# Assessing the FISAbility of FISA: Will the Pendulum Swing Too Far?

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# Contents

## *Introduction*

*[T]he law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches.*[1]

Separation can be a devastating event for partners who will need to adjust to their newly single (or re-partnered!) lives. This, of course, can be a daunting process, particularly when child support, relationship property matters, and the like are involved. What is more, the financial effects of separation are generally worse for women which would only add to an already stressful situation.[2] Although both partners inevitably suffer financially,[3] until the last few decades the traditional nuclear family structure meant that the wife stayed at home to perform domestic duties while men were free to earn a living. This division of roles meant that women often faced heightened financial difficulties after divorce given that they had foregone their careers to, for example, look after their children.

Over time, legal changes were made in an attempt to alleviate the financial inequalities. New Zealand soon learnt that separate ownership of property was undesirable when women had little property. What emerged was a presumptive rule of equal sharing of relationship property which now features in the Property (Relationships) Act 1976 (PRA).[4] However, although relationship property was divided equally, the breadwinner often left the relationship with an enhanced earning capacity. This, of course, would not have been possible but for the stay-at-home partner who looked after the children and performed domestic duties. Thus, after separation, the less affluent partner often experienced financial inequality because of how the relationship had functioned.

In 2001, Parliament attempted to remedy the financial inequality flowing from the equal division rule by enacting section 15, an exception to the rule.[5] Section 15 enables the court to order compensation which takes the form of an increased share of relationship property.[6] The consensus

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[1] Rosalie Abella "Economic Adjustment On Marriage Breakdown: Support" (1981) 4 Fam.L.Rev 1 at 1.
[2] After equivalising incomes3, the mean short-term impact on women's equivalised income is a decrease of 19.3 per cent compared to an increase of 15.5 per cent for men: Michael Fletcher, David Maré and Tim Maloney "The Economic Consequences of Marital Separation for Parents in New Zealand: Insights from a Large Administrative Dataset" (2020) 34 IJLPF 289 at 307.
[3] See Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017).
[4] Property (Relationships) Act 1976, s 11.
[5] Property (Relationships) Amendment Act 2001, s 17 substituting the new Part 4 into the Property (Relationships) Act 1976.
[6] Property (Relationships) Act 1976, s 15(3).

in the Supreme Court decision of *Scott v Williams* is that s 15 has "not lived up to expectations".[7] Hence, it is no surprise that the Law Commission, in its review of the PRA, concluded that "section 15 has failed to provide an effective mechanism to share economic advantages and disadvantages".[8]

This paper focuses on the issue of quantum in s 15 and the Law Commission's proposed solution to the issue: the repeal of s 15 and Part 6 of the Family Proceedings Act 1980 (FPA) and, in its place, a limited entitlement to share family income through a Family Income Sharing Arrangement (FISA).[9] To put it briefly, FISA will calculate the economic disparity award through an income-based formula that produces a single amount. The central argument in this dissertation is that FISA swings the pendulum too far in favour of a rules-based solution. Ultimately, after examining FISA this paper advocates for the introduction of non-legislative guidelines, a merger of the respective advantages of rules and discretion.

This dissertation is structured in four parts. Chapter I introduces recent historical developments preceding s 15 and then examines the myriad of issues inherent in the application of s 15. Chapter II turns to the discretionary end of the rules versus discretion continuum and details the difficulties with discretion in two similar jurisdictions, England and Canada. Chapter III turns to an entirely rules-based solution; FISA. This chapter outlines how FISA will calculate an award before critiquing its application.

Lastly, Chapter IV turns to the contemporary use of guidelines in Canada; a middle ground between rules and discretion. This dissertation argues that localised guidelines should be created in New Zealand. These guidelines should use ranges for amount and duration as a "fetter" on judicial discretion which will facilitate more particularised decision-making. Further, it is suggested that The New Zealand Law Society's Family Law Section is the appropriate non-partisan body to create our version of non-legislative guidelines.

[7] *Scott v Williams* [2017] NZSC 185 at [279] per Arnold J.
[8] Law Commission *Review of the Property (Relationships) Act 1976 Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [10.15] subsequently referred to as the "Law Commission Final Report".
[9] See Chapter 10 of the Law Commission Final Report for a detailed discussion of the FISA recommendation.

## *I Where Did it Go Wrong?*

### *A Historical Developments*

Historically, a unitary system of property vested all property rights in the husband and afforded him the common law right of jus mariti.[10] Women could not protect their income and personal property.[11] The feminist solution was the creation of a separate property system enabling women to acquire, hold, and dispose of real or personal property as if she was feme sole.[12] Although justified on the grounds of equal rights, a wife's financial dependence on her husband meant that she had little separate property, nor an ability to earn income.[13]

Changing approach, the Matrimonial Property Act 1963 (MPA) divided property based on the parties' contributions. Its broad judicial discretion led to inconsistent and unpredictable outcomes.[14] The judge could make any order as he thinks fit,[15] and the judge had to have regard to the parties' contributions to the property.[16] Notably, it was the first statute to recognise non-financial contributions,[17] recognition of the wife's domestic contributions and indirect consequences on the family's fortunes.[18] However, the judiciary was slow to adopt this ethos. Contributions were discarded when they were not made to specific property. For example, in *E v E* the wife's claim to her husband's business proceeds failed despite her domestic contributions.[19] Conversely, Woodhouse J in *Hofman v Hofman* strongly supported the wife's non-financial contributions freeing her husband to earn the income in furtherance of their "joint enterprise".[20] Therefore, MPA failed to achieve post-separation financial equality because it was difficult for the less affluent spouse to establish a link between their contributions and non-domestic assets.[21]

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[10] John Priestley "Whence and Whither? Reflections on the Property (Relationships) Act 1976 by a Retired Judge" (2017) 15 Otago LR 67 at 67.
[11] M Briggs "Historical Analysis" in N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) at 2-3.
[12] Married Women's Property Act 1884, s 3(1).
[13] See Anne Barlow "Property and Couple Relationships: What Does Community of Property Have to Offer English Law?" in Anne Bottomley and Simone Wong (eds) *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Hart Publishing, Portland, 2009) 27 at 30; and Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 95 at 105.
[14] Priestley, above n 10, at 72-73.
[15] Matrimonial Property Act 1963, s 5(2).
[16] Section 6(1).
[17] Section 6(1A) inserted by section 6(1) of the Matrimonial Property Amendment Act 1968.
[18] Briggs, above n 11, at 10.
[19] *E v E* [1971] NZLR 859 (CA).
[20] *Hofman v Hofman* [1965] NZLR 795 (SC) at 800 per Woodhouse J.
[21] Nicola Peart (ed) *Relationship Property & Adult Maintenance Acts & Analysis* (looseleaf ed, Thomson Reuters) at 3. See Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 3 noting that typically one per cent of matrimonial property was allocated to each wife per year of marriage.

The partnership of marriage notion emerged in *Hofman*. This decision recognised that the wife's contributions (such as her skilful and provident management of household affairs) were equal to the husband's contributions to the property.[22] By this time, liberal feminist views believed that the solution was to split property down the middle.[23] Thus, the Matrimonial Property Act 1976 (MPA) introduced a deferred community property regime. This ensured that spouses enjoyed separate ownership of property during the relationship, but on separation matrimonial property was to be divided equally.[24] This presumption of equal sharing, therefore, reflects the partnership of marriage view.[25] Again, this view was not universally accepted by the judiciary.[26] As such, the courts failed to appreciate that "[t]he cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it".[27]

By the 1980s the view that equality is sameness was losing strength. On separation, a husband could walk away with an enhanced earning capacity as opposed to the wife's continuing childcare obligations and diminished earnings.[28] In 1988, the Minister of Justice convened the Working Group to address these concerns. The Working Group echoed the concern that a woman's living standards tend to decline whereas the husband's living standards prosper. To put it simply, "equality is not equity".[29] The Royal Commission on Social Policy also concluded that the law created inequalities of result.[30] Specifically, a spouse receiving half of the equity in the home is not placed in an equal position after separation.[31]

One lucrative asset in the marital partnership is the working partner's enhanced earning capacity.[32] Financial inequalities flowed from the fact that their enhanced earning capacity is not divisible. In *Z v Z (No 2)*, decided under the MPA 1976, the wife's future income was expected to be $7,000

[22] *Hofman v Hofman*, above n 20, at 800-802.
[23] Briggs, above n 11, at 13.
[24] Barlow, above n 13, at 30.
[25] Matrimonial Property Act 1976, s 11.
[26] See also *Baddeley v Baddeley* (1978) 1 MPC (SC) at 12 per Mahon J.
[27] Lord Simon "With All My Worldly Goods" (address to Holdsworth Club, University of Birmingham, 20 March 1964).
[28] Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 23-26. It should be noted that parenthood increases the gender gap in hourly wages as women face a 4.4 per cent reduction in hourly wage after becoming mothers compared to no significant reduction for men: Isabella Sin, Kabir Dasgupta and Gail Pacheco *Parenthood and labour market outcomes* (Ministry for Women, May 2018) at 34.
[29] Working Group on Matrimonial Property *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988) at 4.
[30] Royal Commission on Social Policy *Report of the Royal Commission on Social Policy* (Wellington, 1998) at 217.
[31] At 229.
[32] John Caldwell "The Case of Z v Z: Future Earnings, Matrimonial Property and Spousal Maintenance" (1996) 4 NZ L Rev 505 at 505; and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 at [142] per Baroness Hale.

per year compared to her husband's $300,000.[33] The Court of Appeal rejected the wife's claim that earning capacity could be matrimonial property that was to be shared equally. The Court was bound by the conventional concept of property as rights in respect of "things", not "persons".[34] Therefore, to expand "the definition of property to include a husband's enhanced earning capacity would be a radical departure from the conventional concept which Parliament chose to endorse".[35] The exception is when the earning capacity attaches to a legal interest within the definition of property, such as the husband's interest in an accounting partnership.[36]

In short, after a decade of inaction, the newly elected Labour-led Government built upon the former National Government's bills and enacted the current PRA to include the s 15 economic disparity provision and the inclusion of de facto and same-sex couples in the regime.[37] The Hon Margaret Wilson, the Associate Minister for Justice, labelled the changes as "fundamentally about fairness" and signalled that a wife may apply for lump sum payment and/or maintenance for economic disparities.[38] Therefore, Parliament's solution to the financial inequality problem was to allow the court to depart from equal sharing where there is economic disparity arising from the division of functions.[39] Sections 15-15A intended to achieve equality of result in the transition to substantive equality.[40]

### *B Preliminary Problems*

The unanimous view is that s 15 has had minimal success.[41] This will be highlighted in greater detail below. What will not be discussed further is s 15A which deals with situations where the value of separate property increases. Our focus is on how to share the fruits of the partnership.

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[33] *Z v Z (No 2)* [1997] NZFLR 241 (CA) at 258.
[34] At 261-263.
[35] At 264.
[36] At 246.
[37] See generally Briggs, above n 11, at 15-17 for a detailed overview of the legislative process. It is also noteworthy that following the 2001 amendments, in 2005 the Property (Relationships) Amendment Act 2005 extended the application of the Property (Relationships) Act 1976 to civil unions.
[38] Atkin, above n 21, at 11.
[39] Property (Relationships) Act 1976, s 15.
[40] Vivienne Crawshaw "Section 15 – a satellite overview" (2009) 6 NZFLJ 155 at 155; and Mark Henaghan "Sharing Family Finances at the End of a Relationship" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 293 at 311.
[41] Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC, IP41, 2017) at [18.1] and [19.1] subsequently referred to as the "Law Commission Issues Paper". A recent survey of lawyers in New Zealand indicates that about 30 per cent of respondents believe s 15 to be a problem area: Grant Thornton *New Zealand Relationship Property Survey 2019* (Family Law Section of the New Zealand Law Society, November 2019) at 30. The report is currently available at: http://www.familylaw.org.nz/__data/assets/pdf_file/0010/141220/GTNZ-NZLS-RP-2019-FINAL.pdf

Section 15 enables the court to order compensatory adjustments to the economically weaker party through a lump sum or transfer of property.[42] Claims generally arise in two scenarios. First, where the less affluent partner supports their partner to obtain a qualification or experience which enhances their earning capacity (enhancement claims). Second, a partner forfeits their career to take up childcare or domestic duties in supporting the relationship (diminution claims).[43] Three hurdles must be satisfied for a s 15 claim: disparity, causation, and whether an award is just in the circumstances.[44] For the court to have jurisdiction the disparities in income and living standards must be caused by the division of functions. If so, the court may then use its discretion to make a compensatory adjustment. In making this assessment the purposes and principles in ss 1M-1N are relevant.[45] Before discussing the manifold issues with s 15, it is convenient to set out s 15 in its entirety:

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

(1) This section applies if, on the division of relationship property, the court is satisfied that after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the court may have regard to—

- (a) the likely earning capacity of each spouse or partner:
- (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
- (c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

- (a) order party B to pay party A a sum of money out of party B's relationship property:
- (b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

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[42] Property (Relationships) Act 1976, s 15(3). However, Hammond J in *M v B (Economic disparity)* [2006] NZFLR 641 (CA) at [223] commented that the amendment is in part restitutionary because the wife's losses are related to the husband's gains.

[43] *X v X [Economic disparity]* [2009] NZCA 399 at [49]-[50].

[44] *M v B*, above n 42, at [125]. See *Smith v Smith* [2007] NZFLR 33 (FC) at [52] for a summary of authoritative principles drawn from appellate court authorities.

[45] *Scott v Williams*, above n 7, at [143].

Parties must satisfy the court that the income and living standards of one partner are likely to be significantly higher than the other partner's. What constitutes "significantly higher" remains uncertain despite the Court of Appeal adding that it needs to have a "material impact on the life of one party" or "more than a trivial disparity".[46] Similarly, "income" is not defined in s 15 and its scope is inconsistently defined. Robertson J in *X v X [Economic Disparity]* advanced a broad definition to include all periodic streams of money.[47] *Scott* narrowed the focus to preclude income derived from relationship property, for the effects of property division should be neutral.[48] *Scott* is arguably arbitrary and inconsistent with the wide discretion in s 15 which would support the articulation of "income" from *X v X*.[49]

Section 15 also sits uncomfortably in the PRA. First, its broad discretion leads Bill Atkin to conclude that "it is very hard to see how s15 … square[s] with [the] essential basis of the Property Relationships Act 1976".[50] That is because the PRA is a rules-based property sharing regime. Second, the internal focus in s 15 is conceptually inconsistent. That is because the basis of an award comes from a forward-looking consideration of whether there are likely to be future disparities.[51] However, awards are limited to the present size of the relationship property pool (excluding future income).[52] Third, the "clean break" principle may be in tension with s 15. A "clean break" refers to the idea that partners should be able to achieve a final division of their relationship property before being free to live their lives unencumbered by continuing financial ties on the property from their former partner.[53] Claire Green contends that assessing future disparities contravenes the clean break principle because the spirit of a clean break is not to consider the future positions of the parties.[54] However, in other ways, s 15 promotes a clean break. The liable partner is not ordered to support the claimant for the future, but instead to "shoulder some of the economic disadvantage that was caused by the relationship, and suffered by the claimant".[55]

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[46] *X v X*, above n 43, at [77] and [83]. In *Scott v Williams*, above n 7, at [348] per Elias CJ explains that s 15 is concerned with the relative justice between the parties.
[47] *X v X*, above n 43, at [88] per Robertson J.
[48] *Scott v Williams*, above n 7, at [254] per Glazebrook J and [329] per Arnold J.
[49] At [452] and [462] per William Young J; and see Atkin, above n 21, at 111.
[50] Bill Atkin "The Disparity in Economic Disparity – the need for a full-scale overhaul of ss15 and 15A and maintenance" (NZFL Conference, 10 October 2005) 207 at 210.
[51] *de Malmanche v de Malmanche* [2002] NZLR 838 (HC) at [153] per Priestley J; and *Scott v Williams*, above n 7, at [289] per Arnold J.
[52] Green, above n 28, at 14-15.
[53] Law Commission Final Report, above n 8, at [2.63].
[54] Green, above n 28, at 16.
[55] Atkin, above n 21, at 118. Contrast the maintenance provisions in Part 6 of the Family Proceedings Act 1980 which allow for regular payments for a period to cover the claimant's reasonable future needs.

