

**LEGISLATION NOTE:****THE MATRIMONIAL PROPERTY BILL 1975****I INTRODUCTION**

The approach of the legislature in New Zealand toward matrimonial affairs has, in the past, tended to be one of consolidation rather than innovation. The Matrimonial Property Bill 1975<sup>1</sup>, however, is hopefully the first step on the road to a complete reappraisal of all aspects of New Zealand family law. Representing as it does, a significant change of approach in this field, it has the potential to provide the basis for a comprehensive code to replace the presently fragmented and relatively unsystematised matrimonial laws.

The Bill provides ostensibly, that a wife shall assume a totally independent status from that of her husband in all dealings with matrimonial property<sup>2</sup>, and that any contribution<sup>3</sup> she may make to the matrimonial property will be given equal and due consideration with that of her husband. All property owned by the spouses together or individually is classified as separate property<sup>4</sup> or matrimonial property,<sup>5</sup> the latter being further split into domestic and general assets.<sup>6</sup>

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1. 1975 No. 125-1.
  2. Clauses 10(2), 11, 44, 46; and in particular clause 44(1): "Except as provided in any enactment, the rights, privileges, powers, capacities, duties, and liabilities of a married woman shall, for all purposes of the law of New Zealand (whether substantive, procedural, or otherwise), be the same in all respects to those of a married man, whether she is acting in a personal, official, representative, or fiduciary capacity."
  3. Clause 14(1) gives a wide definition of "contributions".
  4. Clause 2: "Separate property" means all the property of either spouse which is not matrimonial property.
  5. Clause 8: Matrimonial property defined: (1) Matrimonial property shall consist of:
    - (a) The matrimonial home or homes and the family chattels; and
    - (b) All property owned jointly or in common by the husband and the wife; and
    - (c) All property owned before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and the wife; and
    - (d) Subject to subsection (2), (5) and (7) of this Act, all property acquired by either the husband or the wife after the marriage; and
    - (e) Any income and gains derived from, and the proceeds of any disposition of, any matrimonial property; and
    - (f) Any policy of assurance taken out by one spouse for his benefit or for the benefit of the other, whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise; and
    - (g) Any policy of insurance in respect of any property that forms part of the matrimonial property; and
    - (h) All other property that the spouses have agreed, pursuant to *section 15* of this Act, shall be matrimonial property.
  6. Clause 9: Domestic assets and general assets defined: (1) Matrimonial property shall comprise two classes of assets, namely domestic assets and general assets. (2) Subject to the provisions of this Act, the domestic assets shall comprise:

The general rule is that the domestic assets are to be divided equally between the spouses on dissolution of the marriage;<sup>7</sup> division of general assets is made on the basis of the contribution to each of those assets.<sup>8</sup> These basic rules appear at first glance to provide the answer to the main criticisms voiced of the Matrimonial Property Act 1963.<sup>9</sup> However closer examination reveals that some of the present problems may continue to be experienced if the Bill becomes law as it stands because of the limited application of the definition of "contributions" and the degree to which conduct is relevant to the division of the matrimonial property. In addition to these two matters, with which this note is principally concerned, there are additional matters which deserve brief mention.

The Bill specifically does not deal with the question of the distribution of matrimonial property upon the dissolution of marriage by death.<sup>10</sup> This may be regarded as a defect in the Bill, given that death is the predominant cause of dissolution of marriages. The Bill purports to be a code of matrimonial property law,<sup>11</sup> but as it stands at present there is some overlap and consequent anomalies in the present matrimonial property and succession laws, especially the Family Protection Act 1955.<sup>12</sup> The result of this may well be, if the rules of the present Bill are applied, that a spouse is better off property-wise, where a marriage terminates through divorce rather than death. Such a situation could be remedied by a strict extension of the Bill to dissolution by death; or alternatively by the extension of the Bill to cover the death situation coupled with a substantial amendment of the succession laws.

