Family property law reform

Bill Atkin*

This paper sets out some of the recent history of family property reform in New Zealand. The courts, parliament and government bodies have been involved in this process over the past three decades but further reforms are likely. The writer lists a number of considerations which should be borne in mind when reform is considered and then some possible future policy directions are foreshadowed

I WHY LAW REFORM?

Family law has been in a constant state of revision and flux. It has generated a substantial amount of legislation and case law. This is not surprising given that it deals with human relationships, not generally in a commercial sense but in a personal sense. Human nature is volatile, and the law reflects this.

Family law can today include a vast area of the law. The wide jurisdiction of the Family Court, ranging from custody and access disputes to mental health, illustrates this. Even the narrower field of family property can encompass not only matrimonial and de facto property but also succession rules, rules on joint ownership of property and aspects of the law of trusts and taxation law. No discussion of the reform of family property law can ignore the provision made by the law for ongoing financial support, most notably in New Zealand, the Child Support Act 1991.

Family property law in New Zealand has been in a constant state of development. The Matrimonial Property Act 1963 represented a radical departure from the conventional rules of property law which normally govern relations between people. Under that Act, the courts were empowered to make orders which departed from the parties' legal and equitable interests and, in particular, recognition was given to the value in monetary terms of work done in the home and in the upbringing of children. This reached its fruition only with the Privy Council decision in *Haldane* v *Haldane*.[1] The 1963 Act was however criticised for its uncertainty, for the wide discrepancies in the awards made by the courts and its focus still very much on financial contributions.[2]

The Matrimonial Property Act 1976 marked a significant change, by defining in some detail the property which could be divided between a husband and wife, and by establishing a basic principle of equal division. While the 1976 Act has introduced a

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* Reader in Law, Victoria University of Wellington.

1 [1976] 2 NZLR 715.

2 Cf *Report of a Special Committee on Matrimonial Property* (Department of Justice, Wellington, 1972), discussed by Ennor "The Matrimonial Property Act 1963 - A New Deal?" [1972] NZLJ 500.

greater note of certainty - it is suggested that there is widespread popular acceptance of the notion of an equal split of property - it is not without its detractions. It has generated a large amount of litigation, which perhaps was inevitable with the level of marriage breakdown now endemic in society. It enshrines anomolous distinctions between marriages ending in separation and divorce and those ending through death of one of the spouses. While the court must have regard to the interests of children,[3] it is usually only the rare case where these interests make any real difference.[4] The extent to which custodial parents are entitled to occupy the matrimonial home is unclear but it is not infrequent that the home will be sold and the proceeds shared. This is partly on the basis of the so-called "clean break" principle, which has been criticised.[5] Accompanying these points has been a more general criticism that the principle of equal division does not mean that husbands and wives leave the marriage literally on equal terms - more often than not the husband will have more separate property, qualifications and job experience.[6] One other major comment about the 1976 Act is that it applies only to legal marriages[7] and has no application to de facto relationships.[8]

II LAW REFORM MOVES IN NEW ZEALAND

In 1988, the Minister of Justice saw the need for an examination of family property law and established a Working Group of departmental officials, Law Commission members, practitioners and academics.[9] The Group was asked to produce a report in a short space of time on the 1976 Act, inheritance laws (mainly the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949), and the law relating to de facto relationships.[10] The report accepted the basic principles of the 1976 Act, but recommended some potentially controversial changes to extend the scope of "matrimonial property", to narrow the grounds upon which parties can argue for a departure from the equal division rules, to encourage awards of capital maintenance and to provide tighter protections against avoidance devices. None of these recommendations has been implemented. On inheritance, the Working Group saw no insurmountable problems with the incorporation of claims by survivors into the framework of legislation such as the 1976 Act, while retaining substantially remodelled family protection and testamentary promises legislation (ideally in one Act). The

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3 Section 26(1), Matrimonial Property Act 1976.

4 Austin *Children: Stories the Law Tells* (VUP, Wellington, 1994) 123-132.

5 Eg Bridge "Reallocation of Property after Marriage Breakdown: The Matrimonial Property Act 1976" in Henaghan and Atkin *Family Law Policy in New Zealand* (OUP, Auckland, 1992) and Ullrich "Matrimonial Property - Is There Equality under the Matrimonial Property Act?" in New Zealand Law Society *Family Law Conference The Family Court ten years on* (NZLS, Wellington, 1991) 97, especially 108.

