MAINTENANCE – TIME FOR A CLEAN BREAK?

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In New Zealand, the relationship property and adult maintenance regimes have long been dealt with under two discrete legislative regimes. Relationship property assets of the parties are divided pursuant to the detailed provisions of the Property (Relationships) Act 1976, whereas the adult maintenance and future income needs of any one party are governed by the essentially discretionary provisions found in Part 6 of the Family Proceedings Act 1980. While the two regimes are clearly distinct, there is nevertheless an acknowledged complementarity in their policies.¹ After all, both share the common goal of facilitating a fair resolution of financial problems ensuing from a failed relationship, and the legislative amendments in 2001 to both the Property (Relationships) Act 1976 and the Family Proceedings Act 1980 were designed to ‘sit alongside’ each other.²

Fifteen years on, the Law Commission’s current review of the Property (Relationships) Act 1976 provides an ideal opportunity to reflect on whether there could now be further integration of the two regimes, and, indeed, whether the concept of separate adult maintenance even remains justifiable in principle at all. In particular, given the regime for property division in New Zealand encompasses compensation for relationship-derived economic disparities (though admittedly a little incongruously), it may be timely to reconsider the purpose and future of our so-called rehabilitative, needs-based maintenance. It may be time to think about fortifying the ‘clean break’ principle.

The clean break principle is premised on the notion that the parties will use their respective shares of the relationship property to start afresh,³ and its purpose is to achieve financial finality and to assist the parties to self-determine and become self-sufficient.⁴ While no overt or implicit reference to this principle can be found in any of the specific provisions of the Property (Relationships) Act 1976, included in which are s 1M or s 1N setting out the purposes and principles of the Act, there can be no doubt that the statutory regime as a whole is firmly grounded on the philosophy that ‘…there should be a clean break between the parties as soon as practicable, with each able to take up their future life independently of the other’.⁵

The Family Proceedings Act 1980, dealing with adult maintenance, does not actually contain any statement of statutory purposes or principles at all, and the authorisation of continuing income support for one party under ss 63 and 64 of the Act⁶ might well be regarded as innately antithetical to the clean break principle. Nonetheless, the clean break is in fact promoted in provisions such as 64(4) and 64A of the Family Proceedings Act which provide directions, albeit ambiguously, on the

¹ As pointed out in PN v PN (1984) 3 NZFLR 277 (HC) at 280.
² See the comments of Hammond J in M v B [Economic Disparity] [2006] NZFLR 641 (CA) at [220]. (The potential for a provision in the Family Proceedings Act 1980 to cover relationship property issues was highlighted, in a quite different context, in the Supreme Court judgment on trusts in Clayton v Clayton (Claymark Trust) [2016] NZSC 30, [2016] NZFLR 189).
⁶ Section 63 essentially governs the period between a separation and dissolution of a marriage or civil union; section 64 governs the period following dissolution of a marriage or civil union, or the end of a de facto relationship.
limits of the duration of maintenance liability. The Court of Appeal in Scott v Williams recently described the essence of the present maintenance scheme thus: after dissolution of marriage, the respondent is liable to pay maintenance to meet the reasonable needs of the applicant that she cannot reasonably meet because of the division of functions during the marriage and the applicant’s likely earning capacity but the applicant must assume responsibility for meeting those needs within a reasonable time.

Such a statement is deceptively simple, for the maintenance provisions of the Family Proceedings Act are notable for their extensive reliance on judicial discretionary judgments and their strikingly indeterminate boundaries. Uncertainty, for example, resides at the very heart of s 64A(1)(a), the key threshold provision for the continuation of maintenance, with its elusive reference to a period of time that is deemed ‘reasonable in all the circumstances of the case’. Similarly, there is considerable elasticity linked to the pivotal concept of ‘reasonable needs’ in ss 63(1) 64(1), 64A(2), and 65 (2)(b) of the Act, and to the concept of ‘practically’ in ss 63(1) and 64(1). As well, a ‘significant discretion’ has been conferred on the courts whenever they undertake the task of determining quantum under s 65 of the Act. All this means that current social thinking on the value of the clean break principle, and the philosophical justification, if any, for adult maintenance can become highly relevant when any assessment is to be made of the generic or specific need for this form of relief.

Certainly, in an early judgment dealing with the spousal maintenance provisions contained in the previous Domestic Proceedings Act 1968, Richardson J delivering the judgment of the Court of Appeal, openly accepted the clean break principle declaring that:

‘[t]he social policies underlying the Matrimonial Property Act, the increasing recognition in all spheres of the equality of the spouses, and the developing philosophy that the parties to a marriage which has broken down should go their own ways in so far as they reasonably can free of continuing claims on one another’.

The Matrimonial Property Act 1976, referred to by Richardson J, was replaced by the Property (Relationships) Act 1976, included in which was a radically new provision that aimed to address issues of economic disparity. Section 15 thus allowed the Court to make an order to depart from the normal regime of equal sharing of relationship property where such a departure would be ‘just’ in order to compensate a party for an income shortfall occasioned by the divisions of functions during the relationship. At the stroke of the legislative pen, the compensatory rationale advanced in a number of overseas jurisdictions for a separate regime of continuing adult maintenance had been

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7 As Winkelman J said in NGC v HAH [2010] NZFLR 677 (HC) at [32], s 64(4) emphasises the policy that ‘...dissolution should in the ordinary course provide a clean break of financial ties’. Courtney J also cited s 64A as a reflection of the clean break principle: Clayton v Clayton (Maintenance) above n 3 at [6].
9 Ibid at [115].
10 See the observation of the Court of Appeal in Z v Z [1997] NZFLR 241 (CA) at 277.
11 Bunce v Bunce [1980] 2 NZLR 247 (CA) at 255-256.
12 There is also the power under s 15 to make an award to recognise the enhanced position of the other party.
13 For a leading academic exposition, see Ira Ellman “The Theory of Alimony” (1989) 77 Cal L Rev 1; see also the analyses of Belinda Fehlberg “Spousal maintenance in Australia” (2004) 18 International Journal of Law Policy and the Family 1 at 4-6 and Patrick Parkinson Family Law and the indissolubility of parenthood (Cambridge University Press, 2011) at 250-254. Compensation was also an important strand of the judgments of the
supplanted and rendered far less potent in New Zealand. For just as the French system of *protestation compensatoire* (which allows a lump sum to compensate the financially weaker party for the financial consequences of dissolution of marriage)\(^\text{14}\) reportedly replaced the post-divorce maintenance obligation in France,\(^\text{15}\) it became correspondingly arguable that the Property (Relationships) Act 1976 (containing not only s 15 itself but other provisions, detailed below, that recognise the accommodation and other needs of the carer of dependent children) should, at least where there is sufficient relationship property, be considered generally exhaustive of one party’s financial claim against the other. A troubling question arose: was there any rational basis for needs-based adult maintenance once compensation for the financial consequences of the relationship had been addressed?

