

FIFTY YEARS OF NEW ZEALAND FAMILY LAW

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This collaborative article examines the significant changes to New Zealand family law during the last 50 years. The article canvasses three areas that have seen substantial changes during this time – what constitutes a legal family; changes in the exercise of judicial discretion in family law cases involving children; and the evolution of the financial and property consequences of family breakdown. The article initially focuses on the law's reaction to the changing New Zealand family and the important milestones in this legal evolution. This is accompanied by a detailed, historic analysis of the difficulties in deciding what is "best" for children involved in family law disputes and the degree of judicial discretion that should be exercised during this process. The article concludes by chronicling the significant legislative changes since 1963 concerning the financial implications of relationship breakdown and how this affects the children involved. This article illustrates how far New Zealand has come in the last 50 years regarding the increased legal recognition and protection of a wide variety of familial relationships. However, it argues that the recent debates surrounding adoption and marriage equality indicate that there is still a way to go before the law treats all New Zealand families equally.

A. Introduction

New Zealand family law has undergone momentous change in the last 50 years. Even the very concept of what constitutes a legally recognised family has changed considerably during this time. This article considers three areas of significant change in New Zealand family law: what constitutes a legal family; changes in the exercise of judicial discretion in family law cases involving children; and how the financial and property consequences of family breakdown have evolved.

B. The Changing Nature of New Zealand Families

During the 1960s the nuclear family (usually solely created by marriage) was far and away the societal norm. The labour market, taxation, social assistance, laws and public policies all primarily revolved around the married, nuclear family.¹ This has changed significantly over the last 50 years. The following statistics, primarily based on Census data, provide compelling evidence of the changing nature of New Zealand families during this time.

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1 Families Commission (Kōmihana ā Whānau) *The Kiwi Nest: 60 Years of Change in New Zealand Families* (Families Commission (Kōmihana ā Whānau), Research report no 3/08, June 2008) at 32.

In 1961 the marriage rate in New Zealand was high at 38.2 marriages per 1,000 not-married population aged 16 and over.² However, in recent times, marriage has become less prevalent. In 2011 the marriage rate was 11.8, nearly one-quarter of the peak of 45.5 in 1971.³ Remarriage rates are high. Thirty-one per cent of marriages registered in 2009 involved the remarriage of one or both partners, compared with a rate of 16 per cent in 1971.⁴ New Zealand now legally recognises de facto relationships between all couples irrespective of sex, sexual orientation and gender identity. By 2006, almost two-in-five men and women aged between 15–55 years old in partnerships were in de facto relationships.⁵ Civil unions were introduced in 2004 and can be celebrated by all couples regardless of sex, sexual orientation and gender identity.⁶ By 31 March 2012 2,745 civil unions had been registered.⁷ Of these, 80 per cent were same-sex civil unions.⁸ Marriage in New Zealand was limited solely to heterosexual couples. However, all couples irrespective of sex, sexual orientation and gender identity are now able to marry.⁹

In the 1960s women had more children and gave birth at a younger age than they do now. The fertility rate in 1961 was 4.31 births per woman.¹⁰ In the year ended September 2012 it had more than halved to 2.03 births per woman.¹¹ The median age of women giving birth was 26 years in the early 1960s.¹² In 2012 the median age of women giving birth was 30 years.¹³

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- 2 Families Commission (Kōmihana ā Whānau) *The Kiwi Nest*, above n 1, at 20.
 - 3 Geoff Bascand *Marriages, Civil Unions, and Divorces: Year Ended December 2011* (Statistics New Zealand, Wellington, 3 May 2012) at 2.
 - 4 Geoff Bascand *Demographic Trends 2010* (Statistics New Zealand, Wellington, 31 January 2011) at chapter 3.
 - 5 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today: A Brief Demographic Profile Fact Sheet 01* (Families Commission (Kōmihana ā Whānau), Wellington, August 2012) at 7.
 - 6 See generally Civil Union Act 2004. For more information about sex, sexual orientation and gender identity terminology see Ministry of Social Development *Selected GLBTI* Definitions* (GLBTI Policy Team, Wellington, 2008).
 - 7 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5, at 8.
 - 8 At 8.
 - 9 On 26 July 2012 Labour MP Louisa Wall's Marriage (Definition of Marriage) Amendment Bill was pulled out of the Parliamentary Members' Bills Ballot and introduced to the House. The purpose of this Bill (as clause 4 of the Bill sets out) is: "to amend the principal Act [the Marriage Act] to clarify that a marriage is between 2 people regardless of their sex, sexual orientation, or gender identity". On 29 August 2012 the Marriage (Definition of Marriage) Amendment Bill (39-1) passed its first reading in a Parliamentary conscience vote 80 votes to 40. In its report to the House on 28 February 2013 the Government Administration Committee recommended by a majority that the Bill be passed with amendments including the insertion of a clause designed to make clear that a marriage licence shall authorise but not oblige any marriage celebrant to solemnise the marriage to which it relates. On 13 March 2013, the Marriage (Definition of Marriage) Amendment Bill (39-2) passed its second reading in a Parliamentary conscience vote 77 votes to 44. For more information about sex, sexual orientation and gender identity terminology see Ministry of Social Development, above n 6.
 - 10 Geoff Bascand *Births and Deaths: Year Ended September 2012* (Statistics New Zealand, Wellington, 20 November 2012) at 4.
 - 11 Bascand *Births and Deaths*, above n 10, at 4.
 - 12 Bascand *Births and Deaths*, above n 10, at 4.

Although over 54 per cent of women born in 1945 had conceived a child outside of marriage by the age of 27, most of the women were married before giving birth or had placed their child for adoption.¹⁴ However, the social expectation of only raising children within marriage has now diminished and in 2010 ex-nuptial births consisted of nearly 50 per cent of all live births.¹⁵ The highest number of births ever recorded in any year was 65,658 in the year ended September 1962.¹⁶ In the year ended September 2012 a total of 60,462 births were recorded.¹⁷ This significant difference across time is compounded further when you consider that New Zealand's population in 1962 was only 2.5 million, whereas the current population is now 4.4 million.¹⁸

The makeup of families has also changed dramatically. In 1966 81.5 per cent of the population lived in a household that included either a single person or one family only and no others.¹⁹ Statistics from the 2006 Census indicate some of the more recent developments in the makeup of the family form.²⁰ In 2006 just under a third of households were couples with children.²¹ 71.9 per cent of families with dependent children were two parent families and 28.1 per cent were sole parent families.²² It has been estimated that a third of children will have lived in a sole mother family by age 17 years.²³

New Zealand's increasing cultural diversity has required the law to understand and recognise different cultural conceptions of "family" and family dynamics. In 2006 4,184,600 people lived in New Zealand. Of these 2,817,700 identified as European or other, 624,300 as Maori, 301,600 as Pacifica, 404,400 as Asian and 36,600 as having origins in the Middle East, Latin America or Africa.²⁴ Such ethnic diversity continues to increase, frequently assisted by immigration. For example, in 2009 alone there were 6,000 immigrants from India, 3,800 from China, 2,300 from the Philippines, 2,200 from Fiji and 9,100 from the United Kingdom.²⁵

13 Bascand *Births and Deaths*, above n 10, at 4.

14 Families Commission (Kōmihana ā Whānau) *The Kiwi Nest*, above n 1, at 21.

15 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5, at 11.

