Reforming Property Division in New Zealand: From Marriage to Relationships

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A. Introduction

The rise in marriage breakdown and divorce in the last few decades has generated radical changes in family law throughout the world. Broadly, the law has had to cope on one front with the children affected by divorce, and on the other with issues ostensibly of a more adult nature, essentially to do with money and property. These issues of money and property can however have a significant impact on the children, so that it is often hard to draw sharp distinctions between the various problems that arise.

More recently, family law has faced even more challenges. For a long time, marriage was the paradigm around which appropriate rules were developed. In the Western world, this paradigm no longer holds the same kind of sway. Unmarried cohabitation is rapidly becoming an equally popular paradigm, yet conventional family law has not always been modelled in a way which accommodates unmarried cohabitants neatly. The situation is further complicated by the social acceptance of same-sex relationships. While smaller in number, these relationships cannot now be easily left out of the equation without inviting charges of discrimination. These new developments in society raise questions for the whole of family law: adoption, status, care and upbringing of children, recognition of relationships, financial support, inheritance, and property division. The focus of this article is on the financial aspects of the ending of a relationship, whether marital or non-marital. The end may come through actual separation or through death. One of the underlying questions is whether there should be a premium in favour of marriage over other relationships. Reforms in New Zealand have answered this question in the negative.

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B. No Obvious World-Wide Trend

Different jurisdictions have dealt in varying ways with the questions of property division of marital and non-marital relationships. There are few patterns. On the whole, common law countries, such as the UK and Australia, have adopted systems which rely heavily on judicial discretion. In Australia, while marriage is a federal matter, *de facto* relationships have been legislated for on a state by state basis. New South Wales, for example, was the first state to pass a *De Facto* Relationships Property Act in 1984.[1] The rules in that Act nevertheless bore a marked similarity in those governing marriages. In the UK, while the court is given a fairly free hand in dividing property of marriages, various factors are to be taken into account. These include the income, earning capacity, property, and other financial resources in the present and foreseeable future, financial needs, obligations and responsibilities, the standard of living before marriage breakdown, age and conduct of the parties, duration of the marriage, disabilities and contributions made to the welfare of the family.[2] Despite this, the House of Lords in a landmark decision, *White v. White*,[3] held unanimously that awards should be tested against the yardstick of equality of division which should be departed from only if there is good reason for doing so. This rule will be especially applicable in so-called big money cases. It is interesting to note that one of the judges in the case was Lord Cooke of Thorndon, a New Zealander.

Common law countries have only in the last 50 years seen the need for distinctive rules for the property division of marriages. Historically, the common law did view marriage as a unity with the husband owning and controlling the property. The reversal of this through legislation giving married women their own property rights was at the time thought to be a triumph for women's rights[4] but it proved something of a let-down for the non-employed wife with no independent financial resources of her own. In New Zealand therefore the Matrimonial Property Act 1963 was somewhat revolutionary because it empowered courts to override strict legal and beneficial title to property and grant the non-titleholder a share of the property.

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1 Revised in 1999 to include close personal relationships (including family ones where the parties live together) falling short of a marriage or *de facto* relationship and now called the Property (Relationships) Act. The Australian Capital Territory earlier passed similar widely encompassing legislation: see the Domestic Relationships Act 1994 where the test requires two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other.

2 See s. 25 of the Matrimonial Causes Act 1973 (UK).

3 [2000] 3 WLR 1571, [2001] 1 All ER 1, discussed by David Hodson, 'White: Equality on Divorce?' in (2000) *Family Law*, at pp. 870–873.

4 Vivienne Ullrich, 'Reform of the Matrimonial Property Law in England During the Nineteenth Century' in (1977) 9 *Victoria University of Wellington Law Review*, at pp. 13–35. The New Zealand Married Women's Property Act 1884 was modelled closely on the English Act of the same name passed two years earlier.

European community property systems however stood somewhat in marked contrast, because the community property system does not operate only at the end of a marriage and is not dependent on the way in which the individual judge exercises a discretion.