In view of the fact that virtually all claimants for adult maintenance to date have been females seeking financial provision from their male former partners,\(^\text{16}\) any discussion of such a question might be perceived to require an analysis of gender equity issues. To some extent, however, the argument around maintenance can be fairly explored in a gender-neutral way, in that it is no longer unrealistic or utopian to postulate examples where a female is in a superior financial position to her ‘house-husband’ male partner. Statistics from the United States, for instance, suggest that between 25%-33% of women are earn more than their male partners.\(^\text{17}\) Thus, when debating the continuing rationale and justification for needs-based maintenance, it would be perfectly reasonable to frame the issue in terms of whether any sound reason can be identified as to why an economically stronger female partner, say a corporate chief executive, should bear any moral or legal responsibility for the financial wellbeing and needs of her former male partner, say a cleaner, once the couple’s property rights, including any compensatory adjustments under s 15, have been properly determined? Should not the woman, and any new partner, be entitled to a break, a ‘clean’ break?

**Clean Break under the Family Proceedings Act?**

(i) The broad discretionary components of the maintenance provisions.

When the 2001 amendments to the Family Proceedings Act 1980, and extensions to the relationship property regime, were being debated in the House of Representatives, an Opposition Member of Parliament, Stephen Franks, correctly discerned that: ‘[T]he clean break principle is superseded by provisions encouraging the award of maintenance...’.\(^\text{18}\) After all, not only did the various amended provisions of the Family Proceedings Act extend the possibility of continuing income support,

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\(\text{Supreme Court of Canada in } \text{Moge v Moge (1993) 99 DLR (4th) 456 and the House of Lords in } \text{Miller v Miller; McFarlane v McFarlane (2006) UKHL 24, [2006] 2 AC 618.}\

\(\text{14}\) See the useful discussion of this system by Parkinson, above n 13, at 31.


\(\text{16}\) See the study of Mark Henaghan, Saskia Righarts, Alex Latu and Ruth Ballantyne “Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men” (Commission for Financial Literacy and Retirement Income, University of Otago, August 2012) at 38.

\(\text{17}\) See Amy Amundsen “Removing the Parachute: Recent Trends in Alimony” (2015) 29 AJFL 61 at 62, suggesting almost a third of American women earn more than their spouses, and Patrick Parkinson above n 13 at 256 who points to a 2004 study that suggests 25.5% of American women in marriages earned more than their husbands. (Overall in New Zealand, however, in 2015 an 11.8% gender pay gap was shown to exist between men and women for median hourly earnings: Ministry for Women “Gender Pay Gap” [2015] 858 NZPD 2755.

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ensuring that the parties could thereby potentially remain even more tethered to each other, but the provisions continued to apply on a discretionary basis meaning the hopeful litigant might well feel encouraged and incentivised to bring an claim against his or her former partner. Even the very lodging of such a claim would inevitably mean the two parties thereupon became interlocked in renewed conflict.

Certainly, as noted above, a ‘statutory steer’ to the clean break principle can be discovered in ss 64(4) and 64A(1) of the Family Proceedings Act. Thus, s 64(4) provides that, except as is provided for, neither party following a dissolution of marriage or civil union or the ending of a de facto relationship is liable to maintain the other. Section 64A(1) further provides:

If a marriage of civil union is dissolved or in the case of a de facto relationship the de facto partners cease to live together,-

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

(b) On the expiry of that period of time neither spouse, civil union partner or de facto partner is liable to maintain the other.

The steer in that provision was, however, far from unwavering. The apparent presumptive policy in favour of a clean break was subject to the discretionary qualification contained within s 64A(1) that financial self-sufficiency needed only to be assumed in a period of time that was ‘reasonable in all the circumstances of the case’. That same wording in the same predecessor provision enabled the Court of Appeal in a leading case Z v Z to hold that there was nothing to preclude ‘a lengthy period of time, or even an indefinite period’, as the determination of what was ‘reasonable’ in the particular case was ‘not informed by any general principle’. The Court of Appeal continued to aver that while such provisions were ‘undoubtedly’ intended to give effect to the clean break principle, there was nothing which required the self-sufficiency objective of the Act to be carried through to the point where the provisions operated unfairly and harshly on one of the spouses. Then, in concluding its landmark judgment, the Court of Appeal commended the possibility of legislative review whereby Parliament could re-examine, inter alia, ‘the merit of the clean break principle and the desirability of resolving the parties’ financial affairs by way of a property adjustment rather than periodic maintenance support’.

(ii) The 2001 change to extended duration of maintenance.

The governmental review envisaged by the Court of Appeal did result in significant legislative changes to both the matrimonial property and adult maintenance regimes, and the enactment of s 15 in the relationship property statute could reasonably have been anticipated to have encouraged the favoured shift away from periodic payment support in favour of property adjustment alone. However, whereas the previous section s 64(3) of the Family Proceedings Act 1980 had provided the Court with the discretion to extend the period of adult maintenance only in circumstances where

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19 The phrase comes from English jurisprudence: see, for example, Matthews v Matthews [2013] EWCA Civ 1874, [2014] 2 FLR 1259 at [13].
21 Ibid at 276.
22 Ibid.
23 Ibid.
24 Above n 20 at 278.
having regard to the ages of the parties and duration of the marriage it was unreasonable to require one party to do without maintenance and reasonable to require the other to pay, the newly introduced s 64A(3)(c) significantly extended the circumstances in which maintenance could potentially be prolonged. Thus, liability was extended out to a situation where a party remained liable to meet the reasonable needs of the other because of....

(c) The ability of the spouses, civil union partners or de facto partners to become self-supporting, having regard to –

(i) The effects of the division of functions within the marriage, civil union or de facto relationship ....;
(ii) The likely earning capacity of each .....;
(iii) The responsibilities of each .... for the ongoing daily care of any minor or dependent children ....;
(iv) Any other relevant circumstances.

As Atkin observed, that amendment seemingly allowed continuing obligations in ‘virtually any situation’.  

