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THE FAMILY PROPERTY (RIGHTS OF SPOUSES) BILL

INTRODUCTION AND BACKGROUND

The Family Property (Rights of Spouses) Bill was tabled in the House of Representatives earlier this year and was referred to a Joint Select Committee of both Houses of Parliament for consideration. The Joint Select Committee began sitting but has not yet concluded its deliberations. I propose to go through the provisions of the Bill and to refer, where relevant, to the comments submitted in respect of the various provisions. The views offered in relation to the issues raised by commentators are my own and do not necessarily indicate the position which might ultimately be taken on these matters. I should mention also that the comments received indicate the need for drafting refinements to clarify some of the provisions of the Bill. These will be dealt with by the draftsman. The focus of my presentation is on the substantive features of the Bill.

The Bill is substantially based on the recommendations of the Family Law Committee in their Report on Matrimonial Law Reform. That Committee was appointed in 1975 under the chairmanship of a former President of the Court of Appeal, Justice Ira Rowe. Its membership over the period it functioned included representatives of the Bench, the private Bar, Social Services and the Norman Manley Law School. The Committee's earlier recommendations for divorce reform led to the enactment of the Matrimonial Causes Act 1988.

The Committee's recommendations on matrimonial property reform were intended to remedy the deficiencies of the existing law and to provide a statutory scheme which would achieve an equitable division of assets between spouses upon the breakdown of marriage. A brief note on the current law would be appropriate.

The current law governing the property relations between married persons is based on the separate property system.¹ Under this system the property rights of a husband and wife are not affected by the fact of marriage – the ownership of property acquired during marriage is determined by who paid for the property. A notable exception to this general rule is the presumption of advancement, which operates to presume that a gift is intended

¹This is a consequence of the removal, by the Married Women's Property Act, 1887, of the legal disabilities of a married woman with regard to property.

where a husband purchases property in his wife's name.² Apart from this, it may be said that the law treats married persons no differently from strangers as regards property rights. However, because of the community of life and purpose which characterises marriage, the ordinary rules of property law are not always readily applicable to the determination of the property rights of spouses, particularly in the case of property which is acquired and used for family purpose, such as the family home, furniture and appliances. The home may be bought in the name of one spouse only, although the intention is that it should belong to both of them. From time to time either spouse may buy specific items of property intended for their mutual use and enjoyment without any intention that the sole owner should be the one who paid for it. Spouses may contribute generally to expenses of the home and not to the purchase of specific items of property. The application of the "you own what you buy" rule in these situations is likely to produce a result that is not only unfair, but also contrary to the expectations of the parties themselves.

To meet the peculiarities of property acquisition within the marital setting certain principles based on the doctrine of trust have been developed by the courts over time in resolving property disputes between spouses. These are principles which are derived from decisions of the English courts and which have been applied by the Jamaican courts. The essence of these principles is that where the legal title to property is held by one spouse, the other spouse is entitled to a share in such property if the circumstances establish the existence of an implied, a resulting or constructive trust.³ These principles have whittled away the significance of the presumption of advancement. Whether a trust exists will depend on the circumstance of the particular case, but briefly, a trust may be found to exist –

- Where the spouses intended that the beneficial interest in the property should be shared by both of them;
- Where one spouse leads the other spouse to believe that the property belongs to both, and the other spouse acts on that belief to his/her detriment; (e.g. where the other spouse finances substantial improvements to property)
- Where a spouse makes a direct or indirect contribution to the purchase of the property in money or money's worth. The latter may take the form of services performed. (e.g. where a wife functioned as an unpaid receptionist in

² The general rule is that a gift is not effective unless there is evidence that a gift is what the donor intends. A gratuitous transfer will, in the absence of such evidence, give rise to a resulting trust so that the transferee holds the property on trust for the transferor.

³ *Pettitt v Pettitt* [1962] 2 All E.R. 383, *Gissing v Gissing* [1970] 2 All E. R. 780

her husband's business), but services in the form of house work and child care are not recognised as a contribution to property.

These principles apply also to the determination of the property rights of cohabitants.⁴ The application of these principles to the factual situation may, however, produce different results. E.g. where the contribution relied on takes the form of the payment of household and personal expenses by a woman, if the parties are married this may be regarded as the assumption by her of expenses for which the husband would have been responsible as part of his maintenance obligation. Where the parties are cohabiting without marriage, the woman has no right to maintenance.