When pressure for reform grew again in New Zealand in the 1970s, policy-makers turned away from the discretionary approach still at the heart of the Australian and the UK law and looked more to community property systems. The Matrimonial Property Act 1976 is however often described as a deferred community regime, as it applies community-type rules primarily at the end of a marriage when the parties separate or divorce.[5] Generally speaking, property defined as 'matrimonial' (not unlike 'community') is divided equally between the spouses, subject to certain exceptions. However, it is possible to divide matrimonial property at times other than at the end of the marriage and some couples find taxation advantages in doing so. This can be done either by obtaining a court order relating to specific property or by signing an agreement in accordance with the rules in the Act.[6]

It can be seen from this brief description that the New Zealand approach to property division stands in contrast to many of the other approaches around the world. It illustrates the point that reformers have not found it easy to discern consistent world-wide trends.

C. Renewed Pressure for Change

In New Zealand, the continued operation of the Matrimonial Property Act 1976 for 25 years is quite remarkable. Given the volatile nature of personal relationships, most areas of family law have been frequently updated. So, New Zealand, like many others countries, has wrestled with issues such as child abduction, child abuse, domestic violence, financial support of children and inter-country adoption, to mention just a few. Pressure to alter the property legislation has nevertheless been lurking for some time.[7] This covers three main questions. First, there have been claims that the law has not always worked fairly for the party with primary care of the children, usually the mother. The Act does not take account of the future needs of the parties but, in effect, looks back to ask how the marriage should affect the division of capital between the parties. The fact that at the end of the marriage one

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[5] For a fuller discussion of these points, see Angelo and Atkin, 'A Conceptual and Structural Overview of the Matrimonial Property Act 1976' in (1977) 7 *New Zealand Universities Law Review*, at pp. 237–258.

[6] See ss. 25(3) and 21 of the Matrimonial Property Act 1976, respectively.

[7] In fact, the first version of what became the Matrimonial Property Act 1976 covered *de facto* relationships, but the provision was dropped during the course of the Bill's passage through Parliament: see Clauses 16 and 49 of the Matrimonial Property Bill 1975.

party is likely to be in a much better income-earning position than the other is not generally relevant, although it may create a sense of injustice. Putting this another way, it is said that the equal division of property does not leave the parties in an equal position in reality, largely because of their differing income situations.

Secondly, as noted above, the dramatic increase in unmarried cohabitation has invited calls for a coherent statutory scheme to meet the demands of the parties involved. In New Zealand with its population of under four million, 247,287 people were living in *de facto* relationships according to the 1996 census. This can be compared with 87,960 in 1981 when statistics were first collected. When a question was asked for the first time in the 1996 census, 6520 people were reported as being in same-sex relationships. In the absence of a statutory regime,[8] parties to *de facto* relationships have resorted to other laws not designed with them in mind to resolve property claims. In common with other common law countries, New Zealand has used the law of trusts, and less frequently other areas such as the law of restitution, to provide a mechanism for the resolution of disputes.[9] In order to obtain an equitable interest under a constructive trust in the other party's property, the claimant must show that there was a reasonable expectation on both sides that there would be such an interest and that the claimant has made direct or indirect contributions to the asset in question. This will not always be straightforward, as for example a claimant might be denied a remedy if the contributions have been matched by benefits received during the relationship. Furthermore, the amount of any award will be hard to predict. There is no presumption in favour of equal division. Instead, an assessment is made on the basis of contributions. It is widely accepted that the operation of the law is unsatisfactory.

Thirdly, the position of survivors has appeared anomalous. Unlike spouses who separate, a person whose spouse has died does not enjoy a right to equal division of the matrimonial property.[10] A little oddly, the Matrimonial Property Act 1963, repealed as far as its application to separating couples is concerned, remains extant for a surviving spouse. So long as there is a 'question' to settle between the survivor and the estate, then the survivor can ask the court to exercise its wide discretionary powers to make an award out of the estate. In addition, under New Zealand inheritance law, a widowed spouse, who claims to have been poorly provided for under the will or on an intestacy, can apply to the court under the Family Protection Act 1955. According to the Act, the applicant must show that adequate provision is not available from the estate for the applicant's proper maintenance and support[11]

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[8] A small exception applies to *de facto* couples who are also engaged to be married: the Domestic Actions Act 1975 can be used but the object of the Act is to restore the parties, as best as possible, to the position that they were in prior to the engagement.

[9] The leading Court of Appeal judgment is *Lankow v. Rose* [1995] 1 NZLR 277.