For instance, no apparent constraints could be identified as to what circumstances might be deemed ‘relevant’ under s 64A(3)(c)(iv), and the clean break policy, already rather cloudy as a consequence of the qualifying proviso requiring self-sufficiency only in a period of time that was ‘reasonable in all the circumstances of the case’, proved to have been weakened rather than strengthened.

(iii) Some judicial decisions on duration.

The real debate over maintenance is around its duration. Needless to say, judges will still continue to pay due homage to the clean break principle, and continue to invoke the spirit of s 64A. Early dicta of the Court of Appeal in Slater v Slater, endorsing the view that maintenance should be viewed as only a temporary bridge to assist a party who was ‘consciously moving towards self-sufficiency’, are still considered by the current judges to possess ‘considerable authority’ (despite the Court of Appeal in Z v Z having expressed concern that the Slater dicta might have been ‘...either misconstrued or applied with undue rigidity in practice’). As Miller J put it, the clean break principle, whilst rather attenuated, does remain as ‘...an important consideration in what remains a no-fault dissolution regime’. To take one example, Judge Walsh was openly unimpressed by the perceived failure of a fifty-three-year-old woman, with a special needs adult child, to take reasonable steps towards self-sufficiency, and by her apparent ‘mind-set’ that the husband had an ongoing duty to maintain her, on the basis that marriage was forever.

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26 See for example CAM v JMP [2013] NZHC 592 at [81] per Andrews J.
27 See for example Clayton v Clayton (Maintenance), above n 3, at [6] per Courtney J.
29 At 176.
30 See the comment of Judge Callinicos in TJO v CGO [2012] NZFC 857 at [7]. The Slater dicta were also accepted by the Court of Appeal in C v G [Maintenance of former partner: period of liability] [2010] NZCA 128, [2010] NZFLR 497 at [31].
32 At 276.
33 JES v JBC [2007] NZFLR 472 (HC) at [51].
34 BJR v VMR [Economic disparity] [2007] NZFLR 177 (FC) at [92].
Generally, the requirement of reasonableness within 64A is taken to necessitate a maintenance period that is defined and limited in time; and while the extent of a ‘reasonable’ period of time is left unspecified, some judges seem to adhere to the view that the expected length of time would ordinarily be in the realm of three to four years following separation.\textsuperscript{35} One Family Court judge said that from his search of the case-law the longest period he had able to find for continuation of spousal maintenance was for a period of five years from the date of separation.\textsuperscript{36} And in \textit{M v B [Economic Disparity]},\textsuperscript{37} Robertson J held that after five years of separation, with the children having grown up and the property division having been finalised, it was indeed ‘time for a clean break’.\textsuperscript{38}

On the other hand, it is not exactly exceptional to discover judges who are sympathetic to the award of quite lengthy periods of maintenance. Even in \textit{M v B [Economic Disparity]} itself, Hammond J, though expressing his general agreement with Robertson J’s judgment, did feel that the five year limit may have been ‘on the light side’.\textsuperscript{39} In \textit{B v B}\textsuperscript{40} Rodney Hansen J upheld an award of maintenance of $1,900 per month for a total period of eight years following dissolution: the judge reasoned that the challenges faced by a woman in her mid-fifties re-establishing herself after 25 years of being engaged predominantly in child rearing activities should not be understated, and that the mother in this particular case had care of a child with special needs who was about to commence intermediate school. In one case concerning a 67- year-old superannuitant in part-time work, after a marriage of 23 years duration, Keane J indicated, obiter that post-dissolution maintenance could potentially be considered beyond a three-year time span.\textsuperscript{41} Citing an earlier judgment of Panckhurst J in \textit{D v D},\textsuperscript{42} Keane J pointed out that awards for even an indefinite period were not unknown.\textsuperscript{43}

It is true that many of the maintenance awards of a more extended duration have tended to involve quite lengthy relationships. Nevertheless, Andrews J opined in a case where the relationship had lasted only two years and two months, but where there were two children of the relationship and the applicant was undertaking study, that she ‘….would not be willing to hold that as a matter of principle a maintenance liability for three-and-a-half, or even five-and-a-half years after a relationship of short duration is, by reason of its duration alone reasonable or unreasonable’\textsuperscript{44}

There are, of course, limits. Unsurprisingly, the possibility that a spousal maintenance order could continue for 42, or even 20, years was seen as completely contrary to the spirit of the Family

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\textsuperscript{35} See, eg, the comment of Judge McHardy in \textit{KK v HK} (Family Court, Auckland, FAM 2004-004-509, 27 August 2008) at [94]; the decision was upheld on appeal: \textit{KK v HK} (High Court, Auckland, CIV 2008-404-6161, 31 July 2009, Keane J). In the study of Mark Henaghan et al, above n 16, the average duration of maintenance was for a period of 24 months, at [5.11].

\textsuperscript{36} \textit{PEL v FFB} [2012] NZFC 9534 at [77] per Judge Burns (the 5 year period, in the case of a marriage of 13 years duration and with two children, was upheld by Gilbert J on appeal \textit{Lawrence v Baker} [2013] NZHC 2378 at [35]. A period of maintenance for five years post separation was also considered reasonable by Judge O’Dwyer in the circumstances of \textit{Waldorf v Hugglesitch} [2015] NZFC 3413, [2015] NZFLR 909 at [121].

\textsuperscript{37} Above n 2.

\textsuperscript{38} At [157].

\textsuperscript{39} At [265]. (It is interesting to compare the seemingly less generous approach of Hammond J in a much earlier judgment of \textit{Mackie v Mackie} [1993] NZFLR 213(HC)).

\textsuperscript{40} (High Court, Dunedin, CIV-2011-412-000328, 26 September 2011) at [30]-[31].

\textsuperscript{41} \textit{Beran v Beran} [2005] NZFLR 204 (HC) at [93].

\textsuperscript{42} [2001] NZFLR 613 (HC).

\textsuperscript{43} Above n 41 at [93].

\textsuperscript{44} \textit{CAM v JMP} [2013] NZHC 592 at [32]. The Family Court award was upheld, but the quantum was reduced from $2,000 to $1,680 per week as from the time of the High Court judgment.
Proceedings Act 1980. Moreover, in NGC v HAH\(^ {46} \) Winkelmann J attested to some difficulty with the notion of indefinite orders in the absence of clear justificatory reasons.\(^ {47} \) And it should be pointed out that the circumstances of a case such as D v D (where in the course of a 25 year marriage the wife had left the television industry to manage the home and care for the children) would now fall neatly within the purview of a claim under s 15 of the Property (Relationships) Act.

