The Minister of Justice's opening speech

Hon D A M Graham MP*

Members of the Judiciary, Ladies and Gentlemen, I welcome the opportunity to open this symposium on Family Property and the Law. I congratulate the New Zealand Institute of Advanced Legal Studies for its initiative.

It would have been appropriate this morning to have been able to advise this assembled gathering of decisions the Government has made in this important area. Regrettably no such decisions have yet been made.

Over the last few years there has been a very active law reform legislative programme involving as you will know the company law package, human rights legislation, the Privacy Act, criminal justice amendments and electoral reform. It has simply not been possible until now for the Government to turn its mind to issues relating to matrimonial property.

But I am pleased to be able to say that it is now being given attention and I would hope that good progress will be made over the next 12 months or so, with a view to introducing new legislative measures. Accordingly it is entirely appropriate for this symposium to discuss these issues and for all who have an interest in the topic to begin preparing for such legislative change.

Families are an important part of most people's lives. It is difficult NOT to belong to one, and family property law touches most of us at one stage or another in our lives. Sensitivities over family property and succession can be acute. When disputes arise they can create deep rifts within families - rifts that sometimes take years to heal. In the most bitter cases, these rifts never mend. Family is, essentially, a private matter but we all have a view on what defines a family. And it is more apparent than ever that there are many and varied definitions of what defines a family. We no longer share a single definition.

This serves to illustrate that concept of family is not static. The obligations we feel toward our families also change, and the law must change as society changes. If it loses touch with the realities of society, the law can become outmoded, irrelevant or unjust. The new reality is that New Zealand's family structures, in line with the rest of the Western world are no longer overwhelmingly dominated by the two parent nuclear family so well known to previous generations.

Diversity is a key defining characteristic of families in the nineteen-nineties, and, of course, Maori families were never the nuclear families of Pakeha experience. In the past the law failed to recognise the different experience of Maori. The importance of whanau, hapu and iwi and Maori concepts of property and succession need to be

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recognised. I am pleased that the need for the law to reflect biculturalism has been recognised by the Law Commission succession project's intention to consult widely with Maori.

It is the role of the government and Parliament to ensure the law remains relevant. It must respond to changing social norms and reflect the society within which it operates. And New Zealand lawmakers have long shown an ability to respond to social change. By the same token law reform should not be entered into lightly. And with the widespread effect that family law has on society and families it is particularly important that these laws should not be reformed without considerable thought.

There are a number of issues which clearly will need to be addressed. Solutions are easier to see in some than in others. I hasten to say that the comments I am about to make are my own personal initial thoughts and I confess I have yet to consider all of the ramifications of any one of these topics. However we have to start somewhere. I know that much work has been done over the years particularly by the Law Commission and the working group on Matrimonial Property and Family Protection which reported in October 1988.

It seems undeniable that current family property law in this country no longer accurately reflects social reality. Much of our family law comes from the post war period when attitudes were very different from today.

Can I begin with some comments about the Matrimonial Property Act 1976? It was seen as radical when it was introduced. I well remember appearing as counsel in many cases when its predecessor, the 1963 Act, was in force. In those days the rule of thumb was that a wife was entitled to one per cent of the assets for each year of the marriage, and that was some improvement on what had gone before! Today it seems incredible that that should have been so.

The 1976 Act certainly was a vast improvement with its presumption of equal sharing of matrimonial assets. No longer were financial contributions to the marriage the predominant factor and due recognition was given to the contribution by, usually, the wife who raised the children and kept the home.

Of course today in many relationships husband and wife share responsibilities both from the earning and the child-rearing points of view. No doubt some on the distaff side claim that not only are they now earning but they are also carrying most of the child-rearing burden as well, and there is much truth in that. But whilst the division of asserts may well be much fairer as a result of the 1976 Act, there is still I believe, room for reform.

I have never been able to quite understand the fairness in a case where the assets are divided more or less equally, but the wife who has custody and primary responsibility for the children, is left with a greatly reduced earnings capacity both then and in the future compared with the earnings potential of the husband.

I well remember the cases when acting for the wife where the goal was to try to get as much of the fixed assets as possible in the justified belief that inflation at least would ensure a build-up of the assets to her, leaving the husband to earn as much as he could, but with few assets. Those were the days when inflation was at 15 per cent or more. Today that consideration hardly applies. The airline pilot who can earn $300,000 a year still has a much greater chance of accumulating assets compared with his wife in the former matrimonial home where the value remains far more constant. In other words, when it comes to a division of property, should the earning capacity of each partner be taken into account and if so, how? There are of course endless variables. The airline pilot may lose his licence the following year and it is difficult, if not impossible, to unscramble the egg once broken and revisit the division of the matrimonial assets.

