

FEMINIST LAW BULLETIN NEW ZEALAND AOTEAROA

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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- Identifies when feminist issues arise in policy, legislative proposals, and the practice of law;
- Provides an opportunity for exploration and discussion of some of these issues;
- Enables a general readership to gain an introduction to feminist analysis of the law.

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"In the bigger scheme of things the universe is not asking us to do something, the universe is asking us to be something. And that is a whole different thing." – Lucille Clifton

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Fairer Property Law At Last

History was made last month when the Property (Relationships) Act was passed almost three years to the day after it was introduced. Originally consisting of two Bills (the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill), the new Act was made possible by a Government Supplementary Order Paper that joined the two bills together.

There were several historic aspects to the new Act including the recognition of lesbian and gay relationships as de facto relationships, doing away with different categories of property, increased recognition of women's unpaid work, and a new set of statutory purposes and principles. In this article we answer some of the commonly asked questions about the new law.

What is the new Act called?

The new Act is called the Property (Relationships) Act 1976. The new Act amends the Matrimonial Property Act 1976 and changes its name.

What are the purposes of the new Act?

The purposes are:

- To reform the law relating to property of married and de facto couples
- To recognise the equal contributions of partners to their partnership

The Feminist Law Bulletin is written and produced by Joy Liddicoat, PO Box 5071, Wellington, New Zealand or e-mail: strategic@xtra.co.nz

- To provide for a just division of the relationship property between the couple, while taking account of the interests of any children of the relationship.

What are the principles of the Act?

When deciding cases under the new law, the Courts will have to take into account the principles of the Act, namely:

- That men and women have equal status and that their equality should be maintained and enhanced.
- That all forms of contribution to the marriage partnership or de facto relationship (in other words, both paid and unpaid work) should be treated as of equal value.
- That a just division of relationship property must have regard to the economic advantages or disadvantages to spouses or de facto partners.
- That questions about the new Act should be resolved as inexpensively, simply, and speedily as is consistent with justice.

Who does the new Act apply to?

The new Act applies to married couples, heterosexual de facto couples and lesbian and gay couples. It doesn't apply to other sorts of family relationships.

The Act will not apply to people who have been in a relationship for less than 3 years or to people who have been in a relationship for longer than 3 years but where the courts decides it would be fair to treat the relationship as one of short duration.

What is a de facto relationship?

A de facto relationship includes heterosexual and lesbian and gay couples where:

- Both are at least 18 years old
- They live together as a couple
- They are not legally married to each other

It is likely that in deciding whether or not a couple is in a de facto relationship the courts will look at evidence of a range of matters including:

- How long the relationship was
- Whether or not it was a sexual relationship
- The degree of financial inter-dependence or dependence
- Any agreements about financial support
- Ownership of property
- Care and support of children
- Whether they hold themselves out as a couple to their family and friends
- How the different household tasks were divided

What property will be shared equally?

Under the new Act all matrimonial property will be shared equally unless to do so would be "repugnant to justice" (this is a difficult legal test to meet). Under the current law, only the family home and chattels are shared equally.

In addition, if the actions of one partner directly or indirectly increase the value of separate property held by the other, the increase in value is treated as joint property. This covers the situation where one partner helps the other with, for example, the business or a holiday or second home.

What about children's property?

There is no specific right for children to get some share of the property. However, the new Act will require the Court, when making an order for furniture, to have particular regard to the needs of the person applying to have suitable furniture, household appliances and household effects to provide for the needs of any children.

Are there any new orders that can be made?

The Court will now have power to order one partner to pay the other where there is going to be a difference in the economic outcomes because of the way in which work was shared during the relationship. For example, if a woman stayed at home to look after children, and could not be in paid work, an order might be made that she should be paid extra until she has been able to train to get a job.

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The Court will also be able to order lump sum payments.

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What about family trusts?

The new Act is designed to make it harder for people to use family trusts to prevent them having to share their property with their partner. The legal test for when a Court can overturn a trust will be lowered from where it has an "intention to defeat" the other spouse's interest, to where it "has the effect of defeating" that interest.

What happens if one partner dies?

The new Act will apply the same rules about property division whether the relationship is ended because one spouse dies, or because the relationship has irreconcilably broken down.

For heterosexual de facto couples and for lesbians and gays there is the additional recognition of their legal right to a claim in the estate of their partner.

Under the current law de facto partners (whether heterosexual or lesbian or gay) have no right to claim on their deceased partner's estate, no matter how long they have lived together.

What about contracting out?

People will be able to have their own agreements if they want to. However, the new rules, a Court will be able to set aside a contract if allowing the contract to stand would cause "serious injustice."

What will the contracts look like?