6 Idem.

7 And the rare category of void marriages: see s 2(1), Matrimonial Property Act 1976, definition of "marriage".

8 See generally Atkin *Living Together Without Marriage The Law in New Zealand* (Butterworths, Wellington, 1992).

9 The writer was a member of the Working Group.

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

Working Group proposed a special statute for property disputes between de facto partners. Again, there have been no legislative changes on inheritance or de facto relationships.[11]

While the 1988 Report is the major document examining family property law reform in New Zealand, it is now six years old and other changes have occurred. Most notable of these has been the passage of the Child Support Act 1991. Ever since it came into force, this Act has had a rough life. It is an attempt to solve the ongoing financial needs of children and caregivers but its principles have little to do with equalisation of custodial and non-custodial financial positions. It functions on the basis of a set formula which is meant to apply to all families. In particular circumstances, it can therefore lead to gross inequalities. It operates in isolation of property division and trade-offs to take account of maintenance.[12] The consequence now is that it is most unwise for non-custodial parents to settle property disputes in a way which includes ongoing provision, or for non-custodial parents to take on additional obligations which are unlikely to lead to an adjustment in child support payments. Further, because the Child Support Act purports to reform the support laws, it may make it much harder to justify reform of the property laws to take account of ongoing needs. Parliament has chosen a particular path for addressing these needs. The fact that this path has does not involve an assessment of such needs nor any individual assessment of the non-custodial parent's real ability to meet those needs cannot be visited on the matrimonial property laws. That would simply lead to two contradictory and duplicating regimes for maintenance.

The Child Support Act 1991 was reviewed in 1993 by the Child Support Agency. Apart from some minor amendments,[13] the principal recommendation of the Agency was that there should be another review by an independent body. The Government established such a review team headed by former Principal Family Court Judge, Judge Trapski. It is not expected that this committee will make recommendations about the future shape of matrimonial property laws. It could however recommend changes which will impact upon matrimonial property. For example, the formula could be changed to take account of commitments undertaken by the liable parent to the benefit of the custodial parent and child. The departure order procedures could be amended to make it easier to recognise division of property which has taken account of child support. Voluntary agreements, which can be simply overturned by an application for a child support assessment, could be given some real binding force.

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11 The Law Commission is now examining the whole of inheritance law as part of its Succession Project.

12 These matters may be raised in an application for a departure order under s 105, Child Support Act 1991 but the courts have interpreted this section narrowly and departure orders are not easy to obtain: cf the Court of Appeal decision in *Lyon v Wilcox* [1994] 3 NZLR 422; [1994] NZFLR 634.

13 Incorporated in the Child Support Amendment Act 1994, Part VIA. The main amendment is to provide for review officers with power to grant departures from the formula on the same basis as the courts can do now.

III THE COURTS' ROLE IN LAW REFORM

While Parliament is the forum for comprehensive law reform, we should not overlook the role played by the courts in this process. The courts must give flesh to the statutory bones of legislation such as the Matrimonial Property Act, and in other areas, notably property division for those in de facto relationships, the courts have moulded the rules of common law and equity to fit situations they were not originally designed for.

The key player in interpreting the Matrimonial Property Act 1976 has been the Court of Appeal.[14] The Court of Appeal has shown a determination to uphold the principles of the Act with some rigour.[15] It has not lightly allowed exceptions to equal sharing of the home and chattels,[16] it has widened the potential for sharing by the non-owning spouse in such things as superannuation,[17] contributions to separate property,[18] family transactions on favourable terms,[19] and goodwill,[20] and has introduced a note of flexibility to allow for post-separation contributions.[21] The courts have also enabled the Act to be used as a vehicle for the non-gratuitous transfer of property between spouses during the course of a happy marriage.[22] Thus, we must accept that the 1976 Act is available not only on marriage breakdown but also during marriage.

With respect to de facto relationships, the courts have developed trust law in ways which would have been barely contemplated thirty years ago. The law on implied trusts has conventionally required fairly solid evidence of a common intention of property sharing and detriment on the part of the claimant and construvctive trsts have tended to arise where there was some kind of equitable fraud against the claimant. In may respects, this is still the approach in England,[23] but other Commonwealth countries have

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14 Few cases have gone to the Privy Council and these have seen the Court of Appeal's position upheld: cf *Reid v Reid* (1982) 1 NZFLR 193 and *Holt v Holt* [1990] 3 NZLR 401; [1990] NZFLR 145.

15 Perhaps the judgment of Woodhouse J in *Reid v Reid* [1979] 1 NZLR 572 is still the classic example of the judicial unpacking of the principles of the Act.