Some United States jurisdictions have treated a degree or professional licence as an item of matrimonial property, available for sharing,[1] while others[2] have found a marital property interest in the potential increase in future earning capacity which results from "professional training" rather than the training per se. This approach has however been subject to criticism on the basis that the value of these intangible "assets" is difficult to calculate, and it may not always be the case that professional training reflects future earning capacity.

In 1987 the Australian Law Reform Commission proposed that a post-separation disparity in living standard could be taken into account when matrimonial property is divided. Such an approach is not without merit but it is difficult to see how such an approach could be reconciled with the need for certainty in the principles for division of matrimonial property. These principles must remain clear to enable separating couples to resolve their own disputes. A further Australian Law Reform Commission report released in April this year endorses previous recommendation made in this area.[3]

And then there is the question as to whom the Matrimonial Property Act should apply. The simple fact is that many couples live in de facto relationships and that trend is growing. It seems difficult and indeed fruitless to argue that this should not be so. People after all are free to live as they wish. Why should those who choose to live together without a formal marriage be required to rely on the concept of constructive trusts which are difficult to prove and expensive to litigate? Such actions take up much court time and are an expense to the legal aid system greater than the norm.

On the other hand many believe that giving de facto couples the same legal recognition as married couples devalues the institution of marriage. But is that really valid if marriage or de facto breakups occur at relatively the same rate? After all the perceived benefit to society of marriage was fundamentally the long term commitment it promised.

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1 *O'Brien* v *O'Brien* 66 NY 2d 576; 489 NE 2d 712 (1985).

2 *In re Marriage of Horstmann* 263 NW 2d 885 (1978).

3 *Equality Before the Law: Justice for Women*, Report No 69 (Law Reform Commission, Sydney, 1994).

Nor for that matter did the law on divorce which required a guilty spouse to wait seven years before obtaining a divorce successfully prevent the tide of change sweeping across society. Perhaps it caused it. Do easier and cheaper dissolutions of marriage downgrade the institution of marriage? It is difficult to judge cause and effect.

So we are faced with recognising the reality of today's world, yet are reluctant to lose the traditional values on which many societies have been based for so long. Dame Edna would at this point exclaim "Call me old fashioned, possums!".

Ultimately it becomes a question of the role of Parliament to lead the debate on moral values or follow.

There are at least three possible approaches in respect of de facto property if it is thought by Parliament that legislation in the area is warranted. Those alternatives include:

1) Equating de facto relationships with married relationships. This is seen in the recommendations of the Ontario Law Commission involving amendment to the definition of "spouse" for the purposes of the Family Law Act. This approach was first mooted in New Zealand in the 1975 draft Matrimonial Property Bill. Reference to de factos in the definition of "spouse" was dropped before the Bill was introduced.

2) Separate de facto property legislation as is the case for New South Wales, Victoria, South Australia and the Northern Territory. It is also embodied in the recommendations of the Australian Commonwealth Joint Select Committee accepted by the Commonwealth Government and the 1992 proposals put forward by the Scottish Law Commission; or

3) Ameliorating de facto property law within a statute regulating property in respect of "domestic relationships" generally. This would include law relating to same sex, parent/child, sibling, and other forms of domestic relationships as included in the Australian Capital Territory Domestic Relationships Act 1994.

The fact that de facto relationships are not covered by the Act also impacts on children. The Act empowers a court to order occupation of the matrimonial home in favour of one of the parties. This allows a custodial parent and children to remain in the family home in many cases avoiding severe hardship which might be occasioned by requiring them to leave. Unfortunately, children of de facto couples are not assured the same permanence of residence that children of married couples enjoy. Further, as we know, the Act empowers the court to make an order settling the matrimonial property or any part of it for the benefit of the children of the marriage. It is hard to justify depriving children of a de facto relationship of the same rights.

Clearly a decision on the jurisdiction of the Matrimonial Property Act will need to be made before much longer. Another well known difficulty with the Act is that it applies only during the joint lifetime of the spouses. If one spouse has died and inadequate testamentary provision is made then the surviving spouse is put to the

trouble to either apply under the 1963 Act with all its imperfections and different criteria, or embark on a family protection action, or occasionally a testamentary promises action. In the case of the first, that is an application under the 1963 Act, it clearly is now anachronistic and for the law to provide that a separation by death penalises the survivor relative to a separation inter vivos is difficult to understand, let alone tolerate. For the latter two actions, that is family protection or testamentary promises actions, they are of course fraught with difficulties.