Although the trust principles have gone some way in softening the harsh effects of the separate property system, the law is complex and uncertain, and unfair in many factual situations. Proof of the requisite "intention" or "contribution" to support the existence of a trust often poses a problem as this requires the kind of record keeping which is not normal in domestic relations. The non-recognition of a wife's homemaking contribution places at a serious disadvantage a woman who interrupted her working life to have children and to care for them and the home. The deficiencies of the separate property system have motivated statutory reforms in common-law countries. The matrimonial property schemes introduced by such reforms follow two basic models.

The first is the discretionary system, which provides for the judicial reallocation of property between spouses when their relationship comes to an end. Guidelines for the exercise of the court's discretion are usually provided. This approach is exemplified by legislation enacted in England, Australia and Barbados.⁵

The other model is the system of deferred participation, referred to in the Family Law Committee's Report as the "fixed-share approach" - spouses remain separate as to property during the currency of the marriage, but are entitled to share equally in assets attributable to the marriage upon breakdown of marriage. Legislation introduced in New Zealand and Ontario is based on this model.⁶

A third legislative model in the form of a hybrid system is emerging, that is, a combination of the main features of the other two basic systems. This model treats spouses

⁴ *Burns v Burns* [1984] 1 All E.R. 244; *Geddes v Stoeckert* Privy Council Appeal No. 66 of 1998

⁵ The Matrimonial Causes Act 1973 (Eng.), The Family Law Act 1975 (Aus.), The Family Law Act 1981 (Bd's),

⁶ The Matrimonial Property Act 1976 (N.Z.), The Family Law reform Act 1978 (Ont.) The Family Law Act 1980 (Ont.)

as being equally entitled to specified property, leaving the remaining property to be distributed through judicial discretion. In 1978 the English Law Commission recommended the introduction of a statutory co-ownership of the matrimonial home, which would have transformed the English matrimonial property regime to this third model.⁷ However, this recommendation was not implemented.

The approach followed by the Family Law (Scotland) Act, 1985 is along this line. It creates a statutory presumption of equal ownership of household goods obtained in contemplation of or during marriage other than by gift or succession from a third party.⁸ Proof of who paid for the goods during marital cohabitation is not sufficient to rebut this presumption.⁹

This hybrid system, or “composite approach” was initially favoured by the Family Law Committee. The matrimonial home was selected as the property to which equal division should apply as it is likely to be the most significant item of property in most cases and also the one that is most often the subject of dispute. It was felt that giving each spouse a fixed half share in the family home would not only be fair, but would also go a far way in reducing property disputes between spouses. However, in the final Report the Committee recommended the adoption of the discretionary system.¹⁰ The FLC felt that the full discretionary approach would be easier and simpler to implement, and that although it did not provide a perfect solution to the deficiencies of the existing law, it would provide the scope for future refinement and development. The government, however, after consultation with women’s organisations, opted for the immediate introduction of the composite approach based on the preliminary proposals of the Committee.

Another modification made to the Family Law Committee’s proposals was the extension of the new statutory provisions to cohabitants. This is in keeping with the policy to recognise persons in longstanding and stable common-law unions for the purpose of certain legal benefits. The Bill defines “spouse” to include “a single woman who has

⁷ The third Report on Family Property (1978) Law Com. No. 86

⁸ “Household goods” are defined as any goods kept or used at any time during the marriage in any matrimonial home for the joint domestic purpose of the parties to the marriage other than money or securities; any motor-car, caravan or other road vehicle or any domestic animal. The Family Law (Scotland) Act 1985, S. 25

⁹ Ibid. S. 5(2)

¹⁰ This decision was largely influenced by a concern that the need to protect the interest of a non-title owning spouse against alienation of his/her interest in the matrimonial home without his/her consent would have certain administrative and financial implications which could delay the implementation of the proposed reform. See FLC Report on Matrimonial Property Reform, para. 6.3

cohabited with a single man as if she were in law his wife for a period of not less than five years"; and "a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years. A widow, widower or divorcee is regarded as having "single" status". This definition follows the formulation used in other legislation which recognise the common law spouse.¹¹

THE NEW STATUTORY RULES

The new rules introduced by the Bill will replace the rules and presumptions of common law and equity which now govern the determination of the property rights of spouses.¹² A practical effect of this is that the same procedure will now apply to property disputes between married couples and property disputes between qualified cohabitants. The current law will continue to apply to property disputes involving cohabitants who do not qualify as spouses for the purpose of the proposed Act.

As stated earlier under the new rules the family home is treated differently from other property owned by the spouses.

The Family Home

The Bill sets out the entitlement of each spouse to the family home in the event of marriage breakdown or cessation of cohabitation and in the event of the death of one spouse.