The Select Committee that considered the Bill recommended that a model form of agreement for contracting out should be included in new regulations. This step was to help people who cannot afford a lawyer and who need some guidance on the sorts of things that the contract should cover. However, every contract will need to be tailored to the lives of the particular couple.

When will the new Act apply?

The new Act comes into force on 1 February 2002. This means that if a couple ends their

relationship after 1 February 2001, their property will be divided under the new rules. De facto couples (including lesbians and gays) who want to have their own contracts can do so from **1 August this year**. The same goes for married couples. If a de facto couple breaks up before 1 February 2001, their property will be divided under the current law.

For married couples the Act applies to marriages after 1 February 2001 (although rules for marriages of short duration will stay the virtually the same). Married couples that have any court proceedings that started before 1 February next year but not finished will be dealt with under the new law. We may yet see a flurry of settled litigation from litigants who have otherwise been dragging their heels to get their cases settled up until now.

What information will the public get about the new Act?

The Select Committee that considered the Bill recognised the importance of an education campaign about the new Act and the Government has set aside \$60,000 to cover education about the new laws. The Ministry of Justice indicated that this was to be spent, at least in part, on the production of a series of pamphlets, including one on contracting out of the Act. Some information may eventually be available on the Ministry of Justice website.

The study on *Women's Access to Legal Services* showed that most women prefer information that is readily accessible to them, their family or community groups. The study also showed that while pamphlets are the most common form of legal education material, this form is the least favoured by women (particularly Maori and Pacific Islands women and women with disabilities). This suggests that a community based education (such as training for community workers and appropriate seminars) may well be far more effective than the planned paper campaign.

Punitive Australian Access Laws

The Family Law Amendment Bill 2000 raises serious concerns for mums awarded custody of their kids after separation. The Bill is a federal one and has been lobbied for by men's groups. Under the law parents who repeatedly refuse access visits to the other parent face compulsory penalties such as fines, community service, education programmes, or even up to one year in prison. The new laws will also apply to people who repeatedly refuse to take their children for access visits.

The new laws remove any discretion for judges to impose the appropriate penalty and, for that reason, have been likened to mandatory sentencing. Attorney-General Daryl Williams has been reported as stating that the laws were introduced to make parents more aware of their responsibilities to their children after a relationship ends. In practice, however, the laws are most likely to mainly affect women because women are more statistically likely to be a custodial parent who may be refusing access.

Research in New Zealand shows that one of the dangerous times for women who have left their partners, is immediately after separation. In addition, research shows that verbal or physical abuse of the custodial parent often takes place when the other parent is exercising access. This can also be extremely dangerous for the children, as the tragic case of the Bristol family in Wanganui showed.

Groups in Australia have expressed concern about the unfairness of the new laws, particularly for women who may have perfectly valid reasons (such as safety) for refusing access on a particular occasion. In addition, the imposition of fines and other penalties for refusing access has been labelled unfair and punitive.

(See also: *Access Penalties Become Mandatory Sentencing*, Law Institute Journal, March 2001)

From the Net

www.cevep.org.nz

Check out one of the growing number of New Zealand feminist websites from the Coalition for Equal Value Equal Pay which was recently launched. This site includes relevant legislation, resources, history, current situation and links to other interesting sites.

www.ibanet.org

International Bar Association site that has a link to the papers given at the World Women Lawyers Conference recently held in London (the papers are listed under the past conference link).

www.hrw.org

Human Rights Watch – an international but United States of America based website with country updates and good links to human rights materials.

www.amnesty.org.nz

Amnesty International New Zealand section – includes information on justice for women victims of torture as well as persecution of lesbians.

www.dpa.org.nz

Disabled Persons Assembly – this is an umbrella organisation representing people with disabilities, the organisations involved in advocacy on their behalf and service providers. site contains information about DPA, updates and links to other disability sites.

www.natlib.govt.nz

The National Library site with a great sound track and links to catalogues, databases, and digital collections.

www.aviva.org

Free monthly listing of women's groups and events worldwide, including Australasia (current issues include the widening of the gender pay gap in Australia).

The Backlash Is Happening

Many lawyers and community workers are concerned about the level of current public debates in family law, especially domestic violence and custody and access of kids. Over the last three or four years we have seen:

- Attempts to re-open the Family Courts to the media so that case details can be publicised
- Cases of men murdering their former spouses after separation citing problems about access and custody as an excuse
- Attempts to discredit some of the hard won parts of the Domestic Violence Act (such as the presumption that there should not be any access when there has been physical or sexual abuse of a child until it can be shown that the child will be safe)
- The Shared Parenting Bill promoted by Dr Muriel Newman of ACT which included a presumption of 50:50 joint custody and would have made it a crime to make a false allegation of domestic violence or sexual abuse
- Review of the Guardianship Act which covers custody and access of children
- Minimising and victim blaming attacks on women and children who are victims of domestic violence
- Proposals to further cut the rate of the DPB for women who cannot or do not name the father of their child

What is at stake?

