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**DOMESTIC VIOLENCE AND MATRIMONIAL  
PROPERTY: DOES THE LAW MEET THE  
PROPERTY NEEDS OF VICTIMS OF DOMESTIC  
VIOLENCE.**

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*The text of this paper (excluding contents page, footnotes, bibliography and annexes) comprises approximately 14,503 words.*

## ABSTRACT

*The law relating to domestic violence is largely concentrated on protecting the victim. However victims of domestic violence also have important property needs. This paper is an analysis of those needs and the laws which deal with domestic violence and matrimonial property. Its purpose is to determine whether the law effectively meets the immediate, short term and long term needs of those victims*

*The Domestic Violence Act and the Matrimonial Property Act 1976 both have the potential to meet the immediate and short term needs through occupation and tenancy orders, if the tests are applied with a full understanding of the nature of the abusive relationship. The Law However fails to meet the long term property needs of victims. It lacks in the flexibility to enable the victim to obtain an unequal share of domestic matrimonial property, and fails to recognise the affect of abuse on contributions and the need that such abuse creates. This paper argues that to meet these long term needs, the law needs to be flexible and able to consider the need created by the abuse, without judging the actions that caused that need.*

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## I INTRODUCTION

Domestic violence has become an endemic problem in New Zealand society. One way or another we all may be affected, whether as members of the community who bears the cost, or as victims.

The law dealing with domestic violence has improved dramatically in recent years with the changes in public attitude, the increased response of the police to domestic situations and most importantly, the introduction of the Domestic Violence Act 1995.

The ability of the law to effectively protect victims of domestic violence has been increased by the widened scope of the Act. The court can now grant comprehensive orders to protect the victim from violence and molestation.

Domestic violence has mental, physical and emotional cost for the victim, in the long and short term. These have been acknowledged and addressed by the Domestic Violence Act; However domestic violence also creates property needs for its victims, which have not been so well addressed by the law.

The purpose of this paper is to understand what those needs are and to look at the availability and effectiveness of the options for meeting those needs. In part II of my paper I have attempted to outline the main issues surrounding domestic violence, to enable the reader to fully understand the affect which it has upon its victims. In part III I outline the property needs that arise from an abusive relationship. The need for protection cannot be separated from the need for safe accommodation. The law needs to address both these needs or it will not be effective in meeting either one. In part IV I analyse the immediate need for safe accommodation. The law grants the court the ability to make *ex parte* orders, (orders without notice to the other party) granting the victim occupation of property. Part IV examines the way in which the court applies the tests for these orders and the problems associated with those tests and their temporary nature.

Occupation and tenancy orders can be made under both the Domestic Violence Act and the Matrimonial Property Act, and potentially provide a longer term solution to property needs. I look at the criteria for these orders and their respective merits and faults in part V, identifying that the law is alternately too strict in its application, or allows too much discretion, which has the potential to cause injustice if not used in conjunction with a full understanding of domestic violence.

In my paper I argue that although the law has the potential to meet the immediate and short term needs if utilised properly, the provisions available for dealing with long term needs are inadequate. Part VI highlights the avenues available under the Matrimonial Property Act for providing for the property needs of victims. Victims of abuse do not fit comfortably into any exception to the presumption of equal sharing, neither is it appropriate for them to participate in mediation, for reasons which I outline in section VI. I conclude my paper by addressing some possible solutions to this problem.

Domestic Violence is an all reaching problem and I acknowledge that its range of victims is far reaching. People of all ages, ethnicity and gender are affected. However statistics show that victims are predominantly women and so it is on this assumption that I have based my paper. I have also limited the scope of my paper to addressing the issues for married couples. However, the Domestic Violence Act, is not limited to married couples, therefore the implications of the Domestic Violence Act extend to *de facto* couples.

## II THE NATURE OF DOMESTIC ABUSE

It is necessary to understand the nature and effect of domestic abuse before you are able to fully identify and understand the needs of victims of domestic abuse. Domestic abuse is not limited to specific acts of abuse, but has a ongoing effect



on the way that the parties to the marriage relate to each other, and the different needs of those parties. Furthermore, it is necessary to analyse the effect that property laws have in meeting those needs.

Domestic abuse has been hidden within the private realm of society for many years, but as the doors are being opened on this disease which plagues society, a greater understanding of the causes and the nature of the abuse has enabled society and the law to better understand the best ways in which it can respond to and deal with the problem.

### *A Defining the Term*

Domestic abuse is a very subjective term. What is considered to fall within its definition will be determined by the extent of the understanding of the nature of domestic abuse. A narrow definition will serve to limit the application of any assistance and recognition that the law provides.

In this paper domestic abuse means the same as defined in section 3(2) of the Domestic Violence Act 1995 (DVA)

(2) In this section "violence" means —

- (a) Physical abuse:
- (b) Sexual abuse:
- (c) Psychological Abuse, including, but not limited to,
  - (i) Intimidation:
  - (ii) Harassment:
  - (iii) Damage to Property:
  - (iv) Threats of physical abuse, sexual abuse, or psychological abuse.

Understanding the context in which abuse occurs is crucial to defining the problem. It covers a wide range of behaviours which may hurt the abused person physically, emotionally and spiritually. Abuse can come in many different

patterns, from occasional explosions of brutality to continuous, degrading put-downs.<sup>1</sup>

There is no one physical act, no single type of batterer, or no characteristic of a victim which can fully define domestic violence. Consequently, domestic violence is best defined as that combination of factors and behaviours by which a batterer forces an intimate partner to "live with a constant sense of danger and expectation of violence."<sup>2</sup>

### **B**     *Understanding the Concept*

It has long been a misconception that domestic abuse is about physical violence caused by a loss of self-control. The causes of domestic abuse have recently been the subject of investigation in an effort to understand and deal with the prevalence of domestic abuse in New Zealand. These studies have shown that the public generally still considers domestic abuse to be about anger and loss of control. There is an underlying reason for the violence, and it is the need of the abuser to have power and control. As a result it has been identified that abuse is not just about acts of violence, but is about the relationship as a whole and the way that the abuser relates to his partner.

The Power and Control Wheel is one of the simplest methods of understanding the extent and nature of domestic abuse. (refer figure 1)<sup>3</sup>

This model describes the tactics most commonly used by men against women in a relationship. Each component can be considered separately, however the reality is that these tactics are used in combination, an abuser will use any combination necessary to get the required control.

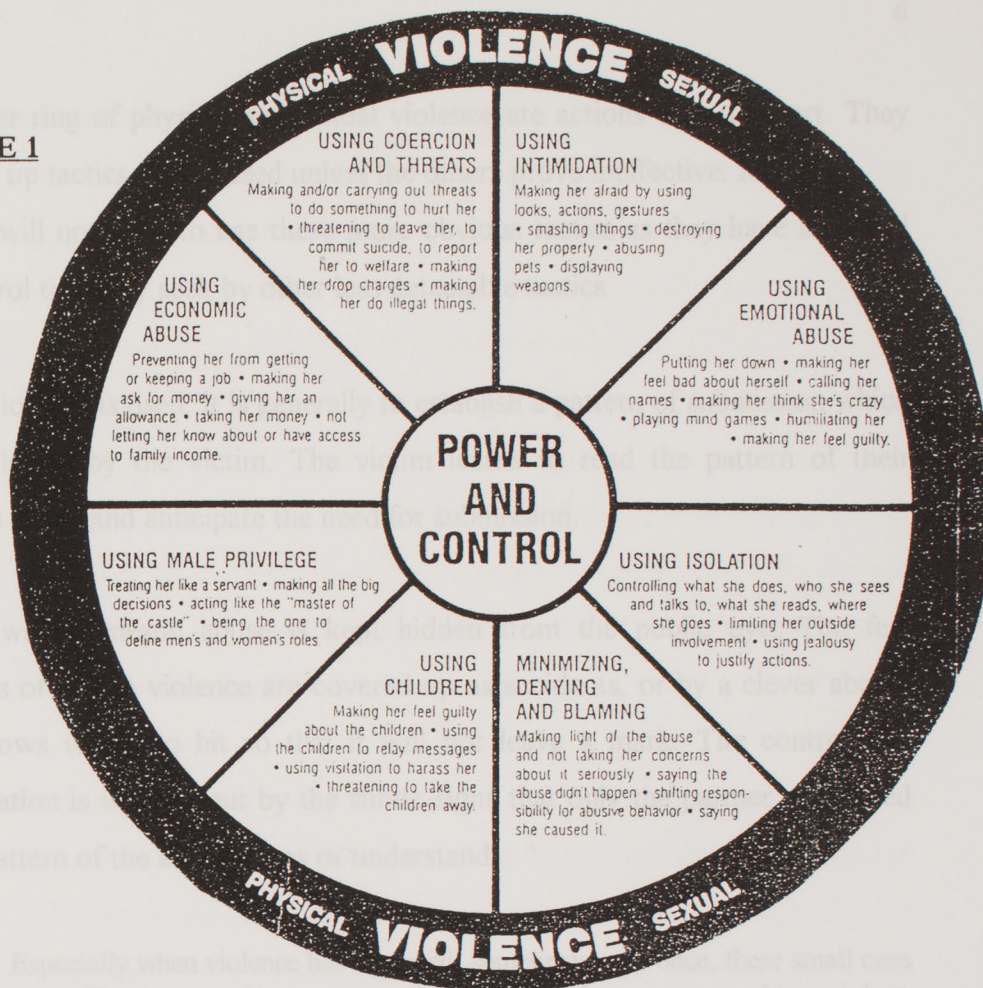
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<sup>1</sup> J Leibrich, J Paulin and R Ransom. *Hitting Home: Men Speak About Abuse of Women Partners*. (Department of Justice 1995) 28.