**Relationship property and maintenance connection.**

The crucial interrelationship of economic disparity awards under s 15 and maintenance awards under the Family Proceedings Act is specifically examined in the section below, but the more general symbiotic relationship between maintenance and relationship property is also worth exploring. Any agreements negotiated between the separated parties, for instance, are likely to involve bargaining property against the income support;\(^ {48} \) and thus, for example, a less generous provision for property may well be offered if there is to be an extended maintenance obligation.\(^ {49} \)

Likewise, where court proceedings are involved, the interrelationship of property and maintenance issues is recognised by s 32 of the Property (Relationships) Act 1976. To facilitate a degree of cogency, this allows the Court in relationship property proceedings to make a maintenance order for a spouse or partner (s 32(2)), and equally provides that the Court must have regard to any maintenance order that has been previously made (s 32(1)). Furthermore, as discussed below, certain child support orders can also be made pursuant to s 32. The close interrelationship between the two remedies of maintenance and relationship property is also recognised in s 65(2)(a)(iii) of the Family Proceedings Act which provides that if a maintenance order is to be made then the Court in fixing the quantum of the order is required to have regard, inter alia, to the ‘[m]eans derived from any division of property...’\(^ {50} \)

Where the parties have yet to resolve the division of relationship property, they can, of course, be placed in a highly unsettling transitional period that may, as discussed below, require maintenance support,\(^ {51} \) and in Clayton v Clayton (Maintenance)\(^ {52} \) Courtney J ruled that the wife’s inability to meet reasonable needs arose because she had been unable to access her share of relationship property.\(^ {53} \)

In fact, as Robertson J stated in M v B [Economic Disparity],\(^ {54} \) ‘reasonable needs’ cannot even be accurately assessed while issues relating to the division of relationship property remain extant.\(^ {55} \)

47 At [65].
48 As observed by Holland J in PN v PN (1984) 3 NZFLR 277 (HC) at 279.
49 As commented by the Court of Appeal in C v G [Maintenance of former partner: period of liability above n 30 at [43].
50 As recently noted by the Court of Appeal, this will include an income shortfall award: Scott v Williams above n 8 at [123].
51 KBP v PK (Family Court, North Shore, Fam-2007-044-001783, 21 August 2009, Judge Ryan) at [11]. Robertson J observed in M v B [Economic Disparity] above n 2 it was not uncommon for maintenance to be dealt with as a separate proceeding to ensure that a partner was able to survive financially while legal proceedings were completed (at [126]). In Cavanagh v Cavanagh (1994) NZFLR 365 (FC) maintenance was ordered to be terminated at the date when matrimonial property issues were determined; see also McGregor v McGregor (no 2) [2003] NZFLR 596 (FC) at [71].
53 At [48] and [73] (this was held to fall under ‘other relevant circumstances’ in s 64(2)(a)(iii)).
54 Above n 2.
55 At [129].
successful maintenance awards these days will be in the form of interim orders under s 82 of the Act;\textsuperscript{56} and, again as argued more fully below, interim orders can be more readily supported as a temporary solution to protect the financially disadvantaged party’s position pending the final outcome of relationship property proceedings.

Overall, the need for any general maintenance might be thought to be inversely proportional to the benefits of a relationship property division,\textsuperscript{57} and given that the two remedies currently subsist in tandem it would certainly be preferable if the issue of the need, if any, for maintenance was to be decided either contemporaneously or subsequent to an order for property division. Equally, though, under current statutory regimes it is by no means mandatory, as Courtney J has intimated, for property issues to be resolved before final maintenance.\textsuperscript{58}

Once the division of the relationship property has been finally ordered, though, then the parties are expected to plan on becoming self-supporting,\textsuperscript{59} and the High Court has consistently declared that when relationship property is divided it becomes incumbent upon the parties to organise their capital so as to become self-sufficient.\textsuperscript{60} In other words, the ‘clean-break’ principle only truly comes into full play once the property has been divided. At that point the parties are expected to begin their lives anew, and it is at that point that the payment of periodic maintenance truly does become ideologically anomalous.

**Economic Disparity Awards and Maintenance.**

While Robertson J, delivering his judgment in \textit{M v B [Economic Disparity]}\textsuperscript{61} held that s 32 of the Property (Relationships) Act 1976 did not signify that s 15 should be linked with the maintenance inquiry,\textsuperscript{62} or that an economic disparity award should be treated as capitalised maintenance,\textsuperscript{63} the two remedies have elsewhere been judicially described as ‘inextricably linked.’\textsuperscript{64} In \textit{M v B [Economic Disparity]} itself, Hammond J was content to describe economic disparity compensation as ‘the functional equivalent of a lump sum for future maintenance’.\textsuperscript{65}

As Robertson J also conceded, the actual subject matters of both 15 of the Property (Relationships) Act and ss 63 and 64 of the Family Proceedings Act are indeed ‘remarkably similar’,\textsuperscript{66} and the Court

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\textsuperscript{56} See the case sample of Mark Henaghan et al, above n 16 at [5.37].

\textsuperscript{57} As noted in \textit{Fisher on Matrimonial and Relationship Property} (online looseleaf ed, Thomson Reuters) at [18.86].

\textsuperscript{58} NGC v HAH [2010] NZFLR 677 (HC) at [64] (her Honour said it was easy to envisage circumstances where there would be a lengthy delay between dissolution and resolution of property issues). See also the observation of Judge Malosi in \textit{Youngman v Austin} [2015] NZFC 5081 at [25].

\textsuperscript{59} See for example the comment of Judge Burns in an application for interim maintenance in \textit{AMG v S(S)G} (Family Court, Auckland, Fam-2011-004-002021, 16 December 2011 ) at [43.]

\textsuperscript{60} See eg \textit{Bratten v Bratten} [2013] NZFC 2171, [2013] NZFLR 941 at [101]-[104] and \textit{Clayton v Clayton} (\textit{Maintenance}) above n 3 at [6] per Courtney J.

\textsuperscript{61} [2006] NZFLR 641 (CA).

\textsuperscript{62} At [126].

\textsuperscript{63} At [122] - [124]. Young P also stated that he would not treat the s 15 claim on the basis it was intended to provide for capitalised maintenance (at [191]; but cf Hammond J at [272].

\textsuperscript{64} See the observation of Priestley J in \textit{FH v LH} [2013] NZHC 1044 at [48]. Extra-judicially, Judge Doogue has noted the trend for cases to identify a nexus between economic disparity and spousal maintenance claims: “Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty” (2007) 5 NZFLJ 282 at 283.