The current publicity has been driven by a range of different groups, mainly "men's rights groups," which complain about the treatment of men, and especially men who are fathers, in the Family Court. Principles and structures of our legal system that we have taken for granted are under serious threat, including:

- The Family Court – there has been some discussion of doing away with the Family Court altogether or making major changes to it
- Women's fundamental right to control their own lives, especially after separation

- The safety of children when parents separate or divorce
- The principle that the best interests of the child shall always be the paramount consideration – this could be replaced so that parents' rights are paramount
- Legal protections for women and kids under the Domestic Violence Act

How did this start?

Since the 1970s different types of "men's rights groups" developed in the United States, Britain, Australia, Canada and New Zealand. Many of these groups claim that the courts discriminate against fathers in contested custody cases by awarding custody in most cases to mothers. Other issues focused on by these groups have included:

- Resentment, grief and disempowerment of a parent who has "lost" custody
- The conflicting evidence of the impact on children of absent fathers
- Fathers refusing to take access when they are entitled to

These issues have been picked up by some groups in New Zealand, especially by use of internet technology to distribute information and maintain networks. Self-identified examples of such groups include:

- ❑ A Child's Right To Be Mothered and Fathered By Both Parents.
- ❑ DADS Army 2000.
- ❑ Families apart require Equality (FARE).
- ❑ Father and Child Trust Otago.
- ❑ Men and their Children. MATCH.
- ❑ New Zealand Men for Equal Rights.

These groups have well established international links (see for example, <http://nzmera.50megs.com>) and websites that contain the following sorts of statements:

"The definition of rape must be restricted, and all attempts to expand the definition of rape to include anything a woman might afterwards wish she hadn't done should be strenuously resisted."

"The Law is not an Ass - the Law is a Sexist Bitch!"

"The restrictions on defence lawyers in rape trials must be removed, in order to safeguard the rights of innocent defendants. It is up to judges and juries, not parliament, to decide what evidence is relevant in a given case."

There is regular picketing of Family Courts in Wellington, Porirua and Auckland by groups such as these, with the result that many lawyers, their clients and judges feel uncomfortable and are being intimidated.

However, the claims made by such groups rarely add up. For example, research in Australia showed that in the vast majority of cases the parties settled before going to a hearing. If a case did go to a defended hearing, the outcomes usually favoured the father. In New Zealand, research from the University of Otago has shown that 90% of cases are settled out of Court and that men and women win and lose about the same percentage of cases. Unfortunately, these facts are not getting publicised. In addition, it is often difficult to know exactly what these groups are really claiming about the Family Court and therefore even more difficult to debate the real issues.

How does this fit with the law's historic treatment of women?

Claims about the preferential treatment given to women are not new. In fact, for many years litigants who were unhappy with the outcome of their own cases mixed their dissatisfaction with concerns about the equal rights of women generally. Typical strategies included denigrating women who fought for equal rights (calling them "man-hating", claiming their children suffered as a result or that they were bad mothers, and saying that all the troubles in society could be traced back to women's campaign for equality).

Today, these arguments are usually seen in claims that, for example:

- women's rights have gone far enough (because we now have a woman Prime Minister, Chief Justice, Governor-General and Leader of the Opposition)

- those positive steps to address gender bias in the courts (such as no cross-examination of a sexual assault victim on prior sexual history) actually discriminate against men
- men are the real victims and should get special protections, especially from false allegations of sexual abuse or domestic violence

What can be done about it?

Responses to these activities and the claims of these groups in other countries have varied. In some cases there have been law changes to a presumption of joint custody (some states of the US have this). However, even in these cases, there is no presumption of joint *physical* custody – in fact the legal effect of many of these laws is the equivalent of guardianship. In New Zealand most fathers have guardianship as of right when the child is born.

More recently the United Kingdom has focused on parental responsibilities to children, rather than treating kids as property that one parent has a "right" to. In Australia changes to the law to introduce a concept of "shared responsibility" happened in response to intense lobbying by fathers' rights groups. However, a study into these laws found these measures resulted in increases applications by men who were wanting to control what their former partners could do after separation. For example, fathers seeking orders to make mothers move back to their old cities or suburbs when women had moved without the consent of the father and using court orders to stop women moving.

Summary

The backlash is not new, but the current context is a concern. The questions now are:

- How can the context be re-focused onto good family law and policies that are fair and benefit everyone in the community?
- What can be done to protect women and kids from the effects of the backlash?
- How can women's hard won equal rights achievements be retained and new achievements made (such as equal pay)?