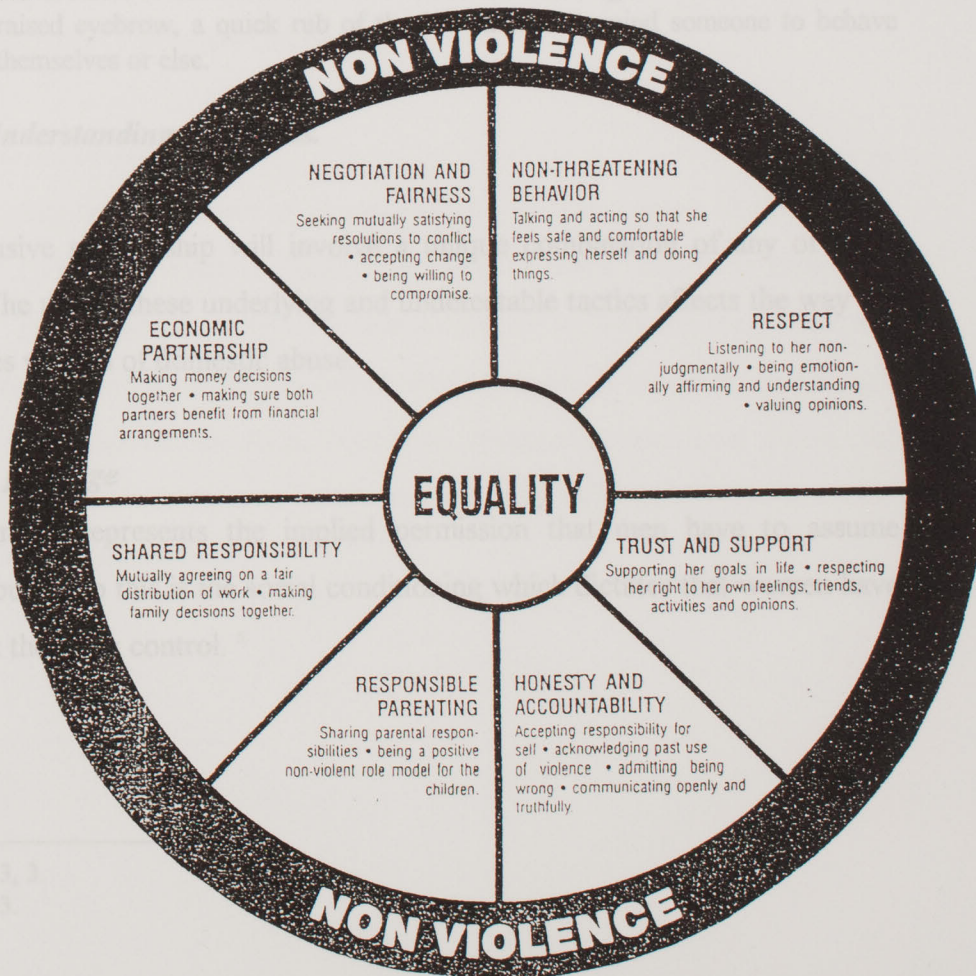
<sup>2</sup> R Valente; "Addressing Domestic Violence: The Role of the Family Law Practitioner." (1995) 29 Number 2 FLQ 187, 188.

<sup>3</sup> G Barnes, S Flemming, J Johnston and S Toone *Domestic Violence* (New Zealand Law Society Seminar 1993) 5. I have also included the Equality Wheel (figure 2) as a comparison of the elements of a healthy, non-abusive relationship.

**FIGURE 1**



**FIGURE 2**



The outer ring of physical and sexual violence are actions of last resort. They are back up tactics, rarely used unless the others prove ineffective. Most abusers will not have to use these more obvious tactics as they have achieved the control that they seek by other less detectable tactics.

Where violence is used, it is generally to establish a pattern of submission which is then learnt by the victim. The victim learns to read the pattern of their partner's abuse and anticipate the need for submission.

In this way domestic abuse is kept hidden from the public eye. The few instances of visible violence are covered up as accidents, or by a clever abuser who knows where to hit so that it will not leave a mark. The control and manipulation is worked out by the subtle signs that only the partner, sensitised to the pattern of the abuser, sees or understands: <sup>4</sup>

Especially when violence has occurred, sometimes only once, these small cues are sufficient to send a very powerful message. Many men are seldom violent, but are able to use that rare time as an overwhelming reinforcer. Therefore a raised eyebrow, a quick rub of the left ear, can remind someone to behave themselves or else.

### **1 *Understanding the tactics.***

Each abusive relationship will involve a unique combination of any of these tactics. The use of these underlying and undetectable tactics affects the way the law serves victims of domestic abuse.

#### **(a) *Male privilege***

This segment represents the implied permission that men have to assume control, built into this is the social conditioning which dictates that women have to accept the mans control. <sup>5</sup>

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<sup>4</sup> Above n 3, 3.

<sup>5</sup> Above n 3.

**(b) Economic abuse**

Abusive men use their control over the money to keep their partner financially dependant upon them. As a result, their partner is unable or unwilling to leave the only financial security that she knows of for her children. For a large number of women the financial cost of leaving is considered to be too high.<sup>6</sup>

**(c) Isolation****c) Coercion and threats**

Threats generally relate to what will happen if the victim leaves the abuser, or does not do as he wants. This means that it is simpler and often safer for the woman to stay in the relationship with a danger she knows and can predict, rather than face the uncertain ramifications of leaving.<sup>7</sup>

**(d) Intimidation.**

This is often the most subtle of the tactics. The abuser will clean a weapon in front of his partner or will use height or size to make his partner feel defenceless. It may even extend to breaking things which are precious to his partner. All these tactics serve to remind the victim who is in charge, and to keep the victim in a defensive mode.<sup>8</sup>

**(e) Using Children****(e) Emotional abuse**

This is a very common form of abuse, and is generally related to the victim's sexuality. To attack the sexuality of the victim is to attack their "very essence of being".<sup>9</sup> The abuser does this to enable himself to dehumanise his partner thereby treating her as an object rather than a person. It serves to destroy the self-esteem of the victim. After continual, systematic, emotional abuse, the victim will lose all confidence in her abilities, and will begin to believe what they abuser says about her.<sup>10</sup>

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<sup>6</sup> Above n 3.

<sup>7</sup> Above n 3.

<sup>8</sup> Above n 3.

<sup>9</sup> Above n 3, 6.

<sup>10</sup> Above n 3.

The most harmful aspect of emotional abuse in a domestic setting is that intimate partners know which areas are the most sensitive and vulnerable areas to attack. As a result, the scars created by emotional abuse are often the deepest, and the longest lasting.<sup>11</sup>

**(f) Isolation**

Isolation is designed to keep the victim away from any support mechanisms that she may have, and to place the focus on the needs and desires of her partner. The isolation from social contact also increases the victim's dependence on the abuser, and leaves her less able to leave her partner and face the difficulties of that situation without support.<sup>12</sup>

**(g) Minimising, denying and blaming**

Few abusers look honestly at the affects of their abuse and their responsibility for it. They place the responsibility and the need to change on others. The abuser will minimise the extent or the seriousness of his actions to avoid any guilt, and will cause the victim to feel that their own feelings are not valid.<sup>13</sup>

**(h) Using Children**

Abusers use the welfare of the children as a tool to ensure that their partner stays with them, they will often challenge for custody, even if they do not want to look after the children, in order to maintain control over their partner. Joint custody, access and visitation rights enable the abuser to continue his harassment of his partner well after the relationship is over.<sup>14</sup>

The control that the abuser exerts over his partner has many facets, and the law must be careful to consider the underlying cause of domestic abuse and the ways in which it is worked out when dealing with issues relating to that relationship. It is not enough to simply protect a victim from physical abuse if

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<sup>11</sup> Above n 3.

<sup>12</sup> Above n 3.

<sup>13</sup> Above n 3.

<sup>14</sup> Above n 3.

the law does not also address the whole realm of abuse which the victim has suffered, and attempt to protect the victim from a continuation of the abuser's desire for control, or it will only have dealt with part of the problem.

## 2 *The victims perspective*

A recent study into the attitudes of men to domestic abuse<sup>15</sup> shows that there is a prevalent attitude that women are at least partly to blame for the abuse that they suffer. This view is representative of the attitudes of society in general. As a consequence, victims of abuse often feel that they are not going to be believed, that the behaviour of their abuser is not being condemned. They feel that the law, which in their eyes is represented by the white middle class judiciary, is not going to assist them in meeting their needs. This belief, although it may not be true, has been supported in the past by the actions of the courts. This perceived attitude is epitomised by one Australian judge, who on receiving an application for a protection order against a husband who threatened his wife with a gun, said:<sup>16</sup>

I don't believe anything that you are saying. The reason I don't believe you is because I don't believe that anything like this would happen to me. If I was you, and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you.

The victim's perspective is also affected by the fact that she comes into contact with the legal system at the most dangerous time in the relationship. Abuse is a very strong reason for a victim to leave the relationship, however, competing against these considerations of safety, are the issues of financial dependence of the victim and her children upon the abuser, lack of confidence and self esteem due to continued emotional and psychological abuse, and the victim is generally well aware of the physical danger of leaving her partner. Homicide statistics show that when a woman is threatening to leave, or is actually leaving an

<sup>15</sup> Above n 1.

<sup>16</sup> R Graycar "The Relevance of Violence in Family Law Decision Making." (1995) 9 AJFL 58, 61.

abusive partner is the most dangerous time for victims.<sup>17</sup> Separation is often devastating for abusive men, as they fear losing their control over their partner, and as a result "the marital relationship has been identified as potentially the most lethal in society."<sup>18</sup>

### C Statistics

Statistics about domestic abuse help to put the extent of the problem into perspective. National indicators about the prevalence of domestic abuse point to a major social problem:

- Between 1978 and 1987, 47% of the 193 female homicide victims were killed by an existing or former male partner; there was a history of abuse in 56% of these cases.
- In 1990 under the Domestic Protection Act, the Family courts received 3,393 applications for final non-molestation orders; and 2,409 applications for final non-violence orders; these figures do not include interim orders which would approximately quadruple the number of the non-molestation orders made, and treble the number of non-violence orders.<sup>19</sup>
- In 1991, 461 women were hospitalised for assault; it is estimated that more than one third of these cases were attributable to domestic abuse.
- In 1992 there were 1,902 reported offences of common assault (domestic).
- In 1992, the Police attended 21,093 domestic disputes.

<sup>17</sup> Women are most commonly killed by their abusive partners during or shortly after separation.

<sup>18</sup> D Chappell and H Strang "Domestic Violence - Findings and Recommendations of the National Committee on Violence" *Journal of Family Law* 211, 214.

<sup>19</sup> When the court grants a non-molestation order upon application, the order is an interim one. Orders do not become final until the court has heard any arguments against the order being made final. Recent statistics in the "Women's Safety Survey (Victimisation Survey Committee, Wellington, 1997), show that a large number of applicants for interim non-molestation orders do not apply for the order to be made final, or the order is dismissed upon application from the respondent. Therefore the number of orders that are granted on first application is not reflected in the number of orders which are made final. Another reason for this is that a large number of applications for non-molestation and protection orders are made on an *ex parte* basis. Orders granted on an *ex parte* basis are temporary until the respondents case is heard. Only a small percentage of those orders sought and granted are actually made final by the courts.