16 Under ss 13 and 14 of the Act: see *Martin v Martin* [1979] 1 NZLR 97, *Wilson v Wilson* [1991] 1 NZLR 687, *Joseph v Johansen* (1993) 10 FRNZ 302 and *Pickering v Pickering* [1994] NZFLR 201.

17 Eg *Haldane* v *Haldane* [1981] 1 NZLR 554.

18 Eg *French* v *French* [1988] 1 NZLR 62, although see also *Walsh* v *Walsh* (1984) 3 NZFLR 23 which runs against the trend.

19 Eg *Mills* v *Dowdall* [1983] NZLR 154.

20 Eg *Z* v *Z* [1989] 3 NZLR 413.

21 Eg *Meikle* v *Meikle* [1979] 1 NZLR 137 and *Rush* v *Rush* (1986) 4 NZFLR 236.

22 Cf *Commissioner of Inland Revenue* v *Van Doorne* [1983] NZLR 495, *Cox* v *Cox* [1992] NZFLR 97 and *An Application by Roberts* [1993] NZFLR 731.

23 Eg *Lloyds Bank plc* v *Rosset* [1991] 1 AC 107. For a recent English discussion of the nature of the constructive trust remedy, see Hayton "Constructive Trusts of Homes - A Bold Approach" (1993) 109 LQR 485. The author concludes (489): "For ease of reference one should, perhaps, distinguish between 'automatic' and 'discretionary' constructive trusts, the former being an automatic incident of the institution of the

developed the law in a much freer way.[24] In New Zealand, the Court of Appeal has been active for over decade. In 1983 in *Hayward* v *Giordani*,[25] the court was still largely searching for the elusive "common intention" but Cooke J (as he then was) stated:[26]

> ...a function of the courts must be to develop common law and equity to reflect the reasonable dictates of social facts, not to frustrate them. While not alone enough to justify imposing a constructive trust, a stable de facto union provides a background in which one will tend to arise much more naturally than as between strangers.

By the time of the now classic case of *Gillies* v *Keogh*[27], Cooke P took the view that there was no practical difference in talking about constructive trusts, unjust enrichment, imputed common intention or estoppel, and he thus developed the now commonly cited "reasonable expectations" test - that an equitable interest could arise where reasonable people in the shoes of the plaintiff and defendant would have understood that the claimant's efforts would result in a share in the other party's property. The development of the law stuttered somewhat in *Phillips* v *Phillips*,[28] the Court of Appeal, probably with some justification from the point of view of the law of equity, refusing to accept an equal division rule as being a norm in de facto cases. However, some further clarification, if not expansion, is apparent in *Nash* v *Nash*,[29] where the Court of Appeal was unabashed in accepting that an interest could arise almost wholly on the basis of non-material domestic contributions and even left open the strong possibility that non-financial contributions in the home could attract an interest in property other than the home and its surroundings.

While the courts have been creative in addressing the needs of de facto couples, there are serious limitations on the law as currently articulated. First, there will be some relationships, of which *Gillies* v *Keogh* is itself an example, where the reasonable expectations test leads to no equitable interest at all. Whether this is appropriate as a

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express trust of property, and the latter involving discretionary relief of a proprietary or personal nature imposed on a defendant because of the poor state of his conscience". The New Zealand courts have not addressed the issues in this way.

24 Eg *Baumgartner* v *Baumgartner* (1987) 164 CLR 137, *Pettkus* v *Becker* (1980) 117 DLR (3d) 257 and *Sorochan* v *Sorochan* (1986) 29 DLR (4th) 1.

25 [1983] NZLR 140.

26 Above n 25, 148.

27 [1989] 2 NZLR 327, 330. The test is actually found in *Pasi* v *Kamana* [1986] 1 NZLR 603 and *Oliver* v *Bradley* [1987] 1 NZLR 586, but *Gillies* v *Keogh* is where it is worked out with its fullest explanation.

28 [1993] 3 NZLR 159.

29 [1994] NZFLR 921. The case dealt mainly with a property which contained the family home and was also used for horses. The High Court award had been limited to the portion of the property used for the home but the Court of Appeal increased the woman's share by including the whole of the property in the division. The most recent statement of the law by the Court of Appeal is now found in *Lankow* v *Rose* [1995] NZFLR 1, where a five member bench upheld an award of a half interest to the claimant but reiterated that there is no presumption of half shares.

matter of policy is for debate. Secondly, the share to which a de facto partner is entitled is hard to predict and will often be well below the half most married spouses receive. In *Nash* for instance, the share was 25 per cent. Thirdly, in the absence of statutory entitlements, the de facto claimant is on the back foot and, unless the matter is settled, may have to file proceedings in the High Court. While an unknown level of cases are settled before this happens, the obtaining of a share is something of a lottery for de facto partners.

