LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

October 2017, Wellington, New Zealand | ISSUES PAPER 41

Dividing relationship property – time for change?

Te mātatoha rawa tokorau – Kua eke te wā?

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Version: 8 Nov 2017

General information

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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A catalogue record for this title is available from the National Library of New Zealand.

ISBN: 978-1-877569-82-1 (Online)
ISSN: 1177-7877 (Online)

This title may be cited as NZLC IP41

This title is also available on the Internet at the Law Commission's website: www.lawcom.govt.nz
Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka.

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Foreword

The Property (Relationships) Act 1976 (PRA) is a crucial part of New Zealand's social legislation. It contains the rules for the division of property when a relationship ends as a result of separation or on the death of one of the partners. The PRA is, however, now over 40 years old and is in need of review. In this review, the Law Commission asks whether the existing rules in the PRA are still achieving a just division of property at the end of a relationship.

When first enacted in 1976, the PRA challenged and helped redefine the role of women in society. When it was amended in 2001, the PRA sought fair treatment for different relationship types by extending its application to de facto relationships and same-sex relationships. The PRA has both reflected and shaped societal values in the way people enter, conduct and leave relationships. Yet we know that New Zealand in 2017 looks very different to New Zealand in 1976, and even 2001. Our Study Paper, *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei*, confirms that the changes have been dramatic. For example, in 1976 the marriage rate was 35 per 1,000 unmarried adults yet by 2016 that rate had dropped to 11. Children are now ten times more likely to identify with more than one ethnicity than older New Zealanders.

There have also been some broad changes to New Zealand law over the last 40 years. A more child-centred approach, particularly in the family law context, is well-established. New Zealand law has increasingly sought to recognise tikanga Māori. Human rights law has developed and plays an important role in our legal framework. The courts have responded to New Zealanders' widespread use of trusts by developing remedies to recover property held on trust. All of these developments are relevant to the legal context in which the PRA operates.

Consequently, in this Issues Paper, *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?,* we ask "if New Zealand has changed so much, is the policy of the PRA still sound, and are the right principles guiding its rules?" Our preliminary view is that the policy and principles remain sound. We discuss these

in detail in Part A, which I encourage everyone to read before turning to specific issues.

What has emerged from our work so far are some important questions relating to the rules of the PRA and how they attempt to ensure a just division of property. These questions are:

1. Does the PRA always apply to the right relationships in the right way?
2. Does the PRA divide property that should be kept separate?
3. How should the PRA deal with trusts?
4. What should happen if equal sharing does not lead to equality?
5. How should the PRA recognise children's interests?
6. Does the PRA facilitate the inexpensive, simple and speedy resolution of PRA matters consistent with justice?
7. Does the PRA provide adequately for tikanga Māori?
8. How should the PRA's rules apply to relationships ending on death?

Each of these important questions gives rise to a number of further questions. For example, in asking whether the PRA facilitates the inexpensive, simple and speedy resolution of PRA matters consistent with justice, we have looked not only at the resolution of matters in and out of court, but we have also looked at the resolution of matters involving a cross-border element such as when property or one of the parties is located overseas.

We hope that our online consultation platform and Consultation Paper (which summarises each important question) will help members of the public and interested groups to identify easily those areas that interest them and provide feedback on those areas. We also warmly invite members of the public and interested groups to attend the consultation meetings we will be holding throughout the country (details of which can be found on our website).

The PRA is likely to affect the lives of most New Zealanders. Please read this Issues Paper and share your opinions on the issues and options for reform discussed throughout. We emphasise that the

views we express are preliminary and do not preclude further consideration of the issues. The feedback we receive will influence the recommendations we make to the Government at the end of 2018.

Ngā mihi nui

Douglas White

President

Acknowledgements

The Law Commission gratefully acknowledges the contributions of the people and organisations that have shaped our views in this Issues Paper and the accompanying Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017). A list appears in Appendix B.

In particular we acknowledge the generous contribution of time and expertise from our Expert Advisory Group:

- Professor Bill Atkin, Victoria University of Wellington
- Judge Andrew Becroft, Children's Commissioner
- Mr Stephen van Bohemen, Barrister
- Mr David Goddard QC, Thorndon Chambers
- Mr Greg Kelly, Greg Kelly Law
- Professor Nicola Peart, University of Otago
- Dr Jan Pryor
- Professor Jacinta Ruru, University of Otago
- Judge Laurence Ryan, Principal Family Court Judge
- Ms Renika Siciliano, McCaw Lewis
- Ms Kirsty Swadling, Barrister and Mediator

We are also grateful for the support and guidance of the Māori Liaison Committee to the Law Commission.

Finally, we gratefully acknowledge the opportunity to participate in the Otago University Faculty of Law's *Colloquium on 40 Years of the PRA: Reflection and Reform* held in December 2016 in Auckland.

The Lead Commissioner on this project is Helen McQueen. The Advisers who have worked on this project are Emma Bassett, Alec Dawson, John-Luke Day, Nichola Lambie, Francis McKeefry, Mihiata Pirini, Lisa Yarwood, and Karen Yates. The clerks who have worked on this project are Fady Girgis and Maddy Nash.

Have your say

This Issues Paper, a Consultation Paper and the accompanying Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), are available online at www.lawcom.govt.nz.

We want to know what you think about the Property (Relationships) Act 1976 and whether reform is needed. In this Issues Paper and the Consultation Paper we ask a series of questions. You can respond to any or all of these questions, raise any issues we haven't covered, or tell us your story. If you are sending us a submission (by email or in the post) it is helpful if you state the number of the question you are discussing.

Your feedback will help shape the Law Commission's recommendations to the Government.

When can I have my say?

The deadline for submissions or comments on this issues paper is **7 February 2018**.

How can I have my say?

You can go online to our **consultation website** prareview.lawcom.govt.nz and read the papers and respond to our online consultation questions (or tell us your story).

You can come along to a **public meeting** and speak to one of our team. Details of the public meetings can be found at www.lawcom.govt.nz.

You can **email** your submission to: pra@lawcom.govt.nz

You can **post** your written submission to:

Property (Relationships) Act Review
Law Commission
PO Box 2590
Wellington 6011
DX SP 23534

What happens to my submission?

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Therefore your submission will normally be made available on request. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982. The Law Commission also complies with the Privacy Act 1993, which governs how we collect, hold, use and disclose personal information provided in your submission. You have the right to access and correct your personal information.

We will use submissions to inform our consideration of the issues that arise in this review, and in any future reviews that cover the same or related issues. The Commission may refer to submissions in its reports, but as a matter of course we will anonymise submissions from private individuals. All submissions are kept by us as part of our official records.

If you do not want all or part of your submission to be released (including your name) or referred to in any Commission publication, please tell us which parts should be withheld and the reasons why. When possible, your views will be taken into account.

Glossary

Terms and abbreviations commonly used in this Issues Paper have the meanings set out below.

Māori terms

Hapū – Extended kin group, consisting of many whānau.

Iwi – Tribe, descent group consisting of many hapū.

Mana - Prestige.

Tikanga – Law, custom, traditional behaviour, philosophy.

Tupuna/Tipuna – Ancestor, grandparent.

Whānau – Family group including nuclear or extended family.

Whanaungatanga – Kinship, connectedness, a web of relationships of descent and marriage.

General terms

2001 amendments – The amendments to the PRA that came into effect on 1 February 2002 through the Property (Relationships) Amendment Act 2001.

Beneficiary – A person who has received, or who will or may receive, a benefit under a trust or an estate.

Children – Minor or dependent children, except where expressly stated.

Contracting out agreement – An agreement made between the partners, or a partner and a deceased partner's personal representative, under section 21, section 21A or section 21B of the PRA with respect to the status, ownership and division of their property, for the purpose of contracting out of the provisions of the PRA.

De facto relationship – Under the PRA, a relationship between two persons who are both aged 18 or older, who live together as a couple but are not married or in a civil union with one another. The PRA lists a range of matters in section 2D(2) that indicate whether two persons "live together as a couple", such as the duration of the relationship, the existence of a common residence and the degree of financial dependency

between the partners. Note that the definition of de facto relationship under the PRA is different to the definition used in other statutes, and for the collection of statistics. See discussion in the Study Paper.

Estate – A person's property left after he or she dies.

Framework of the PRA – Collectively the PRA's policy, theory, principles and rules as described in Chapter 3.

Intestacy – When a person dies without leaving a will, or where the will does not effectively dispose of the deceased's property.

Jurisdiction – A court's power to hear, decide and make orders in a case, including the territorial limits of the court's power.

Māori land – Land that is defined as Māori land under the Te Ture Whenua Māori Act 1993. This includes Māori customary land (held in accordance with tikanga Māori) and Māori freehold land (Māori customary land to which the beneficial ownership has been determined according to tikanga Māori by order of the Māori Land Court).

Non-division orders – The types of orders a court can make under the PRA that grant a partner temporary rights to use or occupy property, but do not affect each partner's entitlement to a share of relationship property when division occurs.

Policy of the PRA – The policy of the PRA is the just division of property at the end of a relationship, as described in Chapter 3.

PRA – The Property (Relationships) Act 1976. Between 1976 and 2001 the PRA was called the Matrimonial Property Act 1976.

Principles of the PRA – The principles which form the basis for the PRA's rules, including implicit and explicit principles, as described in Chapter 3.

Qualifying relationship – A marriage, civil union or de facto relationship of three or more years' duration.

Relationship property – The property described in section 8 of the PRA, which generally includes the family home, family chattels and property acquired during the relationship.

Separate property – The property described in section 9 and section 10 of the PRA which is generally any property that is not relationship property and specifically includes any property a partner receives from a third party by way of gift or inheritance.

Short-term relationship – A relationship of less than three years' duration, and includes short-term marriages, short-term civil unions and short-term de facto relationships.

Stepfamily – A couple with children, where at least one child is the biological or adopted child of only one partner. Stepfamilies include couples who are married, in a civil union or in a de facto relationship. Stepfamilies also include "blended families." Blended families are those that include children from previous relationships as well biological or adopted children of the partners.

Study Paper – The Law Commission's study paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o n*āianei (NZLC SP22, October 2017), published jointly with this Issues Paper.

Succession law – The system of rules that says who gets people's property when they die.

Trust – A legal relationship in which the owner of property holds and deals with that property for the benefit of certain persons or for a particular purpose.

Trustee – A person who owns property on trust and is required to deal with the property in accordance with the terms of the trust.

Working Group – The Working Group on Matrimonial Property and Family Property established in 1988 to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships.

Part A – Introducing the Law Commission's review

Chapter 1 – Context, scope and approach

Introduction

1.1 Dividing property when relationships end is often a challenging task, and one which typically comes at a time of emotional upheaval. When relationships end as a result of separation, both partners will generally be worse off financially, because the resources that were being used to support one household must now support two. How property is divided can significantly affect the financial recovery of partners and any children they might have. Different issues arise when a relationship ends on the death of one partner. The interests of the surviving partner may have to be balanced against competing interests, for example any children of the deceased.

1.2 The Property (Relationships) Act 1976 (PRA)[1] sets out special rules of property division that apply when relationships end. These rules apply when partners separate, unless they agree otherwise. The rules can also apply when one partner dies. People can use the rules in the PRA to work out their entitlements and come to an agreement about the division of their property, or they can ask a court to apply the rules and make a decision for them.

1.3 This Issues Paper asks whether the PRA rules are operating appropriately in contemporary New Zealand. Is the PRA achieving a just division of property at the end of relationships?

1.4 In this chapter we explain the context of this review, its scope and our process so far. The rest of Part A is arranged as follows:

(a) In Chapter 2 we explore why we have the PRA. We explain that the PRA is social legislation, and outline its history.

(b) In Chapter 3 we discuss what the PRA attempts to achieve. We describe the framework of the PRA and how it works in practice.

[1] For ease of reading, we will refer to the Property (Relationships) Act 1976 as the PRA in the remainder of this Issues Paper.

(c) In Chapter 4 we discuss the big questions we have identified so far, and some of the options for reform that might significantly change how the PRA works in practice.

Our terminology and approach to anonymisation of court decisions

1.5 Three types of relationships are at the centre of the PRA: marriages, civil unions and de facto relationships. For readability, we use the term "relationship" unless we are referring to a specific relationship type. Likewise, we use the term "partner" to refer to a spouse, civil union partner or de facto partner. Often the discussion in this Issues Paper takes place after a relationship ends, but for simplicity we will continue to refer to "partners" rather than "former partners."

1.6 In Chapter 4 we ask whether the PRA should be amended to use relationship neutral terms, and invite submissions on this issue.

1.7 Many court decisions under the PRA are anonymised through the use of fictitious names or the use of parties' initials. Some decisions are not anonymised yet are still subject to publication restrictions.[2] To address this, we have replaced the names of parties with initials when our discussion of the facts of a case includes sensitive information which could identify individuals who may be vulnerable.[3]

Social context of this review

1.8 The PRA was enacted over 40 years ago. Since then New Zealand has undergone a period of significant change. We discuss these changes in detail in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper).

1.9 New Zealand is more ethnically diverse. The Māori, Pacific and Asian populations have more than doubled since 1976.[4] In 2013,

2 Property (Relationships) Act 1976, s 35A; Family Court Act 1980, ss 11B–11D.

3 For a copy of our anonymisation policy please contact the Law Commission.

4 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Ian Pool "Population change - Key population trends" (5 May 2011) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz> and Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 6.

one in seven people identified as Māori.[5] Children today are also ten times more likely to identify with more than one ethnic group compared to older New Zealanders.[6] The population is ageing, and at significantly different rates across ethnic groups, which will continue to drive ethnic diversity in the future.[7] Religious identity is also changing. Fewer people identify as Christian, while almost half of the population report that they have no religion.[8]

1.10 These population shifts have coincided with changing patterns of partnering, family formation, separation and re-partnering.[9] What it means to be partnered has changed significantly since the 1970s, when the paradigm relationship involved a marriage between a man and a woman, in which children were raised and wealth was accumulated over time. Now, fewer people are marrying and more people are living in de facto relationships.[10] In 2016, 46 per cent of all births were to parents who were not married (or in a civil union).[11] There is also greater recognition and acceptance of relationships that sit outside the 1970s paradigm, including same-sex relationships.[12] More relationships end in separation,[13] and increasing rates of separation are driving

5 Statistics New Zealand 2013 Quickstats about Māori (December 2013) at 5.

6 In 2013, 22.8 per cent of children under 15 identified with more than one ethnic group, compared to just 2.6 per cent of adults aged 65 and over: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 7.

7 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (*NZLC SP22, 2017) at Introduction citing Statistics New Zealand National Population Projections: 2016(base)–2068 (19 October 2016) at 5 and 7; and Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 8.

8 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction citing Statistics New Zealand 2013 QuickStats about culture and identity (April 2014) at 27–30.

9 Data is not routinely collected in New Zealand for the specific purpose of investigating family characteristics and transitions. As a result there are some significant gaps in our knowledge. We do not know, for example, how many relationships end in separation, or how many people re-partner and enter stepfamilies. For a discussion of these limitations see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

10 In 2013, 22 per cent of people who were partnered were in a de facto relationship, compared to 8 per cent in 1986. In contrast, the percentage of partnered people who are married has fallen, from 92 per cent in 1986 to 76 per cent in 2013: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1, Figure 1b citing Statistics New Zealand Population Structure and Internal Migration (1998) at 10; Statistics New Zealand Population Structure and Internal Migration (2001) at 52; and Statistics New Zealand "Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Censuses" <nzdotstat.stats.govt.nz>.

11 In 1976, only 17 per cent of children were born out of marriage: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 2 citing Statistics New Zealand "Live births by nuptiality (Maori and total population) (annual-Dec)" (May 2017) <www.stats.govt.nz>.

12 In 2013, 8,328 people recorded that they lived with a same-sex partner, up from 5,067 in 2001: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand 2013 Census QuickStats about families and households – tables (November 2014).

13 For example in 2016 the divorce rate was 8.7 (per 1,000 existing marriages and civil unions), compared to 7.4 in 1976: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i*

a rise in re-partnering,[14] which is leading to an increase in stepfamilies. There has also been a significant increase in single parent families, with the proportion of single parent households almost doubling since 1976.[15]

1.11 These social changes have significant implications for our review. They will have undoubtedly influenced public values and attitudes, and increasing diversity in relationships and families may affect what a "just" property division looks like today. The policy implications of increasing diversity in relationships and families are well recognised:[16]

> *Increasingly diverse and flexible family forms mean there are no longer clear universally held assumptions to be made about family circumstances; the increasing pragmatism of family law reform, aiming to offer management of family matters rather than abstract justice based on moral or religious principles, means that it becomes ever more important for the policy maker to understand what individuals expect and value…*

Scope of this review and our approach so far

1.12 In December 2015, the Minister responsible for the Law Commission, Hon Amy Adams, asked the Law Commission to review the PRA. The Terms of Reference are set out in Appendix A and are wide-ranging. They require consideration of the PRA rules and how property matters are resolved in practice.

1.13 Since then we have extensively researched the history of the PRA and reviewed case law, commentary and court data to understand how the PRA is operating in practice. We have looked at international experiences to inform our understanding of possible

Aotearoa o nāianei (NZLC SP22, 2017) at Chapter 3 citing Statistics New Zealand "Divorce rate (total population) (annual-Dec)" (June 2017) <www.stats.govt.nz>. This does not include de facto separations, for which no information is collected.

14 In 2016, remarriages accounted for 29 per cent of all marriages, compared to 16 per cent in 1971: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4 citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

15 Single parent households comprised 9 per cent of all New Zealand households in 2013, up from 5 per cent in 1976: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5, Figure 5a citing Statistics New Zealand "Household composition, for households in occupied private dwellings, 2001, 2006 and 2013 Censuses (RC, TA, AU)" <nzdotstat.stats.govt.nz>; and Dharmalingam and others *A Demographic History of the New Zealand Family from 1840: Tables* (Auckland University Press, 2007) at 17.

16 Mavis MacLean and John Eekelaar "The Perils of Reforming Family Law and the Increasing Need for Empirical Research, 1980-2008" in Joanna Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets An Interdisciplinary Study* (Hart Publishing, Oxford, 2009) 25 at 31.

reform options. We have also researched the social context and published our findings in the accompanying Study Paper. We established an Expert Advisory Group to assist us in this review, and sought guidance from the Law Commission's Māori Liaison Group on those matters that may be of particular concern to Māori.

1.14 We have also undertaken targeted, preliminary consultation with a range of interested parties (see Appendix B). This preliminary consultation identified a number of issues and options for reform that are reflected in this Issues Paper. We know there will be other perspectives, and the submissions we receive in response to this Issues Paper will help us to develop our views on whether changes to the PRA are needed and if so what form they should take.

1.15 The Terms of Reference for this review do not include other areas of family and social legislation such as the child support regime in the Child Support Act 1991, the maintenance regime in the Family Proceedings Act 1980 or the social security regime in the Social Security Act 1964. We cannot, however, consider the PRA in isolation from these regimes, as they each play an important role in supporting partners and children at the end of a relationship. In Part F we consider options for reform that have implications for the maintenance regime, and our discussion of the application of the PRA on the death of one partner in Part M has also required us to consider aspects of succession law which are not part of our Terms of Reference. It is possible that our final recommendations may have implications for these regimes. In Part L of this Issues Paper we also address the rules of private international law, the full extent of which is beyond the scope of this review. We discuss the role of the PRA as social legislation, and its relationship with other areas of family and social policy, in Chapter 2.

1.16 Our final report to the Minister Responsible for the Law Commission is due in November 2018.

Structure of this Issues Paper

1.17 This Issues Paper is divided into parts. Following on from Part A (Introducing the Law Commission's review) the parts are as follows:

- **Part B – What relationships should the PRA cover?**

We look at the types of relationships to which the PRA's main rules of division apply. We examine whether the PRA focuses on the right kinds of relationships.

- **Part C – What property should the PRA cover?**

The PRA requires partners to divide their relationship property. We look at the types of property that the PRA defines as relationship property and separate property.

- **Part D – How should the PRA divide property?**

The general rule at the heart of the PRA is that, on division, each partner is entitled to an equal share of relationship property. We discuss whether this general rule remains appropriate. We also look at the exceptions to equal sharing and whether they apply in the right circumstances.

- **Part E – How should the PRA treat short-term relationships?**

If a relationship has lasted for less than three years, the general rule of equal sharing does not apply. The PRA provides special rules for short-term relationships, and de facto partners have different rights to married and civil union partners. We ask whether the special rules should continue to apply to short-term relationships and if the different rights based on relationship type are justified.

- **Part F – What should happen when equal sharing does not lead to equality?**

Sometimes the partners will take different roles in a relationship. If one partner has been freed up for paid work, that partner may leave the relationship with a developed career. Conversely, a partner who has sacrificed paid work to perform unpaid roles in the relationship might not have the same income-earning opportunities after the relationship. Equal sharing may not fairly apportion the economic advantages and disadvantages each partner takes from the relationship. We look at how the PRA deals with these scenarios and whether it is effective.

- **Part G – What should happen to property held on trust?**

Many families use trusts to hold property. Trusts can cause difficulties if a relationship ends because trust property generally stands outside the PRA. There are, however, many legal remedies through which a partner can claim a share of the trust property, but they are not all found within the PRA. We examine this law and consider whether reform is needed.

- **Part H – Resolving property matters in and out of court.**

We look at how the PRA facilitates the resolution of property matters at the end of a relationship. We look at whether the law and processes meet people's reasonable expectations, and whether they are as inexpensive, simple and speedy as is consistent with justice.

- **Part I – How should the PRA recognise children's interests?**

Children have an important interest in the way their parents divide property at the end of a relationship. We focus on whether the PRA does enough to recognise the interests of children and we look at what taking a more child-centred approach would look like in practice.

- **Part J – Can partners make their own agreement about property?**

The PRA does not require all people to divide their property according to its rules. Instead, partners can make their own agreements to determine the status, ownership and division of their property in the event they separate or one partner dies. Partners can also make their own agreement to settle any differences that have arisen between them with respect to their property. We look at how the PRA controls the way these agreements are made and how agreements are to apply.

- **Part K – Should the PRA affect the rights of creditors?**

The PRA has a general rule that creditors continue to have the same rights against the partners and their property as if the PRA had not been passed. There are however a few exceptions. We examine whether the general rule and the exceptions are working appropriately.

- **Part L – What should happen when people or property have a link to another country?**

Some relationships will have links with other countries, either because the partners have ties with those countries or because they hold property overseas. We look at when the PRA should apply to these relationships, when a New Zealand court will decide the matter, how and where remedies can be enforced, and whether reform is needed.

- **Part M – What should happen when one partner dies?**

When a partner dies, the surviving partner can choose to either take whatever provision is made for them under the deceased's will, or apply for a division of the couple's property under the PRA. There is also limited scope for the personal representative of the deceased to seek a division under the PRA. These rules are complex. They give rise to difficult questions about the surviving partner's interest in the couple's relationship property and the rights of other people who feel entitled to the deceased's property. We discuss these issues and consider whether the PRA is the best statute to address these questions.

Chapter 2 – Why do we have the PRA?

2.1 In order to understand why we have the PRA, it is helpful to look to the past and explore how property practices when relationships end have changed throughout New Zealand's history. We look at property practices in traditional Māori society, those that were inherited from England and Wales and the series of law changes that ultimately resulted in the PRA. We then go on to explore the current social and legal context within which the PRA currently operates.

Marriage and property practices in traditional Māori society

2.2 Māori ascribe to a unique world view that governs their relationships with each other and the world around them. The roles of men and women in traditional Māori society can be understood only in the context of this world view.[17]

2.3 In traditional Māori society, men and women were considered essential parts of the collective whole, both formed part of the whakapapa that linked Māori people back to the beginning of the world, and women in particular played a key role in linking the past with the present and the future.[18] Women were nurturers and organisers, valued within their whānau, hapū and iwi.[19] Women of rank maintained powerful positions within the social and political organisations of their tribal nations, reflected in the fact that some women signed the Treaty of Waitangi on behalf of their

17 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 327 and Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 125.

18 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330 and Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 125.

19 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

hapū.[20] Women's mana could be inherited from male and female tupuna, as well as conferred on female and male descendants.[21]

2.4 Marriage was a relationship of importance not only to the spouses but also to their whānau, for it established links between the whānau and provided each with new generations.[22] According to Māori custom, public expression of whānau approval established a couple as "married".[23] A married woman remained a part of her own whānau even if she chose to live with her spouse's whānau: her marriage did not entail a transferral of "property from her father to her spouse".[24] Spousal differences were resolved between whānau,[25] and in cases where misconduct was shown, divorce was relatively simple so long as the correct procedures were followed.[26] Divorce carried no stigma, and child care arrangements and support were sorted out within the whānau context.[27]

2.5 While Māori valued marriage, it was not given absolute precedence over other relationships because of the emphasis placed on descent.[28] For Māori, descent and descent group membership are key elements in the organisation of both social

20 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 16.

21 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 14.

22 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62 and Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 186-187 citing Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (1st ed, Oxford University Press, Auckland, 1992). Some marriages were arranged for the purpose of building relationships between iwi, in some cases for securing peace following hostilities: Hirini Moko Mead *Tikanga Māori* (Revised ed, Huia Publishers, Wellington, 2016) at 177–180.

23 Customary recognition of marriage took many different forms depending on iwi or hapū, or on the social status of the couple. Once approval was given by the whānau, the couple were considered married, even if cohabitation was delayed. The newly married couple did not set up a new household but joined an established one. See Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 19 and Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

24 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127, as cited in Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at [77].

25 ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 52.

26 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127, as cited in Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 20.

27 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 125 at 127. However, the tikanga of muru was traditionally practised in circumstances that threatened the institution of marriage, including he tangata pūremu: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 161 and 255.

