Recent Legislative Changes Affecting Succession Law in New Zealand - The Property (Relationships) Act 2001

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Introduction

It is the most proximate kinds of human relationships which bedevil the regulators. The law in its inherent tendency to simplification and abstraction often proceeds on the assumption that the reverse is the case treating relational proximity as if it were somehow compelling. Succession law, so far as it is concerned with family relationships, puts the lie to that assumption. It is sometimes said that succession law is one area of law that is most closely tied to and reflective of a particular culture. To conceive enshrined succession law principles as functioning like the genetic code of a culture or society provides an appropriate metaphor. It is one that has sometimes been employed to indicate its role of succession in the self-perpetuation of social structures.

This pertains in two senses. Firstly, the principles of succession directly reflect a range of (sometimes competing and unresolved) cultural norms and precepts relating to social institutions and rights of obligations. These include those such as individual choice, family obligations and their significance. Secondly, the metaphor provides a perspective on that which succession law sets out to achieve - the manner in which cultural norms and precepts of a society at a given time, or at least some of the most important of them, are transmitted from one generation to another . In some cultures that which is transmitted by a regime of succession is clearly a matter of social status and perhaps political authority. In the case of so-called Western capitalist cultures, on the other hand, it is primarily wealth and property which are primarily transmitted through the operation of succession law. Wills and intestacy rules set out to provide some ordered legal regime for this transmission. But the transmission can sometimes be disorderly or disruptive if the legal mechanisms for transmission are arbitrary in some respects; for example if they are left purely to an individual's freedom of choice alone. Thus there often appears from time to time an endeavour to guarantee a more orderly pattern of transmission.

In light of both of these senses, recent changes in important parts of the law of succession in New Zealand are highly significant. In the first sense they reflect wide-scale changes which have taken place in the cultural composition of that country. In the second sense, it is evident from the legislative reforms that there is a perception that the reliance on the so called freedom of testation to achieve an orderly disposition of property has generally failed, particularly where the recognition of more potent social obligations is demanded. This paper outlines some of the main aspects of these changes. No doubt there will be some ongoing questions about whether or not the law here is imposing change or simply reflecting it but this tends to be an issue of the chicken and egg variety.

However, it is interesting to note that, at a time when the South Pacific jurisdictions are still struggling to come to terms with the concept of family provision or testator's family maintenance legislation, New Zealand, the original mover of such legislative reform in succession law, has introduced more sweeping changes. Family provision and testators family maintenance involve, to the uninitiated, a legislative scheme which purports to accommodate the right of deceased person to dispose of his or her property as

they wish whilst at the same time providing that in cases where the testator has failed in his or her duty to defined family members, the court may at its discretion, order that provision be made out of the testator's estate for that family member. Certain jurisdictional and other conditions must be made out but the court's order is largely discretionary. The order takes effect as a codicil to the testator's will or as a new will if there is an intestacy. In an important respect, for New Zealand at least, the current changes are radical changes because they go back to the beginning. This indeed is the proper sense of the term radical; that is going back to or searching for the roots or fundamentals. These changes, in fact, evince a further move in the direction of guaranteed provision for surviving partners out of the estate of a deceased person in that country.

In some jurisdictions in the South Pacific there is family provision legislation is similar to that which, in New Zealand, in its latest manifestation, appears in the Family Protection Act 1955.[1] In the South Pacific region it is fair to say that such legislation is generally outdated and of dubious effect. Furthermore it is seldom used. It exists in Solomon Islands, Fiji, Samoa and, in a rather gnomic form, in Vanuatu.[1] Sometimes it is criticized because of the assumptions it makes regarding the nature of a family per se, or because, in the South Pacific context, it purports to impose family obligations which are at odds with those to be found in custom. Like many other legislative regimes in the South Pacific jurisdictions, it suffers from the 'time- warp' syndrome. It was adopted from other common law jurisdictions at a time long past and has not been modified since. It remains part of the legal system post independence, but it is frequently ignored perhaps just because it is perceived as irrelevant culturally, socially and politically. That is, of course, until someone discovers that it does have force of law and seeks the redress that it provides. In such a case the problem of lack of effective law reform measures in many countries becomes even more acute.