Entitlement on breakdown of relationship

On marriage breakdown or cessation of cohabitation each spouse is entitled to one-half share of the family home. Entitlement will arise, where the spouses are married, on the grant of a decree of nullity or dissolution of marriage or upon separation without the likelihood of reconciliation; and in the case of cohabitants, upon the termination of cohabitation.¹³

The equal share rule may be displaced in two ways :

- i) By an order of the court. By Clause 7 the court is empowered, on the application of a spouse, to vary the equal-share rule where it is of the

¹¹ See e.g. the Intestates estates' and Property Charges Act, S.2; The Inheritance (Provision for Family and Dependents) Act. S.2

¹² Clause 4

¹³ Clause 6 (1)

opinion that it would be unreasonable or unjust for each spouse to be entitled to a one-half share, taking into account such factors as it thinks relevant, including the following-

- (a) that the family home was inherited by one spouse;
 - (b) that the family home was a gift to one spouse and the donor intended that spouse alone to benefit;
 - (c) that the family home was already owned by one spouse at the time of the marriage or beginning of cohabitation;
 - (d) that the marriage or cohabitation was of short duration.¹⁴
- ii) By agreement between the parties ...Spouses or prospective spouses are permitted to contract out of the statutory regime by agreeing between themselves how property is to be owned or divided in the event of the termination of their marriage or cohabitation. Such agreements are subject to certain limitations and safeguards.¹⁵ Agreements will be discussed in greater detail later.

Entitlement on the death of one spouse

Where the marriage or cohabitation is terminated by the death of one of the spouses, the family home will be treated as having been held in joint tenancy if it was not so held, with the result that the surviving spouse will be entitled to the entire interest in the family home.¹⁶ This provision will override the provisions of a will or the law relating to intestacy. Like the half-share rule, this provision is avoidable by agreement.

Comments on provisions regarding the Family Home.

The provisions regarding entitlement to the family home have attracted the most comments. These are generally supportive of the application of the sharing concept to the family home, but particular aspects of the provisions have been criticised.

Issue is taken with the application of the equal share rule to property that was owned by one spouse prior to marriage or cohabitation, and to property acquired by one spouse by way of gift or inheritance. The view advanced is that the owner-spouse should not be put to the trouble and expense of applying to the court for a variation of the rule, but that the

¹⁴ Clause 7

¹⁵ Clause 10

¹⁶ Clause 6 (2)

specific factors which the court is required to consider where an application for variation is made should be treated as grounds for excluding such property from the definition of the family home.

The underlying principle of matrimonial property sharing systems is that assets which represent the joint efforts of the spouses, the proceeds of their partnership so to speak, should be shared between the spouses when their relationship ends. Consequently, pre-nuptial property, property acquired after the spouses have separated, inheritances and gifts from a third party are commonly excluded on the ground that they are not attributable to the marriage.¹⁷ However, there is a view that the matrimonial or family home is inherently family property and as such qualifies as shareable property regardless of how and when it was acquired.¹⁸ It is felt that the freedom of parties to contract out of the statutory provisions and the power of the court to vary the rule can effectively meet those instances in which a fifty-fifty division of the home would be unjust.

The adequacy of these measures in the Jamaican context is debatable. It is not now the common practice for spouses to regulate their affairs by way of contract. Marriage and cohabitation contracts suggest a certain level of sophistication and association with the wealthy. Such a contract has to comply with certain formalities which will require the involvement of a lawyer. The other option open to spouses would require court intervention. The cost and the time, in the case of litigation, are factors that might inhibit the usefulness of these measures to ordinary married couples and cohabitants. Against this background, the exclusion of certain property from the application of the equal-share rule is attractive. This will require a policy decision.

I offer some thoughts on the exclusion of property to which the specific factors mentioned in clause 7 apply.

With regard to a home which was already owned by one spouse at the time of the marriage or the beginning of cohabitation - the home may have been paid for, at least in part, by mortgage instalments falling due after the marriage. It seems to me that if there is to be an exception, it should apply only to a home that has been fully paid for before the

¹⁷ See e.g. the definition of household goods in The Family Law (Scotland) Act 1985

¹⁸ E.g. the New Zealand Act defines "matrimonial property" to include the matrimonial home and family chattels, whenever acquired. Matrimonial Property Act, 1976, s.8. Under the Ontario Family Law Act 1986, pre-nuptial property, gifts and inheritances are excluded from shareable property, other than the matrimonial home. S.4

marriage or commencement of cohabitation. If the home was bought in contemplation of marriage or cohabitation, I think it should be treated as the family home.