Also while the Bill upholds the removal of traditional incapacities of married women in all respects,<sup>13</sup> it may be said to effect a change

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- (a) The matrimonial home or homes; and
  - (b) The family chattels; and
  - (c) Any land purchased by either the husband or the wife or both for the purpose of erecting thereon a matrimonial home; and
  - (d) Any policy of assurance upon the life of the husband or the wife if that policy is held by the husband or the wife for the benefit of either of them or both of them; and
  - (e) All other property that the husband and wife have agreed, pursuant to *section 15* of this Act, shall be domestic assets; and
  - (f) Such other part of the matrimonial property as does not exceed \$10,000 in value or, in any case where *subsection (3)* of this section does not apply and neither spouse is the beneficial owner of an estate in land on which the matrimonial home or homes are situated, such other part of the matrimonial property as does not exceed \$30,000 in value.

7. Clause 12.

8. Clause 14.

9. E.g. A. C. Holden: "With My Worldly Goods I Thee Endow — The Division of Family Assets at Law" (1975) 3 Otago L.R. 281.

10. Clause 5.

11. Clause 4.

12. See also Administration Act 1969 and the Joint Family Homes Act 1964 which are also relevant.

13. Clause 44.

only in relation to this legislation with no regard to the application of its principles in other areas.<sup>14</sup>

The physical law-out of the Bill is, it is suggested, noticeably defective. Several of the important and complementary definitions are contained in both the body of the Bill and in clause 2, rather than all together. The result is that some of the definitional clauses do not have the Bill-wide application they need, and would have had, if they appeared in the definition clause, clause 2. This makes the Bill more than necessarily cumbersome to handle and difficult to understand, as well as facilitating what appears to be a serious substantive oversight in respect of the application of the definition of "contribution".

## II CONTRIBUTIONS

"Contribution" is defined in clause 14(1) for the specific purpose of clauses 12(3) and 13. This definition does not apply to clause 12(2) or clause 14(2), both of which sub-clauses use the word. Clause 8(3) on the other hand itself specifically incorporates the definition of clause 14(1). In clause 12(2), an imbalance of contributions must be shown to warrant a departure from the general rule of equal division of domestic assets under clause 12(1). As the definition of "contribution" is not applicable to this section, confusion may result. A court will have to decide whether sub-clauses (2) and (3) are contradictory or complementary (either of which results would leave room for former judicial practices to apply and thus give preference to financial contributions), or whether implicitly the definition of "contribution" for clause 12(3) is that for clause 12(2).

Limitations of its application aside clause 14(1) gives a fairly exhaustive definition of "contribution". The use of the phrase "prudent management of the household" however is unfortunate in that it invites the implication that housekeeping performance is to be evaluated by a standard higher than that required in the normal performance of domestic tasks. It puts a businesslike interpretation on a function which should be determined on a completely different basis. Contributions as a wife and mother should not be seen to be less important or valuable than dollars saved by careful budgeting.<sup>15</sup> Further, the use of wording similar to that in the present legislation encourages reference to earlier cases and perhaps the adoption of the restrictive standards used under it.

A problem at present faced by housewives seeking proper recognition of their contribution (in its widest sense) to the matrimonial property is that the courts will not allow them to 'trace' their contributions towards the home into any other assets amongst the matrimonial property. A housewife cannot claim a proportion of

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14. E.g. the effect of clause 44 on the rules of domicile is not clear.

15. Discussed by Holden, note 9, at p. 284.

increase in value during their marriage, of the couple's total assets. She must identify a specific contribution to each individual asset. In other words the argument that her 'household management' has contributed to keeping her husband's costs down, so that she has in effect contributed to his business, is of no avail to her.<sup>16</sup> The court will only give recognition to a substantial contribution to all spheres of the husband's business and the home.<sup>17</sup>

Some provision has been made in clause 14(1)(b) of the Bill for full tracing to be carried out during the apportionment of the general assets. However, if the division between domestic and general assets is maintained, this right needs to be spelt out with greater precision to avoid further decisions like *E v. E*.<sup>18</sup>

### III CONDUCT

Clause 12(2)(b) provides that where "the contribution of one spouse to that part of the assets, because of neglect of his or her responsibilities in relation to the other spouse, or because of dissipation of his or her income or capital, has clearly been disproportionately small" the equal division rule for domestic assets shall not apply. This runs directly counter to the stated purpose of the Bill to "recognise the equal contribution of husband and wife to the marriage partnership".<sup>19</sup> With the possibility of evading the equal distribution rule of clause 12(1), this provision is likely to be taken advantage of in most matrimonial disputes and will perpetuate the wrangle over the value of, and standard for, evaluation of child rearing and household management.

