

M759

MONTAGUE, M. Section 15 Economic Disparity Awards...

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¹ Property (Relationships) Amendment Act 2001.

² Family Proceedings Act 1980.

³ Bill Ashworth and Wendy Parker *Relationships Property in New Zealand* (Butterworths, Wellington, 2001).

⁴ *Wong and Parker*, above, 90-92.

⁵ *Report of the Royal Commission on Social Policy* (Vol 4, Wellington, 1988) 18.

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I INTRODUCTION

In February 2002 amendments to the Property (Relationships) Act 1976 (PRA) took effect.¹ The amended section 15 was a novel concept for New Zealand law as it gave the courts discretionary powers to make awards to redress economic disparity arising from a marriage or de facto relationship.

While the PRA deals with relationship property, the Family Proceedings Act 1980 deals with the circumstances under which one spouse or de facto partner must contribute to the income of the other spouse or de facto partner who cannot meet all of his or her reasonable needs.²

The similarities between the two schemes are immediately apparent. The purpose of this paper is to examine in more depth the purposes of each scheme and the similarities between them to ultimately decide whether an expanded view of spousal maintenance could encompass section 15.

II BACKGROUND TO SECTION 15

Much debate centred on the new discretionary powers that the proposed amendments to the PRA would create. On the one hand, the detractors saw the proposed section 15 as "inviting litigation and legal argument".³ On the other hand, there had been a significant movement for change proponents of which, cited reports and statistics as proof that such a discretion was necessary.⁴

A clear statement of the social problem that Parliament faced can be found in the Report of the Royal Commission on Social Policy 1988, chaired by Sir Ivor Richardson. It said that the "equal reallocation of existing assets at the time of separation often fails to produce true equality between the sexes and handicaps the spouse with the lesser career prospect and the children of the marriage".⁵

¹ Property (Relationships) Amendment Act 2001.

² Family Proceedings Act 1980

³ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (Butterworths, Wellington, 2001) 89.

⁴ Atkin and Parker, above, 90-92.

⁵ *Report of the Royal Commission on Social Policy* (Vol 4, Wellington, 1988) 18.

Thus, according to the Royal Commission, this inequality is in part due to the traditional practice of dividing relationship property equally between the two parties. It follows then, that an unequal division of relationship property may in appropriate cases, do a lot to lessen the inequality between the two parties.

It had also been noted that the "prevailing view from overseas jurisdictions is that women, particularly those with the children, suffer a severe decline in living standards after the marriage breakdown".⁶

Given the views presented in the literature, together with the statistical data, parliament decided to amend the relationship property laws in New Zealand in an attempt to reduce the inequality between the two partners that arise when a relationship breaks up.

The 1988 Working Group on Matrimonial Property and Family Protection, was not convinced that readjusting the shares of relationship property was the appropriate way to redress the inequality. Instead it advocated the "maintenance laws and state provided social security" as the appropriate means to redress any inequality.⁷ Nonetheless, the Working Group still acknowledged that there was an inequality that needed to be redressed following a relationship break up.

III SECTION 15

Evidently, parliament disagreed with the Working Group's recommendation and duly passed the Property (Relationships) Amendment Act 2002, substituting a new section 15 which allowed for the unequal division of relationship property:

15. Court may award lump sum payments or order transfer of property-

(1) This section applies if, on the division of relationship property, the Court is satisfied that, after the marriage or de facto relationship ends, the income and living standards of 1 spouse or de facto partner ("party B") are

⁶ Caroline Bridge "Reallocation of Property after Marriage Breakdown" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (1ed, Oxford University Press, Auckland, 1992) 231.

⁷ Atkin and Parker, above, 90.

likely to be significantly higher than the other spouse or de facto partner ("party A") because of the effects of the division of functions within the marriage or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the Court may have regard to-

- (a) the likely earning capacity of each spouse or de facto partner;
- (b) the responsibilities of each spouse or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or, as the case requires, any minor or dependent children of the de facto relationship;
- (c) any other relevant circumstances.

(3) If this section applies, the Court, if it considers it just, may, for the purpose of compensating party A,-

- (a) order party B to pay party A a sum of money out of party B's relationship property;
- (b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

A Applying Section 15

Priestley J, in the leading case on section 15, *De Malmanche v De Malmanche*,⁸ outlined the way in which section 15 should be applied and made a number of useful observations about the policy of the section.

He outlined a set of jurisdictional requirements that had to be met before the court could determine whether or not it should exercise its discretion:⁹

- The comparative enquiry must focus on *income and living standards*, not on one of those benchmarks in isolation.
- There must be evidence to satisfy the court that one party's income is *likely* to be significantly higher than the other party's.

⁸ *De Malmanche v De Malmanche* [2002] NZLR 838, Priestley J, (HC).

⁹ *De Malmanche*, above, para 151.

- The income and living standards must be *significantly* higher.
- The significantly higher income and living standards must be the result “of a causal relationship or nexus between both those effects and the division of functions within the relationship”.
- The court must be satisfied, on the balance of probabilities, that after the end of the relationship the income and living standards of one party must be significantly higher than the other party’s.

Essentially, Priestley J emphasised the salient features of the provision, especially the importance of the jurisdictional elements. At para 155 he commented that “parliament has ... marked out clear and unequivocal boundaries within which economic disparity may be redressed and outside which the court may not step”.¹⁰ Furthermore he said that “Parliament has not ... conferred a broad and unfettered discretion. It has stipulated tight jurisdictional parameters”.¹¹

The strictness of the causal nexus emphasises that section 15 is directed at compensating the disadvantaged party for what happened while the parties were living together.

