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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 77

The Future of the Joint Family Homes Act

December 2001
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Contents

14 December 2001

Dear Ministers

I am pleased to present to you Report 77 of the Law Commission *The Future of the Joint Family Homes Act*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

J Bruce Robertson
President

The Hon Margaret Wilson
Minister Responsible for the
Law Commission
Parliament Buildings
Wellington

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

Preface

THIS REPORT responds to a ministerial reference in the following terms:

The Commission shall consider and report on:

- whether taking subsequent law changes into account there remains a need for the continued existence of the Joint Family Homes Act 1964; and
- if there is a need for its continued existence, whether the Act should extend to de facto (including same-sex) relationships, and, if so, whether any other amendments are necessary to minimise the potential for misuse to defeat creditors.

The Law Commission published a discussion paper in August 2001 (NZLC PP44). The paper was mentioned reasonably prominently in the various legal periodicals and would, we are confident, have in that way been brought to the attention of all practising (including in-house) lawyers and judicial officers. Copies of the paper were sent to a number of chartered accountants specialising in insolvency and to the Ministry of Economic Development. There was also some coverage in the general media. Those who made submissions to the preliminary paper are listed in Appendix A to this report. The Law Commission believes that the small number of submissions reflects the fact that the Joint Family Homes Act has lost most of the commercial or social importance that it may once have had. The reasons for this decline are discussed in this report.

The Commissioner having the carriage of this project was DF Dugdale.

The future of the Joint Family Homes Act

BACKGROUND

1 SINCE THE LAST DECADE of the nineteenth century there has existed in New Zealand legislation designed to protect the homes of married couples from the claims of unsecured creditors and from death duties. The earliest such statute, the Family Home Protection Act 1895, which at the time of the 1908 consolidation was re-enacted as Part I of the Family Protection Act of that year, cannot be ranked as a success. Although it remained in force until repealed by the Family Protection Act 1955, that is for about 60 years, its complexities were such that its provisions were invoked on no more than a score of occasions. In the meantime there had been enacted the Joint Family Homes Act 1950. That statute was described by the then National Party government as part of its programme to reinforce Christian family values. It is the successor to that statute, the Joint Family Homes Act 1964, that remains in force today.[1] Under the provisions of the Joint Family Homes legislation, a dwelling occupied as their home by a married couple and owned by either, or both of them, can, by a reasonably cheap and simple procedure, be vested in the husband and wife as joint tenants.

2 Section 25 of the Joint Family Homes Act 1964 provides in effect that, subject to a provision intended to keep up-to-date the records of the Māori Land Court, Part XIX of the Māori Affairs Act 1953 (restricting alienation of Māori land) does not apply to registration as a joint family home. It seems reasonably clear that this provision survives the replacement of Part XIX by Part VII of the Te Ture Whenua Māori Act 1993, though it would have been more user-friendly if the 1993 statute had expressly said so. The spouse of an owner of an interest in Māori freehold land does not necessarily belong to one of the preferred classes of alienee. There is room for

[1] We discussed this history in more detail in paras 1–13 of the preliminary paper NZLC PP44.

differences of policy opinion in relation to the interface between restricting the alienation of interests in Māori land on the one hand and general family and succession law statutes on the other. There is room for argument as to what should be the substantive law and which court (as between the Family Court and the Māori Land Court) should have jurisdiction. There can be contrasted with section 25 of the Joint Family Homes Act 1964 the Matrimonial Property Act 1976 section 6 which excludes Māori land from the application of that Act. The recommendation we make at the conclusion of this report makes it unnecessary for us to pursue these issues in the current context.

3 The advantages flowing from registration as a joint family home were, at the commencement of the scheme, these:

- a substantial death duty saving;
- a degree of protection against unsecured creditors, discussed in more detail later in this report;
- the security for a spouse not already on the title (usually the wife) of being able, on becoming a co-owner, to thwart dispositions of the property of which she disapproved (as improvident for example);[2]
- the convenience of being able, as part of financial planning schemes (usually but not invariably tax driven), to vest their homes in both spouses without incurring stamp or gift duty; and
- the saving of legal costs in the case of very small estates by making it possible to register title to the home in the surviving spouse by means of a survivorship transmission without the need to obtain, for that purpose, a formal grant of administration of the deceased spouse's estate.

4 In the half-century since the coming into force of the Joint Family Homes Act 1950, most of these advantages have evaporated.