## *C Causation*

### *1 A strict approach*

If the disparity threshold is satisfied, the court then considers whether the disparity is "because of" the effects of the division of functions.[56] The causation hurdle, unfortunately, is where many claimants trip up.[57] The Law Commission estimates approximately 20 per cent of claims fail at this hurdle compared to Fae Garland's finding that 29 out of 60 cases failed to establish a causal link.[58]

A strict approach to causation required the division of functions to be the principal cause of the disparity. The high evidential burden required a "but for" causal link between the division of functions and the claimant's loss of earning ability or enhancement of the liable partner's earning capacity. It also applied counterfactuals; for example: what would the claimant's likely future income be "but for" the relationship? Thus, this test was highly speculative and promoted unedifying and damaging arguments.[59] It was also insurmountable for non-career partners without a history of paid employment because there was no basis to assess their likely income if they had never worked. In *CH v GH*, despite a $1,000,000 disparity, the claimant who had become a mother at the age of 16 was unable to show that the division of functions had a detrimental effect on her career because she had no previous employment history.[60] Accordingly, this approach had put "the jurisdictional bar too high".[61]

### *2 The working assumption*

The Court of Appeal in *X v X* advanced a presumption of causation. If one partner is employed full-time and the other performs unpaid domestic work, it is presumed that the arrangements are agreed to.[62] The presumption was effectively endorsed in *Scott*, and a recent High Court decision has also noted that *Scott* is authoritative guidance on this point.[63]

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[56] Section 15(1).
[57] Bill Atkin "Family Property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 193 at 231.
[58] Law Commission Issues Paper, above n 41, at [18.44]; and Fae Garland "Section 15 Property (Relationships) Act 1976: Compensation, Substantive Equality and Empirical Realities" (2014) 3 NZ L Rev 355 at 363 reviewing 60 cases that have used s 15.
[59] *Scott v Williams*, above n 7, at [309]-[310] per Arnold J.
[60] *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.
[61] *M v B*, above n 42, at [201] per William Young P.
[62] *X v X*, above n 43, at [104]-[105]. The presumption is rebuttable by clear evidence to the contrary or compelling evidence.
[63] *Gosbee v Gosbee* [2020] NZHC 1001 at [4] per Walker J. It should also be noted that Atkin, above n 21, at 111 asserts that *Scott* is arguably obiter dicta on the issue of causation.

*Scott* held that in relationships conducted "along traditional lines", the "working assumption" is that the division of functions caused the disparity.[64] The assumption may be displaced by strong evidence of other causative factors.[65] For example, illness[66] or when the career partner enters a short-duration relationship with an established business.[67] In contrast, long-duration relationships would unlikely displace the assumption.[68] While the assumption assumes the division of functions causes the entire disparity, the High Court recently suggested that a partial rebuttal of the working assumption is possible.[69]

Various issues with the assumption are noteworthy. Nikki Chamberlain suggests that Arnold J's reliance on *X v X* was ill-founded. In that case, it was presumed that the division of functions was pursued by the parties. That is distinct from assuming that the disparity was caused by the division of functions.[70] The assumption also is contrary to the express statutory wording which contemplates a causation inquiry.[71] Further, as the assumption can be rebutted, this may allow respondents to still provide unsatisfactory evidence, contrary to the intended removal of unedifying evidence from claims.[72] Hence, Atkin also cautions whether the assumption is contrary to the understanding that onuses of proof are unsuitable in the PRA.[73] Despite these concerns, the present position is that causation may be assumed in relationships conducted along traditional lines.[74] The assumption is consistent with the principle that all contributions are considered equal, and it may prevent parties from advancing damaging arguments, such as arguments that the disparity is caused by their talent and skill.[75] Thus, it should reduce the burden on claimants in establishing a causal nexus. Above all, minimising the causal nexus hurdle should be warmly accepted by future claimants.

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64 *Scott v Williams*, above n 7, at [203]-[204] per Glazebrook J, [311] and [323] per Arnold J, and [345] per Elias CJ.
65 At [293] per Arnold J.
66 The recent decision of *Quinn v Quinn* [2019] NZFC 105 at [39]-[40] successfully displaced the assumption due to illness.
67 *Scott v Williams*, above n 7, at [325] per Arnold J; and *Preston v Preston* [2019] NZHC 3389 at [118].
68 *Scott v Williams*, above n 7, at [323] per Arnold J and [264] per Glazebrook J.
69 *Gosbee v Gosbee*, above n 63, at [47] and [51].
70 Nikki Chamberlain "The Future of Economic Disparity Redress in New Zealand" (2018) 28 NZULR 293 at 302.
71 *Scott v Williams*, above n 7, at [382] per O'Regan J and [446] per William Young J.
72 Chamberlain, above n 70, at 304.
73 Atkin, above n 21, at 112.
74 *Quinn v Quinn*, above n 66, at [37].
75 *Scott v Williams*, above n 7, at [205] per Glazebrook J, [309]-[310] per Arnold J and [345] per Elias CJ.

### 3 *Enhancement claims*

A collateral issue is that it is notoriously difficult to establish an enhancement claim. Diminution claims are easier to establish because it is easier to show a loss of career was caused by the relationship than showing that the relationship enhanced the other partner's earning capacity.[76] For enhancement claims, the division of functions must be the sole cause of the disparity, a more onerous causation requirement. Further, respondents have argued that the enhancement is caused by their skill and ability, not because of the claimant's role.[77] The so called "nanny argument" has occasionally succeeded, where respondents argue that a nanny could have performed the claimant's domestic role.[78] These arguments have the unwelcome effect of diminishing the value of the claimant's domestic contributions to the partnership, contrary to the principle that a just division of relationship property has regard to the economic advantages and disadvantages.[79]

## *D Quantum*

### 1 *Precise calculation or a broad brush approach?*

If the jurisdictional requirements are met the claimant may receive an order for payment or transfer of relationship property to compensate for the disparity.[80] The principal difficulty for the court is the lack of guidance on how to calculate compensation. At least six methods have been used to compensate compensation.[81] The *Scott* litigation provides a perfect example of this issue in light of the wildly differing awards granted across the judicial system.[82] Thus, the "disparate results on economic disparity at differing levels of the judicial hierarchy are testament to the unfortunate fluidity of the concept".[83]

Before *Scott*, quantification predominantly followed the *X v X* methodology, although this was not the only available approach.[84] The *X v X* methodology only applied to diminution claims and did

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[76] Law Commission Issues Paper, above n 41, at [18.55]-[18.59]; and Atkin, above n 21, at 118. Note that in a review of cases between February 2002 to January 2019, 25 of 35 cases used the diminuition method: Emma Littlewood "Economic disparity at the end of a relationship – is FISA the answer?" (2019) 9 NZFLJ 165 at 166.
[77] Henaghan, above n 40, at 318.
[78] See generally Susannah Shaw "Disparity in *Jack v Jack*: Judicial Overreach or a Just Result at Long Last?" (2014) 45 VUWLR 535 at 538-541.
[79] Seb Recordon "Rules or Discretion? Towards a better approach to quantum in addressing post-separation economic disparities in New Zealand" (2019) 3 NZWLJ 100 at 106.
[80] Section 15(3).
[81] Littlewood, above n 76, at 165.
[82] In *Williams v Scott* [2014] NZFC 7615 Judge McHardy awarded $850,000. The High Court in *Williams v Scott* [2014] NZHC 2547 reduced the award to $280,000. The Court of Appeal in *Scott v Williams* [2016] NZCA 356 increased the award to $470,000. A majority (Glazebrook, Arnold and O'Regan JJ) of the Supreme Court in *Scott v Williams,* above n 7, at [271] awarded Ms Scott $520,000. At [358] Elias CJ opined that the issue should be remitted back to the Family Court for reconsideration. At [477] William Young J would have reduced the award to $188,000.
[83] Atkin, above n 21, at 121.
[84] *X v X*, above n 43, at [175].

not apply where the less affluent partner had no pre-relationship employment.[85] Its attractiveness was that it was predictable and structured. However, it was costly and uncertain for claimants in calculating the "but for" income which relied heavily on expert opinion evidence.[86] Costly proceedings ultimately created the expectation that claims were financially inviable.[87] This methodology contravened the principle that proceedings should be resolved as inexpensively, simply, and speedily as is consistent with justice.[88]

*M v B* favoured a wider "broad brush" approach because "[s]ection 15 awards are necessarily a matter of impression, and rote applications of a formula will not be appropriate".[89] That approach was revived in *Jack v Jack's* "jury assessment" approach.[90] In *Jack*, Goddard J upheld the Family Court's broad brush approach which awarded the wife 70 per cent of the relationship property. This award was calculated without a clear explanation, for the Family Court simply referred to numerous factors including Mrs Jack's home support, assistance in setting up Mr Jack's practice, the couple's ages, and childcare responsibilities.[91] *Jack* is simply one instance of a court reaching an "impressionistic" figure for quantum.[92] However, *Sparks v Prescott* noted that "it is one thing to take a broad brush approach to inherently imprecise calculations, but there has to be some financial evidence and employment evidence on which to base such findings".[93] Thus, while there must be some financial evidence to justify the amount ordered, there is lessening importance of relying on financial expert evidence which, in turn, led to uncertainty and unpredictability in calculating compensation.[94] *Scott* likely represents an implied repudiation of the broad brush approach because a rational method is necessary, although no one method was prescribed.[95]

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[85] Recordon, above n 79, at 108.
[86] Green, above n 28, at 67.
[87] See Law Commission Final Report, above n 8, at [10.15(a)]
[88] Section 1N(d).
[89] *M v B*, above n 42, at [147].
[90] *Jack v Jack* [2014] NZHC 1495, formerly known as *Carpenter v Carpenter* [2013] NZFC 8396.
[91] *Jack v Jack*, above n 90, at [68]-[70].
[92] Atkin, above n 21, at 119.
[93] *Sparks v Prescott* [2016] NZFC 275 at [86].
[94] See Recordon, above n 79, at 109-110.
[95] *Scott v Williams*, above n 7, at [265] per Glazebrook J and [357] per Elias CJ. *Gosbee v Gosbee*, above n 63, at [59] observed that the Supreme Court viewed there to be no single approach mandated.

*2 A wasted opportunity?*[96]

In *Scott,* the jurisdictional elements were not in issue. The sole issue for determination was the appropriate methodology to calculate compensation.[97] In light of the problems with counterfactuals, Arnold J's proposed methodology gained general support, focusing on the actual disparity, a somewhat broader inquiry.[98] The "quantification methodology" advanced by Arnold J is generally as follows:[99]

1. Identify the extent of the disparity resulting from the division of functions (likely most easily done by considering the income and living standards);[100]
2. Consider how long the disparity should be compensated for. This does not necessarily correlate to the potential working life of either party because: the non-career partner is expected to undertake income-earning activities and the career partner's personal autonomy must be recognised (to move on with his or her life);
3. Apply the necessary discounts to cover the contingencies of life (for example, illness and redundancy) and taxation;
4. Calculate a present value for the annual figures thus derived to identify a particular sum;
5. Halve that sum. This is necessary to avoid transferring the full disparity to the career partner.

The starting point is that for relationships conducted along traditional lines, the whole disparity is the extent of the disparity. As O'Regan and William Young JJ pointed out, the division of functions may partially cause the disparity.[101] In other words, the disparity may have other causes besides the division of functions. As recognised in *Gosbee*, if the disparity has other causes then adopting the entire disparity as the starting point for an award may overcompensate the claimant.[102] Thus, where the division of functions is not wholly responsible for the disparity, it would be unjust to compensate for the full disparity.[103] Accordingly, the compensatory award should reflect the partial rebuttal of the working assumption.

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[96] A survey of New Zealand lawyers found that 64 per cent of respondents believed that *Scott* had not made s 15 more workable in practice: Thornton, above n 41, at 28.
[97] *Scott v Williams*, above n 7, at [159] per Glazebrook J.
[98] At n 296 per Glazebrook J and [385] per O'Regan J.
[99] The quantification method is set out in its entirety at [326] per Arnold J. Note that when New Zealand lawyers were asked about whether they had seen a change in approach following *Scott*, 35 per cent did not know and, of the remainder, 47 per cent said "yes" and 54 per cent said "no": Thornton, above n 41, at 30.
[100] Arnold J departs from the starting point in *X v X* ("but for" income) and focuses on the extent of disparity.
[101] *Scott v Williams*, above n 7, at [385] per O'Regan J and [450] per William Young J.
[102] *Gosbee v Gosbee*, above n 63, at [52].
[103] At [54].

The second step of Arnold J's quantification methodology considers the duration of compensation. This step may contravene the clean break principle. On the one hand, Arnold J observed that the clean break principle provides some guidance to limit duration. That is, a court may expect that the non-career partner will take steps after separation to become financially independent over time to recognise the importance of autonomy for the partners.[104] On the other hand, applying Green's argument that s 15 does not sit logically with the clean break principle, Arnold J's forward-looking calculation of disparity (step one) and its projection (step 2) should not be undertaken because the clean break principle is not concerned with the parties' future positions.

Moreover, the issue of halving is also contentious, particularly because it is contrary to the express wording in s 15.[105] Many lower-level authorities suggest that halving is appropriate to avoid reversing the disparity.[106] In *X v X*, the Court of Appeal agreed that an award should be halved, using the *X v X* methodology, to share the loss between the parties.[107] Arnold J's quantification methodology also favours halving, yet Glazebrook J accepted that halving is not always appropriate to prevent a reversal of the disparity.[108] For example, if a broad brush approach is used without reference to the actual incomes or disparity it may not be appropriate to halve the award.[109] The step of halving the award may preserve the disparity when contingencies are applied to further reduce the amount payable to the claimant.

