DE FACTO PROPERTY RIGHTS: A PROPOSAL FOR REFORM

W. E. PARKER

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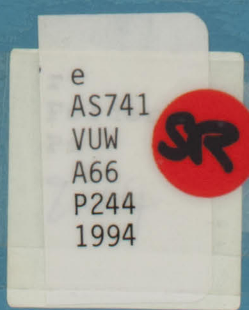

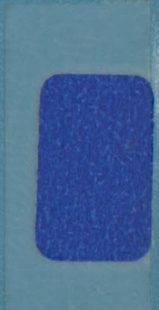

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DE FACTO PROPERTY RIGHTS: A PROPOSAL FOR REFORM

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ABSTRACT

This paper examines de facto property rights. It accepts that the current legal position provides inadequate remedy for those who are attempting to establish rights to property on the termination of a de facto relationship, and considers arguments for and against state regulation as a means of rectifying these inadequacies. In doing so it outlines the aims of such reform.

The paper then considers issues in need of examination before any process of legislative reform is undertaken. International and domestic human rights issues are examined to ensure that any legislative proposal conforms with these requirements and promotes human rights. De facto relationships are compared with marriage in order to consider the use of some existing matrimonial property provisions for de facto couples. The question of how to define a de facto relationship is also considered.

Part IV of the paper provides the background to the approach adopted in Part V which is to set out in detail (in the form of a draft Bill) a proposal for legislative reform.

The text of this paper (excluding contents pages, footnotes, bibliography and annexures) comprises approximately 17,500 words.

I INTRODUCTION

Property sharing has been described as "one of the most important issues at the end of a de facto relationship".[1] It is important not only for its financial implications but also for the fact that its resolution must come at a time when relationships are under strain. The increasing incidence of de facto relationships[2] will predictably be met with a corresponding rise in the breakdown of such relationships; a situation for which the law is presently ill-equipped to deal with.

As this paper will outline, the current lack of any statutory provision for property sharing in these situations creates inequities, both between the parties to the relationship themselves, and when outcomes are compared against those attained by couples whose marriages have broken down. The paper attempts to provide a remedy for this situation.

The phrase "de facto relationship" used throughout this paper has been chosen to describe the relationships referred to.[3] Although lacking in legal precision it is a phrase to which common usage has ascribed a definition that is generally understood and accepted and it has therefore been selected in preference to alternative choices. The term de facto relationship is commonly used to refer to heterosexual couples

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[1] W R Atkin *Living Together Without Marriage* (Butterworths, Wellington, 1991) 73.

[2] New Zealand census figures are: 1981 87,960 people; 1986 114,279 people, 1991 161,856 people. It is important to note that this is a self-defining status.

[3] "The phrase "de facto relationship" ... implies that there is a relationship existing as a matter of fact rather than as a matter of law. Thus "marriage" is a de jure relationship, existing by operation of law independently of how the parties in fact live." Above n 1, 4.

who cohabit without marrying each other, and it is these couples to whom the primary focus of this paper is directed.[4]

Both the language and the legal changes suggested need to be viewed in their wider, social context. New Zealand society and its legal system are grappling with a changing notion of what it means to be a family. The trend has been increasingly inclusive, and "family" now embraces groups that were once considered to be outside of its ambit.[5]

Another important contextual change is the ascendancy of the rights of children and the corresponding responsibilities of parents, and also of society as a whole, to protect and nurture young people. Strongly allied with this is the belief that the family is the optimal place to do this and that therefore it is a unit that should be supported, and supported in its various forms.[6]

It is in this context that the paper considers the position of de facto relationship property rights in the hope that detailed examination provides justification for the need to pass an Act of Parliament to rectify the current situation. The paper concludes with a draft Bill to give an indication of the form that such legislation might take.

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4 Arguments are made in this paper for the inclusion of same sex de facto relationships in any legislative scheme. Arguments are also made for limiting statutory cover to sexual or "marriage-like" relationships, although it is acknowledged that a wider coverage could be given, as under the Domestic Relationships Act 1994 (ACT).

5 For example, Pacific Island and Maori extended families, childless couples, de facto couples and one parent families.

6 International Covenant on Economic, Social and Cultural Rights, Article 10; below, Part III A 1 (a). It may be considered that some practical moves such as cuts to domestic purposes benefits run counter to the articulation of this theory.

II WHY REGULATE?

A THE NEED FOR LEGISLATIVE INTERVENTION

1 The Historical Position

An examination of the historical position gives a vital perspective on the "state institution" of marriage as a relatively recent phenomenon. In some ways the relationship between marriage and other forms of cohabitation has come full circle. The last two decades have seen a narrowing of the factors that distinguish one from the other. Legally, socially and morally the demarcation lines between the two are now less distinct, evidenced for example, by the abandonment of the status of illegitimacy,[7] community practices of openness[8] and by the fact that such terms as "living in sin" have all but fallen into disuse. Many de facto relationships are functionally indistinguishable from marriage.[9] The sole difference may be that a formal registration of the relationship has not taken place. Both kinds of relationships encompass an extensive range of affiliation.

This was also the position prior to Lord Hardwicke's Act for the Better Prevention of Clandestine Marriages 1753 (UK),[10] which marked the beginning of a formal role for the state in what was to become the "institution" of marriage. Before 1753 marriage involved an agreement between the parties to it that could have, but did not

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7 Status of Children Act 1969, s 3.

8 For example, practices of schools towards unmarried, cohabiting parents and practices of landlords towards prospective unmarried tenants.

9 This functional indistinguishability has meant that arguments promoting marriage as superior to, and different from de facto relationships have become increasingly difficult to sustain.

10 26 Geo. II c.33.

require, witnesses or religious recognition.[11] Cohabitation was a way of proving such "marriages by consent",[12] and relationships took on many forms, not all of which were permanent. Church involvement began in the thirteenth century and introduced the concept of marriage as a monogamous union for life. Religious ceremony marking the event of marriage was initially an upper-class privilege,[13] popular because of its ability to protect proprietary interests due to its legitimating effect on the blood line. A trade in illegal marriage by enterprising clergy developed.[14] The courts at the time called repeatedly for state intervention to remedy property rights issues, as they are doing now.[15] The 1753 Act was passed in response to these calls and it allowed for only one mode of legal marriage which included a formal, public ceremony incorporating religious elements grounded in moral beliefs.

Therefore the line between formal marriage and other relationships became very clearly marked by Lord Hardwicke's Act. Marriage represented a neat convergence of state and church interests and its absence lead to both social and legal disadvantages.[16] The state adopted the ecclesiastical view of marriage as a

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[11] E A Quin and C J O'Neill *Cohabitation in New Zealand: Legal and Social Aspects* (University of Waikato, Hamilton, 1984) 4; M D A Freeman and C M Lyon *Cohabitation Without Marriage: An Essay in Law and Social Policy* (Gower, Aldershot, 1983) 6.

[12] E A Quin & C J O'Neill, above n 11, 4, n 4.

[13] Above n 12, 4, n 5; M D A Freeman and C M Lyon refer to it as an "optional extra ... considered both expensive and otiose", above n 11, 6.

[14] M D A Freeman and C M Lyon, above n 11, 8.

[15] The difference being that historically these were succession issues based on questions of legitimacy of heirs, whereas today most property issues arise from the breakdown of relationships during the lifetime of the parties. For an example of a recent judicial call for a legislative response see *Gillies* v *Keogh* [1989] 2 NZLR 327, 347, per Richardson J.

[16] The starkest example being the status of children of informal unions: that of *filius nullius* or nobody's child. The law did not recognise such children, conferring neither rights nor protection on them.

monogamous, irrevocably life-long commitment[17] because this accorded with its interest in a tidy and sure system of ownership of property.

Before 1857[18] divorce was only possible by an ecclesiastical decree or through a private Act of Parliament. Since then divorce has continued to become more freely available to the point where we now have a no-fault system.[19] The law is no longer interested in the reasons for the breakdown of a marriage but rather in sorting out the consequences of that fact.[20]

Today the law does not ignore relationships merely because they lack a marriage licence, but it has been a reluctant participant in sorting out the property consequences arising from the breakdown of de facto relationships. Legal intervention in de facto relationships is very evident in areas such as maintenance and custody issues.[21] The increasing incidence of de facto relationships[22] means that problems left unresolved by the law will continue to grow.[23]

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[17] *Hyde* v *Hyde* (1866) LR 1 P&D 130.

[18] Matrimonial Causes Act 1857 (UK) introduced judicial divorce on the sole ground of adultery (once again the emphasis was on the protection of property rights); Quin & O'Neill note that only two or three divorces a year were granted by means of an Act of Parliament, above n 12, 10.

[19] Family Proceedings Act 1980, s 39. Some argue that the legal responses to this changing concept of marriage have been a reactive measure aimed at saving the institution of marriage which would have simply been by-passed if it had remained inflexible and legally binding for life, Quin & O'Neill, above n 12, 11.

[20] The Matrimonial Property Act 1976 and the Guardianship Act 1968 are examples of this approach.

[21] See for example, P Vaver "The Legal Effects of De Facto Relationships" [1976] NZ Recent Law 161; H Cull "De Facto Couples & Family Law - What Protection?" Conference Paper, New Zealand Suffrage Centennial Women's Law Conference, Wellington, 1993, 255, 260.

[22] Above n 2.

[23] In many ways the issues are clouded by the re-emergence of the blurring of the distinction between de facto and de jure marriage.

2 The Current New Zealand Position

As de facto relationships often perform familial functions, their interface with the law is primarily in the Family Courts. For example, the Family Proceedings Act 1980 makes provision for counselling to be available to married couples as well as to couples in relationships in the nature of marriage.[24] The Family Court does not have jurisdiction to hear property division disputes between couples whose relationships have broken down.[25] Currently such disputes are heard in the High Court and by the Court of Appeal on appeal. There is no statutory codification of the applicable principles relating to property division for de facto couples as there is under the Matrimonial Property Act 1976 for married and formerly married couples. De facto relationship property disputes fall to the general law to be resolved. Most often these are dealt with under common law although statutory provisions are not without relevance.[26]

The law of trusts is the area of law to which many counsel have turned. The four main types of trust: express, implied, constructive and resulting, have all been employed to ascertain whether a partner to a de facto relationship without legal title to property can be granted a beneficial interest in that property. Express trusts, where the parties have declared their respective beneficial interests in writing are less problematic and less likely to be challenged in court. The existence of an implied trust is determined by the court, and it is necessary for the court to find a common intention or agreement between the parties. As intention must be inferred or implied, evidential problems arise. Constructive trusts are "constructed" in the absence of common intention. Resulting trusts arise where a beneficial interest is retained even though an asset has been disposed of.

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[24] Family Proceedings Act 1980, s 8; s 7A(1)(b), includes these couples in the definition of marriage.

[25] This anomaly is further highlighted by the fact that the Law Reform (Testamentary Promises) Act 1949, s 5(1) (as amended by Law Reform (Testamentary Promises) Amendment Act 1991, s 3) conferred jurisdiction to hear testamentary promises claims upon the Family Court.

[26] Including Contractual Remedies Act 1979 and Domestic Actions Act 1975; W R Atkin "De Factos Engaging Our Attention" [1988] NZLJ 12.

The equitable action of proprietary estoppel has also been utilised. If an expectation of an interest in property is raised and relied upon and causes detriment to the person expecting the interest, then an action may be sustainable.

Many of the principles of equity and common law that are applied to this area were not designed for the purpose to which they are now being put. While equitable remedies found in the law of trusts and restitution are malleable, they have proved inadequate for the task of reallocating property on the breakdown of a de facto relationship in the sense that even where an equitable interest is established it may be very small.[27] The kind of remedy available under trust law is also limited, especially when compared to those available under the Matrimonial Property Act 1976. Trust law further suffers from the limitation of applying on an asset by asset basis.[28] This approach was a reason for criticism when applied by the Matrimonial Property Act 1963, and indeed was a motivating factor for the introduction of the 1976 Act.[29]

Trust law places a heavy probative burden on the claimant.[30] Evidence supporting the creation of a legal interest is required because property rights do not automatically spring from the relationship itself but only arise where they can be justified under the applicable equitable principles.

