WHAT FAMILY FOR THE 21ST CENTURY?

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D'une manière générale, l'organisation familiale en Nouvelle Zélande ne se démarque guère des critères traditionnellement en vigueur dans les sociétés occidentales. Ainsi un mariage n'est, en principe, valablement reconnu qu'à la condition qu'il intervienne dans le cadre de relations hétérosexuelles. De même, les rapports parents/enfants restent encore profondément empreints du respect des règles biologiques classiques.

Or, les dernières évolutions du droit de la famille néo-zélandais, nous enseignent que ce cadre traditionnel ne forme plus la référence unique. En effet le droit positif prenant en compte les bouleversements que connaît la société dans ce domaine, apporte un nombre important d'ajustements aux schémas classiques en vigueur, sans toutefois les modifier radicalement. La cellule familiale nucléaire traditionnelle, n'est plus maintenant la seule à être reconnue. Elle coexiste avec les familles monoparentales ou à l'inverse avec celles, qui dans les familles recomposées, regroupent des parents multiples.

Par ailleurs, la loi n'hésite plus à reconnaître aux familles constituées entre des personnes du même sexe, tout un ensemble de droits et d'obligations qui sont à bien des égards, similaires à ceux attachés aux familles traditionnelles. Une tendance similaire apparaît aussi pour la protection des enfants nés dans le cadre de la procréation assistée, lesquels se voient maintenant conférer des droits équivalents à ceux reconnus aux autres enfants.

I INTRODUCTION

In New Zealand the traditional nuclear family remains the predominant family form. Marriage between a heterosexual couple is still the usual precondition for the establishment of a family. In a

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number of respects biology continues to be privileged over other ways of establishing parent/child relationships. However there is evidence that the concept of family in New Zealand is becoming increasingly less dependent on legal formalities and biological relationships. Recent developments in the law indicate that the nuclear family headed by a man and a woman, joined together by marriage, is no longer the only socially acceptable form of family in New Zealand. Sole parent families, reconstituted families, families with children born with the assistance of new birth technologies, along with families comprising an unmarried couple, whether heterosexual or same sex, and the children within such families, are all accommodated to varying extents by New Zealand family law. With or without a marriage certificate or a biological connection, people in a variety of different groupings consider themselves to be families and are treated as such by the law.

II SOCIAL CHANGE

There are significant changes taking place in New Zealand society. Over a third of children in New Zealand do not live in traditional nuclear families. The marriage rate has dropped from 45.5 in 1971 to 15.6 in 2000, which is its lowest level yet.[1] The divorce rate has increased from 5.1 in 1971 to 12.3 in 2000.[2] The number of people living together outside of marriage increased 46.1% between 1991 and 1996.[3] Same sex couples are increasingly living openly together. The number of children living with one parent increased 41.1% between 1986 and 1996.[4] Increasing use is being made of new birth technologies. The number of adoptions has decreased from 3,967 in 1971 to 540 in 1996.[5] The number of women employed full-time in the workforce has increased from 670,002 in 1986 to 808,107 in 1996.[6] While in New Zealand, as elsewhere, there are both conservative and liberal extremists who adhere to hard line views, the prevailing social climate here is one of increasing acceptance of diversity in familial relationships. There is now considerably less stigma attached to divorce, living together without marriage, same sex relationships, sole parenthood and infertility than was apparent as recently as a decade ago. These changes in attitude are echoed by contemporary legislative developments.

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1 Statistics New Zealand *Marriage and Divorces (Year ended December 2000) - Hot Off The Press* (Wellington, New Zealand, 14 May 2001) Table 1.

2 Statistics New Zealand, above n1, Table 3.

3 At the 1991 census, 161,856 people were living in de facto relationships. This figure increased to 236,397 at the 1996 census.

4 At the 1986 census, 119,535 children were living with one parent. This figure increased to 168,690 at the 1996 census.

5 Keith C Griffith MBE, *New Zealand Adoption: History and Practice, Social and Legal, 1840 - 1996*, (Wellington, 1997) 132.

