

An Opposition commentary

Judith Tizard*

I have been asked to provide a commentary today on Rt Hon Justice Hardie Boys' paper entitled "Judicial Attitudes to Family Property" and while I have the pleasure to be Labour's associate Justice spokesperson, the thought of commenting on the views and actions of the whole of the High Court and the Court of Appeal over the last 18 years in the area of matrimonial property and other family property matters had me daunted. I am therefore delighted that his Honour limited the scope of his paper a little.

I found that the paper clarified a number of complicated issues for me. It outlined very clearly the areas that need Parliamentary attention and offered areas for possible judicial innovation within the present Matrimonial Property Act 1976 and I hope those are taken up. I shall keep advocating my view, however, that there is nothing wrong with judicial attitudes that a majority of women on the bench could not fix. It is probably the quickest solution to our problems in Parliament too.

As a Member of Parliament who is not a lawyer I shall follow Justice Hardie Boys' excellent example and shall limit my ambitions as to what I can cover here today. I shall stick with the political brief which I inherited from my colleague and predecessor as Labour's associate spokesperson for Justice, Lianne Dalziel, who has said that the Matrimonial Property Act 1976 should be amended to include de facto couples as the present position is unfair and people are being hurt. Her view and that of the Labour Women's Council is that the law should recognise the changes in family patterns in New Zealand over the last 20 years and also should acknowledge the intent of the Human Rights Act 1993 to outlaw discrimination on the basis of marital status and, as of last year, of sexual orientation.

Our view and that of the Labour caucus is that if the Government does not act promptly I should introduce a private member's Bill to get the issues onto the legislative table for discussion. I have been talking to people and groups throughout the country over the last year and there is overwhelming support for change. I have very limited research assistance available to me so I hope that my work will be overtaken by a good Government Bill. Our view is that any major change to family law is best dealt with in government legislation but it must be dealt with soon.

The issues raised in the 1988 Report on the Working Group on Matrimonial Property and Family Protection are probably beyond any Opposition MP's resources to resolve but I believe that the direction in which the law should go is clear.

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I think that most New Zealanders now agree that the Matrimonial Property Act 1976 was an important and successful innovation. I am concerned to be informed today that many men are still uncomfortable with its principles.

Those, who in 1976 declared that the Act would be the end of civilisation as we knew it, may, looking at our country today, feel their case proved but I do not think we can blame the Matrimonial Property Act 1976 for the social, economic and political transformation since its enactment. After eighteen years of operation the most frequent calls for amendments to the Act are asking for extensions to it, not its abolition.

Among the chorus of calls for reform there are those who argue for wider judicial discretion to allow the allocation of an unequal share of matrimonial property to recognise cases where the subsequent responsibilities are not equally divided or where the earning potential or present earning ability of one spouse is much lower than the other's. Others call for different divisions of property at the end of second or subsequent marriages or for marriages later in life.

Questions are raised as to whether relationships where children are involved should be treated differently to childless unions. Some argue for other or wider definitions of matrimonial property and some for similar rights to exist at the death of a spouse as exist where a marriage ends with dissolution. Many of us argue that the range of domestic relationships in need of protection is much wider than just those covered by the 1976 Act.

There is also a common belief that people in de facto relationships are included in the provisions of the Act. This stems, I think, from the fact that the Bill introduced by Hon Martyn Finlay, the Labour Minister of Justice in 1972-1975, included marriages and "purported marriages". I am told that the inclusion of de facto relationships was lost by one vote in the National Government caucus in 1976. The original Bill was widely discussed and debated but the subsequent deletions were not well publicised.

In May 1994 a survey showed 68% of a sample of New Zealanders thought that people's rights in de facto relationships were protected by the Matrimonial Property Act 1976 or were unsure of the position. After the publicity campaign by the Legal Services Board this number had dropped to 43% but I believe that too many people are still ignorant of their rights or have no rights in the event of a collapse of their domestic relationship.

It is often the poorest people who suffer most in this situation because not only have they acquired less property that may be shared, but they are the least likely to be able to afford to go to court. Again and again when I have urged people to fight for their rights or for their children's rights I am told that they have been advised that it would cost more than the value of the property to go to court so they have no choice but to walk away from the only asset they had and face the uncertainty of life at the whim of an increasingly unsympathetic welfare state.

I cannot pretend to offer solutions to all of these perceived problems and nor do I believe that the law or the courts can provide justice in all cases but I do believe that

Parliament has been painfully slow to respond to the very real concerns of many well informed people who are involved with the operation of the Act. I am increasingly of the view that it is lack of political will and not lack of resources that holds change back.