The New Zealand Reforms

This principle behind the recent New Zealand legislation is similar, in some ways, although not exactly, to the principle which was in Roman law called legitim, by virtue of which a guaranteed share of particular property of the deceased could not be disposed of by will. It had to pass to a spouse and/or others. There are many variations of this principle which naturally emerged in civil law countries but which has in more recent times crept into legal reform agendas in other countries. The application of such a principle removes a particular share of property, or perhaps specifically designated property, from the realm of testamentary power. In other words, it cannot be disposed of by will. It still survives in most civil law jurisdictions, for example, the principle légitime in French law or in the law of the State of Louisiana, U.S.A., although there are variations both as to just how it provides the guarantee of entitlement and to whom it provides the entitlement. Such a principle as it existed in Scottish law was, in fact, the subject of discussion in the New Zealand parliament at the time the original testator's family maintenance legislation was introduced in 1900 - the first such legislation anywhere in the world.

However, at the time the parliament of New Zealand rejected the introduction of the Scottish approach. What it preferred to do was to preserve the right of a testator to dispose of property by will, presumably because it was regarded as such a basic right of property and therefore also a fundamental right in a liberal political society. What it did in the form of testators family maintenance legislation was to create the possibility of subsequent discretionary interference by the courts with the right of free testation in a particular case subject to certain requirements, both jurisdictional and substantive, being met.

The correct approach to what was achieved here has long been the subject of dispute. Indeed it is still open to dispute even though the basis of the jurisdiction has been widened. The conjecture has been as to the basis upon which the courts are to exercise their discretion; for example whether it was based on the failure of the testator to perform a moral duty to provide adequately for family members (which has been the approach conventionally adopted in alter court decisions) or whether on some other basis.[2] Whatever

the case it was left to the discretion of the court rather than purporting to guarantee any entitlement of a family member to a certain share of the estate. Testator's maintenance legislation has become family provision legislation. In the various jurisdictions which adopted it, the concept of a family has subsequently been widened in some cases and the mechanisms for determining the property of the deceased person have been changed. But many would agree that somehow the fundamentals have remained the same. Unfortunately understanding exactly what the fundamentals are has been the thing upon which many commentators cannot agree. They do agree that the courts can override the power of testation but on what basis should they approach it. The predominant view of the courts themselves , whether in Australia or New Zealand, has been that the power to intervene and invoke the discretion is based on the notion that the testator has failed in his/her moral duty to make adequate provision for the proper maintenance and support of family members. However, the legislation itself does not refer to the notion of a moral duty as such. Yet the language of the relevant sections constituting jurisdiction does contain moralistic language such as 'adequate provision' and 'proper support'. Furthermore it seems that the legislature did couch the debates on the originally proposed legislative scheme in terms of notions of a failure by the testator of his/her moral duty to provide for members of the family.

There has also been continuing disagreement as to the rationale for the existence of this legislation. Some have contended that its purposes was to ensure that a testator's dependents were provided for and social obligations to them were carried out. Another view is that the key issue is that of relieving, at least to some extent, both the State and through it society at large from the obligations to provide for dependents who are left without support. Whatever the case, in this general context the provision s of the initial scheme of family provision in New Zealand were contained in the Family Protection Act 1955. However so far as the succession side of the issue can be taken as one of providing for the members of family the parliament had also introduced the Matrimonial Property Act 1976 which purported to guarantee to a spouse on dissolution of the marriage a fixed one half share of the matrimonial property. This was not extended to the testamentary context. However it has provided an important precedent for the consideration of the current reforms in that context.

The Substance of the Reforms

The recent changes have become new law as part of the Property (Relationships) Act 2001. There are several changes introduced by this legislation but I want to concentrate on some of the more important of them only. This Act was passed after a long period of formulation and deliberation by the Law Reform Commission, the parliament and various committees/public representations on changes to the various schemes set out in the Matrimonial Property Act 1976 and the Family Protection Act 1955. The process of reform involved two seemingly independent proposals in the intial stages. One was in the shape of a proposed Matrimonial Property Amendment Bill. The second was a De Facto Relationships (Property) Bill. Both in their own way proposed amendments to vital aspects of the regime under the Matrimonial Property Act 1976.