- From 1976 a special death duty allowance applied in respect of all matrimonial homes whether joint family homes or not, and death duties have been abolished entirely in respect of anyone dying on or after 17 December 1993.
- The Matrimonial Property Act 1976 confers on each spouse a deferred sharing entitlement to the matrimonial home. That entitlement is coupled, in the case of a spouse not on the title,

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[2] An additional security is that by virtue of s 10(1)(a) (which requires a joint application to cancel registration) the joint tenancy cannot be severed unilaterally as it can in other cases (*Fleming v Hargreaves* [1976] 1 NZLR (CA) 123). We do not think that this consideration on its own warrants preservation of the joint family homes legislation.

with a Notice of Claim procedure which is able to be invoked if the comfort of being certain of being in a position to thwart dispositions by the other spouse is sought. From 1 February 2002 that protection will be extended to de facto partners.

- If it is desired for financial planning or any other purposes to vest the home in the names of both spouses, the Matrimonial Property Act 1976 enables this without incurring stamp or gift duty to the extent that the transferee spouse does not end up with more than half the matrimonial property, and in 1999 stamp duty was abolished entirely.[3]

5 What remains are:

- protection from creditors;
- minor advantages in relation to legal costs. Inter-spouse transfer under the Matrimonial Property Act 1976 is more expensive than settling the property as a joint family home, and, as already referred to, there is the possible advantage in winding-up small deceased estates.

Of these two classes of benefit, that of protection against creditors is by far the most important.

6 There has been a shift away from formal legal marriage. At the 1996 census 236 397 people were living in de facto relationships, an increase of 74 541 or 46.1 per cent since 1991. Among women aged 20–24 years, 60 per cent of those who were in partnerships were in a de facto union. For men, the corresponding figure was 73 per cent. The marriage rate has decreased from 19.76 per cent per thousand not-married population aged 16 years or over in 1991 to 15.66 per cent in 1983.[4] Of the total of those living in partnerships in 1996, 236 394 or 14.8 per cent of a total of 2 786 223 were in de facto relationships.[5] That shift is reflected in the provisions of the Property (Relationships) Amendment Act 2001 which, when its relevant provisions come into force on 1 February 2002, will extend the protections of the Matrimonial Property Act 1976 (to be renamed the Property (Relationships) Act 1976) to those in de facto relationships including same-sex relationships.

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[3] We discussed the matters described in this paragraph in more detail in Part II of the preliminary paper NZLC PP44.

[4] *New Zealand Official Year Book 2000*, 120, para 6.2. A graph comprising Appendix C of NZLC PP44 records the annual rate of new marriages from 1961–1998.

[5] Statistics New Zealand, *National Summary: 1996 New Zealand Census of Population and Dwellings* (Wellington, 1997) 52, Table 11.

7 The number of registrations of dwellings as joint family homes was artificially inflated by settlement as a joint family home being imposed as a condition of family benefit capitalisation and certain state housing loans. This factor, and the third Labour government's expansionary housing measures, resulted in a peak in 1974 of over 30 000 registrations. With the evaporation of the benefits of registration already described and the reduction in the pool of potential settlors resulting from the fall in the marriage rate, the number of registrations has substantially reduced. Registrations for the most recent year for which we have statistics (to 30 June 2000) totalled 1 589.[6]

PROTECTION AGAINST CREDITORS

8 Because the most substantial surviving benefit of registration of a dwelling as a joint family home is the protection afforded against unsecured creditors, we describe with particularity the extent of that protection:

- The rights of the spouses or their survivor in the property are protected from bankruptcy and execution (section 9(1)(d)).[7]
- The rights of *secured*[8] creditors remain unaffected. The practical effect of this limitation is (because a small tradesman reliant on accommodation from a banker or other financier is likely, in conjunction with his or her spouse, to have had to secure liability to repay such advances over the home) largely to confine the protection to consumer bankruptcies.
- The Official Assignee or a creditor may apply to the High Court for an order that the settled property be sold or mortgaged (section 16). The broad effect of the statute is that, in such cases, the protection is confined to the 'specified sum', a term discussed in the next paragraph. This provision in practice functions capriciously. Official Assignees have considerable autonomy and differing views as to when a section 16 application is appropriate. There is no uniformity in the views of creditors as to whether they want to hound a particular bankrupt in this

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6 Appendix A to NZLC PP44 depicts the registration figures over the life of the legislation in graph form.

7 The settlor or settlors must, at the time of registration, have been able to pay his, her or their debts without recourse to the settled property (s 3(1)(b)) and the bankruptcy protection is postponed for two years after registration in the case of an unadvertised application (s 9(1)(d) second proviso).

