from him, the wife ought now to be in a position to meet her own reasonable needs by reason of her own earning capacity.

[189] In respect of quantum, Ms Hollings laid considerable emphasis on the judgment of the Court of Appeal in *Z v Z (No.2)* and in particular to the passage set

out earlier in this judgment. The seven member bench in that case thought it helpful to restate certain basic principles as to the appropriate approach to maintenance assessment post dissolution. The usefulness of that discussion is not diminished by the amendments effected in 2001.

[190] At p 294-295 the Court said:

Once liability for maintenance is established, the Court is to determine the amount of that maintenance under s 65. Subsection (1) specifies a number of matters to which the Court is to have regard. The first matter specified is the means of each party. Those means include "potential earning capacity" and the means derived from any division of property between the parties under the Matrimonial Property Act (para (a)). The second matter is the reasonable needs of each party (para (b)). This latter requirement is expanded in subs (2). In considering the reasonable needs of each party the standard of living of the common household is to be disregarded unless, in the opinion of the Court, there are special circumstances. Under the final subsection the liability to pay maintenance is subject to the liable party, or anyone dependent on that party, not being deprived of a reasonable standard of living.

Again, care is required not to read more into the section than is justified by the language, always having regard to the policy of the Act.

While keeping in mind the clean break principle, the section clearly confers on the Court a significant discretion in determining the amount of maintenance which is to be payable. Liability under subs (1) of s 64 is restricted to the "extent that such maintenance is necessary to meet the reasonable needs of the other party". As that section provides the jurisdiction for spousal maintenance it must predominate. But Parliament nevertheless has vested the Court with a significant measure of discretion in determining the quantum of the maintenance.

First, the Court must determine the reasonable needs of each party. Obviously, "reasonable needs" is not limited to a subsistence level. Nor are reasonable needs necessarily uniform. What constitutes the reasonable needs of one person may not be sufficient to meet the reasonable needs of another. What is appropriate provision for the reasonable needs of a wife in some circumstances may not be adequate for a wife in other circumstances. Maintenance to meet the reasonable needs of a party may vary considerably. Furthermore, the fact that the Court is to have regard to the reasonable needs of "each" party, indicates that, to some extent, it will necessarily be examining their relative needs.

Secondly, in s 65(1), Parliament has directed the Court to have regard to a number of factors in determining the quantum of the maintenance, of which the reasonable needs of each party is only one factor. While the reasonable needs of the party seeking maintenance may, as a matter of jurisdiction (under s 64(1)), define the upper limit of the maintenance, these other factors must be taken into account when determining the quantum of the maintenance. Included among these factors are the potential earning capacity of the parties and the means derived by them from the division of matrimonial property under the Matrimonial Property Act.

[191] Ms Hollings referred in particular to s 65(5) which entitles the Court to take into account the standard of living the parties had while they lived together in determining the reasonable needs of each party. The husband does not seek to argue that the wife is living beyond her means, nor does he argue that she must inevitably accept a diminished lifestyle. Her budget is not attacked.

[192] Reference was also made by Ms Hollings to s 65(3) which requires the assessment of an appropriate order to have regard to the division of functions within the marriage, in considering the potential earning capacity of the wife.

[193] Mr Vickerman placed emphasis on s 64A(1) which restricts liability for post-dissolution spousal maintenance to the circumstances provided for in that section. He submitted that the normal purpose of spousal maintenance post-dissolution is to serve as a temporary bridge to assist a spouse towards self-sufficiency. In particular, he referred to the passage in *Z v Z (No.2)* (p 293) in which the Court noted that in determining the period after which a party ought to be responsible for his or her own needs, the Court is to have regard to “all” the circumstances of “the particular case”. As the Court observed, the determination of what is reasonable in a particular case is not informed by any general principle. Moreover, while any maintenance obligation following dissolution of marriage should ordinarily be temporary and not life-long, there is nothing in the wording of the legislation to preclude a lengthy period of time, or even an indefinite period, if having regard to the factors set out in the legislation that period of time is reasonable in all the circumstances of the particular case (p.294).

[194] The husband referred to several cases which underscored the need for the parties to a dissolved marriage to become self-sufficient if it is reasonable in all the circumstances of the particular case. Among those cases were: *Weir v Weir*, *M v M* HC AK AP72/01 31 May 2002, *Teehan v Wright* [2004] NZFLR 577; and *Hurst v Hurst* (1998) 7 FRNZ 525. In the last named case Giles J dealt extensively with the decision of the Supreme Court of Canada in *Moge v Moge* [1992] 3 SCR 813, on which some reliance was placed by the wife in this present case.