28 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

life and personal identity.[29] Mana, land rights and the trusteeship of taonga all passed down descent lines.[30]

2.6 Māori place high value on land, or whenua.[31] Māori are "tangata whenua", or people of the land, and cultural practices or tikanga associated with birth and death emphasise links to the land.[32] Land was the foundation of the social system, and continuity of the group depended very much on a home base, called te wā kāinga, where people could live like an extended family.[33] The relationship Māori had with the land was not about owning the land or being master of it:[34]

> *In the beginning land was not something that could be owned or traded. Māoris did not seek to own or possess anything, but to belong. One belonged to a family, that belonged to a hapū, that belonged to a tribe. One did not own land. One belonged to the land.*

2.7 Both men and women had the capacity to hold property:[35]

> *The position of Māori women with regard to the ownership of property was in great contrast to that of their Pākehā contemporaries. In Māori society before and after contact, use-rights over land and resources were 'owned' or held by women as individuals as well as by men, subject only to the overriding right of the tribal community and the mana (authority) of chief over the land and people.*

2.8 Marriage "did not alter this reality."[36] A woman retained ownership of land that was hers prior to marriage, and decisions regarding it were hers to make, subject to her whānau and hapū interests.[37]

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29 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

30 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62. One of the distinctive features of Māori social organisation is that descent is traced through links of both sexes. As a result individuals have not one but many descent lines.

31 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 285–286.

32 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 287.

33 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 288.

34 Eddie Durie "The Law and the Land" in Jock Phillips (ed) *Te Whenua Te Iwi, the Land and the People* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) at 78. See also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 289.

35 Angela Ballara "Wahine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 133–134. See also Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 15; and Judith Binney and Gillian Chapman *Ngā Mōrehu The Survivors* (Oxford University Press, Auckland, 1986) at 25-26.

36 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330. See also Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22.

37 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330 and Angela Ballara "Wahine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 134.

Women could hand land down to some or all of their children, male or female, and gifts of land were often made by parents to their daughters on their marriage.[38] If a woman's family gifted land to her husband in celebration of their marriage, his right of occupancy would terminate and the land would revert to her family if on the woman's death there were no children of the marriage and the husband had no blood link to the land.[39]

The impact of introduced law on the role of Māori women in society

2.9 At the time of the signing of the Treaty of Waitangi in 1840, Māori women were acknowledged as owners of Māori land in accordance with tikanga.[40] Māori women continued to play important and active leadership roles during the latter part of the nineteenth century, particularly in the Māori land movements and the land wars.[41]

2.10 However the role of Māori women in society was gradually undermined in the period of colonisation that followed the signing of the Treaty of Waitangi.[42] Māori collectivism was philosophically at odds with the colonial ethic of individualism.[43] The role of women as nurturers and organisers was challenged by the colonial view of men as heads of the family, while the role of women of rank as leaders was challenged by the colonial view of the subordinate role of women to men.[44] The relationship of women with the land was also challenged by the colonial concept of individual land ownership and the role of men as property owners.[45]

38 Angela Ballara "Wahine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 134. See also Pat Hohepa and David Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29 and Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 15.

39 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 330.

40 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 16.

41 Angela Ballara "Wāhine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 133–134.

42 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11; and Pat Hohepa and David Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 29.

43 Annie Mikaere "Māori Women: Caught in the contradictions of a Colonised Reality" (1994) 2 Waikato LRev 127 at 133.

44 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

45 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

2.11 Most Māori married according to their own custom until the early twentieth century.[46] However, the English Laws Act 1858[47] and successive marriage laws required Māori to conform more closely to the legal requirements for establishing marriage inherited from England until, in the 1950s, customary marriages were no longer legally recognised.[48] To avoid their children being deemed illegitimate, and to access social services (such as the widow's benefit and housing assistance), Māori couples had to marry according to State law. This led some Māori to move away from customary marriage, although it remained common in the 1950s and 1960s.[49] The Status of Children Act 1969, which eliminated the discrimination of children based on their parents' marital status, and the growing prevalence of cohabitation among non-Māori, may have subsequently reduced pressure for Māori couples to officially register a marriage.[50] Today the general rule remains that Māori have to marry in accordance with State law in order for their marriage to be legally recognised.[51]

2.12 Customary Māori land tenure with regard to women was progressively undermined in the late nineteenth century.[52] The Native Land Act 1873 provided that husbands should be party to all deeds executed by married Māori women.[53] Husbands on the other hand were free to dispose of their Māori wives' land

46 Megan Cook "Marriage and partnering — Marriage in traditional Māori society" (4 May 2017) Te Ara — The Encyclopedia of New Zealand <www.teara.govt.nz>.

47 The English Laws Act 1858 declared that the laws of England had force in New Zealand. See Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22.

48 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22. The Māori Purposes Act 1951, s 8(1) and the Māori Affairs Act 1953, s 78, both provided that:

> *Every marriage to which a Māori is a party shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European; and all provisions of the Marriage Act 1908 shall apply accordingly.*
>
> *The Māori Affairs Act also invalidated all future Māori customary marriages and any marriages entered into in the past, except as expressly provided by that Act (s 79).*

49 Megan Cook "Marriage and partnering — Marriage in traditional Māori society" (4 May 2017) Te Ara — The Encyclopedia of New Zealand <www.teara.govt.nz>; Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 186; and Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Overview" (1998) 10 Social Policy Journal of New Zealand 122.

50 Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Overview" (1998) 10 Social Policy Journal of New Zealand 122.

51 Family law statutes enacted since 1950, including the Marriage Act 1955, largely ignore Māori customary marriages. The exception is Te Ture Whenua Māori Act 1993, which preserves the application of family maintenance in relation to marriages in accordance with tikanga Māori, but only those entered into before 1 April 1952 (s 106(4)). See Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 334.

52 Angela Ballara "Wahine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 134.

53 This followed unsuccessful attempts by Pākehā husbands to "gain control of the lands of their Māori wives" by challenging a provision of the Native Lands Act 1869 which enabled married Māori women to deal with their land as if "feme sole" (an unmarried woman). See Angela Ballara "Wahine Rangatira: Māori Women of Rank and their Role in the Women's Kotahitanga Movement of the 1890s" (1993) 27 The New Zealand Journal of History 127 at 134.

interests without their wife being a party to the deed.[54] Legislation enacted during this period also moved land ownership into individual (usually male) ownership rather than guardianship, again eroding Māori women's control.[55]

2.13 As the Law Commission has earlier observed:[56]

> *Land alienation had profound effects on Māori society, and in particular Māori women, as it destroyed the collective whānau/hapū unit. That the whānau/hapū unit was given less importance undermined the values that maintained its well-being. The erosion of those values – family and tribal history, language skills, mutual caring and support – eroded the importance of the roles and of the women who traditionally performed them.*

2.14 The imposition on Māori of colonial standards subordinated Māori women and contributed directly to the diminution of their value in Māori society.[57] The influence of introduced laws and culture eventually affected the core of Māori society. When the English common law was applied to Māori women, their status was the same as their English counterparts.[58]

Post-colonial history of relationship property law

The doctrine of matrimonial unity

2.15 Colonial New Zealand inherited its rules of marriage and divorce from England and Wales. In contrast to the role of women in traditional Māori culture, in English common law the husband was the authoritarian head of the family, with powers over both person and property of his wife and children. On marriage, the law deemed husband and wife to be one legal person, and that person was the husband. This was known as the doctrine of matrimonial unity, and it meant that most of the wife's property

54 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 21.

55 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22.

56 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22.

57 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 16.

58 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 17.

rights were acquired by the husband on marriage.[59] The property of the husband and wife could be used and, in most cases, disposed of as the husband pleased. It was also available to the husband's creditors to satisfy his debts. In contrast, the wife could not dispose of what had been her property without the consent of her husband.[60]

2.16 The husband, in return for the ownership and control of property his wife brought to the marriage, had an obligation to maintain his wife and children.[61] This maintenance obligation remained even if the husband and wife ceased to live together, and could be enforced by a court.[62]

2.17 The importance of the institution of marriage in post-colonial New Zealand meant that it was supported and protected by the State and the justice system: "Entry to and exit from marriage was firmly controlled, and the responsibilities of husband and wife were supported by the law and the fact that the welfare system was very limited."[63]

The separation of property system

2.18 In the nineteenth century, New Zealand lawmakers introduced legislation to remove many of the legal disabilities the doctrine of matrimonial unity placed on married women. In the first instance, changes were relatively modest, providing limited protections for "deserted wives."[64]

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59 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.4].

60 The courts did, however, develop a number of ways to mitigate the harshness of the doctrine. In particular, the courts of equity recognised that a settlement on trust solely for the wife's benefit was not captured by the doctrine, and thus a husband and his creditors could not access those funds. This led to the widespread practice of marriage settlements among the moneyed classes. See *Ulrich v Ulrich* [1968] 1 WLR 180 at 188 (CA); *W v W* [2009] NZSC 125; [2010] 2 NZLR 31 at [14]; Nicola Peart "Intervention to Prevent the Abuse of Trust Structures in New Zealand" [2010] NZ L Rev 567 at 592; John Rimmer "Nuptial Settlements: Part 1" (1998) 5 PCB 257 at 258.

61 A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 241–242. See also *Dewe v Dewe* [1928] P 113 at 119 per Lord Merivale as cited in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.5]: "A husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes, physic, etcetera suitable to the husband's degree, estate or circumstances."

62 Matrimonial Causes Act 1857 (England & Wales) 20 & 21 Vict c 85, s 32. In New Zealand see the Divorce and Matrimonial Causes Act 1867, s 27.

63 Megan Cook "Marriage and Partnering - Marriage in the 19th century" (4 May 2017) Te Ara - the Encyclopedia of New Zealand <www.teara.govt.nz> at 2.

64 The Married Women's Property Protection Act 1860 granted a wife who had been deserted by her husband the right to apply to court for an order to protect from her husband and his creditors the property she had acquired since desertion. Those responsible for introducing the legislation explained that the previous law was unsatisfactory as the property of a wife who had been deserted by her husband could later be seized by the husband or even his creditors, leaving the deserted wife destitute: (16 August 1860) 2 NZPD 320. The circumstances in which an order could be sought were enlarged by the Married Women's Property Protection Act 1870. Section 2 granted the woman the right to seek an order when she and her husband had separated due to the husband's cruelty, adultery, habitual drunkenness or habitual failure to provide maintenance for the wife and children. Both the 1860 Act and the 1870 Act were consolidated in the Married Women's Property Protection Act 1880.

2.19 More significant reform came with the Married Women's Property Act 1884, which swept aside the doctrine of matrimonial unity and replaced it with a "separation of property" system. Parliament's primary concern was that the matrimonial unity doctrine had allowed husbands to squander the property that their wives brought to the marriage so that women were left without any means.[65] In response, the Act provided that a wife could independently acquire, hold and dispose of property as if she was a "feme sole."[66] In other words, she was an independent legal person. Wives could now acquire their own property, enter contracts in their own name, and sue and be sued.

2.20 While the previous law deemed husband and wife to be one legal person (the husband), the effect of the Married Women's Property Act was to treat husband and wife virtually as strangers.[67] The Act looked at property as his or hers, rather than "theirs."[68] This, however, brought its own problems. The law now required a court to divide property according to each spouse's entitlements under general property law principles. More often than not, ownership was determined based on who held legal title and had paid for each item of property. The Act therefore did little for married women as most had remained homemakers, earned no income and accordingly had no means to contribute financially to the purchase of property.[69] In reality most of the matrimonial property was in the husband's sole name and had been paid for from his earnings. Likewise, the income on which the spouses relied was usually earned by the husband. As a result, on separation many women were left without any rights to the property used and acquired in the course of the marriage, unless they could show a direct interest in property that they had paid for in "cold hard cash."[70]

2.21 Despite the problems with the Married Women's Property Act, its substance was retained in later re-enactments of the same

65 (5 September 1884) 48 NZPD 155.

66 Married Women's Property Act 1884, s 3.

67 AM Finlay "Matrimonial Property – Comparable Sharing: An explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

68 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 3.

69 AM Finlay "Matrimonial Property – Comparable Sharing: An explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 4.

70 AM Finlay "Matrimonial Property – Comparable Sharing: An explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at at 4.

law, and lingered well into the twentieth century.[71] Amendments in 1961 extended the principles to relationships that ended on death.[72] No provision was made for de facto relationships.[73]

The Matrimonial Property Act 1963 – Recognising non-monetary contributions to property

2.22 In the second half of the twentieth century, concern was growing about the way in which the law disadvantaged women. There was increasing recognition that a wife may have supported her husband for many years by maintaining the home and looking after the children. These types of contributions undoubtedly helped the husband to work, earn income and acquire property.[74] However under the existing Married Women's Property Acts these types of contributions did not create any property interest in the matrimonial property.

2.23 The Matrimonial Property Act 1963 (1963 Act) was introduced in response to these concerns. It retained the separation of property system of the Married Women's Property Act, but with a "superimposed judicial discretion" that enabled a court to make orders overriding the spouses' strict legal and equitable[75] interests in the property.[76] When making those orders, a court was required to have regard to the contributions the husband and wife made to the property in dispute, whether "in the form of money payments,

71 Married Women's Property Act 1894, the Married Women's Property Act 1908, the Law Reform Act 1936, the Statutes Amendment Act 1939, the Married Women's Property Act 1952. The changes made by the series of Married Women's Property Acts did not, however, affect a wife's right to maintenance. A husband's maintenance obligations, even after separation or divorce, lived on under separate legislation. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.8].

72 In 1961 the Married Women's Property Act 1952 was amended to define "husband" and "wife" to include their personal representatives, with the effect that the Act applied on the death of one spouse. See Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 6.

73 However, the purpose of the Married Women's Property Acts was to unwind the doctrine of unity that only applied on marriage. In effect, therefore, the position of women in de facto relationships may have been similar to that of married women under the Married Women's Property Acts. That is, women in either type of relationship could own property in their own right if she was a "feme sole", but would be required to establish property rights based on general property law principles.

74 The sentiment of law reformers in this era toward the dynamics of most families was famously summarised by English Judge, Lord Simon: "Men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it." (Lord Simon of Glaisdale "With All My Worldly Goods" (address to the Holdsworth Club, University of Birmingham, 20 March 1964) at 32).

75 A person may have an "equitable interest" in property even though they might not be the legal owner. The most common example of an equitable interest is where property is held on trust. The trustee, who is the legal owner of the property, is obliged to deal with the property for the beneficiaries. In that case, a beneficiary's interest is an equitable interest under the trust property.

76 Matrimonial Property Act 1963, s 5(3). See A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 248.

services, prudent management, or otherwise."[77] For example, if the legal title to the matrimonial home was solely in the husband's name, a wife could claim an interest in that property by showing contributions that would not ordinarily result in a property interest under general property law principles. A 1968 amendment clarified that it did not matter that the spouse had not made a contribution in the form of money payments, nor did those contributions have to be of an "extraordinary character."[78]

2.24 The reforms brought about by the 1963 Act were very progressive for its time, although it applied only to marriages. It was at this point that New Zealand matrimonial property law broke away from England and Wales and took on its own distinctive character.[79] The philosophy of the 1963 Act was to produce an outcome that recognised a wife's role in the family, at a time when marriage was still a defining structure of society and a wife's role was still largely focused in the home.[80] For the first time a wife's non-monetary efforts for her family, rather than direct financial contributions, could justify an interest in property when that marriage ended, on separation or death.[81] Despite the landmark shift, however, a number of problems with the 1963 Act's practical application emerged over the next decade.

The Matrimonial Property Act 1976 – "A new deal"[82]

2.25 Problems with the 1963 Act were identified in a report released in 1972 by a committee comprising members of the Ministry of

77 Matrimonial Property Act 1963, s 6(1).

78 Matrimonial Property Amendment Act 1968, s 6(1), which inserted a new s 6(1A) into the Matrimonial Property Act 1963.

79 In England and Wales the law was later amended through the Matrimonial Causes Act 1973 (UK). That legislation introduced a regime where the court had broad discretion to make orders regarding property at the end of a marriage. Although it remains in effect, it was amended in 1984 on the recommendation of the Law Commission of England and Wales to require the court to have regard to particular matters when making property adjustment orders. See Matrimonial and Family Proceedings Act 1984 (UK), s 3, which introduced s 25 to the Matrimonial Causes Act 1973 (UK). See also: Law Commission of England and Wales *Family Law: The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law* (LAW COM No 112, 1981).

80 For example, in the early 1960s over 90 per cent of all babies were born within marriage, and only 16 per cent of married women participated in the labour force. See P Hyman "Trends in Female labour force participation in New Zealand since 1945" (1978) 12 New Zealand Economic Papers 156 at 157; Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, 2007) at 225.

81 The Matrimonial Property Act 1963 applied on death as a result of a 1961 amendment to the predecessor legislation, the Married Women's Property Act 1952. That amendment defined "husband" and "wife" to include their personal representatives, and those definitions were carried into the 1963 Act. See Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 6.

82 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

Justice and the New Zealand Law Society.[83] In 1975 the Select Committee on Women's Rights also reported to Parliament on the way the 1963 Act was working.[84] Both committees complained that the 1963 Act's approach of requiring a spouse to show specific contributions to identified pieces of property still caused difficulties for married women. The committees said the law should instead assume that equal contributions have been made in respect of all assets of the marriage, especially the family home, and equal division should be automatic.[85] A "coherent and rational code" was needed to replace the 1963 Act.[86]

2.26 There was a general political consensus that progressive reform was needed.[87] The Matrimonial Property Bill 1975 (Bill) was introduced into Parliament and, despite an intervening general election and change in government, the Bill was enacted and became the Matrimonial Property Act 1976 (the 1976 Act). [88]

What problems did the Bill intend to remedy?

2.27 In a White Paper published on the introduction of the Bill to Parliament, the Minister of Justice explained:[89]

> *The law in New Zealand that now governs relations between husband and wife in property matters, despite the improvements made in the last 15 years, falls well short of achieving equal justice in practice between married people; nor does it accord with the way in which most married people in New Zealand look on their property and treat it.*

2.28 The Minister explained that the fundamental problems with the 1963 Act included:[90]

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83 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972).

84 NV Douglas "Women's Rights Committee: June 1975" [1975] IV AJHR I13.

85 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 11. NV Douglas "Women's Rights Committee: June 1975" [1975] IV AJHR I13 at 75.

86 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at 2.

87 Leading up to the 1975 general election, both Labour and National adopted the policy of legislating a presumption of equal sharing of matrimonial property. See New Zealand National Party *National Party 1975 General Election Policy* (National Party, Wellington, 1975) at 4; New Zealand Labour Party *The Labour Party Manifesto 1975* (Labour Party, Wellington, 1975) at 31.

88 The only major issue which divided the two parties in the process leading to the enactment of the Matrimonial Property Act 1976 was whether de facto partners should be included: see (7 December 1976) 408 NZPD 4564.

89 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

90 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5.

(a) An applicant had to prove specific contributions to identifiable items of property and have them quantified by a court.[91] In truth, the Minister said, a wife would be seeking an award from the husband's property, rather than a share of "their" property. In settlement negotiations, this placed married women in an inferior bargaining position.

(b) There was a considerable measure of uncertainty in every case. The cases decided under the 1963 Act showed that results could differ "significantly" on similar facts, and could depend "a good deal" on which judge heard the case.

(c) The practice of the courts had been less than generous. There had been cases where wives had made significant contributions to their families over a number of years but, despite such loyalty and hard work, they were awarded a share of between one quarter and one third of the family home.[92]

(d) The task of showing specific contributions to identifiable items of property was often impossible in practice. The non-monetary contributions of wives and husbands were of a far more general character, although no less real.

What solution did the Bill seek to provide?

2.29 The Bill was said to embody the concept of "marriage as an equal partnership between two equal persons and as the basis on which our present society is built", and was "devised in the light of New Zealand needs and New Zealand values".[93] Spouses were no longer

91 The courts' approach of determining disputes by considering each item of property and making orders in respect of those items had been confirmed by the Court of Appeal in *E v E* [1971] NZLR 859 (CA). However the Privy Council later saw no justification or foundation for an "asset by asset" approach as taken by the Court of Appeal: *Haldane v Haldane* [1976] 2 NZLR 715 (PC) at 727.

92 An Auckland District Law Society Public Issues Committee said in 1975, "Differing judges have different ideas of what as a matter of social policy is fair, some markedly favouring wives and some husbands": Auckland District Law Society Public Issues Committee "Background Paper on the Law as to Matrimonial Property" (1975) at 2, as cited in Geraldine Callister "Domestic Violence and the Division of Relationship Property Under the Property (Relationships) Act 1976: the Case for Specific Consideration" (LLB(Hons) Dissertation, University of Waikato, 2003). See also A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 248-249. The authors discuss the general approach to dividing property taken by the courts under the Matrimonial Property Act 1963:

> *Though judicial discretions are inherently unpredictable, the pattern that the courts appear to have adopted in exercising their discretion was to grant the wife an equal share in the matrimonial home, where she could show some financial or material contribution as well as domestic contributions, while in other cases she could normally have expected an entitlement of around about a third.*

93 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.

to be treated as strangers in law but as partners in a common enterprise.[94] The primary shift in emphasis was from the concept of contribution to the property, to contributions to the marriage partnership, which were presumed to be equal.

2.30 The Bill was founded on the basis that a court should be permitted to look at the marriage assets as a whole and relate the contributions of the husband and wife to them, rather than to specific items of property.[95] The Bill did this by introducing the concept of "matrimonial property."[96] Matrimonial property was the property that the husband and wife could regard as "theirs." Broadly speaking, the Bill defined matrimonial property as the family home, family chattels and all other property acquired by husband or wife after the marriage except by inheritance or gift.[97] It was this matrimonial property that would be subject to equal division between the husband and wife. Separate property, in contrast, would continue to belong solely to the husband or wife and would not be eligible for sharing. All property owned by either spouse that did not come within the definition of matrimonial property was separate property.

2.31 The concept of equal division of matrimonial property, the Minister explained, "has the great advantage of reintroducing certainty, putting husband and wife in an equal bargaining position should the marriage break up, and being consistent with broad social justice."[98]

2.32 The Bill expressly considered the role of Māori land, which had not been excluded under the 1963 Act. The Bill sought to protect the special status of Māori land and recognise the interests of other parties in that land by removing it from the ambit of the property sharing regime.[99] There was no discussion in Parliament of the change brought about by the Bill, but it seems to reflect the view that special rules for Māori land were necessary.[100] The

94 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

95 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5-6.

96 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 6.

97 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 6.

98 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 7.

99 Clause 6 of the Matrimonial Property Bill 1975 (125–1) excluded Māori land within the meaning of the Māori Affairs Act 1953.

100 Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs, and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 464.

exclusion of Māori land meant that if one or both of the spouses had an interest in Māori land that land would not fall within the pool of matrimonial property available for sharing at the end of the marriage.

2.33 While the Bill dealt only with dividing property on separation, the Government also considered that the rights of a surviving spouse should not be inferior in any way to those of a separated spouse.[101] The Government observed, however, that reforming the law on the division of property on death presented "complex and stubborn problems", and elected to deal with this issue separately.[102]

2.34 The Government also questioned whether the new equal sharing regime should apply to de facto partners.[103] It observed that the same vulnerabilities married women suffered under the previous law could also affect women in long standing de facto relationships. The Minister said that for "practical and humanitarian grounds" there was a strong case for including de facto partners within the new regime. Following a change of Government, de facto relationships were removed from the Bill.[104] The incoming Minister of Justice said that removing de facto relationships meant that "…we believe that individuals should demonstrate to those they live with a responsibility to the other partner, and a responsibility at law to regularise that union."[105]

2.35 The resulting 1976 Act was recognised as:[106]

> *… social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "worldly goods" should the marriage come to an end.*

101 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

102 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

103 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12-13.

104 Matrimonial Property Bill 1976 (125-2) as reported from the Statutes Revision Committee.

105 Hon David Thomson MP, Minister of Justice (9 December 1976) 408 NZPD 4727.

106 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580 per Woodhouse J. Discussed in Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 5.

2.36 In the years that followed, the general rule of equal sharing of matrimonial property became accepted in New Zealand as the new norm.[107]

The 2001 Amendments and the new Property (Relationships) Act 1976

2.37 In 1988 a Working Group was established as part of the Government's social policy reform programme, to revise and update matrimonial property and family protection laws, including the 1976 Act.[108] There had been significant change in the social landscape since 1976, and the Working Group was required to consider whether equal division of matrimonial property provided a just and equitable result and whether the general approach of the 1976 Act was sound.[109]

2.38 The Working Group reported:

(a) It had looked at the "considerable topical concern" that equal division of matrimonial property had failed to secure an equitable result.[110] The heart of the debate about equality and equity, the Working Group said, was "the economic consequence of current sex roles in our society."[111] This could not, however, be laid at the door of the 1976 Act.[112] While the Working Group recommended improvements that would "go some way towards avoiding the discrepancies in the spouses' standard of living",[113] it considered it was unrealisistic to expect the 1976 Act to achieve social equity between the sexes.[114] Rather, the State must continue to have

107 See JM Krauskopf and CJ Krauskopf "Sharing in Practice: the effects of the Matrimonial Property Act 1976" (1988) 10 Fam Law Bull 140. The authors conducted a pilot study on, among other things, the extent to which the equal sharing norms had been accepted in New Zealand one decade after the introduction of the Matrimonial Property Act 1976. The authors concluded that a "minor social and legal revolution occurred in the acceptance of the major goals of the legislation."

108 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships. The Working Group was convened to deal with the broad policy issues, rather than to produce a blueprint for new legislation: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

109 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 3.

110 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

111 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

112 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

113 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 14. These recommendations are discussed at paragraph 2.40 below.