Awards are limited to the size of the relationship property pool.[110] One live issue is whether 100 per cent of the relationship property can be awarded to the claimant. Arnold J held that because the award must be "just" under s 15(3), the career partner must be able to move on with their life which would suggest that in most instances an award will be only for part of the career partner's share of relationship property.[111] Conversely, Elias CJ noted that where the relationship generated a small relationship property pool and there is a significant disparity it would not be unlikely that an award could be made for the entire share.[112] Furthermore, low-income earners are prejudiced by the cap on awards confined to the size of the relationship property pool. For example, a low-income earning couple accrues minimal assets, but on separation one partner signs a lucrative

[104] *Scott v Williams*, above n 7, at [318] per Arnold J.
[105] Law Commission Issues Paper, above n 41, at [18.99].
[106] For example, *Smith v Smith,* above n 44; *E v E* [2005] NZFLR 313 (FC); and *V v V* HC Wellington CIV-2006-485-764, 8 December 2006.
[107] *X v X*, above n 43, at [231] and [233].
[108] *Scott v Williams*, above n 7, at [326] per Arnold J and [215] per Glazebrook J.
[109] Atkin, above n 21, at 125.
[110] Compare section 15A.
[111] *Scott v Williams*, above n 7, at [327] per Arnold J.
[112] At [357] per Elias CJ.

$300,000 contract which is outside the grasp of s 15.[113] Thus, after the division of relationship property one partner exits the relationship with an enhanced earning capacity. The other partner's compensation, if any, would only be modest as limited by the relationship property pool. Even if an award is made, the strong fifty-fifty ideology in the minds of the judiciary may explain why awards are generally conservative.[114] As such, litigation only occurs when the relationship property pool is significant.[115] This raises access to justice issues because lawyers would simply advise their clients with modest relationship property pools that a claim is not worthwhile. Thus, s 15 is a "remedy for the rich" which fails to protect the economically vulnerable.[116]

*3 The discretionary exercise and overlap with maintenance*

Whether a compensatory award is granted depends on whether an award would be just.[117] Section 15(2) ensures that the court considers the likely earning capacities of the partners, responsibilities for the daily care of children, and any other relevant circumstances.[118] Initially, it was suggested that s 15 had "tight jurisdictional parameters".[119] At present, s 15 confers broad discretion.[120]

In theory, its broad discretion facilitates flexible decision-making after considering the factual circumstances before the court. The uncertainty as a product of the discretion in s 15 has increased legal costs.[121] The normative question is how broad discretion should be following the lack of Parliamentary guidance.[122] On the one hand, broad discretion conflicts with the presumption of equal sharing and concomitant values of certainty and predictability of result.[123] On the other hand, many circumstances will be relevant to the future earning abilities of the parties, in which case, it may be arbitrary to limit the discretion. *Scott* held that the Court of Appeal erred in considering, among other things, other judicial decisions and the size of the relationship property pool applicable to each other.[124] In contrast, the High Court in *Holroyd v Holroyd* saw no reason to depart from the Family Court decision which took into account, among other relevant factors, the

[113] Law Commission Issues Paper, above n 41, at [18.111]-[18.113].
[114] Green, above n 28, at 328-329.
[115] Recordon, above n 79, at 105.
[116] Garland, above n 58, at 362 empirically found that lower-income cases were less likely to satisfy the disparity threshold and, accordingly, less likely to receive compensation.
[117] Section 15(3).
[118] *X v X*, above n 43, at [111] and [115]. See generally Atkin, above n 21, at 115-116 for a summary of relevant factors in the exercise of discretion.
[119] *de Malmanche v de Malmanche,* above n 51, at [157] per Priestley J.
[120] *Scott v Williams,* above n 7, at [287] per Arnold J and [386] per O'Regan J. Compare Glazebrook J at [214].
[121] Deborah Chambers "New Zealand Family Property Laws Continue to Fail Women" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 71 at 73.
[122] See Henaghan, above n 40, at 320.
[123] Crawshaw, above n 40, at 155.
[124] *Scott v Williams*, above n 7, at [253]-[254] and [271].

respondent's share of relationship property in awarding compensation of $100,000.[125] While *Scott* limited the broad discretion, it appears that recent High Court decisions have adopted the merits of a broad approach in determining whether an award is just.[126]

Section 15 and maintenance are siloed into distinct legislation despite their related issues.[127] The PRA governs the division of property while Part 6 of the FPA governs maintenance. Both regimes deal with financial welfare issues upon the end of a relationship.[128] Both provisions also transfer value from the more affluent partner after assessing the income differential between the parties. Economic disparity is compensatory whereas maintenance provides temporary financial support to meet the recipient's financial needs in the transition to post-separation independence.[129] Hammond J in *M v B* noted that the 2001 amendments made to the FPA, notably ss 64(2) and 64A, are designed to "sit alongside" the PRA and allow the courts to fully address issues of disparity.[130] This distinction between compensation and meeting financial needs was blurred by Hammond J in *M v B*. Hammond J held that compensation for future economic disparity is the "functional equivalent" of a lump sum for maintenance.[131] As both claims are often conflated, the awards appear to be justified on similar grounds.[132] Accordingly, an "uneasy tension" exists because of the overlapping nature of s 15 and maintenance.[133]

The link between s 15 and maintenance proceedings required Parliament to include cross-referencing provisions in the PRA and FPA.[134] This has had limited success because the courts have struggled with determining the procedural ordering of claims.[135] Regardless, s 15 claims are generally assessed first. The reasoning in *P v P* provides a compelling case for the proposition that s 15 should be addressed first: the "reasonable needs" of the recipient can only be assessed after

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[125] *Holroyd v Holroyd* [2020] NZHC 1210 at [6(f)] and [12].
[126] See also *Gosbee v Gosbee*, above n 63, at [67] where Walker J took a "holistic approach".
[127] Contrast the approach of England in Wales in the Matrimonial Causes Act 1973 (UK).
[128] John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 393 at 393.
[129] *M v B*, above n 42, at [124] per Robertson J and [191] per William Young P. Compare [223] per Hammond J.
[130] At [220] per Hammond J.
[131] At [245] and [272] per Hammond J.
[132] Law Commission Issues Paper, above n 41, at [19.42] and [19.60]-[19.62].
[133] Green, above n 28, at 147; and Bill Atkin "Financial Support – who supports whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020) 149 at 188.
[134] Section 32 of the Property (Relationships) Act 1976 requires the court in a relationship property proceeding to have regard to previous maintenance orders. It also permits the court to make a maintenance order. Section 65(2)(a)(ii) of the Family Proceedings Act 1980 provides that the court must have regard to the means derived from any division of property when determining quantum for a maintenance order.
[135] Robertson J in *M v B*, above n 42, at [122] and [125] opined that property division is to be determined first. At [207] William Young P suggested that the order of applications did not matter. At [247] Hammond J noted that property division would be resolved before maintenance.

ascertaining whether the recipient will receive a lump sum or transfer of property under the PRA.[136] Ideally, therefore, PRA proceedings would be assessed first. Logistically, this may not be possible where there are long delays between dissolution and resolution of property issues.[137] Regardless, *de Malmanche v de Malmanche* has allowed the s 15 discretion to be used in a way that curtails the difficulties with the s 15 hurdles. To decline a s 15 award consequently allows the court to order maintenance to offset the post-separation financial disadvantages.[138] Therefore, despite the theoretical differences between s 15 and maintenance, the borders between both claims ostensibly remain uncertain.

### *E Conclusion*

Section 15 may be likened to a "Pandora's box"; a present which at the time seemed valuable but in reality was a curse. This chapter canvassed the manifold issues with s 15 to demonstrate the need for reform. The Supreme Court in *Scott* postulates as much, noting that s 15 "cannot be accounted to have been successful in meeting its purpose".[139] Thus, it is necessary to closely consider how New Zealand can reduce the financial inequalities experienced after separation.

[136] *P v P* [2005] NZFLR 103 (CA) at [67].
[137] *NGC v HAH [Maintenance]* [2010] NZFLR 677 (HC) at [64].
[138] *de Malmanche v de Malmanche*, above n 51, at [191] per Priestley J.
[139] *Scott v Williams*, above n 7, at [351] per Elias CJ.

## *II International Difficulties with Discretion*

### *A Introduction*

Contemporary family law regimes are turning to more rule-like provisions for financial relief.[140] For the reasons outlined in Chapter I, reform is on the horizon in New Zealand as the Law Commission recommends the implementation of FISA, a rules-based formula. Chapter III will examine the FISA recommendation which will radically shift New Zealand along the rules versus discretion continuum.[141] This chapter instead focuses on how England and Wales and Canada have grappled with and responded to their issues with discretion. This chapter brings to light why broad discretion is an unworkable solution for quantifying economic disparity awards.

### *B Rules and Discretions*

Rules and discretions are not a choice between two alternatives. The question is what the correct mix of rules and discretion in the particular circumstances is. Before addressing this question throughout this paper, it is necessary to outline the respective benefits of rules and discretions.

Generally, rules generate rough justice and decent outcomes by reducing the number of available outcomes.[142] Rules enable private citizens to organise their lives rationally; a planning function due to the "public" nature of rules.[143] Under s 15, parties could not plan their lives because it was uncertain which of the quantification methodologies would be used. Additionally, the high causation threshold prevented partners from being confident as to whether it would be satisfied, or not. Rules promote treating like cases alike which prevent bias and discrimination in decision-making.[144] Simply put, rules generate consistent and predictable resolution of cases.

Discretion allows decision-makers to achieve individualised justice after considering the particular circumstances of the case.[145] Litigating parties experience the feeling of procedural fairness because they feel that their case is properly heard on its merits.[146] When the stakes are high the use of

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[140] Carol Rogerson "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in Mavis Maclean, John Eekelaar and Benoit Bastard (eds) *Delivering Family Justice in the 21st Century* (Hart Publishing, Oxford, 2015) 51 at 53.
[141] Carl Schneider "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27 Fam.L.Q. 229 at 232 locates rules and discretion along a "continuum".
[142] Emma Hitchings and Joanna Miles "Rules Versus Discretion in Financial Remedies on Divorce" (2019) 33 IJLPF 24 at 26.
[143] Schneider, above n 141, at 237.
[144] Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others *Law Policy in Modern Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017) 261 at 266.
[145] Schneider, above n 141, at 234.
[146] Miles, above n 144, at 267.

discretion may be justified because of the desire to reach the right answer. Discretion enables the law to resolve disputes in volatile areas of law and where there is a lack of consensus on the rules or values that should apply.[147] In short, the flexibility offered by discretion is its justification.

Assessing whether discretion is desirable requires a general understanding of what judicial discretion is. HLA Hart stated:[148]

> It seems to me then that discretion occupies an intermediate place between choices dictated by purely personal or monetary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious.

For HLA Hart, discretion is not the exercise of choice. Discretion is reasoned and constrained decision-making that appeals to rational principles.[149] Along a spectrum, discretion occupies the intermediary space between determinate rule application and arbitrary choice.[150] Discretions can be either weak or strong. Strong discretions are not bound by pre-determined standards while the former involves the use of judgement or are unable to be reviewed or reverses by other officials.[151] Importantly, rules and discretions are not the only available options. For example, factors, guidelines, and presumptions are also available to tackle the mischief that Parliament aims to counteract. Thus, Parliament must carefully consider whether rules, discretion, or a halfway house is optimal. Even a mixture of these options is theoretically possible. The following discussion suggests that broad discretion is unsuitable.

### *C English Difficulties*

#### *1 Statutory framework*

England and Wales do not have a statutory objective to guide the courts when making ancillary relief orders on divorce.[152] In circumstances other than divorce, parties must look to the law of property and trusts for their entitlements.[153] On divorce, the Matrimonial Causes Act 1973 (MCA)

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147 Hitchings and Miles, above n 142, at 26.
148 HLA Hart "Discretion" [2013] 127 Harv L Rev 652 at 658.
149 Geoffrey Shaw "HLA Hart's Lost Essay: "Discretion" and the Legal Process School" (2013) 127(2) Harv L Rev 666 at 668.
150 At 700-702.
151 Schneider, above n 141, at 232.
152 For convenience future references to England encompass England and Wales.
153 Joanna Miles and Rebecca Probert "Sharing Lives, Dividing Assets: Legal Principles and Real Life" in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing, Portland, 2009) 3 at 5-6.

empowers the court to make a wide range of financial orders. Judges are guided by the "section 25 factors" granting wide discretion.[154] The court must first consider the welfare of a child under the age of 18 and consider ending all financial obligations between the divorcing spouses.[155] Beyond that, s 25(2) is effectively a list of considerations that may sway the court's remedial discretion.

Historically, under the MCA a "minimal loss" duty required the court to place the parties in a financial position as if the marriage had not broken down and all financial obligations and responsibilities were discharged.[156] The duty was repealed for pragmatic reasons and because divorce was no longer fault-based. Thus, the courts are left with ss 25-25A to develop principles that clarify ancillary relief. In this respect, judges may be likened to a bus driver who, having received instructions about how to drive the bus, has not been told where to drive the bus.[157]

*2 (Un)fairness*

In earlier decisions, ancillary relief used the respondent's resources.[158] These awards were conservative and capped at the claimant's "reasonable requirements". In "big money" cases, husbands walked away from divorces considerably richer than their ex-wives. Recognising this, Lord Nicholls in *White v White* held that it was inappropriate for the surplus to vest solely in the husband where the assets exceeded the financial needs of the parties.[159] Lord Nicholls also noted that there was no statutory basis for placing a ceiling on awards limited to the claimant's reasonable requirements.[160] Instead, *White* held that the objective is to achieve a fair outcome.[161] However, fairness, without further elaboration, has little value because:[162]

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[154] Matrimonial Causes Act 1973 (UK), s 25(2). For example, the parties' income, earning capacity, financial needs, standard of living and contributions to the welfare of the family.
[155] Sections 25(1) and 25A. Section 25A is a "statutory steer to an eventual clean break": *Matthews v Matthews* [2013] EWHC Civ 1874 at [13].
[156] Matrimonial Proceedings and Property Act 1970 (UK), s 5.
[157] See Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [2.5].
[158] Traditionally, wives were conceptualised as the passive victim and unable to be autonomous or self-sufficient: Ellen Gordon-Bouvier *Relational Vulnerability Theory, Law, and the Private Family* (Palgrave Macmillan, Cham, 2020) at 90.
[159] *White v White* [2001] 1 AC 596 (HL) at 607-608 per Lord Nicholls.
[160] Gillian Douglas and Stephen Gilmore "The (Il)legitimacy of Guideline Judgements in Family Law: The Case for Foundational Principles" (2020) 31 K.L.J. 88 at 96.
[161] *White v White*, above n 159, at 605 per Lord Nicholls.
[162] At 599 per Lord Nicholls.

> Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.

The significance of *White* is Lord Nicholl's guidance on how to exercise judicial discretion to reach a fair outcome. What emerged was the "yardstick of equality" recognising that before an unequal division of property is ordered, "a judge would always be well advised to check his tentative views against the yardstick of equality of division".[163] Further, fairness does not discriminate between the breadwinner and homemaker, nor should it advantage one partner to the other's disadvantage.