- In 1992, breaches of non-molestation orders had risen to 1,066 from 675 in 1987.
- In 1992 5,148 women were admitted to women's refuges and a further 6,638 women sought other kinds of support and assistance from women's refuges.
- In March 1994, following the screening of "Not Just a Domestic" on national television, 1,309 people phoned the help-line for advice most speaking of their problem for the first time.
- Estimates for the annual economic costs of family violence in New Zealand range from \$1.189 billion to \$5.3 billion; these estimates use a broad-based definition including both physical and psychological abuse and defined "family" in an extended way.<sup>20</sup>

### III IDENTIFYING THE NEEDS

In the face of the statistics and the dangers associated with a victim of domestic abuse leaving her partner the law needs to comprehensively protect those women from the abuse from which they are attempting to escape. Furthermore the law needs to enable victims of domestic abuse to feel that they can leave their relationship, that the law will support them and enable them to be freed from the control of their abusive partners. In order to do this the law needs to begin by identifying and understanding what their needs are.

The introduction of the Domestic Violence Act in 1995 has significantly improved the protective measures available to victims of a wide range of abuse. However the laws relating to property play a large role in determining whether victims can be effectively freed from the abuse that they have suffered. Women coming from abusive relationships have many emotional and psychological needs which need to be addressed, they also have the very practical and real needs of safe and adequate accommodation for them and their children, and the

<sup>20</sup> Above n 1, 31.

financial security to be independent of their partner. A major reason why women stay with abusive partners is because they are financially dependent. It is therefore vitally important that the law enables them to be as independent and separated from their abusive partner as is possible in the circumstances: <sup>21</sup>

One of the principal problems facing a party to the breakdown of a family relationship is accommodation. Who is to occupy the dwelling house where the family resided may become a crucial question between the parties. The need for [immediate] accommodation tends to be even greater for a victim of domestic violence.

Studies into the effects of separation and divorce on the living standards of the respective partners of a relationship have shown that the wife's living standard drops dramatically after separation or divorce, especially where they also have custody of the children. The Working Group on Matrimonial Property and Family Protection<sup>22</sup> found that the basis of equality underpinning the Matrimonial Property Act 1976 may lead to a lack of equity between the parties. The presumption of the 50/50 split in matrimonial property has failed to create equal living standards.<sup>23</sup>

There are two main reasons for this:

- a) The domestic role played by the majority of women within the marriage relationship, has led to a reduced earning capacity. This is caused by the long absence from the workforce, and the sacrifice of career opportunities.
- b) Women are most commonly the custodial parent. This results in a three-fold fall in living standards.

(i) Custody often creates an obligation of full time child care. This means that women are either unable to obtain work, or the income is insufficient to support the family.

<sup>21</sup> Butterworths Family Law Service Commentary, Number 29, para 7.630.

<sup>22</sup> The Working Group on Matrimonial Property and Family Protection 1988

<sup>23</sup> Above n 22, 4.

(ii) The proceeds of a half share of the matrimonial home and other matrimonial property are generally not sufficient to purchase other suitable accommodation for the mother and children. Her level of income is generally insufficient to obtain a mortgage, therefore the mother is forced to live in rental accommodation, generally of a much lower standard than the matrimonial home.

(iii) The need to live in rental accommodation means that the capital gained from the equal division is consumed, leaving the mother less capable of obtaining permanent housing.<sup>24</sup>

The property needs that arise when a victim leaves an abusive relationship can be categorised into three groups: immediate needs, short term needs and long term needs

#### IV IMMEDIATE NEEDS

As discussed before, separation is a time of danger for victims, therefore the law needs to have provisions to protect and provide for these women immediately, in such a way as to ensure that they are not endangered any further. It does this by means of *ex parte* orders (orders without notice to the other party).

The immediate need is for safe accommodation. In order to achieve this the victim will often need to utilise the whole range of *ex parte* orders; protection orders, occupation or tenancy orders and furniture orders. These orders are all available under the DVA.

<sup>24</sup> Above n 22, 5

### A *Ex parte Occupation Orders*

s60(1) An occupation order may be granted on an *ex parte* application, only if the court is satisfied that:

- (a) The respondent has physically or sexually abused the applicant or a child of the applicant's family; and
- (b) The delay that would be caused by proceedings on notice would or might expose the applicant or a child of the applicant's family to physical or sexual abuse.

s60(3) of the DVA also stipulates that an application for an *ex parte* occupation or tenancy order may only be granted if the court makes a protection order at the same time, unless the court considers that there are special reasons for not making the protection order.

When an occupation order is granted on an *ex parte* application, the applicant is granted an interim order until either the respondent is heard, or the court makes the order final.

Under section 76 of the DVA the respondent is entitled to notify the court that he wishes to be heard regarding whether a final order should be made. The Act also establishes procedures for making final any orders made on an *ex parte* application, including the power to require that the order not be made final without a hearing involving representation of both the parties. If the respondent does not wish to challenge the order being made final, then the order will become final by operation of law after 3 months.<sup>25</sup>

*Ex parte* orders do not require that the applicant show proof of the alleged abuse, there is a presumption that the applicant's claim is substantiated. This enables the court to be able to protect the safety of the applicant.<sup>26</sup> If the

<sup>25</sup> Refer to s 60(2) of the Domestic Violence Act 1995.

<sup>26</sup> S Edwards and A Halpern *The Progress Towards Protection* (1992) NLJ 798.

applicant is being truthful about the violence and the risk of further harm, and the court does not believe her and therefore does not grant the order, then there is the risk that the law will fail in its role of protector. The need to grant the order 'just in case' is reinforced by the fact that a violent spouse is extremely likely to abuse his partner when he learns of her attempt to leave him and remove herself and any children from his control.

This presumption is justified by the fact that *ex parte* orders are only temporary, if the allegations prove groundless then the order will be removed as soon as the respondent's case has been heard. In the interim the law must err on the side of caution lest it allow a tragedy to occur.

### **B Ex parte Tenancy Orders**

The criteria for *ex parte* tenancy orders are the same criteria used to grant an *ex parte* occupation order.<sup>27</sup> however the property to which the order may be applied and the effect of the order differ greatly.

Under the DVA the property which is subject to occupation and tenancy orders has been extended to include all property in which the parties have a legal interest. Occupation orders apply to all dwelling houses<sup>28</sup> which either party owns or has a legal interest in at the time of the order. Occupation orders may not be made on property where the parties only have a beneficial interest.<sup>29</sup>

Tenancy orders apply to any dwelling house of which at the time that the order is made the other party to the proceedings is -

- (a) Sole tenant; or
- (b) A tenant holding jointly, Or in common, with the applicant.

<sup>27</sup> I have outlined the criteria for *ex parte* occupations orders above.

<sup>28</sup> Defined in s2 of the DVA; Dwelling house includes -

- (a) Any flat or town house, whether or not occupied pursuant to a licence to occupy within the meaning of section 121A of the land Transfer Act 1952;
- (b) Any mobile home, caravan or other means of shelter placed or erected upon any land and intended for occupation on that land.

<sup>29</sup> See *Wells v The Family Court* [1995] NZFLR 149.

If a tenancy order is granted, then it is taken to also apply to any furniture and other household effects which are let with the property and the land and buildings included in the tenancy.<sup>30</sup>

When a tenancy order is granted it has the effect of making the applicant the sole tenant subject to all the normal conditions of a tenancy.<sup>31</sup> It allows the occupant to exclude all others from the property including the respondent but does not affect the rights of third parties in the property.<sup>32</sup>

### C *Ex parte Protection Orders*

s13(1) A Protection order may be made on an application without notice, if the court is satisfied that the delay that would be caused by proceedings on notice would or might entail -

(a) A risk of harm; or

(b) Undue Hardship -

to the applicant or a child of the applicant's family, or both.

(2) ...the court must have regard to -

(a) the perception of the applicant or a child of the applicant's family, or both, of the nature and seriousness of the respondent's behaviour; and

(b) the effect of that behaviour on the applicant or a child of the applicant's family, or both.

As is reflected in the presumption that an occupation or tenancy order will not be granted without a protection order, the need for 'safe' accommodation cannot be fully met with just an occupation order.<sup>33</sup> The law must also emphasise that the respondent is to have nothing to do with the applicant, and that the law has found the applicant is in need of protection from the actions of the respondent.

<sup>30</sup> Refer to s 56(2) DVA.

<sup>31</sup> A tenancy which is subject to a tenancy order can be terminated and affected just as with a normal tenancy the rights of land lord and tenant do not change in respect of their relationship to each other.

<sup>32</sup> *Fisher on Matrimonial Property* (3ed, Butterworths, Wellington, 1996.) para. 7.639.

<sup>33</sup> Butterworths Paragraph 7.632.

### D *Problems with Ex parte Orders*

The court in *Q v Q*<sup>34</sup> held that the test for *ex parte* orders is a 'rigorous test.'<sup>35</sup> The court held that the fact that the applicant was able to go to the presumptive safety of a refuge, until an application could be brought on notice, meant that she did not satisfy the test. The delay occasioned by a hearing on notice would therefore not expose her or her children to risk as she had an alternative housing arrangement.

While the development of refuges and safe houses is a great development in the protection and assistance of victims of domestic abuse, and the role that they play is to be applauded, there is a danger that the court may see their existence as an easy alternative to having to deal with the needs of victims to be provided with safe and adequate accommodation while they work their way through the process of leaving their abusive partner.

The dispossession of a person on the basis of unproved allegations is a very serious matter and should not be a step that is lightly entered into, however the accommodation provided by grossly under funded agencies such as women's refuge is far from adequate for the needs of a family.<sup>36</sup>

Another problem that has been identified in relation to *ex parte* orders is the length of time that it takes for the respondent to be heard. When the interim order is made on the basis of what are sometimes unsubstantiated allegations,<sup>37</sup> this can cause undue hardship for the respondent, dispossessed and stigmatised for an unacceptably long period of time.

<sup>34</sup> *Q v Q* [1994] 12 FRNZ 46.

<sup>35</sup> Above n 34, 51.

<sup>36</sup> Refuge safe houses comprise of a house with 5-6 room in which 5-6 people live. They are obliged to live in cramped and far from private conditions, and to deal with all the stresses and strains that this places on the family, at a time of great upheaval and emotional turmoil.

