

New Zealand Property Rights Legislation: a changing landscape?

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Introduction

For the last twenty-five years, the property rights landscape in New Zealand has remained relatively unchanged. Formerly married couples have been able to access the Matrimonial Property Act 1976 to resolve their property issues, whether through court action, or by bargaining in its shadow. De facto couples, in the absence of statutory provisions, have used the law of trusts, and in doing so, have, over time, built up a substantial body of case law.

The unchanging scenery is not necessarily a sign that all is well. Beneath the static landscape lie a number of contentious issues. These have rumbled away for some time and in the last three years they finally percolated through into the legislative agenda.¹ The proposed changes are wide-ranging, signaling a philosophical shift of great significance. This paper explores the old terrain and sets out the changes ahead, concluding that the lie of the land will be much altered.

Matrimonial Property Act 1976

In order to understand the law reform proposals, it is necessary to canvass the existing provisions as these provide the foundation for the new scheme. The shortcomings of the current law have also provided an impetus for change.

At the time of its passing, the Matrimonial Property Act 1976 was viewed as a groundbreaking piece of legislation. Its objectives of equality and justice, especially for women, pushed it firmly into social policy territory. The rising divorce rates of the time similarly spoke to the need for a more effective property resolution scheme.² The 1976 Act replaced the 1963 statute and provided for a much stronger presumption of equal sharing. It also removed the need for contributions to the marriage to be reflected in property value, whether directly or indirectly. The Matrimonial Property Act 1976 is truly a law of its time; the type of liberal equality predominant in the second wave liberal feminist movement reflected here was also evident in other laws of the 70s.³

¹ At the time of writing the amendments are yet to be passed into law.

² The Domestic Purposes Benefit was introduced in 1972, giving separated women access to independent funds for the first time. This had an impact on separation and divorce.

³ For example the Equal Pay Act 1972.

A key feature of the 1976 Act therefore, was its legislative direction and the consequent impact that it had in reigning in judicial discretion. This shift was premised on the need for discretion to provide flexibility across a range of relational circumstances with guidance necessary to attain greater equality between the sexes. The law change in 1976 continued the mix of rules and discretion, although with the emphasis moving toward a rule-based scheme.⁴

The Matrimonial Property Act 1976 applies to all married couples and provides for the ability to contract out of its provisions.⁵ Under the Act, there are 3 types of property; separate, matrimonial and balance matrimonial. Subject to a number of exceptions, separate property remains the property of the owner. Core matrimonial property (in most cases the house and chattels) is divided on a presumption of equal sharing, which is only able to be displaced where there are extraordinary circumstances that would render equal sharing repugnant to justice.⁶ This provision has been interpreted very stringently. Balance matrimonial property, usually consisting of farms and businesses, is divided according to the contributions of the parties to the marriage partnership.⁷ Here too, there is a presumption of equal sharing, but one that has a lower test for its displacement; that is, in cases where the contribution of one party has clearly been greater than the other.⁸ The kinds of contributions that can be considered are limited to those listed in section 18. They include care of dependents, performance of household duties, acquisition or creation of matrimonial property, and supporting or assisting the other spouse. There is a specific direction that there is no presumption that financial contributions are of greater value than non-financial contributions.⁹ Finally, in line with the shift towards no-fault divorce, negative contributions are limited to those that are gross and palpable and have significantly affected the extent or value of matrimonial property.¹⁰

As previously mentioned, the Act aims to put the parties in the same position by dividing the property equally. This has been criticized on the grounds that 'equality is not equity' and that it is unfair to treat ex-partners similarly when they do not have, for example, the same capacity to earn an income. The Act is also retrospective, casting back over the marriage and therefore avoiding, and being unable to factor in, the differing future needs of the parties. Notably, the lived post-divorce experience has highlighted many of the shortcomings of equal division.¹¹

De Facto Property Rights

Until now, there has been no statutory property rights provision for de facto couples. In the absence of a statute, recourse has been made to the law of

⁴ This is discussed more fully in Atkin, B and Parker, W "De Facto Property Developments in New Zealand: Pressures impede progress" paper presented at the 10th conference of the International Society of Family Law, Brisbane, July 2000.

⁵ Matrimonial Property Act 1976, s 21.

⁶ Matrimonial Property Act 1976, s14.

⁷ Matrimonial Property Act 1976, s 15.

⁸ This test also applies to marriages of less than 3 years duration.

⁹ Matrimonial Property Act 1976, s 18(2).

¹⁰ Matrimonial Property Act 1976, s 18(3).

¹¹ A position that the lobby group *Divorce Equity* has consistently maintained.

trusts. Over time, the principles under trust law have become reasonably settled, although awards of property are often in the vicinity of 20-30%. Predicting outcomes is difficult, and the lack of certainty, along with the cost of litigation, has rendered the common law remedy less than satisfactory. Interestingly, the equitable remedies have worked as well for same-sex partners as they have for their heterosexual counterparts.