\textsuperscript{65} [2006] NZFLR 641 at [272].

\textsuperscript{66} At [122].
of Appeal in Scott v Williams also pointed out recently that a s 15 income shortfall award may be justified on the same basis as a spousal maintenance award. Both sets of provisions are essentially concerned with the same issue of the ‘income differential between the parties on the breakdown of a relationship’, and, while there are certainly different governing rules for the two remedies, the division of functions during a relationship will potentially be important in both maintenance and economic disparity proceedings, and the evidence led by the parties might well relate to both claims. Hence, in JES v JBC Miller J noted the close link between the applicant’s case for an economic disparity award resting on the loss of a relatively modest earning capacity and the maintenance award resting on an inability to meet reasonable needs.

At present, the close linkage between the two remedies does mean one remedy will inevitably be offset against the other. As the Court of Appeal recently ruled, ‘[it] cannot be the case that the s 15 award does not affect the extent of entitlement to spousal maintenance….’, and a s 15 entitlement will fundamentally affect the extent to which it is ‘necessary’ for some maintenance provision, past or future, to be made. Nevertheless, the order in which the respective claims should be decided is quite indeterminate, and it has been observed that there is presently an ‘uneasy tension’ between the two remedies. In short, and as had been predicated by the Family Law Section at the time of the Bill’s passing, the interrelationship of the two remedies has been the cause of great confusion and uncertainty.

The question, then, is whether these two remedies should continue to co-exist side by side into the future. In the past, a number of judges and academics have proffered a preference for maintenance over a s 15 award as the more appropriate remedy to assist the financially disadvantaged party. In Hammond v Hardy, for example, Priestley J speculated that if the circumstances of the case had justified some additional capital entitlement, a lump sum maintenance award would have provided a much easier and less expensive route than a s 15 order. The argument of this paper, however, is

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67 Above n 8.
68 Ibid at n [26].
70 As had happened in the High Court in Hodgson v Hodgson [2015] NZCA 404, [2015] NZFLR 979, as noted by Williams J, delivering the judgment of the Court of Appeal, at [21].
71 [2007] NZFLR 472 (HC).
72 At [47].
73 See the early discussion of Judge Adams in V v V [2002] NZFLR 1105 (FC) at [62] –[64].
74 Scott v Williams above n 8 at [127].
75 See the differences between Robertson, Hammond and Young J in M v B [Economic Disparity] above n 2 at [125], [266] and [207] respectively.
76 As noted by Claire Green “The impact of s 15 on the Property (Relationships) Act 1976 on the vexing problem of economic disparity” (Thesis, PhD, University of Otago, 2014) at 147.
77 See Mark Henaghan “More maintenance claims likely” (2001) 3 BFLJ 286 at 287.
78 As noted by Bill Atkin and Wendy Parker Relationship Property in New Zealand (2nd ed, LexisNexis, Wellington, 2009) at 166.
81 At [97].
that it might be timely to consider, at least where there is sufficient relationship property, whether a s 15 compensatory award should not be considered the more acceptable of the two remedies.

Certainly, as identified above, the circumstances of some cases such as D v D\(^2\) decided before the 2001 amendments seem to fall squarely within the parameters of a s 15 claim, and there have been cases subsequent to the amendments where judges have indicated that an economic disparity award did subsume some of the factors raised in a maintenance claim.\(^3\) The remedy overlap also emerged in the judgment of Hammond J in M v B when his Honour hinted that the purposes of the Family Proceedings Act were relevant in the Court’s holistic evaluation of whether a s 15 award was ‘just’.\(^4\)

The s 15 determination is, of course, grounded on discretion; and, in a relationship property statute dedicated to the codification of ‘clear and inflexible’ rules,\(^5\) the reliance on discretion has been the subject of some disquiet. Other difficulties surround the scope and application of s 15 (including, most notably, for our immediate purpose, the restrictive requirement that awards may be sourced from relationship property alone), and s 15 is one of the specific matters to be scrutinised by the Law Commission. Some recommendations for future reform seem entirely possible. However, the moral foundations of the provision have never been particularly contentious, and the fundamentals of the clean break principle can be seen to be served rather than thwarted by the award of a compensatory lump sum founded on the role division of a failed past relationship. The same embrace of the clean break ideal obviously cannot be claimed, though, for an award of periodic maintenance designed to help meet a party’s income needs into the future.

**A potential difficulty with a ‘clean break’ – children.**

The familiar mantra that ‘parenthood is forever’ captures the belief that the severance of the intimate relationship with an adult partner will not result in the termination of responsibilities to minor children; and many applicants who seek maintenance orders will ground their argument on their professed inability to meet their reasonable needs as a result of their childcare responsibilities. Obviously enough, the possibilities for work, including available hours, are affected by the need to care for children.\(^6\) In the case of pre-school children, for example, the costs of childcare may well absorb any income from the likely range of employment options available to the applicant;\(^7\) and even in the case of school-age children, economic choices are inevitably reduced when there is a need for a parent to confine her or his work to school hours, and to be available on ‘stand-by’ if, for example, the child should be ill or have some special needs.\(^8\)

At first sight, a clean break without continuing maintenance might therefore appear to conflict with the needs of children, and any courts working in the family jurisdiction are hardly likely to eschew child welfare considerations or to deny the quotidian practicalities confronting the adult carers of

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\(^2\) [2001] NZFLR 613 (HC).

\(^3\) See the comments of Allan J in B v M \([2005]\) NZFLR 730 (HC) at [187]- [188]; the judgment of Allan J was upheld on appeal by the Court of Appeal in M v B \([Economic Disparity]\) above n 2.

\(^4\) M v B \([Economic Disparity]\) above n 2 at [227].

\(^5\) Hammond v Hardy above n 80 at [40] per Priestley J.

\(^6\) See, for example, Douglas v Douglas \([2013]\) NZHC 3022, \([2014]\) NZFLR 235 at [44]-[47]; also A v A (Family Court, North Shore, Fam-2007-044-0014562, 21 June 2010) at [68];

\(^7\) See the comment of Judge Burns in Eid v AD (Family Court, Manukau, FAM-2010-092-002080, 1 September 2011) at [24]. The judge proceeded to have regard to the principles of ss 4 and 5 of the Care of Children Act 2004 and the importance of strengthening a child’s relationship with his or her parents.