16 Bascand *Births and Deaths*, above n 10, at 2.

17 Bascand *Births and Deaths*, above n 10, at 2.

18 Bascand *Births and Deaths*, above n 10, at 2.

19 Families Commission (Kōmihana ā Whānau) *The Kiwi Nest*, above n 1, at 21.

20 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5.

21 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5, at 4.

22 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5, at 5.

23 Families Commission (Kōmihana ā Whānau) *New Zealand Families Today*, above n 5, at 5.

24 Ministry of Social Development *The Social Report 2010:te pūrongo oranga tangata* (Ministry of Social Development, Wellington, 2010) at 11.

25 Ministry of Social Development *The Social Report*, above n 24, at 11, provides ethnic population projections for 2006–2026. The report suggests that the national percentage of European people will drop from 77 per cent of the population in 2006 to 70 per cent in 2026; Māori will increase from 15 per cent of the population in 2006 to 16 per cent in 2026; Pacifica peoples will increase from seven per cent of the population in 2006 to 10 per cent in 2026; and Asian peoples will increase from 10 per cent of the population in 2006 to 16 per cent in 2026 at 15.

1. *The law's reaction to the changing New Zealand family*

Fifty years ago the legal and dominant social concepts of the family were based on marriage, with traditional marital roles and financial rights and obligations based on gender. The only recognised parent child relationships were either based on genetics or adoption.

However, in 2012 the law adopts a functional approach to defining the family. For most purposes, legal rights and responsibilities attach equally to marriage, civil unions and de facto relationships. New Zealand has introduced marriage equality, which allows a couple to marry regardless of their "sex, sexual orientation or gender identity".²⁶ Recognition is now given to parent child relationships, not just based on genetics and adoption, but also on psychological attachments,²⁷ and cultural significance.²⁸ There is also increased recognition of the intentional family, whereby couples and single people can utilise IVF and other birth technologies, such as surrogacy, to create the children they desire.²⁹

The law's characterisation of the child has changed dramatically in 50 years. In 1963 the child was perceived as dependent, subsumed within family membership and an object of concern.³⁰ New Zealand's ratification of the United Nations Convention on the Rights of the Child in 1993, and the influence of the jurisprudence on the sociology of childhood, led to legal recognition of the child as a person in its own right. Children are deserving of respect and should be treated as participating members of their family and the wider community. This attitude towards children was exemplified by the implementation of the Care of Children Act 2004.³¹ However in the future, more families and whānau may be treated as family units, rather than as a

26 Marriage (Definition of Marriage) Amendment Bill 2012 (39-2), cl 4.

27 See generally *Tanner v Edghill & Marlow* [2008] NZFLR 262, (2007) 26 FRNZ 906 (HC) at [39] and *Temple v Barr* HC Wellington CIV-2010-485-561, 24 August 2010 at [82].

28 See *NHP v TIT* [2012] NZFC 4340 at [15-20] where the Court recognised a whāngai arrangement.

29 Advisory Committee on Assisted Reproductive Technology *Proposed Amendments to Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services and Guidelines on Donation of Eggs or Sperm Between Certain Family Members: Consultation Document* (ACART, Wellington, 2012) proposes to amend the surrogacy guidelines to remove the current prohibition on a same sex couple obtaining permission to enter a surrogacy arrangement at 1.2.1. Martin Johnston "A Different Answer to that Question" *New Zealand Herald* (Auckland, 3 November 2012) reports that since August 2010 Immigration New Zealand has issued visitor's visas to 18 children born as a result of international surrogacy agreements. As current New Zealand law struggles to cope with how to legalise the placement of a child born as a result of an international surrogacy arrangement the Family Court has called for the government to provide guidance. See *Re Application by KR* [2011] NZFLR 429; *Re Application by BWS* [2011] NZFLR 621; and *Re B* [2010] NZFLR 97. In response to similar problems internationally the Permanent Bureau of the Hague Conference issued *A Preliminary Report on the Issues Arising From International Surrogacy Arrangements* (Permanent Bureau of the Hague Conference, The Hague, March 2012).

30 See generally Bronwyn Dalley *Family Matters: Child Welfare in Twentieth Century New Zealand* (Auckland University Press, Auckland, 1998) and Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependents: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law Practices, Processes and Procedures* (Hart Publishing, Oxford, 2003) at 303.

31 See Care of Children Act 2004, ss 4-7 and 16(1)(c).

collection of individuals, due to proposed legislative reforms and funding models. This creates a risk that the distinct interests of children will be lost.³²

2. Milestones in the legal evolution of the family

In the 1960s the State's primary concern was broadly to support families. The family benefit was universalised in 1946, and the 1958 capitalisation scheme allowed families to obtain the family benefit in a lump sum to buy a house or finance extensions and renovations of their current home.³³ The Joint Family Homes Act 1964 and the Family Benefits (Home Ownership) Act 1964 illustrate the State's emphasis on ensuring all families had a home that was protected and secure. The societal prominence of the secure family unit meant that children born outside of marriage were still classified as illegitimate until 1969, when the Status of Children Act 1969 was passed to give such children legitimacy.

The 1960s also saw the emergence of the oral contraceptive pill, which gave women more control over their family planning decisions.³⁴ Women began to have greater involvement in the workforce during this time,³⁵ and general economic adversity, precipitated by the collapse of the world wool price in 1967, made it essential for many households to have two sources of income.³⁶

At the end of the 1960s the Domestic Proceedings Act 1968 was passed, which emphasised exploring avenues of reconciliation when marriages were in difficulty. Society was still focused on keeping families together wherever possible. However, by the 1970s separations and divorces had begun to increase, which led to many single mothers relying on maintenance orders or discretionary emergency benefits to survive. For example, between 1970–1972 the number of women receiving emergency benefits for domestic purposes doubled.³⁷ In 1973, the Domestic Purposes Benefit (DPB) was introduced by

32 For example, this may well be a consequence of the proposals in cl 5 of the Family Court Proceedings Reform Bill 2012 (90-1) that seek to restrict access to the Family Court for applications under the Care of Children Act 2004 and to limit the circumstances in which a Lawyer for the Child may be appointed. A further example is provided by the core principles underpinning the Family-Centred Services Fund (Whānau Ora), which focuses on working with the whole family and whānau. See Ministry of Social Development *Family-Centred Services: Direct Services: Practice Guidelines* (Ministry of Social Development, Wellington, July 2011) at 5. As from 1 July 2012 the majority of family violence funding was re-channelled to the Family-Centred Services Fund. See Ministry of Social Development *Family Violence Funding: Focus on the Frontline* (Ministry of Social Development, Wellington, April 2011).

33 Tim Garlick *Social Developments: An organisational history of the Ministry of Social Development and its predecessors, 1860–2011* (Steele Roberts Aotearoa, Wellington, 2012) at 73 and 76.

34 Family Planning "History: 1960" Positive Sexual Health – Family Planning <www.familyplanning.org.nz>.

35 Between 1991 and 2012 the proportion of woman holding a post-school qualification increased from 32 per cent to 50 per cent. Between 1991 and 2011 women's labour force participation increased from 49 per cent to 58 per cent. In 2006 66 per cent of all mothers were in employment. See Families Commission (Kōmihana ā Whānau), above n 5, at 13.