The Matrimonial Property Act 1976 had imposed what could be called a system of a presumptive share in respect of matrimonial property. A spouse on dissolution of the marital relationship inter vivos was entitled to a presumptive one half share of the property of the marriage. The presumption could be displaced by the court as regards a matrimonial home and household chattels where there were extraordinary circumstances which would make equal sharing repugnant to justice. The general rationale behind the legislation was that of equal sharing between marriage partners. This development in itself was a ground-breaking reform at the time. However, the Matrimonial Property Amendment Bill proposed to extend such a principle to the field of succession by extending the presumption of equal sharing to a dissolution of marriage brought about by the death of a partner.

The De Facto Relationships (Property) Bill could be traced to proposals for reform of the law relating to de facto couples in a 1988 Report of a Working Group on Matrimonial Property and Family Protection,

although the issue was also mooted when the Matrimonial Property Act 1963, the predecessor to the 1976 Act, was being debated. So far as the protection of property rights of de facto partners is concerned, the Property Law Act 1952 was amended in 1986 to include a section 40A . This provision allowed de facto partners to make agreements as to the division of property on separation. Prior to this contracts of this nature were treated as unenforceable as being contrary to public policy.

However, the significant measure proposed under the De Facto Relationships (Property) Bill was to extend the matrimonial regime relating to the division of property to the ending of a de facto relationship and to provide some presumptive guarantee as to the entitlement of the partners to such a relationship. No such regime had previously existed in New Zealand. The entitlement of a former de facto partner to a division of property or to property per se was often left to the equity courts and the remedy of the constructive trust.[3] It is in the form of a presumption as to the entitlement of equal sharing of a partner to the relationship, which would operate in respect of "core" relationship property (i.e. the family home and chattels). The balance of the relationship property was then to be divided according to the partners' respective contributions to it. It was proposed that the partners could contract out of the provisions as long as certain procedural requirements were met.

However, entitlement under the proposed De Facto Relationships (Property) Bill was not extended to all de facto relationships. It only proposed to apply to relationships which were 'in the nature of marriage between a man and a woman' (hence not same-sex relationships) and also to relationships of this kind which, normally, had endured for not less than three years. However it was also proposed that in some circumstances the court could make awards in respect of relationships of less than 3 years were there a child of the relationship. Likewise the court could make an order where one partner had made a substantial contribution to the relationship. In either case it would need to be shown that failure to make an award would result in serious injustice.

These two Bills were referred to committees for review and reception of public submissions in 1998. Finally, with further important amendments proposed, they were on passed by the parliament. However this now appeared under the umbrella of one piece of legislation; namely, the Property (Relations) Act 2001 which appears technically as the new name of the Matrimonial Property Act 1976. The reforms proposed by the De Facto Relationships (Property) Bill were absorbed into the amendments proposed to the Matrimonial Property Act 1976 by virtue of a Supplementary Order Paper No. 25. The new Act as passed also introduced some amendments to the Family Protection Act 1955 and to the Administration Act 1969.

The Main Features of the Property (Relations) Act 2001

As noted above, the Act was the product of an attempt to bring together the proposals in the two Bills, each of which in their own way proposed changes to the regime laid down under the Matrimonial Property Act 1976. However, in the course of further discussion and debate on the far reaching proposals contained in the Bills, further changes were formulated and ultimately embodied in the new Act.

The first major change of significance was the adoption of the proposals contained in the Matrimonial Property Amendment Bill regarding entitlement. These proposals were to extend the provisions of the Matrimonial Property Act 1976 relating to equal division of property on dissolution of marriage to situations where the marriage has been dissolved by the death of one marriage partner. The extension of such provisions to succession situations could be seen as an attempt to adopt that which was rejected in 1900; namely; a legitim provision as part of the succession law of New Zealand. But this is not the case for reasons which have been mentioned already. There is merely a presumption of entitlement to an equal share rather than a guaranteed share or a deemed partnership.

It is to be noted that the Property (Relations) Act 2001 by section 4 to be a code. One effect of this is that

where any issue arises in other proceedings concerning matters to which the Act relates they must be decided according to the provisions of the Act. The Act also purports to prevent situations of double-dipping where, for example, one party brings a multiplicity of different claims arising for example, by virtue of a constructive trust or under various short duration partnerships.

The Family Protection Act 1995 remains in place. Indeed, for the purposes of application of sections 86 to 91 of the new Act, the Family Protection Act 1995 is regarded as the principal Act.[4] However, following the original testator's family maintenance legislation of 1900, this Act still proceeds on the basis of providing a discretionary power of the court to interfere with the testator's will making or intestate disposition of property on the basis noted above. There is also Testamentary Promises Act 1949 which deals with and provides mechanisms for the enforcement of promises with respect to provision by will or otherwise on death. This remains in force.