*Miller v Miller; McFarlane v McFarlane* refined the fairness objective. The yardstick was referred to as the "equal sharing principle" reflecting the partnership of marriage. Spouses are entitled to share in the assets unless there is a good reason suggesting otherwise.[164] Equal sharing is not to be presumed. It is an aid and not a rule.[165] The House of Lords also elucidated two further principles. First, financial needs in s 25(2)(b) recognises that marriage creates relationships of interdependence.[166] Second, compensation for significant prospective economic disparity because of how the marriage functioned.[167] These judicially created principles are simply "guidelines" or "relevant considerations" rather than binding or to be applied mechanically.[168]

Under s 25 and the fairness objective, the judiciary is largely free to adjudicate on a case by case basis.[169] HLA Hart's two-fold justification for discretion applies in the context of ancillary relief.[170] Relative ignorance of fact is the inability of Parliament to ex ante predict all possible factual circumstances.[171] The *Miller* and *McFarlane* appeals showcase the inherent factual variability in this area of the law. Relative indeterminacy of aim is where Parliament cannot agree on the policy that the new law should promote. This justifies discretion because human aims are vague, multifaceted, and not perfectly determinate.[172] Baroness Deech challenges HLA Hart's relative indeterminacy of

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163 At 605 per Lord Nicholls.
164 *Miller; McFarlane*, above n 32, at [16] per Lord Nicholls. Baroness Hale at [142] cautioned that too strict an adherence to the equal sharing principle can lead to a rapid increase in the breadwinner's standard of living and a decrease in the primary carer's.
165 At [16] per Lord Nicholls.
166 At [10]-[11].
167 At [13].
168 *White v White*, above n 159, at 615.
169 See Andrew Mohamdee "Rules vs Discretion: Calibrating the Scales for Financial Remedies on Divorce" (Master's Thesis, Durham University, 2019) at 6-11 for an excellent overview of the English law and the issues with the legal framework.
170 Hart, above n 148, at 661-662.
171 Miles, above n 144, at 268-269.
172 Shaw, above n 149, at 703-704.

aim because "[i]t is Parliament's job to make policy in the interests of the entire country. It is the judge's job to apply it, not to determine the legislation".[173] Ostensibly, the presence of both justifications in s 25 justifies the use of discretion.

To comply with the fairness objective, consideration of all factual circumstances is necessary to enable tailor-made solutions.[174] As fairness is grounded in social and moral values,[175] discretion ensures that ancillary relief orders remain "in tune with current perceptions of fairness".[176] The process of accumulating and refining principles from individual decisions exemplifies Carl Schneider's "rule-building discretion".[177] Judges encourage substantive consistency in decision-making through rule-building which is an element of fairness and the rule of law.[178] For example, the Court of Appeal in *Charman v Charman* clarified that equal sharing should be the starting point and only departed from when there is good reason.[179] Refinement of the principles at play in this area of law is welcomed because it clarifies the current legal position.

However, judicial clarification intending to structure the law has had the unintended consequence of disagreement over the application of principles. On the topic of compensation, Mostyn J intimated that it is erroneous to classify a voluntary decision about the distribution of work and domestic roles as a loss "suffered" which entitles the claimant to an award beyond her reasonable needs.[180] Despite being bound by the House of Lords, Mostyn J confined compensation to "a very rare and exceptional case".[181] Where the principles collide, the objective of fairness must supply the answer.[182] Thus, the structural effect of the fairness strands in the strive towards predictability and certainty is accordingly doubted because these strands are fluid and capable of being overruled.[183]

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[173] (27 January 2017) 778 GBPD HL 947 (Baroness Deech).
[174] *White v White*, above n 159, at 599.
[175] *Miller; McFarlane*, above n 32, at [4] per Lord Nicholls and [115] per Lord Hope.
[176] *White v White*, above n 159, at 605.
[177] Schneider, above n 141, at 235; and Miles, above n 144, at 268.
[178] Hitchings and Miles, above n 142, at 43-44.
[179] *Charman v Charman* [2007] EWCA Civ 503 at [65] per Sir Mark Potter P.
[180] *SA v PA (Premarital Agreement: Compensation)* [2014] EWHC 392 (Fam) at [28] per Mostyn J. At [30] Mostyn J noted that quantification is speculative and inherently difficult when it requires a consideration of events that did not happen. Compare the position in *Scott v Williams*, above n 7, at [317] per Arnold J and *X v X*, above n 43, at [102]-[104].
[181] *SA v PA (Premarital Agreement: Compensation)*, above n 180, at [36]. *ND (by her litigation friend KW) v GD* [2021] EWFC at [44] observed that since *Miller; McFarlane* compensation has only been applied in one first instance decision, that of *RC v JC* [2020] EWHC 466 (Fam).
[182] *Charman v Charman*, above n 179, at [73].
[183] Mohamdee, above n 169, at 97.

The principal rationale for redistributing resources is when the relationship has generated needs that justify the other spouse meeting them.[184] Determining the spouse's needs involves a relative assessment between both spouses that compares their standards of livings during the marriage.[185] Needs is an "elastic concept and it is undefined in s 25(2)(b)".[186] Thus, it is unsurprising that there is no unanimity on the point of whether needs must be generated by the marriage.[187] Further, uncertainty derives from the court's "extraordinarily wide discretion" which notably requires a consideration of the spouses' standard of living, age of parties, and physical or mental disabilities.[188] This is particularly problematic when factors conflict and there is no principled justification for reconciliation.[189] The MCA merely points the courts towards relevant matters without instructing the judiciary on what to do with them.[190] Expressed another way, the judiciary may engage in "laundry listing", not spousal support analysis.[191]

*3 Transparency and judicial attitudes*

The Law Commission has since observed that s 25 has led to a lack of transparency.[192] Combined with the expense of obtaining legal advice, parties negotiating outside of court may face difficulties grasping what their legal rights and responsibilities are. The regime offers little certainty and practitioners are unable to advise their clients as to the applicable principles. This precludes any chance of early resolution. The MCA is costly and assumes that parties can access a lawyer who can advise as to the potential adjudicated outcome.[193]

Although rule-building discretion seemingly enhances predictability, judicial attitudes differ as to the extent of appropriate discretion. Different benches in the Court of Appeal have either favoured a strong discretion (bound by high-level principle) or a willingness to create principles to structure their discretion.[194] The dissonance in approach negates the utility of discretion and it means that judicial principles may only have a limited role in enhancing legal certainty.

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[184] *Miller; McFarlane*, above n 32, at [137] per Baroness Hale.
[185] At [138].
[186] *ND (by her litigation friend KW) v GD*, above n 181, at [49].
[187] Contrast *Wyatt v Vince* [2015] UKSC 14 at [33] per Lord Wilson and *Mills v Mills* [2017] EWCA Civ 129 per Ryder LJ at [16].
[188] *Charman v Charman*, above n 179, at [70] per Sir Mark Potter P referring to ss 25(2)(b)-(e); and Law Commission of England and Wales, above n 157, at [3.6].
[189] Lord Nicholls in *White v White*, above n 159, at 609 accepts that the s 25 factors overlap.
[190] Elisabeth Cooke "Miller/McFarlane: law in search of discrimination" (2007) 19 CFLQ 98 at 99.
[191] Miles, above n 144, at 270.
[192] Law Commission of England and Wales, above n 157, at [2.54]-[2.55].
[193] Joanna Miles and Jens Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 138 at 142.
[194] Miles, above n 144, at n 41; and Mohamdee, above n 169, at 98-100.

## *D Canadian Difficulties*

### *1 Statutory framework*

The Canadian legislative regime is federal and provincial. Under the Canadian constitution, marriage and divorce are federal powers which means that the Divorce Act 1985 applies.[195] This Act contains provisions that deal with custody, access, child support, and spousal support.[196] Property division is, however, governed by provincial legislation.[197] As in New Zealand, the provincial regimes for property division all contain the marital partnership principle which justifies equal sharing of marital assets. The application of equal sharing shows Canada's like-minded shift towards rules over discretion.[198]

The Divorce Act 1985 is "fairly open-ended legislation".[199] Spousal support objectives in this Act are four-fold to include recognition of economic advantages or disadvantages arising from the marriage or its breakdown and the promotion of economic self-sufficiency.[200] Beyond the objectives, the court considers the condition, means, needs of each spouse and other circumstances such as the length of cohabitation.[201] After considering the statutory criteria, the court may make a lump sum or periodic sum as is reasonable for the support of the spouse.[202]

### 2 *Conceptual Chaos*

The genus of the conceptual chaos began with the *Pelech* trilogy considering applications to vary spousal support agreements.[203] Wilson J limited support obligations to promote a clean break and finality.[204] The obligation for support was premised on meeting financial needs in the pursuit of economic independence.[205] Subsequently, *Moge v Moge* departed from the clean break model in favour of a compensatory justification for spousal support.[206] The compensatory justification aims to redress economic disadvantages suffered by women for their non-financial contributions to the marriage partnership (for example, childcare responsibilities in the place of workforce

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195 Divorce Act RSC 1985 c 3.
196 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Fam. L. Q. 241 at 243.
197 Miles, above n 144, at 286.
198 Rogerson and Thompson, above n 196, at 244.
199 At 246.
200 Divorce Act RSC 1985 c 3, s 15.2(6).
201 Section 15.2(4).
202 Section 15.2(1).
203 *Pelech v Pelech* [1987] 1 S.C.R. 801; *Richardson v Richardson* [1987] 1 SCR 857; and *Caron v Caron* [1987] 1 SCR 892.
204 Rogerson and Thompson, above n 196, at 247.
205 Jodi Marissa Lazare "Judicial Reliance on the Spousal Support Advisory Guidelines: Spousal Support and Soft Law Across Canadian Jurisdictions" (DCL Thesis, McGill University, 2019) at 54.
206 *Moge v Moge* [1992] 3 SCR 813.

participation).[207] Post-*Moge*, spousal support was not temporary or transitional because the clean break had contributed to the feminisation of poverty. To further complicate matters, *Bracklow v Bracklow* recognised three grounds for support; compensatory, non-compensatory, and contractual.[208] The post-*Bracklow* era recognised an expansive entitlement for spousal support involving competing theories. While the widening entitlement constituted a victory for women who suffered financially after divorce,[209] *Bracklow* left Canada in a state of "rulelessness" with confusing and unpredictable case law.[210] Competing theories, excessive discretion, and the subjective perceptions of individual judges produced a wide range of results.[211]

*3 Contemporary Approach*

The lack of theoretical consensus as to the justifications for spousal support made reform necessary. Canada is important for the emergence of a nuanced approach, that of "guidelines", which seek to confine judicial discretion.[212] Professors Carol Rogerson and Rollie Thompson, with support from the federal Department of Justice, created the advisory Spousal Support Advisory Guidelines (guidelines).[213]

The guidelines do not mandate the threshold issue of entitlement. Entitlement is governed by the aforementioned objectives and principles under the Divorce Act 1985 as enunciated in *Moge* and *Bracklow*.[214] The guidelines do not replace judicial discretion.[215] Rather, a range of figures is produced for quantum and duration to structure decision-making. In this way, ranges are used as the start point for settlement and negotiation.[216] Ranges produce outcomes that constitute average justice. As such, ranges are qualitative expressions of fair results based on dominant judicial practice. To preserve individualised justice, parties may restructure their arrangement by trading

[207] Rollie Thompson "Spousal Support Eh? Sorry, Not Your American Alimony" (2019) 41 Hous.J.Int'l L. 641 at 645-647.
[208] *Bracklow v Bracklow* [1999] 1 SCR 420.
[209] Jodi Lazare "The Spousal Support Advisory Guidelines, Soft Law, and the Procedural Rule of Law" (2019) 31 C.J.W.L. 317 at 320.
[210] Miles, above n 144, at 287; and Thompson, above n 207, at 650.
[211] Carol Rogerson *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (Department of Justice Canada, Ottawa 2002).
[212] Schneider, above n 141, at 230.
[213] Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008).
[214] Rogerson and Thompson, above n 196, at 251.
[215] Lazare, above n 209, at 318.
[216] Miles, above n 144, at 289.

off amount and duration (to reach lump sum or longer duration payments)[217] and can depart from the guidelines in exceptional circumstances.[218]

There are two pathways under the guidelines depending on the presence of dependent children. The without child support formula applies when there are no dependent children and, accordingly, no child support obligations.[219] The formula rests on two crucial factors: the difference between gross incomes and the length of marriage (including premarital cohabitation).[220] This pathway embodies the "merger over time" theory because as duration increases the economic and non-economic lives of the parties merge.[221] For example, a ten-year marriage suggests ranges of 15 to 20 per cent of the gross income difference. If that was $80,000, then a range between $12,000 to $16,000 per annum would be payable for five to ten years.[222]

The with child support is complex.[223] It consists of several formulas depending on the custodial and child support arrangements. Under this formula, child support is prioritised over spousal support which often results in a reduced ability to pay spousal support. The with child support formula is justified by the compensation rationale, a reflection of the "parental partnership model" where past loss and economic disadvantage are tied to childcare responsibilities.[224] Thus, the duration of payments is not linked to the length of the marriage. Instead duration is affected by the age of the children.[225] The formula determines the left-over income after child support, tax, deductions, and government benefits and credits.[226] Ultimately, a recipient receives spousal support equal to 40 to 46 per cent of the combined net income.[227]

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[217] Rogerson and Thompson, above n 213, at 34-35.
[218] At 35. For example, exceptions to the formulas include prior support obligations, illness or disability, and a compensatory exception for short marriages under the with child support formula.
[219] Rogerson and Thompson, above n 213, at 51.
[220] Rogerson and Thompson, above n 196, at 253.
[221] Rogerson and Thompson, above n 213, at 51.
[222] Figures can be reduced to monthly payments. In this example, payments would range between $1000 and $1333.33 per month.
[223] Rogerson, above n 140, at 64.
[224] Rogerson and Thompson, above n 213, at 73.
[225] The applicable duration for the with child support test employs the longer duration of the following two tests: First, the length of marriage test used in the without child support formula. Second, the age of children test ranging from the age at which the youngest child begins school (lower end) to when the youngest completes high school (upper end): Rogerson and Thompson, above n 196, at 258.
[226] Rogerson and Thompson, above n 213, at 76-77.
[227] Rogerson and Thompson, above n 196, at 256.

### *E Conclusion*

This chapter explored the English and Canadian jurisdictions highlighting many problems with broad discretions in the contexts of ancillary relief and spousal support. In England, broad discretion provided by a checklist of s 25 factors has made the task of awarding ancillary relief challenging for the judiciary and costly and uncertain for prospective litigants. In Canada, competing justifications for spousal support muddied the water for determining when spousal support should be granted in particular circumstances. This chapter, which focused on discretion, will act as a useful comparison to Chapter III's analysis of the rules-based FISA recommendation.

## *III FISAs – Needing to Bend the Rules?*

### *A Introduction*

The Law Commission proposes to implement a Family Income Sharing Arrangement (FISA), a rules-based formula for determining quantum.[228] This chapter first outlines how FISAs are calculated before criticising how it calculates economic disparity awards. Importantly, it is argued that FISA will be a blunt instrument because a blanket rule (FISA) will not achieve average justice for all family situations. In other words, the pendulum will swing too far towards a rules-based solution and create a new set of problems.