6 As at the 1986 census and the 1996 census.

III RECENT REFORM

Nowhere are these changes more apparent than in the recently enacted legislative provisions reforming the law relating to family property and support obligations. Central to these reforms is the Property (Relationships) Amendment Act 2001, which amends the existing Matrimonial Property Act 1976 and renames it the Property (Relationships) Act 1976, and three associated amendment Acts.[7] This new legislative package introduced a number of changes to the matrimonial property regime in New Zealand. Changes to the regime include the strengthening of the equal sharing requirement applicable to all "relationship property",[8] the adjustment of the property allocation at the end of a relationship on the basis of economic disparity[9] and the inclusion within the regime of situations where the relationship is ended by death. However the change that is most significant to the discussion in this paper of the shape of the family, is the extension of the scope of the matrimonial property regime to unmarried people living together as a couple within the same property division regime as their married counterparts.[10] Unmarried couples who do not want to be subject to this regime must "opt out", by signing an agreement that complies with formalities prescribed in the Property (Relationships) Act.[11] Such an agreement may be set aside if the Court is satisfied that upholding the agreement will cause serious injustice.[12]

IV INCLUSION OF UNMARRIED COUPLES

Unmarried couples, unlike married couples, do not have to complete any formalities to become subject to the regime. It is enough that they are living together in a de facto relationship. The Property (Relationships) Act specifies that a de facto relationship is a relationship between two people, whether of the same or opposite sex, who are not married to each other but who live together as a couple.[13] In ascertaining whether two people are living together as a couple, the Court is required to take into account all the circumstances of the case, including the duration of the relationship, the nature and extent of the common residence, whether or not a sexual relationship exists, the degree of financial dependence or interdependence, any arrangements for financial support between the parties, the ownership, use, and acquisition of property, the degree of mutual

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7 Administration Amendment Act 2001, Family Protection Amendment Act 2001, and Family Proceedings Amendment Act 2001.

8 Property (Relationships) Act 1976, s8.

9 Property (Relationships) Act 1976, ss15 and 15A.

10 De facto couples were included under the Matrimonial Property Bill 1976, but were removed before enactment.

11 Property (Relationships) Act 1976, ss21 and 21F.

12 Property (Relationships) Act 1976, s21J.

13 Property (Relationships) Act 1976, s2D(1).

commitment to a shared life, the care and support of children, the performance of household duties and the reputation and public aspects of the relationship.[14] No finding in relation to any of these matters listed in the Act, or any combination of them, is to be regarded as necessary.[15] An order for property division cannot be made under the Property (Relationships) Act if the de facto relationship is of short duration (less than three years) unless there is a child of the relationship or the applicant has made a substantial contribution to the de facto relationship, and the Court is satisfied that failure to make an order would result in serious injustice.[16] So for a de facto relationship to be considered more or less analogous to a marriage, there has to be an indication of some durability of the relationship.

V OTHER RIGHTS GIVEN TO DE FACTO PARTNERS

The new legislation also extends to de facto partners other rights that married spouses have enjoyed for sometime. Under the new legislation unmarried partners are able to receive a share of their partner's estate in the case of an intestacy.[17] De facto partners and the children of de facto relationships can now claim against the deceased partner's estate if, because of the terms of the deceased's will or as a result of intestacy, adequate provision for their proper maintenance and support is not available.[18] The new legislation also enables people in de facto relationships who are over the age of 18 to claim maintenance from their ex partners, albeit only after the relationship has ended. In contrast married spouses can claim maintenance from each other both during their marriage and after it has ended.[19] All these reforms, in enabling people in de facto relationships to have access to some support from their ex partners, have the potential to transfer the financial burden of the support of these people from the State to private individuals.

VI SITUATION PRIOR TO NEW LEGISLATION

For the increasing number of people living in de facto relationships, the new legislation has the potential to significantly alter their property rights. Prior to the passing of this legislation, property disputes that arose between partners at the end of a relationship were generally dealt with by means of constructive trusts. To recover, a claimant was required to show they had made direct or indirect contributions to the property in question, that they had a reasonable expectation of an interest in the

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14 Property (Relationships) Act 1976, s2D(2).

15 Property (Relationships) Act 1976, s2D(3).

16 Property (Relationships) Act 1976, s14A(2).

17 Administration Act 1969, s77, as amended by the Administration Amendment Act 2001.

18 Family Protection Act 1955, ss3(1)(aa) and 3(1)(b), as amended by the Family Protection Amendment Act 2001.

19 Family Proceedings Act 1980, s64, as amended by the Family Proceedings Amendment Act 2001.

property, and that the defendant should reasonably be expected to yield to this interest.[20] There was no presumption of equal division of relationship property at the end of a de facto relationship as there was at the end of a marriage. Marriages and de facto relationships, and the legal implications of both relationships, were seen to be quite different. People who chose to be married, chose to take on the legal incidents of marriage, including the matrimonial property regime. Those who chose not to marry, did not.