<sup>37</sup> It is not clear how often this occurs. However the differentiation between the number of interim orders granted and those made final may give an indication that

## *E* Conclusions *The Matrimonial Property Act 1976*

The law has put into practice comprehensive measures to provide for the immediate protection of victims of domestic abuse. However, if the court follows theory in *Q v Q*<sup>38</sup> and holds that a woman is not in need if she can go to the safety of a refuge, then when will a woman ever qualify for an *ex parte* occupation order. The court needs to carefully balance the right of the respondent not to be unreasonably disadvantaged with a reasonable judgment of when the alternatives open to a woman are adequate.<sup>39</sup> I would submit that the availability of a shelter should not be sufficient to exclude a woman from an *ex parte* order as it is not reasonable to expect a woman and children to live in those conditions for anything other than an emergency situation.

## **V SHORT TERM NEEDS** *parts of the matrimonial property*

Not all relationships involving domestic abuse will require that the application for occupation or tenancy orders be made *ex parte*, nor will *ex parte* applications always be granted. For those women, the need for immediate accommodation and safety is replaced by a concern for their needs in the short term.

The need for safe and adequate accommodation is the same, however the criteria and issues associated with property orders gained on notice, are vastly different.

<sup>38</sup> Above n 34.

<sup>39</sup> This is a very difficult balance to strike. I would submit that the availability of a refuge is only a valid alternative where the court can guarantee that the issue will be heard within a short period of time and that there is actually a refuge place available for that period of time. Alternatively if this is not available for that period of time then the presumption needs to be in the applicants favour with a hearing of the respondents case at an early opportunity.



## A Orders Under the Matrimonial Property Act 1976

Orders for occupation and tenancy can be granted under both the Domestic Violence Act (DVA) and the Matrimonial Property Act (MPA). Of these two, the MPA is both the least restrictive and the most discretionary.

### 1 Criteria.

The criteria for granting an occupation order are outlined in section 27.

The court may make an order granting to the husband of the wife, for such period or periods and on such terms and subject to such conditions as the court thinks fit, the right personally to occupy the matrimonial home or any other premises forming part of the matrimonial property.<sup>40</sup>

This extremely broad power must be read subject to section 25(2):<sup>41</sup>

The court shall not make an order pursuant to subsection (1) of this section unless it is satisfied that:

- (a) The husband and wife are living apart (whether or not they have continued to live in the same residence) or are separated; or
- (b) the Marriage of the husband and the wife has been dissolved; or
- (c) One spouse by gross mismanagement or by wilful or reckless dissipation of Property or earnings, is endangering the matrimonial property or seriously diminishing its value; or
- (d) the husband or the wife is an undischarged bankrupt.

Section 25 determines when the court can make an order under the Act. In *Stocker*,<sup>42</sup> Stacey J held that there is no jurisdiction to make an occupation order without the parties being separated or living apart. Section 25(3) allows

<sup>40</sup> s27(1) Matrimonial Property Act 1976.

<sup>41</sup> *Stocker v Stocker* (1978) 1 MPC 200.

<sup>42</sup> Above n 41.

that court to make an order relating to specific property where it considers it just to do so, without the parties being separated. However the court *Richards v Richards*<sup>43</sup> held that such an order should not be made without reference to the general property rights, and should not be made where there is no indication of the general property matters being resolved.

Section 28A completes the list of criteria by requiring that the decision-maker "have particular regard to the need to provide a home for any minor dependent child of the marriage and may also have regard to all other relevant circumstances." The presence of violence in the relationship could therefore be considered as a relevant circumstance establishing whether to grant the order in the applicants favour.

## 2 *Effect of the order.*

The effect of an occupation order is to grant the recipient the right to exclusive occupation of the matrimonial property. This means to the exclusion of the other partner of the marriage. The provisions only apply to the parts of the property that are used for domestic use, and not for business, this specifically applies to farm property. The court also has the power under s27 to place whatever terms and conditions it sees fit upon the order. Occupation orders are generally temporary in nature, although they can be extended to cover the schooling of all the children's secondary schooling, making them of a significant length.

An occupation order can also act as a form of secured maintenance, providing continued support for one partner at the cost of the other.<sup>44</sup>

Section 46 of the Matrimonial Property Act ensures that the rights of mortgages

<sup>43</sup> *Richards v Richards* (1982) 1 NZFLR 243.

<sup>44</sup> Above n 32. The ability of the wife to occupy the matrimonial home to the exclusion of the husband means that the applicant gains the monetary benefit of not being required to pay for rental accommodation. This acts as a substitute for payments of maintenance, and is considered to be secured as the applicant has the security of the home rather than payments which are often difficult to obtain.

are not affected by occupation or tenancy orders. Section 46 states that:

the rights conferred on the husband or the wife by any order made under this Act shall be subject to the rights of the persons entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property in respect of which the order is made if it was registered before the order was registered or if the rights of that person arise under an instrument executed before the date of the making of the order.

Therefore an occupation or tenancy order will not detrimentally affect the right of an interest holder.

The Act also addresses the potential problem of mortgage holders calling up the mortgage on the basis of the order. The Act stipulates that an interest cannot be called up solely on the basis of the order being made. This ensures that the order remains effective.

### **3. Problems.**

The criteria are generally thought to limit the application of such orders to couples who have been legally married and are separated or divorced. This provision is therefore of little use to a victim in an existing abusive relationship, she does not receive any assistance in leaving her abusive partner. Fear of his reaction to the separation will encourage her to remain with her partner rather than take the risk of what his reaction may be.

The concept of secured maintenance also goes against the principal of allowing the parties a 'clean break', which is integral to the MPA. The certainty and finality created by the equal sharing presumption under the MPA has been applauded as it enables the parties to achieve a clean break from each other. Occupation orders go against this concept by preventing the sale of the matrimonial home for a period of time. This has the effect of continuing the connection of the parties through their interest in the matrimonial home. This problem is one of finality. The case for a clean break, which can be said to be stronger in situations of domestic abuse as the victim needs to be able to completely separate herself from the control of her partner. However until the

issue of shares in the property is finally resolved the accommodation order overcomes the need for a clean break

I will discuss the problems common to both Acts in section 4.

### **B Orders Under the Domestic Violence Act 1995**<sup>45</sup>

The purpose and scope of the MPA and the DVA differ greatly, and while the court has been granted power under both statutes the purpose and criteria for each diverge.

#### **1 Purpose of the Act.**

The long title of the Act states that it is "An Act to provide greater protection from domestic violence." In contrast to the MPA it is not designed to deal with the division of property after separation. Its purpose is to protect.

Occupation orders are granted to provide the victim and any dependent children of the family with safe accommodation. The most efficient way the court can fulfil these joint needs, is to allow the victim to remain in occupation of the matrimonial home. This is generally the only realistic accommodation alternative for the victim and any children.

#### **2. Criteria**

The test for granting an occupation order consists of a two stages:

S21(1) On hearing an application for an occupation order, the court may, make an order granting to the applicant, for such period or

<sup>45</sup> The cases I will refer to are based upon the Domestic Protection Act 1982 which has now been repealed. The wording of the relevant sections has remained the same and so the arguments and tests arising from these cases is still relevant to the Domestic Violence Act. Where cases on the Domestic Violence Act have been decided those have been used.

periods, and on such terms and subject to such conditions as the court thinks fit, the right personally to occupy the household residence or any other premises forming part of the household residence.

S21(2) The court may make an order under subsection (1) of this section only if the court is satisfied that such an order-

- (a) Is necessary for the protection of the applicant; or
- (b) Is in the best interests of a child of the family

**(a) The meaning of "necessary for the protection of".**

The meaning of this phrase has been carefully considered and defined in case law. Judge Inglis, defined 'protection' in a series of three cases, *Mantell v Mantell*,<sup>46</sup> *Woodley v Harding*<sup>47</sup> and *Beswick v Beswick*<sup>48</sup>. He found that the term protection had a wide and liberal interpretation.

*Mantell v Mantell*<sup>49</sup> involved no molestation, harassment, or physical violence. It required the court to decide:<sup>50</sup>

whether an occupation order could be made in favour of a wife who needed protection not from the husband but from a situation of intolerable stress that had developed in the home [He] interpreted the words in s 21(2)(a) 'is necessary for the protection of the applicant', as including protection from avoidable emotional or mental harm arising simply from disintegration of the marriage. The need for protection need not necessarily be related to acts or conduct of the respondent: it can also be related to the applicant's response to the situation created by the applicant's and the respondent's relationship.

This very broad interpretation has been confirmed in further case law. The court has gone on to find that 'protection' covers, stress that causes bodily harm, stating that "unkindness and insensitivity aimed at a spouse can be just as, if not more damaging to health than physical blows."<sup>51</sup> *Beswick*<sup>52</sup> confirmed that protection included the situation rather than the conduct of the other party,

<sup>46</sup> *Mantell v Mantell* (Unreported, Family Court, Lower Hutt, 13 November 1984, FP 032/194/84).

<sup>47</sup> *Woodley v Harding* (1984) 3 NZFLR 234.

<sup>48</sup> *Beswick v Beswick* (1984) 3 NZFLR 289.

<sup>49</sup> Above n46.

<sup>50</sup> *Beauchamp v Beauchamp* (1985) 3 NZFLR 516, 521.

<sup>51</sup> *Smith v Smith* (1992) 9 FRNZ 605, 605.

<sup>52</sup> Above n 48.

*Woodley v Harding*<sup>53</sup> confirmed that the respondent's response to the situation was enough to satisfy the criteria, and in *Beauchamp v Beauchamp*<sup>54</sup> Judge Bisphan extended the interpretation to include protection from homelessness and financial hardship.

The apparently unlimited interpretation of "protection" has found some limits within the case law. Although Judge Bisphan, found that homelessness and financial hardship were covered, he stated that although the categories of protection are perhaps never closed, that:<sup>55</sup>

there must however exist a discernible and indeed provable state or condition from which the applicant ought to be protected. The state or condition must arise in the context of the domestic situation. The making of the order must be warranted in light of the state or condition from which protection is sought. A desire by the applicant to end a failing relationship by having the respondent removed from the home where there is no violence, molestation or other compelling reason is not enough.

**(b) *Best Interests of a Child of the Family.***

The "best interests" standard is common in family law, and can be found in many of the key statutes.<sup>56</sup> The discretionary nature of this part of the criteria, means that the scope is extremely wide, it allows for a very wide range of factors to be taken into account.

As a general rule, this criterion will be satisfied where there is no good alternative accommodation available for the children. This is commonly satisfied in the situation of domestic violence as the nature of the relationship is one of control. The victim is generally not able to support herself financially as a result of the impact of the abuse and control. However this will generally apply only where the applicant has been made to leave the matrimonial home by the

<sup>53</sup> Above n 47.

<sup>54</sup> Above n 50.

<sup>55</sup> Above n 50, 522.