114 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

a "significant role" in reducing disparities caused by "social factors."[115]

(b) It was still the case that the surviving partner in a marriage ended by death could be worse off than one whose marriage ended by separation. The Working Group observed that this had long been recognised as "unfair and untenable" and recommended that the 1976 Act should provide for the same rules of division of property on death.[116]

(c) Developments in other areas of law had given increasing recognition to de facto relationships. These were permanent and committed relationships in which the partners lived together as husband and wife despite not being legally married. The only way a person could claim an interest in his or her de facto partner's property was to commence court proceedings, which were often long and complex.[117] Although not unanimous on the exact changes required, the Working Group concluded that the 1976 Act should be reformed to extend its rules of property division to de facto relationships.[118]

2.39 The Working Group reported in 1988, but there was little advancement of its recommendations until 1998, when the Government introduced two reform bills into Parliament.[119] Their progress through the House was slow, in part due to a general election and change of government in 1999. This resulted in substantial changes to the proposed reforms, including changes that addressed "the issue of economic disadvantage suffered by a non-career partner when a relationship breaks down."[120] The amendments were finally enacted in 2001, and the 1976 Act was renamed the Property (Relationships) Act 1976 (PRA).

115 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

116 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40.

117 At this time, the de facto partner with legal title to the property retained it on separation unless their former partner could persuade a court that he or she had an equitable interest in the property, usually under a constructive trust (the leading cases being *Pasi v Kamana* (1986) 4 NZFLR 417 (CA) and, later, *Lankow v Rose* [1995] 1 NZLR 277; (1994) 12 FRNZ 682 (CA)). The Working Group noted that while the courts had tried to do justice between de facto partners, they had been "hampered by the fact that the law of trusts… is not really suited to achieving a just and predictable result in most cases." See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 64–65.

118 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 70.

119 Matrimonial Property Amendment Bill 1998 (109-1), which proposed amendments to the Matrimonial Property Act 1976; and the De Facto Relationships (Property) Bill 1998 (108-1), which proposed a new property division regime for de facto relationships, similar to but distinct from the regime for marriages.

120 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and 74-75.

2.40 The 2001 amendments extended the PRA to cover de facto relationships, both same-sex and opposite-sex, and added a new part to the PRA to provide for the division of relationship property if one partner died (either with or without a will).[121] The presumption of equal sharing was extended to apply to all matrimonial property (now renamed "relationship property"), following the Working Group's recommendation.[122] New sections 15 and 15A sought to achieve greater substantive equality, by permitting departure from equal sharing to compensate for economic disparity caused by the division of functions in the relationship. The "underlying notion" of the PRA as amended in 2001 was "one of equity; that it is sometimes fair to treat people differently in order to achieve a just outcome."[123]

2.41 Changes were also made to the PRA to recognise the particular significance of taonga and heirlooms, consistent with the Working Group's recommendations.[124] Both were explicitly excluded from the definition of family chattels and as such were no longer available for division.[125] The Working Group noted that part of the value of taonga and heirlooms is that they have passed down from earlier generations, and this is lost if they are passed outside the family group.[126]

2.42 The 2001 amendments were the last time significant changes were made to New Zealand's relationship property law, other than the inclusion of civil unions in 2005.[127]

The PRA as social legislation

2.43 The PRA is social legislation. It reflects the State's expectations as to how the wealth and resources of a family should be shared when relationships end. As former Principal Family Court Judge Peter Boshier has observed:[128]

121 Property (Relationships) Act 1976, Part 8.

122 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 13-14. Under the 1976 Act the equal sharing presumption had applied only to the family home and chattels, with other matrimonial property being divided on a contributions basis.

123 Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 NZFLJ 276 at 278.

124 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

125 Property (Relationships) Act 1976, s 2 definition of "family chattels."

126 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

127 Civil Union Act 2005; Property (Relationships) Amendment Act 2005.

128 Peter Boshier and others "The role of the state in Family Law" (2013) 51(2) Family Court Review 184 at 190.

> *The State… carries an overarching responsibility to provide a blueprint for societal values which impact the way people live, behave and interact, both with each other and with their children. Within the umbrella of family law, it is appropriate to express such values from time to time. Accordingly, countries amend their laws to reflect perceptions of changing social norms and obligations and this is further carried out through how the courts interpret and apply the law.*

2.44 The State's role in shaping the law to both encourage and reflect change in societal values is apparent in the history of the PRA. It has been significant particularly in challenging and redefining the role of women in society: "nowhere is the progressive emancipation of women reflected more strongly than in the field of matrimonial property rights of married people."[129] More recent developments have sought to ensure fair treatment of different relationship types, by applying the same rules of division to de facto relationships and same-sex relationships. There has also been a growing awareness that family law policy needs to be better attuned to recognising Māori, and this was reflected, for example, in the exclusion of taonga from the PRA in 2001.[130]

2.45 This history emphasises the need for our review to be supported by a clear understanding of the current values and attitudes of New Zealanders.

2.46 The discussion in this Issues Paper also takes place against the backdrop of New Zealand's domestic human rights law and its participation in a number of international conventions and declarations. The New Zealand Bill of Rights Act 1990 prohibits unjustified discrimination on a range of grounds including sex, marital status, family status and sexual orientation, with reference to the provisions of the Human Rights Act 1993.[131] This is particularly relevant to our discussion on what relationships should be covered under the PRA and how the PRA should treat short-term relationships.[132] New Zealand has ratified the International Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations

129 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.4].

130 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 57.

131 The prohibition on discrimination is subject to "…such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": See New Zealand Bill of Rights Act 1990, ss 5 and 19; Human Rights Act 1993, s 21 for a list of the prohibited grounds of discrimination.

132 See Parts B and E of this Issues Paper.

Convention on the Rights of the Child.[133] New Zealand has also given its support to the non-binding Declaration of the Rights of Indigenous Peoples.[134] These commitments are relevant to our consideration of how the interests of women,[135] Māori[136] and children[137] should be taken into account in the PRA. Any recommendations we make in our final report will be reviewed for consistency with domestic human rights law and New Zealand's international obligations.

The pillars of financial support available when relationships end

2.47 While the PRA addresses how property is to be divided when relationships end, it is only one part of the broader picture of how former partners and their children are supported into the future. Ideally, future needs should be met without reliance on State support or intervention. Adults should be able to provide for their families from their own incomes. Parents have legal obligations to support their children and these are not extinguished on separation.[138]

133 New Zealand ratified the Convention on the Elimination of All Forms of Discrimination Against Women (1249 UN 13 (opened for signature 1 March 1980, entered into force 3 March 1981)) (CEDAW) on 10 January 1985 and the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) on 6 April 1993. To have effect in New Zealand, international obligations must be incorporated into New Zealand's domestic law: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at [8.2] and *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280-281. Where possible New Zealand's domestic law should be interpreted in such a way as to accord with international treaties which New Zealand has ratified: see R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 30.

134 United Nations Declaration of the Rights of Indigenous Peoples (GA Res 61/295, 61st sess, 107th plen mtg, A/RES/295 (2007)). See also the New Zealand Government's expression of support at: "National Govt to support UN rights declaration" (20 April 2010) <beehive.govt.nz>.

135 The Convention on the Elimination of All Forms of Discrimination Against Women defines what constitutes discrimination against women (1249 UN 13 (opened for signature 1 March 1980, entered into force 3 March 1981), art 1). State parties undertake, among other things, to ensure the practical realisation of the principle of the equality of men and women through law and other means; and to establish legal protection of the rights of women on an equal basis with men (art 2).

136 The United Nations Declaration on the Rights of Indigenous Peoples provides, among other things, that indigenous peoples are free and equal to all other peoples and have the right to be free from any kind of discrimination in the exercise of their rights, in particular that based on their indigenous origin or identity: United Nations Declaration of the Rights of Indigenous Peoples (GA Res 61/295, 61st sess, 107th plen mtg, A/RES/295 (2007)) art 2. It is said to assist with the interpretation and application of the principles of Te Tiriti o Waitangi (the Treaty of Waitangi): Human Rights Commission *The Rights of Indigenous Peoples: What you need to know* (Human Rights Commission, Auckland, 2016) at 5.

137 The United Nations Convention on the Rights of the Child sets out the basic rights of children: Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). It provides, among other things, that the best interests of the child shall be a primary consideration in all actions concerning them (art 3.1); that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, and that those views should be given due weight in accordance with the age and maturity of the child (art 12.1); and recognition of the principle that both parents have common responsibilities for the upbringing and development of the child (art 18.1).

138 See Crimes Act 1961, s 152; Care of Children Act 2004, ss 4(1), 5(b) and 16. Parent's obligations to care for their children are discussed in Part I of this Issues Paper.

2.48 The principles of whanaungatanga and manaakitanga mean that in Māori culture, separating partners and their children may be supported by their whānau and indeed their hapū and iwi in some cases.[139] Support from extended family may also be available in other cultures, notably among Pacific people families.[140] All cultures have a vested interest in the functional relationships that determine the well-being and preservation of the family unit.[141]

2.49 Recognising that it will not always be possible for some partners to support themselves and their children when relationships end, the State ensures that there are other means of financial support available. These means of support have been described as "pillars."[142] Each pillar addresses a different issue and together with the PRA they establish a framework of financial support.

2.50 When partners separate, pillars providing for ongoing support include:

(a) **Maintenance**: A person may be entitled to maintenance from their former partner to the extent that it is necessary to meet their reasonable needs if they cannot meet those needs themselves.[143] Maintenance is intended to provide temporary relief to enable a partner to start constructing a new life post-separation.[144] Each partner should assume responsibility for meeting their own needs within a reasonable period.[145] Maintenance is usually a matter for a court to determine, although there is nothing preventing separating partners from making a private agreement as to the payment of maintenance. Maintenance is discussed in Part F.

(b) **Child support**: The costs of caring for any dependent children of the relationship are supported by payments

139 Donna M Tai Tokerau Durie-Hall "Maori Family" in Sandra Coney (ed) *Standing in the Sunshine: a history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

140 For example, one study has found that by age 4, 40 per cent of Pacific children growing up in New Zealand live in a household with other extended family members compared to 8 per cent of European children: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5 citing Susan MB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now we are Four: Describing the preschool years* (University of Auckland, May 2017) at 39.

141 John Chadwick "Whanaungatanga and the Family Court" (2002) 4 BFLJ 91.

142 The law of many jurisdictions is based on a "pillar system" in which the package of financial remedies for a spouse on divorce is constructed on a number of pillars, each addressing a different issue. This happens in many civil law jurisdictions in Europe. See Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, Abingdon, 2014) 138 at 141.

143 Family Proceedings Act 1980, s 64.

144 See for example: *Slater v Slater* [1983] NZLR 166 (CA) at 174 and *C v G* [2010] NZFLR 497 (CA) at [31] and [32].

145 Family Proceedings Act 1980, s 64A.

made by a parent who doesn't live with their children, or who shares the care of their children with another. The objects of the Child Support Act 1991 are set out in section 4, and the Act affirms the right of children to be maintained by their parents, the corresponding obligation on parents to maintain their children and the responsibility of parents to ensure that their obligations to birth and adopted children are not extinguished by obligations to step-children.[146] The amount of child support payable is calculated according to a formula set out in the legislation. The formula takes into account each parent's income, living needs, number of dependent children and care arrangements. The Commissioner of Inland Revenue is responsible for administering the scheme and any parent can apply to the Commissioner for a child support assessment. Court proceedings are not required. The formula does not take into account the special needs of a particular child or the special circumstances of the parents, but a parent can apply to the Commissioner for a departure from the standard formula. Child support is discussed in Part I.

(c) **State benefits**: The State has a role in supporting individuals under the Social Security Act 1964. This includes the financial support of single parents and jobseekers, the payment of supported living payments[147] and pensions, and the provision of Working for Families tax credits for low income households. While recourse to State benefits is generally seen as a last resort, it plays an important role in supporting families post-separation:[148]

> *There is little enthusiasm worldwide for the state to assume responsibility for the economic fallout of relationship breakdown. In reality, where private resources are limited, one party frequently becomes at least partially dependent on state support, but this is more often the product of inevitability than design.*

146 Child Support Act 1991, s 4.

147 Supported living payments are for people who have, or care for someone with, a health condition, injury or disability that severely limits their ability to work on a long-term basis.

148 Joanna Miles "Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 267 at 272.

2.51 Where a relationship ends on death, in addition to having the right to elect an entitlement under the PRA, the surviving partner may be able to access State benefits of the kind described above. They may also have a claim under the Family Protection Act 1955 against the deceased partner's estate which, like maintenance on separation, seeks to provide temporary relief to enable a surviving partner to start constructing a new life.[149] Claims under the Wills Act 2007,[150] the Administration Act 1969[151] or the Law Reform (Testamentary Promises) Act 1949[152] may also be available to a surviving partner or any children of the deceased. These statutes are discussed in Part M.

2.52 It is clear that the State has a vital interest in both the operation of the PRA and its interaction with the other pillars of financial support. When relationships end, this usually comes at a financial cost to each partner, and that cost is ultimately borne by the State through the provision of benefits when the other pillars fail. We have been mindful in preparing this Issues Paper that the division of property at the end of a relationship can affect the need for State support by one or both partners and any affected children.

Tikanga Māori and the PRA

2.53 In recent decades there has been a growing recognition of te ao Māori (the Māori dimension) and the need to acknowledge tikanga Māori and address how it might operate within or alongside New Zealand law.[153] In 2001 the Law Commission

149 The Family Protection Act 1955 allows surviving family members who have not been provided for by the deceased to bring claims against the estate under s 4 for "proper maintenance and support" where the deceased owed a "moral duty" under s 3 to provide for them.

150 The Wills Act 2007 states the requirements for the creation of effective wills and their administration. Wills can be challenged for non-compliance.

151 The Administration Act 1969 provides for how estates are to be administered when a person dies. It contains the rules for dividing property when a person dies without a will, including the entitlement of a surviving partner or child.

152 The Law Reform (Testamentary Promises) Act 1949 allows a person to bring a claim against an estate where the deceased made a promise to provide for the person in a will; that person provided a service which went beyond what would normally be expected of the relationship he or she had with the deceased; and the deceased failed to fulfil the promise.

153 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [117]. The Law Commission Act 1985 requires the Commission to take into account te ao Māori in making recommendations for the reform and development of the laws of New Zealand: s 5(2)(a). In a draft paper written for the purposes of the Commission's review of Māori custom and values, Whaimutu Dewes said there is "an increasing acceptance that Māori Custom Law should be recognised to ensure its survival and to provide Māori determined alternatives to a moncultural government legal system." See Whaimutu Dewes Māori Custom Law: He Kākano i Ruia Mai i Rangiātea, e Kore e Ngaro (unpublished draft paper written for the Law Commission) at 11 as cited in Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001). See also Jacinta Ruru and Leo Watson "Should Indigenous Property Be Relationship Property" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

published a Study Paper, *Māori Custom and Values in New Zealand Law*, in which it concluded:[154]

> *If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.*

2.54 In 2016, Sir Hirini Mead wrote that:[155]

> *… it is time for New Zealand to establish its own common law that is relevant to our people and the realities we face in this country. In other words, Māori custom law has to be an essential part of our joint common law.*

2.55 David Williams has observed that a delicate balance is required of law-makers and decision makers:[156]

> *If tikanga Māori is ignored altogether, except when it needs to be obtained for the purpose of extinguishment, then the monoculturalism of the past will be perpetuated. On the other hand, if custom law is entirely removed from the community context whence it arose then it will rapidly lose its authenticity.*

2.56 New Zealand legislation has, for many years, recognised various Māori concepts.[157] The courts address Māori concepts in case law, taking account of tikanga Māori both through the provision of expert evidence and by taking judicial notice of it.[158]

2.57 Ruru identifies the challenge to the family law system and its practitioners, in "how to recognise, understand and accommodate tikanga Māori relating to the family."[159]

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154 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [402], see also [403].

155 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at viii.

156 David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 5. See also Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [294].

157 For example, the Education Act 1989 defines a wananga by reference to tikanga Māori (s 162(4)(b)(iv)), the Resource Management Act 1991 defines kaitiakitanga and tikanga Māori (s 2) and Te Ture Whenua Māori Act 1993 provides for decisions of the Māori Appellate Court on matters of tikanga Māori to be binding on the High Court (s 61(4)). Mead observes that this may evidence the increasing acceptability and popularity of tikanga Māori in the wider community: see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 26. See also Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, 1996) at 50. More recent examples of Māori concepts in New Zealand law (and proposed law) include the Oranga Tamariki Act 1989 and Te Ture Whenua Māori Bill 2016 (126-2).

158 See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [204]–[220] and [252]. See also the suggestion that a panel of experts (pukenga) could raise general levels of awareness of tikanga Māori and also be involved in court processes in David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 43–44. See also *B v P* [2017] NZHC 338, *Takamore v Clarke* [2014] NZLR 733 (SC).

159 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 58 where she also identifies the challenges of how to understand and mediate conflict in marriages between Māori and non-Māori, and how to formulate

2.58 In the context of the PRA, there are a number of specific issues of particular interest to Māori.[160] However, there is also a broader question about the recognition of tikanga Māori in the framework of the PRA as it is outlined in Chapter 3. To provide context to that discussion, we briefly describe tikanga Māori.[161]

What is tikanga Māori?

2.59 Tikanga Māori[162] refers to the body of rules and values developed by Māori to govern themselves – the "Māori way of doing things."[163] It is sometimes described as Māori custom law.[164] Importantly, tikanga Māori should not be seen as fixed from time immemorial, but is based on a continuing review of fundamental principles in a dialogue between the past and the present.[165] Mead observes that "[t]ikanga Māori is adaptable, flexible, transferable and capable of being applied to entirely new situations."[166]

2.60 In the Commission's Study Paper, *Māori Custom and Values in New Zealand Law*, it concluded that:[167]

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and administer family law so that it guarantees all citizens equal consideration and respect for their cultural views and practices, given the special status of the Māori people as signatories of the Treaty of Waitangi on the one hand, and the imbalance in access of Māori and non-Māori to political power on the other.

160 See paragraph 4.48 for a discussion of Property (Relationships) Act 1976 matters where tikanga Māori is relevant.

161 This description is necessarily brief in this introductory Part of the Issues Paper. We have referred extensively to the Law Commission's *Study Paper Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) and note its own acknowledgment of work and commentaries provided by Justice (now Sir Edward) Durie, Dame Joan Metge, Dr Michael Belgrave, Dr Richard Mulgan, Chief Judge (now Justice) Joseph Williams, Whaimutu Dewes and Dr David Williams (Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at ix).

162 The fundamental values which inform tikanga Māori have been comprehensively examined by Sir Hirini Mead and are also discussed in the Law Commission's *Study Paper on Māori custom and values*. See Hirini Moko Mead *Tikanga Māori* (Revised ed, Huia Publishers, Wellington, 2016) and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [124]–[166].

163 Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 2, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [71].

164 Tikanga is the closest Māori word equivalent to the concepts of law and custom. For a detailed discussion of Māori Custom Law see the Law Commission's previous reports including: Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999); Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) and Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003). It has been suggested that tikanga relies on a collective sharing of decision making, tied to the community, and differs from the law which exists today with its ties to a world of individualism: see Pat Hohepa and David Williams *The Taking into Account of Te Ao Maori in relation to Reform of the Law of Succession* (unpublished paper for the Law Commission, 1996) at 19.

165 Michael Belgrave *Māori Customary Law: from Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, Albany, 1996) at 51 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [10].

166 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 355.

167 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [75]. In reaching this conclusion, the Law Commission drew extensively on the papers of all contributors to the Custom Law Project, which included Dame Joan Metge, Dr Michael Belgrave, Dr Richard Mulgan, Chief Judge Williams, Whaimutu Dewes and Dr David Williams. At [98] the Law Commission quoted Dr Michael Belgrave's statement that:

> *to achieve a modern Maori consensus on the nature of customary law that is workable in the present, it is necessary to appreciate the extent to which colonisation was more than simply a catalyst for the modification of customary law. That at different times Maori customary law was denied, acknowledged, defined modified and extinguished according to non-Maori agenda casts a long shadow that cannot be ignored.*

> *Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is the values which provide the primary guide to behaviour. Aspects of tikanga may be subject to a particular interpretation according to certain circumstances but then reinterpreted in the light of other circumstances. Thus tikanga Māori as a social system was traditionally pragmatic and open-ended and remains so today.*

2.61 While tikanga Māori was an essential part of traditional Māori society and was binding, today there are choices about how people conduct their lives, and tikanga is being revisited.[168]

2.62 Whanaungatanga is the underlying concept of Māori customary family law.[169] It signals that in traditional Māori thinking relationships are everything, and the individual identity is defined through that individual's relationships with others; the individual is important as a member of the collective.[170] Whakapapa, which identifies the nature of relationships between all things, is the glue that holds the Māori world together.[171] It follows that tikanga Māori emphasises the responsibility owed by the individual to the collective.[172] Mead characterises this as individuals expecting to be supported by their relatives near and distant, while the collective group also expects the support and help of its individuals.[173]

2.63 The basic social unit of Māori society is the whānau.[174] Each whānau belongs to one or more hapū and iwi, although Mead observes that today, these terms "are not firmly attached to one kind of kinship grouping", rather they are used more creatively.[175]

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168 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 7. Richard Mulgan suggests that

> *…neither the modern whanau nor the modern iwi encompasses the individual's daily life to the extent achieved by the former hapu. Given that both the extent and the flexibility of the authority of tikanga over individuals depended on their involvement in the life of the hapu, the attenuation of hapu life must set limits to the extent to which Maori customary law is appropriate for modern urban Maori. By the same token, there may be grounds for allowing a more extensive application of tikanga Maori for those Maori who choose to live in closer, more intensely Maori communities which, like the traditional hapu, encompass their economic as well as their social life.*

169 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF 327 at 329. See also Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 9, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130].

170 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130].

171 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130] citing Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 9.

172 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001) at [130].

173 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 32.

174 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 224.

175 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 242.

Nuclear families are submerged in and dominated by the whānau, which also include grandparents, aunts and uncles.[176] Children are considered taonga. The child is viewed as not the child of the birth parents, but of the family, and the family is not a nuclear unit within space, but an integral part of a tribal whole.[177]

2.64 Alongside whanaungatanga there is manaakitanga, which Mead describes as "nurturing relationships, looking after people, and being very careful about how others are treated."[178] Mead stresses that manaakitanga is important no matter what the circumstances might be.[179] Durie observes that "[k]inship bonds [compel] support for whanau during crisis without reference to cause or blame."[180]

176 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 61 and Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF 327 at 329.

177 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 IJLPF327 at 329 quoting Department of Social Welfare, 1996: 74-5.

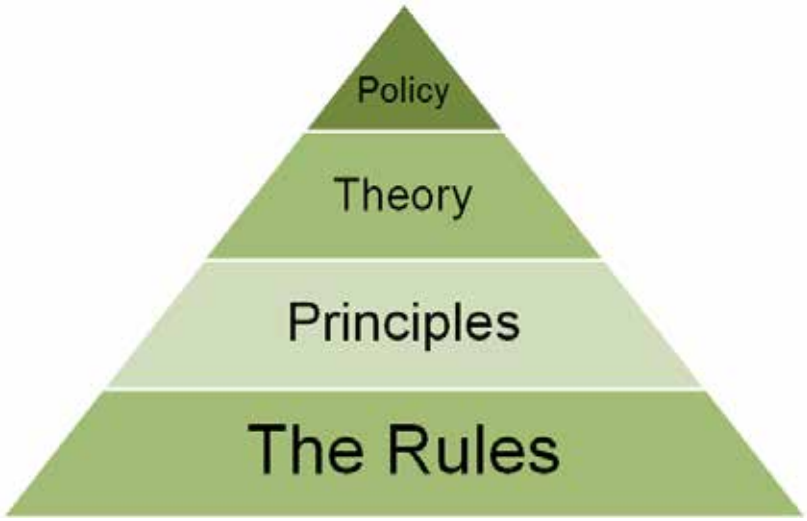
178 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 33. Alternatively, Durie describes manaakitanga as "generosity, caring for others and compassion": ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 6, referred to in the Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001).

179 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 33.

180 ET Durie *Custom Law* (unpublished confidential draft paper for the Law Commission, January 1994) at 52 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, March 2001).

Chapter 3 – What does the PRA do?

3.1 The PRA sets out rules that govern how property owned by either or both partners is divided when a relationship ends. The rules that apply when partners separate sit within a framework. The framework, illustrated in the pyramid below, also includes policy, theory and principles.[181] It is important that we identify and articulate this framework before we discuss the rules of the PRA, because it explains why we have the rules, and guides the courts' interpretation of the rules.[182]



3.2 While the PRA also sets out rules that apply to relationships ending on death, in some respects these rules are at odds with the framework that applies on separation. We therefore discuss the PRA's application on death separately, at paragraphs 3.31-3.323 below.

181 As discussed below, when we refer to principles we are talking about the principles listed in section 1N but also the implicit principles that can be discerned from the Property (Relationships) Act 1976's purpose, rules, history and supporting materials.

182 The Scottish Law Commission also recognised the importance of articulating the framework within which the rules operate in its 1981 review of financial provision on divorce: see Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.37]. The Commission noted that a lack of clear principles involved not only "an abdication of responsibility by Parliament in favour of the judiciary", but also an abdication of collective responsibility in favour of the conscience of a single judge:

> *… it does not seem satisfactory that questions of social policy, which have very important financial consequences for individuals, should turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle…*

The framework of the PRA

3.3 The framework of the PRA is complex because it has developed over time and involves a range of different, sometimes competing, concepts.[183] This problem is not unique to New Zealand. In England and Wales, where the rules of property division on separation have developed largely though case law, the courts recognise multiple objectives but there is no overriding rationale.[184] In Scotland, when the Scottish Law Commission looked at what the objective of financial provision on divorce should be, it concluded that no one objective or principle was adequate standing by itself.[185] A combination of principles was appropriate, because it "corresponds to reality."[186]

Policy and theory of the PRA

3.4 The policy[187] of the PRA is the just division of property at the end of a relationship. By "just" we mean the broad statutory concept of justice outlined in PRA, including in the rules of division but also the rules that permit partners to enter into their own property arrangements, subject to safeguards.[188] This policy is reflected in

183 See Margaret Wilson "The New Zealand context – setting the legal and social scene" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 3, where she observes that the policy of the 2001 amendments to the Property (Relationships) Act 1976 was not necessarily informed by a detailed political discussion of competing theories on how to effect the reform. The lack of a single, coherent theory, Wilson explains at 3–4, is in part due to the fact that people do not live lives according to a theory, and are not always driven by rational decision-making: "it is not surprising that in an area such as family relationships where the issues causing the conflict are complex that the remedies can be pragmatic and lacking in coherence." Wilson goes on to say at 4: "The fundamental reason however for the lack of a coherent theoretical legislative approach in this area is the gendered nature of our relationships."