36 Garlick, above n 33, at 87.

37 At 91.

the Social Security Amendment Act 1973. The DPB was designed to provide financial assistance to solo parents. However, by the mid 1970s the DPB was already under review due to concerns about the snowballing costs of the increasing number of people receiving the DPB.³⁸ After 1976 the individual DPB payments that solo parents received were reduced for up to six months to "discourage couples from separating too readily", and all those who applied for the DPB were referred to marriage counselling to see if reconciliation was possible.³⁹

In the mid 1970s children who were in need of care, state protection and control were governed by the Children and Young Persons Act 1974. The primary emphasis of this Act was to remove children from their parents and place them in children's homes or in foster care. Very little thought was given to the cultural, or other, connections the children had with their extended families. This remained the law until 1989 when the Children, Young Persons, and Their Families Act 1989 was passed and, for the first time in family legislation, whānau, hapū, iwi and wider family groups were recognised and the emphasis was placed on keeping children within their families, rather than removing them. A significant influence behind this substantial shift in ideology was the *Puao-Te-Ata-Tu (Day Break)* Report.⁴⁰

The mid 1970s also saw the first movement away from a fault based divorce system. The Domestic Actions Act 1975 removed civil actions for adultery and breach of promise. The family began to be seen as a group of individuals and not just one legal entity. For example the Matrimonial Property Act 1976 allowed a husband and wife to sue each other in tort.⁴¹

In 1977 the Contraception Sterilisation and Abortion Act was passed. This Act is essentially a compromise in that it allows abortion only if the "abortion is immediately necessary to save the life of the patient or to prevent serious permanent injury to her physical or mental health".⁴² The Act requires that two consultants must sign off any abortion.⁴³ The legislation was not designed to create a system of abortion on demand, but the practical reality of the Act is that abortions have increased in New Zealand since the legislation came into force. There have been some challenges to the Act suggesting that abortions are being performed too readily and that the Act breaches the rights to life of unborn foetuses. However, thus far the courts have not given legal recognition to unborn foetuses and have decided that individual decisions about abortions are best left with the medical consultations and the supervisory committee involved.⁴⁴

38 Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Review" (1998) 10 Social Policy Journal of New Zealand.

39 Garlick, above n 33, at 98.

40 The Māori Perspective Advisory Committee *Puao-Te-Ata-Tu (Day Break): The Report Of The Ministerial Advisory Committee On A Māori Perspective For The Department Of Social Welfare* (Department Of Social Welfare, Wellington, 1988).

41 Matrimonial Property Act 1976, s 51.

42 Contraception Sterilisation and Abortion Act 1977, s 37.

43 Contraception Sterilisation and Abortion Act 1977, s 29.

44 See generally *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 (HC); *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC); *Abortion*

1980 saw the largest and most radical changes in the period of New Zealand's family law history under discussion here. The passing of the Family Courts Act 1980 established a specialist Family Court. The second appointed principal Family Court Judge Patrick Mahony said:⁴⁵

A major focus in modern Family Court systems is the provision of education and support for families, directing parental attention to the impact on their children also affected by what is happening to their parents, their families and themselves. In New Zealand's case, this involves counselling paid for by the Court, mediation, separate legal representation for children and the use of social work and psychological assessments directed in the first place at empowering parents to agree on good workable arrangements for the future parenting of their children.

The Family Proceedings Act 1980 introduced a single no fault ground for what is now called dissolution (previously known as divorce). However the Family Proceedings Act 1980 still emphasised trying to reconcile the parties at the end of marriage.⁴⁶

The Guardianship Act 1968 was amended in 1980 to remove any presumptions that the sex or gender of a parent was relevant in determining who could do the better parenting. Social science research became the primary determinant of who would receive the primary care of a child after parents separated.⁴⁷ Concepts such as "bonding", "attachment" and the "psychological parent" became the primary determinants of who should have the care of a child when parents separated.⁴⁸

The 1980s saw much greater public and legal awareness of violence that occurs in the home. The Domestic Protection Act 1982 recognised that violence that occurs in the home is not a purely private matter, but also a matter that should be regulated for the public good. However, it was not until 1987 that Police practice formally began to recognise that violence occurring in the home is no different from any other kind of violence that occurs in our society. In 1995 the Domestic Protection Act 1982 was overtaken by the Domestic Violence Act, which was the first piece of legislation to recognise same-sex and de facto relationships and to give them the same protection from violence as those in married relationships.

The mid 1980s was a time of acknowledging voices that had not been heard before in family law. In 1984 Cabinet approved the creation of a Ministry of Women's Affairs, which officially opened in 1986. This Ministry played a significant role in ensuring that the perspective of women is heard and taken account of in all aspects of policy development. In 1985, through the determined long-term efforts of Keith Griffiths, the Adult Adoption Information Act came into force. This was public recognition that adopted

Supervisory Committee v Right to Life New Zealand Inc [2011] NZCA 246, [2012] 1 NZLR 176; and *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762.

45 PD Mahony "The Child and the Family Court" in Stuart Birks (ed) *Proceedings of Social Policy Forum 2002: The Child and the Family Court: Seeking the Best Interests of the Child* (Massey University Centre for Public Policy Evaluation, Palmerston North, 2003) at 2.

46 Family Proceedings Act 1980, s 19.

47 See Part C of this paper below.

48 See generally *A v A* (1978) 1 NZLR 278 NZSC.

children may want to know about their birth family to gain knowledge about their own genetic and social identity. In 1986 New Zealand passed the Homosexual Law Reform Act 1986 that legalised homosexual acts between men. Up until this point men in same sex relationships were at risk of serious criminal penalties.⁴⁹

While some voices were given more recognition during this time, other voices were not. The Status of Children Amendment Act 1987 gave legal recognition to people having children via the assistance of donor insemination. The recipient of the donation became the child's legal family and the donor was clearly stated to have no legal connection to the child. However, what was absent from the legislation was any right of the child to be able to trace the identity of their donor parent. This issue has only begun to be addressed since the passing of the Human Assisted Reproductive Technology Act 2004.

The major contribution to family law in the 1990s was the 1993 ratification by the New Zealand Government of the United Nations Convention on the Rights of the Child. This convention recognises that children have their own agency and rights and are therefore entitled to participate in families on their own terms, and be consulted and express views on matters that affect them.⁵⁰

The globalisation of family law, whereby children and families are much more mobile and families are frequently formed across borders, led to the creation of significant international conventions. One such international instrument is the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which was incorporated into our 2004 Care of Children Act. Another is the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, which New Zealand signed in 1997. Both conventions establish central authorities whose role is to attempt to ensure consistent and safe practices for the well-being of children across countries.