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27 This is further borne out by the results of cases; a perusal by the author of 28 cases decided over the last ten years (three of which involved joint ownership and therefore were not considered on this point) revealed that a legal interest in the title to the real property of the relationship was awarded at an average rate of 21% to the non property owning partner. The average length of the relationship was 7.5 years.

28 D Harvey "The Property Rights of De Facto Partners - Some Proposals for Reform" [1989] NZLJ 167, 168.

29 Harvey discusses this point and notes the criticism levelled at *E* v *E* [1971] NZLR 859 and the subsequent treatment of the issue on appeal by the Privy Council in *Haldane* v *Haldane* [1976] 2 NZLR 715; above n 28, 174. See also J B Robertson "Matrimonial Property and Haldane's Case" [1977] NZLJ 19.

30 Above n 28, 169.

Application of the law in this fashion is cumbersome and leads to unpredictability as well as to uncertainty of outcome. While it is not the place of this paper to outline in detail the shortcomings of the common law, it is noted that these factors make property dispute resolution a legal minefield. The need to litigate greatly adds to the cost of such dispute resolution and in doing so diminishes the value of property common to the relationship.

Added to this uncertainty are the myths that surround de facto property rights. Although of uncertain origin their popularity is such that the commonly held but incorrect view that a presumption of equal sharing exists after two years of cohabitation is virtually an urban myth. That this has lead to social, political and legal problems is evidenced by the fact that in June of this year the Legal Services Board launched a month long education programme to help dispel these myths.[31]

The advice generally given to de facto parties wishing to secure their rights in property is to ensure that their name is on the title to any real property and to enter into a cohabitation contract with the other partner.[32] However, it is no small step to move from a position of awareness of one's legal position to one of initiating action to alter that position. The creation of cohabitation contracts also presumes an ability for forethought on the part of the parties as well as a prior realisation that the parties' commitment to the relationship is a long term one. The prerequisites of articulation and financial outlay mean that such agreements are largely the preserve of the middle and upper classes.

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[31] Confusion may have arisen from the fact that the Matrimonial Property Bill, when introduced into Parliament by the then Minister of Justice, included de facto relationships of two years standing or longer within the statutory cover. The fact that de facto couples are treated as if they were married in so many areas of the law may add to the lingering confusion over the legal implications of property division at the end of a de facto relationship.

[32] Although called a contract this is most commonly entered into in the form of a deed which overcomes problems encountered in using contract law; above n 1, 152.

3 The Interests of the State

An examination of the state's interest in the provision of a statute dealing with de facto property rights is by no means incidental to this inquiry. Historically both legal and functional marriages were considered to be in the realm of the private sphere of human activity and thus outside the area in which the state could legitimately intervene. Indeed the state's interest in marriage is relatively recent given a historical perspective. State intervention in the 1990s into what is traditionally known as the private sphere has reached unsurpassed heights. To take the example of family life generally, there are numerous statutes dealing with protection of children, the breakdown of the relationship between the partners, responsibilities relating to child support, schooling and housing.[33] Therefore, the use of a non-interventionist approach and its corollary of legislative inaction in de facto property rights can no longer be justified.

The state's interest in providing for property resolution of de facto relationships falls into several areas. The most persuasive of these from a political perspective are financial considerations. A partner who has spent a number of years in a de facto relationship caring for the children of that relationship may have both a decreased earning capacity and the future financial commitment of caring for children. If that person also has a limited or complete lack of equity in the property of that relationship he or she will be placed at a financial disadvantage. This in turn may result in financial dependence on the state. The state also requires that people living together as a family unit take financial responsibility for any children of that unit. Therefore, a domestic purposes benefit will be suspended once the recipient assumes cohabitation, thus lessening dependence on the state.[34]

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[33] For example, Family Protection Act 1980, Guardianship Act 1968, Domestic Protection Act 1982, Child Support Act 1991 and Children, Young Persons and Their Families Act 1989.

[34] Social Security Act 1964, s 27B (as amended by Social Security Amendment Act 1987 s 11(2) and Social Security Amendment Act (No 2) 1991, s 4(1)).

The need to litigate also reallocates the financial resources of separating couples in a way that does not provide for their needs in that it removes this money from their possession. The state therefore has an interest in the avoidance of litigation.

The state's financial interest extends to the provision of dispute resolution procedures. These should not place an onerous burden on either the parties to the dispute, or on state funds. A simple, cost effective system would meet these needs in a way that the present need to litigate in the High Court does not.

The state also has an interest in stability. Marriages and marriage-like relationships are seen to promote this stability as long as they remain intact. Although property division issues only arise where a relationship has broken down, and therefore may appear to have little to do with stability, the current uncertainties and inequities exacerbate the settlement process and do not promote the goal of speedy resolution. It may even be argued that the rapid and simple resolution of property disputes assists the parties to enter into new relationships and that if property issues from prior relationships are settled this will enhance the chances of any subsequent relationship becoming a long term one.

The Family Proceedings Act 1980 promotes the clean break principle with regard to inter-spousal maintenance.[35] The concept is that it is in the best interests of all parties concerned to resolve with finality any remaining property issues between them, and that spouses do not have a continuing obligation to support each other.[36] The current state of the law means that property issues between de facto partners often remain unresolved, or are resolved at length either through protracted litigation or inter-party negotiation of uncertain result.[37] A statutory provision that promoted

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[35] Section 64(2).

[36] This approach has been adopted in Australian statutes dealing with de facto property rights; Domestic Relationships Act 1994 (ACT), s 14; De Facto Relationships Act 1984 (NSW), s 19.

[37] These methods mean that a party with greater power within the relationship, or with a disproportionately greater access to funds, can influence the outcome of the dispute.

the concept of the clean break principle would extend what is seen as desirable in dissolved marriages to a wider group.[38]

Although there may be some opposition to the complete equation of de facto relationships with marriages,[39] a closer alliance in terms of the outcomes of property disputes would be desirable. The Matrimonial Property Act 1976 has gone some way to improving the regime that preceded it, and these benefits could be extended to de facto partners.

4 Legislative Reform

(a) Reasons For and Against

Inequities of process and of result have given rise to numerous calls for a legislative response to remedy the situation.[40] In 1994 these calls were taken up by Judith Tizard MP, Labour Associate Justice Spokesperson, who proposed the introduction of a private members Bill dealing with de facto property rights, considering contributions to the relationship including non-financial contributions, succession issues after the death of a de facto partner and also protection for gay and lesbian couples.[41]

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[38] V Ullrich "Matrimonial Property - Is There Equality Under the Matrimonial Property Act?" Conference Paper, The Family Court Ten Years On, Auckland, 1991) 97 criticises the application of the clean break principle in relationships where children are involved.

[39] Above n 28, 169; above n 26, 12.

[40] Among them are: *Report of the Working Party on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988) 85; above n 1, 189; above n 28, 167; above n 21, 261. The position expressed in this paper is that such calls should be heeded. Although outside the scope of the paper, it is acknowledged that other areas of law pertaining to de facto relationships are in need of reform, for example succession issues.

[41] "No protection for de facto couples - MP "*Otago Daily Times*, Dunedin, New Zealand, 30 May 1994, 24; "Bill on de facto marriage rights" *Bay of Plenty Times*, Tauranga, New Zealand, 30 April 1994, 3.

Support for such a move is not universal. Arguments against recognising de facto property rights in this form fall into two schools of thought. Libertarians promote individual autonomy and argue that the provision of a scheme similar to that given for those leaving marriages restricts the freedom of choice for de facto partners to consciously choose not to enter into this kind of arrangement. This argument presupposes that a conscious choice not to marry is made and also that the result of the legislative imposition will be the same as, or similar to, marriage. It also assumes that the parties have chosen to live together outside of marriage in order to avoid the incidents of marriage.

Arguments of autonomy can only be taken so far; when taken to their logical extreme they promote individualism to the point of undermining a sense of community.[42] Individualism is also a Pakeha or Western concept and therefore it may be ethnocentric to promote it as a goal in a bicultural society. Autonomy presumes that individuals have equal amounts of power, and appears to conflict with the perceived need to protect the weaker partner of the relationship. There must also be consideration of the fact that both within marriage and within de facto relationships there is a considerable degree of difference, individuality and ability to create the relationship to suit the people in it.[43] Further, in many ways both autonomy and freedom of choice have been encroached upon by the previously mentioned move of the law into the so-called private sphere.[44]

The second major group opposing legislative moves in this area consists of those who are opposed to relationships that are in the nature of marriage but are without legal or religious sanction. Opposition here comes from a moral standpoint. Shifts in moral opinion are difficult to establish quantitatively, but the rise in numbers of unmarried cohabitees has been hailed as an indicator that there has been an attitudinal

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[42] Above n 1, 195.

[43] The law permits parties to a marriage to formalise difference from the norm by provisions such as Matrimonial Property Act 1976, s 21. The same kind of freedom could be extended to legally regulated de facto relationships.

[44] Above Part II A 3.

shift towards such relationships.[45] It is submitted that a statute that makes provision for property division on the breakdown of a relationship is concerned with that breakdown rather than with the reasons, whether perceived as moral or immoral, for entering into that relationship. In other words, it concentrates on the practical effects of the dissolution of the relationship rather than questioning the reason for that breakdown or the reasons why marriage has not been entered into. The state may be concerned with preventing breakdown, but, it is submitted, it also needs to be concerned with providing for those relationships where breakdown is not preventable, or, at the very least, where it is an unassailable fact. There is also some debate over the extent to which moral values should be reflected in the law, and over how the law should accommodate conflicting values.[46] The moral viewpoint also needs to take into account the fact that a number of people enter into de facto relationships because they are unable to marry. This includes those who are still married to a previous partner. Therefore it is the very inability to obtain legal sanction for the relationship that gives rise to some de facto living arrangements.

(b) Aims of Legislative Reform

The primary aim of legislative reform in this area would be a remedial one. It would seek to redress the difficulties of non property owning partners establishing any rights to property once a relationship has broken down.[47] It would aim to produce a fair outcome. This remedy is necessary not only because of the legislative lacuna but also because in the absence of statutory direction, the common law has failed to satisfactorily resolve the situation.[48] The aim of legislative reform would therefore

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[45] Above n 1, 2.

[46] See, for example, H I Hart *Law, Liberty, and Morality* (Oxford University Press, London, 1963); P Devlin *The Enforcement of Morals* (Oxford University Press, London, 1965).

[47] Some current difficulties exist for partners who have legal title, but who seek an increased share. Trust law has the ability to alter the interests of legal title holders as well as to create legal interests.

[48] The extent of the mischief is evident from the outcomes of the trust law cases in this area; above n 27.

be to alleviate the deficiencies found in the common law. Legislation would do this in two main ways. First, by providing the kind of clarity that would remove the need to litigate in the majority of cases, and then by providing a procedure in those cases where litigation was still necessary. Secondly, it would aim to promote fairness in outcome however that may be defined. It would also create remedies that would go beyond what is currently available. This lack of remedy, which is a major deficiency of the common law, could be addressed in a number of ways, primarily through the use of court orders vesting property or adjusting the parties' entitlement to it.

One of the currently perceived areas of unfairness is the way that the law operates to the detriment of women.[49] More often than not it is the woman's name that is missing from the title to the home of the family[50] and therefore it is the female partner to the relationship who is most often forced into pursuing her property rights by initiating court action.[51] Women rate disproportionately highly as custodial parents[52] and this places added financial burdens on them. This is especially so in a post-relationship sense where children need to be housed. A lack of access to property or its financial equivalent means that some women are forced to remain in relationships that are less than satisfactory. Where women are caregivers, their contributions to the relationship are primarily of a non-financial nature and are not as easy to quantify as financial contributions. With regard to de facto relationships

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[49] Support for this position is not uniform. Mr Gazley, lawyer for the appellant in *Lankow* v *Rose* (CA 176/93, judgment reserved) "...said it was a self-serving feminist assumption that at the end of a de facto relationship there should be a division of home and chattels between former partners"; "De facto should not have got half shares - counsel" *The Dominion,* Wellington, New Zealand, 14 September 1994, 7.

[50] Of 28 cases studied by the author, women had their name on the title in ten instances (37%). It is acknowledged that a number of cases involve women who come to the de facto relationship with a prior matrimonial property settlement.