IV PRINCIPLE 1N(c)

Section 15 addresses the economic consequences that arise from the relationship, namely the division of functions in the relationship while the party’s were living together. This is reflected in the relevant principle in section 1N(c) which states:¹²

The principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or de facto partners

¹⁰ *De Malmanche*, above, para 155.

¹¹ *De Malmanche*, above, para 157.

¹² Property (Relationships) Act 1976, s 1N(c).

arising from the marriage or de facto relationship or from the ending of the marriage or the de facto relationship.

Principle 1N(c) is cited regularly by judges in cases involving section 15, but none, however has comprehensively analysed its application to section 15.

A The Two Limbs of Principle 1N(c)

Principle 1N(c) has two limbs – the economic advantages and disadvantages arising from the relationship itself, and the economic advantages and disadvantages arising from the ending of the relationship. The first limb refers to the effects of the division of functions within the marriage. Compensating for this is the primary focus of section 15 where the division of functions has caused the other party's income and living standards to be significantly higher. The second limb refers to effects that are felt in the future and are therefore prospective in nature.

The future disparity of one party having a significantly higher income and living standard is itself an economic consequence that arises from the ending of the relationship. It follows then that the court in determining whether to make an award should have regard to future circumstances as provided by principle 1N(c). Priestley J acknowledged this requirement in *De Malmanche* where he said that:¹³

The prospective purpose of section 15 is abundantly clear by the use of the preposition "after" in s 15(1); the two prospective criteria stipulated in s 15(2) – "likely earning capacity" of each partner and "ongoing daily care" of children; and the specific limitation of the source of the compensatory orders to relationship property.

Moreover, it has to be shown that that the "effect of that division of functions continues after separation – and after the division of relationship property – so as to have a direct causative effect on the claimant spouse's economic circumstances".¹⁴ The disadvantaged spouse, therefore, is entitled to be

¹³ *De Malmanche*, above, para 153.

¹⁴ *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 124 Judge Ellis.

compensated for the effects that arise from the division of functions while the parties were living together, that are felt post-separation. In other words where the division of functions has a “direct causative effect on the claimant spouse’s economic circumstances”, and results in the other party’s income and living standards being significantly higher. As noted by Priestley J above, this is reflected in the future considerations that a court may consider in determining whether or not to exercise the section 15(3) discretion. It is in this sense that section 15 is compensatory.

Judge Inglis made this clear in *Speller v Chong* when he stated explicitly that the ongoing effects of the division of functions are what must cause one party’s income and living standards to be significantly higher than the other’s:¹⁵

I approach the wife’s s 15 claim in the present case on the assumption that in the period immediately following the separation the earning capacity and living standards of the wife were in fact significantly lower than that of the husband (subs 2(a)) and that her post separation responsibilities for the ongoing daily care of the children of the marriage in fact limited her ability to realise greater earning capacity (subs 2(b)). Those consequences, however, resulted from the separation itself, and on the facts are not necessarily exclusively related to the division of functions within the marriage... while the parties were living together.

So, under section 15(2) the economic advantages and disadvantages that arise from the ending of a relationship must be “exclusively related” to the division of functions within the marriage while the parties were living together. In other words the only relevant economic advantages or disadvantages arising from the ending of the relationship are those which flow from the division of functions in the marriage while the parties were living together. As a result he has constrained the application of principle 1N(c) under section 15.

When considering its discretion the court is also allowed to have regard to any other relevant circumstances. Judge Inglis did not suggest that this open-ended consideration must flow from the division of functions in the marriage itself.¹⁶

¹⁵ *Speller v Chong* [2003] NZFLR 385, para 33 (FC) Judge Inglis.

¹⁶ *Speller v Chong*, above, para 33.

Instead, it is open to judges to look at the totality of the circumstances to decide whether or not to exercise their discretion under section 15(3).

B Another Role for Principal 1N(c)

Principle 1N(c) refers to just divisions of relationship property and so is obviously designed to be used as a guide to the division of relationship property and shows that section 15 while being compensatory, also compensates for the ongoing effects of the division of functions within the relationship. Yet when one looks at spousal maintenance, it too takes into account the economic advantages and disadvantages that arise from the relationship and the ending of the relationship, including the effects of the division of functions within the marriage. This suggests that section 15 and spousal maintenance have very similar policy objectives. However, it is necessary to take a closer look at spousal maintenance before the validity of this hypothesis can be tested.

V SPOUSAL MAINTENANCE

Three provisions in the Family Proceedings Act 1980 govern the spousal maintenance scheme. Section 63 deals with maintenance from the date of separation until the marriage has been dissolved. Section 64 deals with the period after a marriage has been dissolved or a de facto relationship has ended. Finally, section 65 deals with the assessment of the amount of maintenance payable to a spouse or de facto partner.

Section 63 reads as follows:

63. Maintenance during marriage

(1) During a marriage, each party is liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1) are as follows

- (a) the ability of the parties to be or to become self-supporting, having regard to—
 - (i) the effects of the division of functions within the marriage while the parties are living together or lived together:
 - (ii) the likely earning capacity of each party
 - (iii) any other relevant circumstances
 - (b) the responsibilities of each party for the ongoing daily care of any minor or dependent children of the marriage after the parties ceased to live together:
 - (c) the standard of living of the parties while they are living together or lived together:
 - (d) any physical or mental disability
 - (e) any inability of a party to obtain work that—
 - (i) it is reasonable in all the circumstances for that party to do; and
 - (ii) is adequate to provide for that party:
 - (f) the undertaking by a party of a reasonable period of education or training designed to increase that party's earning capacity or to reduce or eliminate that party's need for maintenance from the other party, where it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking that education or training to be met immediately by that party—
 - (i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that party; or
 - (ii) because that party has previously maintained or contributed to the maintenance of the other party during a period of education or training.
- (3) Except as provided in this section, neither party to a marriage is liable to maintain the other party during the marriage.