International surrogacy, whereby couples go to countries such as Thailand or India and have their child through a surrogate, is a current issue. Proposed new legislation entitled the Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill is currently in the Parliamentary Members' Bills Ballot. This Bill intends to reform both adoption and surrogacy law in New Zealand. Importantly, in relation to surrogacy, the Bill sets out the "requirements with which a commissioning parent or parents must comply when entering into an altruistic surrogacy arrangement, and when seeking to have that child legally recognised as being a part of their family".⁵¹ These requirements include setting out guidelines for overseas altruistic surrogacy processes that incorporate the New Zealand adoption process. The Bill seeks to ensure the best interests of the child are at the heart of adoption and surrogacy laws. It amends the Status of Children Act 1969 to provide a prima facie presumption as to parenthood for surrogate and adoptive parents of children born overseas whose names have been entered into the birth register of the

49 See generally Chris Brickell *Mates & Lovers: A History of Gay New Zealand* (Godwit Publishing, Auckland, 2008).

50 United Nations Convention on the Rights of the Child, art 12.

51 Proposed Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill, Explanatory Note.

overseas country where the child was born, or when a foreign court has made a parentage order in favour of the surrogate/adoptive parents.⁵²

A greater focus on economic equality and recognition of children's rights emerged in the 21st century. The first major change was the amendment to the Property (Relationships) Act 1976 in 2001.⁵³ The Matrimonial Property Act 1976 was ahead of its time with its strong presumption of equal sharing of the family home and family chattels upon the dissolution of a marriage and its weaker presumption of equal sharing of the rest of what was called "matrimonial property". The 2001 amendment to the newly named Property (Relationships) Act 1976 strengthened the presumption of equal sharing to an entitlement to equal sharing of all relationship property upon the dissolution of a marriage or de facto relationship. More radically, it also recognised that in order to achieve equality of result, the party who has been economically disadvantaged by taking on home and childcare roles should be given more than 50 per cent of the total relationship property. The amendment also enabled a much wider range of relationships to be able to claim equal shares of their property as the legislation formally recognised de facto and same-sex relationships. De facto and same sex-couples were also now able to claim spousal maintenance from each other under the Family Proceedings Act 1980.

The broadening recognition of persons who came under the umbrella of the legal family was further reinforced by the Relationships (Statutory References) Act 2005 which extended most of the rights and obligations of married couples

52 Section 5 of the Status of Children Act 1969 currently states:

5 Presumptions as to parenthood

- (1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.
- (2) Every question of fact that arises in applying subsection (1) shall be decided on a balance of probabilities.
- (3) This section shall apply in respect of every child, whether born before or after the commencement of this Act, and whether born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.

Clause 8 of the proposed Care of Children (Adoption and Surrogacy Law Reform) Amendment Bill 2012 would add the following two subsections to s 5 of the Status of Children Act 1969:

5(4) If a child has been born in a foreign country, and the names of the parent or parents for that child have been entered in a register relating to births in that country, a certified copy of that entry purporting to be signed or sealed in accordance with the law of that foreign country shall be prima facie evidence that in New Zealand, the person or persons named as the parent or parents are the parent or parents of the child.

5(5) If a child has been born in a foreign country, and a court or a judicial or public authority in that country has made an order as to the parentage of the child, a certified copy of that order purporting to be signed or sealed in accordance with the law of that foreign country shall be prima facie evidence that in New Zealand, the person or persons named in the order as the parent or parents are the parent or parents of the child.

53 For more information about the 2001 amendments to the Property (Relationships) Act 1976 see Part D of this article below.

to de facto and same-sex couples. The one notable exception was that no statutory recognition was provided for civil union, de facto and same-sex couples to adopt a child. The Courts have given de facto couples this right, but this has not yet been extended to civil union couples or same-sex couples.⁵⁴

The Care of Children Act 2004 sets out a number of principles which emphasise that children are members of, not just their immediate family, but also their wider families, that decisions need to be made within a child's sense of time and ensure the child's safety is at the heart of any decision made about their care. The Act gives children their own lawyer to ensure that their views are represented. There is also an emphasis in the Act for both parents to be regularly involved in the child's life.

3. Looking to the future

Family law in New Zealand currently faces a significant review of the Family Court, which seems intent on reducing the roles of lawyers in family disputes and relying more on family dispute resolution services. This has the potential to weaken the strength of New Zealand's family law system and may result in some children and vulnerable parties losing their voice in family law disputes.⁵⁵

C. The Conundrum of Deciding What is Best

At the heart of parenting and guardianship disputes (which constitute the largest single category of applications filed in the Family Court)⁵⁶ lies the familiar notion that the best interests of the child are paramount; this is

54 See generally *Re AMM* [2010] NZFLR 629 (HC). If the Marriage (Definition of Marriage) Amendment Bill (39-2) as reported from the Government Administration Committee (which past its second reading on 13 March 2013) is ultimately passed, this will allow married couples regardless of their sex, sexual orientation or gender identity to adopt children. As the Bill's commentary states:

If the bill were to pass, it would make consequential amendments to the Adoption Act 1955 that would have the effect of enabling married same-sex couples to adopt children lawfully, as any married couple may do.

...

We note that currently under the law a homosexual or transgender person may legally adopt a child, but same-sex couples may not. Such a position seems absurd. The amendments we recommend will ensure that married couples are eligible to adopt, regardless of the gender of the adoptive parents.

We note that many families already exist which comprise children and same-sex or transgender parents. However, both parents do not have access to the full range of legal rights that married heterosexual couples have. We consider that allowing same-sex couples to marry would grant an appropriate legal right to those families who are already raising children.

For more information about sex, sexual orientation and gender identity terminology see Ministry of Social Development, above n 6.

55 For more information about the Family Court Review see Family Court Proceedings Reform Bill (90-1).

56 According to 2012 Family Court Statistics such disputes represented 38.9 per cent of the total Family Court workload in 2011. Applications under the Children, Young Persons and Their Families Act 1989 (16.8 per cent) were the next largest category.

sometimes referred to as the paramountcy principle.⁵⁷ Accordingly, if any such case proceeds to a hearing, the final outcome will be determined not by the application of preordained rules but by the exercise of a value judgment from a Family Court judge who is directed by statute to treat each case in an individualised, fact-specific manner.⁵⁸ Consistency, certainty, and predictability, all the qualities typically associated with and expected of the 'rule of law' doctrine, are not exactly trademark features of decision-making here. The judge appears to have been entrusted with an unfettered discretion.

There are other areas of New Zealand family law, such as child support and relationship property, where it can be said Parliament deliberately set out to eliminate judicial discretion in favour of prescriptive rules.⁵⁹ Even within the Care of Children Act 2004 context, the self-contained code in ss 58–61A, prescribing how issues of violence are to be dealt with, attenuates the paramountcy principle.⁶⁰ Section 4(7) unequivocally subordinates that principle in any case concerning international child abduction between Hague Convention contracting states. Nevertheless, it must be said coherent principles of law are notable primarily for their exceptionality in proceedings under the Care of Children Act 2004.

1. *Paramountcy principle and its implications.*

Questions abound over the scope and application of the Care of Children Act 2004, which provides that the "welfare and best interests of the child must be the first and paramount consideration" in proceedings about children.⁶¹ While laudable in its aspiration, the paramountcy principle is highly problematic in its application. Although purporting to provide a single, unifying, child-centric philosophy for the guidance of judges, lawyers, and parties, the principle, at least in its pure unqualified form, is simply devoid of any meaningful legal content.

Unsurprisingly, New Zealand judges have characterised cases involving the application of the paramountcy principle as "notoriously difficult".⁶² For instance, is the child's welfare to be evaluated from a short-term perspective, or a long-term one, or something in-between?⁶³ In an age of moral relativism

57 Care of Children Act 2004, s 4(1).

58 Care of Children Act 2004, s 4(2).

59 The current relevant statutes are the Child Support Act 1991 and the Property (Relationship) Act 1976. In respect of economic disparity awards, however, a wide judicial discretion has been conferred pursuant to s 15 of the Property (Relationships) Act 1976.

60 See the reasoning of Winkelmann J in *Blom v Mackay* [2005] NZFLR 1036 (HC), in relation to the equivalent s 16B of the Guardianship Act 1968. Sections 58-61A of the Care of Children Act 2004 are, as at the time of writing, undergoing governmental review and a radical proposal for change can be found in c14 of the Family Court Proceedings Reform Bill (90-1).