In my view there is a case for excluding inheritances and gifts received by one spouse during marriage. The intention of the donor, that the recipient spouse alone should benefit, should be respected.

If the short duration of the marriage or cohabitation is to be a ground for exclusion, it will be necessary to define what is meant by "short duration." The fact that a five years requirement already applies in the case of cohabitants suggests the need to consider the stipulation of different time periods for marriage and cohabitation.

It is important to note that if the home which was used as the family home is excluded from the equal-share rule, it will be treated as other property owned by the spouses and therefore fall within the discretionary re-distributive power of the court. The non-owner spouse might still be awarded a share in the property if the circumstances warrant this.

The New Zealand Matrimonial Property Act 1976 demonstrates another approach that might be considered. That Act provides for the equal division of the matrimonial home and family assets, but this does not apply, where the marriage has been of short duration –

- (a) to any asset owned wholly or substantially by one spouse at the date of marriage; or
- (b) to any asset that has come to one spouse after the date of the marriage by succession or or by survivorship or as the beneficiary under a trust or by gift from a third person; or
- (c) where the contribution of one spouse to the marriage partnership has clearly been disproportionately greater than that of the other spouse.

The Act provides that in such cases the shares of the spouses shall be determined in accordance with the contribution of each to the marriage partnership. A marriage of short duration is defined as one which has lasted for less than 3 years or for such longer period as the court considers just¹⁹ Additionally, the court is empowered to deviate from the norm of equal division where it considers that such a division would be repugnant to justice.²⁰

The entitlement of a surviving spouse to the entire interest in the family home upon the death of the other spouse is another aspect of the proposed new rules which has aroused

¹⁹ Matrimonial Property Act, N.Z. s.13

²⁰ Ibid, s. 14

some disquiet. The fear is that it will operate to the disadvantage of the children of the deceased spouse from a former marriage or union which, it is felt, would be particularly unfair in the case where the family home was acquired during the previous marriage and it is the only valuable asset which was owned by the deceased spouse. The redefinition of family home to exclude a home which was owned before the marriage or cohabitation would mitigate the hardship envisaged. It would still leave unresolved the broader issue as to whether the surviving spouse should receive the entire interest in the family home, however that is defined. It has been suggested that the surviving spouse should be entitled to only a one-half share.

The inheritance of the family home by a surviving spouse is seen as a means to provide some economic security for that spouse. As stated earlier the provisions relating to the family home follow the preliminary proposals of the Family Law Committee. Those proposals were made in 1976. In 1988 the Intestates' Estates and Property Charges Act was amended to significantly increase the entitlement of the surviving spouse of a deceased person on intestacy²¹. The Inheritance (Provision for Family and Dependents) Act was enacted in 1993, enabling certain family members, including a spouse, to apply to the court for maintenance provisions to be made out of a deceased person's estate, on the ground that adequate provisions have not been made for the applicant by the deceased's will or the law relating to intestacy. It is arguable that in the light of these provisions a fifty-fifty division of the family home upon the death of one spouse would not be unreasonable. This would leave each spouse free to dispose of his or her half share of the family home as he or she sees fit.

Protection of a Spouse's Interest in the Family Home

The Bill provides two safeguards against an action by one spouse to defeat the interest of the other spouse where title to the family home is in the name of one spouse only. Firstly, it authorises the taking by the other spouse of such steps as may be necessary to protect his or her interest, including the lodging of a caveat against the title. Protective action could also take the form of seeking a declaration of property rights under the Act.

Secondly, it requires the consent of both spouses to any transaction relating to the family home, unless such consent has been dispensed with by the court, and confers on the

court power to set aside any transaction on the ground of non-compliance with this requirement. Where an interest was acquired by a bona fide purchaser for value without notice, the spouse whose interest is defeated will be entitled to claim the value of his share out of the proceeds of the transaction²²

Transfers between spouses pursuant to the provisions of the proposed Act are exempt from transfer tax.²³

Property Other Than The Family Home

The Bill confers on the court wide powers of discretionary allocation with regard to property other than the family home. It is to be noted that all such property is subject to reallocation by the court. Property is defined to covers all types of property “any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled”.²⁴ The concept of non-shareable assets is not usually applicable to a discretionary regime. This does not mean that all the assets owned by a spouse will compulsorily be divided, but that it will be left to the court to decide what, if any, asset should be excluded.