Apart from a reference to "proper maintenance and support" the Family Protection Act gives little guidance as to how claims against deceased estates are to be satisfied. The courts apply a test of "the moral duty of the testator". Over the years the test has been reinterpreted by the courts. Early decisions perceived the duty as a duty to make proper financial provision for needy claimants. The issue was one of financial dependency. More recently the trend of decisions is for awards to be made largely on the basis of blood relationship. Where once it was virtually impossible for able bodied adult sons or married daughters in comfortable circumstances to successfully claim against an estate, now adult children are perceived to have a "right to inherit".

The report of the Working Group on Matrimonial Property notes that these awards sometimes reduce bequests to surviving spouses, frustrate the administration of wills and deplete estates. The Act as currently interpreted also encourages speculative claims and is capable of producing windfalls even for claimants who are not in need of maintenance and support even in the widest of these terms.

It is interesting to contrast recent New Zealand cases with the recent UK Court of Appeal decision, *In re Jennings, decd.*[4] In that case the Court of Appeal dismissed the claim of an adult son in comfortable circumstances against an estate of approximately £300,000, the bulk of which had been left to charities. The claim was dismissed notwithstanding that the deceased had for no good reason failed to honour moral or financial obligations to his son during his lifetime. The Court of Appeal held that the mere relationship of father and son was *not* a sufficient basis for making an order under the Inheritance (Provision for Family and Dependants) Act 1975. There had to be some special circumstances, typically a moral obligation before a court could decide that a testator had not made "reasonable financial provision" for an able bodied adult son capable of earning his own living.

Another problem is that under the present law the court has no power to interfere with dispositions of property made before death. These can be made with the intention of defeating claims under the Act. Various overseas jurisdictions enable the courts to claim back property disposed of before death. For example the English Inheritance (Provision for Family and Dependants) Act 1975 provides that an order may be made out of property that the deceased disposed of for less than valuable consideration within six years of death, if on the balance of probabilities the deceased intended to defeat the Act. The New South Wales Family Provision Act 1982 includes in the "notional estate" dispositions taking effect within three years of death if the deceased intended,

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4 [1994] 3 WLR 67; [1994] 3 All ER 27.

wholly or in part, to evade the jurisdiction of the Act and dispositions made within one year of death where the deceased had a moral obligation which was substantially greater than the obligation to benefit the transferee.

In brief therefore, litigants are being forced to bring actions under various statutes which were not designed for the purpose, to achieve a result which should be provided for in the matrimonial property legislation.

Clearly the time has come for some action. It is easy to see the problems. Now we must work to find the answers. The Department of Justice Law Reform Division will be working on these issues, as I have said, early next year. There will be policy decisions to be made. This is of great interest to many people with thousands of New Zealanders affected by this area of the law every year. I do not think piecemeal amendments are desirable and I much prefer to bring the necessary reforms into one package.

As we all know this is the International Year of the Family. A time to celebrate and highlight the importance of the family. It is however sobering to acknowledge that in New Zealand we are also having to face up to the reality of violence within our families. Studies into domestic violence, and in particular the Davison Report on the Bristol case, have formed the basis of legislation designed to enhance protection for victims of family violence. This legislation will send a strong signal to the perpetrators of violence that the Government is determined to deal with them and will not tolerate this blight on our society. Policy decisions on this have been made, the legislation is being drafted and I am expecting to introduce it in the run up to Christmas.[5] You will appreciate the Government considers this a higher priority than issues relating to matrimonial property, but matrimonial property issues will be the next stage in this reform process. I look forward to working with you all to ensure the best possible outcome.

Finally it may be of interest to you to know that the Government has this week decided to establish a new Department of Courts as from July 1, 1995. It has also accepted the principle of the existing Department of Justice becoming a Ministry of Justice with an enhanced policy development capability. The second stage of the review of the Department is due to report before Christmas, and will contain recommendations relating to other functions of the present Department of Justice, including corrections, the public registries and electoral. The separation of the courts to a new department will, I am confident, ensure that the users of the courts receive an efficient service with greater focus. The new policy ministry with upgraded policy capabilities will help to ensure that the reforms I have discussed receive the attention they deserve.

I am sure that the papers to be presented at this symposium will be of great assistance to the Law Reform division and I wish you well in your deliberations.

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5 See Domestic Violence Bill 1994.