### *B Overview of the FISA Recommendation*

The objective of FISA is to share the economic advantages and disadvantages arising from the relationship or its end.[229] Notably, FISA extends the scope of the PRA beyond property to consider "income". FISA also departs from the clean break principle by permitting ongoing economic ties after separation. The changes partially reflect the Borrin Survey's finding that the less affluent partner should receive additional financial support by sharing future income for a set period.[230] A limited entitlement to a FISA arises when the partners have a child together or were in a relationship for ten or more years.[231] A broader entitlement (akin to the circumstances in s 15) arises when:[232]

> During the relationship:
>
> (i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity in order to make contributions to the relationship; or
>
> (ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

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[228] Law Commission Final Report, above n 8, at [10.36] clarifies that FISAs are a hybrid of Option 1 and Option 3.
[229] At [10.55].
[230] Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [175]-[178]. Compare Simon Chapple "Submission to the Law Commission on Review of the Property (Relationships) Act 1976" at 3 where it was submitted that only 29 per cent of respondents supported some form of general income sharing and not a model of equal sharing of income proposed by the Law Commission.
[231] Contrast the Canadian Spousal Support Advisory Guidelines which do not deal with the threshold issue of entitlement.
[232] Law Commission Final Report, above n 8, at [10.62].

The categories of entitlement reflect the relationships that give rise to a reasonable expectation of sharing the economic advantages and disadvantages.[233] A statutory entitlement will provide clear guidance for when FISA applies and also remove s 15's jurisdictional hurdles. A broader category is also beneficial because it increases the scope of FISA to relationships that do not have "easily identifiable characteristics".[234] Partner B has the reverse onus to prove that Partner A (less affluent partner) is not entitled to a FISA (declaration of non-entitlement).[235] Although the broad category of entitlement purportedly requires proof of causation, this is expected to be of no moment because Partner B bears the onus of proof.

Before demonstrating how a FISA is calculated, it is useful to contextualise the application of the formula with the following scenario:

> Manaia and Nikau separated in 2020 after a six-year qualifying relationship. They have two 5-year-old twin boys, Tane and Anaru. During the marriage, Manaia was the primary caregiver and performed domestic duties inside the home. Nikau is a Dunedin bus driver receiving the living wage of $22.75 per hour which equates to approximately $40,000 per annum.[236] After separation, Manaia finds part-time employment at a local supermarket earning $15,000 per annum.

To calculate a FISA, the starting point is to calculate the "family income". Family income is a combination of the partners' average annual income over the three years before separation.[237] The Law Commission's Preferred Approach proposed that post-tax incomes are used.[238] The Final Report simply notes that income should be broadly defined to include taxable and non-taxable income, family expenses from a trust or company, and the income derived from relationship property.[239] This broad definition attempts to calculate the partners' true financial positions at separation. For Manaia and Nikau, their "family income" is $40,000 because Nikau earned $40,000 per annum whereas Manaia was unemployed.

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233 At [10.63].
234 At [10.75].
235 At [10.85]. Recall that under s 15 the claimant (Partner A) has to satisfy the court as to the causation threshold.
236 The living wage was increased to $22.75 in September 2021: Melanie Carroll "Living wage rises to $22.75 an hour in September" (1 April 2021) Stuff NZ <stuff.co.nz>.
237 Law Commission Final Report, above n 8, at [10.88]. The Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga Mariu ai* (NZLC, IP44, 2018) at [5.74]-[5.75] suggested that income should be forward-looking and that post-tax amounts should be used. This review is subsequently referred to as the "Law Commission Preferred Approach".
238 Law Commission Preferred Approach, above n 237, at [5.74].
239 Law Commission Final Report, above n 8, at [10.91]-[10.94].

Second, Nikau (Partner B) will pay Manaia (Partner A) the "annual equalisation amount" which is half the difference of the family income.[240] In Manaia's case, the annual equalisation amount is $20,000 representing half of their $40,000 family income. Third, FISA calculates the duration of payments, that is, half the length of the relationship up to a maximum of five years.[241] The rationale is that as the length of the relationship increases, so does the expectation of sharing. For Manaia, FISA would last for three years because this is half the length of her six-year relationship. Fourth, FISA discounts for contingencies to reflect the reducing expectation to share economic advantages and disadvantages over time. If a 10 per cent discount was applied, Manaia would receive $20,000 in Year 1, $18,000 in Year 2, and $16,200 in Year 3.[242] Manaia's income is equalised in the first year after separation and reduces thereafter. In short, Manaia would be awarded $54,200 from Nikau over three years. Per the default implementation rules, Manaia would receive monthly periodic payments. In Year 1, for example, Manaia would receive $1,500 per month.[243]

This hypothetical demonstrates the relative ease of calculating a FISA compared with the varying methodologies used under s 15. In this way, FISA may be more consistent with s 1N(d) than s 15 because FISA will calculate awards inexpensively, simply, and speedily. FISA also directly deals with income inequality, recognition that earning capacity may be attributable to the equal contributions to the relationship. If administered by the IRD, lengthy delays between separation and proceedings will be removed because Manaia (and other lower socio-economic families) would not need to litigate.[244] Thus, even if Nikau sought a declaration of non-entitlement the IRD would continue administering the FISA, enabling Manaia to meet her living costs and engage a lawyer if necessary.[245] For FISA to apply, all Manaia would need to do is provide written notice to Nikau.[246]

Nikau's example also foreshadows some of the problems with FISA. Nikau effectively gives Manaia fifty cents for every dollar earned to distribute the economic advantages of the relationship.[247] For low-income earners like Nikau, FISA is a financially onerous regime that will cause significant financial hardship. Manaia would enjoy $35,000 in the first year after separation

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240 At [10.98].
241 At [10.86].
242 Note that for all following examples used in this dissertation a 10 per cent contingency is applied.
243 Law Commission Final Report, above n 8, at [10.110].
244 Thornton, above n 41, at 29 notes that 40 per cent of practitioners thought that allocation of court time for relationship property matters had worsened. Practitioners generally need to wait at least four months for a hearing date. The Law Commission Final Report, above n 8, at [10.15(c)] also acknowledged that s 15 awards are not immediate due to delays between separation and the proceedings.
245 Littlewood, above n 76, at 169-170.
246 Law Commission Final Report, above n 8, at [10.77].
247 In Year 1 after separation Manaia would receive $40,000 x $0.50 = $20,000. This figure equates to 50 cents per dollar that Nikau earns.

while Nikau would be left with $20,000. Nikau would now need to stretch $40,000 across two-households rather than one household. This financial hardship may also be exacerbated by child support payments which are excluded from the FISA calculation because they are intended to meet the needs of children.[248] In other words, if child support was involved Nikau's $20,000 may end up being further reduced. Having outlined how a FISA is calculated, what comes next is a critique of FISA.

### *C Quantification Issues*

#### *1 Income*

The basis of the FISA formula rests on the partners' incomes. The Law Commission initially preferred to use income earned after separation (forward-looking). The Final Report, however, recommended that income should be based on the partners' average income earned over the three years before separation (backwards-looking). It is argued that the forward-looking approach better targets the actual disparities at hand, similar to Arnold J's quantification methodology in *Scott*.[249]

A forward-looking approach would impute income if the amount declared by a partner does not fairly reflect the available income.[250] For example, when a partner is intentionally under-employed or does or will receive benefits as a discretionary beneficiary of a trust.[251] The difficulty is that imputation could occur in countless circumstances, making the forward-looking approach redundant.[252] Partners may even purposefully reduce workforce participation or hide income to reduce the amount payable under FISA.[253] However, despite fears of playing the system, we must not ignore the fact that mothers are generally in a worse financial position after separation.[254] Women face a reduction in equivalised income of 19.3 per cent compared to an increase of 15.5 per cent for men.[255] Expressed another way, a very lucrative family asset is often the breadwinner's earning capacity.[256] Consider the following example:

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[248] Law Commission Final Report, above n 8, at [10.91].
[249] Recordon, above n 79, at 116.
[250] Law Commission Preferred Approach, above n 237, at [5.77].
[251] At [5.78].
[252] Recordon, above n 79, at 117.
[253] Law Commission Final Report, above n 8, at [10.45]-[10.46].
[254] See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga, he hononga* whānau i Aotearoa o nāianei (NZLC SP22, 2017) at Chapter 8 for an excellent summary of the financial consequences of separation. This paper is subsequently referred to as the "Law Commission Study Paper".
[255] Fletcher, Maré and Maloney, above n 2, at 300.
[256] See *Miller; McFarlane*, above n 32, at [154] per Baroness Hale. In England, *Waggott v Waggott* [2018] EWCA Civ 727; [2019] 2 WLR 297 held that earning capacity was not capable of being treated as a matrimonial asset subject to a principle of equal sharing. In New Zealand, the Law Commission Final Report, above n 8, at R8 does not recommend changing the definition of "property" in the Property (Relationships) Act 1976. "Property" does not include earning capacity.

> Tyler and Bianca were high school sweethearts. Tyler was happy stacking shelves at the local supermarket earning $48,000 per year. While Bianca was studying nursing, the couple gave birth to their first daughter, Lily. Bianca postponed her studies to care for Lily. After dating for ten years their relationship became strained because Tyler was spending more time at work and not enough time with Bianca and Lily. Bianca decided to separate from Tyler. Just two months after separation Tyler was promoted to store manager, earning approximately $85,000 per year. Is it fair for Tyler to benefit from the increased income?

A backwards-looking FISA would award Bianca $73,521 over five years. For the first year after separation, Bianca would receive $24,000, equivalent to half the family income while Tyler would retain the remaining $61,000 (from his $85,000 income). In this case, a backwards-looking approach is problematic because it does not share in Partner B's (Tyler) future income attributable in part to Partner A's (Bianca) contributions. Without Bianca's domestic contributions (such as caring for Lily) or forfeiting her studies, Tyler would not have been able to increase his earning capacity. For Tyler to exit the relationship without accounting for some of his increased income fails to recognise Bianca's contributions to the relationship. To ignore the fact that Tyler's increased income is linked to the efforts of the partnership is inconsistent with FISA's objective which aims to share the advantages arising from the relationship or its end. A forward-looking FISA would pay Bianca $173,992 which more adequately shares the advantages (increased earning capacity) with Bianca given her extensive sacrifices during the relationship.

Childcare responsibilities play a "dominating role" in determining financial outcomes.[257] Men and women see a decline in income when dependent children live with them.[258] That is why Lady Deborah Chambers QC moots for a forward-looking division of property because the existence of children contributes to the caregiver's plunge on separation.[259] The Law Commission recommends that children's interests are a primary consideration and that the courts would have an obligation to have regard to the best interests of any minor or dependent children of the relationship.[260] Sharing income increases after separation is arguably more consistent with this ethos. Sharing the $85,000 in the Tyler and Bianca example would greatly benefit Lily if she remained in Bianca's care after separation.

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[257] Law Commission Study Paper, above n 254, at 57.
[258] Fletcher, above n 3, at 151.
[259] Chambers, above n 121, at 75.
[260] Law Commission Final Report, above n 8, at R67.

The Canadian experience may also dispel concerns about sharing future income.[261] Following increasing litigation over post-separation changes in income, a Revised User's Guide (RUG) proposed a test that required a "link" or "connection" between the marriage and increased income after separation.[262] The RUG catalogues various factors that support sharing or not sharing income increases. For example, compensatory claims such as long-duration marriages under the without child support formula likely justify sharing post-separation income increases.[263] For present purposes, if Canada can distil factors indicating that future income should be shared, New Zealand can equally undertake the same analysis.

Above all, the forward-looking approach will improve the status quo because FISA will approximately double what a claimant would receive.[264] This is consistent with the Borrin Survey's finding that 49 per cent of respondents favoured an approach that shares "future income" for a set period.[265] Therefore, a forward-looking approach is the preferred basis for an income sharing regime consistent with public attitudes.

*2 Duration*

The Law Commission recommends an arbitrary five-year maximum duration despite differing durational limits proposed by practitioners and academics. For example, Stephen van Bohemen suggested that family income should be shared for two years.[266] However, a recent study revealed that the financial effects of separation last for at least three years.[267] Instead of closing the door at five years, an income sharing regime should not definitively limit income sharing to five years.

The FISA regime will not benefit Partner A's in all cases, especially when the length of their relationship is considered. For shorter duration relationships, the quantum of FISA is much more significant compared to the Canadian guidelines. For example, if a $600,000 disparity produces a $300,000 award over three years under FISA the Canadian guidelines produce an award between $27,000 and $72,000 over six years. Conversely, FISAs are unlikely to address the disparity in lengthier cases. In *Scott*, using Mr Williams' "notional" salary of $200,000, Mrs Scott would receive

[261] Recordon, above n 79, at 118.
[262] Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* (Department of Justice Canada, Ottawa, 2016) at 83. See generally Rollie Thompson "Post-Separation Increases in Payor Income and Spousal Support" (2020) 39(2) C.F.L.Q. 186 for a review of recent Ontario case law.
[263] Rogerson and Thompson, above n 262, at 85-86.
[264] Littlewood, above n 76, at 167-168.
[265] Binnie and others, above n 230, at [178].
[266] Steven van Bohemen "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 83 at 89.
[267] See Fletcher, Maré and Maloney, above n 2.

a total of $227,390 under FISA compared to $629,275 and $1,593,034 under the guidelines.[268] Thus, FISA is unlikely to be just when, between five years after separation and Mr Williams' retirement, the disparity would reach $2,000,000. The more generous award in Canada recognises that the effect of the division of functions will continue well beyond separation. Therefore, Henaghan's maximum limit of ten years would be more appropriate because in long-term relationships Partner B is "likely to be close to retirement".[269] As Seb Recordon pithily notes, "the FISA proposal already throws the clean break principle out with the proverbial bathwater of s 15 lump sum awards".[270]

In England, whether financial relief should bear a durational limit is contentious. In that context, there is a growing transition towards autonomy, largely motivated by a distaste for the "gold digger" trope.[271] Baroness Deech's Divorce (Financial Provision) Bill proposes, amongst other things, to limit periodical payments to no more than five years unless the party would otherwise suffer serious financial hardship.[272] This Bill responds to the "meal tickets for life" awards where undeserving claimants receive large sums on divorce. For Baroness Deech, the Bill adds much-needed certainty and predictability to the law of ancillary relief and fosters economic independence. Hence, the Bill promotes the neoliberal ideology that individuals should bear responsibility for their consequences.[273]

It is noteworthy that Canada departs from Baroness Deech's neoliberal ideology. In Canada, until a few decades ago it was the "communal responsibility of the state" to shoulder the economic consequences of divorce.[274] However, *Moge* placed the support obligation for needy partners on family members. Spousal support was a private obligation because self-sufficiency was only one of many spousal support objectives.[275] This was justified because there were public policy concerns

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[268] Recordon, above n 79, at 126-127.
[269] Henaghan, above n 40, at 325.
[270] Recordon, above n 79, at 121.
[271] Gordon-Bouvier, above n 158, at 96.
[272] Divorce (Financial Provision) Bill 2017 (HL Bill 26-19) (UK), cl 5(1)(c). As a general rule, this Private Members Bill aims to divide matrimonial property equally, as well as clarify that prenuptial and postnuptial agreements are binding except for when procedural conditions are not met.
[273] Sophia Gonella "'Alimony Drones' and 'Gold-Diggers': Protecting Economic Vulnerability Through Spousal Maintenance Orders" (2021) 6 DLR 1 at 16.
[274] *Pelech v Pelech*, above n 203, at [83] per Wilson J; and see Lazare, above n 205, at 85-90.
[275] *Moge v Moge*, above n 206, at [75]. In New Zealand, section 64A(1)(a) of the Family Proceedings Act 1980 states that former partners "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". However, the Law Commission Final Report, above n 8, at [5] states that "the clean break concept is but one factor that is relevant to achieving a just division of property in the circumstances of each individual case".

about the conservation of public resources.[276] If implemented, FISA will do away with the clean break principle by imposing financial obligations on former partners for a maximum of five years.[277] Breaking away from the clean break shows how FISA will alleviate the burden on the state to support former partners.