[51] Of 28 cases decided since 1984, 19, or 68% were initiated by the female partner to the relationship.

[52] In 1990 74% of children who were the subject of custody orders under the Family Proceedings Act 1980 had those orders made giving sole custody to their mothers; *All About Women in New Zealand* (Statistics New Zealand, Wellington, 1993), 41.

there is currently a lack of any statutory or common law presumption of equal weighting of financial and non-financial contributions.[53]

Many of the issues that impact upon women also impact upon their children. Promoting the best interests of children, which a growing body of family law is attempting to do, means that there is a need to further the interests of the carers of children.

The provision of certainty in the law would be a further aim of legislation. In order to achieve this aim the statute would need to provide a set of guidelines which, although remaining flexible, would give a clear indication of the direction to be followed.[54] It would also need to be accompanied by an extensive amount of publicity along the lines of that given to the Matrimonial Property Act 1976 during its introductory period.[55] A major spin off of this provision of certainty would be the removal of the need to litigate in many cases. Parties would have little interest in challenging a property settlement if it was in accordance with the provisions of the statute. If it was clear that equality between partners was the aim of the law then matters would be settled with this in mind.

5 Conclusions

The need for legislative intervention is based upon existing inadequacies in the law. Arguments for the continued exclusion of de facto couples from access to property rights legislation have been shown to be of less force than arguments that demonstrate the need to support "functional families". These arguments are further explored in Part III of the paper, which examines de facto relationships in the light

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[53] Matrimonial Property Act 1976, s 18(2) creates such a presumption for marriage partnerships.

[54] It is arguable that although this is the intended approach of the Matrimonial Property Act 1976, that Act still vests a large amount of discretion with the judiciary.

[55] A H Angelo and W R Atkin "The Matrimonial Property Bill 1975 - Some Further Thoughts" [1976] NZLJ 424.

of discriminatory issues as well as looking at comparisons made with marriage and at the issue of how to define a de facto relationship.

III LEGISLATION: PRELIMINARY ISSUES

A ISSUES OF DISCRIMINATION

Any discussion of a legislative proposal regarding property rights for parties to de facto relationships that have broken down must necessarily include an examination of the proposal in the light of New Zealand's international obligations and domestic statutory provisions. This is to ensure that the proposal does not conflict with international or national requirements.[56] It is also useful to consider such legislation from the perspective of how it might advance human rights.

There are several ways in which these considerations may have an impact. Concepts of marriage, marital status and heterosexism are discussed in the light of international and domestic law, and consideration is given to both the use of international instruments to argue for the introduction of de facto property rights legislation as a way of fulfilling New Zealand's international obligations, and to whether the introduction of such legislation would contravene any of these obligations.

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[56] These aspects will be checked during the parliamentary process; "Ministers intending to propose legislation must submit papers to the Cabinet Legislation Committee, first, when seeking approval for the inclusions of the Bill into the legislative programme and, second, when seeking approval to the introduction of the Bill to Parliament. Ministers will also have obtained approval of the policy underlying the proposed legislative change from the appropriate Cabinet Committee and Cabinet *before* approval is sought through the Cabinet Legislation Committee for a Bill to be introduced...[e]ach paper must, among other things...confirm that the Bill complies with the Treaty of Waitangi and the Bill of Rights Act and international legalisation and standards"; *Legislative Change: Guidelines on Process and Content* (Legislation Advisory Committee, Report No. 6, Revised Edition, Department of Justice, Wellington, 1991) 3. Private members Bills are not subject to this process, but once introduced into Parliament the Legislation Advisory Committee can make submissions either at the request of a Cabinet Committee or at its own initiative.

1 International Conventions

International instruments pertinent to this enquiry are located in five different documents. The Universal Declaration of Human Rights is the document from which all of the others stem. The drafting of the Declaration was one of the first tasks of the fledgling United Nations. It sets out universal rights and is a "common standard of achievement" as opposed to a "legally binding set of rules".[57] These ideals were later transformed into more concrete treaty provisions capable of imposing legal obligations. This process saw the ratification by the United Nations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which were adopted by the General Assembly in 1966 but not ratified by the United Nations until 1976.[58] New Zealand ratified these two covenants in December 1978.[59]

All three of these United Nations documents prohibit discrimination on the grounds of [60]

> "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

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[57] *United Nations International Instruments on Human Rights* (Human Rights Commission, Wellington, 1989) 3.

[58] At the time ratification required the approval of 35 member states.

[59] The covenants were ratified subject to some reservations. They pertain to, inter alia, juvenile incarceration, the pre-existence of the Race Relations Act 1971 as justification for refraining from the introduction of further legislation, exceptions for trade unions, and the right to delay the introduction of paid maternity leave until economic circumstances improve; above n 57, 3.

[60] Universal Declaration of Human Rights, Article 2; International Covenant on Civil and Political Rights, Article 2(1); International Covenant on Economic, Social and Cultural Rights, Article 2(2).

The position codified by the Status of Children Act 1969 is reaffirmed by these provisions, as it constitutes a breach of the covenants to distinguish between children born in or out of wedlock.[61]

(a) The Right to Marry and to Found a Family

Although the prohibited grounds of discrimination may have formed a person's beliefs about marriage, for example a religious or political belief, the Universal Declaration of Human Rights does not include marriage or marital status as a specifically prohibited ground of discrimination.[62] It does, however, state that everyone has the right to marry and to found a family.[63]

Establishing a right to marry necessitates a working definition of marriage. Globally the term involves vastly differing unions with marked differences in the religious and social bases for them.[64] Although family is a culture-specific term, the United Nations appears to use the modern Western meaning of the word which focuses primarily on the nuclear family.[65] Although the United Nations documents are drafted in broad and all-encompassing language, and should be read inclusively wherever possible, it is still obvious that they have a first world orientation. For

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[61] This is stated with more precision in the Universal Declaration of Human Rights, Article 25, "All children, whether born in or out of wedlock, shall enjoy the same social protection."

[62] Arguably marital status falls within "or other status"; see also the International Covenant on Economic, Social and Cultural Rights, Article 10; below, in this section of the paper, (Part III A 1 (a)).

[63] Universal Declaration of Human Rights, Article 16.

[64] M J Eriksson *The Right to Marry and to Found a Family* (Ivstus Forlag, Uppsala, 1990) 25.

[65] This type of approach has been labelled "cultural chauvinism"; F Olsen "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child" in P Alston, S Parker and J Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 216.

example, repeated references to spouse and not spouses appears to indicate an assumption of monogamous marriage.

In New Zealand, relationships in the nature of marriage attract legal and financial responsibilities that in many instances are similar to, or the same as, those that exist for married people.[66] However these relationships are clearly not marriages. A statute that provided for the settlement of de facto property rights disputes would not interfere with the right to marry found in the Universal Declaration of Human Rights, assuming that the option to marry was one that was still available. The statute would provide remedies for de facto relationships at their termination, thus providing new rights, rather than using de facto relationships to limit marital rights or the option of marriage.

There is a divergence of opinion over whether the right to found a family extends beyond the right to marry. In the debates that led to the signing of the Universal Declaration of Human Rights in 1948 it appears that the assumption was made that only those who were married had the right to found a family.[67] The United Nations debates did not include a discussion of whether there were any procreative rights that might possibly extend beyond those found within marriage. But if family includes unions other than marriages[68] then the right is circumscribed only by the need for the spouses to be of full age.[69]

It seems at least arguable that the right to found a family exists independently of the right to marry, if not at the time the Declaration was drafted then at least in the light

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[66] For example personal tax rates and rebates for child care payments; child support provisions.

[67] Above n 64, 131.

[68] Some argue for this interpretation; above n 64, 131.

[69] United Nations Declaration of Human Rights, Article 16; in the International Covenant on Civil and Political Rights this is described as marriageable age.

of social trends since the 1940s, and also considering the position of children under New Zealand law.[70]

The enactment of legislation specific to de facto couples in "functional marriages" would bolster this right. Its extension to de facto relationships on an "economic unit" basis would not infringe the right in any way either. It is difficult to see how an Act dealing with the resolution of property entitlement at the end of a de facto relationship can interfere with right to found a family, unless by inadequately providing for the future of a party to that relationship, it prevents that person from later having children.[71]

However the international documents go further than protecting marriage. They uphold the right of the family, referred to as the "natural and fundamental group" of society "to the widest possible protection" particularly "while it is responsible for the care and education of dependent children".[72] The definition of family includes all de facto partnerships where children are cared for, whether or not those children are the issue of the de facto union.[73] This, therefore, bolsters the argument for a wider interpretation of marriage and illustrates that denying de facto partnerships similar opportunities to those found in post-marital property rights is discriminatory.

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[70] Although presumptions as to paternity differ, the law relating to children does not generally directly distinguish between children born in or out of wedlock; above n 7.

[71] This in turn raises the question of whether financial hardship can circumscribe the right to found a family. If so, then prohibitively high costs for access to assisted reproductive technology may encroach upon the right.

[72] International Covenant on Economic, Social and Cultural Rights, Article 10.

[73] International Covenant on Economic, Social and Cultural Rights, Article 10(1).

(b) The Rights of Children

Universal entitlement regardless of birth is enshrined in the Universal Declaration of Human Rights.[74] A United Nations Declaration on the Rights of the Child was adopted by the General Assembly in November 1959, adopted as the International Convention on the Rights of the Child in 1989 and ratified by New Zealand in 1993.

Children are central to the United Nations' concept of family, and the International Convention on the Rights of the Child promotes the rights and the place of the child within this unit. In doing so it also recognises that the family unit must be supported in order to be able to fulfil its child rearing role.

Again it is arguable that the rights of children would be better protected regardless of the marital status of their parents if de facto property rights legislation of the kind proposed in Part V of this paper was enacted. A child-centred approach places the rights of children ahead of the marital status of their parents. The Family Court system introduced in New Zealand in 1980 adopts this approach.[75] The circumvention of litigation by parents is in the interests of their children, especially if it keeps the common property somewhere within the family unit as opposed to moving it to the pockets of their respective counsel. If litigation is not pursued then a more equitable distribution in favour of the non property owning parent will benefit any children who live with that parent. Therefore the rights of children could be enhanced by such legislation.[76]

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[74] Article 2.

[75] Access to the Family Court is not limited to married couples; Family Proceedings Act 1980, s 7A(1)(b) includes in the definition of marriage "a relationship in which the parties are or have been living together as husband and wife, although not legally married to each other". This in turn allows access to services such as counselling and custody dispute resolution procedures to all "marriage-like" relationships, including those with children.

[76] There is evidence to suggest that post-divorce poverty has an adverse effect on custodial parents and the children who live with them; J M and C J Krauskopf "Comparable Sharing in Practice: A Pilot Study of Results under the Matrimonial Property Act 1976" (1988) 18 VUWLR 21, 34.

The International Covenant on Civil and Political Rights states in Article 23(4) that

> "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

Children of dissolved[77] marriages are therefore to be given necessary protection. This conceivably includes protection of the long term financial status of the new family unit, including situations where this new unit involves a de facto relationship. Arguably, the reference in Article 23(4) relates solely to marriage, because of its clear use of wording that only applies to marriage.[78]

The current legislative situation means that children residing with a non property owning parent who is not married to their other parent are financially disadvantaged when compared to their peers who live with a divorced parent. Protection of these children is inadequate if the custodial parent has no rights to the property of the relationship. Establishing these rights is far more difficult for those parents than for their divorced counterparts, who may be able to rely on the presumption of equal sharing of the family home.[79] This also discriminates against children by way of birth.[80]

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[77] And by extension under New Zealand law, "dissolving" marriages; Family Proceedings Act 1980, s 8, imposes a duty on legal advisers to promote reconciliation and conciliation. The interests of children must also be considered by the court when dividing matrimonial property after dissolution; Matrimonial Property Act 1976, s 26.

[78] Dissolution is a legal event that is descriptive only of the formal end to a marriage.

[79] Matrimonial Property Act 1976, s 11.

[80] Above n 70.