Of relevance here is the intention that the court’s discretion to divide property should be exercisable not only in relation to the determination of property rights, but also in relation to the making of financial provisions for a spouse and/or children upon the ending of the marriage or cohabitation. The determination of appropriate financial provisions will require an assessment of the overall economic position of the spouses, which necessarily involves a consideration of all the assets owned by them. The Family Law Committee recommended that the new law should facilitate this approach.²⁵ The Committee also recognised the need for certain changes to be made to the law relating to maintenance to reflect the equality of spouses espoused by the family property law reform. A separate Bill on maintenance is being drafted for introduction as a companion measure to the Family Property (Rights of Spouses) Bill.

²¹ The Intestates’ Estates and Property Charges (Amendment) Act, 1988

²² Clause 8

²³ Clause 9

²⁴ Clause 2

²⁵ Report on Matrimonial Property Law Reform: paras. 7 –7.12

The court is empowered to divide property, other than the family home, as it sees fit in certain events upon an application by a spouse.²⁶ The court's power extends to the making of an order altering the interest of either spouse in the property, but such an order may be made only if the court is satisfied that it is just and equitable so to do.²⁷

It is convenient at this point to look at the events that will trigger an application for division of property. The Bill entitles a spouse to apply to the court for a division of property in the following events:

- (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
- (b) on the grant of a decree of nullity of marriage;
- (c) where a husband and wife have separated and there is no likelihood of reconciliation; and
- (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.²⁸

An application may be made in respect of any property, including the family home. Where the application relates to the family home, the court will apply the rules discussed earlier.²⁹ It will be observed that the first three events correspond with the events that will give rise to entitlement to a one-half share of the family home. These events signal the end of the relationship. The last-mentioned event permits the premature division of property where the action of one spouse is detrimental to the interest of the other spouse in the property.³⁰

An application for division of property will normally have to be made within twelve months of the dissolution or annulment of marriage, separation or termination of cohabitation, but an out of time application will be permitted with the leave of the court.³¹

²⁶ Clause 14 (1) (b)

²⁷ Clause 15 (1), (2)

²⁸ Clause 13 (1)

²⁹ Clause 14 (1) (a)

³⁰ This provision is copied from the N.Z. Matrimonial Property Act 1976. S. 25(2)(c)

³¹ Clause 13 (2). See also Marital Property Act (Manitoba) S. 12 (e)

Guidelines For The Exercise Of Judicial Discretion

The Bill requires that the court take into account certain factors when exercising its discretionary power to divide property. In prescribing guidelines for the exercise of the court's discretion, the Bill follows other legislation which take the discretionary approach. The objective of such guidelines is to promote consistency in judicial practice, and in particular, to ensure that all relevant factors are considered and given due weight. Accordingly the guidelines seek to address the deficiencies of the present law.

The Bill requires that the court take into account the following factors³²

- (a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;
- (b) that there is no family home;
- (c) the duration of the marriage or the period of cohabitation;
- (d) that there is an agreement with respect to the ownership and division of property;
- (e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

In deciding whether to make an order altering the interests of either spouse in the property, the court must have regard to these factors, in so far as they are relevant, and also the effect of the proposed order upon the earning capacity of either spouse³³ and any other order that has been made under the Act in respect of a spouse.³⁴

One of the shortcomings of the present law is its focus on financial contribution and its failure to recognise services provided in the performance of the role of parent and homemaker in assessing a spouse's entitlement to property. The contribution factor (at (a)) addresses this. Contribution is widely defined and include specifically caring for a child or an aged or infirm relative or dependant; the management of the household and the

³² Clause 14 (2)

³³ This factor has been interpreted as an instruction to preserve a business if possible - *Elsey v Elsey* (1996) 21 Fam LR 249 wife's share was reduced by the Full Ct of Australia from 70% to 60% to prevent the husband from having to sell his business considering that result would be unjust to him.

³⁴ Clause 14 (3)

performance of household duties.³⁵ It is also stated, for the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.³⁶

A few comments on the guidelines – The provisions relating to judicial discretion to reallocate property are based on the property provisions in the Australia Family Law Act of 1975, as amended in 1979.³⁷ So too are the comparable provisions in the Barbados Family Law Act 1981. The guidelines in the Bill are not as expansive as the guidelines in those Acts, for the reason that the Australian and Barbadian legislation provide also for maintenance, and the guidelines for maintenance provision are incorporated into the guidelines for the division of property. In our case, maintenance will be dealt with separately. However, the directive in the Bill, that the court may take into account any fact or circumstance which in its opinion the justice of the case requires to be taken into account, provides much latitude, and the cases on the Barbados and Australia Acts should provide some assistance in the interpretation and application of the provisions of the Bill.