[10] An exception is where proceedings had been commenced before the death. In this situation, the proceedings continued under the 1976 Act (see ibid. s. 5).

[11] See s. 4. Other family members such as children can also apply under the Family Protection Act, but prior to the most recent reforms a *de facto* partner was unable to do so.

but this language has been interpreted very broadly by the courts who now ask whether the deceased fulfilled 'the moral duty' owed to the applicant.[12] The position of the survivor has been recognized to be incongruous ever since the Matrimonial Property Act 1976 was passed. While many will be happily provided for under the deceased's will, why should the position of others be so radically different from that of separating spouses?

D. The Law Reform Process

The process of law reform is often long and involved. In New Zealand, this has been true of property reforms. Suffice it to highlight one or two of the key steps along the way. In 1988, the then Minister of Justice established a 'working group' to look at a wide range of issues.[13] The Group made a number of detailed recommendations, mostly tackling the three areas of concern discussed above. An election in 1990 brought a more conservative government into power, which was not greatly motivated to proceed on the Working Group's report, especially in relation to *de facto* relationships. Nevertheless, late in 1994, the Minister of Justice announced that he had asked his department to prepare legislation on *de facto* relationships.[14] It was not until 1998 that he eventually introduced into Parliament the *De Facto* Relationships (Property) Bill and a companion piece the Matrimonial Property Amendment Bill. The latter contained a wide range of amendments to the existing law, the most notable of which was the incorporation of widowed spouses into the 1976 regime. While many of the detailed rules were carried over from the matrimonial regime to the *de facto* one, the latter was different in several significant ways. The principal difference was that the equal sharing rule applied only to the house and chattels, other relationship property being divided according to contributions (although certainly not limited to financial contributions). The government of the day saw it as ideologically important to maintain a distinction between marriage and unmarried cohabitation. This was indicated by the proposal to have two separate pieces of legislation, which, while they overlapped to a large extent, would nevertheless be less favourable for the *de facto* partner.

The Bills were sent to a parliamentary select committee for public submissions.

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[12] One of the earliest leading precedents was the Privy Council decision in *Allardice v. Allardice* [1911] AC 730 and recently, the Court of Appeal decision in *Williams v. Aucott* [2000] NZFLR 532.

[13] *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988). The author was a member of the Group, as were the current Associate Minister of Justice responsible for family law, Margaret Wilson and the current Chief Justice, Dame Sian Elias.

[14] Atkin, Austin and Grainer, *Family Property Law and Policy* (NZ Institute of Advanced Legal Studies, Wellington, 1995) at p. 6.

This process was dragged out, the Government changed its minister of justice and decided that other priorities such as law and order should take precedence over family law reform. A general election then occurred in 1999 which brought a centre-left coalition government to power. The new minister responsible for family law took a markedly different view from her more right-wing predecessors. She could see no reason why the rules for dividing property at the end of a relationship (whether on death or separation) should differ depending on the marital status of the parties. She therefore abandoned the idea of having two pieces of legislation and brought all relationships, including same-sex ones, under one and the same statute. This was put before Parliament, went again to a select committee and another round of public submissions took place. The level of public interest in the issues surged, because the Committee received 1,631 submissions compared with 163 on the earlier *De Facto* Relationships (Property) Bill. One of the major concerns was the blurring of the distinction between marriage and *de facto* relationships, as a result of which the Committee decided to drop the generic word 'partner' and use more extended phrases such as 'spouse or *de facto* partner'. This change was merely cosmetic, not affecting the substance of the proposals, and left opposition parties in Parliament still opposed to the unified law.

When the Bill was voted on in the full Parliament, members of Parliament were given a 'free' vote i.e., they were not bound to follow the line of their party. Two major votes were taken, first to determine whether *de facto* relationships would be merged with marriage into the one Bill as proposed by the minister, and secondly, whether the legislation should include same-sex relationships. It is fascinating that the first vote was passed by the narrow margin of four votes but the second was passed by the far greater majority of forty-one. What happened was that most opposition members voted against treating marriage and *de facto* relationships the same, but when this passed, many of them could see no reason to exclude same-sex couples. For some, the negative vote on the first question was because they felt it downgraded marriage. For others, it was because of a more ideological objection to imposing rules on people who had chosen not to marry. These views were not really at stake when the question was whether *de facto* relationships should be split between heterosexual and homosexual couples. In New Zealand's generally liberal society, such a split is now seen to be hard to justify. Those who voted in the negative on this second question tended to be the morally conservative residue of members.