8 Including various classes of quasi-secured creditors such as local authorities in respect of rates (s 15).

way. There is no real guidance from any reported case as to when the High Court may be expected to exercise its discretion against bankrupts.[9]

The protection afforded by registration as a joint family home then is:

- against execution creditors;
- against the Official Assignee in bankruptcy unless the Assignee or a creditor elects to apply to the High Court for an order for sale or mortgage and the High Court in its unfettered discretion makes such an order, in which event the protection is confined to the specified sum.

9 The specified sum is fixed from time to time by Order in Council. Currently it is $82 000, an amount fixed in 1996. It has long been acknowledged that to have one specified sum for the whole of New Zealand operates unfairly in that no account is taken of regional differences in house prices. If the purpose of the specified sum is to put the bankrupt in a position to acquire a substitute home in the area where he lives, there are in fact many regions where the specified sum falls short of providing the equity for a home of a reasonable minimum standard, particularly when account is taken of the difficulties in raising finance that an undischarged or recently discharged bankrupt can be expected to encounter.[10]

10 In our preliminary paper[11] we discussed anecdotal information to the effect that today registration or non-registration as a joint family home rarely affects the outcome of a bankruptcy. We have already mentioned in paragraph 8 the likelihood that in a tradesman's bankruptcy his home will be encumbered in favour of his financier, so that usually joint family homes are relevant only in the case of consumer bankruptcies. Although these are increasing in number, because of high, modern lending ratios homes often have only a trifling net equity if any at all, so that disclaimers by Official Assignees of any entitlement to the home are common. Those of the submissions that we received which referred to this point

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9 See *Official Assignee v Lawford* [1984] 2 NZLR 257, 264. If the bankrupt or any family member refuses to yield up possession to enable a sale with vacant possession, the Official Assignee can apply for a possession order to the District Court under the Insolvency Act 1967 s 66, but the order is a discretionary one and we are told that, in practice, orders are not easily obtained.

10 There is a fuller discussion of the factors relating to the specified sum in para 34 of the preliminary paper NZLC PP44.

11 NZLC PP44, paras 36–37.

accepted the proposition that registration or non-registration as a joint family home rarely affects the way in which a bankrupt's assets are distributed. The fair point was made that in addition to the cases where registration as a joint family home saves the home of the bankrupt, there are likely to have been other cases where creditors have not pressed the matter to bankruptcy simply because they have been told that the only asset that would be available is a home registered as a joint family home. But the net effect of the matters to which we have referred in this and paragraphs 8 and 9 is that registration as a joint family home does not often make a difference in the way in which the estates of bankrupts are disposed of.

SOME ADDITIONAL CONSIDERATIONS

11 The scheme of the bankruptcy legislation is to confine the property of the bankrupt passing to the Official Assignee to that to which the bankrupt is beneficially entitled.[12] The effect, when it comes into force on 1 February 2002, of the Property (Relationships) Act 1976 section 20B (as of its predecessors) is (in broad terms) that where one partner becomes bankrupt the inchoate claim of the other partner is to be treated as if it were an equitable interest and fenced off from the claims of the bankrupt partner's creditors. This protection is subject to a cap which has always been fixed at the same amount as the 'specified sum' discussed in paragraph 9. In practice, where one spouse is bankrupted the protection under the Joint Family Home Act is likely to be greater, because the shares of both spouses are protected, not just the entitlement of the non-bankrupt spouse. Although, as part of the description of background given in our preliminary paper, we refer to the existence of section 20B, its underlying policy is distinct from that of the joint family homes legislation and it seems to us to require no further comment in this report.

12 The Human Rights Act 1993 section 21(1)(b) defines what it calls "the prohibited grounds of discrimination" to include marital status as follows:

> (b) Marital status, which means the status of being—
> (i) Single; or
> (ii) Married; or
> (iii) Married but separated; or
> (iv) A party to a marriage now dissolved; or

[12] Insolvency Act 1967 s 42(3).

(v) Widowed; or
(vi) Living in a relationship in the nature of a marriage.

That provision has no legal effect on the existing joint family homes legislation, but if the definition of prohibited grounds of discrimination in the Human Rights Act 1993 is to be thought of as having any sort of weight or influence outside the situations defined in that statute, then it needs to be taken into account in considering reform. It is clear that to afford a protection against the claims of creditors to married couples unavailable to anyone else is discriminatory, and that even if the statute were to be amended in parallel with the extension of the provisions of the Matrimonial Property Act 1976 to de facto partners effected by the Property (Relationships) Amendment Act 2001, its provisions would still discriminate against those who choose or are compelled by circumstances to live without partners.