The inclusion in clause 12(2)(b) of matters relating to the conduct of the parties serves to provide for more, rather than less, injustice. Apart from the already recognised imbalance when regarding the comparative contributions of the housebound wife and the earning husband, the situation may also arise where a woman who is a poor housekeeper is penalised, but a man of low intelligence with a lower than average income is not. Contributing factors in other areas of the marriage may also lead to such neglect as that referred to in clause 12(2)(b), but these are apparently to be ignored. For example, the behaviour of one spouse, while not related to the assets in question, may precipitate neglect of the property by the other spouse. Similarly clause 12(2)(c) could allow conduct to be considered, and for this reason (and the fact that it is an unnecessary provision), it should, it is submitted, be deleted.

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16. *E. v. E.* [1971] N.Z.L.R. 859.

17. *Haycock v. Haycock* [1974] 1 N.Z.L.R. 146; *King v. King* [1974] Recent Law 101; *Gleeson v. Gleeson* [1975] Current Law 1090.

18. [1971] N.Z.L.R. 859.

19. In the Long Title of the Bill.

The loophole provided by the above clauses cannot be retained, if the basic tenets of the Bill are to be maintained.<sup>20</sup> The suggested conduct rules merely serve to complicate proceedings and prolong bitter argument between the parties. It is nevertheless recognised that there should be some control over the wilful distribution or wasting of the matrimonial assets. This control should operate on the basis of physical damage resulting from positive actions. Where damage can be clearly shown, it is both acceptable and just that the spouse responsible should find his or her share of the matrimonial property diminished by a corresponding amount. Such a provision would narrow the escape route provided by considerations of conduct and hence discourage constant challenge of the newly-found right of equal distribution.

The difficulties in the Bill mentioned in the note largely arise from the uncomfortable and artificial division between the 'domestic' and 'general' assets. Problems of adequately defining contributions; the role of conduct and fault in determining appropriate shares; evasion of the equal distribution rule; a fair consideration of 'global' interests;<sup>21</sup> and the unwieldy physical layout of the definition clauses of the Bill, are all direct consequences of establishing this division of assets. The answer may therefore lie in removing this concept from matrimonial property.

The promoters of the Bill have apparently<sup>22</sup> accepted the concept that a marriage is a partnership in which profit and loss are shared equally. But to accept this notion in relation to a home, but not necessarily in relation to a family business for example is, with respect, hypocritical. The only justification for such an attitude is in cases of wilful neglect or damage of assets or where the marriage has been of such short duration as to make an equal division inequitable.<sup>23</sup> If provision, in such cases, was made for reversion to separate property of assets owned at the time of marriage or acquired by gift or inheritance during the marriage, this criticism may be overcome. The appropriate duration of a marriage for purpose is debatable, but five years or less would suggest itself as a sufficient length of time to establish a contribution in marital terms. And also it is long enough to render accusations of opportunism unjustified.

If such reforms are implemented, fewer matrimonial disputes before the courts would occur and their passage through the courts would also be less trying and time-consuming. In addition the opportunity for any reversion to former judicial attitudes would be eliminated. And this is achieved without unfair disadvantage to a spouse subjected to wilfully destructive behaviour by the marriage partner.

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20. See, *Matrimonial Property — Comparable Sharing — An Explanation of the Matrimonial Property Bill 1975*: a paper presented to the House of Representatives in 1975.

21. See *E. v. E.*, note 16.

22. See approach to the division of the domestic assets adopted in clause 12.

23. A concept recognised in clause 12(2) (a) of the Bill.