[195] The Court in *Moge v Moge* concluded that the purpose of the law of spousal support was to redress the income imbalance arising out of the roles of the parties adopted in the marriage, and for that purpose largely rejected the clean break philosophy. The Canadian legislation was quite different from ss 63-66 and Giles J concluded that there was no room for the wider approach adopted in *Moge v Moge* having regard to the express terms of our legislation. I agree.

[196] More directly for present purposes, *Hurst v Hurst* is of some relevance by reason of the Court's finding that the wife was not entitled to rely on the need for after school care of a 15 year old daughter, in arguing that she was unable to work full time.

[197] Mr Vickerman argues that the wife has not established that post-dissolution she should not now be responsible for meeting her own needs. He says:

- a) The wife is relatively young and in career terms, she is "in her most productive stage of life", and she has qualifications and experience which are in demand;
- b) While the marriage was relatively lengthy, the wife was out of the workforce entirely only for some eight years and has easily re-entered it, albeit on a part time basis. There is evidence that she could command a reasonable salary if she recommenced full time work, with prospects of advancement;
- c) The wife's responsibilities to the children are not such that they prevent her from taking lucrative full time employment;
- d) Her choice not to obtain more lucrative work is unreasonable, and inhibits her from taking responsibility for meeting her own needs. It is now three years since the parties separated, during which period the wife has done "relatively little to become self-supporting when it is clear that opportunities to do so were available to her".

[198] In essence, says the husband, the wife believes that he has an on-going responsibility to maintain her post-dissolution, contrary, it is said, to the express terms of s 64A(1). The husband concedes that the wife was entitled to a period of post-separation maintenance and support from the husband while she endeavoured to re-establish herself, but the period of three years since separation has been sufficient for her to achieve that objective. It is further said for the husband that now to award the wife spousal maintenance, would be to run a real risk of perpetuating dependency, and exacerbating it by diminishing the relevance of her work experience.

[199] The issue is not an easy one. The wife plainly has a range of skills and a degree of experience which fit her to undertake full time work in the market research field. She clearly has abilities and skills well above the ordinary. There is ample evidence to that effect. The issue is simply that of the extent to which the wife's child care responsibilities can properly be said to impinge upon her ability to meet her own needs. That arises under both ss 64A(3)(c)(iii) and 64(2)(b).

[200] The younger child of the parties, their daughter, was born on 19 March 1996 and is a little under nine. The wife says that while she is able and willing to undertake part time work, she cannot accept employment which prevents her from being at home when the children arrive home from school. Plainly, the children do require such care and will do for several years yet, but there are ways and means of providing it. Options would include the employment of a nanny or resort to friends or other support people. Of course the employment of a nanny would, to a certain extent, offset the financial benefits to be obtained from full time employment. Those costs would be the joint responsibility of the parties. There are competing issues: on the one hand it is highly desirable in her own interests that the wife establishes herself in the full time work force once more. She has considerable ability and experience and can command a substantial salary. On the other hand, the after school welfare of the children must be ensured.

[201] I agree that this is not a case in which the wife is entitled to indefinite post-dissolution spousal maintenance. The separation occurred in September 2001, more than three years ago. However, the parties have yet to effect the division of



relationship property and in the immediate future there is likely to be a good deal of re-organisation as the partners re-adjust their assets and finances. In particular, it may well be necessary that the present family home be sold and the wife and children rehoused elsewhere. And there is the question of afternoon (and presumably holiday) child care discussed above.

[202] In those circumstances it is proper that a maintenance order be made in respect of the wife, but it will be for a limited period.

[203] The wife produced in evidence a schedule of her anticipated expenses on an annual basis. She deposed to personal expenses of \$69,047. However, that figure included a non-recurring item of \$40,000 in respect of matrimonial property legal and accounting advice (for the purposes of this proceeding). That item ought, I think, to be excluded. On the other hand, her budget incorporated only half of mortgage outgoings in respect of the present family home. The other half was allocated to the children. Earlier in this judgment I expressed the view that the whole of the mortgage payments ought to be allocated to the wife's budget and it is therefore necessary to increase the figure for mortgage outgoings by \$6821, making a total projected expenditure of \$35,868. This budget was not challenged, except that the husband argued that it was not proper to include mortgage liabilities at all, since the probability is that the family home will need to be sold, and for the wife and children rehoused elsewhere. I do not think it appropriate to make a deduction on that account. If the home is indeed sold, then it will be necessary for the wife and children to find appropriate alternative accommodation and to factor into their on-going budget the costs of that accommodation. In the meantime, the mortgage remains.

[204] The wife estimates her net wages for the year on an annual basis at \$16,500, and allows for rent from a boarder/flatmate at \$7,400 pa. These figures produce a total of \$23,900 against a budget of \$35,868. It seems to me that income from a boarder may become problematic if the family home is sold. On the other hand, the wife can and ought to do more over the next year or so to increase her own income. To some extent those considerations cancel each other out.