61 See Care of Children Act 2004, s 4(1).

62 See *K v G* [2005] 3 NZLR 104, [2004] NZFLR 1105 (HC) at [20] per Gendall and France JJ, and *R v S [Guardianship]* [2004] NZFLR 207, (2003) 22 FRNZ 1017 (HC) at [1] per Heath and Priestley JJ.

63 A question raised in his classic article Robert H Mnookin "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law and Contemporary Problems 226 at 260.

and uncertainty, what exactly constitutes a 'good' childhood? Are the 'best interests' of a child better met by a 'happy' childhood or rather by one of some hardship and unhappiness that leads to later resilience in adulthood?⁶⁴ Then, on a different tack, does the paramountcy principle mean the child's welfare invariably trumps all other considerations, irrespective of the strength of those other considerations, or does it simply mean the child's welfare is to be accorded more weight than any other in a non-exhaustive list of all relevant considerations, but that those other considerations could singly or in combination outweigh it?⁶⁵

Moreover, as presently constructed, the non-exhaustive list of principles contained in s 5 of the Care of Children Act 2004, are both congested and diffuse.⁶⁶ New Zealand appellate courts have consistently and emphatically eschewed any possibility of adopting presumptive weightings or starting points.⁶⁷

The sheer indeterminacy of the scope and content of the paramountcy principle is unfortunately its most defining characteristic. The family judge must fall back on his or her personal judgment and guesswork rather than on premeditated legal reasoning. In turn, the appellate courts, whilst given a reasonably free hand on the current New Zealand approach,⁶⁸ find themselves in no better position to make legally-grounded decisions than first instance courts.⁶⁹ There is no doctrine of *stare decisis* undergirding the paramountcy principle.

All the emphasis on individualised justice means that the philosophical and psychological bearings of the individual judge become crucial in any decision-making under the Care of Children Act 2004. Thus, in a recent address to the New Zealand Family Court Judges' triennial conference, Black LJ pointed out that the discretion in family law requires the judge to put something of herself or himself into every decision made,⁷⁰ and various New Zealand judges have admitted that a variability in outcomes is the natural consequence of this personalising of decision-making. Former Principal Family Court Judge

64 See Andrea Charlow "Awarding Custody: The Best Interests of the Child and Other Fictions" (1987) 5 Yale Law and Policy Review 267 at 268.

65 Consider the interesting analysis of Richard Chisholm "The Paramount Consideration: Children's Interests in Family Law" (2002) 16 AJFL at 87. The author differentiates the "weak" and "strong" views of the paramountcy principle.

66 In 2012 the Cabinet Social Policy Committee recommended that the s 5 principles should be re-ordered and simplified. See Office of the Minister of Justice "Family Court Review – Proposals for Reform" (Office of the Minister of Justice, Wellington, August 2012) at [75]. This is reflected in cl 4 of the Family Court Proceedings Reform Bill (90-1).

67 Most recently, and notably, by the Supreme Court in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

68 Following the Supreme Court judgment in *Austin, Nicols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 the appellate courts must reach their own conclusions on any questions of fact, degree and value judgment. In the context of Care of Children Act 2004 proceedings see *C v LT* [2009] NZFLR 1098 (HC) at [32].

69 *K v G*, above 62, at [20]. See the comment of Gendall and France JJ.

70 Lady Justice Black "Does it Help to Have Rules" (paper presented to New Zealand Family Court Judges Conference, Wellington, 4 August 2011) at 13. Intriguingly, legislative recognition of the importance of "personality" in the adjudicating process is found in s 5(2) of the Family Courts Act 1980.

Boshier, for instance, extra-judicially conceded that the frequently differing decisions on relocation are explicable and dependent on the “judge’s philosophical view on the raft of issues that relocation cases throw up”.⁷¹ In a rarely evidenced passage of judicial self-reflection, the Court of Appeal in *D v S*⁷² specifically attributed the differing assessments evident in relocation cases to the influence of the judges’ own perspectives and experiences.⁷³ The judges certainly find themselves troubled by the absence of rules and legal yardsticks in child law,⁷⁴ and they are still left, as John Eekelaar memorably said, “cruelly exposed”.⁷⁵

Quite apart from the difficulties created for the judges, the wide judicial discretion still extant in child law is hardly conducive to the engendering of public, professional, or academic respect. Mark Henaghan has thus frequently suggested that there is an element of a “lottery” to decision-making in New Zealand relocation law⁷⁶ and, with reference to Australian family law, Peter McManus has argued that clients in the family law discretionary system may well feel disappointed and alienated by the “dismayingly broad” discretion and the apparently arbitrary decision-making.⁷⁷ One wonders too if the suggestion that Australian family law enjoyed a low reputation in legal professional practice and the academy⁷⁸ could be explicable in part by the perceptions of palm-tree justice intrinsic to the broad discretions.

2. The juristic consequences of a lack of predictability.

The New Zealand High Court has recently reiterated that any judicial search for relevant precedent would be “fruitless”, and that attempts to analyse factual similarities and differences, or reconcile outcomes, were likely to lead the judge into error.⁷⁹ The “sobering” reality is that frequently no ‘right’ or ‘wrong’ outcome exists,⁸⁰ and the very essence of discretion entails a range of

71 Peter Boshier “Have Judges been missing the point and allowing relocation too readily” (2010) 6 NZFLJ 334 at 334.

72 *D v S* [2002] NZFLR 116, (2001) 21 FRNZ 331 (CA).

73 At [37].

74 See Black, above n 70, at 2 and 13.

75 See John Eekelaar “Trust the Judges: How Far Should Family Law Go” (1984) 47 MLR 593 at 596.

76 See Mark Henaghan “Relocation Cases - the rhetoric and the reality of a child’s best interests - a view from the bottom of the world” (2011) 23 CFLQ 226 at 241 and Mark Henaghan “Doing the COCACobana – using the Care of Children Act for your child clients” (2008) 6 NZFLJ 53 at 56.

77 Peter McManus “Rules and Discretion in Family Law” (PhD thesis, University of Queensland, 2005) at 70-71.

78 See John Dewar “The Normal Chaos of Family Law” (1998) 61 MLR 467 at 469 and John H Wade “The Professional Status of Family Law Practice in Australia” (1985) 8 UNSWLJ 183 at 183-184 and 202.

79 See the observation of Winkelmann J in the relocation case *LH v PH [Relocation]* [2007] NZFLR 737 (HC) at [39]. To similar effect, see *S v L [Relocation]* [2008] NZFLR 237, (2007) 26 FRNZ 684 (HC) at [25] per Harrison J.

80 As noted by Priestley J in *Brown v Argyll* [2006] NZFLR 705, (2006) 25 FRNZ 383 (HC) at [38].

differing assessments and decisions being legitimately open to the judge.⁸¹ As the Supreme Court expressly acknowledged in *Kacem v Bashir*⁸² a lack of predictability in child law cases is “inevitable”.⁸³

That unpredictability, in turn, increases the likelihood of litigation in child disputes.⁸⁴ For a hopeful party (perhaps, most especially, a self-represented litigant) is surely encouraged to try out his or her chances in court, and become emboldened to persist until he or she gets, as Henaghan puts it, “... a judge who looks at the facts of the case the way the person wants them to”.⁸⁵ Quite perversely, the bypassing of principled rules in favour of an aspirational child-centric ideal has positively incentivised litigation, with all the concomitant dangers to the best interests and welfare of the individual child that are thereby entailed.