A Differences Between Sections 63 and 64

Section 64 is slightly different to section 63. Most notably de facto relationships are covered only when the relationship ends (section 64), as opposed to marriage where one spouse is liable to maintain the other during the marriage (section 63).

The requirements under section 64 are also stricter. Absent is any equivalent of section 63(2)(d) – any physical or mental disability and section 63(2)(e) any inability of a party to obtain work that (i) it is reasonable in all the circumstances for that party to do; and (ii) is adequate to provide for that party.

However, for the purposes of this paper they can be treated as the same and any differences that affect this analysis will be dealt with as they arise.

B Application of Spousal Maintenance

The focus of spousal maintenance is the reasonable needs of a disadvantaged spouse or de facto partner, or more specifically the inability to meet those reasonable needs. The inability to meet one's reasonable needs is a consequence that flows from the ending of a relationship, in much the same way that a significantly higher income and living standards flows from the ending of the relationship. In other words it is a prospective consideration.

Like section 15, Parliament has not granted the courts an unfettered discretion when deciding a claim for spousal maintenance. The provisions make it clear that the inability of the claimant to meet his or her reasonable needs must have arisen from one or more of the circumstances listed in subsection 2. Thus, although the criteria for awards of spousal maintenance are not as tightly circumscribed as the grounds in section 15, there must still be a causal relationship with one of the circumstances listed in subsection 2.

The leading case on spousal maintenance is the Court of Appeal's decision in *Z v Z (No 2)*¹⁷. However, it should be noted that spousal maintenance was also amended in 2001.¹⁸ Prior to the case of *Z v Z (No 2)*, the Court of Appeal had considered spousal maintenance in *Slater v Slater*.¹⁹ In *Z v Z (No 2)* counsel submitted that the principles enunciated in *Slater* had been "either misconstrued or applied with undue rigidity in practice".²⁰ Therefore the court considered it appropriate to "comment on the interpretation and application" of the spousal maintenance provisions.

The court commented that the "approach to s 64 and the principles to be adopted in interpreting and applying those provisions were set out in full in

¹⁷ *Z v Z (No2)* [1997] 2 NZLR 258 (CA)

¹⁸ Family Proceedings Amendment Act 2001.

¹⁹ *Slater v Slater* [1983] 1 NZLR 166 (CA).

²⁰ *Z v Z (No 2)*, above, 293.

Slater v Slater and there is no need to repeat them in this judgment”.²¹ The court in *Slater* correctly said that the inability to meet reasonable needs must arise as a result of one of the factors listed in the provision and that it only has to be a real and substantial cause of that inability notwithstanding any other effects. The court in *Z v Z* then made it clear that there is nothing in the wording of the statute, or the Court of Appeal’s judgment in *Slater*, that suggested or even warranted the suggestion, that the provisions were to operate “unfairly and harshly on one or other of the spouses”.²²

Thus, spousal maintenance is not as tightly delineated as section 15, because the inability to meet reasonable needs can be as a result of any one of the factors listed in subsection 2. Section 15 on the other hand, requires the division of functions within the relationship to be the cause of the disparity.

VI SECTION 15 AND SPOUSAL MAINTENANCE

Prima facie, section 15 and spousal maintenance have different focuses. This follows from the way each scheme is drafted. Section 15 purports to compensate only for the effects of the division of functions while the parties were living together. Spousal maintenance purports to aid a disadvantaged party in meeting his or her reasonable needs.

A Principle 1N(c) and Spousal Maintenance

Spousal maintenance is aimed at redressing the inability of one party to meet his or her reasonable needs, which is a future consequence of the ending of a relationship, in much the same way section 15 is aimed at redressing one party having a significantly higher income and living standard. This must be due to one or more of the circumstances listed under sections 63(2) and 64(2) of the Family Proceedings Act 1980, which are a mixture of economic advantages and disadvantages arising from the relationship or from the ending of the relationship, including the considerations under section 15.

²¹ *Z v Z (No 2)*, above, 293.

²² *Z v Z (No 2)*, above, 293.

B Analogy Between Section 15 and Spousal Maintenance

The analogy to section 15 should be apparent. Both seek to redress a prospective situation. Section 15 seeks to redress the situation where one party's income and living standards are significantly higher than the other party's, and spousal maintenance seeks to redress the situation where one party cannot meet his or her reasonable needs. Both require causation. Section 15 disparity must be caused by the effects of the division of functions within the marriage while the parties were living together, which is an economic disadvantage arising from the marriage, but felt post separation. It should be remembered that the section 15(2) circumstances which a judge may have regard to are future considerations that flow from the ending of the relationship. Spousal maintenance disparity must be caused by one or more of the circumstances listed in subsection 2, which are a mixture of economic advantages and disadvantages arising from the relationship itself and the ending of it.

It has been argued that both section 15 and spousal maintenance aim to redress future disparities. Spousal maintenance clearly aims to enable a party to be able to meet his or her reasonable needs. In other words, the factors listed in subsection 2 are compensated by a spousal maintenance award to the extent that a claimant can meet his or her reasonable needs. However, it is not so clear what measure of compensation is used when dealing with section 15.

VII SECTION 15 ECONOMIC DISPARITY

The future disparity that section 15 is trying redress arises where one party's income and living standards are significantly higher than the other party's.

Judge Ellis in *G v G* said that "the purpose of the section is not however to achieve an artificial 'equalisation' of incomes post separation".²³ A similar observation was made by Judge Inglis in *Speller v Chong* where he said:²⁴

²³ *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 124 Judge Ellis.