184 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [3.62]. The Commission observed at [3.7] that this meant the courts have extraordinarily wide discretion, resulting in a lack of transparency and the potential for judicial inconsistency.

185 Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.59].

186 Scottish Law Commission *Family Law: Report on Ailment and Financial Provision* (SCOT. LAW COM. No. 67, 1981) at [3.60]:

> *We have seen that no single objective which is precise enough to be useful is wide enough to cover all the situations in which an award of financial provision may be called for. The reason is that an award of financial provision on divorce may be justified by one or more principles. It leads to clarity in the law to recognise this. A subsidiary advantage is that a system based on a combination of several principles can be discriminating as well as realistic. It may be, for example, that matrimonial misconduct will be relevant in relation to some principles but not others; or that an order for periodical payments for an indefinite period will be justified by some principles but not by others.*

The Commission recommended the adoption of five principles, and these remain the foundation of financial provision on divorce in Scotland today. See Family Law (Scotland) Act 1985, s 9, discussed in Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (Project Report, University of Glasgow, 2016) at 54.

187 Or purpose. We have used the term policy here so that we do not confuse purpose with the statutory purpose of the Property (Relationships) Act 1976, in s 1M.

188 See *Martin v Martin* [1979] 1 NZLR 97, where the Court of Appeal considered what was meant by the term "serious injustice" under s 13 of the Property (Relationships) Act 1976. Woodhouse J said, at 102, "in that context the reference to justice is clearly to the broad statutory concept of justice outlined in the Act and not to the varying standards that might appeal to individuals." Richardson J similarly said, at 108, that "the justice with which the statute is concerned at so many points is justice weighed in terms of the policy and scheme of the legislation itself rather than according to an abstract ideal."

the statutory purpose and principles set out in sections 1M and 1N of the PRA[189] as well as in the legislative history discussed in Chapter 2.

3.5 But why do the PRA's rules divide property in the way they do, and why can this division be described as just? The answers to these questions are found in the theory of the PRA. The theory ties together the policy of a just division of property and the rules that implement that policy. The theory provides the reason for *why* the division of property under the PRA is a just division.[190]

3.6 The primary theory of the PRA is based on the *entitlement of the two partners*. The PRA treats a qualifying relationship as an equal partnership or joint venture. The partners contribute equally, although perhaps in different ways, to the relationship. Each partner is therefore entitled to an equal share in the property of the relationship.[191]

3.7 Two secondary theories sit alongside the primary entitlement theory:

(a) The *compensation* theory recognises that in certain circumstances one partner should receive a share of the other's resources in order to compensate them for economic disadvantages a partner suffers from the relationship. Section 15, which allows a partner to claim compensation when the partners' division of functions during the relationship has led to a disparity in income and living standards after separation, reflects a theory of compensation.[192]

(b) The needs theory recognises that certain resources could help meet the *needs* of a partner or children of the relationship. Key needs-based provisions of the PRA are those dealing with occupation of the family home and

189 Section 1M(c) explains that one purpose of the Property (Relationships) Act 1976 (PRA) is to provide for a just division of relationship property, and section 1N(c) also refers to a just division of relationship property. We consider however that the overarching policy of the PRA is broader than the just division of *relationship* property. In effect, the statutory purpose in section 1M(c) explains how the PRA achieves its policy of a just division of property at the end of relationships, by limiting the rules of division to relationship property only.

190 For a discussion of the theoretical analysis of property division frameworks see Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

191 See Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 275 and 292–293.

192 Some other provisions allow a partner to claim compensation when his or her rights under the Property Relationships Act 1976 have been unjustly lost or defeated (see for example ss 44 and 44C which provide compensation when a disposition of property has defeated a partner's claim or rights under the Act) or where the partner's conduct merits greater entitlements (see for example ss 18B and 18C which deal with a partner's contributions, both positive and negative, after the relationship has ended).

postponement of the vesting of the partner's property entitlements.

3.8 We discuss these theories in greater depth where relevant in this Issues Paper.

Principles of the PRA

3.9 The principles form the basis for the PRA's rules.[193] Primarily, they are set out in the PRA itself: including in section 1N, which explicitly identifies four principles to guide the achievement of the purpose of the PRA, as set out in section 1M. We do not, however, see the list in section 1N as exhaustive. It was inserted by the Parliamentary select committee considering the amendments to the PRA in 2001, and in our view its effect was to add to, rather than replace, the implicit principles of the legislation as originally enacted.[194] A fuller expression of the PRA's principles can be discerned from its purpose, rules, history and the materials accompanying its enactment and subsequent amendment.[195]

3.10 We start with the four explicit principles set out in section 1N of the PRA:

(a) **Men and women have equal status, and their equality should be maintained and enhanced**.[196] Promoting the equal status of women and men has been a principle of the PRA since it was introduced in 1976. The principle of gender equality is enshrined in New Zealand law, and the Government remains committed to the protection and promotion of women's rights.[197]

193 See the discussion on what is meant by a principle in William Dale "Principles, Purposes, and Rules" (1988) 10 Stat LR 15 at 18 and 22. Dale suggests that a principle is a first idea which is the starting point or basis for legal reasoning. A rule in a statute answers the question "what", whereas a principle answers the question "why".

194 In particular, the effect of s 1N of the Property (Relationships) Act 1976 was to add to the principles of the legislation as originally enacted the principle regarding functional equivalence of different types of relationships (s 1N(b)) and the principle that a just division of property takes into account the economic disadvantages partners suffer arising from the relationship (s 1N(c)).

195 The White Paper to the Matrimonial Property Bill 1975 identified a series of principles on which that Bill was based. We note however that some of these principles no longer apply as a result of amendments to the Bill as it progressed through Parliament, and subsequent amendments to the Matrimonial Property Act 1976. See AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10. The 1988 Working Group similarly identified certain principles that underpinned New Zealand's family law. See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 3.

196 Property (Relationships) Act 1976, s 1N(a).

197 Consistent with the New Zealand Bill of Rights Act 1990, ss 5 and 19 and Human Rights Act 1993, s 21, as well as the Convention to Eliminate All Forms of Discrimination against Women. See *Women in New Zealand: United Nations Convention on the Elimination of All Forms of Discrimination against Women: Eighth Periodic Report by the Government of New Zealand 2016* (CEDAW/C/NZL/8, 15 July 201) at [1].

(b) **All forms of contribution to the relationship are treated as equal**.[198] The notion that unpaid domestic and childcare responsibilities are of equal value to financial contributions further promotes the equal status of men and women. An entitlement based on non-financial contributions to the relationship was "not to be regarded as a matter of grace or favour, or as a reward for good behaviour, but as plain justice."[199]

(c) **A just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from their relationship or from the ending of the relationship**.[200] This principle was introduced in 2001 amid concerns that an equal division of relationship property does not always produce substantive economic equality between the partners.[201] For example, when a partner takes time out of the paid workforce to care for the children of the relationship, or leaves their job in order to move with their partner to a different geographic location with fewer career prospects, this can negatively affect how much that partner is likely to earn in the future.

(d) **Questions arising under the PRA should be resolved as inexpensively, simply and speedily as is consistent with justice**.[202] Inherent in this principle is a preference for people to resolve property matters out of court where that is consistent with justice.[203] Avoiding court is generally in the interests of not only the partners but also any children of the relationship. Predictable outcomes encourage partners to resolve property matters out of court; therefore straightforward rules of classification and division of property, as opposed to rules involving an exercise of discretion, are consistent

198 Property (Relationships) Act 1976 (PRA), s 1N(b). See also s 18(2), that confirms there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. The PRA does not easily address what might be called negative contributions to a relationship such as the existence of family violence and we discuss this further in Chapter 12.

199 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

200 Property (Relationships) Act 1976, s 1N(c).

201 See for example the discussion in Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

202 Property (Relationships) Act 1976, s 1N(d). Similar objectives are stated in the Family Court Rules 2002, r 3 and the High Court Rules 2016, r 1.2.

203 Self-resolution of property matters out of court may not be consistent with justice where, for example, there is a significant imbalance of power between the partners or information asymmetries.

with this principle.[204] However situations will inevitably arise which were not contemplated by the legislation. The question is how to balance the need for some measure of discretion to enable a just result in the exceptional cases, but not at the expense of certainty and predictability for the majority.[205] It is also inevitable that recourse to the courts will be necessary in some cases. In order for property matters to be resolved inexpensively, simply and speedily in court, a court must be properly resourced and court procedures need to be efficient and easy to follow. Another important aspect of ensuring property matters are resolved "consistent with justice" is the need for full disclosure between the partners, both in and out of court.

3.11 Although not stated in section 1N, the following are also implicit principles of the PRA:

(a) **The law should apply equally to all relationships that are substantively the same**. This principle is inherent in the core rules of the PRA which apply in the same way to marriages, civil unions and de facto relationships of three or more years' duration.[206] The principle is driven by the idea of equality as expressed in anti-discrimination laws and is reflective of a shift in family law policy towards greater recognition of a wide range of family relationships.[207]

(b) **A just division of property when a relationship ends should reflect the assumed equal contributions made by both partners**. This principle embodies the concept of equal sharing or the "50:50 split". The idea of equal sharing was introduced having regard to the "great advantages of reintroducing certainty, putting husband and wife in an equal bargaining position should the

204 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

205 Currently, the Property (Relationships) Act 1976 balances need for certainty and discretion by permitting departure from the equal sharing rule in very limited circumstances, which we discuss at [3.27] below.

206 The de facto relationships we are referring to are the relationships that are of some permanence, so that they are comparable in substance to marriage and civil unions which are not affected by the rules about a marriage or civil union of short duration. Questions remain about how to assess whether relationships are substantively the same, and we discuss this further in Part B.

207 Mark Henaghan "Legally defining the family" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 1 at 5. This reflects the right to freedom from discrimination on the grounds of marital status and family status enshrined in the New Zealand Bill of Rights Act 1990, s 19 and Human Rights Act 1993, s 21.

marriage break up, and being consistent with broad social justice."[208]

(c) **Only property that has a connection to the relationship should be divided when the relationship ends**. Just as important as "how" property is shared, is "what" property should be shared. The principle of the PRA is that only property which is central to family life (commonly owned or used property, such as the family home and chattels, whenever acquired) and property attributable to the relationship is subject to equal sharing. Property of one partner that is kept separate from the relationship is not subject to equal sharing. It can be a difficult task to define the property pool to which equal sharing should apply.

(d) **Misconduct during the relationship is generally irrelevant to the division of property. This principle is long-standing.** Speaking in Parliament on an amendment to the predecessor to the PRA, the Matrimonial Property Act 1963, the then Minister of Justice confirmed that:[209]

> *The purpose of the Act is not to reward a wife for good behaviour or to punish her for bad behaviour… To introduce an element of fault in a substantial way would be to warp altogether the concept behind the Act – the concept of marriage as a partnership.*

This principle was carried into the PRA[210] and is consistent New Zealand's no-fault approach to marriage dissolution.[211] The PRA is generally not concerned with moral judgements about the partners' conduct.[212] Misconduct can only be considered in PRA proceedings in truly extraordinary cases, where the conduct was "gross and palpable" and it significantly affected the extent or value of the property to be

208 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 7.

209 (26 November 1968) 358 NZPD 3392.

210 Matrimonial Property Act 1976, s 18(3). See discussion in AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

211 Family Proceedings Act 1980, ss 37–43. The sole ground for dissolution of a marriage or civil union is that the relationship has broken down irreconcilably. This is established only if the parties have been living apart for the past two years, and no proof of any other matter shall be required: s 39.

212 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40].

divided.[213] Even then, misconduct is treated merely as a negative fact diminishing or detracting from other positive contributions to the relationship, rather than warranting a penalty in the division of property.[214]

(e) **A just division of relationship property should have regard to the interests of children of the relationship**. This principle is expressed in several places in the PRA, including section 1M (which sets out the purpose of the PRA) and section 26.[215] It recognises that the interests of children of the relationship may be considered sufficiently important to warrant some degree of priority over their parent's property entitlements.[216] However as we discuss in Part I, in practice children's interests are seldom prioritised in this way.

(f) **Partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards**.[217] The rules of division in the PRA were intended to be "subordinate to the freedom of the husband and wife, subject to proper safeguards, to regulate their property relations in whatever way they think fit."[218] The Government at the time did not want to "force married people within the straitjacket of a fixed and unalterable regime."[219] This principle was therefore an "integral feature of [the PRA's] public legitimacy."[220] Importantly, the principle concerns relationship autonomy rather than individual autonomy. A person cannot unilaterally contract out of his or her obligations under the PRA; they must do so by way of agreement with their partner. Safeguards ensure that both partners enter agreements with

213 Property (Relationships) Act 1976, s 18A(3).

214 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.40]. This principle is also apparent in other provisions of the Property (Relationships) Act 1976, for example, in the way it treats simultaneous relationships. The partner that maintains two qualifying relationships is not penalised, for example, for any deception involved in maintaining the two relationships. See Property (Relationships) Act 1976, ss 52A–52B.

215 The need to have regard to the interests of children is also evident from the White Paper accompanying the Matrimonial Property Bill 1975 when it was introduced into Parliament. See AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

216 See discussion in Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 290–291 and 302–303.

217 Property (Relationships) Act 1976, pt 6.

218 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 10.

219 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

220 *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

informed consent and the rights of third parties are not prejudiced. Agreements settling the partners' property matters at the end of the relationship must be made on the same basis if they are to be enforceable in a court.

(g) **A just division of property under the PRA should recognise tikanga Māori and in particular whanaungatanga.** This principle is reflected in the exclusion of Māori land and most taonga from the pool of relationship property to be divided under the PRA. Instead, dealings with Māori land are governed by Te Ture Whenua Māori Act 1993 and the kaitiakitanga of taonga is governed by tikanga.[221]

(h) **A single, accessible and comprehensive statute should regulate the division of property when partners separate**. The PRA sought to provide a single, coherent, and rational code to replace the existing law on the division of property on separation.[222] This recognised the undesirability of requiring partners to rely instead on general remedies in property law or equity.[223] The situation is more complex for relationships ending by the death of one partner, as succession law also applies.

3.12 As highlighted throughout this Issues Paper, it is often necessary to prioritise and accommodate different theories and principles in particular situations.[224]

How it works – The PRA rules

3.13 The rules in the PRA set out how the policy, theory and principles (explicit and implicit) are achieved in practice. This discussion provides a high level summary of how the rules generally operate. Specific rules, and how well they work in practice, are considered in greater detail in other parts of this Issues Paper.

221 Although legal action under concepts such as constructive trusts may still be taken in relation to taonga. See for example *B v P* [2017] NZHC 338 at [150], [161]-[168].

222 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5. The operation of the Property (Relationships) Act 1976 as a code is enshrined in s 4.

223 Equity is a body of law New Zealand inherited from England and Wales. In previous centuries the courts would apply equity when established legal rules would achieve unfair outcomes. Over time, the courts' practice of applying equity evolved into distinct rules and principles. These rules and principles have become the law of equity which applies in New Zealand today.

224 See Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813; Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

3.14 The PRA implements a deferred regime of property sharing. This is because the actual division of property only happens when a court makes orders dividing the relationship property, or when the partners enter into a contracting out agreement under Part 6 of the PRA dividing the property between them. Prior to division, the partners may deal with or dispose of any property as if the PRA did not exist.[225]

3.15 It is important to note that many New Zealanders do not resolve their property affairs in accordance with the PRA rules. We know from anecdotal evidence that many partners divide their property in accordance with their own sense of fairness. Sometimes, the partners record their agreement in a way that meets the PRA's requirements for a binding contracting out agreement. Those agreements can be made before or during the relationship to specify how their property is to be divided if they separate in the future, or after separation to resolve their property matters.[226] Agreements can also provide for the division of property if one partner dies, and an agreement can be made between a surviving partner and the personal representative of the deceased's estate.[227] At other times, partners may resolve their property matters informally, with or without taking legal advice.[228] In all cases, the negotiated compromises may lead to different outcomes than might have resulted if the PRA was applied.

3.16 We also know that some rules of the PRA appear significant on a plain reading, but in reality are seldom relied on by a party or applied by a court. Section 26, which provides that a court may make property orders for the benefit of children, is a good example. This is an important power, however it is rarely used and when it is, the orders tend to relate to only a small proportion of the partners' property.[229]

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225 Property (Relationships) Act 1976 (PRA), s 19. Only in limited circumstances may a partner restrain a disposition of property while the property remains undivided. Section 42 enables a partner to lodge a notice of claim on the title to any land in which a partner claims to have an interest under the PRA. The notice has the effect of freezing the title as if the notice was a caveat lodged under the Land Transfer Act 1952 (s 42(3)). Section 43 allows a partner to apply to the court to restrain dispositions of property made in order to defeat the partner's rights and interests under the PRA.

226 Property (Relationships) Act 1976, ss 21–21A. When entering an agreement, the partners must comply with several requirements. These include that the agreement is in writing, each partner has independent legal advice before signing the agreement, and each partner's signature is witnessed by a lawyer who has explained the effect and the implications of the agreement to the partner (s 21F). A court retains an overriding power to set a contract aside if giving effect to the contract would cause a serious injustice (s 21J).

227 Property (Relationships) Act 1976, ss 21(2) and 21B.

228 We do not know how many people resolve property matters without the assistance of lawyers, but it is likely that this accounts for a significant proportion of separating partners. By way of example, research in England and Wales identified that 47 per cent of couples divorcing or separating between 1996 and 2011 did not seek legal advice: Rosemary Hunter and others "Mapping Paths to Family Justice: matching parties, cases and processes" [2014] Fam Law 1404 at 1405.

229 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26.04(2)].

Who does the PRA apply to?

3.17 The PRA is concerned with three types of relationships: marriages, civil unions and de facto relationships. The general rule of equal sharing applies to all relationships of three years or longer, although special rules of division exist for shorter relationships.[230]

3.18 The PRA defines a de facto relationship as a relationship between two persons who are both aged 18 or older, who live together as a couple and who are not otherwise married or in a civil union with one another.[231] Sometimes it can be difficult to determine whether partners are in a de facto relationship for the purposes of the PRA and, if so, when that relationship began. No official records of de facto relationships are kept as is the case with marriages and civil unions. The PRA therefore lists a range of matters that indicate whether two people "live together as a couple", such as the duration of the relationship, the existence of a common residence and the degree of financial dependency between the partners.[232]

What property is covered by the PRA?

3.19 The first step in dividing property is to identify what is covered by the PRA. The PRA applies to all *property* the partners own, either individually or jointly. The definition of property in the PRA is broad, and it includes real property, personal property, estates or interests in such property, debts and other rights or interests.[233] The property *owner* is a person who is the "beneficial" owner.[234] A person can therefore have rights to property even if they are not the legal owner.

3.20 There are, however, several resources that can confer considerable financial benefits on a partner but they do not come within the PRA's definition of property. These resources include things like a partner's ability to earn income or a discretionary beneficial interest in a trust.

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230 The Property (Relationships) Act 1976 provides special rules of division for marriages and civil unions of short duration at ss 14 and 14AA. However these special rules do not apply if partners were in a de facto relationship prior to their marriage or civil union, and the combined time living in a de facto relationship and marriage or civil union was more than three years. In respect of de facto relationships of short duration, the court can only make an order for the division of property if there is a child of the relationship or the applicant has made a substantial contribution to the relationship (s 14A).

231 Property (Relationships) Act 1976, s 2D(1).

232 Property (Relationships) Act 1976, s 2D(2).

233 Property (Relationships) Act 1976, s 2.

234 The Property (Relationships) Act 1976 defines "owner" to mean "the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity" (s 2).

What property is shared between the partners?

3.21 Property eligible for division between the partners when a relationship ends is what the PRA classifies as "relationship property."[235] Only property that has a connection to the relationship should be subject to division.[236]

3.22 Relationship property is defined in the PRA to include:[237]

(a) the family home and family chattels (including furniture, household appliances and motor vehicles), whenever acquired;

(b) all property owned jointly or in common in equal shares by the partners;

(c) all property owned by either partner before the relationship if the property was acquired in contemplation of the relationship and was intended for the common use or benefit of both partners;

(d) all property acquired by either partner after the relationship began;[238] and

(e) the proportion of the value of any life insurance policies and superannuation scheme entitlements that are attributable to the relationship.[239]

3.23 Property that is not relationship property is "separate property" under the PRA,[240] and is not subject to division at the end of a relationship. Separate property can include:

(a) property acquired by either partner while they were not living together as a couple;[241]

235 Property (Relationships) Act 1976, s 11.

236 See paragraph (c) above. The rationale for classifying certain types of property as relationship property is, as the Minister of Justice explained in the White Paper to the Matrimonial Property Bill 1975, to avoid partners having to show specific contributions to identified pieces of property to claim an interest in that property: see AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5-6.

237 Property (Relationships) Act 1976, s 8.

238 This is subject to several exceptions, including where the property acquired after the relationship began was acquired out of separate property: Property (Relationships) Act 1976, ss 8(1)(e)–(ee) and 9–10.

239 The value that is attributable to the relationship is normally calculated by reference to the contributions made during the period of the relationship. Contributions made prior to and after the relationship are not captured.

240 Property (Relationships) Act 1976, s 9(1).

241 Property (Relationships) Act 1976, s 9(4)(a).

(b) property acquired out of separate property, for example, dividends received from shares acquired before the relationship;[242]

(c) property acquired by a partner as an inheritance, gift or because the partner is a beneficiary under a trust;[243] and

(d) property with a special character, such as heirlooms and taonga.[244]

3.24 Separate property can, however, be converted to relationship property and be divided between the partners in some circumstances. This might happen when an increase in value in the separate property, or any income or gains received from the separate property, are due to the application of relationship property or the actions of the other partner.[245] Separate property may also become relationship property if it is used to acquire or improve relationship property, or if it is mixed with relationship property so that it becomes unreasonable or impracticable to regard that property as separate property.[246]

3.25 The PRA also classifies debts. A debt may be a relationship debt or a personal debt.[247] A relationship debt is, broadly speaking, a debt incurred for the common benefit of the partners or in the course of their common life together, and is eligible for division.[248] The net value of relationship property to be divided between the partners is calculated by determining the total value of the relationship property and then subtracting any relationship debts.[249]

How is relationship property divided?

3.26 The general rule is that all relationship property is divided equally between the partners.[250] This rule characterises the PRA as an

242 Property (Relationships) Act 1976, s 9(2); *Rowney v Rowney* (1981) 4 MPC 178 (HC) cited in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.38].

243 Property (Relationships) Act 1976, s 10(1).

244 Section 2 of the Property (Relationships) Act 1976 defines heirloom and taonga.

245 Property (Relationships) Act 1976, s 9A. For example, if one partner owned a holiday home before the relationship began, and the partners pay for the home to be upgraded using relationship property funds which then increases the home's market value, that increase in value would be relationship property. See *Hollingshead v Hollingshead* (1977) 1 MPC 108 (SC).

246 Property (Relationships) Act 1976, ss 9A(3) and 10(2).

247 Property (Relationships) Act 1976, s 20.

248 Property (Relationships) Act 1976, s 20(1). A personal debt is not a relationship debt. A personal debt relates solely to a partner's personal affairs.

249 Property (Relationships) Act 1976, s 20D.

250 Property (Relationships) Act 1976, s 11.

equal sharing regime.[251] The rule is built firmly on the principles that all forms of contribution to the relationship are treated as equal, and that a just division of property when a relationship ends should reflect those equal contributions.[252]

3.27 The PRA's general rule of equal sharing is not absolute. It does not apply to short-term relationships. There are also circumstances where equal sharing can be departed from even if the relationship is three years or longer:[253]

(a) **Extraordinary circumstances:** If there are "extraordinary circumstances" that would make equal sharing of relationship property "repugnant to justice", a court can order that each partner's share of property is to be determined in accordance with the contributions they made to the relationship.[254] This exception has a high threshold and will only apply in truly extraordinary cases.[255]

(b) **Economic disparity:** Sometimes the income and living standards of one partner after a relationship ends are likely to be significantly higher than the other partner, because of the division of functions within the relationship. The obvious example is where one partner stopped working to care for children, while the other partner continued to work and progressed their career. On separation, the partner that stopped working may struggle to restart their career (particularly if they have ongoing childcare responsibilities). In these cases, a court may order the partner with the higher income and living standards on separation to pay compensation to

251 In conceptual terms, the presumption of equal sharing means the Property (Relationships) Act 1976 can be described as a "community of property" system in relation to relationship property (see A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 258). This means the relationship property is deemed to be the joint property of both partners to the relationship. There are, however, some important qualifications to make. First, New Zealand's system is only a community of property system in respect of relationship property. It is not a full community of property system, which means all the property of the partners is jointly owned. Rather, it is only the relationship property that is equally divided under s 11 of the Property (Relationships) Act 1976 as the joint property of the partners. Second, the community of property system regarding relationship property is deferred. It is only after the partners have separated, or one partner has died and the surviving partner elects to divide their relationship property under the Act, that the interest in relationship property arises (subject to ss 42, 43 and 44 of the Property (Relationships) Act 1976 which provide some immediate protection of relationship property prior to division).