The 1998 Proposals

The law reform process under the previous centre-right National government was marked by concerns to uphold the sanctity of marriage. Same-sex rights were rejected outright on moral grounds, and heterosexual de facto couples, especially those with children, were not to be encouraged when marriage was the preferred arrangement. Subsequently, a one-Act-fits-all approach was not adopted.

The path of the proposals, both before and after the 1999 election, is notable in itself. The proposals have been with the New Zealand cabinet since 1995. It is interesting to reflect on the arguments that consumed state sector officials and their ministers during the late 1990s. A clear split is evident. The 1996 – 1999 government favoured advice from the Ministry of Justice, while an alternative view put forward by the Ministry of Women's Affairs is reflected in changes since the 1999 election. The reforms started out as two inter-linked bills – one to amend the Matrimonial Property Act and one to provide a property regime in the case of heterosexual de facto couples. In keeping with the National party line, this deliberately not only had the perception of keeping the status of marriage intact, but allowed for different tests for property division for de facto couples. These different tests had a weaker presumption of equal sharing than under the Matrimonial Property Act. Whether this was due to a desire to protect the higher status of marriage, or a means of accommodating what was perceived to be a greater diversity of relationships is unclear.

The bills were introduced into the House and duly went to select committee. An opposition Supplementary Order Paper proposed the inclusion of same-sex couples within the de facto regime just before the bills' second reading. The progress of the De Facto Relationships (Property) Bill was halted when the then Minister of Justice decided to consult the public on a range of legal issues relating to same-sex couples.¹² Nevertheless, the select committee issued an interim report on the bill.

The Matrimonial Property Amendment Bill 1998 was due for report back to the House at the time of the 1999 election. Both bills were carried over to the next parliament. With a new centre-left government installed at the end of 1999, the bills did not immediately feature as a priority amongst a plethora of reforms. However, by April the rumour mills were at work suggesting major changes were underway. The Attorney-General and Associate Minister of Justice, Margaret Wilson, announced a number of changes, had them approved by cabinet and drawn up as a Supplementary Order Paper of some 82 pages. In a majority government setting, this would not pose a problem.

¹² Over 4000 submissions were received in response to the consultation paper. A report is due in August 2000.

However the current Labour/Alliance government is two votes short of a majority in the House of Representatives and therefore needed the support of another party to pass the proposals into law. For this, it turned to its most common ally, the Green party. This party, while supportive of the substance of the changes themselves, insisted that they were of sufficient magnitude to require a return to select committee. This adherence to democratic process leads us to where the reforms stand at the moment, with public submissions having closed in early July and the Law Reform, Justice and Electoral select committee due to report back to parliament in August 2000.

The 1998 proposals in the twin bills made only one major change. That was to bring marriages ended by death within the 1976 scheme. It did attempt to fix some anomalies relating to debt and introduced better protection against the devolution of marital property into trust and company structures.¹³ But overall the categorisation and division of property were left unchanged. At the time the proposal was criticised for failing to grapple with the key areas of concern.¹⁴ The Y2K proposals, as they appear in the Supplementary Order paper, however, introduce change of a different magnitude.

Property (Relationships) Bill 2000

So what, then, are the key changes? Firstly, the new law will cover formerly married couples, as well as de facto and same-sex relationships of more than three years duration.¹⁵ The broader scope of the bill is less remarkable than the fact that all three groups will have access to the same rules for the division of property. This is a shift from the previous position of retaining the higher ground for marriage only. The claim that all relationships are to be treated the same is, however, a little disingenuous, in that relationships of interdependence but without a sexual element remain outside of the scope of the bill.

Another very important extension is to those marriages ended by the death of one of the parties. These property settlements were never included in the 1976 Act, leaving them to be decided under the 1963 statute, on a contributions basis, with the contributions needing to be related, either directly or indirectly, to the value of property. Initially envisaged as a temporary measure, their omission has left the widowed with limited access to matrimonial property for far too long. The new provisions allow for the survivor to choose whether to claim under the will, or under statute, with the statute itself now determining that these cases are decided under the same rules for division as for inter vivos disputes. Situations of intestacy are also covered, affecting the Administration Act and Family Protection Act provisions. The general impetus is to increase protection and provide the same property rights, no matter how the relationship was terminated.

¹³ This is particularly importance since the introduction of the Companies Act 1993, which allows for one-shareholder companies and does not require articles of association.

¹⁴ Parker, W. (1997) "New Lamps for Old? Proposals to reform family property law" BFLJ 189.

¹⁵ De facto and same-sex relationships of less than 3 years duration will not be covered except in certain circumstances, however a period of cohabitation preceding a marriage will be counted as one relationship in terms of its duration.