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(c) The Rights of Women

In the majority of instances it is the female partner to a de facto relationship who does not have legal title to the real property of the relationship.[81] A major motivation for the implementation of legislation dealing with de facto property rights is to rectify the way in which the law of trusts has operated to the detriment of women.[82] Motherhood is upheld and given special protection under our international obligations[83] and yet this protection does not extend to the property rights of mothers whose de facto relationships end. It is difficult to argue that the current law, either as it affects mothers or nulliparous women, creates a "distinction, exclusion or restriction made on the basis of sex".[84] Although its effect is discriminatory, the basis for the discrimination is marital status and not gender. However the removal of such discriminatory effects would further protect the rights of all women, and indeed of all parents, particularly if it accounted for non-financial contributions to the relationship.

Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women[85] goes further and requires ratifying states

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[81] A perusal of 28 trust law cases decided since 1984 revealed that in seven cases the title was in the woman's name and in three cases title was held jointly by both parties, giving a total of 37%, meaning that in 63% of cases the woman did not have legal title.

[82] "No Protection for De Facto Couples - MP", *Otago Daily Times*, above n 41. On the basis of decided cases, a non-property owning spouse can expect to obtain between 15% - 40% of the property; above n 21, 259. See also the statistics noted in Part II A 4 (b).

[83] Universal Declaration of Human Rights, Article 25(2); International Convention on the Elimination of All Forms of Discrimination Against Women, Article 12(2); International Convention on the Rights of the Child, Article 24(2)(d).

[84] International Convention on the Elimination of All Forms of Discrimination Against Women, Article 1.

[85] Ratified by New Zealand in 1984.

> "to ensure, on a basis of equality of men and women...(h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and *disposition* of property..." (Emphasis added.)

While the current law does not discriminate on a gender basis with regard to entitlement to any of the above property rights, its effect is to discriminate against women who do not make legal provision for property shared by virtue of their de facto relationship when compared with their married counterparts. Again the real inequity is between married and unmarried women.[86]

2 Domestic Human Rights Legislation

(a) The Human Rights Act 1993.

The Human Rights Commission Act was passed in 1977 prior to the ratification by New Zealand of the International Covenant of Economic, Social and Political Rights and the International Covenant on Civil and Political Rights in 1978. It has since been succeeded by the Human Rights Act 1993.[87]

Although the focus of the Human Rights Act 1993 is on human rights rather than on property rights, and although remedies for discrimination apply to specific areas[88] there remain several ways that the Act can be of influence.

The prohibited grounds of discrimination, as extended by the 1993 Act, are an indication that the existing inequity between married and non-married people in regard to post-relationship property settlements is less tolerable. This is because the prohibited grounds indicate the types of groups and kinds of bases on which it is

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[86] Although in practice this operates unfavourably in respect of women, the basis is a lack of marital status, and this is equally applicable to men who are not legally entitled to real property, or other property of the de facto unit, or who have made non-financial contributions to the relationship.

[87] Which came into effect on 1 February 1994.

[88] Employment, housing and accommodation, education, the provision of goods and services and access to public places; Human Rights Act 1993, Part II.

unacceptable to discriminate. Given these extended grounds, this is also true in regard to relationships in the nature of marriage as well as to attitudes towards same sex relationships. The Human Rights Act 1993 also advances arguments that those in de facto relationships should be treated uniformly by all areas of the law.

(i) Section 5 Powers

Also of importance are the powers of the Commissioner under the Human Rights Act 1993, section 5. The powers set out in section 5 are wide-ranging and have the potential to effect change in many ways. The Human Rights Commission can report to the Prime Minister on the implications of any proposed legislation.[89] The Commission can also report to the Prime Minister on the desirability of legislative action.[90]

The ability of these powers to be used in the context of de facto property rights is further enhanced by the Human Rights Act 1993, section 75(2)(e), which gives the Complaints Division of the Human Rights Commission the power to investigate of its own motion

> "any act, omission, practice, requirement, or condition which is not apparently in breach of any of the provisions of Part II of this Act but which has the effect of giving different treatment to any group of persons where that group consists of persons against whom discrimination is unlawful by virtue of Part II of this Act".

Therefore the Human Rights Commission is empowered to act should it be of the view that the current legal situation with regard to remedies for de facto property

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89 Human Rights Act 1993, s 5(h)(iii); this provision also existed in the Human Rights Commission Act 1977, s 6. The 1977 functions are repeated (Human Rights Act 1993, s 5(a),(b),(c) and (e)), but other functions have been added.

90 Human Rights Act 1993, s 5(h)(i).

issues has the effect of giving different treatment to people "living in the nature of marriage".[91]

Section 5 also enables the Commission to prepare guidelines for the avoidance of discriminatory acts or practices, and section 5(f) allows it to consult with other bodies (such as the United Nations) that are concerned with the protection of human rights.

The Commission has until 31 December 1998 to examine all Acts and regulations in force in New Zealand as well as all policies and administrative practices of the New Zealand government and determine whether these conflict with Part II of the Human Rights Act 1993 or infringe upon its spirit and intention.[92]

(ii) Prohibited Grounds of Discrimination

The Human Rights Act 1993 makes several important changes to the prohibited grounds of discrimination. Under the 1977 Act the relevant prohibited ground referred solely to marital status. Marital status was not further defined and this created problems over whether de facto relationships were included within the definition.[93]

The 1993 Act removed this doubt. Section 21(1)(a)(iv) includes "living in a relationship in the nature of marriage" within the definition of marital status. Presumably relationships that involve de facto couples that do not fall within the definition of a relationship "in the nature of marriage" can still be discriminated

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[91] A group for which discrimination on areas covered by Part II of the Human Rights Act 1993 is unlawful; Human Rights Act 1993, s 21(1)(b)(vi). See also section 5(g) which empowers the Commission to inquire generally into any matter.

[92] Human Rights Act 1993, s 5(1)(i) and (j).

[93] Several interpretations of the definition in regard to de facto relationships were possible. See above n 1, 186. The Human Rights Commission issued a policy statement in 1984 to clarify that marital status did include de facto relationships.

against.[94] It is therefore important to be able to define a relationship "in the nature of marriage". There exists a considerable body of common law on this subject, mostly in the area of social security law.

Section 21(1)(m) Human Rights Act 1993 prohibits discrimination on the grounds of sexual orientation.[95] It would therefore contravene the Human Rights Act to define functionally "marriage-like" relationships in a way that discriminated against same sex relationships. Many same sex relationships share marital characteristics including shared property, care of children, sexual relations and long term commitment. Further, the definition of marital status in section 21(1)(iv) makes no reference to the need for the parties to be a man and a woman. Clearly then, same sex relationships can be relationships in the nature of marriage. If a relationship in the nature of marriage can be entered into only by parties legally capable of marrying then not only would same sex relationships be excluded from the definition, but so would those relationships where marriage is not possible because, for example, one of the parties is still legally married to their former partner.

Family status is a prohibited ground of discrimination.[96] This is defined as

> "(i)Having the responsibility for part-time care or full-time care of children or other dependents: or
>
> (ii)Having no responsibility for part-time care or full-time care of children or other dependents".

If elements of this definition of family status are imported into a piece of legislation as proposed then it would also not be desirable from the Commissioner's point of view to distinguish between relationships on the basis of the presence of children. This may sit uneasily alongside functional arguments that centre on the family as a place of child rearing. However reconciliation is possible if emphasis is placed on

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[94] Subject to arguments regarding family status and sexual orientation; below, later in this section, (Part III A 2(a)(ii)).

[95] Defined as "heterosexual, homosexual, lesbian or bisexual orientation".

[96] Human Rights Act 1993, s 21(1)(l)(iii).

supporting these families in a way that does not in any way disadvantage childless families.

(b) The New Zealand Bill of Rights Act 1990

The prohibition against discrimination on the grounds set out in the Human Rights Act 1993 is incorporated into the New Zealand Bill of Rights Act 1990,[97] further strengthening the impact of these prohibited grounds of discrimination in New Zealand. Section 6 of the New Zealand Bill of Rights Act (which effectively creates a further presumption to be applied when interpreting statutes), requires an interpretation of legislation that is consistent with the New Zealand Bill of Rights Act wherever possible. This would assist in an interpretation of legislation pertaining to de facto property rights that accords with New Zealand's anti-discrimination legislation.[98]

Of importance is the effect of New Zealand Bill of Rights Act 1990, section 5, which states;

> "[s]ubject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Use of the Human Rights Act grounds of prohibited discrimination via the New Zealand Bill of Rights Act would permit this limitation to be employed, whereas this would not be the case under the Human Rights Act alone as no such limitation is contained in the latter statute.

Distinctions based on marital status may therefore be justified if the limitation set out in the New Zealand Bill of Rights Act 1990, section 5, is justified. The New

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[97] New Zealand Bill of Rights Act 1990, s 19, as amended by the Human Rights Act 1993.

[98] This might become important if such legislation came under attack from those in moral, philosophical or political opposition.

Zealand Bill of Rights Act, section 17, also asserts a right to freedom of association. This promotes the right of a couple to live together without marrying and could also be used to justify the retention of distinctions between marriages and de facto relationships.[99]

(c) The Relationship Between International and Domestic Legislation

The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 are interlinked as previously discussed. Both statutes also have links with United Nations documents. The long title of the former Act affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, while the long title of the latter statute states the aim of better protecting human rights in New Zealand in accordance with United Nations Covenants or Conventions on Human Rights. These links mean that the arguments made relating to the interpretation of United Nations Conventions have direct relevance to interpretations of domestic anti-discrimination legislation.

3 Conclusions

Legislation that introduced a scheme for the property division of de facto relationships would not transgress any of New Zealand's international obligations. Although none of the international instruments ratified by New Zealand prohibit discrimination on the basis of marital status, they do set out rights pertaining to motherhood and childhood as well as rights to found a family and to marry. The proposed legislation would add to some of these rights without derogating from any right to marry.

Domestically, the Human Rights Act 1993, supported by the New Zealand Bill of Rights Act 1990, while currently having no direct application to intra-relationship property rights, add impact to arguments that the current inequity between those who are covered by the Matrimonial Property Act 1976 and those who are not needs

[99] Above n 1, 193.

rectification. The extension of prohibited grounds of discrimination on the grounds of marital status to include relationships in the nature of marriage, discrimination on the basis of sexual orientation or family status indicates a widening of the kind of groups seen as deserving of protection.

B ISSUES OF EQUIVALENCY

The central societal position of marriage has brought with it an inevitable comparison of de facto relationships (especially those that superficially resemble marriages) with marriages. This section of the paper looks at how de facto relationships should be treated vis a vis marriage and at whether there is merit in making the comparison. Complete equation with marriage may lead, for example, to wholesale application of the Matrimonial Property Act 1976 to de facto relationships, but such assumptions should not be made about every point discussed herein. Conversely, many of these arguments may support a call for a separate piece of legislation providing for de facto property division.

As previously stated, the distinguishing factors between marriage and some de facto relationships are less obvious than they have been in the past.[100] Many de facto relationships are what might be termed "functional marriages", that is, they fulfil many of the same purposes and functions that marital relationships do. It is this factor, the fulfilment of family functions, that serves as a justification for equivalent treatment.[101] There have been many influences on this development. Socially, there has been both an increase in the incidence of de facto relationships and an increasing acceptance of this type of living arrangement. Legally, statute law has encompassed this wider notion of family in an increasing range of areas. Previously this consisted predominately of financial responsibility provisions such as those relating to child support, but now de facto couples caring for children receive cover

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[100] See above, Part II A 1.

[101] This argument and others advanced in this section of the paper are found in Freeman and Lyon; above n 11, ch 6.

under statutes that entitle them to processes aimed at keeping the family unit intact.[102] Thus the rise in importance of the functional family is reflected in the operation of the law. The courts have also played an influential role through the extension of the application of the common law using the fulfilment of family functions as a basis for decision making.[103]

The presence of children has been a factor of increasing importance. This separates de facto relationships into those with children and those without, and there are many that fall into the latter category. While there are sound policy reasons for protecting the rights of children, a blanket extension of marital property law to all de facto couples with children is not a satisfactory solution because questions remain, such as responsibility for children that were part of the de facto unit but not the biological children of the parties.[104] In many ways the Child Support Act 1991 has set out the rights and responsibilities of the respective parties, but it does so in respect of the maintenance of children and not in respect of the resolution of property disputes of their unmarried parents. The existence of the Matrimonial Property Act 1976 may be an indication of the need for a regime dealing with property issues that is separate from issues of child support.[105]

The duration of the relationship is another comparison point between marriages and de facto relationships.[106] The duration of the relationship is a consideration of the

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[102] For example, Family Proceedings Act 1980, s 7A(1)(b); above n 24.