²⁴ *Speller v Chong* [2003] NZFLR 385, para 35 (FC) Judge Inglis.

It is also to be remembered, as Priestley J has pointed out in *De Malmanche v De Malmanche* (above, at para 157) that s 15 does not allow a broad and unfettered discretion to redress economic disparity simpliciter or to achieve generalised social justice or gender equity objectives. The section is limited to the redress of injustice created by post-separation economic disparity, of which the cause has been “the division of functions within the marriage ... while the parties were living together”.

Thus the future disparity represented by one party’s significantly higher income and living standard that results from the division of functions does not entitle that party to have his or her income and living standards put in a position equal to the other party. So, if section 15 is not designed to achieve “equalisation of incomes” or remove “economic disparity simpliciter” what then is it aimed at accomplishing?

In *Nation v Nation* the judge said that “when the section speaks of ‘living standards’, this should not be confused with ‘lifestyle’. The former relates to material benefits while the latter refers to a way of life”.²⁵

In *McGregor v McGregor* Judge Clarkson’s enquiry into the claimant’s living standards was as follows:²⁶

As to living standards, not a great deal of evidence was adduced in this regard. I have the current expenses list of the wife which would reflect a reasonably comfortable standard of living however, it shows outgoings exceeding income of over approximately \$400.00 per week, which are at the expense of capital.

This closely resembles an enquiry into spousal maintenance. It follows, that a section 15 award should compensate a claimant only for the effects of the division of the functions in the marriage to the extent that he or she is able to achieve a reasonably comfortable standard of living. A reasonably comfortable standard of living will often mean nothing more than reasonable needs. Moreover, section 63(2)(c) includes an enquiry into the parties’ previous

²⁵ *Nation v Nation* [2003] NZFLR 150, para 110 (FC) Judge P von Dadelszen. Note: this was appealed but the appeal did not deal with section 15.

²⁶ *McGregor v McGregor* (23 December 2002) District Court Auckland FP 004/245/00, para 30 Judge D F Clarkson.

standard of living, further exemplifying the similarities between the two schemes and suggesting that a party's reasonable needs will often be governed by the "material benefits" the claimant party enjoyed during the relationship.

Therefore, section 15 is really directed at compensating for the post-separation effects of the division of functions in the relationship so that the claimant party can enjoy a reasonably comfortable standard of living having regard to the economic advantages and disadvantages that arise from the relationship and its ending. This view of section 15 accords with the material cited in the lead up to the enactment of section 15 where it was noted "that prevailing view from overseas jurisdictions is that women, particularly those with the children, suffer a severe decline in living standards after the marriage breakdown".²⁷

Thus, fundamentally both schemes redress a very similar future disparity having regard to economic advantages and disadvantages that arise from the relationship and its ending, which if they apply under section 15 will always apply under spousal maintenance. This is highlighted by the applicability of principle 1N(c) to both schemes.

More broadly, both schemes can be seen as essentially facilitating the smooth readjustment of the claimant party following the break up of a relationship. Given this, the question that naturally arises is whether it is necessary to have two schemes if one scheme could do the job of both.

VIII CAN SPOUSAL MAINTENANCE SUBSUME SECTION 15?

A Why Section 15 Cannot Subsume Spousal Maintenance

The key factor that enables spousal maintenance in a lot of cases to subsume a section 15 award is that all the indicators for a section 15 award are included in the maintenance scheme, together with others that are not included in section 15. For example, where the likely earning capacity and ongoing care of the children are indicators, they will be present in both schemes, and spousal

²⁷ Caroline Bridge "Reallocation of Property after Marriage Breakdown" in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (1ed, Oxford University Press, Auckland, 1992) 231.

maintenance will be able to address them. But say for example that there is a physical disability that is a major cause of the disparity, then section 15 is not applicable and so cannot address it, whereas such a circumstance is provided for under section 63 of the FPA. Essentially in having as its primary object the provision of reasonable needs, spousal maintenance is often a "more flexible remedy".²⁸

B Indications that Spousal Maintenance can do the Job of Section 15

During the third reading of the Property (Relationships) Amendment Bill, the Associate Minister of Justice, who was in charge of the Bill said:²⁹

under the new law, the wife could apply ... for a lump sum payment and/or spousal maintenance to redress the economic disparity she has suffered as a result of lost career opportunities during the time she spent out of the paid workforce.

The Associate Minister made it clear, therefore, that spousal maintenance may be used instead of, or together with section 15 to redress economic disparity.

A more telling pointer, however, to the possibility of spousal maintenance compensating for all the effects of the division of functions in the relationship while the parties were living together, can be found by looking at the judicial comments made in cases involving claims for both section 15 and spousal maintenance. In *Wheeler v Simpson* Judge Inglis said:³⁰

Even if I had found it possible to determine that the division of functions in the marriage might have had some limited effect on the wife's prospective income and living standards in the short term, I would have considered that spousal maintenance (for which the wife has not applied) would have provided a more appropriate remedy.

Priestley J too in *De Malmanche* said that "whilst he has the children with him for the majority of the time, child support and even spousal maintenance are

²⁸ *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 132 Judge Ellis.

²⁹ (March 1999) 591 NZPD 8625.

³⁰ *Wheeler v Simpson* (29 October 2002) Family Court Manukau FP 092 620 01, para 32, Judge Inglis.

available to redress any significant inequalities in the income and earning capacity of the husband (s 15(2)(a)).³¹

C Judge Can Spousal Maintenance Compensate for Section 15 Economic Disparity?