The prospective needs of a spouse, though not specifically mentioned in the Bill's guidelines is a factor to be taken into account by the court in dividing property. Studies on judicially determined settlements under the Australian Act confirm the influence of the "future needs" factor in the determination of the share in property received by a spouse.³⁸ The "future needs" factor involve a consideration of matters such as whether the spouse has primary responsibility for the care of dependent children, his/her employment status and level of education, length of marriage, whether child support was paid or received. Of these, responsibility for the care of dependent children appears to be the most influential in the determining the nature and extend of property orders. The "future needs" factor illustrates the inevitable link between maintenance and property considerations.

The existence of an agreement between the parties with respect to the ownership and division of property is one of the specific matters which the court must take into account. It would appear that "agreement" for this purpose is not limited to, but would include, the type of formal agreement contemplated by the Bill. This means that the existence of such a

³⁵ Clause 14 (3)

³⁶ Clause 14 (4)

³⁷ The Family Law Act, 1975, as amended in 1979(Aus.) S. 79 (4)

³⁸ The division of matrimonial property in Australia – Grania Sheeman and Jody Hughes: Family Matters Issues No. 55 Autumn 2000, pages 28-33 (a publication of the Australian Institute of Family Studies)

contract, although a relevant consideration, will not preclude the making of an application for property division. This is in keeping with the principle that agreements should be subject to judicial review.³⁹

One of the responses to the Bill raised the issue of conduct - whether the conduct of the parties should be taken into account by the court when considering property division. This matter was considered by the Family Law Committee in the context of maintenance, and the Committee decided that no specific reference should be made to conduct, leaving the court free to consider the conduct of the party where it considers this relevant.⁴⁰ This approach is based on the view that to treat conduct as a relevant consideration to the making of financial provisions would be incompatible with the abolition of matrimonial fault. Even where conduct is a factor which the court is required to take into account, as in the case of the English Act, the courts have limited consideration to conduct which is obvious and gross.⁴¹ As regards property division, generally the courts have tended to restrict their consideration to spousal misconduct which adversely affects property, e.g. the reckless dissipation of assets, which as you have seen, is a ground for applying for a division of property under the Bill. The New Zealand Act expressly forbids the consideration of wrongful conduct which is not relevant to the acquisition of the property in dispute or to its extent or value.⁴²

However, recent Australian cases have shown an inclination by the courts to take into account domestic violence on the ground that it made the victim's contribution more onerous.⁴³ This is an interesting development which is no doubt due to the heightened consciousness of domestic violence.

Declaration Of Property Rights During Marriage

Clause 11 of the Bill provides for the determination of the property rights of spouses during the marriage or cohabitation. The provisions of the Bill are essentially a re-

³⁹ *Dean v Dean* [1978] 3 All ER 758 Bush J held that agreement could not oust jurisdiction of the court, under the Eng. Matrimonial Causes Act 1973, to alter property, although in the particular case the parties were held to the terms of the contract.

⁴⁰ See FLC Report pages.20-21

⁴¹ *Wachtel v Wachtel* [1973] 1 All ER 829. This limitation has been given legislative expression in the Barbados Act Family Law Act 1981, which states that "the obligation to maintain the other party to the marriage or union exists without regard to the conduct of either party but the court may have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of their relationship".

⁴² Matrimonial property Act 1976, S. 18 (3)

⁴³ *Doherty v Doherty* (1995) 20 Fam LR 137, *Kennon v Kennon* (1997)22 Fam. LR1

enactment of the summary procedure provisions under the Married Women's Property Act which will be repealed when the new Act comes into force. The new procedure will differ from the existing one in two important respects. First, it will be available for the settlement of property disputes not only between a husband and wife, but also between common-law spouses who meet the qualifying criteria. Second, the property rights of the spouses will be determined with reference to the new statutory rules.

This means, where the property in dispute is the family home, the entitlement of each spouse to one-half share subject to the displacement of this rule in one of the ways discussed earlier will be the guiding principle. Although a spouse's half-share is realizable on the occurrence of a triggering event, it is a present interest which a spouse may take steps to protect during the marriage. The institution of proceedings for declaration of rights might be just such a step. A spouse's right in respect of other property is not as clear-cut, as this is determinable by the court. The court, in that instance would be concerned with the ownership of the property in question, and not the division of property between the spouses. Both involve the exercise of the court's discretionary power but the focus is different. In the case of an application for division of property, the objective is to divide property equitably between the spouses, which might require the alteration of ownership rights. In the case of an application for declaration of property rights, the court has to determine existing ownership rights. In this instance the impact of the new statutory rules will lie mainly in the much wider definition of contribution and the treatment of financial and non-financial contribution as being of equal value.