VII LEGITIMISATION OF THE NON-MARRIED FAMILY

As the statistics show, increasing numbers of New Zealanders are choosing not to marry, but rather to live together and raise their children outside of marriage. With the growing incidence and acceptance of de facto relationships, it has become increasingly hard to distinguish in reality between a family headed by a married couple and one headed by an unmarried couple. Proponents of the recent property law reform contended that if the matrimonial property regime is required to protect the vulnerable family members (usually women who are homemakers and children) in married families, it is only fair to extend this same protection to the vulnerable members of de facto families.[21] The inclusion of de facto couples under the same property regime as married couples removes some of the remaining distinctions between families based on marriage and those based on de facto relationships. With the passing of the new property legislation, the role of marriage in legitimating the formation of the family is lessened.[22]

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20 *Lankow v Rose* [1995] 1 NZLR 277, (1994) 12 FRNZ 682, [1995] NZFLR 1 (CA).

21 "In our view the time has long since passed when marriage itself is seen as something different, for most couples, from the decision to live together, share chattels and houses, and in particular bring up children together. This legislation will fill a long-left gap in the law." (4 May 2000) 583 NZPD 1934 (Hon L Harre, Report of Select Committee).

"Why should people in de facto or same-sex relationships be treated differently from married couples? They are a very large and important part of New Zealand society. They accrue assets during their relationships in the same manner as their married counterparts, and therefore have a right to the same legal protections. Fundamentally, they have a right to a fair deal too." (29 March 2001) 591 NZPD 8626 (Hon M Wilson, Third Reading).

"Just because someone is in a de facto relationship…does not mean to say that person's rights, in terms of property division, should be any less than those who are formally married." (29 March 2001) 591 NZPD 8636 (K Locke, Third Reading).

21 "…it is time that we stopped discriminating in our legislation against these [de facto] couples." (4 May 2000) 583 NZPD 1927 (Hon M Wilson, Report of Select Committee).

22 "This legislation is also quite important in legitimating different types of relationships other than the traditional marriage relationship." (29 March 2001) 591 NZPD 8636 (K Locke, Third Reading).

VIII OPPOSITION TO THE REFORMS

Parliamentary opponents of the new legislation maintained that the distinction between the property division and support obligations imposed on married couples and those imposed on de facto couples should be retained. They contended that the new legislation would have the effect of "marrying people" who had no intention of making that commitment to each other.[23] They were concerned that it would result in people losing their property to an ex de facto partner, even though property sharing had not been an intended consequence of their relationship. They cited situations such as student flatmates in a casual relationship while attending university, a solo mother sharing her home with a man to relieve her loneliness, and elderly couples in retirement homes living together for companionship, as examples of when it would be unjust to impose the same rights and obligations on people living together, as would have been imposed on them had they been married.[24]

IX ACCURATE REFLECTION OF PUBLIC PERCEPTION?

Despite this opposition to the proposed changes, there was sufficient support within Parliament to enact legislation putting the property law relating to married and de facto relationships on an equal footing. However the extent to which the legislation is supported by the community at large is not clear. The new legislation was the culmination of a number of years of consideration of such reform by successive governments. Issues relating to the reform of property law for both married and unmarried couples were considered by the Working Group on Matrimonial Property and Family Protection in their 1988 Report.[25] Two separate bills regulating the property matters of married and de facto couples went before Parliament in 1998.[26] The content of the two bills, however, was so similar that there seemed little reason not to combine them. This was eventually done, the end result being the Property (Relationships) Amendment Act 2001. While there was considerable community consultation prior to the eventual enactment of this legislation, there is no evidence of any rigorous research as to whether or not people in de facto relationships view their relationships as identical to marriages and wish them to be accompanied by the same legal implications. There is also little indication that rigorous reviews of the demographic factors and

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23 "But by putting it [de facto relationships] together with marriage, that will effectively be marrying them by default without their having choice of action." (4 May 2000) 583 NZPD 1928 (Rt Hon J Shipley, Report of Select Committee).

24 See (29 March 2001) 591 NZPD 8627, 8638, 8639.

25 Working Group on Matrimonial Property and Family Protection *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, New Zealand, 1988). The issue had also been considered at the time of the 1976 reforms.

26 Matrimonial Property Amendment Bill 1998; De Facto Relationships (Property) Bill 1988. Although there was a change of Government in 1999, the Bills proceeded through the legislative process.

economic circumstances within affected families was undertaken prior to the enactment of the legislation.