Because the division of functions within the marriage is also a causal factor under spousal maintenance, it could be argued that an award made to enable a spouse to meet his or her reasonable needs could already compensate for all or part of the post-separation effects of the division of functions. So to award under section 15 would “duplicate those adjustments”, as Judge Ellis said in *G v G*.³²

D G v G

In *G v G* the parties had lived together for 22 years and had one child, who had the time of the hearing was 17 years old. The judge first considered the claim for spousal maintenance under section 63 of the FPA. Judge Ellis determined the reasonable needs of the wife. Next he declared that liability existed because the wife was unable to meet the whole of her reasonable needs based on a combination of factors under section 63(2).

The judge held that there had been a division of functions in the marriage which resulted in the wife being out of the work force for 10 years, while staying at home caring for the child and supporting the husband. Particular emphasis was placed on the wife being the primary caregiver of the child. The wife had a physical disability, which the judge held to be a predominant factor limiting the wife’s ability to work.

The judge went on to consider the likely earning capacity of the parties to be \$20,000 for the wife and no less than \$85,000 for the husband. He also considered the “repartnering” of the husband with another lawyer as a relevant circumstance. As a result an award of \$29,970 was made, which was then

³¹ *De Malmanche v De Malmanche* [2002] NZLR 838, para 191 Priestly J, (HC).

³² *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 132 Judge Ellis.

reduced by a factor of 20 to allow for contingencies, leaving a total lump sum award of \$24,000 payable by the husband.

Judge Ellis then considered the claim for a section 15 award. After enunciating the general principles from *De Malmanche*,³³ and concluding that the husband's income and living standards are likely to be significantly higher than the wife's Judge Ellis decided:³⁴

While I was satisfied in relation to spousal maintenance that the "division of functions" and the wife's responsibility as principal caregiver of the child contributed to her practical inability to meet the whole of her reasonable financial needs at date of separation, I am also satisfied that the "effects of the division of functions" has been a diminishing factor over the period of years since separation and that by the date of this hearing it was no longer a "real and substantial" cause of the economic disparity between the parties. The only significant cause of the wife's present inability to maximise her potential and achieve economic self-sufficiency is her physical disability.

Having reached that conclusion, the wife's claim for compensation under this heading cannot proceed. However, even if I were wrong in that conclusion, I would exercise my discretion against making any additional compensating payment because the conclusions I have reached in relation to the other headings of claim by the parties. In my view, given the particular circumstances of this case, the spousal maintenance provisions of the FPA Act have provided a more flexible remedy to assist the wife in the transition from marriage partnership to the expectation of self-sufficiency. The disparity in the income and living standards of wife and husband has been specifically addressed by way of maintenance payments, including a modest lump sum by way of 'top-up' for past and future maintenance. It would not be just, in my view, to duplicate those adjustments by way of further compensation.

1 The wife's disability

Firstly Judge Ellis's decision is a good example of why section 15 cannot do the job of spousal maintenance, as it is the wife's physical disability that is the

³³ *De Malmanche v De Malmanche*, above, para 151

³⁴ *G v G*, above, paras 131, 132.

main factor causing the disparity, not the division of functions, which Judge Ellis held to be a diminishing factor since separation.

2 *Alternative argument*

In any event Judge Ellis would still not have awarded under section 15 because spousal maintenance adequately compensated for the effects of the division of functions within the marriage. This does not mean that the effects of the division of functions did not contribute to the wife having a significantly lower income and living standard. In fact, Judge Ellis went through the division of functions and found that it had caused a real disadvantage to the wife.³⁵ Essentially what he has said is that the spousal maintenance award subsumes those effects. In other words the effects of the division of functions have been taken account in the spousal maintenance award.

Judge Ellis's decision highlights the point made earlier that a claimant should receive compensation having regard to the effects of the division of functions within the relationship, to enable the claimant to enjoy a reasonably comfortable standard of living. Here the effects of the division of functions were significant, but the spousal maintenance award already provided adequate compensation for those effects, and even taking into account the wife's disability, the award still enabled her to enjoy a reasonably comfortable standard of living.

E **Where Spousal Maintenance Cannot Adequately Compensate where Section 15 Otherwise Would**

There is one situation, however, that section 15 will cover but spousal maintenance will not. One party may be able to meet his or her reasonable needs and as a result is unable to gain an award of spousal maintenance, despite the fact that the other party has a very high income, due to the division of functions in the relationship.

F **The Ongoing Daily Care of any Children**

Spousal maintenance, like section 15, allows the court to have regard to the ongoing daily care of the children but is not limited to having to be “exclusively related” to the division of functions, although often this will be the case. The ongoing daily care of the children will obviously be a determinant of a party’s reasonable needs, and therefore the effects of this include those related to the division of functions within the relationship. Alternatively, child support, which is especially directed at compensating for this, should be the appropriate means of compensation.

IX CHILD SUPPORT AND SECTION 15

This is the approach that Judge Inglis favoured when deciding *Speller v Chong*. Section 32(2)(c) of the Property (Relationships) Act 1976, enables the court to make an order for child support. Judge Inglis decided that the necessary jurisdiction required for a section 15 award did not exist. Like Judge Ellis in *G v G*, he went on to say that even if jurisdiction was established, he would still not have exercised his discretion under section 15(3).³⁶ Instead to redress the economic disparity occasioned by the ongoing daily care of the children that arose from the division of functions in the marriage, he exercised his powers under section 32(2)(c) of the PRA,³⁷ and made an order for child support pursuant to section 105(2)(c)(ii) of the Child Support Act 1991.³⁸

It is still important to note that the ongoing daily care of the children not only entails the costs of the children but it also has an effect on a party’s ability to be or become self-supporting.³⁹ As a result it may be that only compensating for the costs of the children does not sufficiently take into account the effects it has on the claimant party’s ability to be or become self supporting and therefore spousal maintenance should still be granted to compensate for this.⁴⁰

X SPOUSAL MAINTENANCE AND SECTION 15 IN PRACTICE

³⁵ *G v G*, above, para 93.