E. A Unified Law

There are few who would dispute that the law governing *de facto* relationships has been unsatisfactory and with the rapid rise in such relationships a simpler and fairer scheme was needed. When the first version of a new scheme was examined (the *De Facto* Relationships (Property) Bill), the most obvious difficulties with it arose where

it parted company with the rules governing marriages. For example, if one of the objectives was to avoid costly litigation, then the proposal that relationship property, other than the home and chattels, be divided according to contributions was bound to do the opposite. The subtle differences between marriage and *de facto* relationships were also likely to cause confusion, at least in the ordinary person's mind. There were therefore good practical explanations for applying the same law to both marriage and *de facto* relationships.

However, other more substantive reasons can be advanced for a unified approach. It focuses on how people actually live and function, rather than the external formal character of a relationship.[15] The real nature of the relationship is given priority over legal status. Although some may argue that the unified approach gives quasi-marital status to *de facto* relationships despite the lack the usual formalities, this hardly advances the debate as it is still the way people function that determines whether they are inside or outside the scheme. Furthermore, New Zealand's human rights legislation challenges discrimination on the grounds of marital status and sexual orientation.[16] To have one law for married people and another for unmarried cohabitants is ostensibly discriminatory.[17] A unified system has the merit of avoiding this problem. While stigma against those living together unmarried has largely evaporated in New Zealand, the new law may assist in removing its last vestiges.

On the other hand, there are downsides with the unified approach. The most compelling of these is that, unless they take advantage of the power to enter into a contract altering the standard rules (to be discussed later), people are forced into a set of rules that they did not choose. Their freedom of association is thereby compromised. This argument is not however so much one against a unified system as against any enforced set of rules for *de facto* couples. The same point could just as easily have been directed to the earlier proposal of the previous government to have a separate act for *de facto* relationships. It is for this reason that one of the right wing parties[18] in New Zealand favours what it calls a 'contracting in' scheme. Under this, a couple would be bound by the statutory division rules only if they agreed, perhaps by some fairly simple mechanism. A variant on this is a suggestion from the Law Commission. In a paper primarily devoted to the legal position of same-sex relationships, it recommended that partnerships could be registered along lines

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[15] A similar comment is made in an article about a House of Lords decision holding that 'family' includes same-sex partners for the purposes of the Rent Act 1977 (UK): L. Glennon, 'Fitzpatrick v. Sterling Housing Association Ltd – An Endorsement of the Functional Family?' in (2000) 14 *International Journal of Law, Policy and the Family*, at pp. 226-255.

[16] The two principal pieces of legislation are the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

[17] This argument was not however one which swayed the majority of the Court of Appeal when it was invited to rule that lesbian couples could marry: *Quilter v. Attorney-General* [1998] 1 NZLR 523.

[18] The Association of Consumers and Taxpayers Party, commonly known as the ACT Party.

similar to the models adopted in several European countries.[19] The proposal goes beyond questions of property, as registration would confer the same rights and liabilities as marriage. But neither 'contracting in' nor the Law Commission's proposal really takes reform of the property laws very far. Those who 'contract in' or register their relationship will be catered for but this is likely to be a minority of couples, leaving the vast majority having to fall back on the old unsatisfactory law. Freedom of choice is a fine objective but may have to be sacrificed in the interests of a workable scheme.

Another downside of the unified approach is that it treats a wide range of relationships the same, irrespective of the level of commitment in the relationship. Married couples have arguably committed themselves by getting married, but this is not true of unmarried cohabitants. The definition of '*de facto* relationship' in the New Zealand law will be looked at later, but it should be noted at this stage that, with some narrow exceptions, *de facto* relationships will fall within the new law only if they have lasted for at least three years. This means that in most instances relationships will have evidenced an element of stability that renders them 'marriage-like'. Casual relationships will not be covered.

F. The Principal Changes

As already noted, one of the main aspects of the New Zealand reforms is the assimilation of marriage and *de facto* relationships. Some particular points about this will be examined later and likewise the extension of the scheme to cover survivors. Certain other important changes apply to all relationships.