\(^8\) See the observation of Rodney Hansen J in B v B (High Court, Dunedin, CIV-2011-412-00328, 26 September 2011) at [31].
young children. Nor will they be indifferent to the possible benefits flowing to young children if the parent has additional time to be physically available to provide care.\(^9\) Hence, Judge Burns ruled in a case concerning the mother of a ten-month-old child that: ‘...it would be wrong for the Court to adopt a policy requiring parents of young children to go into paid employment when they do not choose to do so’.\(^{10}\) Likewise, Allan J referred to the need to ensure the after-school welfare of a then nine-year-old child in \(B \text{ v } M\).\(^{11}\) In the circumstances of that latter case, however, his Honour did rule that maintenance should end five years after separation, when the child had reached the age of 10, saying it would be appropriate for alternative arrangements to be made for after school care and for the mother to undertake full-time work.\(^{12}\) On appeal, the Court of Appeal agreed the clean break should take place at that point.\(^{13}\)

Thus, even on the current approach to maintenance, the courts might anticipate that parents caring for children will take on some part-time work\(^{14}\) and cases can be found where judges have been unimpressed that an applicant with children has not made greater efforts to seek out work or retrain.\(^{15}\) The courts have also warned against any glib assumptions or stereotypes about ‘caregivers’,\(^{16}\) especially in this era of increased shared care of children where men are much more likely than in previous times to be involved in the care and upbringing of children.\(^{17}\)

What is also clear from a number of judgments is that an application for adult maintenance, including interim maintenance, is not to be used as a backdoor method for recovering child maintenance.\(^{18}\) Until the child reaches the age of 18, the child’s needs are plainly to be met through the provisions of the Child Support Act 1991. Accordingly, the courts have insisted that an adult maintenance claim must be for the purpose of meeting the expenses for the needs of the adult party alone, rather than the expenses for the needs of any child of the applicant’s household. As Judge Burns put it, ‘[i]t seems obvious that spousal maintenance is for the spouse and children receive their support via child support.’\(^{19}\) Thus, in any judicial consideration of applications for interim adult maintenance, the courts will examine the household budget (required to meet the financial expenses of the applicant and children), assess its reasonableness, and then deduct the quantum that would be payable by child support.\(^{20}\) Even under the present maintenance provisions, therefore, there is theoretically no extra child-care allowance to be granted under either ss 63, 64, or 82 of the Family Proceedings Act. The purpose of adult maintenance is not to boost the children’s financial wellbeing.

That is not to say the New Zealand statutes dealing with the financial welfare of adult parties post-separation are indifferent to the plight of children. The Property (Relationships) Act 1976 envisages

\(^{9}\) See, for example, \(Bratten \text{ v } Bratten\) [2013] NZFLR 941 (FC) at [98].

\(^{10}\) \(EID \text{ v } AD\), above n 87, at [25].

\(^{11}\) [2005] NZFLR 730 (HC) at [200].

\(^{12}\) Ibid, at [206].

\(^{13}\) Above n 2.

\(^{14}\) See, for example, \(Waldorf \text{ v } Hugglestich\) above n 36 at [114].

\(^{15}\) See, for example, \(BIR \text{ v VMR [Economic Disparity]}\) above n 34.

\(^{16}\) See the warning issued by Hammond J in \(Mackie \text{ v } Mackie\) [1993] NZFLR 213 (HC) at 219.

\(^{17}\) See for example, the circumstances identified in \(Youngman \text{ v } Austin\) [2015] NZFC 5081 at [72].

\(^{18}\) See, for example, \(Youngman \text{ v } Austin\) ibid at [46] and \(Copley \text{ v } Wing\) [2013] NZFC 4632, [2014] NZFLR 388 at [14].

\(^{19}\) \(AMG \text{ v } S(S)G\) above n 59 at [18].

\(^{20}\) See the comments of Judge Burns in \(AMG \text{ v } S(S)G\) above n 59 at [23], which were accepted and followed by Moore J in \(Collins \text{ v } Collins\) [2014] NZHC 2121 at [31]. The same approach had been adopted by Winkelman J in \(Day \text{ v } Weldon \_ \text{Day}\) (High Court, Hamilton, CIV 2007-419-1291 3 December 2007 at [10]. Similarly, see the comments of Judge Callaghan in \(MHL \text{ v } DJRL [Spousal Maintenance]\) [2006] NZFLR 174 (FC) at [12]-[14].
that certain types of child support orders can be made alongside property orders. Lump sum child support orders, for example, can be made, and capitalisation might be authorised if it enables a party to acquire a family home from the other party where this would otherwise not be possible.\textsuperscript{101} Likewise, upwards departure orders in favour of the receiving carer could be sought.

Moreover, the needs of children are recognised in various other provisions of the Property (Relationships) Act 1976.\textsuperscript{102} Section 1M(c) provides the purpose of the Act to provide a just division of relationship property ‘while taking account of the interest of children’, and s 26 of the Act provides it is mandatory for the Court to have regard to the interests of minor or dependent children. There is also the power under s 26 for the Court, if it considers it ‘just’ to settle property on children.\textsuperscript{103} Additionally, while the clean break principle may lie at the heart of the Property (Relationships) Act, there is specific provision in s 28A for the Court to make an occupation order and to delay of the sale of the home with ’particular regard to the need to provide a home for any minor or dependent children’.\textsuperscript{104} There is even a wider power under s 26A of the Act to postpone the vesting of a share in the relationship property if the Court is satisfied that immediate vesting would cause undue hardship for a person who is the ‘principal provider of ongoing daily care for 1 or more minor or dependent children’.\textsuperscript{105} All such provisions are sensitive to the needs of children and family life, and, should the courts be prepared to take a child-centric approach,\textsuperscript{106} there is a further ability to compensate for post-separation child-care contributions under s 18B of the Act.

In short, any shift away from the adult maintenance regime in the Family Proceedings Act 1980 in favour of reliance on the Property (Relationships) Act regime should not be viewed as intrinsically hostile to the needs of children. There is in fact a more distinct and overt focus on the needs of children discoverable in the relationship property statute than in the rather mishmash provisions of the adult maintenance legislation. If the rights and liabilities of the adult parties were to be confined to the relationship property and child support statutes alone, there would be no need to fear that the interests of minor children would be overlooked.

**Interim maintenance.**

In the immediate aftermath of a relationship breakdown, with all the concomitant turmoil and tension, there could well be unmet economic needs which must be addressed as a matter of urgency if hardship, either absolute or relative in nature, is not to be visited upon one of the parties,\textsuperscript{107} and it would seem somewhat heartless to expect an instant reordering of financial lives while the parties are still coming to terms with the emotional and financial fallout of their separation. Some buffer zone does seem desirable. Section 82 of the Family Proceedings Act accordingly provides judges with the jurisdiction to make an order of interim maintenance, and it is intended to allow judges to act swiftly in the aftermath of a relationship breakdown if that should be necessary to ameliorate

\textsuperscript{101} See the comment of Judge Ryan in *HEG v IRG* (Family Court, North Shore, Fam-2007-044-001982, 17 June 2010) at [41].