252 Property (Relationships) Act 1976, ss 1N(a) and 1N(b).

253 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.21]; Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR11.03].

254 Property (Relationships) Act 1976 (PRA), s 13. A partner's contributions, within the meaning of the PRA, are defined in s 18 of the PRA.

255 See for example *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111 per Richardson J; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 697: "It is difficult to envisage any stronger use of language than is reflected in 'extraordinary circumstances' and 'repugnant to justice' to emphasise the stringency of the test which has to be satisfied in order to justify departure from the equal sharing regime."

the other partner out of their share of the relationship property.[256]

(c) **Dispositions of relationship property to a trust:** If one partner has disposed of relationship property to a trust, and this defeats the other partner's rights under the PRA, a court can order that the partner who disposed of the property to the trust to pay compensation to the other partner, either from their separate property or their share of relationship property.[257]

(d) **Settling relationship property for the benefit of children:** If the court makes an order settling relationship property for the benefit of children, that property is not divided between the partners, although a court can reserve an interest of either or both partners in that property.[258]

(e) **Two homes owned when the relationship began:** If, when the relationship began, the partners each owned a home that was capable of becoming the family home,[259] but only one home (or the sale proceeds of one home) came into the pool of relationship property, a court may adjust the partners' shares of relationship property to compensate for the inclusion of only one partner's home.[260]

(f) **Sustained or diminished separate property:** If the separate property of one partner has been sustained by the actions of the other partner or with the application of relationship property, a court may increase the share of relationship property to be received by the other partner.[261] Conversely, if the value of one partner's separate property has diminished in value because of the actions of the other partner, a court may reduce the other partner's share in relationship property.[262]

256 Property (Relationships) Act 1976, s 15.

257 Property (Relationships) Act 1976, s 44C.

258 Property (Relationships) Act 1976, s 26. As noted at paragraph 3.16 above, s 26 is seldom used.

259 The family home, being the dwellinghouse used as the family's principal family residence, is classified as relationship property (Property (Relationships) Act 1976, s 8(1)(a)).

260 Property (Relationships) Act 1976, s 16.

261 Property (Relationships) Act 1976, s 17.

262 Property (Relationships) Act 1976, s 17A.

(g) **Personal debts paid from relationship property:** If one partner has used relationship property to pay personal debts, a court can adjust the shares of relationship property to be divided between the partners or make orders requiring the partner to pay compensation to the other.[263]

The role of the courts in dividing property

3.28 Partners can agree to divide their property in any way they think fit. They are not required to apply the PRA's rules of division, however, if they want their agreement to be enforceable they must meet certain process requirements set out in the PRA.[264] Partners can resolve their property matters in a range of different ways, including by negotiation, with or without legal advice, or by mediation, arbitration or some other dispute resolution process.

3.29 If partners cannot agree on the division of property, then the PRA provides for property disputes to be decided by the Family Court.[265] A partner can apply for a determination as to the respective shares of each partner to the relationship property, or for orders dividing the relationship property between the partners.[266] The Court is bound to follow the rules of division in the PRA, but has a range of powers to implement its determination of each partner's share of the relationship property. In particular, the Court can order the sale of property and the distribution of the proceeds, order the vesting of any property in one partner and order the payment of money by one partner to the other.[267]

3.30 The Family Court can also make a range of orders that do not affect the division of relationship property (non-division orders). These provisions are needs-based and primarily give effect to the principle that a just division of relationship property has regard to the interests of children. Non-division orders include orders postponing the vesting of any share in the relationship property,

263 Property (Relationships) Act 1976, s 20E.

264 For an agreement to be binding it must be in writing and signed by both partners. Each partner must have had independent legal advice before signing, and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See Property (Relationships) Act 1976, s 21F.

265 Property (Relationships) Act 1976, s 22. This is subject to the Family Court's power to transfer proceedings to the High Court under s 38A, and the right of appeal of Family Court decisions to the High Court under s 39.

266 Property (Relationships) Act 1976, s 25.

267 Property (Relationships) Act 1976, s 33.

orders granting one partner a right of occupation of the family home (or other home forming part of the relationship property), orders vesting a tenancy in one partner, and orders giving one partner the right of possession and use of furniture.[268]

Application of the PRA on death

3.31 When a partner dies, the surviving partner chooses between applying for a division of relationship property under the PRA rules (option A), or accepting an entitlement under the deceased partner's will or the intestacy rules (option B).[269] If the surviving partner chooses option A, he or she does not usually receive anything under the will, as the PRA treats all gifts to the surviving spouse as having been revoked, unless the will expresses a contrary intention.[270] The choice must be made within six months of the grant of administration of the deceased partner's estate unless a court extends the time period.[271] If the surviving partner fails to make a choice, option B is the default option.[272]

3.32 There are several differences between the PRA rules that apply on death and the rest of the PRA. Notably, the surviving partner can divide the couple's relationship property on death by electing option A, while the deceased's personal representative must seek leave of a court for a division of property and show that a failure to grant leave would cause "serious injustice".[273] If the surviving partner elects option A, that entitlement takes priority over any beneficial interest under the will or the rules of intestacy, as well as any claim made under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949.

3.33 Short-term relationships on death are treated differently. A short term marriage or civil union is treated the same way as a qualifying relationship when one partner dies, unless the court considers that would be unjust.[274] Short-term de facto relationships that end on death are treated differently, and are

268 Property (Relationships) Act 1976, ss 26A–28D.

269 Property (Relationships) Act 1976, s 61.

270 Property (Relationships) Act 1976, s 76. We understand that few wills satisfy this requirement.

271 Property (Relationships) Act 1976, s 62.

272 Property (Relationships) Act 1976, s 68.

273 Property (Relationships) Act 1976, s 88(2).

274 Property (Relationships) Act 1976, ss 85(1) and 85(2).

subject to the rules that apply to short-term de facto relationships that end on separation.[275]

How New Zealand compares internationally

3.34 Jurisdictions around the world recognise the need for special rules of property division when relationships end, but differ on what shape these rules should take.[276] Most jurisdictions that have a specific statutory scheme follow a similar structure, with rules of classification and division, followed by adjustment provisions for the exceptional cases. There are two broad approaches, with some countries adopting a regime that has elements of both. The first is a "community of property" approach, where the property of the partners is considered to be held jointly. The second is the separate property approach, where the property of the partners is kept separate at all times. Most jurisdictions have moved away from separate property systems and have embraced some form of community of property regime. These regimes vary from a full community of property approach, where all property is shared,[277] to a "community of surplus" approach, whereby the partners share only the property gains made during the relationship.[278]

3.35 A key distinguishing feature of New Zealand's relationship property regime is the application of the same rules to de facto, married and civil union partners. Of the jurisdictions that New Zealand usually compares itself to,[279] only Australia and Scotland make specific provision for the division of property between de

275 Property (Relationships) Act 1976, ss 85(3) and 85(4).

276 Bill Atkin "Family property" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 197 at 209.

277 Such as the universal property regime, found in the Netherlands until recently (the law change comes into effect on 1 January 2018) and in Portugal previously (where universal community of property was abandoned with reform of the 1966 Civil Code in 1977). Under a full or universal community of property regime all property of the partners is in principle owned by both partners from the start of the relationship and throughout the relationship. At the end of the relationship all the property is divided equally

278 This is also known as a community of acquests or acquisitions, or limited community of property. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.61]. See also A Angelo and W Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 240. The authors note however that rarely are the spouses in a community of surplus regime sufficiently business-like in their approach to their marriage to prepare an inventory of property held at the time of marriage. Consequently the marriage usually concludes with the spouses sharing all their property whenever acquired because of the operation of a presumption that what is not stated to have been acquired before marriage is deemed to have been acquired during marriage. We note however that behaviour may have changed since the date of publication of this article. An example of a jurisdiction that has a community of surplus or accrued gains as an option available to partners is Germany (known as *Zugewinngemeinschaft)*.

279 Including Australia, England and Wales, Ireland, Scotland and Canada.

facto partners along similar lines to married partners.[280] In other jurisdictions, de facto partners (or "cohabitants" as they are often referred to in Europe) are required to resolve any property disputes using other general legal remedies such as constructive trust, contract or unjust enrichment.[281]

3.36 Different jurisdictions prioritise the theories of entitlement, compensation and needs in different ways. There can be many variations in terms of how a regime is constructed, given the large number of policy choices to be made (for example deciding what, when and how property should be divided). The scope for variation means that those countries that New Zealand often compares itself with have radically different approaches to dividing relationship property.

3.37 In England and Wales for example, there is no statutory rule that each partner has an equal entitlement to relationship assets. Rather, the courts divide property at their discretion, with the first consideration being the welfare of any minor children.[282] In Australia, the courts have a significant discretion pursuant to the Family Law Act 1975 to alter the property division on the basis of what the court considers to be just.[283] A court will consider the contributions of the partners to the property, the welfare of the family and the partners' future needs.[284] In Canada there is a presumption of equal division of "net family property", which can

280 In Australia, the Family Law Act 1975 (Cth) provides for de facto couples to obtain property settlements on the same principles that apply to married couples. Qualifying relationships are those of two years or more, that have a child of the relationship, are registered, or where one party made substantial contributions so that serious injustice would arise if an order was not made. The Family Law (Scotland) Act 2006 provides a presumption that cohabitants will share equally in household goods acquired during the relationship. There are limited rights relating to the family home. For example, a partner can apply for a right to occupy the family home if the other partner is the legal owner. Financial provision may also be ordered if one of the partners suffered economic disadvantage arising from the relationship.

281 This is not to say that no legal protection is available to help cohabitants after a relationship ends. In Canada, spousal support (similar to maintenance) may be awarded on separation with regard to various factors including the length of time the partners cohabited and the division of functions during the relationship. On 29 September 2017 the Alberta Law Reform Institute published *Property Division: Common Law Couples and Adult Interdependent Partners* (Report for Discussion 30, September 2017) <www.alri.ualberta.ca>. This Report for Discussion is open for public consultation until 20 November 2017. We will consider this Report for Discussion and any subsequently available information from the ALRI as we prepare our Final Report. In other European jurisdictions there are varying levels of legal protection for cohabiting partners, often linked to the presence of children or the length of the relationship. For example, in certain parts of Spain cohabitants have inheritance rights and the right to some form of maintenance. In Norway, cohabitants likewise have various rights of inheritance if they have children together or have cohabited for more than five years: Inheritance Act (in force 1 July 2009) (Norway), s 28(b)–(c).

282 Matrimonial Causes Act 1973 (UK), ss 24 and 25.

283 Family Law Act 1975 (Cth), s 79. Recently questions have been raised as to whether the discretionary nature of the property division regime in the Family Law Act 1975 (Cth) should be replaced with a system based on prescriptive principles, in order to promote greater certainty, fairer outcomes and lower costs. In 2014 the Australian Productivity Commission recommended that the Australian Government review whether presumptions should be introduced, as currently applies in New Zealand, in order to promote greater use of informal dispute resolution mechanisms: Australian Government *Access to Justice Arrangements: Productivity Commission Inquiry Report* (2014) at 874. In September 2017, the Australian Government commissioned the Australian Law Reform Commission to undertake a comprehensive review of the Family Law Act 1975 (Cth), including the substantive rules and general principles in relation to property division: Attorney-General for Australia "First comprehensive review of the family law act" (press release, 27 September 2017).

284 See the factors set out in s 75(2) of the Family Law Act 1975 (Cth).

be rebutted for example if equal division would be unconscionable (in Ontario) or unfair (in British Columbia).

3.38 There are also differences in the approach when a relationship ends on death. Most European civil law jurisdictions have a default matrimonial property regime that entitles spouses to an equal share of their matrimonial property on divorce and death.[285] Succession law governs the distribution of the estate, after the matrimonial property entitlement has been accounted for, and a surviving partner may have a fixed entitlement to property from the estate.[286] The surviving spouse may also be entitled to additional financial security in the form of either capital or income provision or a maintenance claim.[287]

3.39 In both Australia and England and Wales, the court's power to alter the spouses' matrimonial property interests (discussed at paragraph 3.37 above) does not apply if a relationship ends on death. Instead, succession law governs the distribution of the deceased partner's estate and will determine whether and to what extent the surviving partner shares in the assets of the deceased.[288] In Canada, a surviving spouse can apply to court for a division of the deceased's estate. The court's approach will be province dependant. In British Columbia for example, a court can order a just and equitable amount be paid from the deceased's estate if it considers the surviving spouse was left with an inadequate amount.

3.40 Ultimately, each country takes a unique approach not only to the division of relationship property but also to the other "pillars" of financial support that may be used to assist partners affected by the end of a relationship. Some countries will place more emphasis on private transfers between individuals (such as maintenance or child support) while others have strong State assistance systems. The approach of each country will, as with New Zealand, be influenced by the values that each society prioritises. For example, the degree of importance placed on the

285 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also Jens M. Scherpe "The Financial Consequences of Divorce in a European Perspective" in Jens M. Scherpe (ed) *European Family Law* (Edward Elger Publishing, Cheltenhan, 2016) vol 3 at 202–205.

286 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

287 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

288 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). For England see Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1. For Australia see for example Succession Act 2006 (NSW).

interests of the children can influence whether provision is made to protect their interest in the family home.

Chapter 4 – What are the big questions of this review?

4.1 In this chapter we introduce what we think are the "big questions" about how the PRA is working in contemporary New Zealand. These are big questions because the responses could result in substantial change to the law. These questions, and possible options for reform, are then discussed in detail throughout the Issues Paper.

Is the framework of the PRA sound?

4.2 The PRA as passed in 1976 "was easy to understand and apply to most marriages."[289] Since then New Zealand has undergone a period of significant social change, including in patterns of partnering, family formation, relationship breakdown and re-partnering. The PRA itself has also undergone significant change during this period, extending to de facto relationships, civil unions, same-sex relationships and relationships ending on death. Before we turn to how the PRA is working in practice, it is important to first consider whether the framework of the PRA (explained in Chapter 3) still reflects what most New Zealanders want now and in the foreseeable future. If evidence suggests that this framework no longer reflects the values and expectations of most New Zealanders, this will affect our consideration of the PRA rules, as "the principles that we choose to guide us are the DNA of law reform."[290]

The policy of a just division remains sound

4.3 While there may be different views on how the PRA framework ought to be implemented through rules, we consider that the policy of a just division of property at the end of a relationship remains appropriate for New Zealand both now and into the future.

289 Bill Atkin "Financial support – who supports whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 209 at 224.

290 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

4.4 We think that there is an ongoing need for specific legislation that ensures a just division of property when relationships end. The general law of property does not respond well to the issues that arise on separation or the death of one partner. In many cases where the partners have made different contributions to the relationship, general property law principles will not achieve a just result.

4.5 Our preliminary view is that there should continue to be a comprehensive statutory regime setting out the rules to provide for a just division of property when partners separate.

4.6 We also take the preliminary view that the rules to provide for a just division of property when a partner dies should be set out in a separate statute that also addresses the interests of third parties and relevant aspects of succession law. The death of a partner gives rise to different issues than separation and in some respects the rules that apply to relationships ending on death are at odds with the framework that applies on separation. The remainder of this discussion focuses on the PRA as it applies to separation. We discuss the rules that apply on death at paragraphs 4.50 to 4.52 below.

The PRA strikes the right balance between the theories of entitlement, compensation and needs

4.7 We consider that the primary theory underpinning the rules of division in the PRA, based on a partner's *entitlement* to certain property as a result of the (presumed) equal contributions they made to the relationship, remains sound. We have considered fundamentally different approaches prioritising the different theories of compensation or need. However changing the approach would require a substantial redesign of the PRA rules, involve making difficult policy decisions[291] and would introduce a much greater measure of discretion into the rules of division. As discussed in Chapter 3, greater discretion comes at a cost to certainty and predictability, both of which are important in

[291] If we adopted rules of division based primarily on compensation, policy decisions would need to be made about what is being compensated for, whether and to what extent there would need to be proof of a causal connection between the loss or gain and the relationship, how multiple factor causation should be dealt with, and how the loss or gain should be quantified. Rules based on need would also involve policy decisions including how we measure the claimant's needs (subjectively or objectively), how we account for the other partner's needs (for example, if he or she has limited assets), whether there should be a causation requirement (for example, that the needs are generated as a result of the relationship ending), and how long the payments should continue for. See discussion in Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268.

promoting resolution of disputes.[292] We are also mindful of the costs of significant structural change and the risk of unintended consequences.

4.8 The theory of compensation already has a role in the PRA. Section 15 is aimed at remedying situations where the roles each partner took during the relationship have led to a disparity in their income and living standards after separation. It compensates a partner for the economic disadvantages he or she suffers as a result of the division of functions during the relationship. This can, where necessary, provide "a more sophisticated concept of equality" than equal division alone can achieve.[293]

4.9 A theory based on needs is different in nature. The entitlement and compensation theories focus on past events and have the same broad objective of achieving economic equality at the end of a relationship.[294] In contrast, a needs-based theory is forward-looking and imposes an ongoing financial responsibility as if the relationship were continuing.

4.10 Our preliminary view is that property should not primarily be divided according to need at the end of a relationship, for several reasons:

(a) First, the PRA, as social legislation, plays an important role in promoting gender equality. It does so largely by recognising that non-monetary contributions to a relationship, that have traditionally been the remit of women, are equal in worth to monetary contributions and create enforceable property rights. In contrast, framing a claim in terms of future need has the effect of "casting claimants in the passive role of supplicants", encourages or at least prolongs dependency (as future re-partnering may affect their eligibility to receive relief), and fails to recognise the legitimacy of their claim to property of the relationship.[295]

(b) Second, a division of relationship property based primarily on needs does not strike the right balance

[292] See paragraph 3.10 (d) above.

[293] Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 288.

[294] For further discussion see Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 288–289.

[295] Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 287.

with the concepts of "no-fault" relationship dissolution or a "clean break". The concept of a "clean break" is that the property of the relationship is divided upon separation and the parties are free to go their separate ways without any competing continuing demands on their property.[296] The clean break concept will often be inappropriate where there are children of the relationship (discussed in Part I), or where the there is financial inequality between the partners resulting from the relationship (discussed in Part F).[297] But we appreciate that the concept of a clean break is still valued by many people, particularly given that more people are now entering into more than one qualifying relationship throughout their lifetime.

(c) Third, the PRA does not operate in a vacuum and cannot be expected to resolve all of the financial consequences of separation. Partners should ideally be able to meet the future needs of their families from their own incomes, and where that is not possible by payments under other pillars of financial support that are needs-focused (discussed in Chapter 2), including maintenance under the Family Proceedings Act 1980, child support under the Child Support Act 1991 and State benefits under the Social Security Act 1964.

(d) Fourth, a distribution of property based on entitlement and/or compensation may be sufficient to meet a partner's needs in any event. In contrast, distribution based on need is effectively defined by and limited to one partner's needs, which may in fact result in a smaller distribution (with the other partner retaining more than an equal share of the property).[298]

296 While the clean break concept is not given expression in the Property (Relationships) Act 1976, it is recognised by the courts. In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), the Court of Appeal noted that "the Act proceeds on the premise that on the breakdown of marriage the matrimonial property should be divided and adjustments made between the spouses and that they should then be free to go their separate ways without any competing continuing demands on the property of each other" at 269. See also *Haldane v Haldane* [1981] 1 NZLR 554 (CA) and *M v B* [2006] 3 NZLR 660 (CA).

297 The difficulty with a clean break when there are children of the relationship was discussed during Parliamentary debates of the De Facto Relationships (Property) Bill 1998 (108-1) and Matrimonial Property Amendment Bill 1998 (109-1) (which later became the Property (Relationships) Amendment Bill 2000). Patricia Schnauer from the ACT Party NZ said that "there is no doubt an adverse effect from applying the clean-break principle on the separation of couples. While there can be a clean break in terms of dividing up property, I suggest that it is totally impossible emotionally to have a clean break from one's children", at (5 May 1998) 567 NZPD 8233. Chris Fletcher from the National Party noted that the idea of a clean break "is a good one" but that "[t]he reality, particularly for the partner who has been at home raising the children…she is much less likely to get back on her feet as quickly as her ex-husband", at (6 May 1998) 567 NZPD 8280.

298 Joanna Miles "Financial Provision and Property Division on Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 268 at 284 and 287–288.

4.11 However, that is not to say that a needs-based theory should play no role in the PRA. In practice section 15 compensation payments (discussed at paragraph 4.8 above) often meet a partner's post-separation needs. Our preliminary view, discussed in Part F, is that section 15 requires reform, and one option we consider is to unite the section 15 compensation payments and maintenance payments by requiring one partner to make financial reconciliation payments to the other partner in certain circumstances. Such an approach would be based on both the compensation and needs theories. It would not, however, detract from the general rule of equal sharing under the PRA based on a theory of entitlement.

4.12 The needs of the partners and any children of the relationship are also relevant to the court's implementation of the (generally equal) division of relationship property under the PRA and its consideration of whether to make non-division orders. These orders grant a partner temporary rights to use or occupy property, but do not affect each partner's entitlement to a share of relationship property when division occurs. Non-division orders are usually made to reflect the needs of the other partner or their children.

Some principles may need to change

4.13 Our preliminary view is that, broadly speaking, the principles of the PRA remain sound in 2017. Some principles may, however, need to change to better reflect people's changing values and expecations about what is fair when relationships end.

4.14 In Part C we consider the principle that all property that has a connection to the relationship should be divided when a relationship ends. Repartnering and stepfamilies are more common today, and this might mean more people want to keep property separate. The PRA automatically treats some property as relationship property because of its use, such as use of a house for the family home. There is a question as to whether this principle remains appropriate in contemporary New Zealand.

4.15 In Part I we also consider whether the PRA should take a more child-centered approach, and propose options for promoting children's best interests that might require a redefinition of the existing principle that a just division of property should have regard to children's interests.

Recognising tikanga Māori in the PRA

4.16 We discussed in Chapter 3 the implicit principle that a just division of property under the PRA should recognise tikanga Māori and in particular whanaungatanga. At paragraphs 4.48–4.49 below we identify some potential issues with the way that the rules allow tikanga to operate, and ask whether this means aspects of the PRA should be changed.

4.17 A further question we have considered is whether the current approach of accommodating and responding to tikanga Māori within the framework of the PRA, rather than having a separate regime for property division according to tikanga Māori, remains appropriate. Our preliminary view is that the PRA framework can respond to matters of tikanga Māori, and that these matters should not be treated separately. We would like to hear from anyone who has a different view, with their suggestions for reform.

The principles should be explicit

4.18 As a matter of good drafting practice, particularly where a statute substitutes the general law and introduces rules based on distinct values, we commend the approach of a comprehensive principles section at the outset of the legislation. The Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[299] The principles will guide the reader with a clear understanding of the values that are promoted through the legislation and what Parliament intended to be achieved.[300]

299 Interpretation Act 1999, s 5(1). The Legislation Bill 2017 (275-1) currently before Parliament proposes to relocate the Interpretation Act within the new legislation. Legislation Bill 2017 (275-1), cls 10-12 (general principles of interpretation) and cl 150 (repeal of Interpretation Act 1999).

300 See Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) at [229]; Law Commission *The Format of Legislation* (NZLC R27, 1993) at 9; Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [30]. See also R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 122–123. See also Law Commission *Reforming The Law Of Contempt Of Court: A Modern Statute* (NZLC R140, 2017). We note too that this approach has been recommended by the New Zealand Law Society in its submission on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill (New Zealand Law Society "Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill"at [34]).

Do you agree?

4.19 Our preliminary view is that the framework of the PRA is sound. On the whole, we think that the current framework can achieve a just division of property when partners separate.

4.20 This preliminary view is significant, but it does not necessarily preclude major change. We discuss below what we think are big questions with the way the PRA is currently working, and potential options for reform. Changes in these areas could have considerable consequences for outcomes under the PRA.

CONSULTATION QUESTION

A1 Does the framework of the PRA described in Chapter 3 remain appropriate both in 2017 and in the foreseeable future?

a. Should this regime continue to be based primarily on a theory of entitlement, supplemented by theories of compensation and need?

b. Have we accurately articulated the explicit and implicit principles which should guide the content and interpretation of the rules in the PRA? Should any of the principles be amended or removed? Should any other principles be added?

c. Does further consideration need to be given to how tikanga Māori is taken into account in the framework of the PRA? If so, what might this look like?

The big questions

4.21 We have identified eight "big questions" with how the PRA is working in contemporary New Zealand. These raise questions about whether the PRA always achieves a just division of property at the end of a relationship. In response to these big questions we are considering whether substantial change is needed to the PRA rules. This may require the PRA to embrace new ideas and new concepts.

4.22 These big questions are summarised below and are then explored in depth throughout this Issues Paper.

Big question 1: Does the PRA always apply to the right relationships in the right way?

4.23 Since the PRA was first enacted over 40 years ago, there have been significant changes in relationship patterns, including how relationships form and end.[301] In essence, relationships are now much more diverse and this diversification is expected to continue. For example:

(a) Fewer people are marrying.[302]

(b) More people are living in de facto relationships.[303] There is evidence to suggest that most married couples now spend a period of time living together before marriage.[304]

(c) Remarriages have increased, and in 2016 accounted for 29 per cent of all marriages, compared to 16 per cent in 1971.[305] No information is collected about re-partnering in a de facto relationship, but it is expected that these rates will have also increased.