First, the Matrimonial Property Act 1976 will be known as the Property (Relationships) Act 1976, as if it had always had that name. The reason for this is that the new reforms, although extensive, have been achieved by amending the existing statute, instead of replacing it with a completely new one. One of the amendments is to change the name of the Act to reflect more accurately what it is about.

Secondly, the equal division rule has been imbedded more tightly. Under the original 1976 Act, several exceptions applied depending on the kind of property under consideration. There were two exceptions for the house and chattels, first where there were 'extraordinary circumstances' rendering equal sharing 'repugnant to justice',[20] and secondly where the marriage was one of short duration, which, unless the court extended the period, was one of three years.[21] Both of these exceptions were narrow. The first was held by the Court of Appeal to be a stringent

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[19] Law Commission, *Recognising Same-Sex Relationships Study Paper 4* (Wellington, 1999).
[20] See s. 14 of the original Matrimonial Property Act 1976.
[21] See s. 13 of the original Matrimonial Property Act 1976.

test, not easily satisfied. One example where it was invoked was where the lawyer husband had embezzled his firm's trust account and was sent to prison as a result.[22] The second could succeed only if one of three further conditions had been satisfied: the asset in question had been owned by one spouse before the marriage; or it had been acquired by succession, survivorship, gift or under a trust; or one party's contribution to the marriage had 'clearly been disproportionately greater' than the other's. Where either the extraordinary circumstances or short duration marriage exception existed, the division of property was according to the parties' respective contributions to the marriage.

For property other than the home and chattels, the exception from equal sharing was much easier. Where one party could satisfy the court that they had made a clearly greater contribution to the marriage than the other, then division was according to such contributions.[23] The ability to displace equal sharing in this way was important because the property in question could include business assets, farms, investments, superannuation and life insurance policies and other valuable items. On the other hand, the Act was careful to define 'contributions' broadly and expressly stated that there was no presumption that financial contributions should be given greater weight than non-financial ones such as work in the home and childcare.[24]

The new law treats all relationship property in the same way and allows as exceptions to equal division the two which formerly applied only to the home and chattels. In other words, in future when dealing with businesses, investments and such like it will be much harder to argue a case for unequal division. Whereas in the past it was enough to show a clear difference in contributions, only a difference gross enough to be extraordinary will suffice. To take an example, in the case of *Walsh v. Walsh*[25] a marriage had lasted 10 years with two children born during that time. The husband had acquired a farm largely through periodic gifts from his father. Half of the farm had been acquired before the marriage, the other half being acquired afterwards. The Court held that only the second half of the farm was matrimonial property. The wife played a full part in the farming operations and the running of the home. The Court nevertheless divided the half-share in the farm and the livestock three quarters in favour of the husband, because he was able to show that he had made a clearly greater contribution to the marriage. Under the new law, this result must surely be in doubt. Given the length of the marriage and the responsibility of caring for the children, can we say that there are extraordinary circumstances rendering equal sharing repugnant to justice?

The facts of *Walsh* can be used to lead to the third important change. If it is presumed that the wife in that case cared for the children after the parties separated and given the children's needs and her lack of a career path, she would not easily be

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[22] *Pickering v. Pickering* [1994] NZFLR 201, CA.
[23] See s. 15 of the original Matrimonial Property Act 1976.
[24] See s. 18 of the original Matrimonial Property Act 1976.
[25] (1984) 3 NZFLR 23, CA.

able to find a good job. She would more than likely receive social security benefit.[26] The husband on the other hand would be able to continue farming and receive quite a good income. Even if the relationship property were divided equally, the husband is in a far better position to meet his ongoing financial needs than is his wife. Under the original form of the 1976 Act, these points would have been irrelevant. They might be relevant to the amount of child support he pays[27] and also to a claim which the wife could make for spousal maintenance.[28] In something of a departure from the philosophy of the 1976 Act to look backwards at what happened during the marriage rather than forwards to future needs, Parliament has now given the courts a discretion to give a woman such as Mrs Walsh an extra sum of money to make up for her overall weaker financial position. Section 15 states as follows:

(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage or *de facto* relationship ends, the income and living standards of one spouse or *de facto* partner (party B) are likely to be significantly higher than the other spouse or *de facto* partner (party A) because of the effects of the division of functions within the marriage or *de facto* relationship while the parties were living together.
(2) In determining whether or not to make an order under this section, the court may have regard to:
    (1) the likely earning capacity of each spouse or *de facto* partner;
    (2) the responsibilities of each spouse or *de facto* partner for the ongoing daily care of any minor or dependent child of the marriage or, as the case requires, any minor or dependent children of the *de facto* relationship;
    (3) any other relevant circumstances.
(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A:
    1. order party B to pay party A a sum of money out of party B's relationship property;
    2. order party B to transfer to party A any other property out of party B's relationship property.