X FINANCIAL INTERDEPENDENCE FEATURE OF MARRIAGE

Financial interdependence has long been accepted as a feature of married life. This has not necessarily been the case with de facto relationships. Prior to the introduction of the new regime, not only was the division of their property at the end of a relationship treated differently depending on whether or not a couple was married, but so too was the imposition of support duties. Whereas married partners had mutual support obligations during marriage, and in some circumstances after marriage, de facto partners were only required to support one another in very limited circumstances.[27] The new legislation acknowledges that people in marriages have more extensive support duties than their unmarried counterparts. For example, the regime as a rule does not apply to de facto relationships which last for under three years, while it applies to all marriages, albeit with special provisions relating to marriages of short duration.[28] Similarly, although de facto partners may be required to provide maintenance for an ex partner once the relationship has ended, unlike their married counterparts, they are not required to provide maintenance to their partners during the relationship.[29] But despite these exceptions, most of the other elements of the property regime instituted by the new legislation apply with equal force to both married and de facto couples.

XI FINANCIAL INTERDEPENDENCE BETWEEN DE FACTO COUPLES

While de facto households may be increasingly as socially acceptable as married households, whether or not the new legislation treating married and unmarried couples alike is appropriate, will depend partly on whether the financial interdependence of marriage is, in reality, a feature of de facto relationships. Relationships "in the nature of marriage" have long been treated as synonymous with marriages for the purposes of benefit entitlement under the Social Security Act 1964.[30] It is possible, however, that a number of people living in de facto relationships of three or more years duration may be financially independent of their partners. It is also possible that some of these people consider themselves to be in relatively short-term relationships. Statistics show that younger people are more likely to live together in de facto relationships than they are to marry,[31]

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27 Family Proceedings Act 1980, ss78-81.

28 Property (Relationships) Act 1976, ss14, 14A.

29 Family Proceedings Act 1980, s64, as amended by the Family Proceedings Act 2001.

30 Social Security Act 1964, s6. See *Thompson v DSW* [1994] 2 NZLR 369, (1993) 11 FRNZ 402, *Ruka v Department of Social Welfare* [1997] 1 NZLR 369 (CA).

31 At the 1996 census, 62% of women, and 73% of men, aged 20 to 24 years in partnerships were in a de facto relationship. Women are less likely to live with de facto partners than spouses if they are over 25 years of age.

and that de facto couples are less likely to have children than their married counterparts.[32] If a distinction exists between the way de facto and married couples view the financial implications of their relationship, a number of de facto couples will want to opt out of the new property regime. The extent to which the contracting out provisions are utilised by unmarried couples may give some ex post facto indication of whether the new property regime actually reflects functional reality.

XII SAME SEX RELATIONSHIPS

Another significant aspect of the new legislation is the inclusion of same sex couples in the category of unmarried couples within the ambit of the regime.[33] When the question of whether or not to include same sex couples in this regime was put to a conscience vote in Parliament, 80 Members of Parliament voted in favour of inclusion while 39 voted against. This positive endorsement of same sex families by the New Zealand legislature follows on from earlier developments which were indicative of increasing acceptance of same sex relationships within New Zealand. Such developments include the Homosexual Law Reform Act 1986 (which repealed the provisions of the Crimes Act 1961 criminalising sexual acts between consenting males), the Human Rights Act 1993 (which prohibits discrimination on the grounds of either family status[34] or sexual orientation[35]), and the New Zealand Bill of Rights Act 1990 (which affirms freedom from discrimination on the grounds of sexual orientation[36]).

XIII PREVIOUS LIMITED RECOGNITION OF SAME SEX COUPLES

On occasions when financial accountability was in question, the New Zealand Courts have been willing to impose the same familial obligations on same sex partners as they would on heterosexual partners on the basis that the relationship between the parties was "in the nature of marriage". Accordingly, in *A v R*[37] the High Court upheld the earlier Family Court decision[38] that a woman was a step-parent for the purposes of support liability under the Child Support Act 1991 in respect of children born to her former lesbian partner as a result of artificial insemination during the course of their 14 year relationship. The judge opined that "on the proper construction of the statute *any*

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32 At the 1996 census, 12.1% of married women had no children, compared to 49.0% of women in other partnerships. 87.3% of children are the children of married parents. Also, de facto couples have fewer children on average than their married counterparts. At the 1996 census, married women had an average of 2.5 children, while women in other partnerships had 1.2 children.

33 Property (Relationships) Act 1976, s2D.

34 Human Rights Act 1993, s21(1)(l).

35 Human Rights Act 1993, s21(1)(m).

36 New Zealand Bill of Rights Act 1990, s19(1).

37 [1999] NZFLR 249, (1999) 17 FRNZ 647.