The current Minister of Justice is quoted as saying in March this year that relying on constructive trusts was "not terribly desirable" and that while he accepted there are problems under the Matrimonial Property Act 1976 for people in de facto relationships "on the other hand [de facto couples] don't have to live like that, its a matter of choice. I think we have eroded the sanctity of marriage a fair bit over the years so I am reluctant to see further moves". He acknowledges that a review of the Act including the position of people in de facto relationships is under way, but he is described as not a strong supporter of such a law change.

His colleague the Minister of Women's Affairs has a very different view and was quoted in the media this year saying that she was "backing a law change to bring de factos under the Matrimonial Property Act this year". Mrs Shipley recognises that "the way in which relationships are formed has changed and [that] we must try and reflect that in legislation".

I am therefore cautiously pleased to hear that the Minister gave an undertaking this morning to introduce, next year, legislation to address some of these issues.

In the 1991 census 161,856 New Zealanders identified themselves as being in de facto relationships. This was an increase of nearly 25,000 since 1986. This change alone might indicate a need to review the law relating to the division of property at the end of such relationships.

All sorts of changes in social patterns and technology have changed the ways families operate. New birth technologies have created the opportunity of parenthood for many who were unable to have children in the past and we should not assume that only conventionally married couples will take advantage of the advances. The rising divorce rate, the increasing number of single parent families, and the number of New Zealand families, particularly single parent families headed by women, estimated to be living in poverty might suggest that only some laws have kept up with social reality.

The Child Support Act 1991, for example, recognises that New Zealand families come in many shapes and sizes. It not only recognises de facto relationships and step parents' obligations, but I am advised that it has been held to recognise the obligation of a lesbian woman to maintain the biological child of her ex partner, the child having been born during the course of the women's relationship. It seems odd to me that one of the excuses for doing nothing is the difficulty in defining a de facto relationship.

As well as the Child Support Act 1991, the Social Security Act 1964, the Domestic Protection Act 1982, the Accident Rehabilitation and Compensation Insurance Act 1992, the Children, Young Persons, and Their Families Act 1989 and the Human Rights Act 1993 all manage to recognise the rights and obligations of people living in families of their choice to be supported and protected to the same extent whether they choose legal marriage or not.

I cannot therefore understand the Minister's refusal to take the necessary steps to protect the contribution to domestic property of those who have chosen, or more often have not chosen but have just drifted into, a de facto relationship.

It is sometimes suggested that while protection should be given, it should not be included in the Matrimonial Property Act. This Act, it is claimed, deals with one sort of legally defined relationship while the range of de facto relationships is so wide that a different Act which gives more discretion to the Courts to vary settlements according to contribution and according to the nature of the commitment of the parties is needed.

I do not believe that the range of de facto relationships is actually that much wider than the range of relationships found among married couples and I am supported in this by most marriage guidance counsellors to whom I have spoken.

The New South Wales De Facto Relationships Act 1984 is often held up as a desirable model. This Act however covers several areas already covered in New Zealand by legislation which addresses the needs of all families regardless of their legal status. I, again, cannot see why domestic property must be dealt with in a different way to maintenance of children or protection from violence just because the people involved are, or are not married.

If I must take a model other than the Matrimonial Property Act 1976 then I think I would prefer the Australian Capital Territory's Domestic Relationships Act 1994 which gives those "who have been in a domestic relationship for at least two years" who have "provided personal or financial commitment and support of a domestic nature to the material benefit of another person" possible entitlement "to adjustment of the ownership of property which belongs to the other person to reflect the value of their contribution".

This Act makes provision for gay and lesbian relationships as well as heterosexual de facto relationships and it goes further to recognise that other friends or relatives living together, for example an adult living with an elderly parent, may need protection as well. This is particularly important as the Government moves to tighter targeting of benefits and more asset testing of sick, elderly or disabled people.

The Matrimonial Property Act 1976 assumes that when two people enter a marriage they both do so with intent of giving all their energy, their resources and their hope to building a domestic arrangement that will support, encourage and protect them and any children they may have. This is true for most people in de facto relationships as well. Very few people go into a relationship with the view that it will end but if it does, both partners deserve fair recognition of their contribution, married or not.

The present law also assumes that both parties in a relationship have equal information and power. This is often not true. Too many people in this country have been treated unfairly by their ex-partners and by the law. Many have lost their own property as well as their fair share of joint property, jeopardising their chances to build new lives for themselves and their children.

I am pleased to hear, finally, today that the Government and the Minister of Justice will act to recognise the concerted voices of all those calling for change. I hope he will listen to his colleague the Minister of Women's Affairs in the development of the legislation and that we will see legislation soon.

If not, I shall introduce a Bill which attempts to address the issues in 1995.