<sup>56</sup> The best interests of the child must be considered when making orders under the Matrimonial Property Act 1976, and the Guardianship Act.

conduct of the abusive partner or the situation. It will not be open to applicants who choose to leave the matrimonial home for their own ease and comfort.

The scope appears to be limitless, however it is now accepted that it must relate to their physical, emotional and psychological welfare, their stability and their accommodation needs.<sup>57</sup> However it is not appropriate to apply a legalistic and restrictive interpretation where the best interests of children are at stake."<sup>58</sup>

### *(c) Overriding Discretion.*

Once all the criteria have been fulfilled, the court still has an overriding discretion as to whether they will grant the occupation order.<sup>59</sup>

In determining whether to make the order, the court must consider all the relevant circumstances, and make an order that is just and fair, to both the applicant and the respondent.

A number of factors, other than the protection of the applicant or the best interests of the child, may be relevant, including health and age of the parties, the personal connection to the property, the importance of the home to the occupation of one of the parties, the financial consequences of the decision on all the parties, the parties conduct and the nature and duration of the relationship between the parties.<sup>60</sup> It is also important that the court looks not at the ideals but at the realities of the situation.

### *3. Effect of the order.*

While the legal effect of an occupation order under the DVA is essentially the same as under the MPA there are also many other personal effects on the applicant, respondent, the children of the family, and their relationship.

<sup>57</sup> Above n 50. This phrase however is not restricted to the effects of violence, molestation or domestic disharmony on the children.

<sup>58</sup> Above n 50, 522.

<sup>59</sup> S21 Domestic Protection Act 1982.

<sup>60</sup> Above n 21, 7640.

- The ability to exclude the abusive partner from the home can create a feeling of safety and security for the applicant and the children.
- Maintains a settled environment for any children of the family as they are able to remain in their home and attend the same school and remain in the same familiar surroundings.
- The order overturns the right to consortium, which exists between married couples.<sup>61</sup>
- The court recognises the need to use this power to prevent people from using their own bad conduct to force their partners to leave the home at the disintegration of the relationship. Guest J, supports this, "I also think that where one spouse has been dispossessed as a result of violence, then the court ought to be quick to protect that person against what might appear to be might being right."<sup>62</sup>
- An occupation order is not a permanent solution to the problem of security, it has been described as both a 'Band-Aid' and a 'stop gap measure'.<sup>63</sup> It will need to be finalised and will always be subject to variation and removal upon application. I will discuss this in more detail later.
- Granting of an occupation order also has negative consequences for the applicant, specifically in the context of domestic violence. An occupation order only grants the right to exclusive possession. The victim of the violence is not allowed to rent or lease the property, and must live in it or the order will be removed. This can create hardship in finding sufficient income to maintain the property, especially any mortgage on the property. It is also a problem in that most victims do not want to remain in the home where they have been abused. It can be detrimental to their emotional and psychological welfare.
- Occupation of the family home may also prove to undermine one of the purposes for which it was made, the protection of the applicant and any

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<sup>61</sup> The right of consortium has been addressed in *Dawson v Dawson* (1984) 3 NZFLR 353. The right of consortium relates to the rights of married couples to the companionship and society. It also includes the right to live together in the matrimonial home.

<sup>62</sup> *Wood v Campbell* (1988) 4 NZFLR 533, 535.

<sup>63</sup> Refer *Wood v Campbell* (1988) 4 NZFLR 533; *Beauchamp v Beauchamp* (1985) 3 NZFLR 516.



children. If the violent partner is dispossessed, he is likely to be resentful of the order. This will compound any possible feelings of anger, uncertainty and resentment over the separation and loss of control over his partner. In this situation the abuser will know the whereabouts of his partner, and have an intimate knowledge of the layout and security of the property. The risk of danger to the abused partner in this kind of situation is great.

- As with the MPA the DVA also provides protection for the rights of mortgagees and other interest holders. Section 75 ensures that if the interest was obtained before the order was made that the occupation or tenancy order does not affect that interest, other than stipulating that the interest holder may not call up the interest on the basis of the order.

#### 4 *Problems under the Domestic Violence Act.*

On consideration of the provision in the DPA it becomes clear that there are some general problems that need to be addressed if the act is going to satisfy the need of victims of domestic violence.

- a) The court has the power to place whatever terms and conditions it thinks fit upon the recipient of the occupation order. These conditions can quite often be seen to be totally arbitrary.

In *Redward v Redward*<sup>64</sup> the court held that it could vary the occupation granted to the wife, and as a result they excluded her friend from entering the property. The court found that the husband's extreme jealousy and anger over his wife's friend, was not in the best interests of the children and so ordered that the friend be excluded to protect the children.

In so doing, the court aided the husband in his continued control over his wife, and rewarded his extreme and violent behaviour. I do not disagree that the situation was unhealthy for the children, however I believe that this was not an appropriate means of dealing with the situation.

<sup>64</sup> *Redward v Redward* (1987) 2 FRNZ 456.

In *Dawson v Dawson*<sup>65</sup> the court granted an occupation, and ordered that the applicant attend counselling<sup>66</sup> and suggested that this was a suitable case for mediation<sup>67</sup>. There are a vast number of issues and problems associated with mediation and joint counselling in the presence of domestic violence, especially mandatory participation. The main issue that needs to be understood here, is that in a relationship of domestic violence, the underlying problem is not that the abuser cannot control his temper, it is that the abuser feels the need to control his partner, and does this through using violence to gain submission. Therefore mediation and counselling not only create a situation of risk and discomfort by forcing the victim to have contact with her abusive partner, there are also serious questions as to the possible effectiveness of these sessions. If the mediation and counselling is not effective then there is no benefit to outweigh the detriment to the victim.

Under the DVA section 31 states that parties shall not be compelled to attend programme sessions where the other is present. Programmes as defined in section 2 of the DVA are those which have the objective of protecting the victim, or stopping or preventing the abuser from being violent. Counselling sessions involving both the parties would fall within these criteria. Whether this section and its implications apply to mediation will be discussed in part VI.

The continuance of an occupation order is revisable if the recipient changes the victims living position. Meaning that she is unable to build a new life, while continuing in the minimal security that the order does provide.

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<sup>65</sup> *Dawson v Dawson* (1985) 3 NZFLR 353.

<sup>66</sup> Section 10 of the Family Proceedings Act states that upon application for a separation order the registrar shall arrange for counselling. Sub section (2)(b) allows a Family Court Judge to give a direction that the parties do not have to attend counselling on the ground that the respondent has used violence against, or used bodily harm to the applicant or child of the marriage or has threatened to do so. This does not mean that the court cannot order counselling, but there is an indication that counselling in the presence of violence is not advisable.

<sup>67</sup> I will deal with the implications of Mediation in the presence of domestic abuse in detail in part VI.

This power to vary and place conditions is also compounded by the temporary nature of the remedy. It may fulfil a temporary need for accommodation but it does not allow the victim to rebuild her life.

The discretionary nature of the order has caused injustice for both the applicant and the respondent. The courts have in my opinion extended the criteria of protection too far. To dispossess one partner is a drastic move, to do so through no fault of their own on the basis that their partner feels extremely stressed by the breakdown of the relationship, can lead to injustice for the respondent.

Injustice has also been created for the applicant. The discretion has led to inconsistency and uncertainty in the application of the law. However this need for certainty and consistency needs to be balanced with enough flexibility to deal with each individual situation. The Act clearly spells out what orders are available. This means that the Act may prove difficult to apply in some situations.

The final problem with the property orders under the DVA is that they do not take precedence over other orders. A DVA order can be over ridden by an order for sale under the MPA.<sup>68</sup> It can also be subject to an order for sale under section 140 of the Property Law Act, in the case of *de facto* marriages.<sup>69</sup>

### *C Changes made by the Domestic Violence Act.*

The introduction of the Domestic Violence Act 1995 (DVA) solved some of the problems which existed under the Domestic Protection Act. There have been some major changes in the purpose and object of the Act, and in the way that the provisions operate.

<sup>68</sup> Above n 21, para 7.632.

<sup>69</sup> Above n 21, para 7.632. The DVA applies to all domestic relationships as defined within the Act including De facto marriages.

Some of the more important changes include:

- Increasing the application of occupation orders to cover all dwelling houses in which either party has a legal interest.<sup>70</sup>
- The act has extended the people to whom the act applies. It now includes domestic relationships, which are not in the nature of marriage.<sup>71</sup>
- The act has been extended to protect children of the applicants, rather than children of the family, which required that they had been part of the family relationship.<sup>72</sup>
- The court must now have regard to the reasonable accommodation needs of all the parties. This has helped alleviate some of the injustice suffered by respondents. For example under the 1982 Act the court orders could have been made against a husband who did not have a job and would have difficulty finding an accommodation for himself, where as his partner, although deserving of the occupation order, was capable of finding and paying for suitable alternative accommodation without the need for the matrimonial home.
- The grounds for *ex parte* applications have been extended to include sexual abuse as defined in the Act as well as physical violence.<sup>73</sup>
- The joining of non-violence and non-molestation orders into protection orders has aided the flexibility of the Act, enabling orders to provide for all the protection needs within the scope and application of one order.

These changes have dealt with many of the problems which arose under the Domestic Protection Act and has been a good development in the law. However there are problems with existed in the DPA which have not been remedied under the DVA. I will deal with these in my conclusion.

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<sup>70</sup> Refer to s 2, DVA.

<sup>71</sup> The Act now covers all parties who are in a domestic relationship. This includes all family relationships, such as siblings and parent/child relationships, flatmates and other domestic relationships. The Act does not allow orders to be made against children though, unless they are married. Refer Section 2, DVA.

<sup>72</sup> Refer s 53 DVA.

<sup>73</sup> Refer s 4, DVA.

**D Tenancy Orders Under the Matrimonial Property Act 1976.**

As with *Ex parte* occupation orders the criteria for occupation and tenancy orders are essentially the same.

**E Furniture Orders**

Orders allowing the possession of furniture and other household items are available under both the DVA and the MPA.

s28B The court may make an order granting to the person in whose favour the order is or has been made the use, for such period, and on such terms, and subject to such conditions as the court thinks fit, of all or any of the household furniture or household appliances, effects, or equipment in the matrimonial home or other premises to which the order made under section 27(1) of this Act relates or in the dwelling house to which the order made under section 28(1) of this Act relates.<sup>74</sup>

This section allows the court a wide discretion to grant a furniture order, and it will generally do so when an occupation or tenancy order is granted.