38 See *T v T* [1998] NZFLR 776, (1998) 17 FRNZ 387.

relationship in the nature of marriage between two persons is capable of generating the status of step-parent."[39] Similarly, in *Julian v McWatt*[40] the judge was satisfied that there had been a de facto relationship in the nature of marriage between the two men concerned and that one of the men was holding property on behalf of his former partner as a constructive trustee.[41] Same sex relationships had already been recognised as being analogous to marriages under the Domestic Violence Act 1995, which provides legal protection for victims of domestic violence. As Fisher J opined in *P v M* "for the purpose of establishing family relationships under the Domestic Violence Act a live-in same-sex relationship is equated to legal marriage".[42]

XIV SAME SEX COUPLES NOT ALLOWED TO MARRY

These cases of legislative and judicial recognition of same sex partners constituting a family are interesting in view of the continued inability of same sex couples in New Zealand to marry. This matter was tested before the Court of Appeal in the case of *Quilter v Attorney General*.[43] This case arose as a result of a refusal by the Registrar of Births, Deaths and Marriages to issue marriage licenses to four lesbian couples in stable long term relationships. They claimed that the refusal to allow them to marry offended against section 19 of the New Zealand Bill of Rights Act 1990. The Marriage Act 1955 does not define marriage explicitly. However it appears to be implicit in that Act that marriage can only be between one man and one woman. All five Court of Appeal judges confirmed this understanding of marriage in the current legislation in dismissing the appeal in the *Quilter* case. The judges' approaches to New Zealand Bill of Rights Act question differed. At one extreme were those who thought the provisions of the Marriage Act were not discriminatory. At the other was Thomas J, who was of the opinion that even if the Marriage Act was discriminatory, any change in the legal definition of marriage would have to come from Parliament.[44] *Quilter* therefore confirmed that until there is legislative reform, marriage is not an option for same sex couples in New Zealand.

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39 (1999) NZFLR 249 at p 255.

40 [1998] NZFLR 257.

41 See also *Hamilton v Jurgens* [1996] NZFLR 350.

42 [1998] NZFLR 534, 541, [1998] 3 NZLR 246, 252, (1998) 17 FRNZ 47, 54. In that case the same sex partner of a woman was found to be a "family member" of the woman's brother for the purposes of the Domestic Violence Act 1995; see also *Collins v Hanrahan* [1997] NZFLR 433, (1997) 15 FRNZ 584 where the Court was satisfied it had the jurisdiction under the same legislation to make a protection order against the lesbian partner of the applicant's sister.

43 [1998] 1 NZLR 523, [1998] NZFLR 196.

44 [1998] 1 NZLR 523, 528, [1998] NZFLR 196, 201.

XV ANOMALY

In light of this clear judicial rejection of same sex marriage, the new relationship property regime places the Court in an interesting position. Under the Property (Relationships) Act 1976 and the associated legislation, the Court will be ascertaining whether two same sex people are living together as a couple for the purposes of that legislation. The factors that the legislation requires the Court to consider in ascertaining whether or not this is so are largely factors which have been used in the past to ascertain whether people are living together in a relationship "in the nature of marriage".[45] The new legislation is thus legislative recognition of same sex relationships as analogous to marriage. Accordingly, there is an anomaly between the legislative recognition of same sex de facto relationships as analogous to marriage for some purposes, and the refusal to allow same sex partners to marry.

XVI RECONSTITUTED FAMILIES AND FINANCIAL IMPLICATIONS

Reconstituted families, consisting of parents and children from at least two different biological families blended into a new family unit, are an increasingly common and accepted family form in New Zealand. This increased acceptance is indicative of the decreasing emphasis on the biological connection between parents and children. In the context of step-families, the broader understanding of family is particularly apparent in relation to financial obligations. Although the Child Support Act 1991 still gives priority to the biological nuclear family, step-parents may be found to be liable to pay child support in some circumstances. The Child Support Act may impose responsibility for child support on a person who has undertaken financial responsibility for a child and is declared to be a step-parent of that child under section 99.[46] Succession law still, however, privileges biological and adopted children. Step-children are not entitled to a share of an intestate's estate as biological and adopted children are under the Administration Act 1969. Likewise, whereas biological and adopted children of any age may make a claim against a deceased parent's estate under the Family Protection Act 1955, if the deceased parent has not made adequate provision for them by way of will or intestacy, step-children may only make such a claim if they are dependant on the deceased parent at the time of death.[47] The Law Reform (Testamentary Promises) Act 1949, under which a person can claim against the estate of a deceased person if the deceased failed to make testamentary provision for them as promised for services rendered or work performed for the deceased during their lifetime, is silent as to the rights of step-children. It was, however, interpreted somewhat inconsistently with other succession law in the case of *Re Welch*.[48] In that case a step-

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45 *Thompson v DSW* [1994] 2 NZLR 369, (1993) 11 FRNZ 402.