[103] For example, claims under the Law Reform (Testamentary Promises) Act 1949, where "services" are considered in the light of the consortium between the claimant and the deceased; above n 1, 169; P R H Webb et al (eds) *Butterworths Family Law Service* (6 ed, Butterworths, Wellington, 1993) 1011.

[104] It is acknowledged that these problems also arise on the dissolution of marriage.

[105] This is not to deny that the two issues are inextricably linked.

[106] This is dealt with in more detail in Part III C 4. It is suggested that any statute dealing with de facto property rights would have to deal with this issue in some way, either by making duration one factor along with others that would determine the existence of a justiciable relationship, or by making cover under the scheme dependent on duration of a specified length.

courts when determining relationships in the nature of marriage for social security purposes, although admittedly, due to the nature of the enquiry, most of these relationships are examined in their early stages. While it would be inappropriate and unworkable for the law to become involved in property issues consequent upon the termination of transient or ephemeral relationships, if it is to deal with de facto property rights then the issue of duration must be addressed. Problems may arise as the beginning of a de facto relationship is not always easy to determine and it may not be entered into with any intention of longevity. However, this may also be true of marriages where a life-long commitment has been replaced by a commitment to stay in the marriage as long as it retains at least a minimal level of satisfaction.[107]

Marriage-like behaviour, including the expression of a future intention to marry, has been used as an indicator in determining a relationship in the nature of marriage. Atkin[108] points out that this is covered by the Domestic Actions Act 1975 and finds little force in the argument that relationships involving an unfulfilled intention to marry be treated as marriage-like relationships. It should also be noted that the aim of the Domestic Actions Act 1975 is to put the parties back into the position that they would have been in had there been no agreement to marry.[109] The nature of the relationship, particularly attitudes towards sex and money, may also be indicative of a relationship in the nature of marriage.

Another justification for equivalent treatment is that there is a need to protect the weaker family members. It may be argued that the very structure of the family unit, based as it is on a patriarchal system, has led to the existence of weaker family members and that this has been bolstered by the private nature of family life and a history of non-interference with it. The area of domestic violence is one area where the need to protect the weaker family members has resulted in the removal of

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107 "[Marital] success [is] judged more on happiness and emotional satisfaction which are difficult to achieve, rather than on economic and child rearing factors"; above n 52, 41.

108 Above n 1, 191. Arguments discussed in this section can be found in this text in ch 10.

109 Domestic Actions Act 1975, s 8(3).

distinctions based on marital status.[110] The focus, in terms of any imbalance of power, now centres on the place of children within the family. The increasing importance of the rights and needs of children of de facto unions has been a major impetus for the decreasing focus on the marital status, or lack of one, of parents.

Atkin argues that the Matrimonial Property Act 1976, as the statute that governs the property disputes of divorced couples, cannot be used to equate marriages with de facto relationships in a way that treats them as equivalent states, because that Act is not premised on the alleviation of need, but rather on a partnership between equals.[111] This statutory presumption of equality, which led to a presumption of equality of entitlement to the property of the relationship, was necessary because of the societal and legal influences that led to the imbalance. The same inability to adequately compensate non-financial contributions to the relationship has led to problems in trust law solutions to de facto property rights. The same forces apply to both types of relationships and therefore, although there is no standard marriage or de facto relationship, there exist the same reasons for addressing this imbalance. There may be cases where parties to a de facto relationship have not made equal contributions, particularly in the extent of property they bring to the relationship. However, if they are to be treated as functional marriages then a premise of equal sharing is justified. Many marriages (especially second marriages) suffer from the same inequality, and yet the Matrimonial Property Act 1976 appears able to provide for these situations.[112] Further, a de facto property rights statute would not be premised on the alleviation of need, but rather on achieving a fair result based upon the nature of, and respective contributions to, the relationship.

Atkin adds two further arguments that may justify equivalent treatment.[113] First, that "justice" requires that the situation be rectified to alleviate perceived injustices and hardship. It is the perceived inequity, apparent because outcomes of property

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[110] Domestic Protection Act 1982, ss 2, 4, 13.

[111] Above n 1, 191.

[112] Through such provisions as ss 14 and 21.

[113] Above n 1, 192.

disputes indicate individual hardship, that has prompted many of the calls for change.[114] Secondly, there is the argument that in substance de facto relationships are the same as marriage. This appears to refer to arguments about familial functions, and of course not all de facto relationships fall into this category. There remain substantial differences between marriage and de facto relationships, with marriage being a legal status not dependent on any inquiry as to its functions or its quality.[115]

While marriage retains its central place in society, it is important that such a state-sanctioned status does not become less advantageous than other types of unions. To do so would be in breach of the Human Rights Act 1993 and may have the effect of lowering the numbers of people who choose to enter into marriage. This in turn may give rise to perceptions of moral decay which may have political ramifications. Legally, the wholesale equating of all de facto relationships (however defined) with marriage would also have a deleterious effect.[116] It would do so by fostering the impression that there remained no legal distinction between married and unmarried couples. If the type of de facto relationship to qualify under the Matrimonial Property Act 1976 was wider than relationships in the nature of marriage, then the Act could eventually cover relationships that would bear little resemblance to marriage. If cover was limited to relationships in the nature of marriage it is possible that the Matrimonial Property Act 1976 could be used to resolve property issues. This would not remove the need to separately define a relationship in the nature of marriage. It may assist both the court and the general public to recognise that these "marriage-like" relationships are deserving of a scheme similar to the property division scheme under the Matrimonial Property Act 1976. However, because of the perceived need to maintain some distinction between marriage and de facto relationships, and to separate them as distinct choices, as well as enabling the

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[114] "Tizard Bill supported" *Nelson Evening Mail*, Nelson, New Zealand, 7 June 1994, 3.

[115] Atkin also argues that international law and the New Zealand Bill of Rights Act 1990 preclude equivalent treatment. These arguments were taken up in Part III A.

[116] Above n 28, 169.

incorporation of elements of overseas de facto property rights legislation, it is submitted that a statute dealing solely with de facto property rights be enacted.

The issue is one of comparison rather than one of equivalency. There exist both similarities and distinguishing factors between marriages and de facto relationships. A separate de facto property rights statute would retain an important distinction between marriage and de facto relationships and would allow issues of particular relevance to de facto couples, such as the duration of the relationship, to be dealt with separately.

C DEFINING A DE FACTO RELATIONSHIP

1 Who to Include?

There are several options regarding the type of relationship that could be captured by any statutory regime. One is to limit cover to relationships that are "in the nature of marriage". Clearly, this measures a de facto relationship along the marital yardstick. In its favour, both the judiciary and government officials have had experience in quantifying and assessing de facto relationships in this way.[117] These decisions have also been recorded and thus could be used as a guideline to determine a basic scheme (perhaps containing a list of indicative factors) to be set out in a statute. Care needs to be taken with this approach as it must be borne in mind that decisions of definition that relate to fiscal policies such as child maintenance and the payment of domestic purposes benefits have a different (and arguably wider) purpose than do decisions relating to inter-party property rights. If the underlying policy and intentions of a statutory scheme dealing with de facto property rights were explicit then some of the issues surrounding definition may be more easily answered.

[117] Although this is not without problems. "It [the term de facto husband and wife] is a term obfuscatory of any legal principle except in distinguishing the relationship from that of husband and wife." *Calverley* v *Green* [1985] 59 ALR 111.

However it may be desirable that consideration be given to relationships that, although marriage-like, are not presently considered to be in the nature of marriage for most of the state's purposes. This would include same sex relationships. The Human Rights Act 1993 omits the words "a man and a woman" from its definition of living together as a marital status and therefore same sex relationships could fall within this definition. On a functional basis, there would be a significant number of same sex relationships that would perform similar or the same functions as marriage. This would involve extending our current notion that marriage can only exist between one man and one woman.[118]

A definition based on a "functional marriage" measure would clearly have the intention of merely extending some of the current benefits of marital status to a wider group on the basis that this wider group consisted of "marriages by another name". As previously discussed there are reasons for doing so on this basis, strengthened by the rising emphasis on the rights of children. But this focus may also be perceived as one that is relatively narrow. It would exclude other relationships where there is an exchange, such as the provision of financial support in exchange for support of a domestic nature, that may justify one party having rights to the property of the other.

Therefore, another alternative would be to extend cover to all "domestic relationships". This approach has been favoured in the Australian Capital Territory, where the Domestic Relationships Act 1994 (ACT) defines domestic relationship as[119]

> "a personal relationship between 2 adults (other than a married couple) in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other".

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[118] This is a deeply embedded cultural concept, although it is not a specific requirement of the Marriage Act 1955.

[119] Section 3. The domestic relationship must have existed for at least 2 years; s 12.

Although it is yet too early to discern how this Act will be interpreted, section 3 clearly covers situations of both dependence and inter-dependence.

The introduction of relationships that extend beyond that of functional families needs to be looked at in terms of its philosophical and policy bases. The interests of the state in terms of resolving property disputes of families have been examined.[120] The domestic relationship approach appears to be based on estoppel type principles and would cover those relationships where an exchange has taken place without any connotations of a sexual relationship.[121] The interests of the state in these situations appears to be less obvious, although providing recompense that recognises the efforts of a party to a domestic relationship is a salutary aim.

The consideration given in this paper to the extension of cover to same sex relationships is based on the concept of a monogamous sexual relationship. Therefore, while it challenges heterosexist notions of marriage and the need for formal registration, it does not challenge other marital concepts. Multi-party and non-sexual relationships do challenge these concepts.[122] It is submitted that to include them in a legislative proposal at this stage would increase the level of opposition to the Bill to a level that may hinder its passage. The debate may be worthwhile, but it would run the risk of confusing the issues of supporting functional marriages with supporting other forms of association.

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[120] See Part II A 3.

[121] For example children caring for elderly parents. The Explanatory Memorandum to the Domestic Relationships Bill states "[i]t should be made clear that the relationship is to involve a commitment which goes beyond friendship and 'neighbourliness' - flatmates, people living in group houses, employed live-in housekeepers and other domestic employment. Those living in halls of residence for employees or students would also not normally be entitled to seek relief", 2.

[122] The former challenges monogamy and the latter the notion of conferring rights and responsibilities based on a sexual bond and procreation.

2 Beginnings and Endings

The lack of a precise time of commencement of a de facto relationship is one of the major differences between those relationships and marriages, and one that could prove to be one of the most problematic in terms of establishing statutory cover. Marriage is marked by ceremony and registration and therefore its beginning point is determinable without difficulty. In contrast, a de facto relationship may have no clear starting point, either to the parties themselves or to the rest of the community.[123] Therefore, in each case the commencement of the relationship will be a matter of fact and will need to be established. Once again, assistance could be derived from the existing body of law on relationships in the nature of marriage, but there will be many cases where the determination of a beginning point will be far from easy. In attempting this exercise, an approach that looked at what was within the contemplation of the parties using a mixture of subjective and objective tests could be employed. Thus a court would look at when the parties thought the relationship began and at the impression they gave to others. As well as this, provision could be made for state registration of de facto relationships at the instigation and with the consent of both partners to the relationship.[124] This would provide some clarification and would avoid the need to litigate on this particular issue, but this saving in litigation would be minimal because it presumes that the parties are able to agree on a starting date (these couples would therefore not be arguing the issue whether in of out of court). For registration to be an effective solution it would need to be able to be retrospective, subject to the consent of both parties. Admittedly, these solutions would still not avoid the existence of the "grey area cases".

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[123] Some de facto relationships will not suffer from this problem. It is not uncommon for there to be a commencement date that relates to one party moving into the same dwelling as the other.

[124] In terms of the scope of this paper, this would be for the sole purpose of determining the commencement of the relationship for the purposes of the statute relating to de facto property rights.