What is more, vehement opposition to Baroness Deech's Bill raise arguments that equally apply to FISA. First, the Bill's feminist approach to maintenance grossly misunderstands the post-separation economic reality of women.[278] Women take longer to financially recover from relationship breakdowns.[279] Thus, for Dr Sharon Thompson curtailing periodical payments exacerbates this gender inequality by prioritizing financial contributions in contravention of the non-discrimination principle.[280] Limiting FISA duration also fails to recognise that all contributions are equal, for FISAs will not reflect the extensive non-financial contributions made by the non-earning partner.[281]

Second, although the strive for certainty is applauded, the Bill's rigidity may lead to "grotesque consequences"[282] due to its "one-size-fits-all approach".[283] For example, it may be unrealistic to tell a 60-year-old wife who recently left a long marriage that after five years of payments she must "fend for herself".[284] Furthermore, assuming the income disparity is constant, a qualifying relationship of 10 years and one of 40 years would generate the same FISA award. This is problematic where the non-earning partner in longer relationships would have made considerable non-financial contributions that will not be recognised.[285] Therefore, as FISA does not value the unpaid work inside the home, the five-year durational limit fails to recognise the equality of contributions to the relationship.

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[276] Rogerson, above n 211, at 30.
[277] Recordon, above n 79, at 115.
[278] Donna Crowe-Urbaniak "Reform of Financial Provision on Divorce: For the Few, Not the Many" (2020) 24 Edinburgh L.Rev 268 at 271.
[279] In the English context see Hayley Fisher and Hamish Low "Recovery From Divorce: Comparing High and Low Income couples" (2016) 30 IJLPF 338.
[280] Sharon Thompson "Divorce (Financial Provision) Bill 2017-2019 (UK) Submission of Written Evidence" at [6]-[7]. In New Zealand, sections 1N(a)-(b) of the Property (Relationships) Act 1976 promote equality of status between men and women and the equality of contributions to the relationship.
[281] See Recordon, above n 79, at 127-128.
[282] Lord Wilson "Changes over the centuries in the financial consequences of divorce" (address to the University of Bristol Law Club, 20 March 2017).
[283] Lady Hale "What is a 21st Century Family?" (speech to the International Centre for Family Law, Policy and Practice, University of Westminster, 1 July 2019); and Crowe-Urbaniak, above n 278, at 269.
[284] This example adapts an issue raised by Lord Wilson, above n 282, at 11 who used a durational limit of three years.
[285] Chapple, above n 230, at 7. FISAs also do not consider re-partnering, changes in economic status, additional children and the like.

*3 "One-size-fits-all"*

The ordeal with discretion in s 15 swiftly pushes New Zealand towards a "one-size-fits-all" model.[286] This section argues that FISA is a blunt instrument in an area of law in which it is undesirable to treat all factual circumstances under the same umbrella.

As discussed, FISA is a one-size-fits-all formula applicable to all family situations, no matter how variable. The Law Commission acknowledged that not all awards generated under FISA will reflect the extent to which the parties have been economically advantaged or disadvantaged from the relationship or its end.[287] Accordingly, partners may seek an adjustment order which amends the amount payable, only if a failure to grant the adjustment order would result in "serious injustice".[288] The court must then consider the purposes, principles, and a list of statutory considerations in the exercise of its discretion.[289] Only in rare cases will the court exercise individualised justice.

One concern is that litigation in the "discretionary margins" may undermine the rules-based focus of FISA.[290] The Law Commission did not expressly acknowledge whether the serious injustice standard is a similarly high threshold, as in other sections of the PRA.[291] This standard has been subject to "context-specific judicial interpretation", but Recordon still believes that the "wording implies that the test is a difficult one to overcome".[292] The author agrees with this observation because the Law Commission's drive towards certainty would be undermined by a lower standard of serious injustice as an exception to the rule. The likely high threshold should be considered in the following example:

> Bob is a secondary school teacher earning $58,000 per annum. Bob's wife of six years, Laura, earns $80,000 as an accountant. Laura ends their relationship, taking Ashley, their two-year-old daughter with her permanently. Laura moves in with James, her new stockbroker boyfriend who earns over $130,000 per year.

[286] Atkin, above n 133, at 189.
[287] Law Commission Final Report, above n 8, at [10.115].
[288] At [10.116].
[289] At [10.117]. For example, each partner's current and likely future employment situation, significant change in financial circumstances that has arisen since separation, and obligations in relation to the care of any minor children or other dependants.
[290] Recordon, above n 79, at 129.
[291] For example, Property (Relationships) Act 1976, ss 14A and 21J.
[292] Recordon, above n 79, at 120 and 129.

Under FISA, Bob will receive approximately $29,810 across three years.[293] It should be recalled that women and men living with dependent children experience a decline in income. This is unlike Laura's case, for while she may experience a reduction in income because of childcare costs, she may also enjoy James' financial support. Regardless, Bob may still need to pay Laura child support because Laura has full-time care of Ashley.[294] If Bob was to make monthly payments of $400 ($4,800 per annum), his FISA award would effectively be reduced in half in the first year. These circumstances may be exceptional because Laura will live with her dependent child and not experience a decline in income. After all, James may financially contribute to Laura and Ashley's benefit. However, it is uncertain whether these circumstances would satisfy the serious injustice standard. Bob's FISA award will be diminished by a child support obligation. If these circumstances do not reach a fair result after FISA, it is not defensible for the exception to only apply in very limited circumstances.[295]

FISA is a blunt instrument that will not produce fair outcomes in all family situations. Recall the low income-earner Nikau, the bus driver who had to pay Manaia $20,000. One of the contemplated grounds for an adjustment order is where the default implementation rules would result in "significant financial hardship" for Nikau (Partner B).[296] It is axiomatic that low-income earners will struggle to split $40,000 across one household, let alone two separate households in Nikau's case. Thus, Nikau would likely obtain an adjustment order in light of his difficulty satisfying his FISA obligations. However, it is absurd that low income-earners, like Nikau, will need to obtain an adjustment order when the statutory formula generates a payment scheme that will cause financial hardship. FISA aims to reduce litigation by creating a statutory entitlement. However, as shown in Nikau's case, while Manaia would be entitled to a FISA, Nikau would still need to access the courts to reduce the amount payable in contravention of this aim. Therefore, FISA fails to satisfy the new purpose of the PRA, that is, it does not achieve a just division of property.[297]

### *D Conclusion*

This chapter provided an overview of the FISA recommendation and criticised FISA's quantification formula. Numerous arguments were advanced, namely, FISA's retrospective focus fails to consider relevant post-separation income changes and that the durational element is overly

[293] Bob receives $11,000 in Year 1, $9,900 in Year 2, and $8,910 in Year 3.
[294] Child Support Act 1991, ss 5-7.
[295] Recordon, above n 79, at 129.
[296] Law Commission Final Report, above n 8, at [10.118].
[297] At [2.51].

strict. Crucially, this chapter has shown that the Law Commission's recommendation will swing the pendulum too far in favour of rules. FISA represents a faux pas because by tidying up the difficulties with discretion new rules-related issues emerge.

## *IV Striking the Right Balance*

### *A Introduction*

This dissertation has explored either end of the rules versus discretion continuum, concluding that neither approach is satisfactory. At one end, s 15 and the overseas jurisdictions illustrate the difficulties with unfettered judicial discretion. On the other end, FISA epitomises the problems with an entirely rules-based methodology for calculating economic disparity awards. What is left, however, is to consider the positive response to the Canadian guidelines which occupy an intermediary position along the continuum.

In light of the deficits with entirely rules or discretionary-based approaches in Chapters II and III, this final chapter argues that New Zealand should adopt localised guidelines following Canada. These guidelines should create ranges for quantum and duration which would "fetter" judicial discretion and define the scope for argument. Further, the guidelines should take into account, at the very least, childcare responsibilities beyond the partners' income. The following discussion outlines various recommendations that the author believes will improve the Law Commission's FISA approach.

### *B Why Guidelines?*

#### *1 Canadian approach*

A guided approach requires striking the right balance between rules and discretion. The Canadian guidelines must be viewed contextually within the legal structure and society within which they operate. Canada's monumental project reviewed local case law to identify patterns and, after consulting an Advisory Working Group, tested formulas against current practice.[298] Put simply, the guidelines were devised from the "ground up" and are a creature of Canadian jurisprudence.[299] Thus, it would not be in our best interests to adopt their guidelines because for New Zealand to entertain this guided approach localised guidelines will need to be devised.

Some form of discretion is inevitably necessary for quantifying economic disparity. HLA Hart identified two difficulties that make discretion appealing; relative ignorance of fact and relative indeterminacy of aim. Similarly, Schneider's "rule-failure" discretion justifies discretion when circumstances are so variable, complex, and unpredictable that Parliament cannot devise a rule

[298] Rogerson and Thompson, above n 213, at 17-18.
[299] Rogerson, above n 211, at 63-64.

that will appropriately apply in a significant number of cases.[300] These difficulties justifying discretion are identified in the operation of s 15 (and therefore FISA). Section 15 was implemented as a result of changing social attitudes that sought equality of result. This trend is set to continue as households, families, and societies are expected to diversify further.[301] In other words, s 15 embodies relative ignorance of fact and relative indeterminacy of aim because families are increasingly flexible and family structures continue to evolve from the traditional nuclear family.[302] Thus, a level of discretion would better accommodate this diversity to achieve FISA's objective, that is, to share the economic advantages and disadvantages arising from the relationship or its end.

In the context of classification, David Burns cautioned that injustices may flow from categorising all relationship property in one pool.[303] Similar concerns exist with FISA. FISA is a blunt instrument that will apply to all family circumstances, no matter how distinct. To treat families under one umbrella formula will create injustices. For example, recall that Nikau the low-income earning bus driver will experience financial hardship as a result of FISA. It is for that reason that the Law Commission in England rejected an approach that generates only one answer because it would be unacceptable to the family law profession.[304] Likewise, to implement one rule which will likely yield to future changes in social attitudes ignores the volatile nature of New Zealand society in the 21st century. A property sharing regime must retain some level of "flexibility on the margins" that is tightly controlled and has a limited range.[305]

The Canadian guidelines markedly improved the law of spousal support. In July 2008, the guidelines were introduced after seven years of consultation.[306] The guidelines were positively received and are widely used by practitioners and judges.[307] The authors of the guidelines emphasise that the compensatory and need-based justifications for spousal support (promoted by the guidelines) have gained cultural acceptance in Canada.[308] Several courts of appeal have

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300 See Schneider, above n 141, at 235.
301 Law Commission Study Paper, above n 254, at 9-10 and 66.
302 Ashley Varney "Divorcing Rhetoric from Reality: A Law Reform and Policy Perspective on Section 15 of the Property (Relationships) Act 1976 (LLB (Hons) Dissertation, Victoria University of Wellington, 2017) at 39. See also Miles, above n 144, at 269 noting that "[Relative indeterminacy of aim], by contrast, is a growing problem for family law policy given the diversity of contemporary family forms and the abandonment of fault-based matrimonial law with no obvious substitute as a founding principle".
303 David Burns "Relationship property and extraordinary circumstances" [2004] NZLJ 135 at 136.
304 Law Commission of England and Wales, above n 157, at [3.151].
305 Priestley, above n 10, at 81.
306 Lazare, above n 209, at 321.
307 Rogerson and Thompson, above n 196, at 242.
308 Law Commission Issues Paper, above n 41, at [19.82].

endorsed the guidelines as a useful starting point or litmus test, although the guidelines are not law per se.[309] In England, the Law Commission looked favourably towards the Canadian approach in recommending that the Family Justice Council prepare guidelines as to the meaning of "financial needs".[310]

The Canadian guidelines are successful outside of court. Rogerson and Thompson's review showed that the guidelines shape client expectations and frame negotiations and settlements by narrowing the range of outcomes.[311] The guidelines encourage settlement, reduce litigation and costs, and simplify the process for obtaining spousal support.[312] The extent to which FISA will achieve these aims is uncertain. First, Recordon argues that 61 per cent of applications for departure orders under the Child Support Act 1991 were made by the liable parent despite a similarly high threshold.[313] Thus, Recordon is sceptical whether the serious injustice threshold in the context of FISA will deter litigation. Second, Atkin cautions that because "life is so volatile in the 21st century and that many changes can occur in working conditions and child care arrangement", we cannot be confident that adjustment orders will not be common.[314] Even low-income partners may need to seek an adjustment order due to financial hardship resulting from the application of FISA. Hence, FISA will not shape client expectations if the court will depart from the "rules" of FISA in any event. Departing from FISA to make an adjustment order will mean that legal advice is less useful because the court will have the discretion to consider a wide range of statutory considerations.[315] In other words, it will be difficult for practitioners to advise their clients as to the likely outcome of an adjustment order.

Rather than wide discretion in limited circumstances, guidelines facilitate the exercise of more consistent decision-making. In the Canadian context, judges must reason within the confines of "ranges" for duration and quantum of spousal support. Ranges promote nuanced and flexible

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309 *Yemchuk v Yemchuk* [2005] BCCA 406, *Redpath v Redpath* [2006] BCAA 338, *Fisher v Fisher* [2008] ONCA 11 and *Wild v Wild* [2019] ABCA 159.

310 Law Commission of England Wales, above n 157, at [3.88]. It should be noted that the Family Justice Council has since published two editions of guidelines regarding financial needs on divorce in June 2016 and April 2018. See Family Justice Council *Guidance on "Financial Needs" on Divorce* (Judicial Office, London, 2018) for the most recent edition.

311 Rogerson and Thompson, above n 196, at 261-262.

312 Julien Payne and Marilyn Payne *Canadian Family Law* (4th ed, Irwin Law, Toronto, 2011) at 314.

313 Recordon, above n 79, at 129-130. The figure of 61 per cent was at June 2011 and calculated from approximately 66,581 applications. More recently, Atkin, above n 133, at 170-171, states that in the 2018/19 year there was 2,730 applications for a departure under the Child Support Act 1991. It is noteworthy that of the 2,370 applications, 1,687 were from liable parents.

314 Atkin, above n 133, at 189.

315 Law Commission Final Report, above n 8, at [10.117].

decision-making because judges must reason within "fair" outcomes.[316] There is a sense of accountability on the part of judges. Judges must provide reasons which justify why decisions of amount and duration were selected from within the range or from outside of the formulas.[317] Accordingly, the guidelines make the discretionary decision more transparent which may encourage more modest claims.[318]

However, guidelines are not a perfect machine. When initially introduced, legal actors were concerned with the guideline's non-legislative status and the application of "cookie cutter" justice to a fact-specific area of law.[319] Additionally, the practical difficulty with the guidelines is that the document is long and complex.[320] The full text of the final version is 166 pages and the with child support formula often depends on the use of software and availability of legal advice to set the award fairly. To alleviate these difficulties, a free basic calculator and advanced calculator are available for parties to calculate the ranges for amount and duration based on their specific circumstances.[321] Despite being difficult to navigate, the guidelines are used unsophisticatedly in practice. The exceptions and grounds for departing from the formulas are generally not considered by lawyers and judges.[322] Instead, the default mid-ranges for amount and duration are simply adopted.[323] Therefore, while the ranges facilitate constrained discretion, they are not always used as intended.