46 *A v R* [1998] NZFLR 249, (1999) 17 FRNZ 647; *T v T* [1998] NZFLR 776, (1998) 17 FRNZ 387; *BPS v MNS* [1998] NZFLR 289, (1998) 16 FRNZ 500.

47 Family Protection Act 1955, ss3(b) and 3(d).

48 [1989] 2 NZLR 1 (HC and CA), [1990] 3 NZLR 1 (PC).

child's claim under the Law Reform (Testamentary Promises) Act was dismissed on the basis that the services the child rendered were nothing more than would be expected in a family situation. *Re Welch*, therefore, is yet another example of the Court clearly equating stepfamilies with biological families.

XVII STEP-PARENT/CHILD RELATIONSHIP

The step-parent/step-child familial relationship is also recognised by the Courts in relation to other rights and duties. The relationship between step-parents and step-children is sometimes formalised by the Court by the appointment of the step-parent as a guardian of the child, or by making a custody order in the step-parents favour. However only in rare cases are step-parents able to adopt the children of their partner.[49] The Court places a very strong emphasis on not breaking the biological tie between parent and child when considering adoptions by new partners or other members of the child's biological family.[50] The Courts' preference is to award guardianship or custody rights under the Guardianship Act 1968 to step-parents or other biological family members applying to adopt, rather than allowing them to adopt. In this way the legal relationship between the biological parents and the children can remain intact rather than be replaced by a legal fiction that would distort family relationships.[51]

XVIII ADOPTION

The number of adoptions has been decreasing since in New Zealand since the 1970's.[52] This decrease is no doubt partly a result of the reduction of unwanted births through improved awareness and availability of contraception and abortion. However the decrease in adoptions can partly be accounted for by the increasing acceptance of a wider variety of family forms which reduces the pressure on women to make their children available for adoption. Unmarried parenthood is no longer stigmatised to the same extent within the community, the last vestiges of discrimination against children born out of wedlock have been removed,[53] and support benefits for sole parents with children are readily available.[54] The decrease in adoptions may also be a result of increasing

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49 *Re Adoption A9/90* (1990) 7 FRNZ 524, [1990] NZFLR 254; *L v B* [1982] 1 NZFLR 232.

50 Even so, in 1996, 78.9% of all adoptions were intra family adoptions.

51 *Application by B (Adoption)* [2000] NZFLR 673; *Adoption Application by R* [1999] NZFLR 961; see also general discussion of step-parent adoptions in *P v P* (1985) 1 FRNZ 684; see also Department of Justice *Adoption Act 1955: A Review by an Interdepartmental Working Party, Proposals for Discussion* (Wellington, 1987).

52 See Keith C Griffith MBE, *New Zealand Adoption: History and Practice, Social and Legal, 1840 - 1996*, Wellington, 1997, 132 Adoptions by strangers dropped from 2,136 in 1996 in 1972 to 114 in 1996.

53 See Status of Children Act 1969, s3.

54 In 1968 the Domestic Purposes Benefit was introduced which provided State support for unmarried mothers.

awareness of the importance of continued acknowledgement of a child's biological parentage. This privileging of the biological tie is accompanied by a growing acceptance that a family can exist as a functioning social construct without this biological link. Hence the reduction in need for families constituted of children and step-parents or other family members in loco parentis to hide the lack of biological link behind the facade of adoption. So while there is a privileging of biological link over social or psychological link, this is not inconsistent with a more sophisticated understanding of, and an increasing willingness to acknowledge openly, the different and coexistent roles a number of parent figures may have in a person's life.

XIX ACKNOWLEDGEMENT OF BIOLOGICAL REALITY

In response to the increasing understanding of the importance of retaining the biological link in adoptions, social workers have been facilitating openness in the adoption process. Birth parents and adoptive parents have been encouraged to meet and maintain contact with members of the adopted child's birth family. This development has proceeded despite the outmoded Adoption Act 1955 that provides for adoption to be a secretive affair in which all links between the birth family and the adopted child are severed. The original birth certificate showing the names of the birth parents is superseded by a new birth certificate naming the adoptive parents as the only parents. There is no indication on the new birth certificate that the child has been adopted. Thus a legal fiction is created that obliterates the biological parentage of the child, replacing it with the legal parentage of the people who adopt. The veil of secrecy that the Adoption Act attempted to cast over the whole process has been pierced to some extent by the Adult Adoption Information Act 1985. This Act provides that once an adopted person[55] has reached the age of 20, they may apply for a copy of their original birth certificate and a birth parent[56] may apply for access to identifying information held about the child they gave up for adoption. Birth parents[57] and adopted persons[58] may, however, place a veto on the release of this information if they wish to continue to remain anonymous.