\textsuperscript{102} Peart has suggested the provisions have only had a limited effect: Nicola Peart “Protecting children’s interests in relationship property proceedings” (2013) 11 Otago LR 27.

\textsuperscript{103} While only used in exceptional circumstances, see, for example, *Hader v Hader* [2015] NZFC 4376, [2016] NZFLR 107.

\textsuperscript{104} Not many occupation orders are made, but see the discussion in *W v W* [1997] NZFLR 543 (HC) at 547-548 and *R v R [occupation orders: trusts]* [2010] NZFLR 555 (FC) at [64].

\textsuperscript{105} There is a high threshold for this: see *Hammond v Hardy* [2007] NZFLR 910 (HC) at [114].


\textsuperscript{107} As identified, for example, by Brewer J in *RMA v JB* [2013] NZHC 2984, [2014] NZFLR 160 at [15].
immediate ensuing hardship. Such orders presently last for a period of only six months, and ensure that in the period immediately following separation an affected party can fund the normal and recurring expenses of living and accommodation, and temporarily maintain the previous lifestyle. Independence, as the Law Commission for England and Wales recently pointed out, cannot be expected to be sudden.

Maintenance of this purely interim kind under s 82 can perhaps be more easily accepted than final maintenance, given its purpose is merely to provide stopgap protection of a party’s position pending the determination of substantive proceedings and property division. The clean break principle can only really arise once relationship property has been allocated, and it might seem undesirable for parties to be forced to diminish their capital assets in order to maintain themselves until the division of the relationship property has actually taken place. Thus, provided short-term maintenance is achieving more than simply a ‘therapeutic interlude’, it might be thought reasonable for a respondent to make some contribution to the applicant’s costs for a defined period of time pending division of the property.

Thus, if final maintenance obligations and orders were to be reviewed and rolled back, as is being provisionally argued for here, the interim maintenance order could still have a role to play as a temporary holding measure. Some review though would still be necessary. For instance, the present discretion under s 82 has consistently been held to be broad and ‘unfettered’, presumably because of the stopgap nature of the interim orders, but whether under a new revised legislative regime such an order should be entirely discretionary is perhaps a more open question.

Likewise, if a new legislative approach to interim orders were to be taken, this would raise the question of whether the order should continue to expire automatically at the end of six months. A global settlement or determination is, of course, always the desired goal, and in practical terms a six month period will normally be insufficient to enable this. While successive applications may be discouraged by the appellate courts most High Court and Family Court authorities recognise practical realities and do allow for the possibility of multiple interim maintenance orders with fresh evidence being required on each occasion. In light of the uncertainty, specific consideration of the question of duration of s 82 orders or some equivalent may be warranted - as indeed may some exploration of the alternative of making interim distributions of relationship property under s 25(3) of the Property (Relationships) Act 1976.

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108 Ibid at [38].
109 If a significant period of time has in fact elapsed since the separation, but before the application, then the Court will need to determine if the party’s current reasonable needs can be properly equated with what they were during the relationship: Owen v Thomas [2014] NZHC 2200 at [45] per Duffy J.
111 See B v B [Maintenance] [2008] NZFLR 789 (HC) at [33] and Cornell v Cornell [2016] NZFC 1795 at [5].
113 FH v LH ibid at [18].
114 The judgment of the Court of Appeal in Ropihoe v Ropihoe [1979] 2 NZLR 245 (CA) is almost invariably cited in interim maintenance applications.
115 As noted by Judge Moss in Head v Wyman [2014] NZFC 5787 at [19].
116 As stated by Alastair Logan “Interim Maintenance and costs” (paper presented to NZLS Family Law Conference, Dunedin, October 2015) at 59.
119 Perhaps a modified version of s 63 awards.
Future directions.

The maintenance provisions originally contained in the Family Proceedings Bill 1978 were previously characterised by Atkin as ‘very messy’, and over thirty years later the same author continued to lament that the maintenance rules were still ‘complex and not entirely a model of clarity’. Even from the perspective of necessary tidying up, therefore, some reconsideration of the maintenance rules would therefore seem opportune, so that, as a bare minimum, a greater degree of internal coherence could be achieved. To take but one example, the distinctions between separation and dissolution enshrined in ss 63 and 64 are, as Atkin has argued, ‘somewhat vaporous’, and the differences could very happily be done away with.

Thus the Law Commission’s forthcoming review of the Property (Relationships) Act 1976 does provide a golden opportunity to consider the parallel question of whether needs-based adult maintenance regime remains fit for purpose, and, indeed, whether adult maintenance could be safely folded into the relationship property regime. While Parliament in 2001 may well have intended that the Family Proceedings Act amendments would provide the courts with greater flexibility, and would address economic disparities where a relationship property settlement did not, the full ramifications of the newly introduced compensatory orders under s 15 of the Property (Relationships) Act may not have been properly appreciated at that time. Seemingly, the possibility of integrating the separate maintenance and relationship property regimes was neither considered nor addressed, and the relationship of maintenance and economic disparity has consequently become one of ‘confusion’. In 2006, the need to overhaul the law on the inter-relationship of capital and income was described as ‘urgent’, and, ten years on, that need clearly still persists.