³⁶ *Speller v Chong* [2003] NZFLR 385, para 35 (FC) Judge Inglis.

³⁷ Property (Relationships) Act 1976, s 32(2)(c).

³⁸ *Speller v Chong*, above, para 42.

³⁹ Family Proceedings Act 1980, s63(2)(a).

⁴⁰ See *Moge v Moge* [1992] 3 SCR 813 (SC) for a fuller discussion on this point.

It has been argued in this paper that section 15 is largely redundant when it is compared to spousal maintenance, as for the most part both schemes attempt to redress the economic disadvantages suffered by a party following the break up of a relationship. Therefore it is useful to look at examples of how section 15 and spousal maintenance have been applied together to see whether such an approach is feasible or even valid.

A Nofoasaefa v Nofoasaefa

Here the parties had been in a relationship for 17 years and had 3 children, aged 17, 15 and 9. Judge Mill naturally cited the indications of Priestley J from *De Malmanche*. Next she considered the division of functions. The wife had worked night shifts and looked after the children during the day. Due to the demands resulting from the division of functions the wife was unable to complete a social worker course or advance her career by training to become a registered nurse.

Furthermore, it was agreed between the parties that the husband should train to be a registered nurse, therefore significantly advancing his career. As a result the husband's income was likely to be significantly higher than the wife's. The ongoing daily care of the children was almost entirely the wife's responsibility and the earning capacity of each party is likely to remain the same for some time to come.

Judge Mill concluded that on the balance of probabilities this was due to the division of functions in the marriage and awarded \$5,000.

Judge Mill then turned to spousal maintenance. He said "that the wife has not been able to become self supporting as a result of the effects of the division of functions while the parties were living together, in the same way I have found her to be affected in relation to section 15 of the Relationship Property Act [sic]".⁴¹ As a result he ordered a further lump sum payment of \$5,550 for past maintenance in addition to the \$5,000 section 15 award.

⁴¹ *Nofoasaefa v Nofoasaefa* (27 March 2003) Family Court Porirua FP091/22/00, para 92, Judge I G Mill.

1 Criticisms

Based on the propositions advocated in this paper, the "proper" way to approach this case would be to start with spousal maintenance and child support, and then decide whether any section 15 award is appropriate. The first thing to note about this case is that the sums of money involved are low. The husband is only likely to earn \$49,000 per annum while the wife would earn up to \$28,000 per annum. Thus a \$5,550 maintenance award together with child support (no figure is provided) is a sizeable sum and enables her to enjoy a reasonably comfortable standard of living. Moreover, the judge says that the same effects of the division of functions in the marriage caused both the significantly higher income and living standards of the husband and the inability of the wife to meet reasonable needs. It is hard to see how those same effects are not compensated by the child support and spousal maintenance award.

2 A greater role for future maintenance

It is clear that the wife's career prospects have been seriously impaired because of the division of functions in the marriage, as she herself was going to begin upgrading her qualifications and the division of functions in the marriage enabled the husband to significantly advance his. Thus, in order to address this economic consequence, future maintenance could be awarded for a reasonable period of time so that the wife could complete her qualifications and reach her earning potential.

B *McGregor v McGregor*

In *McGregor*, the parties had been in a relationship for 14 years but had no children. The husband's job was such that he had contracts for considerable periods of time based overseas, where the wife would usually accompany him.

Judge Clarkson held that the husband's income and living standards were likely to be significantly higher than the wife's.

¹⁰ *McGregor v McGregor* (25 December 2002) District Court Auckland TP 001245/02, para 61 Judge D.F. Clarkson.

As to causation, evidence was presented that the career break from travelling had a serious negative impact on the wife's income earning ability and was a major contributor to the disparity in income between the wife and husband. The husband further conceded that he found her support helpful while the parties lived overseas.

Judge Clarkson concluded that the travel and therefore the negative effects arising from it were a natural occurrence of the division of functions in the marriage. While noting that some of the economic disparity is due to ability and career choice (she was previously a secretary, while he was as engineer), she still found that the relevant causal nexus was present. Consequently she decided to exercise her discretion and make a section 15 award of \$50,000.

As in *Nofoasaefa*, the judge's consideration of spousal maintenance provisions before making an order is limited to "I consider the wife has established that for a period she was unable to meet her reasonable needs and become self supporting having regard to the effects of the division of functions within the marriage".⁴² The judge awarded \$15,900 past maintenance.

1 THE CRITICISMS

Again the judge should have started with spousal maintenance and then looked at section 15. The \$50,000 awarded under section 15 represents what the wife would have been earning had she not suspended her career as a result of the division of functions within the marriage. However, even if the wife had not forgone her career and was earning at the top end of her potential, then the husband would still have a significantly higher income and living standard. As a result, it is hard to see the basis for a section 15 award as no matter what, the husband was always going to have a significantly higher income and living standard. It does not follow, therefore, that her foregone career opportunity should be compensated by an award under section 15 as it does not cause the husband's income and living standards to be significantly higher. However, the spousal maintenance award of \$15,900 does compensate for the effects of the

⁴² *McGregor v McGregor* (23 December 2002) District Court Auckland FP 004/245/00, para 68 Judge D F Clarkson.

division of functions within the marriage to the extent that the wife will still be able to enjoy a reasonable standard of living.