3. Attempts to shun the appearance of unfettered discretion: Reframing the judicial task

It has always been apprehended that the core task of a judge is to make definitive findings of law but, obviously enough, fact-finding is also a traditional and accepted judicial function. Perhaps for this reason, the judges may attempt to present and shape the discretion bestowed on them under the paramountcy principle into a more comfortable mould of evidence evaluating. For instance, the Supreme Court in *Kacem v Bashir* propounded the view that the Court was *not* in fact exercising a discretion, but rather was “... making an assessment and decision based on an evaluation of the evidence”.⁸⁶ Such language is admittedly comforting, but it must remain questionable whether the reality of making a decision on a child’s future welfare and best interests can be truly designated as evidentially based when the requisite evaluation of well-being in the future can, in truth, never be grounded on demonstrable, proven facts. Perhaps the rhetoric employed does not entirely convince.

4. Attempts to shun the appearance of unfettered discretion: Relying on social science

Consistent with the endeavour to inject an appearance of objectivity into decision-making on a child’s best interests, and the need for judges to be seen to base their decisions on “evidence” rather than “intuition”,⁸⁷ the Courts will often seek to rely upon a psychological report under s 133 of the Care of Children Act 2004. Provision of an expert opinion, of a purportedly scientific kind, could, as with the overarching language of evidence-evaluation, provide

81 *D v S* [2002] NZFLR 116, (2001) 21 FRNZ 331 (CA) at [37].

82 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

83 At [35].

84 As accepted in the report by Nicola Taylor, Megan Gollop and Mark Henaghan “Relocation Following Parental Separation: The Welfare and Best Interests of Children” (Law Foundation, Dunedin, 2010) at 144.

85 Mark Henaghan “Discretion, Status and Money: The Essence of Family Law in New Zealand” [2011] International Survey of Family Law 281 at 300.

86 *Kacem v Bashir*, above n 82, at [35].

87 See the dictum of Hardie Boys J in *M v Y* [1994] 1 NZLR 527, [1994] NZFLR 1 (CA) at 11.

a cloak of legitimacy for what would otherwise emerge as a starkly personal value judgment.

These s 133 reports, however, unfortunately rest on shaky legal and psychological foundations. First of all, undue judicial reliance on social science poses its own threat to notions of rule of law.⁸⁸ Secondly, and quite remarkably, there seems to be little science to support the use of psychological reports in disputes over the care of children,⁸⁹ and it is quite possible psychologists enjoy no special expertise in predicting the future behaviour and development of either the child or parents. Certainly social science research into the future welfare of children seems, at best, to provide only probabilistic predictive statements of minimal value in any particular case,⁹⁰ and, as the 2010 New Zealand Research Report into Relocation observed of the then available relocation research, “[t]he research findings are widely variable depending on the methodological approach utilised”.⁹¹ The s 133 reports, which may become less common in the future,⁹² are seemingly themselves essentially subjective evaluations.

5. Identifying limits to the discretion

It is a foundational principle of judicial review that the ambit of any statutory discretion is inherently limited by its statutory boundaries, irrespective of the breadth of the statutory wording conferring it.⁹³ As with any other statutory discretion, a Family Court judge exercising discretion granted under the Care of Children Act 2004 must therefore take into account all mandatory relevant matters, and disregard all irrelevant matters.⁹⁴ Here, at last, some constraints over discretionary decision-making in child law may be found to exist.

Certain considerations are expressly deemed irrelevant to the exercise of the discretion conferred under s 4(1) of the Care of Children Act 2004. For instance, issues of the parent’s gender and conduct must be excluded from the judge’s evaluation.⁹⁵ Other considerations, such as the child’s views, are

88 As pointed out by Ruth Deech “Divorce Law and Empirical Studies” (1990) 106 LQR 229 at 233–234.

89 See Robert E Emery, Randy K Otto and William T O’Donohue “A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System” (2005) 6 Psychological Science in the Public Interest 1 at 7–9 and Ira Turkat “On the Limitations of Child-Custody Evaluations” (2005) 42 Court Review 8.

90 The point made, for example, by both William G. Austin “Relocation, Research, and Forensic Evaluation, Part 1: Effects of Residential Mobility of Children of Divorce” (2008) 46 Family Court Review 137 at 138 and Kenneth Waldron “A Review of Social Science Research on Post Divorce Relocation” (2005) 19 American Academy Matrimonial Lawyers 337 at 344.

91 See Black, above n 70, at 9.

92 See the 2012 Cabinet Social Policy Committee proposals by the Office of the Minister of Justice, above n 66 at [120] and cl 22 of the Family Court Proceedings Reform Bill (90-1).

93 See *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

94 See the celebrated judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1, [1948] 1 KB 223.

95 Care of Children Act 2004, ss 4(3) and (4). Acts of violence do, of course, carry specific legal consequences. See now cl 4 of the Family Court Proceedings Reform Bill (90-1) that would modify the presumption in relation to conduct.

rendered explicitly mandatory for the judge to take into account,⁹⁶ and any failure to do so immediately renders the ensuing decision jurisdictionally suspect.⁹⁷ Very interestingly, the courts are also now beginning to identify matters that are *implicitly* mandatory in the exercise of Family Court discretion. For instance, following some strong hints uttered by the Court of Appeal in *Tavita v Minister of Immigration*,⁹⁸ it is now virtually certain that the 1989 United Nations Convention on the Rights of the Child is an implicitly mandatory consideration in the exercise of any statutory discretion that impacts on children.⁹⁹

With regards to the Treaty of Waitangi, Cooke P also intimated that if a decision touched on matters covered by the Treaty, such as 'taonga', then in order for a decision-maker to act reasonably he or she would need to take the Treaty into account.¹⁰⁰ In other words, the Treaty can be viewed as an implicitly mandatory consideration whenever 'taonga', including intangible cultural values, is in issue.¹⁰¹ Family organisation falls within the definition of 'taonga', and Gallen and Goddard JJ thus importantly declared:¹⁰²

... we take the view that all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect.

In judicial review parlance, it could therefore be said that it would be an 'abuse of discretionary power' if a Family Court Judge, when exercising his or her statutory discretion in relation to a Māori child, failed to take into account the principles of the Treaty. And, in relation to a child of any ethnicity, it would similarly be an 'abuse of discretion' if the judge was to fail to have regard to relevant provisions of the United Nations Convention.

The existence of these implicitly and explicitly mandatory considerations in the Care of Children Act 2004, and of the various matters that can be deemed irrelevant to the exercise of judicial powers, has created some potentially valuable legal boundaries. Without some significant prior qualification, it would be a little misleading to describe the discretionary powers of the judges under the paramountcy principle as 'unfettered'.¹⁰³ Yet,

96 Care of Children Act 2004, s 6.

97 *Brown v Argyll* [2006] NZFLR 705, (2006) 25 FRNZ 383 (CA) at [45] per Priestley J.

98 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, [1994] NZFLR 97 (CA).

99 See *Re An Unborn Child (No 1)* [2003] NZFLR 344 (HC) at [18] and [70(b)], *P v K* [2003] [2003] 2 NZLR 787, NZFLR 489 (HC) at [72] and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

100 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 560.

101 The High Court in *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 held at [59] that "taonga" extends to intangible cultural values.

102 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, [1997] NZFLR 642 (HC) at 184.