IV POINTS TO REMEMBER IN THE LAW REFORM PROCESS

The history of family law reform has tended to be somewhat piecemeal in New Zealand. While much was done in 1980 as part of the "family law package" ushering in the new era of the Family Court, changes to property law, domestic violence, adoption, guardianship, child support and succession have tended to be made when their turn arrives. There is a danger of looking at matrimonial property reform in isolation both of other areas of the law and of the social conditions which the law will regulate. The child support reforms are perhaps a classic illustration of the need to think through the full impact of changes - that law picked out one issue, financial support of children, and largely ignored other issues such as property, custody, accommodation and non-financial support of children.

Reform of the matrimonial property laws should therefore be done with an eye to its effect on all aspects of the marriage breakdown process, and indeed to its effect on live marriages. At the same time, social and economic circumstances must be researched. How is the reduction in legal aid and the much decreased availability of cheap housing and mortgage finance through the State changing the ground rules? What are the consequences of increased female participation in the workforce, higher levels of redundancy and unemployment, and greater pressures to provide one's own superannuation? It has been conventional wisdom to say that women leave marriages much worse off than men, and while this may often be true, are there economic factors altering this, has indigenous New Zealand research been done on the point,[30] are there

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30 For example, one piece of research raises some questions about the conventional wisdom: Family Court Custody and Access Research Report 2 *A Survey of Parents who have Obtained a Dissolution* (Department of Justice, Wellington 1990) especially Tables 2.10, 2.12 and 2.13. Some recent research has been done on the way in which couples handle their money but it does not really cover th issues under discussion: Fleming and Easting *Couples, Households and Money The Report of the Pakeha component of the Intra Family Income Study* (Intra Family Income Project, Wellington, 1994), especially ch 11 "Money and the break down of relationships" and pp 109-110 "Reconstituted families". With respect to the latter, the authors say: "The business of how to live in a reconstituted family, how to relate, who pays for whom, and how the rules are set, is worthy of further study". Judith Davey in *From Birth to Death III* (Institute of Policy Studies, Wellington, 1993) 200 refers to the lower living standards of custodial parents and their children and the greater likelihood that fathers will work full-time and repartner. She also notes that longstanding inequalities in education and career opportunities are at the root of this rather than legal effects.

situations where the roles are reversed? The number of couples living in de facto relationships has increased significantly, 87,960 people recorded in the 1981 census as being in de facto relationships, compared with 161,856 in the 1991 census. Also since the 1976 Act was passed, same sex relations between men have been decriminalised and there is much greater awareness that same sex relationships cannot be ignored.[31]

So, in reforming our family property laws, it is suggested that the following points among others must be borne in mind:

- The impact of changes on other laws must be thought through.
- The law should be as consistent as possible with other laws (eg those affecting children). Overall consistency and coherence may not always be a virtue, but where there are discrepancies they should be explicable.
- Social and economic data must be collected and analysed.
- Changes must conform to our international obligations and domestic human rights laws.
- Changes must be considered in the light of the Treaty of Waitangi and the increasing cultural diversity in New Zealand.
- The basic assumptions of any new law should be carefully worked out. This was done for the 1976 Act and is reflected in the Title, but it becomes more complicated when we add de facto and same sex relationships and devolution of property on death.
- Where possible, new laws should draw on existing case law if the existing rules are regarded as satisfactory. We should be careful not to introduce totally new concepts and phraseology unless necessary, because this will simply require the courts to reinvent the wheel and force more people to litigate in the early days of the life of a new statute.
- The balance between certainty and flexibility needs to be carefully considered. The 1976 Act has a hard core of certain rules which work reasonably well for most marriages. Around the edges there are a number of discretionary rules, for instance enabling the courts to depart from equal sharing. To develop a law which lacks such a hard core will merely invite disputes and litigation.
- The transitional arrangements will be important. Both the 1976 Act and the Child Support Act operated retrospectively in the sense that they applied to past marriages and previously worked out maintenance arrangements. Generally

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31 In 1988, the Working Group merely flagged the need to consider relationships other than heterosexual ones: above n 10, 85.

speaking, this worked for the 1976 Act but has been a major problem for the Child Support Act.