This represents an exception from equal sharing to be placed alongside extraordinary circumstances and short duration relationships. But it is an exception that would not help Mr Walsh but could excite the interest of Mrs Walsh. She still has several hurdles to cross. She needs to show that as a result of the marriage her income and living standards will be significantly lower than her husband's. She can probably do this, but Mr Walsh has one important argument up his sleeve. How will the court react when he argues that the economic disparity is not because of the division of functions within

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[26] Under the Social Security Act 1964, she would be entitled to a 'domestic purposes benefit'.
[27] Under the Child Support Act 1991, which determines the amount to be paid according to a formula which varies with the number of children and the liable parent's taxable income.
[28] See ss. 60–71 of the Family Proceedings Act 1980.

the marriage, but because of his father's generosity in transferring the farm into his name? Next, the section invites the court to consider various factors including the open-ended 'any other relevant circumstances'. Could Mr Walsh argue that any substantial award would prejudice his ability to keep the farm going? If the effect of an order in favour of Mrs Walsh would be to force the sale of the farm, would this cause the court to hesitate? Finally, if the court decides to make an order, it would be 'for the purpose of compensating' Mrs Walsh. How is this to be calculated? Would it be a proportion of Mr Walsh's income multiplied by the number of years of the marriage? Or should the court start with a notional income for a farmhand or childcare worker and multiply by ten? Should account be taken of the fact that Mrs Walsh has had accommodation and other incidents of marriage provided in that time?

These questions are a few of those that can be asked about how Section 15 will operate. therefore it is not surprising that this provision has attracted opposition from politicians, lawyers and judges.[29] It embraces a new approach for New Zealand law and the expectation is that, as happened when the 1976 Act was first passed, there will be a lot of litigation before its interpretation settles down.

Two other points should be noted about the general changes to the New Zealand law. Under the original version of the 1976 Act, married couples were able to enter agreements without the need for a court order.[30] Such agreements in some cases represented settlements of disputes over the division of property after the parties had separated. Others were entered at some other time, often before the marriage so that they were in effect an antenuptial settlement. These were typical 'contracting out' agreements, whereby the usual rules for determining shares in property could be departed from. With the extension of the law to cover *de facto* relationships, it is thought that more contracting out agreements may be signed, so long of course as both parties consent. Under the previous law, agreements could be set aside by the court on grounds rather broader than those available under the law of contract, namely where it was considered unjust to give effect to the agreement. In deference to the argument that *de facto* couples should have freedom to decide how they will manage their lives, the ability of the court to set an agreement aside has been narrowed. In future, the court must be satisfied that giving effect to the agreement would cause *serious* injustice and must take account of the fact that the parties wished to achieve certainty by means of the agreement.[31]

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[29] For example, see the minority report of the National and ACT Parties after consideration by the parliamentary select committee. The report is at the beginning of the revised Bill, Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25, 109–3. The minority report said 'The Government has got it wrong because letting judges decide property division on a case-by-case basis means there will be no certainty any more. Different judges will make different assessments giving different reasons' (at p. 44).

[30] See s. 21 of the Matrimonial Property Act 1976. There has in fact been a recent trend in the cases not to set aside pre-nuptial agreements too easily: *Place v. Pleat* [1997] NZFLR 759 and *Wood v. Wood* [1998] NZFLR 516.

[31] See s. 21J of the Property (Relationships) Act 1976.