The end of a de facto relationship would appear to be less problematic, or at least to have some commonality with the end of a marriage. Although marriage has a formal registered end point, dissolution is preceded by a process of relationship deterioration that is an internal matter for the parties to the marriage. Dissolution is available two years after the "irretrievable breakdown of the marriage"[125] which is an event or series of events determined by the parties and marked by the end of cohabitation.[126]

Beginnings and endings may also occur within a relationship, where the parties resume cohabitation after a period of separation. This may impact upon the duration question in that it may be difficult to determine the length of an intermittent relationship.

3 Overseas Solutions

Sweden granted limited property rights to unmarried cohabitants under the Law on Cohabitants' Mutual Home (1987).[127] It covers marriage-like relationships and includes same sex relationships.[128] The Act uses a system of deferred community property, which consists of the family home and chattels but excludes items of recreational use and objects used exclusively by one partner.[129] Parties are able to contract out of the Act.

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[125] Family Proceedings Act 1980, s 39(1).

[126] Family Proceedings Act 1980, s 39(2) states that it is necessary to prove that the parties have been living apart for two years and that this is the sole ground for establishing that the marriage has broken down irreconcilably.

[127] M Fawcett "Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants" (1990) 24 Fam LQ 179.

[128] Extension to same sex relationships was given under a separate law; above n 127, 185.

[129] Above n 127, 187.

The issue has also met with a legislative response in Australia. The De Facto Relationships Act 1984 (NSW) covers heterosexual de facto relationships[130] which have lasted two years or longer.[131] The court can make a variety of orders adjusting or declaring the property interests of the partners and contracting out of the Act is permitted.[132]

The Property Law (Amendment) Act 1987 (Vict) is modelled on the New South Wales legislation and is of similar effect.

The Domestic Relationships Act 1994 (ACT) has been previously discussed.[133] Its application extends wider than sexual relationships although the type of court orders available are similar to the New South Wales legislation. The Australian Capital Territory statute allows parties to contract out of the Act[134] but the Victorian statute does not.

4 Duration

One noticeable effect of measuring de facto relationships against marriage has been the importance placed on a degree of permanence of the relationship. Whether or not this is borne out by the actual duration of the relationship, it is considered important for the parties to have had a degree of long term commitment at some point. Indeed it might prove both cumbersome and inappropriate for the law to become involved in the reallocation of inter-party rights and resources in relationships that are transitory. If this is so, then once the starting point of a de facto relationship is

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[130] Defined as "living or having lived together as husband and wife on a bona fide domestic basis although not married to each other".

[131] Unless there are children of the relationship or one party has made a substantial contribution for which they will otherwise remain uncompensated; De Facto Relationships Act 1984 (NSW), s 3(1).

[132] De Facto Relationships Act 1984 (NSW), Part IV.

[133] See Part III C 1.

[134] Domestic Relationships Act 1994 (ACT), Part IV.

established, its duration will have some bearing on whether it comes within a statutory scheme. Duration can either be placed as one factor alongside others that determine entry into the scheme, (as in the De Facto Relationships Act 1984 (NSW)), or it can be elevated to an entry status of its own, (for example five years duration where there are children of the relationship, under the Family Relationships Act 1975 (SA)).[135]

As the matter of duration must be addressed in some form, it may be that a requirement of this nature is a distinction based on marital status that is "justified in a free and democratic society".[136] If such a provision was considered discriminatory, so would the distinction in the Matrimonial Property Act 1976 on the basis of a marriage of short duration.[137] The Marriage Act 1955 and statutes such as the Matrimonial Property Act 1976 create distinctions based on marital status and yet do not appear to have been challenged under anti-discrimination provisions.

5 A Legislative Definition?

If legislation is to be enacted there are several options regarding this issue of definition. The law could define a de facto relationship in detail. The application of a formula may add certainty but its lack of flexibility detracts from its usefulness as an option. It would avoid the value judgements of the judiciary but it would substitute those of the legislature.

The law could avoid a definition altogether and leave the concept to be shaped by the judiciary. This would perhaps be too uncertain and would make it difficult for people to organise their affairs with the aim of creating a desired legal result. Both the benefits and detriments of this approach can be seen in the case law that developed under the Social Security Act 1964, section 27A where the legislative phrase "in the nature of marriage" became detailed in itemised lists.

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[135] A statute dealing with the legitimacy of children.

[136] New Zealand Bill of Rights Act 1990, s 5.

[137] Matrimonial Property Act 1976, s 13.

A middle ground would be for the law to set out certain benchmark factors, for example the requisite duration of a de facto relationship under a law of property division, or perhaps list factors for the judiciary to take into account, and then leave the mechanics of application to particular relationships to the judiciary. This would provide some guidance while still retaining flexibility.

Broad definitions are useful because they can be creatively adapted to cover a wide range a relationships. But they do place discretion in the hands of those charged with deciding whether a relationship comes within the definition. Importantly, the decision is once again removed from the parties themselves, although their views on what they consider to be the nature of the relationship will no doubt carry some weight.

6 Conclusions

Defining a de facto relationship is no easy task. The commencement, duration and termination of such relationships all contain issues that could prove problematic in drafting an appropriate piece of legislation, as might the question of who to include within a definition. Some jurisdictions have tackled these issues. Attention is now given to a legislative solution that is tailored to the social and legal environment in New Zealand.

IV A LEGISLATIVE SCHEME: COMMENTARY

A INTRODUCTION

This section of the paper provides background information regarding the reasons for the adoption of approaches and provisions outlined in the draft legislation proposed in Part V. In doing so it supplements the explanatory notes given throughout the De Facto Property Rights Bill.

B COVER AND CODIFICATION

The issue of cover for any proposed statutory scheme partly relates to the type of relationship that will come within the scope of the legislation. The issue of defining a de facto relationship is covered in Part III C where reasons are given for cover to extend to marriage-like relationships, including same sex relationships. Cover also refers to the method by which those couples, however defined, come within the Act. Should such a scheme have mandatory and automatic application to any relationship coming within the definition under the Act, or should such regulation only take effect through the positive act of the parties? It is submitted that the best solution is to provide universal cover with a provision for the parties to contract out of the statutory provisions if they so wish. This suggested application is the approach followed by the Matrimonial Property Act 1976 and it has several advantages. The contracting out provision in section 21 allows the parties autonomy and freedom to choose a method of property division that suits their individual needs. Thus it counters arguments that the statute would impose a regime on individuals who deliberately choose not to marry in order to avoid the ramifications of the Matrimonial Property Act 1976, as it would only impose such an effect on those who

take no action. The opportunity for another approach and outcome would be retained.

The automatic application would safeguard the interests of the majority of de facto couples who make no provision for property division on the breakdown of their relationship.[138] Currently this inaction has led to inequities. Alternatively, to provide cover only to those who "registered" under the Act would only capture those with the financial means and forethought to seek cover.[139] It is submitted that even the most extensive advertising campaign on the part of the state would fail to adequately address the need for education regarding the respective differences of choosing to enter the scheme or electing not to.

Provision for contracting out is not without its problems. It involves the expense of obtaining legal advice, and may place a relationship under strain where consensus on the terms of the agreement is protracted or contentious. Adoption of the Matrimonial Property Act 1976, section 21 would mean that the court could avoid or vary an agreement on grounds that are much wider than contract. This amounts to a major encroachment on the autonomy of the parties.

A further issue regarding cover is the retrospectivity of the statute. If the Act were to apply to all de facto relationships in existence at the time it came into force then it may be argued that these relationships would become subject to a what would amount to a legal imposition. However, if extensive publicity were to surround the introduction of the Act and the ability to contract out of it, and considering that the Act has a remedial focus, these concerns could be alleviated. The law makes many impositions on the private ordering of the lives of its citizens and legal imposition in the family law area include the Matrimonial Property Act 1976 and the Child

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[138] Before the introduction of legislation in Sweden only approximately 5% of de facto couples made written contracts relating to property division; above n 127, 191 n 65.

[139] The proposed scheme makes this so for those wishing to escape the provisions of the statute.

Support Act 1991. Both of these statutes have a very marked effect on those who come within their ambit.

It is also suggested that the scheme provide comprehensive and exclusive cover. It would therefore act as a codification of the law.[140] This would mean that pre-existing cohabitation contracts would cease to have effect, and would need to be re-registered under the Act. Codification would clarify the position with regard to the applicability of the pre-existing law. It is preferable to begin with a statute that is clearly separate from the trust law principles currently applied. Matrimonial Property Act 1976 principles adopted would naturally bring with them application of judge made law on the particular issue or section concerned.

The Act would replace normal contractual rules, and thus apply a uniform scheme to all relationships coming within it.

C THE BASIS FOR APPLICATION

The Matrimonial Property Act 1963 was criticised for its emphasis on assets. While it did also look at contributions to those assets through the marriage relationship, and the judiciary were given specific direction to look at[141]

> "the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever)"

scant regard was given to non-financial contributions. The statutory direction left a large amount of discretion with the presiding judge, and it was this factor, in the hands of traditionalists, that resulted in a division of property of less than 50% for

[140] A statement regarding the codification position could be made in the usual statutory form in order to avoid confusion.

[141] Matrimonial Property Act 1963, s 6.

the overwhelming majority of wives. In 1968[142] the legislature amended section 6 to state that an order vesting an interest in property may be made to either party

> "notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character."

This also proved to be insufficient and the issue was further tackled by the Matrimonial Property Act 1976. Again the concern was the division of assets of the marriage, and these were classified as either matrimonial or separate property. The relative contributions of the parties were presumed to be equal with regard to the sharing of the matrimonial home and chattels. The notion of contribution was also strengthened, and given a detailed listing in section 18(1). Section 18(2) also clearly stated that greater weight was not to be given to financial contributions over non-financial ones.

If a de facto property sharing regime were to start from the notion of a partnership of equals (which would be able to be departed from where the circumstances made it fair to do so), then, like the 1976 Act, the emphasis would be on assessing the relationship in global terms and dividing the property of the relationship on the basis of overall contribution to the relationship. This would move away from the asset by asset approach that is necessary under the law of trusts. The concept of contribution should be wide ranging in order to capture the diversity of relationships covered. Section 18(2) of the Matrimonial Property Act 1976 should be incorporated as should the presumption of equal sharing. Non-financial contributions should be counted from the duration date of the relationship, as established by the court.

As coverage is given on a "functional family" basis, an assessment of the relationship from the presumption of a partnership of equals is justified on the same grounds as the Matrimonial Property Act 1976. Admittedly there will be relationships where this is not appropriate and the Bill makes provision for these, again following a

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[142] Matrimonial Property Amendment Act 1968.

Matrimonial Property Act 1976 model. The overriding emphasis is on achieving a result that is fair to both partners.

D PROCEDURE

The Family Court should be the court with jurisdiction to hear disputes involving de facto property rights. This is because of its special ability to deal with disputes that, although proprietary in nature, concern interrelational aspects. It would also be sensible to utilise the same court that would be hearing any custody or access disputes arising out of the breakdown of the family unit. The tenets of privacy and informality are well suited to the resolution of these disputes. It is important that court assisted dispute resolution of this kind be assessable and therefore issue of the cost of bringing proceedings needs to be addressed. As with the Matrimonial Property Act 1976, provision should be made to allow cases to be heard in the High Court where appropriate.

E CONCLUSIONS

Any legislative scheme dealing with de facto property rights needs to deal with a variety of issues including the extent of cover, the relationship with the common law, and the kinds of presumptions and approaches to be made. More importantly, it needs to be based on a clear and sound philosophy so that the direction for implementation will be obvious.

The preceding sections of this paper have attempted to provide such a foundation, and it is on this that the following section, containing a draft Bill on de facto property rights, is constructed.

IV LEGISLATION: THE DE FACTO PROPERTY RIGHTS BILL

A INTRODUCTION

This Bill sets out a proposal for legislation to provide remedy for de facto property rights on the breakdown of relationships. Its basic scheme is similar to the Matrimonial Property Rights Act 1976. It operates on a system of deferred community property and provides a classification system for communal and separate property. There are, however some differences from the statutory cover provided for married couples. These and other points, such as the use of provisions from Australian legislation, are set out in the explanatory note that follows in italics after each clause. The Bill is of limited coverage and there are several important omissions which would need to be considered before any such legislation was presented. These include issues of succession, division of rural property, issues relating to creditors and other affected third parties, superannuation, valuation and de facto minors.