XX ADOPTION REFORM

Clearly the adoption legislation in New Zealand is in need of reform to ensure that the law facilitates the implementation of current thought and practice in this area. The New Zealand Law Commission has recently undertaken a study of adoption in New Zealand and as a result recommended the introduction of new legislation, the Care of Children Act, reforming adoption

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55 Adult Adoption Information Act 1985, s4.

56 Adult Adoption Information Act 1985, s8.

57 Adult Adoption Information Act 1985, s3.

58 Adult Adoption Information Act 1985, s7.

law, and other legislation governing the guardianship of children.[59] The Law Commission's proposals encourage openness in the adoption process and call for caution in severing the biological parent/child relationship. In the Law Commission's opinion guardianship is usually more appropriate than adoption in intra family adoption situations. The emphasis, it says, should be not on creating legal fictions that distort genealogies, but on "people coming to terms with their family situation".[60] In the Law Commission's view, information about the adoption should be available to the birth parent, the adopted person and the adoptive parents, without any provision in future for the vetoing of the release of the information by those involved.[61] The Law Commission suggests there should be greater willingness to consider adoptions by non traditional adoptees, for example single people, same sex couples and older people, if in the particular circumstances of the case the approval of the adoption would be in the best interests of the child. The thrust of the Law Commission's proposals is therefore to encourage recognition of biological ties, while at the same time accepting and facilitating a wider range of family forms.

XXI NEW BIRTH TECHNOLOGIES

New Zealand law has only made initial steps towards coming to terms with the issues presented by the burgeoning use of new birth technologies. Currently, a child born to a surrogate birth mother is the legal child of the birth mother no matter how the child was conceived. Under the Status of Children Amendment Act 1987, if a birth mother becomes pregnant through the use of artificial insemination or by the implantation of a donated embryo, the birth mother and her husband or partner, providing that he consented to the procedure, are the legal parents of the child.[62] The donors of the sperm and/or the ovum have no legal rights.[63] If the birth mother conceived the child by sexual intercourse with the husband of the commissioning couple, but she is married to another man, or is living in a relationship in the nature of marriage with another man, there is a rebuttable presumption that her husband or the man with whom she is living, is the father of the child.[64] Even if the presumption is rebutted and the commissioning father is named on the birth certificate, he does not have guardianship rights in respect of the child unless granted these rights by the court

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59 Zealand Law Commission *Adoption and Its Alternatives - A Different Approach and a New Framework: R65* (Wellington, 2000)

60 New Zealand Law Commission, above n60, 138, para 373.

61 New Zealand Law Commission, above n60, 171 to 173, paras 477 to 481.

62 See Status of Children Amendment Act 1987, ss 5(1), 7(1), 9(1), 11(1), 13(1), and 15(1).

63 See Status of Children Amendment Act 1987, ss 5(2)(b), 7(2)(b), 9(2)(b), 9(3)(b), 11(2)(b), 13(2)(b), 13(3)(b), 15(2)(b), 15(3)(b).

64 Status of Children Act 1969, s5(1).

under the Guardianship Act 1968.[65] The usual way for a commissioning couple to formalise their relationship with the child is by means of adoption.

XXII NEW BIRTH TECHNOLOGIES AND LESBIAN MOTHERS

Issues arise also with the birth of children to women in lesbian relationships. The partner of a lesbian woman has no automatic legal relationship a child born to her partner. Some women in this situation have applied to adopt the child. However in such a situation the courts prefer to award the applicant guardianship rights rather than to approve an adoption.[66] As discussed earlier, a woman may be found to be a liable parent in relation to the children of her lesbian partner for the purposes of the Child Support Act 1991.[67] While not discussing the issues raised by the regulation of new birth technologies in depth, the Law Commission's report does make the suggestion that any future legislation dealing with these issues should address the issues concerning the use of new birth technologies by lesbian women.

XXIII ACKNOWLEDGEMENT OF BIOLOGICAL PARENTAGE

The Law Commission's Adoption Report also suggests that, as with adoption, there should be openness in relation to information in situations where new birth technology procedures are used. This sentiment is consistent with the Assisted Human Reproduction Bill 1998 currently before Parliament, which covers a range of topics concerning both genetic engineering[68] and new birth technologies. The Bill provides for the compulsory collection and retention of information about donors of genetic material and the children born containing donated genetic material.[69] Prospective donors are to be advised of the information about them that will be held and eventually accessible to any children born containing their genetic material. Children over 18 years old are to have access to all information about their biological parentage held by the Registrar General. The Bill also provides for the donors of sperm or ovum to have access to information about children born containing their genetic material, with the consent of the children once they have reached the age of 18, or regardless of consent once the children are 25 years old. As the collection and retention of relevant information and the access to that information has to date been unregulated, there is potential for people to have entered into the processes with a range of different understandings as to

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65 Guardianship Act 1968, s8.