The DVA allows broadly the same discretion for making furniture orders, however this power is divided between ancillary furniture orders<sup>75</sup> and furniture orders.<sup>76</sup>

The court may grant an ancillary furniture order with the occupation or tenancy order only if it is satisfied that both the applicant and the respondent lived together in the dwelling house; or that a child of the applicant's is or will be living in the specified dwelling house.

<sup>74</sup> Refer to s 28B of the Matrimonial Property Act 1976.

<sup>75</sup> Refer to s 63 of the DVA.

<sup>76</sup> Refer to s 66 of the DVA.

Furniture orders under section 66 are not related to an occupation or tenancy order, but are dependant upon the court granting a protection order. A furniture order expires along with the protection, occupation or tenancy order which it is attached to.

Furniture orders affect furniture, household appliances, and household effects. Personal items are not included. Any furniture which is subject to the order is able to be traced to a third party and the rights of the applicant apply to furniture that has been removed since the application was made. The order is subject to the rights of a third party and does not make those rights invalid.<sup>77</sup>

#### *F Conclusions*

The law is still not fully meeting the need for safe and secure accommodation. Occupation orders are only a temporary measure and are subject to a number of restrictions, the most unsettling of which is the ability of the court to place what ever terms and conditions on the order that it thinks fit. This has been seen to include a variation to exclude the occupant from having certain visitors,<sup>78</sup> and orders for mandatory counselling.<sup>79</sup> It also extends to placing conditions as to who is responsible for the payment of the mortgage and household expenses, conditions as to certain pieces of property that are still open tot he respondent, the length of the order and the conditions upon which it can be terminated, such as remarriage, formation of a de facto marriage and the children finishing their education. The occupant may even have to account to her partner for the use of his share of the property.<sup>80</sup> The need for complete safety not just physically but also to feel protected, is still not being achieved and therefore the Act is failing to provide the greater protection it was designed to do. The DVA does provide a much needed temporary solution to the

<sup>77</sup> This means that if there is a hire purchase agreement on the property or some other security that the right is not affected by the order. Above n 21, para 7.644.

<sup>78</sup> Above n 64.

<sup>79</sup> Above n 65.

<sup>80</sup> Above n 32, para 7.643.

problem of accommodation in a lot of cases, but there needs to be an increased awareness of the temporary and limited nature of the provisions. An occupation order under the DVA cannot provide any lasting security.

This really can only be addressed by allowing victims the ability to begin their lives afresh, and to be certain that they are free from the control of their abusive partner.

## VI LONG TERM NEEDS

Victims of abusive relationships need to develop a full understanding of what their long term needs will be, and the extent and effectiveness of their options in meeting those needs.

Occupation and tenancy orders are still not a long term solution for victims of domestic abuse, even when they are made final. It is important that victims are able to separate themselves from the control of their abusive partner, and this cannot be achieved by occupying a house which he has a legal interest in. Victims need to be able to be financially independent, both in where they live and in their means of support. The only way for the victims to achieve this is to either obtain a job which provides a sufficient income to begin again, (for the reasons shown in part II this is not generally a viable option) or, use the property existing in the marriage to develop a new start, with settled accommodation and total independence from their abusive partner.

In part II I outlined the findings on the poverty often suffered by women upon separation. It has become clear over the years that an equal division of the matrimonial property will generally not be sufficient to enable the victim to become financially independent. In order for the law to assist victims of abuse to become financially independent, it needs to provide for a departure from the presumption of equal sharing.

Married couples have several alternatives open to them in deciding how to divide the matrimonial property, I will deal with each of them in turn.

## *A Litigation under the Matrimonial Property Act 1976*

### *1 The Equal Sharing Presumption*

The 1976 Act was a step forward in recognising that the performance of household tasks and the care of children, were of an equal value to financial contributions to the marriage partnership. Both parties were presumed to have contributed equally to the marriage, and therefore should share equally in all acquired property. Any departure from that presumption could only be done according to the specific exceptions provided within the Act.<sup>81</sup>

### *2 Marriages of Short Duration*

Section 13 of the MPA allows for the equal sharing presumption to be displaced, in relation to the matrimonial home and family chattels, when the marriage has been of a short duration. 'Short duration' is defined in section 13(3) as being where the spouses have lived together for a period of less than three years.

This provision allows for property bought to the marriage wholly or substantially by one party, or inherited during the marriage, to be removed from the application of equal sharing. It also allows for consideration of the contributions of the spouses, if the contribution of one, has been disproportionately greater than the other spouse. This is one possible way in which victims of abusive relationships may be able to get a greater share of the property.

<sup>81</sup> Above n 32.



Where the marriage has been short in length, then the application of this section is straight forward. Furthermore the section extends to cover situations where the marriage has been for a longer period of time, but the couple can be considered not to have been living together, either because they have not been cohabiting, or because the nature of the relationship is so broken down that they are not considered to be living in a marriage-like relationship. The court has the discretion under section 13(3) to allow longer relationships if it considers it just to do so.<sup>82</sup>

Upon finding that there are grounds for a departure from equal sharing, the division of property will be divided according to contribution to the marriage partnership.

### 3 *Extraordinary Circumstances*

The second exception to the equal sharing presumption is where there are extraordinary circumstances that in the opinion of the court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 applies.<sup>83</sup>

There has been much debate as to what constitutes extraordinary circumstances,<sup>84</sup> the Court in *Martin v Martin*<sup>85</sup> considered these approaches, and concluded that you could not take any of the concepts in isolation of the others, but rather had to consider what they meant when read together.

<sup>82</sup> Above n 32.

<sup>83</sup> Refer to s 14 MPA. Section 11 regulates the division of the matrimonial home and the family chattels.

<sup>84</sup> The second school of thought can be seen in *Beven v Beven* (1977) 2 MPC 23. White J thought: that the words "extraordinary" and "repugnant" were simply intended to show that the exception would arise when it is seen that "the new general rule of equal sharing would be clearly unjust"...In my opinion, the section cannot be interpreted as meaning that something less than justice will be tolerated but simply that the onus rests on the spouse who asserts to demonstrate that the general rule of equal sharing would be unjust in the particular case because of extraordinary circumstances. The focus here is on the concept of justice rather than "extraordinary" or "repugnant".

<sup>85</sup> *Martin v Martin* [1979] 1 NZLR 97.

Woodhouse J said that:<sup>86</sup>

If the Legislative intention had been no more than to define a simple situation "where circumstances make the equal sharing between the spouses unjust", then those very words could have been used. Instead the circumstances must be so "extraordinary" that they would "render repugnant to justice" an application of the general rule in favour of equality.

The case law has not yet addresses the issue of whether violence or other abuse within a relationship can constitute 'extraordinary circumstances. There have however been extreme cases involving the murder of the children of the family where the court has been called upon to decide if the situation fulfils the criterion.

In *MacKenzie v MacKenzie*<sup>87</sup> the husband applied under section 14 to have the proceeds of the matrimonial home divided on the basis of contribution due to the extraordinary circumstances of the case. In this case the wife, who was mentally ill, murdered the children of the marriage in the home.

The court looked at the extent to which the event had affected the value of the matrimonial home, and whether that effect warranted a departure from equal sharing.

The court found that the events which had transpired within the home had considerably affected the value of the house, as any real estate agent would be obliged to disclose to all prospective buyers the events which had taken place, decreasing the potential value of the property. Judge Bisphan said "I do no doubt that for one moment that the killing of these three children by the wife is an extraordinary circumstance" and agreed with counsel for the husband who stated that, "If the circumstances of this case did not constitute "extraordinary circumstances" in terms of s 14 the section could have no application"

<sup>86</sup> Above n 85, 102.

<sup>87</sup> *MacKenzie v MacKenzie* (1984) 3 NZFLR 79.

In *Money v Money*<sup>88</sup> the father threw the children of the marriage off the Auckland Harbour Bridge, then jumped himself. The husband was rescued but the children died. The wife, relying on the decision in *Mackenzie*,<sup>89</sup> applied for a departure from equal sharing under section 14. In this case the court found that the fact that the murder had been committed away from the home, meant that the extent of the affect on the value of the home, was not sufficient to render the extraordinary circumstances repugnant to justice.

These two cases, therefore, clearly states the law in this area. Even in such an extreme situation as the murder of the children of a marriage, the court will not allow departure from equal sharing unless there has been a significant effect upon the value of the property.

Therefore in the case of abuse in a marriage relationship, the abuse would need to be both extraordinary and have an effect upon the value of the matrimonial property, to meet the requirements of s 14.

Fisher<sup>90</sup> identifies another possible argument for victims of abuse under s14. The case of *I v I*<sup>91</sup> the wife had entered into an adulterous relationship not long after the marriage had begun. The court held that her action had the effect of dooming the relationship. Where these actions were added to disparate financial contributions between the parties, the court held that the circumstances were enough to constitute extraordinary circumstances which rendered equal sharing repugnant to justice.

I would therefore submit that if the facts were to be changed so that the action was not an adulterous relationship but rather abuse within the marriage which began at an early stage of the marriage, that this should also be considered to have doomed the relationship. If there are also disparate contributions then it

<sup>88</sup> *Money v Money* [1992] NZFLR 289.

<sup>89</sup> Above n 87.

<sup>90</sup> Above n 32.

<sup>91</sup> *I v I* [1995] NZFLR 276.

should be sufficient to satisfy section 14.

There has been a lack of clarity within the case law as to whether the circumstances have to be extraordinary in both nature and kind.<sup>92</sup> I would argue that the legislature could not have meant to exclude situations where the circumstances themselves were of a common nature, but were of such a degree as to make them extraordinary even in their commonness. For example; a situation where one partner overspends the family budget on unnecessary impulse buying, would seem to be a reasonably common scenario in New Zealand society. However, most people would not hesitate to consider it "extraordinary", if that partner was to spend money to such a degree as to place the family in extreme debt, unable to pay for the ordinary necessities of life. If this is correct then could domestic abuse fulfil the requirements of being an extraordinary circumstance?

Statistics<sup>93</sup> show that domestic abuse in New Zealand society is prevalent, and therefore cannot be considered to be extraordinary in itself. However, it is unclear whether certain cases, of an extreme degree, may be able to satisfy the requirements. For example, take a situation where the abusive partner has been excessively abusive, both physically and emotionally. As a result, his partner is permanently disfigured and unable to work. She is psychologically scarred and has developed a fear of all men, believing that they all wish to hurt and control her. His behaviour is extraordinary in the context of the marriage partnership, and the effect that his actions have had on her are extreme. Surely here, the long term harm that she has suffered would make it repugnant to justice to divide the matrimonial property equally. The law is not clear in this area as to what will constitute a reason to depart from equal sharing, the discretion given to the

<sup>92</sup> *Martin v Martin* (Above n 85) illustrates this confusion. Woodhouse J clearly states that the phrase refers to circumstances that must not only be remarkable in degree but also be unusual in kind. In comparison Richardson J found that "the entire range of possible circumstances is open

for consideration. Circumstances may be extraordinary in kind or degree.