Unlike the South Pacific legislation, in New Zealand, as also in Australia, the family provision scheme applies to situations where there is an intestacy. This is on the basis that the exercise by the testator of a choice not to make a will or a completely effective will, or even a testator's ignorance of the power to make a will could just as much amount to a denial of the moral duty to the family as the making of a will itself. The South Pacific schemes appear to assume that it is only the positive act of making a will, as an act of positive choice, that could warrant intervention. The logic of that is perhaps peculiar in itself. It seems to assume that a moral duty to one's family can be breached only if one positively undertakes a course of action which is inconsistent with the duty. Thus it adopts the absurd proposition that failure to undertake a course of action can never involve a breach of a moral duty or, for that matter a social obligation.

Secondly, it is not only dissolution of marriage which produces the presumptive entitlement to a division of relationship property. Under the new Act the entitlement to the presumptive share arises simply when the relationship ends. In respect of married partners, section 2A[4] of the new Act provides that their relationship ends in the appropriate sense in the event of either dissolution, death of one of them or if they cease living together as husband and wife. In respect of de facto relationships, sub-section [5] of the same section provides that the partnership relationship ends in the event of their ceasing to live together in a relationship in the nature of marriage, or if one of them dies.

Thirdly, as anticipated in the above discussion, provision is made under the Act for application of such an extended scheme of presumptive entitlement in respect of matrimonial property to de facto relationships. The new Property (Relations) Act 2001 applies to de facto relationships whenever they commenced but it will not apply in respect of a de facto relationship which terminated before 1st June 2000. The extension to de facto relationships aspect takes up one of the main proposals in the De Facto Relationships Bill. However, with more recent amendments the legislation has adopted the more radical step of extending the notion of a de-facto relationship to same-sex partners.

According to new section 2A[2] a de facto relationship is defined as a relationship where two people (whether a man and a woman, or a man and a man, or a woman and a woman) are living together in a relationship in the nature of marriage, although not married to each other. The new legislation dispenses altogether with some of the terminology used to designate matrimonial relationships and property. Thus the term 'partner' replaces 'spouse', 'husband' and 'wife'.[3] 'Partnership relationship' (note the definition of a de facto relationship as above) replaces marital relationship, 'family home' replaces 'matrimonial home' and 'relationship property' replaces 'matrimonial property'.

Under some circumstances the court has power to make an order in respect of what are now called relationships of short duration, replacing the notion of marriages of short duration as originally set out. There are the relationships mentioned above being less than three years. In such cases it is necessary to

show that the courts failure to make an order would result in substantial injustice. In computing the duration of a relationship for the purposes of these provisions a de facto relationship followed by a period of marriage can be taken as a partnership relationship.

Obviously there will be situations where compounds of the types of relationships to which the Act now refers might come into play. This is not only in situations where, say, a de facto relationship might precede a marriage between the same party. There might be conflicts between the entitlements of different parties to a relationship with the same person either as between claimants under de facto relationships or as between de facto relationship and a marital relationship. Thus at one level the Act sets up the possibility of priorities claims particularly where there is insufficient property of a particular person to satisfy all of the claims. The complexities involved in equitable and legal priorities disputes are well known. In respect of this situation the Act has created further dimensions to priorities claims. This is hardly the case of the law creating complexities for its own sake. It is simply attempting to deal with what are already socially complex patterns of relationships. The legislation does however attempt to provide some legal mechanism to resolve

Fourthly, the new Act has also changed the position relating to separate property, being property which arose independently of the relevant relationship. The former Matrimonial Property Act 1976 provided by section 9[3] that separate property and any income or gains from it were deemed separate property and therefore exempt from the provisions of the Act unless an increment in value or the income or gains from the property were directly attributable in whole or in part to the actions of the other party. In such a case all the increment or the income or gains would have been regarded as relationship property. A new section 9A[2] extends this to situations where direct or indirect actions of the non-owing partner contribute to the gains etc. But in such a case both partners share in the increment, income or gains according to the contribution of each partner to such increase etc. This is supplemented buy the Court's power to order a payment of money from one partner to another in respect of separate property under section 15A discussed below.