66 *Re T* [1998] NZFLR 769.

67 *T v T* [1998] NZFLR 776, (1998) 17 FRNZ 387.

68 The Bill contains provisions prohibiting the cloning of human beings, the fusing of animal or human embryos, the implantation of animal or human embryos into the opposite species, the use of human cells to develop procedures and technologies for the undertaking of these activities and the supply of human gametes and embryos for valuable consideration.

69 The nature of the information to be collected and held is not specified but will be clarified in associated regulations.

the retention and disclosure of information. In order to protect donors who believed that their anonymity would be preserved, the provisions in the Bill are not retroactive. Considerable background work was carried out prior to the drafting of this Bill,[70] but again there appears to be little evidence of systematic investigation of the reactions of possible donors and others involved in the process to the abandonment of the possibility of anonymity. However the increased openness in this area, like the trend towards open adoption, is consistent with the growing belief that knowledge of biological origins is important and does not derogate from the validity of the formation of families unrelated by biology.

XXIV ACCOMMODATION OF CULTURAL DIVERSITY

A relatively recent development in New Zealand family law has been a move towards recognition of the significance of the extended family. This move has been driven, certainly in part, by a desire to make the law more culturally appropriate in a country where, although the population is predominantly of people of European descent, a significant minority of the population are of Maori and Pacific Islands descent. It also has the effect of widening the circle of people who can take responsibility for children in need and thus take some of the financial burden off the State. The Children, Young Persons, and Their Families Act 1989 ("the CYPF Act") regulates care and protection of children refers to the "families, whanau, hapu and iwi or family groups". The term "family" is not defined in the CYPF Act, but presumably refers to the nuclear family. "Whanau", "hapu" and "iwi", Maori words commonly understood to identify different levels of familial and tribal organisation, are also not defined. The term "family group" is defined however, in the following manner:[71]

> Family group", in relation to a child or young person, means a family group, including an extended family,—
>
> (a) In which there is at least 1 adult member—
>
> (i) With whom the child or young person has a biological or legal relationship; or
>
> (ii) To whom the child or young person has a significant psychological attachment; or
>
> (b) That is the child's or young person's whanau or other culturally recognised family group.

It is interesting to note that this definition is sufficiently broad to incorporate relationships that have their basis in a biological or legal link, psychological attachment or cultural recognition. The CYPF Act provides for people constituting these various groups to be consulted about certain decisions pertaining to the care and protection of the child involved. Other New Zealand legislation

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70 Ministerial Committee on Assisted Reproductive Technologies *Assisted Human Reproduction: Navigating Our Future* (Tribunals Division, Department of Justice, Wellington, 1994).

71 Children, Young Persons, and Their Families Act 1989, s2.

relating to children does not extend the understanding of family so broadly, but focuses on the nuclear family. However as existing legislation is reviewed it may be bought into line with the emphasis on the extended family that is apparent in the CYPF Act. The Law Commission's report on adoption suggests that before an adoption order in favour of a non-family member is approved it must first have been considered whether there was anyone within the extended family who could adopt the child. Incorporating this requirement into the adoption legislation would be consistent with the approach taken in the CYPF Act. The Law Commission's recommendation in its report that "where practicable a child should be placed within a family of the same culture as the child"[72] acknowledges both the importance of biology and cultural heritage.

XXV CONCLUSION

There is a trend in New Zealand law to extend the duties and obligations of family beyond the traditional nuclear family. As has been discussed above, a broader understanding of domestic relationships has already been incorporated in the Domestic Violence Act, and in the Property (Relationships) Act and associated legislation. This trend is not necessarily indicative of a rejection of biology as significant. The emphasis in the recommendations of the Law Commission on the importance of the acknowledgement of biological parentage in the adoption process and in the use of new birth technologies would suggest the prevailing mood is towards respecting the significance of biology. At the same time, the increasing imposition of familial duties and obligations on people, whether or not they are connected by the biology or the formalities of marriage or adoption, suggests a willingness on the part of law-makers to recognise social reality and to regulate accordingly. It remains open to speculation whether this is indicative of an enlightened attitude held by the community and recognised by the legislature, or a determination on the part of the legislature to ensure that the cost of care and support of individuals is carried to the greatest extent possible by that person's domestic grouping rather than the State.

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72 New Zealand Law Commission, above n60, 89, para 217.