As is the case now in respect of proceedings under the Married Women's Property Act, the proceedings under the proposed new Act will be heard in the Resident Magistrate's Courts. All other proceedings under the Act will be heard by a Resident Magistrate or a Judge of the Supreme Court or Master in Chambers depending on the value of the property which is the subject of the proceedings.⁴⁴

Agreements

I had promised to return to Agreements. The Bill permits the making of agreements with respect to the ownership and division of property –

⁴⁴ Clause 5 (1)

- 1) by spouses or two persons in contemplation of marriage to each other or cohabitation, for the purpose of contracting out of the statutory regime; and
- 2) by spouses for the purpose of settling any differences that have arisen between them.⁴⁵

An agreement which is made for the purpose of avoiding the statutory rules may cover matters including the definition of the respective shares in property to which each spouse will be entitled in the event of divorce or separation, the calculation of such share and the method by which property is to be divided.

An agreement may be made between persons age 16 years and over.⁴⁶ This age limit corresponds with the age of marriage and the age of consent.

It is expressly provided that an agreement between cohabitants shall not be void as against public policy. This is to counter the common rule that a contract for future illicit sexual intercourse is illegal and unenforceable. However, an agreement entered into between spouses with the intention of defeating their creditors will be void.⁴⁷

There are prescribed formalities for the making of an agreement – The parties must each obtain independent legal advice and a certificate by the legal advisor to this effect is required. The agreement must be in writing and must be signed by both parties, in the presence of a Justice of the Peace or attorney-at-law, if the contract is signed in Jamaica, or in the presence of a Notary Public if signed in a foreign country.⁴⁸ By a recent amendment to the Probate of Deeds Act and the Judicature (Supreme Court) Act the persons by whom legal documents can be attested in foreign countries now include Jamaican diplomatic officers. The provision in the Bill should be amended to reflect the new provisions.

Compliance with these formalities go to the enforceability of the agreement, although the court may treat the agreement as being effective in whole or in part or for any particular purpose, if satisfied that the non-compliance has not materially prejudiced the interests of a party to the agreement.⁴⁹

⁴⁵ Clause 10 (1)

⁴⁶ Clause 10 (6),(12)

⁴⁷ Clause 19

⁴⁸ Clause 10 (4)

⁴⁹ Cl. 10 (5)(a) (7) similar to N.Z Act, S. 21 – Diane Carol Snee & Anor v Benjamin Lefore Snee [1999] NZCA 252 (1Nov. 1999)

Agreements are generally subject to judicial review. The court may set aside an agreement if satisfied that it would be unjust to give effect to it having regard to⁵⁰ -

- (a) the provisions of the agreement;
- (b) the time that has elapsed since the agreement was made;
- (c) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;
- (d) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;
- (e) any other matter which it considers relevant to any proceedings.

One of the responses to the Bill suggested that in the absence of fraud, the court should not have the power to alter an agreement once all the stipulations have been met. Permitting agreements between spouses as to the ownership and division of property upon the termination of their relationship involve two distinct policy issues. The first is based on the view that spouses should be encouraged to regulate their own affairs. The other policy issue concerns the role of the state to ensure that such agreements are fair and workable. It is pursuant to the latter that safeguards are provided at the time of the formation of the contract and after. These safeguards are designed to prevent exploitation and hardship particularly in relation to the more vulnerable party where there is a power imbalance. Pre-nuptial contracts are considered to be particularly open to abuse. In some cases, independent legal advice can be but a mere formality. It is for this reason that statutes which recognise the parties' freedom to contract usually give the court an overriding power of review.⁵¹

Protection Of Property Rights

Mention was made earlier of the mechanisms for the protection of a spouse's half share in the family home where that spouse is not a title-holder. The Bill provides further measures which are generally applicable for the protection of a spouse's interest in property.

Once proceedings have been instituted pursuant to the Act, no property which is the subject of such proceedings may be disposed of without the leave of the Court or the written

⁵⁰ Clause 10 (8)

⁵¹ See e.g. N.Z. Act S. 21 (10)

consent of the spouse by whom the proceedings were brought. Contravention of this provision is punishable as a criminal offence.⁵²

The court is empowered to restrain or set aside dispositions of property to defeat the claim or rights of a person under the Act.⁵³ As usual the interest of a bona fide purchaser for value without notice is protected.