B THE BILL

DE FACTO PROPERTY RIGHTS

ANALYSIS

Title
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2. Interpretation
3. Act to bind Crown
4. Act to be a code
5. Commencement of relationship
6. Applications under this Act
7. Time limit for making application
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Classification of Property

9. Communal property defined
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11. Property acquired by succession etc
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Proceedings Under Act

20. Appeals
21. Interests of children
22. Interests of other parties
23. Duty of Court
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25. Mediation
26. Evidence
27. Restriction of publication

A BILL INTITULED

An Act to make provision for proceedings as to property between partners to a de facto relationship; to recognise the equal contribution of partners to the partnership; and to provide for a just division of the property of the partnership at the termination of the relationship.

Justification for treating marriage-like relationships like marriages with regard to the presumption of equal sharing is given in Part III C 1. The overriding emphasis is on just division. The Bill does provide for other approaches where appropriate given the facts of the relationship before the Court.

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and Commencement—(1) This Act may be cited as the De Facto Property Rights Act 1994.

(2) This Act shall come into force on the 1st day of February 1995.

The short title provides a clear indication of the scope of the Bill. The shorthand term "de facto" has a commonly accepted meaning. "Property rights" indicates the concern with property as opposed to other factors such as paternity or custody or personal rights.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

"Child of the relationship" means—

(a) A child born as a result of a sexual relations between the partners; or

(b) Any child who resided with the parties on a full time basis before they ceased to live together, whether that child is a child of one or both of the parties or not; or

(c) A child for whom both partners to the relationship accept responsibility for long term welfare:

This definition recognises the increasing existence of blended families and the need to define children of the relationship wider than those arising from blood ties. The relationship between this provision and the Child Support Act 1991 needs to be fully explored, as does the need to include children conceived by assisted reproductive technology. The categories overlap. A foster child or step-child, for example, may come within clause 2(1)(b) or (c), but both provisions are necessary to cover situations where this is not so. The clause is an amalgam of provisions found in the De Facto Relationships Act 1984 (NSW) and the Domestic Relationships Act 1994 (ACT).

"Contribution" includes—

(a) The care of any child of the parties or of the household or any infirm relative or dependant of the partners;

(b) Financial and non-financial contributions made directly or indirectly by or on behalf of either or both of the partners to the acquisition, conservation or improvement of any of the property or financial resources of either or both of them;

(c) Any contributions made in the capacity of homemaker or parent, made by either of the partners to the welfare of the family:

Although less specific than the Matrimonial Property Act, the scope of these contributions is intended to be as broad. It is intended that these will be assessed globally as contributions to the relationship as a whole.

"De facto relationship" means a relationship where the parties are living together or have lived together in the nature of marriage, although not married to each other, for a period of 3 years, and includes such relationships where the parties are of the same sex:

The choice of "in the nature of marriage" means that use can be made of existing case law that defines what this means at a factual level. Not addressed, but of importance, is the issue of breaks in the continuity of relationships. Statutory provision would need to be made for this. The confinement to marriage-like relationships is deliberately cautious, and extension of the Act to other forms of domestic relationships could occur at a later date. The time period of three years means that the law does not apply to ephemeral or transitory relationships (except where the conditions of s 8 are met), and it equates with the time at which a marriage no longer becomes one of short duration under the Matrimonial Property Act. Homosexual relationships are included to accord with the Human Rights Act 1993.

"Family chattels"—

(a) Means chattels owned by either partner to the relationship or both of them and which are—

(i) Household furniture or household appliances, effects, or equipment; or

(ii) Articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment; or

(iii) Motor vehicles, caravans, trailers, boats, windsurfers or bicycles used wholly or principally, in each case, for family purposes; or

(iv) Accessories of a chattel to which subparagraph (iii) of this paragraph applies; or

(v) Household pets; and

(b) Includes any of the chattels mentioned in paragraph (a) of this definition which are in the possession of either partner pursuant to a hire purchase or conditional sale agreement or an agreement for lease or hire; but

(c) But does not include chattels used wholly or principally for business purposes, or money or securities for money:

Cf. Matrimonial Property Act 1976, s 2. Windsurfers and bicycles are added to acknowledge developments in recreation. These items can be of considerable value.

"Family home" means the dwellinghouse that is used habitually or from time to time by both partners to the relationship or by either of them as the only or principal family residence, together with any land, buildings, or improvements appurtenant to any such dwellinghouse and used wholly or principally for the purposes of the household:

Cf. Matrimonial Property Act 1976, s 2.

"Property" includes real and personal property and any estate or interest in property real or personal, and any debt, and any thing in action, and any other right or interest with respect to property:

Cf. Matrimonial Property Act 1976.

3. Act to bind Crown—This Act shall bind the Crown.

4. Act to be a code—(1) Except as otherwise expressly provided in this Act, this Act shall have effect in place of the rules and presumptions of the common law and of equity.

(2) Where proceedings have been commenced under this Act, no claim shall lie under the Domestic Actions Act 1975.

Added for clarity and to prevent trust law principles from applying. Existing cohabitation contracts would have to be re-registered under this Act. For further explanation see Part IV B. Subsection (2) prevents "double dipping".

5. Commencement of Relationship—(1) This Act shall apply to all de facto relationships whether such relationship commenced before or after the commencement date of this Act.

(2) This Act shall not apply to a de facto relationship that ceased to exist before this Act came into force.

All existing relationships are covered rather than having an "opt-in" situation. Prior relationships are not covered as this would be unduly retrospective.

6. Applications under this Act—(1) Application under this Act may be made by a partner to a de facto relationship for the adjustment of interests with respect to the property of the de facto partners or either of them.

7. Time limit for making application—(1) Except as provided by subsection (2) of this section, where de facto partners have ceased to live together, an

application to the Court for an order under this Act shall be made before the expiration of three years after the day on which they ceased, or last ceased, as the case may require, to so live together.

(2) The Court may, at any time after the expiration of the period referred to in subsection (1) of this section, grant leave to a de facto partner to apply to the Court under this Act, where the Court is satisfied, having regard to such matters it considers relevant, that greater hardship would be caused to the applicant if that leave were not granted than would be caused to the respondent if that leave were granted.

The three year period has been calculated to equate with the Matrimonial Property Act 1976, which allows for 12 months from the date of dissolution which can take place two years after the relationship has irreconcilably broken down at the earliest. Subsection 2 allows this time period to be extended to prevent injustice in individual cases. Cf. Property Law (Amendment) Act 1987, s 282 (Vict).

8. Prerequisite for making order—(1) Except as provided by subsection (2) of this section, the Court shall not have jurisdiction to hear an application under this Act unless it is satisfied that the parties to the application have lived together in a de facto relationship for a period of not less than 3 years.

(2) The Court may make an order under this Act where it is satisfied—

(a) That there is a child of the parties to the application; or

(b) That the applicant—

(i) Has made substantial contributions to the relationship for which the applicant would otherwise not be adequately compensated if the order were not made; or

(ii) Has the care and control of a child of the other de facto partner, and that the failure to make the order would result in serious injustice to the applicant.

(3) The Court may conduct a preliminary hearing to determine whether the parties have lived in a de facto relationship for a period of 3 years.

This discretion exists to alleviate cases of individual hardship and again emphasises the importance of children. It recognises that the main thrust of the Bill is with longer term relationships, although there may be exceptions to the rule. Subsection 2, cf. De Facto Relationships Act 1984, s 17(2) (NSW); Property Law Amendment Act 1987, s 281(2) (Vict). Subsection 3 allows for determination of a definition of the relationship to be dealt with as a preliminary matter and is a procedural point.

Classification of Property

9. Communal property defined—Communal property shall consist of—

(1) The family home; and

(2) The family chattels; and

(3) All property acquired by either party after the commencement of the relationship; and

(4) Any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in this section; and

(5) Any policy of assurance taken out by one partner on his or her own life or the life of the other partner, whether for his or her own benefit or for the benefit of the other partner (not being a policy that was fully paid up at the time the de facto relationship was entered into and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and

(6) Any policy of insurance in respect of any property described in this section; and

(7) Any pension, benefit, or right to which either party is entitled or may become entitled under any superannuation scheme if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the time that the relationship began; and

(8) All other property that the partners have agreed, pursuant to section 16 of this Act, shall be communal property; and

(9) Any other property that is communal property by virtue of any other provision of this Act or by virtue of any other Act.

Cf. Matrimonial Property Act 1976, s 8. Communal property is equivalent to matrimonial property.

10. Separate property—Separate property means—(1) All property of either partner which is not communal property; and

(2) All property listed in a section 16 agreement (validly consented to by both parties) as separate property; and

(3) Separate property used to acquire, improve or increase the value of communal property shall become communal property.

(4) All property acquired by either partner to the relationship while they are not living together in the nature of marriage shall be separate property unless the Court considers that it is just in the circumstances to treat such property or any part thereof as communal property.

Cf. Matrimonial Property Act 1976, s 9. Again the scheme of the Matrimonial Property Act applies.

11. Property acquired by succession etc—(1) Property, being—

(a) Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person: or

(b) The proceeds of any disposition of property to which paragraph (a) of this subsections applies,—

shall not be communal property unless, with the express or implied consent of the partner to the relationship who received it, the property or the proceeds of any disposition of it have been so intermingled with other communal property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property.

(2) Property acquired by gift from the other partner shall not be communal property unless the gift is used for the benefit of both partners to the relationship.

(3) Notwithstanding subsections (1) and (2) of this section and s 10(4) of this Act, both the family home and the family chattels shall be communal property unless designated separate property by an agreement made in accordance with section 16 of this Act.

Cf. Matrimonial Property Act 1976, s 10.

12. Division of communal property—Unless section 13 of this Act applies, under any proceedings under this Act, the communal property of the relationship shall be divided equally between the partners to the relationship.

Cf. Matrimonial Property Act 1976, s 11; based on the presumption of a partnership of equals in the long title to the Bill.

13. Departure from scheme of Act—(1) Where there are circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the partners of any communal property, the share of each shall be determined in accordance with the contributions of each to the partnership.

(2) Where the Court is considering departure from section 12 of this Act, it shall take into account the following;

(a) The time that the family home was acquired; and

(b) The respective legal or beneficial shares of the partners in the communal property of the relationship at the commencement date of the relationship; and

(c) Any agreements between the partners as to the respective shares of each of them in the family home; and

(d) The duration of the relationship; and

(e) The respective contributions, in whatever form, of each partner to the relationship; and

(f) The existence or otherwise of children of the family and the future needs of those children; and

(g) Any other matters that the Court thinks fit.

Based on the Matrimonial Property Act 1976, but a less stringent test than section 14 of that Act in that extraordinary circumstances are not required. There will be some relationships where there are valid reasons for departing from equal sharing in the property of the relationship. Subsection 2 lists matters for the Court to consider to provide guidance to the judiciary.

14. Weight to be given to contributions—There shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.

Cf. Matrimonial Property Act 1976, s 18(2). It is considered necessary to state this to counter judicial bias.

15. Misconduct—In determining the contribution of a de facto partner to the relationship, the Court may take into account any misconduct of a partner to the relationship that has been gross and palpable and has significantly affected the extent or value of the communal property; but shall not otherwise take any misconduct of a spouse into account, whether to diminish or detract from the positive contribution of that partner otherwise howsoever.

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

Agreements

16. Power to make agreements—(1) Partners to a de facto relationship, or any 2 people contemplating entering into such a relationship with each other, or any two people terminating, or who have terminated a de facto relationship with each other, may, for the purpose of contracting out of the provisions of this Act or for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the status, ownership, and division of their property (including future property) as they think fit.

(2) Without limiting the generality of subsections (1) and (2) of this section, any such agreement may—

(a) Provide that any property or class of property shall be communal property or shall be separate property; or

(b) Define the share of the communal property or any part thereof that each spouse shall be entitled to upon the termination of the relationship otherwise than by death; or

(c) Provide for the calculation of such share and prescribe the method by which the communal property or any part thereof may be divided.

(3) Every agreement entered into under this section shall be in writing signed by both parties.