[205] I consider it appropriate that the husband bridge the shortfall between the wife's adjusted budget of \$35,868 and her likely income (excluding child support) of \$23,900. I accordingly make an order directing the husband to pay to the wife spousal maintenance in the sum of \$230 per week. That is \$11,960 pa.

[206] However, that order is to inure until 31 March 2006 only. By that time the younger child will have reached 10 years of age and it will be appropriate that by then alternative arrangements are made for her after-school care, in the event, as I believe it to be appropriate, that the wife undertakes full time work.

[207] Further, the parties ought by March 2006 to have so ordered their relationship property affairs that the wife will be able to organise her life in reliance on a more permanent financial foundation than currently exists. By that date, the stage will have been reached at which the husband's liability to maintain the wife will have been extinguished, or at the very least, very substantially reduced.

[208] In fixing that figure I expressly record that I have not overlooked the effect of the s 15 order made earlier in this judgment. It is necessary for a maintenance order to be made in respect of the relatively short period concerned, in order to provide a final bridge to the point at which the wife ought to become responsible for her own needs.

[209] In addition, the wife seeks both lump sum and past maintenance. Post-separation, I think that the husband has properly discharged his maintenance obligations to the wife. Neither lump sum nor past maintenance orders can be justified.

### **Section 182 Family Proceedings Act 1980**

[210] The wife applies for orders:

- a) That the Court inquire into the existence of any agreement between the husband and wife for the payment of maintenance or relating to

the property of the husband and wife or either of them or any post-nuptial settlement made on the parties

- b) Directing that such portion as this Court deems just and appropriate of any property which was settled during the period of the marriage be resettled upon the wife for the benefit of the wife in such manner as this Court may deem appropriate.
- c) For variation of the terms of any such agreement or settlement for the benefit of the wife as this Court thinks fit.

[211] Section 182 of the Family Proceedings Act 1980 provides as follows:

**182 Court may make orders as to settled property etc**

- (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or of the parties to the marriage or either of them, as the Court thinks fit.
- (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.
- (3) In the exercise of its discretion under this section, the Court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the Court considers relevant.
- (4) The Court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage.
- (5) An order made under this section may from time to time be reviewed by the Court on the application of either party to the marriage or of either party's personal representative.
- (6) Notwithstanding subsections (1) to (5) of this section, the Court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage unless it is of the opinion that the interests of any child of the marriage so require.

[212] The focus of this application appears to be the two mirror trusts to which reference has been made earlier in this judgment. Those trusts are equal owners of

the Remuera family home, valued at approximately \$900,000. The trusts each owe \$94,000 to the respective settlors, who are the parties to the proceeding. In its terms, the application seeks an order directing that the Court resetttle upon the wife, for her benefit, such portion of the trusts' property as the Court deems just and appropriate, but little or no attention was paid in argument to that aspect of the application.

[213] The application also seeks an order varying the terms of the trusts for the benefit of the wife "as this Court thinks fit".

[214] The parties were agreed that the respective trust deeds constituted post-nuptial settlements for the purpose of s 182, but the parties otherwise differ in their approach.

[215] Ms Hollings emphasises the apparently wide scope of the jurisdiction under s 182: see *Bishop v Bishop* [1980] 1 NZLR 9, 13, *Re Polkinghorn Trust, Kidd v Kidd* [1988] 4 NZFLR 756; *Bell-Booth v Bell-Booth* [2001] NZFLR 128, 132; eg in *Chrystall v Chrystall* [1993] NZFLR 772 the Family Court in a case in which the wife received very little by way of relationship property division in her own right, ordered that a post-nuptial trust pay to the wife a sum sufficient to rehouse her in reasonable comfort, the trust having become the owner of farming assets to which the wife would otherwise have had a claim under the Act.

[216] However, rather than pursue with any vigour the wife's application under s 182, Ms Hollings submitted that it was better to resort to s 33(3)(m) of the Property (Relationships) Act, a course which I hold below is not open. I have accordingly not had the advantage of hearing from counsel in any depth as to my jurisdiction to make an order in favour of the wife, as sought in terms of the wife's application. Having regard to the stance adopted by the husband as to the application of s 182, I believe the appropriate course is for me to adjourn the application for further consideration.

[217] Mr Vickerman submitted that s 182 is not a mechanism for the division of trust assets in accordance with the principles of equal sharing under the Property (Relationships) Act, and that if the Legislature had intended that trusts should be set aside on divorce, it would plainly have said so in that Act. Moreover, he submitted

in any exercise of its discretion under s 182 the Court must have regard to the impact of the award on the position of all beneficiaries, who in this case include the children of the marriage.