13 A third matter which should be mentioned before setting out our recommendations is the suggestion made in some submissions, including that by the Property Law Section of the New Zealand Law Society, that a desirable goal of the joint family homes legislation is to provide a home for the children of an insolvent, and that this goal should, perhaps, be preserved. In fact, the existence or non-existence of resident children of the registered proprietors has never had any relevance to rights and liabilities under the joint family homes legislation. The most that can be said is that possibly the existence of such children might affect the decision of a creditor or Official Assignee whether or not to apply for an order for sale or mortgage of a joint family home, or the decision of a court whether to grant such application. There are of course many solo parents to whom the protection of the legislation is unavailable. Unless the insolvency law is to be amended to postpone the right of creditors against a home where the household includes children (an innovation which we do not recommend) then arguments based on the desirability of housing the children of bankrupts do not seem to us to be persuasive.

CONCLUSION

14 We now consider whether the two surviving benefits of the joint family homes legislation, which we defined in paragraph 5 as protection from creditors and certain minor savings of legal costs, justify the preservation of the legislation in either its present or some amended form.

15 We do not favour preservation of the legislation as a means of protection against creditors, on the grounds that:

- Any benefit that excludes sole owners is discriminatory.
- The protection against creditors is, in any event, of limited practical value.
- There is a geographical inequity in relation to the specified sum. It seems to us impossible to devise a specified sum that is fair nationwide.[13]
- The current rate of registrations suggests an absence of any widespread belief by members of the public or their advisers of the utility of such protection. We have not overlooked the possibility that one cause of the fall in the number of registrations may be the drop in the marriage rate as described in paragraph 9, a factor that could be eliminated by preserving the statute but extending its protections to de facto partners, but there seems no reason to believe that such a law change would increase the rate of registrations sufficiently to invalidate the conclusion we have drawn.
- It is open to any individual who feels that he or she does have a particular reason to protect a home against creditors to use such other devices as the creation of a trust, which although more expensive than settlement, as a joint family home has the advantage of not involving any limit in value.

16 In our preliminary paper we adverted to the possibility of a blanket protection for homes. We said:

> If there is to continue to be protection of homes against creditors, would the simplest solution be to repeal the Joint Family Homes Act (and logic would suggest the Matrimonial Property Act protection also) and replace it with a blanket protection (up to the amount of the specified sum) of a bankrupt's principal dwelling house, roughly analogous in effect to the protection of necessary tools of trade and necessary household furniture and effects to be found in the Insolvency Act 1967 section 52? This would preserve the protection that is the principal current raison d'être of the Joint Family Homes Act, avoid the problems of definition that would arise if the Joint Family Homes Act were to be extended to de facto relationships and remove the reproach of discrimination against single home-owners that we refer to in paragraphs 41 and 42.[14]

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[13] Some submitters suggested substituting a specified percentage of nett value, but it is difficult to justify an arrangement that would reward the conspicuous consumption of a crashed commercial high-flyer more generously than the modest housing expenditure of a small tradesman.

[14] NZLC PP44, para 45.

Such a proposal properly falls for consideration as part of the Ministry of Economic Development's current review of insolvency law. That Department failed to respond to our invitation to express a view on the matter.

17 Under English statutory law, protection from creditors of certain classes of property dates back at least as far as the Statute of Westminster of 1285[15] (which preserved a debtor's oxen and plough) and so antedates by about 250 years the first English bankruptcy statute which was passed in the reign of Henry VIII.[16] The contemporary New Zealand equivalent is the exclusion under section 52 of the Insolvency Act 1967 from property passing to the Official Assignee of necessary tools of trade to a value of $500 and necessary household furniture and effects (including the wearing apparel of the bankrupt and the bankrupt's family) to the value of $2 000. The only other significant New Zealand exemption, that of (within certain limits) life policies (an exemption of which equivalents survive in Australia[17] and various North American jurisdictions) came to an end on 31 March 1986.[18] There is one other significant class of exemption found in almost all of the United States of America, that of homesteads. This particular class of exemption originated in Texas during its period of independence.[19] From there the idea spread first to Georgia and Mississippi and (influenced in the former confederate states by post-bellum economic circumstances) beyond. There are differences from state to state as to:

- the type and value of the property benefited (the original Texan statute conferred the exemption in relation to "fifty acres of land or one town lot, including his or her homestead, and improvements not exceeding five hundred dollars in value"), some states include houseboats and mobile homes, some states provide corresponding benefits for non-homeowners;
- the extent of the exemption claimable by single persons which may be less than the entitlement of married persons or those living with family members;

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15 13 Ed I c 18.

16 (1542) 34 & 35 Henry VIII c 4.

17 Bankruptcy Act 1966 ss 116(2)(d)(i), (ii).

18 Insurance Law Reform Act 1985 ss 4 and 5 repealing the Life Insurance Act 1908 ss 65 and 66 and the Inalienable Life Annuities Act 1910.