- Any options for reform should be practical ones. We can think up grand schemes for ensuring fairness and equity but they may end up being very difficult to implement and may have deleterious side effects. Again, the child support scheme may be an example of this.

- Any legislation should be drafted in a clear and straightforward way. Section 20 of the 1976 Act, which deal with debts, is perhaps a good example of where the drafting has caused unnecessary complications and litigation.

V POLICY DIRECTIONS

It is not my aim to set out a policy blueprint for the revision of family property laws. I intend merely to raise some of the matters which need consideration.

The 1988 Working Group "was guided by certain principles that already underpin New Zealand's family law":[32]

(a) The law ought to reinforce equality of status between the sexes.
(b) The law ought to endorse the concept of marriage as an equal partnership to which both partners contribute equally, although in different ways.
(c) When a marriage fails the resolution of outstanding issues between the parties should not be unduly protracted (referred to, somewhat erroneously, as the "clean break" principle).
(d) The State should continue to have an important role in supporting families that have lost the support of the principal income earner; in many cases there will not be sufficient money available after marriage breakdown to support two households.

Are these principles still valid today? Do they apply with the same force when we include de facto and same sex relationships within our regulatory framework? Does the notion of equality belie inequities between the parties which the law needs to address? How realistic is the clean break principle in this age of child support obligations and restricted welfare and housing assistance from the State? To what extent should the law ease the transition to reconstituted families? Are these principles so adult focussed that there is too little attention given to the best interests of the children?

Many of the recommendations advanced by the Working Group were designed to meet the claim that the 1976 Act does not ensure equality in fact as opposed to in theory. But arguably these proposals do not go far enough. Some might argue for a system based on future needs, the 1976 Act being largely based on what happened during the course of the marriage.[33] But how can this be done without opening the scheme up to enormous uncertainty and protracted dispute? One way might be by

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32 Above n 10, 3.
33 Eg Bridge, above n 5.

encouraging capital maintenance awards at the time of property settlement as recommended by the Working Group[34] but this idea has been largely undermined by the child support legislation. Greater emphasis could be placed on giving custodial parents occupation of the matrimonial home. There could for example be a presumption to this effect. But the current Act already requires that particular regard be had to the accommodation needs of children. Do we know how many custodial parents do in fact get occupation (as part of a settlement rather than by court order)? Do we know the reasons why occupation is not agreed upon? Do we know the effect of the child support legislation on the willingness of the non-custodial parent to agree to occupation? Do we know whether a presumption in the law would in fact make much difference? Another option is to treat qualifications, degrees and job experience as having property status, which like future superannuation entitlements, can be brought into account when implementing the property settlement. Apart from having a very middle class ring to it, this suggestion needs to be worked through very carefully for its practicability.[35] Another more radical option is to go down the route of the community property jurisdictions and make all matrimonial property shared property from the moment of marriage. New Zealand has been used to the notions of joint families homes and joint tenancies. Would an extension of these notions be that unreal? Would it necessarily solve the perceived inequities in the system?

How should other domestic relationships (eg de facto relationships, same sex relationships, casual relationships more of a "flatting" kind, adult child/parent relationships, etc) be treated? Should they be incorporated within revised matrimonial property laws?[36] Does this impinge too much on individual freedom of association? Is the ability to contract out of the matrimonial property rules, assuming it was carried through to mew legislation, a sufficient safeguard for this freedom when we know that the courts can and do upset such contracting out agreements without too much difficulty? Is the variety of domestic arrangements such that different principles and laws are needed to govern them? How do we resolve conflicts where there is a legal and a de facto spouse vying for the same property? The Working Group recommended a separate statute which would give the courts the power to treat relationships which had all the hallmarks of a marriage much the same as marriages, but other relationships would be treated more on the basis of actual contributions to the relationship.[37] Is this a satisfactory compromise?

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34 Above n 10, 14. See also Austin, above n 4, 144-145.

35 Only one case appears to have successfully invoked time out for study as affecting property division: *Coombes* v *Heycoop* (1992) 9 FRNZ 559 (where the husband was able to use s 14 to obtain a departure from equal sharing because of, inter alia, his wife's university training).

36 Recent legislation introduced in the Australian Capital Territory takes a very broad approach to this question: Domestic Relationships Act 1994. Under s 3(1), "domestic relationship" is defined as "a personal relationship (other than a legal marriage) between 2 adults in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a *de facto* marriage."

37 Above n 10, 85 ff.