In short, even though concerns exist with the Canadian guidelines, it is clear that they represent a positive addition to spousal support. The guidelines have resolved the former problems with discretion in Canada and enhanced the substantive legitimacy of the spousal support obligation. The ranges for quantum and duration also constrain and guide discretion and limit the scope for out of court negotiation and settlement. Therefore, New Zealand should move towards non-legislative guidelines for economic disparity relief.

316 Lazare, above n 205, at 148.
317 Lazare, above n 209, at 333.
318 Thompson, above n 207, at 653.
319 Rogerson and Thompson, above n 196, at 263.
320 Rogerson, above n 140, at 66.
321 Miles, above n 144, at 288; and Rogerson, above n 140, at 67.
322 Rogerson, above n 140, at 66; and Thompson, above n 207, at 653. See Rogerson and Thompson, above n 213, at Chapter 12 for exceptions to the ranges and amounts for spousal support under the formulas.
323 Thompson, above n 207, at 653.

*2 Rebutting the concerns*

The Law Commission cautioned the Canadian approach for two main reasons.[324] First, at the time it was uncertain whether financial reconciliation orders would be socially endorsed. Second, the content of these orders (for example, how to quantify an award or its eligibility criteria) was uncertain. The following discussion rebuts these concerns to show that there is no barrier for New Zealand embarking on its journey to implement non-legislative guidelines.

First, societal attitudes show an appetite for some form of financial reconciliation orders or income sharing. As already noted, the Borrin Survey found that 59 per cent of respondents believed that the less affluent partner should receive additional financial support. Of those respondents, 49 per cent believed that this should be in the form of future income sharing for a set period.[325] Interestingly, a recent survey of practitioners reported that 59 per cent of practitioners supported the replacement of s 15 and spousal maintenance with FISA. That finding, however, is a likely reaction to the challenges with interpreting *Scott*.[326] The important point is that sharing future income is similar to financial reconciliation orders where the affluent partner would support the less affluent partner until the financial inequality arising from the division of functions ends.[327] Given that there is support for income sharing, the first reason for cautioning the Canadian approach is now of little concern.

Second, the Law Commission's Final Report recommends a limited statutory entitlement to a FISA. This limited entitlement will enable lawyers and practitioners to simply identify those entitled to an award.[328] An entitlement is most beneficial compared to the Canadian scheme. In Canada, the "concomitant negative aspect" is that entitlement is judicially determined.[329] Although the statutory entitlement was devised with FISA in mind, the same criteria may coexist with non-legislative guidelines which would apply after the statutory entitlement question is satisfied.[330] As to the concerns about what the orders might comprise, the next section outlines recommendations for a guided approach that give content to the orders.

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[324] Law Commission Issues Paper, above n 41, at [19.83]-[19.86].
[325] Binnie and others, above n 230, at [175] and [178].
[326] Thornton, above n 41, at 28.
[327] Law Commission Issues Paper, above n 41, at [19.41].
[328] Law Commission Final Report, above n 8, at [10.61].
[329] Recordon, above n 79, at 129-130; and Thompson, above n 207, at 653.
[330] Recordon, above n 79, at 133 raised a potential alternative to FISA which is a guided discretionary approach to quantum. This approach is based on the Canadian guidelines in combination with FISA's rules-based entitlement. This paper supports the alternative approach in the discussion that follows.

### *C What Might Guidelines Look Like in New Zealand?*

#### *1 "Fettered" Discretion*

This dissertation recommends that New Zealand should adopt non-legislative guidelines which have a "fettered" discretion, that is, the establishment of ranges of outcomes for economic disparity awards. These guidelines must coexist with a limited statutory entitlement to ensure a desirable balance between rules and discretions. In the New Zealand context, Chambers intimates that guidelines and formulas should allow practitioners to advise their clients as to the appropriate calculations.[331] Chambers reached this conclusion in light of the unfettered discretion in s 15 which is uncertain and costly for lower socio-economic families. Similarly, Miles moots for a halfway approach:[332]

> In my view, the current problems are best resolved in the New Zealand context with a continuing rule of equal sharing of relationship property (subject perhaps to its other current exceptions), combined with a rule-like, but flexible, scheme (as exemplified by the Canadian guidelines) to achieve *some version* of substantive economic equality, the basis of which would need to be articulated to the extent felt adequate to identify, broadly, the types of case in which equal sharing should be departed from on that ground.

For Miles, the solution is a rule-like, but flexible approach to quantification which implicitly rejects an entirely rules-based formula. Interestingly, the Law Commission appeared to agree by noting that "with the diversity of human relationships and behaviour, it would be unrealistic to expect that a statute could set a single rule for every circumstance".[333] Yet that is exactly what FISA sets out to accomplish. This one-size-fits-all approach contradicts the Law Commission's view that a statute may not devise a rule for every circumstance.

In the Irish context of ancillary relief, Kathryn O'Sullivan put the balancing act in this manner:[334]

> However, the adoption of a more formulaic approach premised on the provision of *ranges* of outcomes, with the simultaneous retention of judicial discretion to achieve a different outcome where appropriate, would avoid the charge that such prescribed formulae are too

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331 Chambers, above n 121, at 73.
332 Miles, above n 144, at 290.
333 Law Commission Final Report, above n 8, at [2.42].
334 Kathryn O'Sullivan "Rethinking ancillary relief on divorce in Ireland: the challenges and opportunities" (2015) 35 LS 111 at 128 (emphasis added).

> rigid while nonetheless ensuring that settlements may be better reached in the shadow of the law.

Accordingly, the creation of guidelines that employ ranges for duration and quantum retain judicial discretion and avoid the complexities of a FISA-like formulaic approach. The Canadian guidelines adopt ranges that facilitate regional flexibility and also leave room for discretion.[335] The ranges limit the scope of available fair outcomes and define the scope for argument.[336] Therefore, negotiating partners will be clear as to the appropriate calculation which should be applied in the particular circumstances. Similarly, decisions are transparent because decision-makers are confined to the ranges and must provide reasons for choosing from within or outside of the ranges.[337] The utility of ranges is demonstrated in the following example:

> Ben has three children from a previous relationship which abruptly ended after his ex-partner tragically passed away. His children attend a private school for $20,000 per year for each of his children. Ben has now been in a new relationship with Chloe for 10 years. Chloe resides in Ben's luxurious apartment and keeps her own modest $50,000 income separate. Ben is a director of a company earning at least $150,000 per year. Ben and Chloe then separate after a 10-year de facto relationship.

Applying the without child support formula, Chloe would receive between $1,187.50 and $1,583.33 per month for a period of five to ten years. This is a total figure ranging between $71,250 at the low end and $190,000 at the high end of the ranges.[338] Under FISA Chloe would receive approximately $194, 518.15 over five years.[339] The notion of ranges is more advantageous because it clearly defines the scope for decision-making and negotiations. For example, ranges could take into account the fact that their funds were kept separately (implying that Chloe had a lesser expectation of sharing the advantages and disadvantages) and that Ben has three financially dependent children to look after financially (in line with the reformed ethos giving greater weight to children's interests). Moreover, if Ben sought an adjustment order the court's unfettered discretion would negate the certainty that FISA intends to provide. Instead, ranges will allow for

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[335] Thompson, above n 207, at 652.
[336] Miles, above n 144, at 289.
[337] Lazare, above n 205, at 148.
[338] Chloe would receive an annual amount between $14,250 to $19,000. To calculate the lower end of the range ($14,250 per annum x 5 years = $71,250) and for the higher end ($19,000 x 10 years = $190,000).
[339] Chloe would receive the following annual amounts: Year 1 = $47,500; Year 2 = $42,750; Year 3 = $38,475; Year 4 = $34,627.50; and Year 5 = $31,165.65.

tailor-made decision-making from within a range of acceptable outcomes. This achieves certainty; by defining the range of acceptable outcomes, and flexibility; as the court could reduce or increase the award from beyond the mid-point in the ranges.

*2 Widening the basis*

Non-legislative guidelines in New Zealand should not simply be determined based on the family income. This dissertation recommends that non-legislative guidelines should be broadened to include consideration of wider circumstances, such as continuing childcare responsibilities.

To achieve FISA's objective, it is presumed that income was shared during relationship. It follows that income sharing is the appropriate basis for sharing family income earned before separation. However, Dr Simon Chapple submitted that income may not be an appropriate basis for assessing post-separation living standards when income is not shared during the relationship.[340] In the above example of Chloe and Ben, Chloe keeps her $55,000 income separately and only resided in Ben's apartment during the relationship. That example suggests that for some partners, income sharing is not the appropriate basis for quantifying the FISA award. In Ben's case, it is unfair that he must share his lucrative income with Chloe while his children would be unable to continue at their private school. Where partners kept their incomes separately, it would be unfair for FISA to then enforce income sharing. Furthermore, compared to s 15 and maintenance, FISA is a much narrower assessment because it does not consider disparities in living standards and the like. FISA calculations should be broader. For HLA Hart, discretion may be justifiable when the rule (FISA) does not yield a unique answer in specific situations because of circumstances arising outside the range of concrete applications contemplated when the rule was formulated.[341] For Ben, the rule does not yield a specific answer because it did not contemplate a lack of income sharing during the relationship. Therefore, a rules-based formula based entirely on income is not warranted.

FISA is inorganic because it disregards broader contextual factors (for example, the partners' living standards) beyond their respective incomes. The crucial exclusion in the formula is childcare responsibilities (including child support obligations). This is a perennial problem. In the 1980s the Working Group observed that post-separation inequality was caused in part by childcare

[340] Chapple, above n 230, at 6; and see Henaghan, above n 40, at 325 for an "combined income equalisation payment approach" which similarly uses the parties' respective future incomes for the annual combined income equalisation payment.
[341] See Hart, above n 148, at 656.

responsibilities.[342] Today, men and women continue to experience declines in income when living with dependent children.[343] As shown in the Chapter III example of Bob and Laura, a concurring child support obligation may defeat the benefits of a FISA award. Therefore, FISA overlooks one main determiner of post-separation financial inequality and should be broadened to factor in these circumstances.

An income sharing regime should not calculate the financial award by sole reference to income. The Canadian guidelines use the spouses' income disparity, length of the marriage, and child-rearing period as a proxy for determining the claimant's lost earning capacity.[344] To better reflect the economic reality of separating partners in New Zealand, a better alternative is to implement non-legislative guidelines with ranges that factor in income and, at the very least, childcare responsibilities. This conclusion follows from the substantial effect that childcare responsibilities have on the partners' financial positions after separation.

*3 Practical steps going forward*

Law reform must reflect public attitudes and expectations. The response to FISA-like approaches has been tested and supported by the public. The Borrin Survey found that respondents would endorse future-income sharing while practitioners also welcomed the replacement of the status quo with FISAs.[345] However, to the best of the author's knowledge, the public has not yet been surveyed explicitly about whether there is an appetite for guidelines that provide acceptable ranges for duration and quantum. In other words, the public has not definitively ruled whether guidelines would be more or less socially endorsed than FISA. It may well be that the public has a stronger appetite towards guidelines than FISA. This is particularly important because the public may be unaware of the existence or potential for guidelines in New Zealand. Thus, it would be beneficial to investigate this possibility before ruling out a guided approach.

Following the overseas creation of guidelines, a non-partisan body should be tasked with designing localised guidelines in New Zealand. In Canada, two professors led their project. In England, the Law Commission recommended that the guidance came from a judicial source. Specifically, the Family Justice Council, chaired by the President of the Family Division with its judicial members.[346]

[342] Working Group on Matrimonial Property, above n 29, at 5.
[343] Fletcher, above n 3, at 151.
[344] Lazare, above n 205, at 22.
[345] See Thornton, above n 41; and Binnie and others, above n 230.
[346] Law Commission of England and Wales, above n 157, at [3.86].

It is suggested that The New Zealand Law Society's Family Law Section (FLS) may be well-equipped to undertake this project for the following reasons.

One advantage of the FLS is that it represents many different perspectives within family law. Its 1,000 members range from family law practitioners, judges, academics, legal executives and government employees across New Zealand.[347] This will benefit the design of the guidelines because all areas of family law will be represented in the process. Family law practitioners act for both the affluent and less affluent partners and will not be biased towards either demographic. Additionally, there is a need to investigate whether New Zealand has regional variation in s 15 awards (as is the case in Canada). Thus, the 27 Regional Representatives of the FLS could be tasked with reviewing s 15 decisions from within their region. This will ascertain whether guidelines could be holistically applied across New Zealand or whether guidelines need to be developed for each region. More importantly, the Property Law Section has had guidelines endorsed by the New Zealand Law Society.[348] Economic disparity guidelines will be a novel addition to family property law. Therefore, it is advantageous that the Law Society has previously endorsed guidelines, albeit in a different section.

Above all, the FLS's purpose statement includes the assistance and promotion of family law reform in New Zealand and the promotion of the rule of law.[349] The FLS would assist family law reform if it led the guidelines project because it would improve the FISA recommendation. Guidelines are also consistent with the rule of law principle of transparent and clear law. Discretion (in our context, discretion fettered by guidelines) is essential to the rule of law because "it is the job to be done when indeterminacy inevitably arises".[350] Indeterminacy will continue to feature in the context of economic disparity where family life is increasingly diversifying. Therefore, the FLS would satisfy its purpose statement if tasked with leading the guidelines project: guidelines serve the rule of law; and the FLS would be directly assisting family law reform.

### *D Conclusion*

The contemporary use of non-legislative guidelines is the best vehicle moving forward in New Zealand for quantifying economic disparity awards. Where New Zealand should depart from Canada is the retention of the Law Commission's statutory entitlement. Importantly, ranges for

[347] New Zealand Law Society (Family Law Section) "About Us" < www.familylaw.org.nz>.
[348] New Zealand Law Society "Guidelines" <www.lawsociety.org.nz>.
[349] New Zealand Law Society (Family Law Section) "Our Vision" < www.familylaw.org.nz>.
[350] Shaw, above n 149, at 709.

quantum and duration combines the advantageous traits of rules and discretions within an area of law that requires structural certainty and flexibility at the margins. This dissertation echoes Miles' conclusion that if Canada can achieve a workable scheme for nearly 36 million people across 10 million square kilometres, then New Zealand must feasibly be able to undertake a similar project for 5.1 million Kiwis over 268,000 square kilometres.[351]

[351] Miles, above n 144, at 291.

## *Conclusion*

Once again, the time has come for the law of relationship property to be reformed. We have seen that the equal division rule is unable to cater for a just division of property amidst the complicated nature of family life. Parliament's intended superhero was s 15, the compensatory provision designed to offset the economic disadvantages experienced by the less affluent partner. As described in Chapter I, s 15 turned out to be the villain because it failed to protect economically weak partners. Notably, the lack of statutory guidance for calculating compensation left claimants in no better position than before.