103 In *CAA v AAM [Parenting order]* [2012] NZFLR 109 (FC) Judge Wills did describe the discretion under s 48 as an "unfettered" discretion, but immediately qualified this statement by observing at [14] that it must exercised in "...a manner consistent with the Act's purposes and with regard to the principles identified in the Act."

while a degree of 'Law' can be seen to subsist in cases falling within the purview of the venerable and often venerated paramountcy principle, the challenge and desire for a more principled approach to future decision-making relating to children undoubtedly remains.¹⁰⁴

D. Who Gets the Money?

The last 50 years have been momentous for family law, not least when it comes to property and finance. Over those five decades, the fundamental approach to family property changed and, along with other areas of family law, the notes of equal treatment and inclusion have prevailed. Rather less pronounced is the place of children: their welfare is not the paramount consideration.

Precisely 50 years ago, the Matrimonial Property Act 1963 was passed along with its companion the Matrimonial Proceedings Act 1963. These were marks of the reforming Minister of Justice, Ralph Hanan. While the latter Act contained rules relating to the matrimonial home following divorce, the focus for now must be on the first of the two Acts.

The Matrimonial Property Act 1963 ("the 1963 Act") represented a radical shift from the past. The previous law, in effect, treated husbands and wives as strangers, applying the law of common law and equity that governed commercial and other dealings. At the time, the presence of women in the workforce was low, and property interests by and large favoured men. Some things ameliorated this position. First, divorced women could get maintenance payments, sometimes for life. Secondly, the Joint Family Homes Act 1950, revised by the Joint Family Homes Act 1964,¹⁰⁵ provided attractive incentives for couples to "settle" their homes under the Act on the basis of joint ownership. In its day – the post-war years – this Act was very popular because it was tied to cheap government finance for housing. More importantly, in hindsight, it played an important part in changing attitudes more generally to the way in which the law treated married couples and their property.

The 1963 Act turned the tables on a wider basis. It allowed the courts to make orders that overrode strict legal and equitable interests.¹⁰⁶ The basis for an order under the 1963 Act was the contribution of the parties to the property, but contribution to property could include the non-financial ones to home and family.¹⁰⁷ Thus, it was no longer just a matter of money, or what Woodhouse J referred to beguilingly in a later judgment as "the hypnotic influence of

104 See Henaghan's proposal for a prioritised 'discipline' for relocation cases in Henaghan "Relocation Cases", above n 76, at 241.

105 Almost certainly, it will be repealed by the Joint Family Homes Repeal Bill (2-1) 2012.

106 Section 5(3) of the 1963 Act.

107 Section 6(1) of the 1963 Act, in referring to contributions, stated "whether in the form of money payments, services, prudent management, or otherwise howsoever". The Privy Council in *Haldane v Haldane* [1976] 2 NZLR 715, [1976] 3 WLR 760 (PC) gave this a broad meaning, especially in relation to the tracing of domestic activities to property other than the home. The Matrimonial Property Amendment Act 1968 added subsection (1A) to section 6, stating that an order could be made notwithstanding that the spouse had "made no contribution to the property in the form of money payments or that [the] contribution in any other form was of a usual and not an extraordinary character".

money".¹⁰⁸ The Act did not allow an order to defeat the parties' common intention¹⁰⁹ but misconduct was not relevant if it was "not related to the acquisition of the property in dispute or to its extent or value".¹¹⁰

While the 1963 Act made strides in the direction of the recognition of non-monetary contributions and gender equity, it proved far from satisfactory.¹¹¹ It relied mostly on judicial discretion because of the inherent imprecision in evaluating the broadly based concept of contributions, and the share that wives got in property was often random. The 1963 Act represented a stepping stone to a much more concerted and conceptually pure regime. A Bill introduced by Dr Martyn Finlay, the Labour Minister of Justice, was shepherded through Parliament by the new National Government Minister, David Thomson, illustrating that the legislation had bi-partisan backing. One of the basic principles of the new legislation, the Matrimonial Property Act 1976 ("the 1976 Act"), was equal division of matrimonial property, reflecting the equal but different contributions that both spouses make to "the marriage partnership". It was described as "a new deal", and embraced "comparable sharing – the fairest approach".¹¹²

The 1976 Act excluded "separate property" from the division rules, that is property that is personal and not related to the marriage, and incorporated some exceptions to equal sharing: where the marriage was of short duration, where extraordinary circumstances rendered equal sharing "repugnant" to justice, and, in relation to property other than the home and chattels, where one party had made a clearly greater contribution to the marriage than the other. The 1976 Act expressly defined contributions to relate to the married life rather than to property and included a presumption that monetary contributions were not to be given priority over non-monetary ones.

The 1976 Act is sometimes dubbed a "deferred community" system.¹¹³ This is redolent of the European "community property" systems that, in broad terms, give both spouses equal rights to the property of the "community" upon marriage. Under the New Zealand legislation, entitlements are generally

108 *Reid v Reid* [1979] 1 NZLR 572, (1979) SMPC 298 (CA) at 581.

109 Section 6(2) of the 1963 Act.

110 Section 6A, as added by the Matrimonial Property Amendment Act 1968. Incongruously, general misconduct could be taken into account under Part VIII of the Matrimonial Proceedings Act 1963 in relation to the home.

111 WM Mansell "Whither Matrimonial Property?" (1971) 4 NZULR 271.

112 *Matrimonial Property – Comparable Sharing An Explanation of the Matrimonial Property Bill 1975* (Government Printer, Wellington, 1975) published under the name of the Minister, at 3 and 7. For more background to the 1976 Act, see JK McLay "The Matrimonial Property Act, 1976" in *The Matrimonial Property Act 1976: papers presented at the Legal Research Foundation Inc. seminar: 2nd February 1977* (Auckland University Legal Research Foundation, Auckland, 1977) at 7.

113 Pauline Vaver "Notes on the Matrimonial Property Act 1976" in *The Matrimonial Property Act 1976: papers presented at the Legal Research Foundation Inc. seminar: 2nd February 1977* (Auckland University Legal Research Foundation, Auckland, 1977) 55 at 55. See also AH Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 and Bill Atkin "Family Property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 209 at 211.

deferred until separation or, with more recent changes, until the death of one of the parties.

The 1976 Act altered the legal understanding of relationships. No longer was this understanding dominated by the husband and focused on money. Partnership and gender equality became the new paradigm. In some respects, when the legislation was passed, the typical model at the back of people's minds may have been the income-earning husband and the home-bound wife, but the law was drafted in a prescient way that provided for both this model and future developments such as the much greater participation of women in the paid workforce.

On the other hand, the Act included only certain kinds of domestic relationships. While the original Bill included de facto relationships, they were dropped out after the 1975 election and change of government. Same-sex relationships were barely on the horizon: the law on homosexual relations had not even been decriminalised. The notion of family in the Act was also a largely pākehā one: husband, wife and (probably) children. The Māori renaissance of the 1980s had yet to occur and thinking about family as whānau was still several years off. The only acknowledgment of tikanga Māori was in the exclusion of Māori land from the Act.¹¹⁴

What about children?¹¹⁵ Under s 26(1) of the 1976 Act regard must be had towards the interests of the children,¹¹⁶ and the court is given a seemingly sweeping power to "settle" relationship property for the benefit of the children. The reality is, however, that the children do not get a regular share of the property; instead it almost invariably goes to the parents. The power to settle has rarely been used, the view being taken that the equal division rule should not be upset. Usually fairly extreme circumstances are required, for example where one of the parents has abandoned the family and is not fulfilling support obligations to the children.¹¹⁷ So, the Act was and remains largely adult-focused.