Another potentially important reform deals with property which appears to be beyond the reach of the court and hence not included in the property divided under the Act. It is not uncommon for wealthier people in New Zealand to create family trusts or to run their affairs through a family company. The trust or company may hold substantial assets and may even own the family home. However, as trusts and companies are quite distinct from the individuals in a relationship, they do not automatically come within relationship property legislation. Under the original 1976 Act, property which was disposed of to a third party including a family trust or company could be clawed back into the matrimonial property pool but only if the disposition of the property was intended to defeat the interests of the other spouse. Proof of such intention was often not readily available.

In future, the court will have discretionary powers to deal with the situation where property is disposed of during the course of the relationship to a trust or family company with the *effect* of defeating the claim or rights of the other partner.[32] It will be much easier to prove effect than intention, and the expectation is that the new rules will be well used. The main orders which the court can make are to require the first partner to make a compensatory payment or else to transfer property to the other partner.[33] No one can presume that a court will exercise these powers. It will depend on the facts of each case. The court will for example be influenced by the extent to which what would otherwise be relationship property is now owned by a trust or company, and by the reasons, many perfectly legitimate, why that trust or company was established. But there is no doubt that some claimants from seemingly wealthy relationships will be far better off than under the previous law.

G. *De Facto* Relationships

As already noted, the matrimonial property regime has been extended to incorporate *de facto* relationships. At the same time, various other laws which before now excluded unmarried couples have also been extended. The most important of these are: the ability of one spouse to seek maintenance from the other; the rules on intestacy; and the Family Protection Act 1955 under which certain family members can apply to the court for a greater share of the estate than they received under the deceased's will. In practice, these reforms may be very important for *de facto* partners, but it is the rules for division of property that have attracted the greatest publicity.

It is important for the purposes of these reforms to know what a *de facto*

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[32] See ss. 44A-44F of the Property (Relationships) Act 1976.

[33] In the case of trusts, there is also power to order the trustees to make payments to the disadvantaged partner out of the income of the trust, but only as a last resort.

relationship is. In the absence of a registration system as with marriage, the determination of the character of an association between two people is much more fluid. In the earlier versions of the legislation, *de facto* relationship was defined by asking whether two people were 'living together in a relationship in the nature of marriage'. This phrase, although used in legislation on other matters, was criticized as being too imprecise. A new definition was inserted during the passage of the new law, but whether it leads to greater precision may be questioned. A *de facto* relationship is defined as two persons aged 18 or more, 'who live together as a couple' and who are not married to each other.[34] In determining whether two people live together as a couple, the court must take all the circumstances into account including where relevant:

1. the duration of the relationship;
2. the nature and extent of common residence;
3. whether or not a sexual relationship exists;
4. the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
5. the ownership, use, and acquisition of property;
6. the degree of mutual commitment to a shared life;
7. the care and support of children;
8. the performance of household duties;
9. the reputation and public aspects of the relationship.

These factors are ones that are already familiar to the New Zealand courts which have had to decide in other contexts whether a *de facto* relationship existed. None of them is determinative[35] and it is not a matter of seeing whether a majority of the circumstances can be ticked off like a checklist. For example how is a court to decide on a spasmodic association which has lasted ten years, produced a child but where the violent male partner comes and goes as he pleases contributing little or nothing to the household? While many associations will obviously be *de facto* relationships, there will always be grey areas such as this example where the court will have to make a judgment call. If in the example the woman owned the house and financed the family's food and other daily needs, a court might be tempted to say that the man's lack of commitment tips the balance against a finding of *de facto* relationship, thus preventing him from walking away with a half share.

For most purposes, the rules relating to married couples also apply to *de facto* couples. There is however a difference for *de facto* relationships of short duration

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[34] See s. 2D of the Property (Relationships) Act 1976, modelled on s. 4 of the New South Wales Property (Relationships) Act 1984.

[35] In the context of social security benefit fraud, the Court of Appeal held that financial interdependence was an essential requirement: *Ruka v. Department of Social Welfare* [1997] 1 NZLR 154 but the Property (Relationships) Act 1976 expressly states that no one circumstance is to be regarded as necessary for the purposes of that Act.

i.e., those that have lasted less than three years.[36] Generally speaking, such relationships are outside the jurisdiction of the court under the Property (Relationships) Act 1976. A dispute would have to be resolved under the previous law of trusts and other such rules of common law and equity. However, there are two exceptions to this. First, the court can make an order relating to specific property as opposed to an order relating to the division of property in general. Secondly, the court can make an order with respect to a short duration relationship if:[37]

(3) the Court is satisfied –
  (i) that there is a child of the relationship; or
  (ii) that the applicant has made a substantial contribution to the *de facto* relationship; and
(4) the Court is satisfied that failure to make the order would result in serious injustice.