<sup>93</sup> A Morris *Women's Safety Survey 1996* (Victimisation Survey Committee, Wellington, 1997).

court means that it is possible that given the right situation, domestic abuse could be considered to be an extraordinary circumstance.

However this is not helpful to the large number of women who suffer abuse at the hands of their partner, but not to the necessary degree. For those few victims who manage to fall into either of these two exceptions,<sup>94</sup> the effect is not to grant them a greater share but simply to change the method of division from equal sharing to contribution based division.<sup>95</sup>

#### 4 *Contribution Based Division*

Section 18 of the MPA defines what can be considered to be a contribution under the Act. The possible contributions and their equal status reflects the purpose of the Act, to recognise the value of all contributions to the marriage partnership, rather than just financial contributions to the property of the marriage. These contributions encompass the care of children, acquisition and creation of matrimonial property, the provision of money and the giving of assistance or support to the other spouse. This measure of contributions is used to determine the respective entitlements to balance matrimonial property<sup>96</sup> and the matrimonial home and family chattels, if an exception to the equal sharing rule is satisfied.

It is possible that under this form of division an abused spouse may be worse off than she would have been had she received half of the matrimonial property. If the husband contributed a large majority of the property to the marriage at its inception, and he has kept her at home away from the work force, the court is likely to view their contributions as uneven and award him a larger share of the matrimonial property.

<sup>94</sup> Parties can also depart from equal sharing under the Act by making a section 21 agreement to contract out of the Act.

<sup>95</sup> As I will discuss in the next section, contribution based division is not necessarily beneficial, as the victim may have, for various reasons, made a very modest contribution to the matrimonial property.

<sup>96</sup> Defined in sections 11 and 15 of the Matrimonial Property Act 1976.

The Matrimonial Property Act does not allow considerations of misconduct of the respective partners when deciding how they have contributed to the marriage relationship. This is due to the existence of "No Fault" divorce.

**(a) History of no fault divorce**

The right to a divorce used to be based upon the fault of the respondent and the innocence of the applicant. No fault divorce has been available since the 1920's and has changed the focus from a law based on the view that marriage is a contract between the parties to the marriage under no fault, to the concept of a marriage partnership in the 1976 Act. If one of the parties to the contract breached the terms of that contract, then the innocent party was able to cancel the contract and receive compensation. Women received this compensation in the form of maintenance.<sup>97</sup>

**(b) The current law**

The necessity for fault is removed from the 1976 Act and divorce can now be obtained on the grounds of that the marriage has broken down irreconcilably.<sup>98</sup> To be granted a dissolution under section 39 the applicant will generally have obtained a separation order under section 22. Section 22 requires that there be such a state of disharmony between the parties to the marriage of such a nature that it is unreasonable to require the parties to continue, or, as the case may be, resume cohabitation with each other.

There is a presumption of equal sharing for balance property<sup>99</sup> as well as domestic property<sup>100</sup> unless there has been:

- a) Unequal contributions as assessed under s 18,
- b) Separate property sustained or diminished by the other spouse, or

<sup>97</sup> J Behrens " Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse."(1993) 7 AJFL 9.

<sup>98</sup> Refer to s 39 of the Family Proceedings Act 1980.

<sup>99</sup> Balance property is all matrimonial property that is not the matrimonial home or family chattels as defined within the Act.

<sup>100</sup> Domestic Property is the matrimonial home and any family chattels as defined in the Act.

c) Personal debts that have been satisfied by domestic property.<sup>101</sup>

With the concept of a no fault divorce, also came the removal of any consideration of misconduct, except where it has direct relevance to the property. Section 18(3) outlines the very limited circumstances in which misconduct can be considered.

The court may, -

- (a) In determining the contributions of a spouse to the marriage partnership; or
- (b) In determining what order it should make under any of the provisions of sections 26, 27, 28, and 33 of this act, -

Take into account any misconduct of a spouse that has been gross and palpable and has significantly affected the extent or value of the matrimonial property; but shall not otherwise take any misconduct of a spouse into account, whether to diminish or detract from the positive contribution of that spouse or otherwise howsoever.

In order to be able to consider the misconduct of an abusive partner it is therefore necessary to find a way to link the misconduct to the property. Victims of domestic abuse will generally not be able to show that they have contributed significantly more to the marriage partnership without making reference to the abuse of their other partner.

It is possible that the victim may be able to show that the abuse within the relationship had a significant effect on the property that they were able to acquire, and the value of that property. If the abuser has refused to let his partner work, then he will have deliberately limited the potential income and assets of couple. Also if he has been physically violent, then he has probably broken furniture and other household items, generally of value to his partner, diminishing the extent of her separate property.

<sup>101</sup> Above n 32.

There are two way to consider contributions. The subjective approach allows the court to consider what each party would have contributed had they been able to. Each party is expected to contribute to the best of their ability. If that ability is reduced by circumstances such as illness or an inability to get paid employment, then that is taken into consideration and does not count against them, so long as they have contributed to the best of their ability.<sup>102</sup> Juliet Behrens'<sup>103</sup> argues that the law should apply the subjective approach as it allows for the affect which domestic violence has had upon the victim's ability to contribute. The court can look at the affect of the abuse and determine whether in the circumstances, the victim has contributed to the best of her ability.

The objective approach looks at the contribution in relation to the benefit that it has had for the marriage relationship. It makes no allowance for the individual's limitations. I would suggest that this can create injustice in a situation of domestic abuse, as the actions of the abuser may have affected the extent to which the victim can contribute, and he is then rewarded for that.

**(c) Negative contributions**

Juliet Behrens',<sup>104</sup> criticises the effect that no fault divorce had had on the consideration of misconduct and specifically the effect that it has had on the assistance available for victims of domestic abuse. In relation to contributions, she poses the idea that the abusive behaviour of the husband should be considered to be a negative contribution. In the Family Law Act,<sup>105</sup> contributions are considered to be towards the welfare of the family, rather than the marriage partnership as it is in New Zealand, so it is easy to see how abusive behaviour has a negative impact upon the family. Behrens suggests that the law is being biased in what it chooses to consider. She gives the example of the court looking not only at the fact that the woman does the household tasks but

<sup>102</sup> Above n 32.

<sup>103</sup> Above n 97.

<sup>104</sup> Above n 64.

<sup>105</sup> Refer to section 79 of the Family Law Act of Australia.



also at the standard to which she does them, if the standard is low then it is likely to cause a reduction of her contribution. The court in New Zealand is able to take into account negative as well as positive contributions to the marriage partnership. The return which each partner receives from the marriage should be in proportion to the contribution that they have made. A spouses consumption of Matrimonial property and income is relevant for consideration as is the negative contribution of bad house keeping or excessive laziness, as in comparison the other spouses contribution assumes greater potency.<sup>106</sup>

In line with this theory, it could also be argued that the court should look at the effect that the actions of the abusive partner have on the victim's ability to contribute to the marriage partnership, making a woman's contribution in the home more difficult, must have economic consequences. It would seem unjust to allow the husband to benefit from the detrimental affect that he has had on his wife's contribution. The wording of the Act however would seem to preclude any considerations of this nature. Section 18(3) clearly states that the court "shall not otherwise take any misconduct of a spouse into account, whether to diminish or detract from the positive contribution of that spouse." Therefore the court cannot consider the effects of misconduct unless it satisfies the four elements of section 18(3):

- a) It must be Gross and palpable,
- b) It must affect the extent or value of the property,
- c) The effect must be significant, and
- d) The misconduct must occur before separation.<sup>107</sup>

Another consideration is whether this section precludes the court from considering the misconduct of one spouse, in order to increase the contribution of the other spouse.<sup>108</sup> For example the court may wish to look on the wife's household tasks in a more favourable light once they are able to understand the

<sup>106</sup> Above n 32, Paragraph 12.47.

<sup>107</sup> Above n 32, Para 13.7.

<sup>108</sup> Above n 97.

adverse situation in which this contribution was performed.<sup>109</sup> I would conclude however, that the court would possibly look on this as detracting from the positive contribution of the abusive spouse.

I would suggest that the move from fault to no fault divorce has seen the development of too rigorous an exclusion of considerations of misconduct. As the law stands, victims of domestic violence are going to have difficulty in establishing that they are entitled to a greater share of the matrimonial property, (presuming that the matrimonial home and family chattels is exempt from equal sharing) unless they can establish that the abuse has affected the extent and value of the property. Division on the basis of contribution may also serve to give them a lower entitlement than they would have received under equal sharing.

The 1963 Act allowed more flexibility to consider the impact of misconduct and enable the court to find that misconduct amounted to a failure to measure up to ordinary responsibilities and detracted for their contribution. Case law under the 1963 Act showed that misconduct needed flexibility to be dealt with thoroughly. This is lacking in the 1976 Act.<sup>110</sup>

## 5 Problems

There are several problems inherent in allowing domestic abuse to be considered when dividing property. Firstly there is a very real concern that if the court was to allow domestic abuse to be considered, it would open the flood gates to other concepts of fault, taking the law back to a contract analysis of marriage. There is also the concern that false allegations would be made in an effort to obtain a larger share of the matrimonial property.

<sup>109</sup> In *Williams v Williams* [1980] 1 NZLR 532. The court looked at the husband's contribution in the light of his wife's alcoholism and awarded him a larger share of the property on the basis that his contribution received increased recognition for the situation in which it was performed.

<sup>110</sup> Above n 32, para. 13.8.

The court seems to be reluctant to become involved in the private sphere of family life,<sup>111</sup> and where the misconduct has had no impact upon the property in question, the court claims that it is not its role to be dictating what is appropriate matrimonial conduct, and should not stray into passing moral judgment.<sup>112</sup>

## 6 *Conclusions and Recommendations*

Applications under the MPA do not allow for any consideration of domestic abuse. What options there are available under the Act for obtaining anything other than an equal division, substitute equal division for division based upon contribution, which I have shown is not likely to benefit victims of domestic abuse in gaining a greater share of the property.