Despite some question marks, the 1976 Act worked tolerably well and no storm of criticism emerged. To some extent, its success may be due to the case law that dealt with key issues within just a few years of the Act's coming into force. One of the dominant figures behind these cases was Woodhouse J, who embraced the principles of the Act without demur. This is less true of some other great judges such as Cooke J (as he then was)¹¹⁸ and High Court judges of note such as Mahon J.¹¹⁹ In short, these early cases reinforced the equal division rules at the heart of the Act. Examples of such cases include *Martin v*

114 See Property (Relationships) Act 1976, s 6.

115 See generally A Skellern *Children and the Property (Relationships) Act 1976* (LLM thesis, Victoria University of Wellington, 2012).

116 This was also in the "long title" of the original Act, and now found in s 1M(c), Property (Relationships) Act 1976.

117 See Bill Atkin and others *Fisher on Matrimonial and Relationship Property* (looseleaf, LexisNexis, Wellington) at [18.84].

118 In *Reid v Reid* [1979] 1 NZLR 572, (1979) SMPC 298 (CA) Cooke J would have divided the property 75/25 as against the majority's 60/40, a result that would have been far less favourable to the wife.

119 See *Baddeley v Baddeley* (1978) 1 MPC 10 (SC).

Martin,¹²⁰ which took a narrow view of extraordinary circumstances and marriages of short duration, *Haldane v Haldane*,¹²¹ which took a generous approach to superannuation, and *Reid v Reid*,¹²² which kept a tight rein on the ability to escape equal division for assets other than the home and chattels (the old s 15) and which rejected arguments that would have seen assets acquired during the marriage slip outside of the matrimonial property pool.

In 1988, the then Minister of Justice, Geoffrey Palmer, set up a Working Group to review the Act.¹²³ Several major issues still had to be dealt with, namely how to provide for widowed parties and de facto couples, both sidelined when the 1976 Act was passed. Apart from a number of more technical matters, a newer critique was made of the Act. It was argued that it provided for equality in theory but this did not translate into reality because husbands tended to leave their marriages in a much more secure economic position. Wives, a fortiori if they were primary caregivers of children, were often reduced to surviving on a benefit.

Although it took an unnecessarily long time, the issues were addressed in the major package of reforms passed in 2001. This is not the place to go into details¹²⁴ but, as far as inclusiveness is concerned, de facto couples and widowed persons are now treated, for most purposes, on the same footing as married couples (although most widowed persons will not need to use the Act). The key term “de facto relationship” includes same-sex couples and, with the passage of the Civil Union Act in 2004, civil unions are also included. With respect to equality, the rule in the old s 15 which allowed arguments about contributions to trump equal division was abolished. Of even greater significance was the introduction of a new s 15.¹²⁵ This gives the court a discretion to award compensation for disparities in earning power that can be traced to the parties’ cohabitation. In other words, a party’s disadvantage when incomes are compared becomes a significant factor in determining property entitlements. While the operation of this new form of compensation, especially calculating the quantum, gave rise to a lot of litigation and uncertainty, the Court of Appeal decision in *X v X [Economic disparity]*¹²⁶ appears to have enabled most disputes to be settled.

2001 is therefore a landmark year for the development of the principles of family property law, but that law remains largely mono-cultural and directed towards the interests of adults. The same is largely true of the law of maintenance and, ironically, child support. The starting point for these topics

120 *Martin v Martin* [1979] 1 NZLR 97 (CA).

121 *Haldane v Haldane* [1981] 1 NZLR 554, (1981) 1 NZFLR 43 (CA).

122 *Reid v Reid* [1979] 1 NZLR 572, (1979) SMPC 298 (CA), affirmed by *Reid v Reid* [1982] 1 NZLR 147 (PC). The decision in *Reid* on acquisitions led to an amendment to the Act but the underlying premise that property acquired for the benefit of the parties was to be classified as matrimonial property endures in a clarified form.

123 *Report of the Working Group on Matrimonial Property and Family Protection* (Ministry of Justice, Wellington 1988).

124 See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009).

125 See also s 15A, a companion section, which is very rarely used.

126 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601.

in a 50 year retrospective is the Domestic Proceedings Act 1968. It provided for the maintenance of wives, husbands and children, the grounds for husbands being more constrained than those for wives. De facto partners were ignored, although orders could be made to assist unmarried mothers.¹²⁷ The Family Proceedings Act 1980 consolidated the law, providing rules that were the same for husbands and wives but distinguishing between separated and divorced couples. It was not until the 2001 reforms that de facto partners were included and linked to the rules for divorced persons. Civil union partners are treated the same as married couples.

Maintenance recognises the mutuality of relationships and obligations that can endure, at least for a transitional period, beyond their separation. In this sense, maintenance, which has a long historical provenance, overrides legal and equitable interests in money. While it now treats differing kinds of relationships in much the same way and does not distinguish on the grounds of gender, it does not purport to equalise the financial positions of the parties.

The law on financial assistance for children is dominated by the Child Support Act 1991. Space does not permit more than a superficial gloss of the law.¹²⁸ It shifted child maintenance from the courts to the Inland Revenue Department, which determines financial obligations according to a formula that works well with computers. It has the great advantage of certainty but, because not all situations fit the standard pattern, it is possible for either the payer or the recipient to seek a "departure" from the formula. When the Act first came into force, it created havoc and the courts were deluged with departure applications. Although this all settled down after a while, the Act has been reviewed and a Bill is before Parliament at the time of writing that will make significant changes to the formula and various other rules.¹²⁹

From an overall perspective, we can note that the welfare of the child is not an object of the Child Support Act 1991 despite suggestions that it should be. Further, a child cannot seek child support, again despite suggestions that this should change. Although a recipient may be anyone who has care of the child, the Act is essentially based on a traditional family model. The court has power to declare someone a step-parent for the purposes of the Act and thus potentially be a liable parent¹³⁰ but this happens extremely rarely. Nothing however turns on the marital status of the parents. In sum, the Child Support Act 1991 is traditional in its ethos, but modern in its form of delivery.

E. Conclusion

New Zealand families have changed significantly over the past 50 years. In an attempt to keep pace with these societal changes New Zealand family law has

127 Section 53 of the Domestic Proceedings Act 1968, now found in ss 78–81 of the Family Proceedings Act 1980.

128 For more detail see Bill Atkin "Financial Support: Who Supports Whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013).

129 For more detail see the Child Support Amendment Bill 2011 (337-1) as introduced on 5 October 2011, the Child Support Amendment Bill 2011 (337-2) as reported on 31 October 2012 by the Social Services Committee, and the Child Support Amendment Bill 2011 (337-3) as reported on 27 February 2013 by the committee of the whole House.

130 Child Support Act 1991, s 99.

also changed dramatically, especially regarding who is encompassed by the legal definition of a family, how judicial discretion is exercised in family law cases involving children and how finances and property are shared upon separation or dissolution. The notion of the traditional nuclear family unit consisting of a married mother and father and their biologically related offspring still has its place in family law. However, the traditional family unit is no longer the only family group that enjoys significant legal recognition and protection. New Zealand family law now employs a much broader concept of families that includes a wide spectrum of familial relationships. The current debates surrounding adoption and marriage equality suggest that, although New Zealand family law has come a long way in the last 50 years, there is still a way to go to before all New Zealand families are treated equally by the law.