It has been shown that awards of spousal maintenance and child support can often provide a more equitable outcome than a division of functions within the relationship while the parties were living together. However, this may

2 *A greater role for future maintenance?*

It is undeniable that the wife did forego opportunities to advance her career, and it will take time for her to reach the earning capacity she otherwise would have had. Where this is the case, then future maintenance could be used to subsidise the claimant's income until he or she reaches that potential earning level, therefore ensuring that the wife's sacrifice is recognised. Thus, in *McGregor* instead of awarding a lump sum of \$50,000 under section 15, future maintenance could have been ordered for a period until it was reasonable for the claimant to reach that earning potential. This would have resulted in a lower award but would still have enabled the wife to live comfortably until she reached her potential earning level. This is a much more efficient and equitable outcome. As mentioned earlier, if the claimant can already meet his or her reasonable needs then this option is not available and he or she will remain under-compensated.

XI THE FORM OF MAINTENANCE PAYMENTS

Spousal maintenance awards can be paid either periodically or in lump sum.⁴³ Lump sum payments are usually discounted to account for contingencies such as the payer dying or losing his or her job. A claimant would still rather have a lump sum as it means the money can be put to use sooner than with periodic payments.

Furthermore an award of spousal maintenance can be dealt with at the same time as when the relationship property is being divided.⁴⁴ Thus, if spousal maintenance is awarded as a lump sum and made when the relationship property is being divided there is no difference in the form of the remedy between a spousal maintenance and section 15.

⁴³ Family Proceedings Act 1980, s 69

⁴⁴ Property (Relationships) Act 1976, s 32

XII DOES NEW ZEALAND NEED SECTION 15?

It has been shown that awards of spousal maintenance and child support can often provide adequate compensation for the effects of the division of functions within the relationship while the parties were living together. However, this may not always be the case as in the situation where a party is able to meet his or her reasonable needs but the division of functions has still caused the other party to have a significantly higher income and living standard. Such a situation is compensated by section 15. It follows that if New Zealand was to abandon section 15, there must be some provision made to account for the above situation.

A *An Expanded View of Spousal Maintenance*

One possible solution to this is to take an expanded view of maintenance, so that it covers all possible situations. Guidance for such an approach can be found in Canada's spousal maintenance scheme, which essentially encapsulates both section 15 and New Zealand's spousal maintenance scheme. However it is questionable whether New Zealand would want to allow as wide a recovery as Canada.

The relevant sections of the Canadian Divorce Act 1985 are as follows:

15

(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, as the court thinks reasonable for the support of

- (a) the other spouse;
- (b) any or all children of the marriage; or
- (c) the other spouse and any or all children of the marriage.

...

(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by the spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to the support of the spouse or child.

...

(7) An order made under this section that provides for the support of a spouse should

- (a) recognise any economic advantages or disadvantages to the spouses arising from the marriage or its break down;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection 8;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable period of time.
- (d) in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable period of time.

The Canadian Supreme Court in *Moge v Moge* discussed this provision and the principles associated with it at length.⁴⁵ If anything, the judgment in *Moge* is a more useful aid than the statute itself in formulating a better provision for New Zealand, as it outlines the fundamental principles underlying their spousal support scheme, which are quite different and far more liberal than ours.

B Economic Self Sufficiency

The first major point to take from *Moge*, is that economic self-sufficiency is only one of the goals of the Act and is no more important than any of the others. Furthermore, even where economic self sufficiency has been attained, that does not necessarily mean that the claimant's case is complete.⁴⁶ L'Heureux-Dubé J summed up this part of the majority's judgment by concluding:⁴⁷

In the result, I am respectfully of the view that the support model of self sufficiency which Mr Moge urges the Court to apply, cannot be supported

⁴⁵ *Moge v Moge* [1992] 3 SCR 813 (SC)

⁴⁶ *Moge v Moge*, above, 852.

⁴⁷ *Moge v Moge*, above, 857-858.

as a matter of statutory interpretation, considering in particular the diversity of objectives set out in the Act.

The consequences for this are that the reasonable needs enquiry conducted in spousal maintenance is essentially trying to ensure economic self-sufficiency. Indications from the courts in New Zealand also suggest that this is the overriding policy.⁴⁸ This is reflected by section 15 which is demonstrably designed to compensate a party so that they can maintain a reasonably comfortable standard of living.⁴⁹

As a consequence, the reasonable needs enquiry conducted in spousal maintenance is essentially trying to ensure economic self-sufficiency. It has been argued that section 15 seeks to compensate a party so that he or she can maintain a reasonably comfortable standard of living. Instead of referring to any of these a better formulation to adopt is to refer to readjustment.

Essentially, there is not too great a difference, as often compensating a party so that they are adequately readjusted will be congruent to economic self sufficiency. Using readjustment avoids the rigidity of reasonable needs and applies equally to both claimants who are not self-sufficient and those who are self-sufficient but still worthy of compensation. This enables spousal maintenance to compensate a party that can still meet his or her reasonable needs following the relationship but still suffers some economic disadvantage or confers some advantage on the other party that should be recognised by a compensatory payment.

How then does the Canadian scheme overcome the other problem where a party can meet his or her reasonable needs or is economically self sufficient immediately following separation but still suffers some economic disadvantage or confers some advantage on the other party?

C Compensating for the Division of Functions in the Relationship where a Claimant can meet his or her Reasonable Needs

⁴⁸ *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 132 Judge Ellis.

⁴⁹ See above, n 26.

The Supreme Court believes that spousal maintenance should include situations such as this. L'Heureux-Dubé J said:⁵⁰

Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities.

...

Hence, while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

It is clear then, that the Canadian formulation of spousal support enables a claimant party to recover for lost career opportunities as a result of the division of functions within the marriage even if he or she is able to meet his or her reasonable needs or is economically self sufficient.