The rules for division have themselves undergone considerable alteration. Under the proposals currently before the select committee, the former balance matrimonial property category is removed, with all common or relationship property falling to be divided under the old s 14 test.¹⁶ In effect, this will mean the most common usage of the contributions test under s 15, the division of farms and businesses, will fall away. This is not to say that contribution will become a redundant concept because it will remain in some key areas, such as in marriages of short duration.¹⁷ The idea behind this change is to extend the pool of common property. It does so in a sweeping but nevertheless clear-cut manner. It also retains the now embedded notion of a legislative presumption of equal sharing. The retention of the presumption of equal sharing in turn means that other methods are required to enable an equitable result in some cases.

Picking up on this issue, several new ways of dealing with post-relationship economic disparity appear in the proposals. They include allocation of a compensatory amount of either relationship or separate property, the award of lump sum or periodic spousal maintenance. Another provision changes the basis of allocation for post-separation increases in property.

It appears that spouse maintenance and the perceived counterweight of the clean break principle are likely to undergo modification in the New Zealand context. Our Court of Appeal noted that interpretation of its leading case on spousal maintenance by the lower courts had been overly harsh, and called for a more liberal interpretation of the reasonable needs of former spouses.¹⁸ What is particularly notable in these latest provisions is the introduction of forward-looking concepts inherent in using the future earning capacity of one partner to compensate the other for losses arising from the division of functions during the relationship.

The ability to contract out of the Act remains, but the court's ability to override these contracts has been tightened up. Under the 1976 Act, unjust contracts, that is those that were either unfair or unreasonable at the time they were entered into, or that had subsequently become so could be quashed, wholly or partially, by the court.¹⁹ The new test is one where agreements to depart from the provisions of the Act can only be set aside in cases of serious injustice. While a stricter test, its newness means that it is one that may take a little time to refine through the common law process.

Possible problems and likely impacts

As happened in the late 70s, we can expect a flurry of litigation as the parameters of the new law are tested. Anecdotally, practising members of the legal profession report the termination of some relationships outside of marriage as a means of avoiding the changes to come. There will also be an

¹⁶ That is, equal division unless there are extraordinary circumstances that would render this repugnant to justice.

¹⁷ The retention of the contributions test may remain problematic, especially in the recognition of non-financial contributions.

¹⁸ *Z v Z (No 2)* [1997] 2 NZLR 358.

¹⁹ Matrimonial Property Act 1976, s21 (10).

impact on second and subsequent families, as this law gives greater priority to first groupings. Demographically, the reconstituted family is a growing phenomenon, and hardship in these cases could become an issue. This impact may also extend to the application of the new rules for spouse maintenance.

The way ahead for spousal maintenance is very uncertain. The willingness of the judiciary to apply the new provisions with vigour is yet to be tested. There remains room for much discretion and the New Zealand experience tells us this may be problematic. There are a number of fishhooks in the proposal, with new phrases to be tested within what is quite a philosophical shift. Collection rates of maintenance are likely to remain low and the vexed issue of the relationship between spousal and child support will be brought into sharper relief with the greater emphasis on the needs of the former spouse.

The ability of partners to a relationship to secrete property to trust and company structures is curtailed by the bill. However, this kind of provision is notoriously open to circumvention and the strength of the proposals is likely to be severely tested. If they can be successfully avoided, new protections will need to be developed and implemented.

The courts will have to deal with new aspects, such as determining when a de facto or same-sex relationship began, and new legal tests, such as the serious injustice test for the setting aside of agreements. The rules of statutory interpretation may be aired again as incongruencies and ambiguities created by the grafting on of plain English drafting provisions to an aging parent Act are ironed out.

Public, professional and judicial education will be crucial to the smooth implementation of the Property (Relationships) Act. Cabinet has already noted the need for an education campaign. The success or otherwise of such a campaign is an integral part of the reform package. It is also one aspect that may not receive proper attention or adequate funding.

The Bill leaves gaps. Some submitters were hopeful of tighter timetabling procedures with meaningful penalties for non-compliance. Also sought were provisions to settle ownership of household chattels in a way that allowed immediate access. The omission of this kind of provision does little to improve the upheaval of the immediate post-separation period. Other gaps include specific provision for student loan debt, an issue of growing importance since the introduction of a student loans scheme for the first time in 1992, and a provision tailored to situations of inter-spousal violence.²⁰

Conclusions

Overall the terrain ahead, while generally smoother, looks as if it contains a few rocks. This is probably inevitable in any interface between the law and family relations. Having said that, if the current bill is in fact implemented into law, the changes will bring improvement and the social objectives of the law are more likely to be achieved. It is difficult to predict whether the new mix of rules and discretion, the enhanced measures to alleviate post-

²⁰ Discussed in Parker, W. "Family Violence and Matrimonial Property" [1999] NZLJ, 151.

relationship economic disparity, and the extension of statutory coverage to de facto and same-sex couples and the widowed, all built on the bedrock of the 1976 Act, will be a stable and successful blend. For now, at least, they provide a more enlightened and modern reflection of notions of justice.