19 3 Laws of the Republic of Texas 113 (1839).

- the imposition of a requirement (broadly analogous to our Joint Family Homes Act application) of a declaration before the homestead status can be claimed as against an 'automatic homestead' provision depending solely on occupancy;
- other qualifications and modifications of which it is unnecessary to particularise.

18 The existence of these North American measures demonstrates, we think, that there is nothing outlandish in the suggestion that the Joint Family Homes legislation could be replaced by a blanket exemption along the same lines, and we have considered whether it would be appropriate so to recommend. It would no doubt be argued that this was an injustice to unsecured creditors, but, except in the case of involuntary creditors (for example, successful tort claimants), creditors will, following some suitable transition period, have been aware of the protection at the time of extending credit. Despite the wide extent of home ownership in New Zealand not every bankrupt owns a home (or an equity in a mortgaged home; as already mentioned it is common for bankrupt tradesmen to have mortgaged their homes to the hilt to secure trade debts). It is not clear to us that bankrupt homeowners should be able to start their post-adjudication life assisted by a nest egg represented by the protected interest in the homestead that is not available to other bankrupts who were not homeowners. This, plus the geographical inequity already referred to, seems to us to tell conclusively against this proposal. We do not recommend a homestead protection.

19 It was submitted to us that, if the Joint Family Homes Act is to be repealed, the protection against creditors should be preserved in relation to existing registrations. But the effect of such an exception to the repeal would be that the protection would survive for so long as any present registered proprietor survived, which would mean that the statute would linger on for the benefit of a dwindling number of individuals for half a century or longer. A legitimate purpose of law reform is the simplification of the law and it seems to us that the disadvantages of the course referred to (law practitioners, teachers and insolvency administrators would need to know about the legislation for another 50 years or so) exceed the practical value of any benefits. We do not favour this proposal. Consideration could perhaps be given to deferring the coming into force of the repeal to ensure that any persons minded to set alternative protections in place have an opportunity to do so.

20 Finally, there is the benefit of a cheap and simple means of transferring title from one partner to both.[20] In our preliminary paper we posed the question:

> If it is believed … that there is a social advantage in encouraging the vesting of homes in partners as joint tenants, would provision of a simple procedure for this (there would need to be a gift duty exemption) be preferable to the continued existence of the Joint Family Homes Act?

Some of those who made submissions answered this question "yes".

21 Although it was the Law Commission that asked this question, on further reflection it seems that provision for such a procedure cannot sensibly be considered divorced from an examination of the policy rationale for the imposition of gift duty, a tax which, as we understand it, exists not for the production of revenue but in order to put the brake on tax-driven property assignments. Such a topic is well outside the terms of reference for this report and must be left for consideration on some other occasion.

RECOMMENDATION

22 We recommend that the Joint Family Homes Act 1964 be repealed and not replaced. (At the same time, in the interests of tidying the statute book, the Family Protection Act 1955 section 16(2) should be repealed). Because the provisions of the Interpretation Act 1999 relating to repeals have caused recent difficulty, we recommend that Parliamentary Counsel consider whether the repealing statute should include express provision to the effect that, upon repeal, the settled property (if both husband and wife are still living) shall remain vested in them as joint tenants, but that none of the other effects of registration as a joint family home constitutes an existing right, interest, title, immunity, or duty within the meaning of the Interpretation Act 1999 section 18.

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[20] We do not discuss the other saving, mentioned in paras 3 and 5, namely the possibility, in the case of very small estates, of a transmission by survivorship to the surviving spouse which makes a formal grant of administration unnecessary. If, before settlement, the property stood in the name of one spouse only there is a saving only if that spouse dies first, and it is not always possible to ensure that the spouses expire in the correct sequence. In any event there seems to be general agreement that this possible saving on its own does not justify the legislation.

Appendix A
List of those making Submissions

WR Atkin, Victoria University of Wellington

Warren Cole

RI Cross, Willis Toomey Robinson, Lawyers, Napier

Judith Dickens

Fiona Guy, Barrister & Solicitor, Wellington

Stewart Harrex, Legal Executive, C/o Fitzherbert Rowe, Solicitors, Palmerston North

Secretary for Justice

EA MacDonald, Cullinane Steel, Solicitors, Levin

Magill Earl & Co, Solicitors, Matamata

Property Law Section, New Zealand Law Society

Ian Ramsay, Solicitor, Auckland

AR Wallis, Jack Riddet Tripe, Lawyers, Wanganui

Whaley & Garnett, Solicitors, Greenlane, Auckland

The Women's Consultative Group of the New Zealand Law Society

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