[218] Mr Vickerman further suggested that an appropriate course for the Court to follow would be to direct changes of trustees in such a fashion that the parties were no longer trustees of the trusts settled by the other of them.

[219] I consider the appropriate course to follow is simply to adjourn the s 182 application for further consideration and argument if necessary, in the light of the orders already made in this judgment. Argument on the point to date has lacked a degree of focus because the relative financial positions of the parties, following this judgment, were necessarily unknown to the parties.

[220] If the matter is to be further argued, pursuant to leave reserved, then counsel should give their attention to the question of whether it is necessary to have the children separately represented. Like the parties, they are both discretionary and final beneficiaries and it would be necessary in considering the making of any order under s 182 to take into account their interests.

### **Occupation order**

[221] It was submitted for the wife that if a clean break cannot be achieved, it would be appropriate for the Court to make an order for the occupation of the family home by the wife and the children until the younger of them attains 19 or earlier ceases full time education. That application was made by way of a subsidiary argument. It was not the subject of submissions by Mr Vickerman, and the appropriate course to follow is to reserve leave to pursue that application if necessary.

### **Section 33(3)(m) Property (Relationships) Act**

[222] The wife refers to the provisions of s 33(3)(m) of the Act and invites the Court to vary the terms of the trusts, presumably as an alternative to the s 182 jurisdiction. The point was argued generally in support of an issue dealt with earlier in this judgment, namely whether the interests of the parties as beneficiaries under the mirror trusts were themselves relationship property and if so, how they were to be valued.

[223] I agree with Mr Vickerman that s 33(3)(m) does not confer on the Court an originating jurisdiction. The powers set out in s 33 are plainly conferred for the purpose of enabling the Court to direct the implementation of substantive orders made under ss 25-32 inclusive of the Act. Orders under s 33 may be made only if they are “necessary or expedient to give effect or better effect to orders made pursuant to ss 25-32 inclusive of the Act”: *Munroe v Munroe* [1997] NZFLR 620, 622.

[224] The application of s 33(3)(m) may be argued if and when matters remaining for determination are dealt with (in the event the parties cannot resolve them between themselves).

### **Summary**

[225] The effect of this judgment may be summarised as follows:

- a) As agreed between the parties, relationship property is to be divided equally between them. Leave is reserved to the parties to make further application in the event that the further involvement of the Court is required as to the identification or classification of specific assets.
- b) The future earnings of the husband in his present law firm do not contain an element of super-profit and therefore no part of those earnings constitutes relationship property.

- c) The rights and interests which the parties have as final beneficiaries in the mirror trusts, established respectively by the other of them, constitute relationship property.
- d) The package of rights and interests which relate to their status as trustees and as discretionary beneficiaries, may properly be characterised as relationship property, but I make no determination to that effect. There being no valuation evidence as to the value of any of the rights and interests of the parties under the trusts, I decline to make any order in respect of them. Leave is reserved to the parties to apply further in respect of their interests under the trusts viewed as relationship property, should that be thought appropriate.
- e) The contingent debt owed by the husband in respect of the liability of his first firm to a former client, is a relationship debt, but no order can presently be made in respect of that debt, having regard to the history and current status of the claim against that firm.
- f) There is an order under s 15 of the Property (Relationships) Act directing the husband to pay to the wife out of his share of relationship property, the sum of \$75,000.
- g) There is a departure order pursuant to s 106 of the Child Support Act 1991, under which the husband is to pay to the wife in respect of the support of the two children of the marriage, the sum of \$22,000 pa. That order is to continue in effect until 31 March 2006. The parties are asked to provide sufficient information to the Court to enable an order to be made in the terms required by s 106(4) of the Child Support Act.
- h) The husband is directed to pay to the wife in respect of past child support, a lump sum of \$9000, pursuant to s 109(2) of the Child Support Act.

- i) There is a maintenance order in respect of spousal maintenance pursuant to which the husband is to pay to the wife the sum of \$11,960 pa (\$230 per week) until 31 March 2006. The wife's application for lump sum and past maintenance is refused.
- j) The wife's application pursuant to s 182 of the Matrimonial Proceedings Act 1980 is adjourned. Leave is granted for the application to be brought on for hearing at such time as may be appropriate. The wife's application for an occupation order is likewise adjourned. Leave is granted to the parties to bring that application on for hearing as appropriate. The orders sought by the wife under s 33(3)(m) are refused, on the basis that that sub-section is available only in the event that substantive orders are made under ss 25-32. The application may be renewed in the event that it becomes appropriate to make any of the substantive orders set out in those sections.
- k) Leave is granted to the parties to make such further application as may be necessary or appropriate, having regard to the terms of this judgment.

### **Costs**

[226] Costs are reserved.

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 3.20 pm on Friday 17 December 2005.

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**C J Allan J**