The Court is given power by section 15 of the new Act to order the payment of a sum of money by one partner to another out of relationship property. The Court can do so where it is satisfied that as a result of the termination of the relationship the income and living standards of the first partner are likely to be significantly higher than the other partner because of the effect of division of functions within the relationship while the partners were living together. The section specifies that the Court may have regard to a number of factors in this regard including (a) the likely earning capacity of one partner (b) the responsibilities of each partner for on-going daily care of any minor or dependent children of the relationship and (c) any other relevant circumstances;. Section 15A gives the Court power also or order payment of money from one partner to another where there is (a) a situation of significantly higher living standards of one partner for the same grounds, and (b) any increase in the value of the first partner's separate property was attributable, wholly or in part, and whether directly or indirectly, to actions of that first partner while the partners were living together.

Fifthly, the new Act purports to do away with the provisions in the former Act, which adopted different rules relating to the division of property, and to provide that this is to occur according to a single pervasive rule. At least that was the intention. What is in place is the usual single formula of equal sharing with both provision a distribution according to contributions in exceptional circumstances, plus certain other exceptions, as well as the retention in different form of some of the former rules relating to specific types of property. Despite the fact that the amending SOP announces that this is one distribution rule it still appears to involve what is in fact many. The new 'single' rule is embodied in sections 11 and 13. Section 11 provides that as regards the family home, family chattels and relationship property each of the partners is entitled to share equally. Section 13 however provides that where there are extraordinary circumstances that make equal sharing of property or money repugnant to justice, the share of each partner in that

property or money is to be determined in accordance with each partner's contribution to the partnership relationship. The exceptions are under section 14 and 14A in respect of respectively marriage and de facto relationships of short duration where special rules apply.

Finally, the Act revises the previous provisions designed to prevent contracting out of the Act. In some jurisdictions contracting out is not permitted at all. However in New Zealand such action is permitted subject to the contract being set aside by the Court in certain circumstances. These are to be found in Part 6 generally. Section 21 requires that a Court before setting aside a contract to displace the provisions of the Act, be satisfied that giving effect to the agreement would cause serious injustice. This is a higher standard that that previously required and the reform is allegedly in order to provide greater certainty as to the enforceability of contracting out agreements.

Conclusion

These are, in effect, the main provisions of the reforming legislation. The situation which it purports to address is one of great complexity; the complexity of relationships which are now common enough in a society such as New Zealand. The legislation is comprehensive, far-reaching and involves, in some respects, a brave initiative. As with many reforms in this sensitive area its provisions are contentious. However, the new legislation is the product of an extensive and prolonged discussion and negotiation process which attempted to canvass a broad range of community views.

Would such a scheme provide a likely model for reform in the South Pacific jurisdictions? One would think it unlikely. Many of the provisions, for example in respect of same sex partners would be regarded, for example, as morally repugnant in these communities although, ironically, it is clear that in some of these societies same sex relationships are a fact of life. There would also be strong arguments to the effect that the assumptions behind the legislation, particularly as to equal division of property between individual partners to a marriage relationship and the according of property rights to de facto partners, are untenable in these communities. It is to be recalled that most of the dissolution of marriage regimes in these countries are still set up on guilt based divorce a legal, if not also a social, environment which would produce considerable intolerance for a scheme such as this.

ENDNOTES

[1] See Part IV of the Administration Act 1975 of Samoa; Part VII of the Wills, Probate and Administration Act 1987, of Solomon Islands; Inheritance (Family Provision) Act Cap. 61 of Fiji; section 13[2] of the Wills Act Cap 55 of Vanuatu;

[2] See Allardice v Allardice [1911] AC 730 which expresses the orthodox view that moral duty is the key basis to be used by the courts. This is supported to some extent by Atherton's analysis of the original legislation. For opposing views see Succession Law and Testamentary Claims, New Zealand Law Reform Commission Discussion Paper, No. 24th August 1996, at p. 13; Grainer V. Is Family Protection a Question of Moral Duty? 24 Victoria University of Wellington Law Review 141 at 142 and Permanent Trustee v Fraser (1995) 36 NSWLR 24.

[3] On principles such as those propounded , in Australia, in cases such as Muschinski v Dodds 160 CLR 583 and Baumgartner v Baumgartner, 164 CLR 137

[4] See section 89

[5] By section 2A[3] A person is another person's partner if either they are married to each other or they have a de facto relationship with each other.