Such a view is consistent with a scheme that is directed at facilitating readjustment following the break up of a relationship, as where a party has foregone career opportunities but is still able to meet his or her reasonable needs, then not compensating for that undeniable loss would not be facilitating a fair readjustment.

Such a situation arising is not hard to imagine. For example a relationship of 5 years between two lawyers who were both senior associates when the

relationship was formed. After separation, the claimant party will still be able to return to a good salary and will in all likelihood be able to meet his or her reasonable needs. However the other party is probably now a partner, while the claimant party would have been, had he or she continued working. Such a claimant would still be entitled to some compensation for loss of that career development under the Canadian scheme, as well as under a New Zealand approach that looks to "facilitating readjustment".

D Compensating for Lost Career Opportunities in Addition to a Reasonably Comfortable Standard of Living

Furthermore these observations suggest that even where a party cannot meet his or her reasonable needs then perhaps more compensation is warranted than just enabling the claimant to enjoy a reasonably comfortable standard of living. This fits nicely within the compensatory aim of section 15 but is precluded by the strictness of its wording, in particular the use of the word "significantly".

This already appears to have happened in New Zealand. *McGregor* is an example of where the section 15 award is effectively compensation for the lost career opportunities of the wife.⁵¹ However, as mentioned above, this is not the correct result as it does not fit within the tight wording of section 15 in that the division of functions did not cause any significant disparity. In other words, the disparity would still have been great even if the wife had not forgone career opportunities.

Under the approach advocated by L'Heureux-Dubé J then it would not matter that the wife was only ever going to earn a secretary's income while the husband was an engineer and so the division of functions could not have caused his income and living standards to be significantly higher. Undoubtedly the division of functions and therefore lost career opportunities contributed to this,

⁵⁰ *Moge v Moge*, above, 861-862.

⁵¹ *McGregor v McGregor* (23 December 2002) District Court Auckland FP 004/245/00, paras 56-60 Judge D F Clarkson.

but plainly, it was not the principal cause of the economic disparity.⁵² In fact, it is doubtful in a case such as this, that it is even a major cause.⁵³

1 *Was this ever Parliament's intention with regard to section 15?*

The Associate Minister of Justice during the third reading of the Bill said that section 15 is "there to account for the exceptional case, not the norm".⁵⁴ It can be inferred from this that the type of case that parliament envisaged was one where a party who had real potential earning capacity gave this up, while the other party continued to work and advance his or her career.

This can be viewed in a more cynical light. For example take *McGregor*. Any two rational people in a similar relationship would divide the functions in the way that they did. If relationships of this type were to break up, then it will almost always be the case that there is an economic disparity left at the end of it, and if there has been a division of functions in the relationship, then the claimant will always be entitled to a payment. Naturally it does not follow that such cases are the exceptions. Rather, such a disparity should be covered by spousal maintenance. Such a view of section 15 is reinforced by the strictness of the wording of section 15.

2 *Should New Zealand extend spousal maintenance to encompass this wider view?*

Given that Parliament had the opportunity to encompass such situations but chose not to, by enacting such a tightly defined provision suggests that New Zealand should not extend spousal maintenance. Furthermore, it has been argued in this paper that normal maintenance payments especially with future maintenance will sufficiently compensate that party. This view is reinforced by the fact that such decisions are essentially economically rational ones and are so frequent that a "floodgates" argument can be maintained.

⁵² *G v G* (13 December 2002) Family Court Wellington FP/085/813/00, para 127 Judge Ellis.

⁵³ *McGregor v McGregor*, above, para 32

⁵⁴ (March 1999) 591 NZPD 8625.

However, by using readjustment as the goal, it still gives the court some flexibility. For example the wife may be a secretary who has also completed three years of a law degree where she and her husband decide she should perform the traditional functions in the marriage, which breaks up after 12 years. Such a situation would warrant a higher level of compensation as clearly the career opportunities the wife has forgone are significant.

E Solution

New Zealand should amend its spousal maintenance provisions so that it is directed at facilitating readjustment with a view to enabling a claimant party to enjoy a reasonably comfortable standard of living, instead of the current test of reasonable needs. Doing so would enable section 15 to be repealed, as spousal maintenance would be able to compensate for the effects of the division of functions within the relationship that section 15 is designed to do, including compensating a party who has a reasonably comfortable standard of living, but has undeniably foregone career opportunities as a result of the division of functions within the relationship.

However it is too great a step to depart from the goal of economic self-sufficiency and compensate for lost career opportunities per se, when deciding to make an award under spousal maintenance. However, with facilitating readjustment as the aim, the court is still given more scope than under a reasonable needs enquiry. As a result there is a lesser chance of any situations worthy of compensation going uncompensated.

XIII CONCLUSION

Section 15 was enacted to redress the disparity between two parties that often arises from the division of functions within the relationship when a relationship breaks up. Spousal maintenance is also available to a claimant party he or she cannot meet his or her reasonable needs.

The underlying aims of both schemes are very similar. In many cases the need for an award under section 15 is not necessary as spousal maintenance and child

support, can often provide adequate compensation for the division of functions within the marriage. However, there is a limited range of cases where this is not the case.

Although Canada's very liberal spousal support scheme cannot be supported in New Zealand, it still provides useful principles that guide the application of New Zealand's scheme.

For spousal maintenance to subsume section 15 a wider view of maintenance, reformulated to aim to "facilitate the readjustment" of a claimant party with a view to ensuring the claimant party can enjoy a reasonably comfortable standard of living, must be used. Doing this would mean that spousal maintenance could replace section 15 and compensate a claimant party for the full effects of the relationship as the Court's discretion is not as limited as it currently is under both section 15 and spousal maintenance. Ultimately, however this an issue for Parliament to decide.

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