Assuming the clean break principle does remain a desirable societal aspiration (and while Hammond J in M v B [Economic Disparity] counselled against pressing the clean break principle too far, most would presumably wish for former partners to be emotionally and financially free of each other), then the ambiguities of the Family Proceedings Act adult maintenance provisions are unfortunate. As discussed above, the notions of ‘reasonable’ and ‘necessary’ in the key statutory provisions of the Family Proceedings Act do allow for the infusion of public policy considerations and value judgments, as do the frequent statutory various references to ‘other relevant circumstances’ in, for example, s 63(2)(iii), s 64(2)(a)(iii) and 64A(3)(iv) and the Court’s ability to do ‘as it thinks fit’ in s 70 (2)(a). Correspondingly, the clean break principle could comfortably inform judicial thinking under all the key provisions. Nonetheless, as also pointed out above, insoluble internal contradictions unfortunately exist under the current statute, and it may be time for the Legislature to become more definitive with the clean break principle, and to examine anew the question of whether there is any

121 Family Law Policy in New Zealand, above n 25 at 198.
123 See the House of Representatives Supplementary Order Paper of Tuesday 16 May 2000, cited by Hammond J in M v B [Economic Disparity] above n 2 at [256].
124 As suggested by Bill Atkin “Harmonising Family Law” above n 69 at 473.
125 Ibid at 474. See also the call of Bill Atkin and Wendy Parker for a refashioned ordering of the law above n 78 at 166.
126 M v B [Economic Disparity] above n 2 at [262].
127 Patrick Parkinson identifies reasons why, from a woman’s perspective, a clean break in terms of property settlement might be better than maintenance: “Family Law and the Indissolubility of parenthood” above n 13 at 260.
need for maintenance to meet recurring living expenses at all (at least beyond a temporary interim maintenance period). Certainly similar questions over the ambit and need for final maintenance are being addressed in overseas jurisdictions, with greater restrictions on alimony now being evident in a number of American states and with the possibility of guidelines being floated by the English Law Commission.  

The heart of the maintenance problem is that the fundamental moral question of exactly why one party should be liable to provide income support to an ex-partner has never been properly addressed or answered. Perhaps the need for relationship-derived compensation does offer some explanatory rationale for maintenance in overseas jurisdictions. However, as has been frequently reiterated above, this particular justification has been rendered otiose in New Zealand (at least where there is sufficient relationship property from which to make a compensatory s 15 award), and the statutory provisions of the Family Proceedings Act 1980 are simply not designed to cover the issue of economic disparity specifically. And while the Family Proceedings Act does expressly provide that the means, earning capacity, responsibilities and needs of the respondent may affect the quantum of any maintenance, it regrettably fails to shed any light on why maintenance liability to meet the applicant’s living expenses should fall on the respondent in the first place.

A sharing of gains and losses attributable to a past relationship might seem morally justifiable, but the question remains unanswered as to why there is any additional moral duty imposed on one individual to a failed sexual and emotional relationship to financially support the other. Indeed, yet another question can be usefully interposed at this point. If we should believe it is fitting for one individual to have a legal entitlement to continuing income support against another individual, why should that claim not lie just as naturally against a person biologically related, such as parent or a sibling? 

In truth, as Miles concluded in 2004, income support and needs, in so far as they cannot be met through property entitlements and compensation, surely need to be met by the wider community and not by the former partner. When the cause of financial difficulty is attributable in the main to considerations such as prevailing socio-economic circumstances, societal values, or a person’s personal skill set, it is indeed hard to determine why, once the compensatory obligation has been discharged, a former partner bears any responsibility at all to meet the other’s reasonable needs.

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129 Above n 110. In Canada, where a more generous approach is taken to spousal maintenance, Spousal Support Advisory Guidelines were released in July 2008: see Carol Rogerson and Rollie Thomson “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 FLQ 241.
130 As noted by Mostyn J in SS v NS [Spousal Maintenance] [2014] EWHC 4183, (Fam), [2015] 2 FLR 1124 at [25]. Cynthia Starnes likewise expresses surprise that family law offers no answer to this fundamental question: “Alimony Theory” (2011) 45 FLQ 271.
132 Family Proceedings Act 1980, s 65(2).
133 It has been noted that under the Destitute Persons Act 1910 relatives could be the subject of a maintenance order, with the focus of the orders being heavily on parents and husbands: M Henaghan et al (eds) Family Law in New Zealand (17th ed, LexisNexis Wellington, 2015) at 886-887. In an influential article, Ira Ellman also specifically queried why a former spouse should provide support rather than the spouse’s parents, children or society as a whole: “The Theory of Alimony” (1989) 77 Cal L Rev 1 at 5.
Certainly there is no available evidence to suggest that community thinking would favour anything other than a clean financial and psychological break taking place between former lovers and partners. In the early 1980’s Richardson J suggested community attitudes concerning the end of relationships had been affected by social changes whereby women remained in or returned to the workforce in pursuit of economic independence and personal fulfilment.\(^{135}\) Today, the so-called ‘working woman’ is not a phenomenon but a routine reality. Moreover, since the mid 1980’s the neoliberal social and economic policies of successive New Zealand governments have, for better or worse, fostered an individualist culture; and, it seems entirely likely that, as in the USA,\(^{136}\) the ordinary citizen in New Zealand would not feel particularly enthusiastic over the notion of continuing streams of income for a former partner when, once compensation has been eliminated from the reckoning, an income shortfall cannot be attributed to anything the respondent has personally done.

McMullen recently argued that people now seek marriage relationships less for any possible economic benefits and more for its provision of love and emotional fulfilment, and that the sharing of earning and parenting responsibilities by ever-growing numbers of couples has changed social expectations about what is regarded as fair upon divorce.\(^{137}\) A clean break may be seen as expected and entirely realistic, and even twenty years ago this author was arguing that most women would not regard marriage as an anchor for their economic security and that any concept of maintenance liability might be viewed as a disincentive to couples then contemplating marriage.\(^{138}\)

That, of course, is not to deny that many persons entering into marriages thirty years ago may well have had different expectations; and, in the 1980’s, Ellman argued that maintenance was based upon a desire to encourage sharing behaviour in a marriage relationship, or at least not to penalise it.\(^{139}\) On the other hand, numerous scholars, including feminist scholars, have long recognised that the fact that maintenance that has traditionally been awarded to the female partner serves to create an unfortunate dependence of female upon male, and they have argued for changes to both social thinking and structures in order to allow for the desired clean break.\(^{140}\) Women in a relationship need to continue working; and men need to do more childcare.

Some of those desired social changes may be under way, and, as noted, female participation in the workforce and shared parenting, for example, are hardly remarkable. These days relatively few maintenance orders under ss 63 or 64 of the Family Proceedings Act are in fact made. But maintenance awards may need to become even more exceptional than they presently are, as the fact of their very existence does seem questionable in light of New Zealand’s relationship property regime with its enlightened, though admittedly conceptually awkward, compensatory regime. ‘Interim’ orders, in a modified form, could undoubtedly have some value as a form of emergency relief until the relationship property issues are resolved, and legislative changes to render s 15 more flexible (perhaps, for example, allowing awards out of separate property, as with s 15A) may well be

\(^{135}\) *Slater v Slater* above n 28 at 173.


\(^{139}\) Ira Ellman *The Theory of Alimony* above n 133 at 61.

warranted. Nevertheless, it does seem time to consider whether the break between the parties might not be made somewhat cleaner than it currently is.