In its present form the legislation fails to provide for the long term needs of victims. They are not able to rely upon the domestic abuse to obtain the larger share of property that they need to be independent of their abusive partner. One possible solution to this problem can be found in the Family Law Act in Australia. Australian matrimonial property law divides property on the basis of two considerations, contributions to the welfare of the family, and needs arising from the marriage. I have already discussed the issues relating to contribution, however, it is possible that domestic abuse could be taken into account under a needs based division.

The effects of domestic violence on women are insidious and long-term. They include dire physical injuries, or can be less easily identifiable physical and psychological injuries, including damage to self-esteem and independence. These effects have inevitable economic consequences.<sup>113</sup>

<sup>111</sup> L Bradford "The Counterrevolution: A Critique of Recent Proposals to reform no-fault Divorce Laws." (1997) 49 SLR 607.

<sup>112</sup> Above n 111.

<sup>113</sup> Above n 97, 17.

Property division based on the needs arising out of the marriage, overcomes some of the problems of admitting concepts of fault. It is the existence of the need, not the cause for that need, that is at issue here. In this system a victim of abuse will not be compensated for the actions of her partner, but will instead have her needs met through being granted a sufficient share of the available resources to satisfy them.<sup>114</sup>

There must be a balancing act between the needs of the victim and her abusive partner, but it does allow for some recognition of the victim's needs which have arisen from the abusive nature of the marriage.

It must be acknowledged that a needs based division must also apply to the needs of the abusive partner. This means that in some situations the balance of needs will not benefit the victim. This echoes the DVA which requires the court to take into consideration the accommodation needs of all the parties when granting a property order. This is necessary to preserve overall justice. There are potential problems with the application of this system, including how the court determines what is a legitimate need and which needs should take precedence over others. For the purpose of this paper I am simply highlighting that the theory of needs based division is potentially more effective at meeting the long term needs of victims of domestic abuse than the present law in New Zealand.

The effectiveness of this measure will be dependant upon the judiciary and counsel for victims of abuse being aware of what needs victims have, and the fact that they have arisen from the abuse, such as a lessened capacity to work, physical injuries which may prevent work, or emotional harm which causes the victim to relate badly to men in the work place.

Once again this remedy would only be available if the applicant was able to show that she had a genuine need for a larger share of the property, This is just,

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<sup>114</sup> Above n 64.

as the victim will always be able to show a need for safe and adequate accommodation, and a need for financial independence from her partner. If she does not have these needs, then it is right that she not be granted any additional assistance.

## **B Mediation**

Mediation has sprung up in recent years as a popular form of alternative dispute resolution. In family law cases, the non-confrontational, relaxed atmosphere of mediation has been found to be highly conducive to reaching binding agreements where the parties own the agreement, and therefore are happier with the result and more likely to abide by it.

Couples are frequently turning to the mediation and counselling service provided by the Family Court to attempt to solve their property and custody disputes before they resort to litigation, however, while Mediation has many good features it is not always going to be a suitable option. In this paper I will not attempt to deal with even the main issues surrounding Mediation, I will simply look at the issues which arise when partners to an abusive relationship come to mediation.

### **1 Is mediation a suitable alternative?**

When a couple come to mediation to resolve a dispute, the presence of domestic abuse in the relationship is problematic for two reasons:

- 1) There is a risk that the abuse will continue at the session; and
- 2) The effect that the violence has had on the relationship and the way that the parties relate to each other will affect the outcome of the mediation.<sup>115</sup>

Mediation aims to promote mutuality and equality in negotiation through

<sup>115</sup> C Staniforth "The Evolution of the Family Law Reform Bill 1994: some unresolved issues." (1995) 2 CanLR 145.

assistance of a neutral third party. It has a structured process which emphasises the parties' own responsibilities for decision making. Its application is therefore limited to dealing with relationships where both parties are capable of being empowered by the process.<sup>116</sup>

When you combine the aims of mediation with an understanding of the nature of domestic abuse, an issue as to its suitability becomes evident.

Violence against women does not consist of instances of conflict between perpetrator and the target about which the parties can negotiate, or which can be mediated with the assistance of a skilled third party. It is behaviour by the perpetrator which is designed to control the target of the violence.<sup>117</sup>

Women in abusive relationships have been disempowered, this means that they negotiate for what they think that they can get, rather than an outcome which is just or equitable, or which protects their safety.<sup>118</sup> Because women in abusive relationships are disempowered and the relationship is about control, it creates a strong imbalance of power, which makes mediation inappropriate.

The power imbalance causes problems in a number of ways;

**(a) Impossibility of consensuality.**

Mediation depends upon the presence of some capacity for consensuality, a desire to settle the dispute, and some capacity for compromise. Instead of this the abuser will inevitably bring the pattern of control which has characterised the relationship to the mediation.<sup>119</sup>

<sup>116</sup> S Gribben "Violence and Family Mediation: Practice." (1994) 8 AJFL 22, 23.

<sup>117</sup> H Astor "Violence and Family Mediation: Policy." (1994) 8 AJFL 3, 4.

<sup>118</sup> Above n 117, 5.

<sup>119</sup> Above n 117.

**(b) Unjust burden on the victim**

Mediation will generally require that the victim be in the same room as her abuser, which will cause her fear, and affect her ability to negotiate on her own behalf.<sup>120</sup>

**(c) Exploitative agreements.**

Victims of abuse become hypersensitive to the signs and signals of their abuser in an effort to prevent abuse. These signals are generally undetectable to the mediator, and result in the abusive partner controlling what his partner agrees to, controlling and intimidating her throughout the mediation.

**(d) Ineffective outcomes.**

The abuser will either succeed in controlling his partner during the mediation, or he will ignore as irrelevant any decision reached during the session. Women will often concede property rights in exchange for custody of the children, and the developed behaviour of concession and acceptance will preclude her from effectively reaching an adequate agreement.<sup>121</sup>

**(e) Neutral mediators.**

The concept of the neutral mediators is also flawed in the face of abuse. A neutral mediator is required to treat all parties equally, but in a situation of power imbalance, this equality of treatment does not create equality between the parties.

Therefore while mediation is good for couples who are able to value each others needs, and reach a compromise, the nature of domestic abuse and the affect that it has on the way that the parties relate to each other, means that Mediation will generally not be suitable where the relationship has involved domestic abuse.

<sup>120</sup> Above n 117.

<sup>121</sup> Above n 117.

Section 31 of the DVA acknowledges that programme sessions that involve both the offender and the victim. Section 31 states that a protected person and a respondent...cannot be required to attend programme sessions at which the other person is also present.

As outlined earlier a 'programme' as defined in section 2 means a programme that has the primary objective of protecting the victim from domestic violence, assisting a child to deal with the affects of domestic violence or stopping or preventing violence on the part of the respondent.

Examples of these kinds of programmes would include anger management, victim support, men for non-violence, and women's learning groups. However section 31 envisages that they victim and her abuser may be present at the same session which would indicate that counselling is also included within the scope of the definition.

Whether this definition can extend to cover mediation is unclear. Orders for mediation are not available under the DVA and their nature as a dispute resolution tool would appear to indicate that they are precluded from the definition. They are not designed to protect the victim or prevent violence.

The DVA does not expressly state that the victim and her abuser cannot be compelled to attend mediation, however, by acknowledging joint sessions are not advisable in the presence of violence, it sets a standard which the court should not ignore.

## VII RECOMMENDATIONS

The recent changes introduced in the Domestic Violence Act 1995 have been a large step forward in protecting and assisting victims of domestic abuse.



When you break the needs of abused women into immediate, short term and long term needs it enables you to see that although the law has made an attempt to meet the needs for safe accommodation in the immediate and short term future, the provisions relating to providing for their long term needs are inadequate.

The availability of *ex parte* orders has provided for much of the need. However, as I stated earlier, there is a concern that the court will not grant orders because of the availability of a refuge or inadequate accommodation. In the light of the potentially lengthy waiting periods for a hearing this is not an acceptable alternative to an occupation order. This however must be balanced with a concern not to unduly discriminate against the respondent.

Occupation and Tenancy orders are an effective solution if it is remembered that they are only a temporary measure. It is my recommendation that the remedy that the DVA does provide, would be strengthened, by placing limits on the conditions that can be attached to an occupation order. There needs to be an acknowledgement that the presence of domestic violence in a relationship, changes the dynamics of the relationship. Careful consideration needs to be made as to the implications of any conditions upon the parties, especially the applicant and any children.

It also needs to be accepted that although the DVA is the primary statute dealing with domestic violence, that role is very limited in terms of property. In turn any relief available under the MPA is very limited.

The options available for receiving long term assistance from the law are ineffective and arguments raised in relation to ss 14 and 18 are a mere possibility at best. The law is concerned with the protection of victims of domestic abuse but appears to have neglected to provide any long term solution to the problems created when an intimate relationship is violated by abuse.

It is my recommendation that the law relating to the division of matrimonial property needs to be reconsidered, and the question asked, who is it designed to protect. I would argue that the no fault divorce regime has limited considerations of misconduct into too strict a boundary, and has succeeded in protecting those who abuse the trust and intimacy of the marriage relationship, where they should be protecting the victims of such abuse.

The presence and effect of domestic abuse in a relationship should be considered as a relevant factor in determining the division of matrimonial property, I believe that the Australian system of considering the needs arising out of the marriage is a potential solution. There are problems associated with introducing a needs based division into New Zealand matrimonial property law as I discussed earlier. I do not recommend that the legislation should be changed to include division on this basis, as it would be a radical change to a problem which may be remediable by a less drastic solution.

I recommend that the Matrimonial Property Act should be amended to add another element to the list of contributions under section 18 to include a consideration of actions by one spouse which create a future need for their partner. This would allow the court the flexibility to consider the needs of the parties, and to address that need on a permanent basis rather than the temporary solution provided by an accommodation or tenancy order. The court would not be judging the actions of the abuser and punishing them per se, but would be acknowledging the need that they had created.

This amendment would also require that s 18(3) be amended to allow the court to consider misconduct where it is gross, palpable, and has substantially affected the future needs of the other party to the marriage. This would ensure that the standard is high enough to rule out considerations of adultery and other concepts of fault unless it is of such a nature that it creates a substantial future need. It also allows the court the flexibility to only grant an unequal division where it finds that the case warrants it.

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The present law has succeeded in creating a hole through which victims of domestic abuse fall through. The clean break principle of the Matrimonial Property Act 1976 is not being achieved in this situation, the one situation where it is vitally important that they victim be able to break cleanly from her abusive relationship begin afresh. If the holes in the law are not fixed then the law will continue to fail one of the groups in society that most needs the laws help and protection. The law must protect victims of domestic abuse not allow the control and manipulation of their abuser to be continued through the restrictive boundaries of the law.

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