(d) Legal recognition and social acceptance of same-sex relationships has also coincided with more people recording that they are in a same-sex relationship.[306]

4.24 While there is little New Zealand-based research about the changing dynamics within relationships, we have heard anecdotally that there is an increasing variety in approaches

301 For further discussion about changes in relationships and families see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

302 The marriage rate has declined from 35.5 (people per 1000 unmarried people age 16 and over) in 1976, to 10.9 in 2016: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand "General Marriage Rate, December years (total population) (Annual-Dec)" (June 2017) <www.stats.govt.nz>

303 In 2013, 409,380 people reported they were in a de facto relationship, which accounts for 22 per cent of all couples, up from 8 per cent in 1986: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand "Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Censuses" <nzdotstat.stats.govt.nz>; and Statistics New Zealand *Population Structure and Internal Migration* (1998) at 10.

304 Dharmalingam and others found that 90% of the first marriages of women born after 1960 were preceded by one or more de facto relationships: Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 8. Superu observes that it is now the norm for a de facto relationship to be the first form of partnership for most New Zealanders, and for partners who marry to first spend time in a de facto relationship: Superu *Families and Whānau Status Report 2014* (June 2014) at 164.

305 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4 citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

306 In 2013, 8,328 same-sex couples lived together, up from 5,067 in 2001: See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand 2013 Census QuickStats about families and households – tables (November 2014).

to managing finances. We understand that more partners are choosing not to share their finances, or keep a joint account only for shared expenses such as rent or food. We have also heard about people who, having been through one relationship separation and property division, prefer to keep their finances separate in subsequent relationships. This is sometimes because one or both partners have children from previous relationships and prefer to organise their affairs so that each partner is financially responsible for his or her own children.

4.25 Similarly, we are aware of the increasing research attention being given to partners who live apart. Little is known about how common these types of relationships are in New Zealand, but research in the United Kingdom and Australia suggests that just under 10 per cent of adults are in a relationship but do not live with their partner.[307] This research suggests that partners can live apart for very different reasons. Some partners may face constraints to living together, for example, they may work in different locations, or have commitments to dependent children or elderly parents. For others, living apart may be a conscious choice.[308]

4.26 The increasing diversity of relationships requires us to consider whether the PRA still applies to the right relationships in the right way. While we think the PRA's application to marriages, civil unions and de facto relationships is broadly appropriate, we have identified the following possible issues:

(a) Does the definition of de facto relationship capture the right relationships?

(b) Is three years an appropriate period of time before the PRA's general rule of equal sharing applies, or should it be longer?

(c) Are the different rules of division for relationships shorter than three years justified?

307 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) Journal of Family Issues 1 at 20; and Vicky Lyssens-Danneboom and Dimitri Mortelmans "Living Apart Together and Money: New Partnerships, Traditional Gender Roles" (2014) 76 Journal of Marriage at 950.

308 For further discussion about partners who "live apart together", see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

(d) Are the different rules that apply to short-term de facto relationships, compared to short marriages and civil unions, appropriate?

(e) Does the PRA apply appropriately where partners live or have lived outside New Zealand, or hold property in a number of jurisdictions?

4.27 We address question (a) in Part B, questions (b), (c) and (d) in Part E, and question (e) in Part L of the Issues Paper.

Big question 2: Does the PRA divide property that should be kept separate?

4.28 The PRA classifies property as either relationship property or separate property as a means of identifying which property should be divided at the end of the relationship.

4.29 The PRA's definition of relationship property, consistent with the principle that all property central to the relationship be shared, includes some items that may have been acquired by one partner before the relationship began. In particular, the couple's family home and the family chattels are deemed relationship property "whenever acquired."

4.30 We have encountered criticism that the PRA forces some people to divide property that was not acquired through joint effort. For example, when one partner brings a home into the relationship but the other does not, people have told us that it is unfair that the full value of the house be divided between the couple. There are also various anomalies that may arise depending on the use to which property has been put. For example, if a valuable item of property acquired before the relationship is placed within the family home and used for family purposes, it may be deemed a family chattel and subject to equal sharing. If, however, the item was kept separate to family life (for example if a piece of art was displayed at the partner's workplace) the item may not be considered a family chattel.

4.31 These complaints suggest that the definition of relationship property could be reformed to exclude assets that were acquired before the relationship began. Instead, the concept of relationship property would only extend to property that was acquired during the relationship. This would have significant consequences for the

size of the property pool available for division in some cases, and therefore requires careful consideration.

4.32 We discuss this question in Part C.

Big question 3: How should the PRA deal with trusts?

4.33 Property held on trust will generally not be subject to the PRA's rules of division, even if one or both partners enjoy the use and benefits of that property.[309] Many families in New Zealand use trusts as a means of holding property. Consequently, the PRA does not apply to a significant amount of property attributable to relationships, undermining the policy of a just division and the principle that all property central to a relationship ought to be divided equally.

4.34 The PRA has provisions designed to expose trust property and require the partner who disposed of property to a trust to pay compensation to the other partner. However these provisions are widely criticised for being of limited effect and easy to avoid.

4.35 While there are a number of possible remedies outside the PRA regime that a partner could pursue in relation to trust property, they generally depend on different principles, leaving the law complex and conflicting. Their existence also undermines the principle that a single, accessible and comprehensive statute should regulate the division of property at the end of a relationship.

4.36 One significant option for reform is to amend the definition of relationship property in the PRA so that certain interests in a trust or even the trust property itself could, in defined circumstances, be divided. Broadening the relationship property definition in this way would enable the partners to share property that had a connection to the relationship. It would in effect prevent the policy of the PRA being undermined by the use of trusts to hold property that would otherwise be attributable to the relationship and subject to division.

4.37 We are also considering whether section 182 of the Family Proceedings Act 1980, which relates to setting aside nuptial settlements, should be either repealed or brought within the

309 Unless a partner has a vested or contingent beneficial interest under the trust.

PRA and amended, consistent with the principle that a single, accessible and comprehensive statute should regulate the division of property at the end of a relationship. Another option for reform is to improve the existing provisions in the PRA that deal with dispositions of property to a trust.

4.38 We discuss this question in Part G.

Big question 4: What should happen if equal sharing does not lead to equality?

4.39 In some cases, separation may impose disproportionately greater economic disadvantages on one partner, as a result of the division of functions within the relationship. For example, in some relationships the career of one partner is prioritised (explicitly or implicitly) over the career of the other. This may mean that the other partner (the supporting partner) instead prioritises the care of any children of the relationship and maintaining the family home. He or she may leave the workforce to do so, work part-time and/or deliberately choose a less demanding and ambitious job. The supporting partner may also relocate with their partner when their partner's job requires it. When the relationship ends, the supporting partner may find it more difficult to recover economically from the separation. Because of the decisions the partners made about the division of functions during the relationship, the supporting partner may lack the skills and experience to find rewarding employment, whereas the other partner leaves the relationship with the benefits of an advanced career. In this scenario, the supporting partner loses the economic benefits that he or she expected to receive from the investment in the relationship.

4.40 One of the principles of the PRA is that a just division of property has regard to the economic advantages or disadvantages to the partners arising from their relationship or from its end. This principle is given effect by section 15. Having reviewed section 15 and the case law, we conclude that it has been largely ineffective in remedying the disproportionate economic disadvantages one partner may suffer.

4.41 We are considering a number of options to address this issue. The first option is to lower the hurdles that a partner must overcome to obtain an award under section 15. The second option is to

treat a partner's ability to earn income as an item of property which could be divided to the extent it has been enhanced by the relationship. The third option is unite the section 15 remedy with maintenance in a form of periodic financial reconciliation payments.

4.42 We discuss this question in Part F.

Big question 5: How should the PRA recognise children's interests?

4.43 The interests of children are referred to in a limited number of provisions in the PRA. We have found that in practice children's interests are seldom expressly taken into account in relationship property matters. This is probably due to the uncomfortable fit of needs-based provisions focused on children's interests within an entitlement-based property division regime for adults. Children of relationships are, however, affected when parents or step-parents separate, and New Zealand family law has increasingly adopted a more child-centred approach within social legislation, consistent with New Zealand's obligations under the United Nations Convention on the Rights of the Child.

4.44 A key question we consider is whether the PRA should be reformed to take greater account of children's interests and, if so, what form those amendments should take. We explore this question further and consider a number of potential options in Part I.

Big question 6: Does the PRA facilitate the inexpensive, simple and speedy resolution of PRA matters consistent with justice?

4.45 We understand that the vast majority of partners who separate will not go to court to resolve the division of their property. Some will not even consult a lawyer. There is a critical need to ensure that the PRA's rules, the court process and any dispute resolution mechanisms facilitate the inexpensive, simple and speedy resolution of PRA matters in a manner that is consistent with justice. Agreements reached outside court must be just, efficient and enduring.

4.46 We currently lack the information to fully analyse how couples are resolving PRA matters. We welcome submissions on how the regime is operating in practice, and any areas of concern. Our research and preliminary consultation to date has identified two broad problems:

(a) **Lack of information and support for resolution of PRA matters**. International research suggests that access to information about property rights and the available processes for resolving disputes is vital in ensuring a just and prompt resolution of relationship property disputes.[310] The clarity and certainty of the rules themselves is also important in facilitating just agreements. We are concerned that the current information and support available to people at the end of their relationship may be lacking. We are considering a range of reform options, including the promotion of online resources about the PRA rules and the Family Court process, and online dispute resolution tools. We also identify the range of options for more formal out of court dispute resolution, and ask whether the State should have a greater role in facilitating any of these options for PRA disputes.

(b) **Undue delay in resolving property matters in the court system**. This includes delays as a result of inefficiencies in the case management procedure for PRA cases in the Family Court, as well as delays caused by one partner, for example, by failing to provide full disclosure or comply with other process requirements. We are considering reforms to improve the court process, including changes aimed at early issue identification and minimising undue delay through stricter timeframes, clear rules of disclosure and tougher penalties for breaching process requirements. We are also considering reform options designed to clarify the jurisdiction of the Family Court and High Court to deal with PRA and related matters.

4.47 We consider issues relating to the resolution of PRA matters in Part H.

310 Emma Hitchings, Jo Miles and Hilary Woodward "Assembling the jigsaw puzzle: understanding financial settlement on divorce" [2014] Fam Law 309 at 316-317.

Big question 7: Does the PRA provide adequately for tikanga Māori to operate?

4.48 The PRA recognises tikanga Māori in the exclusion of Māori land from the ambit of the PRA and the exclusion of taonga from the definition of family chattels.[311] In this Issues Paper, we raise a range of other specific matters where tikanga Māori is especially relevant, and question whether the PRA is adequately providing for tikanga Māori to operate. These matters relate to:

(a) recognising customary marriage without subsuming it into de facto relationships (discussed in Part B);

(b) recognising whāngai children (discussed in Part I);

(c) addressing family homes built on Māori land (discussed in Part C);

(d) exempting taonga from division (discussed in Part C);

(e) whether contracting out agreements can be used to accommodate tikanga Māori (discussed in Part J); and

(f) how should tikanga Māori interact in dispute resolution processes (discussed in Part H).

4.49 In some, or all of these areas, reform might be needed to ensure tikanga Māori can operate effectively.

Big question 8: How should the PRA's rules apply to relationships ending on death?

4.50 The are tensions between the rules set out in Part 8 of the PRA that govern property division when one partner dies and succession law. There is considerable difficulty in the way Part 8 tries to bring the two regimes together. First, when one partner dies different interests are at stake than if the partners separate during their lifetime. The law has to grapple with the obligations the deceased may have owed to third parties such as other family members. These obligations may conflict with a surviving partner's interest in the deceased's estate under the PRA. Second, the rules that apply on death are generally complex and inaccessible. We understand that many will-makers, surviving

311 Property (Relationships) Act 1976, s 6 (exclusion of Māori land), s 2 (exclusion of taonga from definition of "family chattels").

partners and even advisers struggle to come to terms with how the law applies. Third, Part 8 is silent on key matters, such as how the rules are to apply when the deceased's representative seeks a division of relationship property under the PRA.

4.51 We question whether the PRA framework remains appropriate for relationships ending on death, given the increase in re-partnering and the prevalence of step-families. Our preliminary view is that while surviving partners should not lose their right to an equal share of relationship property when one partner dies, the provisions that relate to the division of property on death should be placed in a separate statute, which would also address the interests of third parties. Any such legislation would fall outside the scope of this review and would need to be progressed separately. Such legislation would also need to consider issues arising from the intersection of tikanga Māori and succession law.

4.52 We discuss these issues and options for reform further in Part M.

Other general issues

4.53 In addition to the big questions discussed above, there are some smaller points that we wish to raise here because they have an overarching application to the PRA and this review.

Should relationship neutral terms be used in the PRA?

4.54 The PRA uses specific terms to describe different types of relationships, even though the same rules generally apply regardless of the relationship type.[312] In particular the PRA uses the terms "marriage", "spouse", "husband" and "wife"; "civil union" and "civil union partner"; and "de facto relationship" and "de facto partner".[313]

4.55 The Select Committee considering the 2001 amendments decided to retain specific terms to describe the different relationship types in response to concerns that failure to do so would

312 There are some instances in which the Property (Relationships) Act 1976 distinguishes between relationship types, for example the rules applicable to relationships of short duration, ss 14, 14A and 14AA.

313 There is one partial exception: the phrase "spouse or partner" is sometimes used in the Property (Relationships) Act to mean a spouse or civil union partner or de facto partner (see the definition of "partner" in s 2).

undermine the sanctity of marriage.[314] New Zealand society has undergone considerable change since 2000. There may be less social significance attached to different types of relationship, and objections to the use of relationship neutral terms may no longer be so strong. We think it is timely to reconsider whether these objections remain today, or if it is appropriate to use relationship neutral terms in the PRA where the same rules apply to all relationship types.

4.56 While sensitive to the concerns raised in 2001, our preliminary view is that relationship neutral terms should now be adopted, for two primary reasons:

(a) First, the use of specific terms is out of step with the principles of the PRA discussed in Chapter 3. The PRA seeks to achieve substantive equality and neutrality in terms of relationship type. Relationship neutral terms may better reflect the principle that the law should apply equally to all relationships that are substantively the same.

(b) Second, the use of specific terms can make the PRA complicated and long-winded. The introduction of civil unions in 2004 means there are now three different categories of relationship that must be specified in the PRA. For example, section 13 of the PRA currently provides that if the exception to equal sharing applies:

> *…the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.*

This could be simplified, without loss of meaning; to read "…the share of each partner in that property or money is to be determined in accordance with the contribution of each partner to the relationship." Simpler language would make the PRA more concise and accessible to the public.

314 See Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 2000 (109 – 3) (select committee report) at 6: "[some submitters] claim that it is degrading to refer to a spouse as a 'partner', and to call marriage a 'partnership relationship', because they believe that marriage has a quality of sanctity that de facto relationships do not possess." and Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 BFLJ 276. The Rt. Hon. Jenny Shipley said at the time "We are now required to …swallow the amoral and gender-neutral, politically correct line and call our husbands 'partners'. Marriages are now just relationships. …Well, Burton's my husband. I'm his wife. And that's the way we like it." (Rt. Hon. Jenny Shipley, Address to the New Zealand National Party Conference 2000, 19 August 2000).

CONSULTATION QUESTION

A2 Should specific terms be substituted with the neutral terms of "relationship" and "partner" where there is no need to distinguish between relationship types?

Should there be more public education about the PRA and how it works?

4.57 In our preliminary consultation, practitioners told us that most of their clients understand that after three years a de facto relationship will become subject to the general rule that relationship property is divided equally under the PRA. However there are many things that people don't know. People are often unaware that a de facto relationship does not require cohabitation. Nor do they realise that a surviving partner can choose to receive his or her entitlement under the PRA and not under the will. People often do not understand the implications of property being held in trust.

4.58 We would like to know whether greater public awareness of the PRA is needed and, if so, how this could be achieved. Some ideas we have are:

(a) Informing buyers of residential property of potential future obligations under the PRA.

(b) Providing couples who are getting married or entering a civil union with information about the PRA when they apply for a marriage or civil union licence.

(c) New immigrants being told, as part of the information package they receive on arriving in New Zealand, of the existence of the PRA, its general provisions and that the regime is likely to be very different to that regime in the person's country of origin.

(d) Education on the PRA at secondary school.

CONSULTATION QUESTIONS

A3 Do you agree that there needs to be greater public education about the PRA and the obligations and responsibilities that arise under it?

A4 Do you have any ideas about ways to promote public education relating to the PRA? Do you agree with any or all of the ideas we have suggested?

Part B – What relationships should the PRA cover?

Chapter 5 – Who is covered by the PRA?

Introduction

5.1 New Zealand has undergone significant change in the last 40 years.[1] As a result of changing patterns in partnering, family formation, separation and re-partnering, what it means to be partnered has changed significantly since the 1970s. Public attitudes have also undergone major shifts towards matters such as couples living together before or as an alternative to marriage, separation and divorce, having and raising children outside marriage, and same-sex relationships.

5.2 In this chapter we explain the different relationships covered by the PRA, and the history leading up to the inclusion of de facto relationships in 2001. We look at why the PRA should continue to apply to de facto relationships, and on the same "opt-out" basis as marriages and civil unions. The rest of Part B is arranged as follows:

(a) In Chapter 6 we consider the PRA's definition of "de facto relationship", and in particular what it means to "live together as a couple". We consider potential issues with the definition, and set out some options for reform.

(b) In Chapter 7 we look at some specific types of relationships, including Māori customary marriage, and consider how they are treated under the PRA.

Relationships covered by the PRA

5.3 The PRA covers three types of relationships: marriages, civil unions and de facto relationships.[2]

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1 These changes are summarised in Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

2 We use the term "long-term relationship" (as well as "long-term marriage", "long-term civil union" and "long-term de facto relationship") to refer to qualifying relationships of three or more years' duration that are not treated as

Marriages

5.4 Marriage is defined as the union of any two people, regardless of their sex, sexual orientation or gender identity.[3]

5.5 Despite population growth, the number of marriages each year is decreasing.[4] The marriage rate is now around one quarter of what it was when it peaked in 1971.[5] Many factors will have contributed to the fall in the marriage rate, including the increasing prevalence of de facto relationships (discussed below), the increasing numbers of New Zealanders remaining single,[6] and a general trend towards delaying marriage.[7] In 2016, the median age at first marriage was 30 for men and 29 for women, compared to 23 for men and 21 for women in 1971.[8]

5.6 Marriage today offers few legal advantages over a de facto relationship. So why do couples still get married? One reason is to make the shift from a private to a public commitment, another is to celebrate a "successful" and enduring relationship and ensure that it is properly acknowledged by family and friends.[9] Some couples may wish to marry before they have children, or for pragmatic reasons or to conform to expectations and pressures to marry.[10] Some couples may marry for cultural or religious reasons, and in New Zealand cultural and religious identity is

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relationships of short duration under s 2E of the Property (Relationships) Act 1976. Relationships of short duration are considered in Part E.

3 Marriage Act 1955, s 2 definition of "marriage." In the Property (Relationships) Act 1976, "marriage" also includes a marriage that is void (for example a marriage of persons within prohibited degrees of relationship where no order is in force dispensing with the prohibition: see Marriage Act 1955, s 15 and sch 2, and Family Proceedings Act 1980, s 31) and a marriage that has ended by a legal process while both spouses are alive or by the death of one spouse: s 2A.

4 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

5 Statistics New Zealand *Information Release – Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 3. Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

6 Analysis of census results identifies a decline in partnering rates amongst those aged 25–34, with the strongest decline being experienced between the 1986 and 1991 censuses. In 1986, 74% of women aged 25–34 were partnered, but by 2013 this had declined to 65%. For men, the partnership rate declined from 67% in 1986 to 61% in 2013. See Paul Callister and Robert Didham *The New Zealand 'Meet Market': 2013 census update* (Callister & Associates, Research Note, September 2014) at 11.

7 Families Commission / SuPERU *Families and Whānau Status Report 2014* (June 2014) at 164.

8 Statistics New Zealand *Information Release – Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 5.

9 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 45–46.

10 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 50–54 and 54–62.

diversifying.[11] Baker and Elizabeth say that marriage has "… retained its cultural and symbolic value as the socially ordained vehicle for relationships of romantic love and commitment."[12]

Civil unions

5.7 A civil union is a formal registered relationship that is similar to a marriage.[13] Civil unions were introduced in 2004 to provide for heterosexual couples who wanted formal recognition of their relationship but who did not wish to marry, and to address the situation regarding same-sex couples who could not legally marry.[14] Civil unions and marriages are both "opt-in" relationships that make a private commitment public. A civil union provides the opportunity to formalise a relationship without the religious and social associations that can arise with marriage.[15] Civil unions are generally treated the same as marriages under the PRA.

5.8 The number of people entering civil unions since 2005 has remained relatively small, accounting for 1.4 per cent of all marriages and civil unions between 2005 and 2013.[16] The number of civil unions has dropped even further since same-sex marriage was legalised in 2013. In 2016, there were only 48 civil unions, accounting for 0.2 per cent of all marriages and civil unions.[17]

De facto relationships

5.9 The decline in the rate of people entering marriages and civil unions has coincided with an increase in the number of people

11 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

12 Maureen Baker and Vivienne Elizabeth "A 'brave thing to do' or a normative practice? Marriage after long-term cohabitation" (2014) 50(4) Journal of Sociology 393 at 394.

13 The Civil Union Act 2004 provides that two people, whether they are of different or the same sex, may enter into a civil union if they are both aged 16 or over; they are not within the prohibited degrees of civil union; and they are not currently married or in a civil union with someone else: Civil Union Act 2004, ss 10, 18 and 19. In the Property (Relationships) Act 1976, a "civil union" includes a civil union that is void (for example a civil union where at the time of solemnisation either party was already married or in a civil union: see Civil Union Act 2004, s 23 and Family Proceedings Act 1980, s 31); and a civil union that has ended by a legal process while both civil union partners are alive or by the death of one civil union partner.

14 Hon David Benson-Pope, Associate Minister of Justice, (24 June 2004) 618 NZPD 13927.

15 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 1.11.1.

16 Excluding marriages and civil unions of overseas residents. See: Statistics New Zealand "Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

17 Excluding marriages and civil unions of overseas residents. See: Statistics New Zealand "Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

living in de facto relationships.[18] In New Zealand, 409,380 people reported they were in a de facto relationship in 2013.[19] This accounted for 22 per cent of all people partnered, or 13 per cent of the total adult population.[20] This has increased since 2001, when people in a de facto relationships accounted for 18 per cent of all people partnered, or 11 per cent of the total adult population. The increasing prevalence of de facto relationships follows international trends, however the rate is higher in New Zealand than in other comparable countries. The increase in de facto relationships is also likely driving the increase in the number of children born outside marriage.[21] In 2016, 46 per cent of all births in New Zealand were ex-nuptial, up from 17 per cent in 1976.[22]

5.10 Census data can tell us about some characteristics of people living in de facto relationships. A breakdown of census data by relationship type and age demonstrates that younger people are more likely to be in a de facto relationship, with people aged 15–24 being more likely to be in a de facto relationship than be married in 2013.[23] Marriage then becomes more common in the older age brackets, which suggests that many people are living in a de facto relationship before marriage.[24] De facto relationships are more prevalent among Māori compared to any other ethnic group. In the 2013 census, 40 per cent of Māori who were partnered identified they were in a de facto relationship, compared to the 22 per cent of all people part.[25]

18 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1. It is important to note that data collected on de facto relationships in New Zealand (including census data) generally defines a de facto relationship as one where the partners live together as a couple in a relationship in the nature of marriage. As we discuss in Chapter 6, this is different to the definition of de facto relationship in the Property (Relationships) Act 1976, s 2D.

19 Statistics New Zealand "Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Census (RC, TA)" <nzdotstat.stats.govt.nz>.

20 Statistics New Zealand "Partnership status in current relationship and ethnic group (grouped total responses) by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006 and 2013 Census" <nzdotstat.stats.govt.nz>.

21 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

22 Statistics New Zealand "Live births by nuptiality (Māori and total population) (annual-Dec)" (May 2017) <www.stats.govt.nz>.

23 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

24 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1. While we do not know how common it is for partners to be in a de facto relationship immediately preceding their civil union, we expect that the situation is similar to the prevalence of a de facto relationship preceding a marriage.

25 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

The inclusion of de facto relationships in the PRA

5.11 Prior to 2001, when a de facto relationship ended property rights were usually determined under general property law principles or the law of equity.[26] This often resulted in significant unfairness, particularly for women.[27] An analysis of de facto property cases between 1986 and 1990 had found that the average division of property for women in opposite-sex de facto relationships of between three and 10 years' duration ranged from 10–40 per cent.[28] Obtaining more than a 20–30 per cent division under this approach was described as "extremely difficult",[29] and predicting outcomes as "somewhat of a lottery."[30]

5.12 There were attempts as early as 1975 to provide a statutory property regime for de facto relationships. The Matrimonial Property Bill 1975 originally provided for a court to consider applications by partners living in a "de facto marriage" of two or more years' duration.[31] In a White Paper accompanying the Bill, the Minister of Justice at the time said that on "practical and humanitarian grounds" there was a strong case for including de facto relationships within the property division regime for marriages.[32] Following a change of Government, de facto relationships were removed from the Bill at the Select Committee stage.[33] The incoming Minister of Justice said that removing de facto relationships meant that "…we believe that individuals should demonstrate to those they live with a responsibility to the other partner, and a responsibility at law to regularise that union."[34] The opposition described the decision as "unfortunate"

26 Equity is a body of law New Zealand inherited from England and Wales. In previous centuries the courts would apply equity when established legal rules would achieve unfair outcomes. Over time, the courts' practice of applying equity evolved into distinct rules and principles. These rules and principles have become the law of equity which applies in New Zealand today. Note that the Domestic Actions Act 1975 provides a regime for the settlement of property disputes arising out of the termination of agreements to marry. This can apply to de facto relationships where the partners were engaged. The Domestic Actions Act is discussed further in Part H.

27 (14 November 2000) 588 NZPD 6517.

28 (14 November 2000) 588 NZPD 6517.

29 (14 November 2000) 588 NZPD 6517.

30 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 6.