Determination Of Value And Share Of Property

Clause 12 stipulates the relevant date for 1) the determination of a spouse's interest in property and 2) the determination of the value of property.

A spouse's share in property will be determined as at the date of separation or, if they are still living together, at the date of the application. The idea is that the respective shares of the spouses will be calculated with reference to their life together.

As regards the value of property- in the absence of an agreement between the spouses, property will be valued as at the date of the hearing unless the court otherwise decides. A valuator may be appointed jointly by the spouses or each spouse may appoint a valuator, in the latter case the value of the property will be the average of the two valuations.

A query was raised by one of the commentators as to whether "the date of the hearing" means the date of commencement of proceedings or the date of its conclusion.

Some assistance on this point is provided by the views expressed by the Full Court of the Family Court of Australia in *Wardman v Hudson*.⁵⁴ I should point that the Australia Act does not provide for the timing of valuation but the same position obtains as under the Bill by virtue of judicial decision. The Australian court held that as a general rule, the proper time for determining the value of the property is at the date of the hearing of the application, and in justifying this approach stated:

"If the parties to the proceedings were strangers to each other as distinct from being husband and wife then in ordinary circumstances if the court were to make an order severing their joint ownership that consequence would flow as at the date of the order and the parties rights would be determined accordingly. It appears to us that as a generality the fact that the parties are husband and wife should not prima facie alter that position. Otherwise one party may achieve a substantial wind-fall because of an increase in value over the period of time since the separation, that period of time

⁵² Clause 20

⁵³ Clauses 21, 22

⁵⁴ (1978) Fam. Law Cases 90-466, followed by the High Court of Barbados in *In the Marriage of McLean and McLean* No. 131 of 1982

decisions to be taken regarding the level of immunity, if any, which a spouse's interest in the family home should enjoy.

Orders which the court may make

The court is given wide order making powers by the Bill. The variety of orders it may make include orders for the sale, transfer and vesting of property; for the payment of money by one spouse to the other spouse. The court may also make an order granting to one spouse the right to exclusive occupation of the family home or any other premises belonging to either or both of the spouses. This right is enforceable against the personal representative of the spouse against whom the order was made.⁶⁰ These provisions may be used to delay the sale of property where it is needed as accommodation for a spouse and children. These provisions are intended to replace the property order making power under section 10 of the Matrimonial Causes Act.

CONCLUSION

The family property reform proposed by the Bill uses a blend of the fixed equal share approach and the judicial discretionary approach in an attempt to provide a system which affords some degree of certainty and predictability, as well as the flexibility to achieve justice in the individual case. One of the objectives of a statutory regime is that it should reduce conflicts and encourage parties to themselves work out their own property settlements. Whether these goals will be realized will depend on the development of the practice after the Act comes into force.

While the new statutory rules should create greater certainty with regard to the property rights of spouses *vis-avis* each other, the anti avoidance provisions could introduce complications in real estate dealings with third parties, especially where the property involved is the family home. The provisions relating to the family home will certainly affect third party dealings with the family home. It may prudent, as a matter of course, to require a declaration that the property in question is not a family home. It is interesting that the Ontario legislation provides that a statement from a person making a disposition or encumbrance to the effect that the property in question is not a matrimonial home shall, unless the person to whom the disposition or encumbrance is made had noted to the contrary, be deemed to be sufficient proof that the property is not a matrimonial home. A

similar statement by the attorney of the person making the disposition or encumbrance on the basis of the attorney's knowledge shall also be deemed to be sufficient proof that the property is not a matrimonial home.⁶¹

The application of the new law to cohabitants raises special concerns due to the informality of their relationship. Whether they are spouses within the meaning of the new rules will be of concern not only to the parties themselves, but also to third parties with whom they have dealings. How will it be ascertained that a cohabitant is a "spouse"? This difficulty could be met by the provision of a mechanism for the establishment of the status of common-law spouse.⁶²

The new law may promote the use of pre-nuptial and other spousal contracts. This could well become a specialized area of practice for some lawyers.

Despite the imperfections of the Bill and any apprehension as to its implications for future legal practice, it marks an effort in the direction of family property law reform which is long overdue .

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⁶⁰ Clause 23

⁶¹ Family Law Act 1986, S. 21 (3) (4)

⁶² The law of some Australian jurisdictions make provision for the declaration of a de facto spouse. E.g. the Family Relationships Act 1975 (S. Aus.) Part III