This paper examined the best possible mechanism for quantifying economic disparity awards. Underpinning the analysis was the tensions between rules and discretion and average versus individualised justice. Chapter II canvassed the international landscape to examine the pitfalls of discretion. The English unfettered discretion failed to achieve the "fairness" objective, leaving the public searching for transparency in decision-making. Canada, however, has escaped the problems with discretion through the development of non-binding guidelines.

Chapter III critiqued the Law Commission's FISA recommendation. FISA emphatically propels the law towards a rules-based approach without accounting for nuances in complex family circumstances. The crux of Chapter III was that FISA's one-size-fits-all approach will not achieve a just division of property in every case. In short, the failure to consider contextual factors in the statutory formula swings the pendulum too far towards average justice. New Zealand needs to strike the balance between rules and discretion.

Chapter IV discussed how the Canadian guidelines promote flexible, yet constrained decision-making. It was argued that family property law, which is context-specific, justifies some discretion when quantifying economic disparity awards. Chapter IV concluded that the retention of a statutory entitlement alongside non-legislative guidelines that sets ranges for quantum and duration is the optimal solution. Looking to the future, it was suggested that The New Zealand Law Society's Family Law Section may be the most well-equipped non-partisan body to lead the guided approach in New Zealand.

Finally, to borrow the words of Atkin, "the difficulty is not with the goal but with finding a way of achieving the goal".[352] New Zealand's goal is clear: to share the economic disadvantages and

[352] Bill Atkin "Family Law – Solidarity or Disarray?" (2019) 50 VUWLR 369 at 383.

disadvantages arising from the relationship or its end. The difficulty, as examined in this paper, is how to best achieve this goal. FISA is not the panacea. Instead, the pendulum should rest somewhere in the middle, a balance of rules and discretion in the form of non-legislative guidelines and a statutory entitlement.

## *Bibliography*

### *A Cases*

*1 New Zealand*

*Baddeley v Baddeley* (1978) 1 MPC (SC).

*Carpenter v Carpenter* [2013] NZFC 8396.

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

*de Malmanche v de Malmanche* [2002] NZLR 838 (HC).

*E v E* [1971] NZLR 859 (CA).

*E v E* [2005] NZFLR 313 (FC).

*Gosbee v Gosbee* [2020] NZHC 1001.

*Haldane v Haldane* [1976] 2 NZLR 715 (PC).

*Hofman v Hofman* [1965] NZLR 795 (SC).

*Holroyd v Holroyd* [2020] NZHC 1210.

*Jack v Jack* [2014] NZHC 1495.

*M v B (Economic disparity)* [2006] NZFLR 641 (CA).

*NGC v HAH [Maintenance]* [2010] NZFLR 677 (HC).

*P v P* [2005] NZFLR 103 (CA).

*Preston v Preston* [2019] NZHC 3389.

*Quinn v Quinn* [2019] NZFC 105.

*Reid v Reid* [1979] 1 NZLR 572 (CA).

*Scott v Williams* [2016] NZCA 356.

*Scott v Williams* [2017] NZSC 185.

*Smith v Smith* [2007] NZFLR 33 (FC).

*Sparks v Prescott* [2016] NZFC 275.

*V v V* HC Wellington CIV-2006-485-764, 8 December 2006.

*Williams v Scott* [2014] NZFC 7615.

*Williams v Scott* [2014] NZHC 2547.

*X v X [Economic disparity]* [2009] NZCA 399.

*Z v Z (No 2)* [1997] NZFLR 241 (CA).

*2 Canada*

*Bracklow v Bracklow* [1999] 1 SCR 420.

*Caron v Caron* [1987] 1 SCR 892.

*Fisher v Fisher* [2008] ONCA 11.

*Moge v Moge* [1992] 3 SCR 813.

*Pelech v Pelech* [1987] 1 SCR 801.

*Redpath v Redpath* [2006] BCAA 338.

*Richardson v Richardson* [1987] 1 SCR 857.

*Wild v Wild* [2019] ABCA 159.

*Yemchuk v Yemchuk* [2005] BCCA 406.

*3 England and Wales*

*Charman v Charman* [2007] EWCA Civ 503.

*Hart v Hart* [2017] EWCA Civ 1306.

*Matthews v Matthews* [2013] EWHC Civ 1874.

*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

*Mills v Mills* [2017] EWCA Civ 129.

*ND (by her litigation friend KW) v GD* [2021] EWFC 53.

*RC v JC* [2020] EWHC 466 (Fam).

*SA v PA (Premarital Agreement: Compensation)* [2014] EWHC 392 (Fam).

*SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam).

*Waggott v Waggott* [2018] EWCA Civ 727; [2019] 2 WLR 297.

*White v White* [2001] 1 AC 596 (HL).

*Wyatt v Vince* [2015] UKSC 14.

## *B Legislation*

*1 New Zealand*

Child Support Act 1991.

Family Proceedings Act 1980.

Married Women's Property Act 1884.

Matrimonial Property Act 1963.

Matrimonial Property Act 1976.

Matrimonial Property Amendment Act 1968.

Property (Relationships) Act 1976.

Property (Relationships) Amendment Act 2001.

Property (Relationships) Amendment Act 2005.

2 *Canada*

Divorce Act RSC 1985 c 3.

*3 England and Wales*

Divorce (Financial Provision) Bill 2017 (HL Bill 26-19).

Matrimonial and Family Proceedings Act 1984.

Matrimonial Causes Act 1973.

Matrimonial Proceedings and Property Act 1970.

### *C Books and Chapters in Books*

Alison Diduck "Relationship Fairness" in Anne Bottomley and Simone Wong (eds) *Changing Contours of domestic Life, Family and Law: Caring and Sharing* (Hart Publishing, Portland, 2009).

Anne Barlow "Property and Couple Relationships: What Does Community of Property Have to Offer English Law?" in Anne Bottomley and Simone Wong (eds) *Changing Contours of Domestic Life, Family and Law: Caring and Sharing* (Hart Publishing, Portland, 2009).

Bill Atkin "Family Property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020).

Bill Atkin "Financial Support – who supports whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (5th ed, LexisNexis, Wellington, 2020).

Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018).

Carl Schneider "Discretion and Rules: A Lawyer's View" in Keith Hawkins (ed) *The Uses of Discretion* (Oxford University Press, Oxford, 1991).

Carol Rogerson "Shaping Substantive Law to Promote Access to Justice: Canada's Use of Child and Spousal Support Guidelines" in Mavis Maclean, John Eekelaar and Benoit Bastard (eds) *Delivering Family Justice in the 21st Century* (Hart Publishing, Oxford, 2015).

Ellen Gordon-Bouvier *Relational Vulnerability Theory, Law, and the Private Family* (Palgrave Macmillan, Cham, 2020).

Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others *Law Policy in Modern Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017).

Joanna Miles and Jens Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014).

Joanna Miles and Rebecca Probert "Sharing Lives, Dividing Assets: Legal Principles and Real Life" in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart Publishing, Portland, 2009).

John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017).
Julien Payne and Marilyn Payne *Canadian Family Law* (4th ed, Irwin Law, Toronto, 2011).
M Briggs "Historical Analysis" in N Peart, M Briggs and M Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004).
Mark Henaghan "Sharing Family Finances at the End of a Relationship" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017).
Mark Henaghan and others *Family Law in New Zealand* (19th ed, LexisNexis, Wellington, 2020).
Mary Welstead "Judicial Reform on an Increase in Discretion – The Decision in Miller v Miller; McFarlane v McFarlane" in Bill Atkin (ed) *The International Survey of Family Law* (Jordan Publishing, Bristol, 2008).
Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017).
Nicola Peart (ed) *Family Law – Family Property* (online looseleaf ed, Thomson Reuters).
Nicola Peart (ed) *Relationship Property & Adult Maintenance Acts & Analysis* (looseleaf ed, Thomson Reuters).
Nicola Peart, Jessica Palmer and Margaret Briggs "Introduction" in Jessica Palmer and others *Law and Policy in Modern Family Finance Property Division in the 21st Century* (Intersentia, Cambridge, 2017).

### *D Journal Articles*

AH Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237.
Bill Atkin "Family Law – Solidarity or Disarray?" (2019) 50 VUWLR 369.
Carl Schneider "The Tension Between Rules and Discretion in Family Law: A Report and Reflection" (1993) 27 Fam.L.Q. 229.
Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Fam. L. Q. 241.
David Burns "Relationship property and extraordinary circumstances" [2004] NZLJ 135.
Donna Crowe-Urbaniak "Reform of Financial Provision on Divorce: For the Few, Not the Many" (2020) 24 Edinburgh L.Rev 268.
Elisabeth Cooke "Miller/McFarlane: law in search of discrimination" (2007) 19 CFLQ 98.
Emma Hitchings and Joanna Miles "Rules Versus Discretion in Financial Remedies on Divorce" (2019) 33 IJLPF 24.

Emma Littlewood "Economic disparity at the end of a relationship – is FISA the answer?" (2019) 9 NZFLJ 165.

Fae Garland "Section 15 Property (Relationships) Act 1976: Compensation, Substantive Equality and Empirical Realities" (2014) 3 NZ L Rev 355.

Geoffrey Shaw "HLA Hart's Lost Essay: "Discretion" and the Legal Process School" (2013) 127(2) Harv L Rev 666.

Gillian Douglas and Stephen Gilmore "The (Il)legitimacy of Guideline Judgements in Family Law: The Case for Foundational Principles" (2020) 31 K.L.J. 88.

Hayley Fisher and Hamish Low "Recovery From Divorce: Comparing High and Low Income couples" (2016) 30 IJLPF 338.

HLA Hart "Discretion" [2013] 127 Harv L Rev 652.

Joanna Miles "Charman v Charman (No 4) – making sense of need, compensation and equal sharing after Miller/McFarlane" 20(3) CFLQ 378.

Joanna Miles and Emma Hitchings "Financial Remedy Outcomes on Divorce in England & Wales: Not a 'Meal Ticket for Life" (2018) 31 AJFL 43.

Jodi Lazare "The Spousal Support Advisory Guidelines, Soft Law, and the Procedural Rule of Law" (2019) 31 C.J.W.L. 317.

John Caldwell "The Case of Z v Z: Future Earnings, Matrimonial Property and Spousal Maintenance" (1996) 4 NZ L Rev 505.

John Priestley "Whence and Whither? Reflections on the Property (Relationships) Act 1976 by a Retired Judge" (2017) 15 Otago LR 67.

Kathryn O'Sullivan "Rethinking ancillary relief on divorce in Ireland: the challenges and opportunities" (2015) 35 LS 111.

Margaret Wilson "Policy and Law in the Development of Relationship Property Legislation in New Zealand" (2017) 15 Otago LR 89.

Michael Fletcher, David Maré and Tim Maloney "The Economic Consequences of Marital Separation for Parents in New Zealand: Insights from a Large Administrative Dataset" (2020) 34 IJLPF 289.

Niall R Whitty "From Rules to Discretion: Changes in the Fabric of Scots Private Law" (2003) 7 Edin.L.R. 281.

Nikki Chamberlain "The Future of Economic Disparity Redress in New Zealand" (2018) 28 NZULR 293.

Rollie Thompson "Post-Separation Increases in Payor Income and Spousal Support" (2020) 39(2) C.F.L.Q. 186.

Rollie Thompson "Spousal Support Eh? Sorry, Not Your American Alimony" (2019) 41 Hous.J.Int'l L. 641.

Rosalie Abella "Economic Adjustment On Marriage Breakdown: Support" (1981) 4 Fam.L.Rev 1.

Rosie Schumm and Christine Abbots "Spousal maintenance and gender inequality" (2017) 47 Fam Law 1116.

Sarah Dargatz "The Legal Status of the Spousal Support Advisory Guidelines" (2020) 44(4) LawNow 46.

Seb Recordon "Rules or Discretion? Towards a better approach to quantum in addressing post-separation economic disparities in New Zealand" (2019) 3 NZWLJ 100.

Sophia Gonella "'Alimony Drones' and 'Gold-Diggers': Protecting Economic Vulnerability Through Spousal Maintenance Orders" (2021) 6 DLR 1.

Susannah Shaw "Disparity in *Jack v Jack*: Judicial Overreach or a Just Result at Long Last?" (2014) 45 VUWLR 535.

Vivienne Crawshaw "Section 15 – a satellite overview" (2009) 6 NZFLJ 155.

### *E Speeches and Addresses*

Bill Atkin "The Disparity in Economic Disparity – the need for a full-scale overhaul of ss15 and 15A and maintenance" (NZFL Conference, 10 October 2005).

Deborah Chambers "New Zealand Family Property Laws Continue to Fail Women" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018).

Lady Hale "What is a 21st Century Family?" (speech to the International Centre for Family Law, Policy and Practice, University of Westminster, 1 July 2019).

Lord Simon "With All My Worldly Goods" (address to Holdsworth Club, University of Birmingham, 20 March 1964).

Lord Wilson "Changes over the centuries in the financial consequences of divorce" (address to the University of Bristol Law Club, 20 March 2017).

Steven van Bohemen "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018).

### *F Reports*

#### *1 New Zealand*

Grant Thornton *New Zealand Relationship Property Survey 2019* (Family Law Section of the New Zealand Law Society, November 2019).

Ian Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018).

Isabella Sin, Kabir Dasgupta and Gail Pacheco *Parenthood and labour market outcomes* (Ministry for Women, May 2018).

Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC, IP41, 2017).

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

Law Commission *Review of the Property (Relationships) Act 1976 Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga Mariu ai* (NZLC, IP44, 2018).

Royal Commission on Social Policy *Report of the Royal Commission on Social Policy* (Wellington, 1998).

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

*2 Canada*

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

Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* (Department of Justice Canada, Ottawa, 2016).

Carol Rogerson *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (Department of Justice Canada, Ottawa 2002).

*3 England and Wales*

Family Justice Council *Guidance on "Financial Needs" on Divorce* (Judicial Office, London, 2018).

Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014).

## *G Theses and Research Papers*

Andrew Mohamdee "Rules vs Discretion: Calibrating the Scales for Financial Remedies on Divorce" (Master's Thesis, Durham University, 2019).

Ashley Varney "Divorcing Rhetoric from Reality: A Law Reform and Policy Perspective on Section 15 of the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, Victoria University of Wellington, 2017).

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

Jodi Marissa Lazare "Judicial Reliance on the Spousal Support Advisory Guidelines: Spousal Support and Soft Law Across Canadian Jurisdictions" (DCL Thesis, McGill University, 2019).

Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017).

### *H Internet Resources*

"Marriage falling out of favour" (5 May 2020) Stats NZ <www.stats.govt.nz>.

Melanie Carroll "Living wage rises to $22.75 an hour in September" (1 April 2021) Stuff NZ <stuff.co.nz>.

New Zealand Law Society "Guidelines" <www.lawsociety.org.nz>.

New Zealand Law Society (Family Law Section) "About us" <www.familylaw.org.nz>.

New Zealand Law Society (Family Law Section) "Our Vision" <www.familylaw.org.nz>.

### *I Other Resources*

(27 January 2017) 778 GBPD HL (Baroness Deech).

M Wilson (29 March 2001) 591 NZPD.

Sharon Thompson "Divorce (Financial Provision) Bill 2017-2019 (UK) Submission of Written Evidence".

Simon Chapple "Submission to the Law Commission on Review of the Property (Relationships) Act 1976".

T Ryall (29 March 2001) 591 NZPD.