31 Matrimonial Property Bill 1975 (125-1), cl 49.

32 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

33 Matrimonial Property Bill 1976 (125-2) as reported from the Statutes Revision Committee.

34 Hon David Thomson MP, Minister of Justice (9 December 1976) 408 NZPD 4727.

and accused the Government of "closing its eyes" to the needs of people in de facto relationships and the future welfare of their children.[35]

5.13 In 1988 a Working Group was established by the Ministry of Justice to revise and update the Matrimonial Property Act 1976. The Working Group was unanimous that the law as it applied to de facto relationships was unsatisfactory and should be reformed.[36] In 1998 the De Facto Relationships (Property) Bill 1998 was introduced, proposing a separate statutory property regime for de facto relationships.[37] The Bill defined de facto relationship as "a man and a woman… living together in a relationship in the nature of marriage, although not married to each other."[38] The proposed regime was different to the regime for married couples, and only applied to de facto relationships of three or more years' duration.[39]

5.14 Supplementary Order Paper 25 signalled a new policy direction.[40] It was introduced in 2000 following a change of Government, and extended the Matrimonial Property Act 1976 to cover opposite-sex and same-sex de facto relationships.[41] The same property division rules that applied to spouses would generally apply to de facto partners. The Associate Minister of Justice at the time said:[42]

> *As we enter a new century it is about time that New Zealand caught up with the rest of the world and provided legal recognition and rights to the members of a considerable large and growing section of our community who freely chooses to organise their relationships outside the formality of marriage.*

5.15 Supplementary Order Paper 25 was considered by the Parliamentary select committee in mid-2000.[43] Public interest

35 Mary Batchelor MP (9 December 1976) 408 NZPD 4724.

36 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 65–66. It gave as reasons: Many de facto partners fulfil the same family functions as legal spouses; it is inequitable to deny recognition to a relationship which is a marriage in substance; de facto partners and spouses encounter the same problems and therefore need comparable legal remedies; legal rights will reduce opportunities for exploitation and the need for litigation; the law should recognise the undeniable reality of de facto relationships and ameliorate unnecessary hardship and patent injustice; de facto partners can contract out of the legislative reforms; and a greater recognition of de facto relationships is consistent with the trend in similar overseas jurisdictions.

37 De Facto Relationships (Property) Bill 1998 (108-1) (explanatory note) at i.

38 De Facto Relationships (Property) Bill 1998 (108-1), cl 17.

39 De Facto Relationships (Property) Bill 1998, (108-1), cl 50(1). See Government Administration Committee *Interim Report on the De Facto Relationships (Property) Bill* (September 1999) at 13 for a table summarising the main differences between the Matrimonial Property Act and the De Facto Relationships (Property) Bill 1998.

40 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

41 (4 May 2000) 583 NZPD 1926.

42 Hon Margaret Wilson MP, Associate Minister of Justice (4 May 2000) 583 NZPD 1927.

43 (1 June 2000) 584 NZPD 2754–2770.

was high, and the select committee received 1,631 submissions.[44] While the vast majority of submissions (approximately 1,330) did not support extending the Matrimonial Property Act to de facto relationships,[45] the majority of the select committee supported the key changes, making these observations and recommendations:

(a) The Matrimonial Property Act should be extended to cover both opposite-sex and same-sex de facto couples.[46] Statutory protection was necessary to safeguard children and the property rights of people whose de facto relationships end, particularly those in vulnerable positions.[47]

(b) The definition of "de facto relationship" should centre on two people who "live together as a couple", rather than "a relationship in the nature of marriage."[48]

(c) An "opt-out" regime for de facto couples is preferable to an "opt-in" regime.[49]

5.16 The Property (Relationships) Amendment Bill was passed on 29 march 2011, with most amendments extending the regime to de facto relationships coming into force on 1 February 2002. The extension of the PRA to de facto relationships has been described as a "minor triumph for the traditional values of Kiwi pragmatism and tolerance."[50] It is said that we "lead the world" by largely applying the same rules of property division to all relationship types.[51]

44 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 45.

45 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

46 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

47 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

48 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8 and cl 3A.

49 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10–12.

50 Simon Jefferson "De facto or 'friends with benefits'" (2007) 5 NZFLJ 304, at 1.

51 Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 BFLJ 276.

Should the PRA continue to apply equally to long-term relationships that are substantively the same?

5.17 In Part A we said that an implicit principle of the PRA is that the law should apply equally to all relationships that are substantively the same. This principle is inherent in the PRA's core rules, which generally apply in the same way to marriages, civil unions and de facto relationships of three or more years' duration (long-term relationships).[52] The principle is driven by equality as expressed in anti-discrimination laws and reflects a shift in family law policy towards greater recognition of a wide range of family relationships.[53]

5.18 There may be potential issues with how the PRA ensures that only those unmarried relationships that are substantively the same as marriages and civil unions are covered. If the PRA is not capturing substantively similar relationships, it may be failing to provide for a just division of property because it imposes the same general rule of equal sharing on relationships that are different. These issues relate to the PRA's definition of de facto relationship, and are discussed in Chapter 6.

5.19 The broader question is whether the PRA should continue to apply in the same way to all long-term relationships that are substantively the same, regardless of relationship type. Our preliminary view is that it should. We think it would be inconsistent with human rights principles to have different rules for relationships that are substantively the same and that face the same property issues when they end.[54] Treating de facto relationships differently is also likely to be out of step with social trends such as the increasing prevalence of de facto relationships and changing attitudes on social issues such as living together before marriage (or not marrying at all), separation and having and raising children outside marriage.[55] Although legal remedies

52 Exceptions include ss 24 and 89 of the Property (Relationships) Act 1976 (timeframes for commencing proceedings); and ss 63 (maintenance during marriage or civil union) and 182 (orders as to settled property) of the Family Proceedings Act 1980, which do not apply to couples in a de facto relationships. Short-term relationships (those that last for less than three years) are discussed in Part E.

53 Mark Henaghan "Legally defining the family" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 1 at 5. This reflects the right to freedom from discrimination on the grounds of marital status and family status enshrined in the New Zealand Bill of Rights Act 1990, s 19 and Human Rights Act 1993, s 21.

54 See New Zealand Bill of Rights Act 1990, ss 5 and 19; and Human Rights Act 1993, s 21(1)(b).

55 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

may be available in property law or equity, they may be difficult to access or less favourable than the PRA.[56] Retaining de facto relationships within the PRA may also minimise some of the social and economic costs of relationship breakdown to the State.[57]

5.20 Atkin has also observed that:[58]

> *… recognising unmarried relationships in financial statutes is unlikely to undermine marriage because the legal issues that arise in each case are usually when the marriage or relationship is in strife or when one of the parties has died; … and definitions of the relevant relationship and a duration requirement as a condition of jurisdiction (in New Zealand three years) can weed out the fringe associations that should be outside a marriage-based regime.*

5.21 We have also considered whether there should be a separate regime for de facto relationships, as originally proposed in 1998.[59] However we think that it would be a backward step to reconsider that proposal at this stage of the PRA's evolution. The current approach has its issues (discussed in Chapters 6 and 7 below), but is workable as a starting point for reform.

Should the PRA continue to apply to de facto relationships on an opt-out basis?

5.22 The PRA establishes a bilateral "opt-out" regime for all marriages, civil unions and de facto relationships.[60] This means that long-term de facto relationships are subject to the PRA, unless both partners agree to opt out by entering a "contracting out" agreement.[61] A contracting out agreement is a way that partners

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56 For example, an alternative remedy may exist in the common law of contract, constructive trust, under the Law Reform (Testamentary Promises) Act 1949 or the Family Protection Act 1955.

57 See Bill Atkin and Wendy Parker "De Facto Property Developments in New Zealand: Pressures Impeded Progress" in John Dewar and Stephen Parker (eds) *Family Law Processes, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, Portland, 2003) 555 at 556.

58 Bill Atkin "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in Recent New Zealand Legislation" (2008) 39 VUWLR 793 at 794.

59 See the De Facto Relationships (Property) Bill 1998 (108-1); and Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

60 This reflects the implicit principle of the Property (Relationships) Act 1976 that partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards. See Part A, Chapter 3.

61 Property (Relationships) Act 1976, ss 1C(2), 14A and 21. Short-term de facto relationships are discussed in Part E. A court may treat a relationship of three years or longer as a short-term relationship if it considers it just: s 2E(1); and short-term relationships must pass a further test before a property division order can be made: s 14A.

can substitute the PRA's rules with their own arrangement.[62] The contracting out agreement must comply with Part 6 of the PRA, and may be made during a relationship or in contemplation of entering a relationship.[63] The ability to contract out is said to be an "integral feature" of the PRA.[64]

5.23 Alternatives to a bilateral opt-out regime include a:

(a) unilateral opt-out regime, where de facto relationships are covered by the PRA unless one partner opts out (the other partner's agreement is not required);

(b) unilateral opt-in regime, where de facto relationships are not covered by the PRA unless one partner opts in (the other partner's agreement is not required); and

(c) bilateral opt-in regime, where de facto relationships are not covered by the PRA unless both partners agree to opt-in.

5.24 The Parliamentary select committee considered a bilateral opt-in regime for de facto relationships in 2000,[65] but preferred a bilateral opt-out regime because it would mean that vulnerable people unaware of their legal situation would be covered without having to try to contract in.[66] In contrast, under an opt-in regime some people might not be able to secure their partner's agreement to contract into the PRA – this was of particular concern where the relationship is a long one or where there are dependent children.[67]

5.25 Our preliminary view is that the existing bilateral opt-out regime remains appropriate for de facto relationships. We have found no new evidence that questions the conclusion in 2000 that, while an opt-out regime may create unfair outcomes for some, it will

62 Contracting out of the Property (Relationships) Act 1976 is discussed further in Part J. A contracting out agreement may relate to the status, ownership and division of property in particular circumstances: s 21.

63 Property (Relationships) Act 1976, s 21. Partners may also enter into a contracting out agreement to settle any differences that have arisen between them concerning their property: s 21A.

64 *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

65 Reasons in favour of an opt-in regime were noted by the Parliamentary select committee as: (1) people in de facto relationships may have chosen not to marry in order to avoid the statutory property regime; (2) an opt-in regime might, in terms of property sharing, be thought of as effectively "marrying" those couples without their consent; (3) couples in de facto relationships will bear the cost of contracting out of the PRA; (4) some de facto partners may be unable to secure the necessary support from their partner to contract out of the PRA: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

66 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

67 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 11.

"…protect more people, especially those who are vulnerable, and create less unfairness than an opt-in regime."[68] Rather, the arguments in favour of an opt-out regime may be even stronger in 2017. An increasing number of people are living in de facto relationships,[69] and with the passage of time there is likely to be greater public awareness that de facto relationships carry property consequences. Public education about the PRA and how it works, as discussed in Part A, would also help to raise awareness.

CONSULTATION QUESTIONS

B1 Do you agree with our preliminary view that the existing bilateral opt-out regime for de facto relationships is appropriate?

B2 Is the PRA's bilateral opt-out approach causing issues for de facto relationships? If so, would those issues be best addressed by re-examining that approach, or in other ways, such as education; changes to the definition of de facto relationship; changing the minimum duration requirement (see Part E); changes to the PRA's rules of classification and division (see Parts C and D); changes to the PRA's contracting out provisions (see Part J) or something else?

68 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 12.

69 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

Chapter 6 – The definition of de facto relationship

6.1 Under the PRA, a "de facto relationship" is a relationship between two people, both aged 18 years or older; who "live together as a couple"; and who are not married to, or in a civil union with, each other.[70] The definition is flexible because it relies on a high level of judicial discretion and takes a functional approach that looks at how a couple's relationship operates in practice rather than its form.[71] The definition is set out in full below.[72]

> **2D Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to, or in a civil union with, one another.
>
> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship:
>
> (b) the nature and extent of common residence:
>
> (c) whether or not a sexual relationship exists:
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
>
> (e) the ownership, use, and acquisition of property:
>
> (f) the degree of mutual commitment to a shared life:

70 Property (Relationships) Act 1976, s 2D(1).

71 See Margaret Briggs "What relationships should be included in a property division regime? A New Zealand perspective" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

72 Determining the duration of a de facto relationship, including start and end dates, is discussed in Part E.

(g) the care and support of children:

(h) the performance of household duties:

(i) the reputation and public aspects of the relationship.

(3) In determining whether 2 persons live together as a couple,—

(a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and

(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if—

(a) the de facto partners cease to live together as a couple; or

(b) one of the de facto partners dies.

Two people who "live together as a couple"

6.2 At the heart of the definition of de facto relationship is the concept of two people who "live together as a couple."[73] This was not always the case. Early drafts of the definition hinged on the central concept of a man and a woman living together "in a relationship in the nature of marriage."[74] The more neutral concept of two people living together as a couple emerged in 2000 at Select Committee stage.[75]

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73 The significance of the central concept of two people who "live together as a couple" is evident from the structure of the definition and several High Court decisions. The structure of the definition gives the concept of two people who "live together as a couple" in s 2D(1)(b) primacy over the factors listed in s 2D(2). In *Benseman v Ball* [2007] NZFLR 127 (HC) the High Court said at [20] that the "central inquiry must be whether the parties are living together as a couple and thus in a de facto relationship." In *L v P*

92007)26 FRNZ 946 (HC) the High Court said at [44] that "[t]he central plank of a de facto relationship is the parties living together."

74 For example, "de facto relationship" was defined in cl 17 of the De Facto Relationships (Property) Bill 1998 (108-1) as where "a man and a woman are living together in a relationship in the nature of marriage, although not married to each other." The concept of "a relationship in the nature of marriage" persisted in the definition of "de facto relationship" in Supplementary Order Paper No 25 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2).

75 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7. The Select Committee had received submissions that the proposed definition was unclear, and would be difficult and costly to define in court. Some submitters were offended at de facto relationships being defined as

6.3 The Parliamentary select committee considered who should be covered by the definition of de facto relationship. It said that: [76]

> *In considering what criteria to include in the definition of de facto relationship, we discussed who should be covered by this legislation. There is a wide variety of de facto relationships. At one end of the scale there are long-term relationships where a couple have children together, share property, operate as an economic partnership and are committed to sharing their lives. At the other end of the scale there are couples who live together, but are not committed to sharing their lives, remain financially independent and do not have children together. Such couples may be people who seek companionship and may be living in a de facto relationship expressly because they do not wish to share their property. We believe that a definition should aim to capture the first group, but avoid unduly covering the second.*

The factors in section 2D(2)

6.4 In determining whether two people live together as a couple, all the circumstances of the relationship must be considered, including the nine factors in section 2D(2) where relevant. However no factors are prerequisites for a de facto relationship.[77] A court may have regard to such matters, and attach such weight to any matter, as may seem appropriate in the case.[78] This means that two people may "live together as a couple" even if they do not physically live together in the same house, or are financially independent. In *S v S* the High Court said that "…the approach must be broad, with various factors weighed up in an evaluative task."[79]

6.5 Whether two people live together as a couple is case specific.[80] If both parties say they were in a de facto relationship, then "that may well be decisive direct evidence, depending on the existence

relationships "in the nature of marriage." The Select Committee saw the definition of de facto relationship in the New South Wales Property (Relationships) Act 1984 (NSW) and the criteria referred to in *T v Department of Social Welfare* (1993) 11 FRNZ 402 (HC) as a good starting point for what became the current definition of de facto relationship in s 2D of the Property (Relationships) Act 1976.

76 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

77 Property (Relationships) Act 1976, s 2D(3).

78 Property (Relationships) Act 1976, s 2D(3)(b).

79 *S v S* [2006] NZFLR 1076 (HC) at [64]. See also *B v F* [2010] NZFLR 67 (HC) at [51]; and *Benseman v Ball* [2007] NZFLR 127 (HC) at [20].

80 *PT v C* [2009] NZFLR 514 (HC) at [37]; and *S v S* [2006] NZFLR 1076 (HC) at [37].

of other characteristics."[81] However it is not uncommon for one party to deny the existence of a de facto relationship.[82] It is then up to a court to decide whether the parties lived together as a couple. As seen below, a range of committed relationships are de facto relationships. This highlights the flexibility of the definition. It also shows that relationships that are hard to categorise can end up in section 2D disputes.

The duration of the relationship

6.6 A long-term relationship is not necessarily a de facto relationship. In *C v S*[83] the parties had a 19 to 20 year relationship but did not share a common residence (even when they could have) and there was no financial commitment between them.[84] The parties carried on "an affair" of about two decades that never moved to where they were living together as a couple.[85] There the Family Court found that the parties were not in a de facto relationship.

6.7 A short-term relationship may still be a de facto relationship.[86] In *L v D*, a relationship of two years and three months was a de facto relationship.[87] Although the relationship was short, many of the section 2D(2) factors were present. The partners had a common residence for the whole period, a sexual relationship, the applicant carried out substantial unpaid work on the respondent's property, and the partners presented themselves publicly to their friends as a couple.

The nature and extent of common residence

6.8 Sharing a home is an important indicator that two people are in a de facto relationship, but is neither essential nor conclusive.[88]

81 *S v S* [2006] NZFLR 1076 (HC) at [64].

82 In *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010 the Family Court found at [4] and [15] that a de facto relationship existed, despite one party's "total denial" of the relationship and her "unyielding protestations" that the other party was never more than a boarder, albeit a boarder who did not always pay board.

83 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [71] and [74]. The issue in this case was whether the parties were in a de facto relationship as at 1 February 2002. The analysis was complicated by the fact that both parties were married to other people for periods of their relationship.

84 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [158].

85 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [159].

86 However different rules apply to short-term de facto relationships: see Part E.

87 *L v D* HC Blenheim CIV-2006-406-293, 2 November 2010.

88 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(2)]. See also *W v L* [2017] NZHC 388, [2017] NZFLR 299 where at [26] the High Court agreed with the Family Court that living at the same address cannot be determinative.

In *O'Shea v Rothstein* the High Court said that the expression "two people who live together as a couple" means more than physically living together as a couple.[89] The fact that a common residence is not shared at all times does not break the period of a de facto relationship provided that the true nature and characteristic of a de facto relationship remains.[90] In *S v S* the extent of common residence was not great, with the longest period of continuous cohabitation being nine months during a five year relationship. The High Court observed that "the absence of sharing a common residence is not determinative."[91]

6.9 Two people who share a home for a long period are not necessarily in a de facto relationship. In *PT v C* the parties shared a common residence for approximately 20 years.[92] They also had a sexual relationship for around five years, shared the care and support of their child, had a degree of financial interdependence and had a business relationship.[93] Despite these factors the High Court found they were not in a de facto relationship.[94] The relationship lacked the degree of mutual commitment to a shared life indicative of a de facto relationship.[95] One party had "divided loyalties" due to an intimate relationship with someone else, from which a child was born.[96]

6.10 In contrast, two people who live in separate homes can still be in a de facto relationship. In *G v B* the High Court found that the partners had been in a de facto relationship even though they maintained separate residences for lengthy periods of time because the interests of one partner's children required it.[97] The Court said that:[98]

> *There may be compelling reasons why a couple do not share a common residence for substantial periods of time whilst remaining totally committed to a long-term relationship. Ill-health and the need for medical treatment, the demands of*

89 *O'Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [20].

90 *S v S* [2006] NZFLR 1076 (HC) at [63].

91 *S v S* [2006] NZFLR 1076 (HC) at [42].

92 *PT v C* [2009] NZFLR 514 (HC) at [37].

93 *PT v C* [2009] NZFLR 514 (HC) at [37] and [45].

94 *PT v C* [2009] NZFLR 514 (HC) at [55] and [57].

95 *PT v C* [2009] NZFLR 514 (HC) at [55].

96 *PT v C* [2009] NZFLR 514 (HC) at [37]–[39] and [55].

97 *G v B* (2006) 26 FRNZ 28 (HC) at [35].

98 *G v B* (2006) 26 FRNZ 28 (HC) at [33].

employment or studies, the responsibility for childcare or other dependents, and financial need may separately or in combination require couples in committed relationships to live apart for long periods of time.

6.11 It can sometimes be difficult to determine if the parties had shared a common residence as flatmates, landlord and tenant or as de facto partners. This can be the case where a relationship starts as a commercial arrangement and evolves into something more. In *Z v C* the applicant, a migrant student, claimed that within 18 months of moving in she had started a de facto relationship with her elderly landlord.[99] The Family Court found they had developed an affectionate, mutually supportive and close relationship that included sexual contact.[100] Despite that, the Court was not satisfied that they were in a de facto relationship because "…[t]he range of their relationship simply did not develop to the extent that it can fairly or properly be said that they were "a couple" with a mutual commitment to a shared life for the foreseeable future."[101]

6.12 The reason the parties live in separate houses may be relevant.[102] In *S v S* the High Court observed that there are many examples outside the PRA where people living in separate houses or with different families were nevertheless "cohabiting", "so long as the parties retained the intention of cohabiting whenever possible so that their "consortium" was regarded as continuous."[103]

Whether or not a sexual relationship exists

6.13 Two people can be in a de facto relationship even if there is insufficient evidence of a sexual relationship.[104] A relationship where the partners' religious beliefs prevent them from living

99 *Z v C* [2006] NZFLR 97 (FC). See also *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010; *[LC] v T* [2012] NZFC 1702; and *G v R* [2013] NZHC 89, [2014] NZFLR 563.

100 *Z v C* [2006] NZFLR 97 (FC) at [47].

101 *Z v C* [2006] NZFLR 97 (FC) at [47].

102 See *G v B* (2006) 26 FRNZ 28 (HC) where the parties lived in separate houses for around half of their 12 year de facto relationship because the interests of one party's children required it, not because their level of commitment to each other changed.

103 *S v S* [2006] NZFLR 1076 (HC) at [40].

104 In *[LC] v T* [2012] NZFC 1702 the evidence fell short of establishing a sexual relationship at [14], but regardless the Family Court found that the parties were living together as couple, at [24].

together or having a sexual relationship can still be a de facto relationship.[105]

6.14 Similarly, two people can be in a de facto relationship even if they do not have an exclusive sexual relationship.[106] In *S v S*, the partners were in a de facto relationship although they were not monogamous.[107] The High Court said that:[108]

> *There may be instances where couples in a relationship operate on an understanding that each might have, from time to time, other sexual partners. There may be instances where intermittent sexual behaviour occurs but is kept secret from a partner for many years. Sexual fidelity may be a factor which, depending on the circumstances, may indicate a lack of commitment but it depends on all the circumstances.*

The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties

6.15 Financial dependence, interdependence or support is not a requirement for a de facto relationship but it can be an important factor. One text states that "[c]ouples who do not live together and maintain complete financial independence are unlikely to be regarded as living in a de facto relationship."[109] In *C v S* the absence of any financial commitment between the parties was a material consideration leading to the conclusion that their 19 to 20 year relationship was not a de facto relationship (see paragraph 6.6).[110] In that case, there was little pooling of resources or use of the other's independent funds and neither consulted the other regarding their future financial wellbeing.[111] However in a more recent case the High Court observed that the parties' separate finances were not a "…reliable indicator of the nature of the relationship between them, as separate financial arrangements

105 In *S v S* [2006] NZFLR 1076 (HC) at [37] Gendall and France JJ had "no doubt" that the relationship in *H v G* (2001) 20 FRNZ 404 (CA) would have been a de facto relationship for the purposes of the Property (Relationships) Act 1976.

106 Property (Relationships) Act 1976, ss 2D(3), 52A and 52B (which provide special property division rules for some contemporaneous relationships).

107 *S v S* [2006] NZFLR 1076 (HC).

108 *S v S* [2006] NZFLR 1076 (HC) at [44].

109 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(4)].

110 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [158].

111 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [158].

can be quite a common feature of settled de facto or married couples."[112]

6.16 Partners may still provide financial support to each other even if they have separate bank accounts and manage their money independently. In *S v S*, while the partners kept their financial affairs largely separate, Ms S depended financially on Mr S in the sense he provided her with a rent-free home and other benefits that enabled her to maintain a "generous lifestyle."[113]

6.17 Two people can be in a de facto relationship even if one partner receives a State benefit as a sole parent or has made a declaration for benefit purposes that they are not in a relationship.[114]

6.18 Two people can also be in a de facto relationship even if one pays rent to the other. In *C v W* board payments were evidence of a degree of financial interdependence, and represented the parties "having thrown their lot in together."[115] In all the circumstances of that case the Family Court found there was a de facto relationship.[116]

The ownership, use, and acquisition of property

6.19 It may be relevant whether property was acquired before or during the relationship; whether it is held in the name of one or both parties and to what degree; and whether it was used for family, investment or other purposes.

6.20 Two people can be in a de facto relationship even if they hold property in separate names. In *G v B* the High Court observed that how the parties had acquired and owned property showed a clear intention to maintain separate ownership, which "pointed away from a de facto relationship."[117] No property was acquired in joint names and, with the sole exception of cars bought for one party by the other, each paid for their own property when it

112 *W v L* [2017] NZHC 388, [2017] NZFLR 299 at [31]. In that case the parties did not operate a joint bank account and appeared to have kept their finances relatively separate. The High Court did not find a de facto relationship in that case, but for other reasons. See also *B v B* [2016] NZHC 1201, [2017] NZFLR 56.

113 *S v S* [2006] NZFLR 1076 (HC) at [45]–[47] and [65].

114 See *A v T* [2012] NZFC 7836; *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011; and *[LC] v T* [2012] NZFC 1702 for examples of how receipt of a benefit can affect the analysis of whether the parties were in a de facto relationship.

115 *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010 at [7], [15] and [20].

116 *C v W* FC Morrinsville FAM-2009-039-160, 26 April 2010 at [20].