If this rather convoluted provision, remodelled from parallel Australian legislation,[38] is fulfilled, then the division of property is not on the basis of equality but according to the respective contributions to the relationship. It is suggested that, while it may help some mothers left stranded by a partner who walks out early, it is nevertheless going to apply in a very small percentage of situations.

The final matter worth commenting on in relation to *de facto* couples is the possibility that a person who has had several relationships may be subject to multiple claims. How for example is a court to deal with two people claiming the same home owned by a third party? The Act attempts to deal with this kind of situation.[39] Where one relationship follows after the other, then the first gets first bite at the cherry. In other words, the first partner (whether married or *de facto*) would get a half share of the home. The second partner's claim would then have to attach to the half share which remained. If relationships occur at the same time, then the court orders must relate to the property 'attributable' to each relationship. If this is not possible, then the property is divided according to the contributions of each relationship to the acquisition of the property. These situations are likely to arise infrequently. But it is suggested that, despite the gallant attempt to provide some statutory guidance, there will still be cases replete with intricate arguments about how the property should be divided.

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[36] The court can extend the three year period if in all the circumstances it considers it just to do so: s. 2E of the Property (Relationships) Act 1976. Given the history of a similar provision in the original 1976 Act, a court is likely to use this power only sparingly.
[37] See s. 14A(2) of the Property (Relationships) Act 1976.
[38] See s. 17 of the New South Wales Property (Relationships) Act 1984.
[39] See ss. 52A and 52B of the Property (Relationships) Act 1976.

H. Position of Survivors

The extension of the matrimonial property regime to cover survivors on the death of their partner means that by and large the rules which govern separating and divorcing spouses will apply. There are however several distinct points about the position of survivors which are worth mentioning.

First, in general only the survivor and not the deceased's estate can apply for an order.[40] The estate can however apply with the leave of the court which can be granted only if there would otherwise be serious injustice. Unlike *inter vivos* claims, the rule allowing marriages of short duration to escape equal sharing does not apply unless the court considers that equal sharing would be unjust.[41] For *de facto* relationships of short duration, no order can be made except on the grounds which apply to *inter vivos* claims (as described above). On the face of it, this appears to place married survivors in a better position than unmarried ones. Contrary to *inter vivos* claims, there is a presumption that property owned or acquired by the deceased is relationship property.[42] The party, most likely to be the estate, who wishes to rebut this presumption bears the onus of doing so. Finally, property which would normally pass to the widowed partner under the survivorship rule for joint tenancies is, in the absence of a court order to the contrary, not to be treated as the survivor's separate property but may form part of the pool of property available for division.[43]

It is not entirely clear how significant these changes for survivors will in practice be. Most will be amply provided for in the deceased's will or under the intestacy rules. There is no obligation to make a claim under the Property (Relationships) Act 1976. Unless the will expressly provides for the opposite or a court grants an order to the contrary, a person applying under the Act loses entitlements under the will.[44] Survivors will therefore have to weigh up carefully whether to elect to apply under the Act and forfeit the benefits of any testamentary dispositions. The new law will be of greatest advantage to a survivor who has faired badly under the will.

I. Overall Impact

The reforms discussed in this article are the most significant made to New Zealand family law for a decade. While the general shape and philosophy of the previous matrimonial property regime have been preserved, some important inroads have been made, especially the new power given to the courts to award payments to

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[40] See ss. 86 of the Property (Relationships) Act 1976.
[41] See s. 82 of the Property (Relationships) Act 1976.
[42] See ss. 78 and 79 of the Property (Relationships) Act 1976.
[43] See s. 80 of the Property (Relationships) Act 1976.
[44] See ss. 73 and 73A of the Property (Relationships) Act 1976.

compensate for economic disparities. The extension of the law to survivors and the unification of the rules governing married and unmarried (including same-sex) relationships are sensible policies, but there will be an inevitable settling down period as people test the new law in the courts. Fundamentally, the reforms have shifted the emphasis away from marriage to relationships.