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MARRIAGE/RELATIONSHIP SEPARATION AND THE RECESSION

It is interesting that changing economic times creates new challenges for the law. Upon separation, most parties approach a lawyer to seek their assistance in dealing with property division. The question we are going to deal with in today's newsletter is what happens if there is a deficit?

What happens if there are more debts than assets?

As a result of the recession, lawyers are experiencing numerous situations throughout New Zealand that on separation there are more debts than assets. This has given rise to a set of new challenges for lawyers. Does the Family Court have the power to split debts on an equal basis as they do with property or does the party responsible for the debt to the third party remain liable?

The orthodox view—deficits cannot be divided?

Until 2008, the New Zealand Courts had taken an approach that there were no powers available in the Property Relationships Act 1976 ("the Act") to divide debts equally between the parties upon separation. There are numerous decisions whereby the Courts have held there is no power to recompense one party for the other's debts. The decision of the High Court in *G v G* in 2006 confirmed that this was the correct approach.

Current view—equal sharing of economic disadvantage

The traditional view was challenged in the Christchurch Family Court in a decision by Judge Somerville in *C v W*. The Judge talked about a bundle of property rights and "obligations". The Judge held that it would be unjust for one of the parties to bear a disproportionate share of the loss. Indeed there would be a serious injustice if the Court were powerless to provide relief when one of the

parties retained all the assets and the other all the debts, simply because the value of debt was greater than the value of assets. The Court took a differing view and held that there was power in the Act for it to compensate a party who is left to bear a disproportionate share of the parties' debts.

The latest view

After a number of Family Court decisions following *C v W*, the issue was finally taken to the High Court in *T v M* in 2009. Justice Wild comments on the confusion:

"There is a sharp division of view as to whether a Court has jurisdiction to divide relationship property where the parties are in a negative equity position."

His Honour commented that if the Court was powerless to assist a party who was left with a disproportionate share of the debts, then that would be unsatisfactory, unjust, unhelpful and inefficient. Justice Wild then followed the approach taken by Judge Somerville in *C v W*.

Conclusion

Now that the High Court has resolved the confusion in this area, the good news is that those parties who are in a deficit situation and one of the party has been left with a disproportionate share of the debt, then compensation is available against the other party in the Family Court. This was certainly not the view pre 2008 when most lawyers probably would have recommended against making a claim.

- **When is a Contract Formed?—by Eugene Collins**