(4) Each party to an agreement under this section shall have independent legal advice before signing the agreement.

(5) Without limiting subsection 4 of this section, independent legal advice shall include:

(a) The effect of the agreement on the rights of the parties under this Act;

(b) Whether it is advantageous, financially or otherwise, for that party to enter into the agreement;

(c) Whether it is prudent for that party to enter into the agreement;

(d) Whether the agreement is fair and reasonable in the light of the circumstances that were reasonably foreseeable.

(6) The signature of each party to an agreement under this section shall be witnessed by a solicitor of the High Court of New Zealand. The witnessing solicitor shall certify that before the party whose signature he or she has witnessed signed the agreement he or she has explained to that party the effect and implications of the agreement.

(7) Where subsections 3 and 6 have not been complied with in respect of an agreement under this section the Court may declare that an agreement under this section shall have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance has not materially prejudiced the interest of any party to the agreement.

(8) An agreement under this section shall be void in any case where—

(a) Subsections (4) to (6) of this section have not been complied with; or

(b) The Court is satisfied that it would be unjust to give effect to the agreement.

(9) In deciding whether it would be unjust to give effect to an agreement under this section the Court shall have regard to;

(a) The provisions of the agreement:

(b) The time that has elapsed since the agreement was entered into:

(c) Whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was entered into:

(d) Whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was entered into (whether or not those changes were foreseen by the parties);

(e) Any other matters that the Court considers relevant.

(10) Nothing in subsection 8 shall limit or affect any enactment or rule of law or of equity whereby any contract is void, voidable, or unenforceable on any other ground.

This provision to contract out of the Act is important in terms of individual autonomy and preserves the right to order one's affairs as one wishes. It is based directly on the Matrimonial Property Act 1976, s 21, and in doing so gives wide powers to the Court to uphold or vary the terms of the agreement. Subsection 5 sets out matters that the advice must include; cf. Domestic Relationships Act 1994 (ACT), s 33(1)(d). It is recommended that the state provide assistance with the cost of independent legal advice, even though this would probably necessitate an extension to the Matrimonial Property Act 1976.

17. Division of property—The Court may, subject to the provisions of this Act, make—

(1) Such order as it considers just determining the respective shares of each partner to the de facto relationship in the communal property or any part thereof, or dividing the communal or any part thereof between the partners to the relationship.

(2) In respect of existing rights or title in respect of property, the Court may declare the title or rights, if any, that a de facto partner has in respect of the property.

(3) An order under this section is binding on the de facto partners but not on any other person.

Cf. Domestic Relationships Act 1994 (ACT), s 40; Property Law Amendment Act 1987 (Vict), s 278; De Facto Relationships Act 1984 (NSW), s 8.

18. Court orders—In order to give effect to a division of property under section 17 of this Act, the Court may, subject to the provisions of this Act, make the following orders:

(1) Order the transfer of property;

(2) Order the sale of property and the distribution of the proceeds of sale in such proportions as it thinks fit;

(3) Order that any necessary deed or instrument be executed and that documents of title be produced or other things be done to enable an order to be carried out effectively or to provide security for the due performance of an order;

(4) Order payment of a lump sum, whether in one amount or by instalments;

(5) Order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the Court directs;

(6) Appoint or remove trustees;

(7) Make an order or grant an injunction—

(a) For the protection of, or otherwise relating to the property or financial resources of either or both of the partners to the relationship; or

(b) To aid enforcement of any other order made in respect of an application;

(8) Impose terms and conditions;

(9) Make an order by consent;

(10) Make an order granting one of the partners to the relationship the right personally to occupy the family home, subject to such terms and conditions as the Court thinks fit.

(11) Make an order settling the communal property of the relationship or any part thereof for the benefit of the children of the relationship.

(12) Make any other order or grant any other injunction (whether or not of the same nature as those mentioned in this section) that it considers is necessary to do justice between the parties.

Cf. Property Law Amendment Act 1987 (Vict), s 291; Domestic Relationships Act (ACT), s 25. Grants a wide range of powers to the Court.

Proceedings under Act

19. Jurisdiction—(1) The Family Court and the High Court shall each have jurisdiction in respect of proceedings under this Act:
Provided that a Family Court shall have no jurisdiction to entertain any application in respect of any communal property where proceedings under this Act relating to or affecting that property are pending in the High Court at the date at which the application is made.

(2) Notwithstanding anything in subsection (1) of this section, if a Family Court judge is of the opinion that any such proceedings under this Act, or any question in any such proceedings, would be more appropriately dealt with in the High Court, he or she may, upon application by any party to the proceedings of without any such application, refer the proceedings or the question to that Court.

(3) The High Court, upon application by any party to proceedings pending under this Act in a Family Court, shall order the proceedings to be removed into the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in a Family Court. Where the proceedings have been so removed they shall be continued in the High Court as if they had been properly and duly commenced in that Court.

Cf. Matrimonial Property Act 1976, s 22. The Family Court is appropriate for reasons of cost, ease of access, privacy, informality, ability to operate inquisitorially and because the Family Court also deals with custody and access issues. Complicated cases may be transferred to the High Court by a Family Court judge or on application by the parties if the High Court agrees.

20. Appeals—(1) Where a Family Court has made or has refused to make an order in any proceedings under this Act, or has otherwise finally determined or has dismissed any proceedings under this Act, a party to the proceedings or any other person prejudicially affected may, within 28 days after the making of the order or decision or within such further time as the Court may allow in accordance with section 73(1) of the District Courts Act 1947, appeal to the High Court in accordance with the provisions of Part V of that Act.

(2) The provisions of the Judicature Act 1908 relating to appeals to the Court of Appeal against a decision of the High Court of New Zealand shall apply accordingly with respect to any order or decision of the High Court of New Zealand under this Act.

(3) Subject to the rules governing appeals on Her Majesty in Council against a decision of the Court of Appeal of New Zealand or of the High Court of New Zealand, such an appeal may be made in proceedings under this Act to Her Majesty in Council.

(4) The High Court or the Court of Appeal, as the case may be, may, in its discretion, rehear the whole or any part of the evidence, or may receive further evidence, if it thinks that the interests of justice so require.

Cf. Matrimonial Property Act 1976, s 39.

21. Interests of children—(1) The Court shall, in proceedings under this Act, have regard to the interests of any minor or dependent children of the relationship.

(2) If in the opinion of the Court there are special circumstances which render it necessary or expedient that any minor or dependent children of the relationship be represented in any proceedings under this Act, the Court may appoint a solicitor or counsel to represent such children. Where any solicitor or counsel is appointed his or her fees and expenses shall be paid by such party or parties to the proceedings as the Court shall order or, if the Court so decides, shall be paid out of money appropriated for the purpose by Parliament.

Cf. Matrimonial Property Act 1976, s 26. Subsection 2 allows for representation of children. Without provision of this paid service, the right of children to be heard would be ineffective.

22. Interests of other parties—In the exercise of a power under this Act, the Court shall have regard to the interests, and shall make any order proper for the protection, of a purchaser in good faith or other interested person.

23. Duty of Court—Subject to section 21 of this Act, so far as is practicable, a Court shall make orders that will end the financial relationships between the de facto partners and avoid further proceedings between them.

The clean break principle is promoted but made subject to the on-going parental relationship of the parties and the future needs of the children. Cf Domestic Relationships Act 1994 (ACT), s 14; De Facto Relationships Act 1984 (NSW), s 19.

24. Proceedings to held in private—Any proceeding under this Act shall be held in private.

Of mandatory application.

25. Mediation—A Court may refer all or any of the matters in dispute in proceedings before it to a mediator.

Cf. Domestic Relationships Act 1994 (ACT), s 8. The details of this provision would need to be explored, especially the appointment of appropriate mediators, issues of confidentiality, payment and the binding effect or otherwise of any agreement reached.

26. Evidence—(1) In all proceedings under this Act the Court may receive any evidence that it thinks fit, whether it is otherwise admissible in a Court of law or not.

(2) The Court may appoint the Registrar of the Court, or such other person as the Court thinks fit, to make an inquiry into the matters of fact in issue between the parties, and to report thereon to the Court.

Cf. Matrimonial Property Act 1976, ss 36 and 38. An inquisitorial approach is adopted to give greater power to the Court to gather and hear all relevant evidence.

27. Restriction of publication—(1) No person shall publish any report of proceedings under this Act except with the leave of the Court which heard the proceedings.

(2) Nothing in this section shall apply to the publication of any report in any publication that—

(a) Is of a bona fide or technical nature; and

(b) Is intended for circulation among members of the legal profession.

Cf. Matrimonial Property Act 1976, s 35A. Invokes the principle of privacy of the parties.

VI CONCLUSIONS

The issue of de facto property rights has been considered in this paper and the need for legislative intervention established. Existing legal remedies are inadequate both in their scope and in their ability to give proper recognition to direct and indirect non-financial contributions to the property of the relationship and to the relationship itself.

A call for legislative reform is a plea for state action. This action is in the interests of the state. Legislation would bring regulation into line with moral, social and legislative changes. These alterations have resulted in changes in the type of family unit that is recognised and this in turn means that de facto property rights can be more readily asserted. Increasing numbers of cohabiting couples, a shift in moral values, the changing emphasis on the functional family and the rise in importance of the place of children in society and within the family also lend support to calls for reform. Society would benefit by having de facto property issues resolved in a fairer and cheaper way than they are at present.

Having examined the need for reform, the next logical step was to examine any barriers to the enactment of de facto property rights legislation. New Zealand has obligations to promote human rights as set out in several United Nations documents as well as in domestic legislation such as the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. The proposed De Facto Property Rights Bill would promote these rights without encroaching on other rights, such as the right to marry. The human rights movement is indicative of a widening and more inclusive definition of family. This has resulted in de facto relationships becoming more likely to be supported as viable alternatives to marriage. Perhaps less socially accepted, although again supported by human rights law, are same sex marriages.

The issue of how "marriage-like" a de facto relationship could and should be has received attention and has also been the focus of other commentators who have discussed whether to treat marriage and de facto relationships as equivalent states. A comparison of de facto relationships with marriage is both inevitable and useful,

but as the conclusion of this paper is to promote a statute that deals only with de facto relationships, and in doing so keep them distinct from marriage for the purpose of the resolution of property issues, the real issue is comparative as opposed to assessing equivalency. This paper has not sought a definition of de facto relationship that would render it the same as marriage, rather it seeks to consider whether the similarities that exist between marriage and de facto relationships mean that similar property division law should apply. The point of comparison has been to justify both the need for intervention and for a kind of intervention based on principles similar to marriage, for example, on a presumption of equal sharing of communal property. The historical development of marriage demonstrates a movement once again to a position of increasing similarity between marriage and de facto relationships, and a De Facto Property Rights Bill could be viewed as the removal of yet another difference between them.

The private nature a de facto relationships and their fluidity present problems of definition. However, these are not insurmountable from the point of view of defining a de facto relationship within a legislative scheme. The approach to definition in this paper has been to create a definition drawn from New Zealand and Australian legislation which allows for an amount of judicial discretion within certain statutory guidelines and parameters. There is an element of caution in limiting the definition of de facto relationship in a way that aligns it with marriage. It is perceived that a statute that extends the notion of marriage would gain acceptance more readily than a statute that provided more radical challenges to it. It is for this reason that only relationships in the nature of marriage are included within the proposed statutory definition. Extension of this concept to same sex marriages is supported by the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 and by the remedial focus of the proposed legislative change. It is considered that this point alone would create a significant amount of debate within the community and within Parliament, and that any further extensions, such as those involving domestic relationships or multi-party relationships would increase the debate to counter-productive levels.

Having worked through and established a need for reform and looked at some of the possible barriers to its implementation, the natural progression is to a legislative proposal. The proposed scheme is influenced by New Zealand's matrimonial property legislation, which contains many commendable features, and by overseas legislation, particularly that found in various Australian states. The aim was to bring together the best features of a number of systems, in order to best achieve the remedial focus. The proposal provides a detailed outline of the possible shape of legislative reform.

State regulation of de facto property rights appears to have the support of the community, members of the legislature and members of the judiciary. The time for transforming that support into an Act of Parliament has arrived.

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