117 *G v B* (2006) 26 FRNZ 28 (HC) at [16] and [38].

was purchased.[118] But the parties were in a de facto relationship due to their level of commitment, the existence of a constant physical and emotional relationship and the provision of financial support.[119]

The degree of mutual commitment to a shared life

6.21 The attitude of each party to the relationship can be important evidence, and is often "…used to distinguish an affair or infatuation from a de facto relationship, because it signifies a deeper and more meaningful relationship."[120]

6.22 A common argument is that the parties were merely "friends with benefits" and not de facto partners. In *G v R* the High Court found that despite Mr G's arguments that he was a boarder and the parties were "friends with benefits", the evidence supported a mutual commitment to a shared life to the extent that the conclusion that the parties were in a de facto relationship was "inevitable."[121]

The care and support of children

6.23 Care and support of any children may include physical care, financial support and non-financial support. In this context "children" is not limited to children of the relationship. While having children together may indicate that two people are living together as a couple, it is not determinative. In *PT v C*, two parents shared a common residence and cooperated in the upbringing of their daughter for over 20 years, but were not in a de facto relationship (see paragraph 6.9).[122]

The performance of household duties

6.24 Household duties may include home maintenance, gardening, cooking and cleaning. The way domestic work is shared in a relationship may need to be viewed in the light of other factors such as living arrangements and financial support. Household

118 *G v B* (2006) 26 FRNZ 28 (HC) at [16].

119 *G v B* (2006) 26 FRNZ 28 (HC) at [35].

120 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2D.04(6)].

121 *G v R* [2013] NZHC 89, [2014] NZFLR 563 at [4].

122 *PT v C* [2009] NZFLR 514 (HC).

duties performed for payment may suggest a commercial relationship rather than two people who live together as a couple.

The reputation and public aspects of the relationship

6.25 Establishing the public face of the relationship may require evidence from family, friends and colleagues; and may be illustrated through attendance at family and work functions as a couple, photographs of the parties presenting as a couple, and public displays of affection.

6.26 A clandestine relationship however may still be a de facto relationship. In *[LC] v T* the parties described their relationship to others as landlord/tenant or flatmates.[123] There was a considerable age gap between the parties, their relationship was a talking point in their community and they were in fraudulent receipt of a benefit. Yet other factors satisfied the Family Court that although the public aspects of the relationship were "somewhat problematic but understandable", the parties were living together as a couple.[124]

Issues with the definition of de facto relationship

6.27 Achieving a universal definition of de facto relationship is not an object of this review. The current legislative landscape contains three definitions of what is essentially the same concept: de facto relationship as defined in the PRA;[125] de facto relationship as defined in the Interpretation Act 1999;[126] and the phrase "a relationship in the nature of marriage."[127] The PRA's definition of de facto relationship is unique in that it hinges on the concept of two people who "live together as a couple" as opposed to a marriage/civil union analogy. Inconsistency across the statute

123 *[LC] v T* [2012] NZFC 1702 at [14] and [22].

124 *[LC] v T* [2012] NZFC 1702 at [22]–[24].

125 Property (Relationships) Act 1976, s 2D.

126 Interpretation Act 1999, s 29A.

127 The phrase "a relationship in the nature of marriage" is still used in s 63(b) of the Social Security Act 1964, s 66(2)(a) of the Veterans' Support Act 2014, s 8A of the Credit Contracts and Consumer Finance Act 2003, and s 384 of the Accident Compensation Act 2001.

book raises wider issues, because two people may be in a "de facto relationship" for some purposes but not others.

6.28 Our preliminary view is that having a unique definition of de facto relationship in the PRA is not an issue. The PRA defines de facto relationship for a specific purpose, to establish which relationships are subject to its rules about property division when the relationship ends. The central concept of the PRA definition (two people who live together as a couple) has advantages over a marriage/civil union analogy. The concept of two people who "live together as a couple" is comparatively neutral and may better accommodate couples who reject the religious and social connotations of marriage. The language of "coupledom" also allows room for a variety of two person relationships to be recognised in the PRA, and for de facto relationships to be recognised as a genuine "third option". Adopting a marriage/civil union analogy would not achieve a universal definition of de facto relationship because the inquiry will always be context specific.[128] We do however recognise that historical objections to a marriage analogy may not be as strong in 2017 as they were when this approach was rejected in 2000.[129] Same-sex marriage is now possible, and the meaning of marriage may have changed for some people.[130]

Does the definition include relationships that are not substantively the same as marriages and civil unions?

6.29 In Chapter 5 we set out our preliminary view that the PRA should continue to apply in the same way to all long-term relationships that are substantively the same, regardless of relationship type (see paragraphs 5.17 to 5.20). However we signalled there may be issues with whether the definition of de facto relationship captures relationships that are substantively the same as marriages and civil unions.

128 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8. For this reason a list of factors equivalent to those in s 2D(2) of the Property (Relationships) Act 1976 were not included in the definition of "de facto relationship" in s 29A of the Interpretation Act 1999: Relationships (Statutory References) Bill 2005 (151-2) (select committee report) at 4.

129 Matrimonial Property Amendment Bill 1998 nd Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8.

130 The Marriage (Definition of Marriage) Amendment Act 2013 amended the definition of marriage in the Marriage Act 1955 to allow same-sex marriage. Maureen Baker and Vivienne Elizabeth *Marriage in an Age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 188 said that "[c]learly, a diminishing number of people in the English-speaking countries see marriage as a sacrament, or even a union between a man and a woman."

6.30 There is an argument that the definition of de facto relationship risks capturing relationships that are not substantively the same as marriages and civil unions. This may be because the definition does not prioritise factors that are more indicative of a qualifying relationship. It may also be because of perceived differences in how de facto relationships function that are not sufficiently taken into account by the definition. If so, the PRA may fail to provide for a just division of property because it imposes the same general rule of equal sharing on relationships that are different.

6.31 There is also an argument that the current approach is appropriate. This may be because the flexibility inherent in the definition is thought to give courts the ability to exclude relationships that are not substantively the same as marriages and civil unions. It may be because the definition rightly avoids imposing additional requirements on de facto partners that do not exist for couples that are married or in a civil union, because to do so would raise issues under human rights law. Prioritising factors may set a higher bar for de facto relationships and could expect them to exhibit characteristics of a traditional marriage that are no longer hallmarks of a marriage or civil union today.

6.32 We consider below whether more weight should be given to some section 2D(2) factors in the definition of de facto relationship. This may be necessary to avoid unduly capturing relationships that are not substantively the same as marriages and civil unions. It may also be favoured to give more prominence to factors considered more indicative of a de facto relationship, in line with public expectations, or to address issues for particular groups.

CONSULTATION QUESTION

B3 Does the definition of de facto relationship unduly capture relationships that are not substantively the same as marriages and civil unions?

Should more weight be given to the nature and extent of common residence?

6.33 It might be more appropriate to give more weight to this factor because of what it suggests about the nature and quality of a relationship, and the extent to which the partners' lives are

intertwined. Some overseas jurisdictions have explored whether living together in a joint household should be a requirement.[131]

6.34 A relationship between two people who live in the same house may be more likely to exhibit other section 2D(2) factors (such as financial interdependence, shared ownership and use of property and performing household duties) than a relationship between a couple that live in separate houses. Such relationships may have a stronger link to the property divided when the relationship ends, such as the family home and chattels. Giving more weight to this factor would recognise that, for some couples, moving in together is a significant step and evidences a strengthening commitment to the relationship.

6.35 As this factor is said to probe both the quality and quantity of shared living,[132] it may also distinguish between an initial phase of living in the same house that could be seen as "co-residential dating" and couples for whom living together has taken on a deeper meaning.

6.36 The current approach to common residence may be surprising for some partners who live apart, in what are described as "Living Apart Together" (LAT) relationships. LATs are committed couples who live in separate houses for social, moral, religious or other reasons, including that it is more financially advantageous to do so.[133] There is little research about LATs in New Zealand. Most international studies agree that just under 10 per cent of adults are LAT, including studies in the United Kingdom and Australia.[134] Research from the United Kingdom identified four distinct profiles of LATs, occurring at different stages in the life

131 The Law Commission of England and Wales recommended that people should be "cohabitants" to be eligible to apply for financial relief on separation, that is where they are living together as a couple in a joint household and they are neither married to each other nor civil partners: Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.13]. Note that the Law Commission of England and Wales rejected the option of extending or modifying the Matrimonial Causes Act 1973 (UK) for cohabitants. In Sweden some rules apply at the end of a relationship between two people who live together permanently as a couple and with a joint household (so chores and expenses are shared): Cohabitees Act (2003:376) (Sweden), s 1. See also Ministry of Justice, Sweden *Cohabitees and their joint homes – a brief presentation of the Cohabitees Act* (2012) at 1. Note that the Cohabitees Act only provides a minimum level of protection for the financially vulnerable party upon the dissolution of a cohabitee relationship, and the value of the protection depends on what property is to be shared: Margareta Brattström "The Protection of a Vulnerable Party when a Cohabitee Relationship Ends – An Evaluation of the Swedish Cohabitees Act" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 345 at 346 and 354.

132 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [2.12].

133 Families Commission *The Kiwi Nest: 60 Years of Change in New Zealand Families* (Research Report No 3/08, June 2008) at 6.

134 Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) Journal of Family Issues 1 at 20; and Vicky Lyssens-Danneboom and Dimitri Mortelmans "Living Apart Together and Money: New Partnerships, Traditional Gender Roles" (2014) 76 Journal of Marriage at 950.

course.[135] One profile was "seniors" (13 per cent of individuals in LAT relationships). Most seniors were aged 50 and over and most had been married.[136] Seniors were most likely to be in long-term relationships and LATs out of choice, and least likely to have intentions to live in the same house.[137] This may be a growing group in New Zealand given our demographics.[138] The PRA's current approach to common residence may be an issue for older New Zealanders in LAT relationships where there is no expectation of property sharing when the relationship ends, or who do not appreciate that they may be in a de facto relationship even if they do not live in the same house. These LATs may wish to preserve their independence, and may seek to protect property acquired during a previous relationship for succession.

6.37 Giving more weight to common residence may, however, exclude relationships that should be subject to the PRA, for example some LAT relationships where the partners live in separate houses because of their children's needs or work commitments, or because they are forced to live apart for economic reasons, or because one partner is in prison or overseas.

CONSULTATION QUESTIONS

B4 Did you know that common residence is not a requirement for a de facto relationship?

B5 Should more weight be given to the nature and extent of common residence? If so, why?

Should more weight be given to financial dependence or interdependence and financial support?

6.38 Giving more weight to this factor might better align the criteria for a de facto relationship with the consequences of the PRA. It may avoid perceived unfairness, for example where the general rule of equal sharing is applied to relationships where finances were not shared. It may also better align with the partners' expectations and the way they conducted themselves during their relationship.

135 Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) 1 Journal of Family Issues 1 at 13. This research investigated 3,112 individuals in "living apart together" relationships.

136 Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) 1 Journal of Family Issues at 13.

137 Rory Coulter and Yang Hu "Living Apart Together and Cohabitation Intentions in Great Britain" (2015) 1 Journal of Family Issues at 14-15. Note that the study did not identify whether this group also included people who were LAT because their partner had gone into an aged care facility.

138 The proportion of New Zealand's population aged 65 and over is expected to increase from 14.3 per cent in 2013 to 26.7 per cent by 2063: Statistics New Zealand *2013 Census QuickStats about people aged 65 and over* (June 2015) at 7.

Using more individualised systems of money management is viewed by some as evidence of lower levels of commitment to the relationship.[139] There is precedent for this approach in other contexts. For example, financial interdependence is a prerequisite for a relationship in the nature of marriage for some benefit purposes.[140]

Case Study: financial independence

Aroha (55) and Justin (59) were in a relationship for just over ten years. During the relationship, they lived together in Justin's house on Linwood Street with Aroha's daughter Hine (13) and Justin's son, Hayden (32). Aroha and Justin both had good jobs. Both had been married before, and kept their money completely separate. They had no joint bank account. They valued their independence and liked the feeling of equality that came from splitting all the bills evenly down the middle, including the mortgage on the Linwood Street house. Aroha and Justin had an active social life together and shared a passion for motorsport. During their relationship they bought a rally car together which Hayden and Justin used in several events, with Aroha and Hine providing crew support. They also jointly owned several other cars, a bach and a boat. While they were together they hosted a reunion for Aroha's whānau and Christmas dinner each year for Justin's wider family. The Linwood Street house was dilapidated when Aroha moved in, and she did significant work to the property during the relationship including building a garden and deck, painting the bedrooms, sewing curtains and doing all the cleaning.

When the relationship ends, Aroha claims she was in a de facto relationship with Justin and is entitled to half of the house on Linwood Street. Justin consults his lawyer, Crystal. Crystal says that Justin and Aroha were probably in a de facto relationship because, among other things, their relationship lasted for just over ten years; they lived in the same house; they had a sexual relationship; owned and used property together; had a mutual commitment to a shared life and were considered by whānau and friends to be a couple. Crystal thinks Aroha probably has a good claim to half the relationship property. Justin is horrified that Aroha can claim half of the Linwood Street house even though they kept their money separate during their relationship. If Aroha is successful, the house will need to be sold, because Justin can't afford to buy out Aroha's share. Aroha's claim would also frustrate Justin's plans to leave the Linwood Street house to Hayden in his will.

6.39 However, giving more weight to this factor would risk excluding relationships where equality and commitment are expressed in different ways. It may be unwise to assume that independent money management indicates a lack of commitment without

139 Katherine J Ashby and Carole B Burgoyne "Separate financial entities? Beyond categories of money management" (2008) 37 Journal of Socio-Economics 458 at 462, referring to KR Heimdal and SK Houseknecht "Cohabiting and married couples' income organization: approaches in Sweden and the United States" (2003) 65 Journal of Marriage and Family 525, and RS Oropesa, NS Landale and T Kenkre "Income allocation in marital and cohabiting unions: the case of mainland Puerto Ricans" (2003) 65 Journal of Marriage and Family 910.

140 Social Security Act 1964, s 63; and *R v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

considering what the partners are trying to achieve by organising their money in a particular way.[141] It could also risk excluding vulnerable people in relationships that should otherwise be captured by the PRA, for example abusive relationships where no financial support is provided. The Parliamentary seelct committee ruled out making financial interdependence a prerequisite for a de facto relationship in 2001 for this reason.[142]

6.40 There is also an argument that the current appraoch is achieving its aim of not unduly capturing couples that remain financially independent.[143] In *C v S* the Family Court observed that:[144]

> *The lack of financial dependence or interdependence or support is not, in my view, an insignificant matter particularly when one considers that the object of the [PRA] itself is to ensure an equitable division of assets and income taking into account financial and non-financial contributions couples make in any union and it is reasonable to expect as an indicator of mutual commitment and living together as a couple that there would be some demonstration of financial regard for the other party in some fashion or mutual benefit even if segregation of income.*

6.41 We also note there are other ways of dealing with any perceived unfairness created by the current approach. For example, the application of the general rule of equal sharing to a de facto relationship characterised by financial independence may also be addressed by reconsidering how the PRA classifies relationship property which we discuss in Chapter 9.

6.42 These competing arguments should be evaluated in the light of what we know about the way couples who live together manage money.

What do we know about the way couples who live together manage money?

6.43 Some international research suggests a tendency for married couples to operate more or less as single economic units; whereas

141 Katherine J Ashby and Carole B Burgoyne "Separate financial entities? Beyond categories of money management" (2008) 37 Journal of Socio-Economics 458 at 476.

142 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 7–8.

143 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

144 *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006 at [105].

unmarried couples[145] are more likely to operate largely as two separate autonomous economic units.[146] The differences in how couples manage money appear to be more pronounced among "nubile"[147] and post-marital[148] unmarried couples, when compared to married couples.[149] The main exception is unmarried couples with children, who seem to organise their money in broadly similar ways to married couples.[150] Other international research paints a more nuanced picture.[151]

6.44 The available literature on money management within relationships in Australia and New Zealand is sparse and based on older data:[152]

(a) An Australian study using data from a 1997 nationally representative survey found that most unmarried couples, like most married couples, combined some or all of their income.[153] The authors suggested this indicated that living together is somewhat institutionalised in Australia and viewed as similar to marriage.[154] Children affected how couples organised their money, and couples with children aged under 13

145 "Unmarried couples" refer to couples who live together (or "cohabit") in the same household but are not married to each other. Some will be in a de facto relationship under the Property (Relationships) Act 1976. Others will not, because their relationship does not satisfy the criteria in s 2D of the Property (Relationships Act) 1976 (note that living together in the same house is not a requirement for a de facto relationship: ss 2D(2) and 2D(3)).

146 Carolyn Vogler "Cohabiting couples: rethinking money in the household at the beginning of the twenty first century" (2005) 53 Sociological Review 1 at 12–13, referring to KR Heimdal and Houseknecht "Cohabiting and married couples income organisation: approaches in Sweden and the United States" (2003) 65 Journal of Marriage and the Family 525, and J Treas and E Widmer "A multi-level analysis of financial management in marriage for 23 countries" in J Weesie and W Raub (eds) *The Management of Durable Relations* (Thela Thesis, Amsterdam, 2000).

147 "Nubile" unmarried couples who live together are young, childless and have never been married.

148 "Post-marital" unmarried couples are couples who live together after one or both have experienced a marital divorce.

149 Carolyn Vogler "Cohabiting couples: rethinking money in the household at the beginning of the twenty first century" (2005) 53 Sociological Review 1 at 9 and 17.

150 Carolyn Vogler "Cohabiting couples: rethinking money in the household at the beginning of the twenty first century" (2005) 53 Sociological Review 1 at 12–13, referring to S McRae *Cohabiting Mothers* (Policy Studies Institute, London, 1993), J Lewis *The End of Marriage* (Edward Elgar, Cheltenham, 2001), and A Winkler "Economic decision making by cohabitors: findings regarding income pooling" (1997) 29 Applied Economics 1079.

151 For example Lars Evertsson and Charlott Nyman "Perceptions and Practices in Independent Management: Blurring the Boundaries Between 'Mine,' 'Yours' and 'Ours'" (2014) 35 J Fam Econ Iss 65.

152 See also Supriya Singh and Jo Lindsay "Money in heterosexual relationships" (1996) 32(2) ANZJS 57, and Robin Fleming in association with Julia Taiapa, Anna Pasikale and Susan Kell Easting *The Common Purse* (AUP with Bridget Williams Books, Auckland, 1997).

153 Edith Gray and Ann Evans "Do couples share income? Variation in the organisation of income in dual-earner households" (2008) 43(3) Australian Journal of Social Issues 441 at 450.

154 Edith Gray and Ann Evans "Do couples share income? Variation in the organisation of income in dual-earner households" (2008) 43(3) Australian Journal of Social Issues 441 at 450, referring to A Evans and E Gray "What makes an Australian family?" in S Wilson and others (eds) *Australian Social Attitudes: The first report* (UNSW Press, Sydney, 2005).

were more likely to combine their incomes completely than couples with no children or older children.[155]

(b) A New Zealand study of unmarried couples, based on 20 in-depth interviews during the early 1990s, found that some unmarried couples jointly managed their money.[156] Joint money management was most common among unmarried couples with children; however the majority had initiated joint money management many years previously when they moved in together and prior to having children.[157] This study also found that independent money management was adopted by some unmarried couples to avoid financial dependency and achieve equality and autonomy, by retaining control over separate money and a sense of contributing equally to the relationship.[158] It was suggested that independent money management is likely to become increasingly significant as the number of unmarried couples continues to grow in New Zealand.[159]

Should more weight be given to the degree of mutual commitment to a shared life?

6.45 Mutual commitment to a shared life is often regarded as central to the definition of de facto relationship.[160] It is also the only factor in section 2D(2) that touches on the "emotional commitment" described in *R v Department of Social Welfare* as one of the two prerequisites of a relationship in the nature of marriage.[161] There may be a case for giving more weight to this factor because a de facto relationship is unlikely to exist without the

155 Edith Gray and Ann Evans "Do couples share income? Variation in the organisation of income in dual-earner households" (2008) 43(3) Australian Journal of Social Issues 441 at 446–447.

156 Vivienne Elizabeth "Managing money, managing coupledom: a critical examination of cohabitant's money management practices" (2001) 49 Sociological Review 389 at 395.

157 Vivienne Elizabeth "Managing money, managing coupledom: a critical examination of cohabitant's money management practices" (2001) 49 Sociological Review 389 at 395.

158 Vivienne Elizabeth "Managing money, managing coupledom: a critical examination of cohabitant's money management practices" (2001) 49 Sociological Review 389.

159 Vivienne Elizabeth "Managing money, managing coupledom: a critical examination of cohabitant's money management practices" (2001) 49 Sociological Review 389 at 389.

160 *M v P [De facto relationship]* [2012] NZFLR 385 (HC) at [27], referring to *S v S* [2006] NZFLR 1076 (HC) at [32], and Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2009) 39 VUWLR 813 at 823.

161 Emotional commitment and financial interdependence and support are the two prerequisites for a relationship in the nature of marriage for some benefit purposes. See Social Security Act 1964, s 63 and *R v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

"mental ingredient", being commitment by the partners to their relationship.

Should more weight be given to the care and support of children?

6.46 Our preliminary view is that the existence of a child is not conclusive evidence that his or her parents were in a de facto relationship. Sometimes it may be appropriate to attach significant weight to this factor, for example where the parties have made a planned, joint decision to have a child. However, a child may not always be a reliable indicator of a relationship between two people, for example where the child is the unplanned result of a fleeting association.

Should less weight be given to some section 2D(2) factors?

6.47 Giving more weight to some section 2D(2) factors requires a decision that other factors are less important in determining whether two people live together as a couple. We are interested in whether some section 2D(2) factors should be given less weight than others. In particular:

(a) **Whether or not a sexual relationship exists.** The existence of a sexual relationship may be less important in 2017. Sexual mores are said to have become more liberal over time, and today a sexual relationship is not necessarily indicative of a mutual commitment to a shared life.[162] There may be greater recognition of romantic and loving non-sexual relationships based on companionship or where one or both partners identify as asexual. Undue focus on the existence, nature or extent of a sexual relationship may also be seen as inconsistent with the PRA's focus on how property is divided up when a relationship ends.[163] It may also raise evidential issues that may be less relevant when assessing property entitlements.[164]

162 *Craig v Keith* [2017] NZHC 1720 at [44].

163 Property (Relationships) Act 1976, s 1C(1); and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 5.

164 See for example *D v B* FC Napier FAM-2005-041-591, 17 May 2007.

(b) **The performance of household duties.** This may be a less important factor because of the way work is shared or outsourced in some relationships, or because it is considered to have less or no bearing on whether two people live together as a couple. Giving less weight to this factor may, however, be thought to undervalue work in the home and may not be a good conceptual fit with the way the PRA treats all forms of contribution to the relationship as equal.[165]

165 Property (Relationships) Act 1976, s 1N(b). See *King v Church* [2002] NZFLR 555 (CA) at [33].

CONSULTATION QUESTION

B6 Do the range of factors in section 2D(2) still reflect what should be considerations when deciding whether two people are in a de facto relationship? Are any of the factors more, or less important?

Does the definition achieve the right balance between flexibility and certainty?

6.48 McCarthy says that the "biggest criticism" levelled at the PRA's treatment of de facto relationships surrounds the definition of de facto relationship and how it has been interpreted and applied by the courts.[166] In particular:

(a) The definition is criticised for being too broad to provide effective guidance. Grainer notes that key terms and phrases like "relationship" and "live together as a couple" are not defined in the PRA:[167]

> *The operative phrase "living together as a couple" is hardly less vague than the term "de facto relationship." Nor is the matter significantly clarified by the enumerated factors. Taken together, they convey virtually every aspect of human interaction.*

(b) It is difficult to look to previous cases to find guidance on when two people are "living together as a couple", or even to distil any "universal principles".[168] This is because none of the factors in section 2D(2) are prerequisites and each case turns on its own facts.[169] For example, in *PT v C* the parties shared a common residence for over 20 years but were not in a de facto relationship,[170] and in *G v B* the partners maintained separate residences for lengthy periods but were in a de facto relationship.[171] Although there were other factors at play in those cases, they illustrate the point that section 2D cases have limited precedent value.

166 Frankie McCarthy "Playing the Percentages: New Zealand, Scotland and a Global Solution to the Consequences of Non-Marital Relationships?" (2011) 24 NZULR 499 at 505–506.

167 Virginia Grainer "What's Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand" (2002) 11(2) Pacific Rim Law & Policy Journal 285 at 303.

168 Simon Jefferson "De facto or 'friends with benefits'" (2007) 5 NZFLJ 304.

169 Property (Relationships) Act 1976, s 2D(3).

170 *PT v C* [2009] NZFLR 514 (HC).

171 *G v B* (2006) 26 FRNZ 28 (HC).

(c) The discretion in the definition is an awkward fit with the PRA's rules-based regime. Briggs says that:[172]

> *…[t]he broad discretion in s 2D is an awkward inclusion in legislation that has stripped so many other discretions away from the judiciary. By comparison, the court has little or no discretion on the issue of the division of the relationship property. While there are some provisions that allow a departure from equal sharing, these provisions are designed to apply in exceptional cases only. None relates to a discretion so central as that found in s 2D, where the court must rule on the status of the relationship, which in turn, either qualifies or disqualifies entry to the [PRA's] inflexible equal sharing rules. Such an uncertain access route into a rigid code can turn the process into an expensive gamble for potential applicants.*

6.49 There are however advantages in having a flexible definition of de facto relationship. The lack of prerequisites for "living together as a couple" allows the definition to accommodate the diversity of relationships that should be subject to the PRA's rules, and flexibility allows the definition to evolve through judge-made law as relationship formation and separation patterns change.

6.50 Some research suggests that the definition of de facto relationship is fulfilling the original aims of the Parliamentary select committee (see paragraph 6.3).[173] A study from 2002 to 2009 found that an issue about whether a relationship was wholly or in part a de facto relationship arose in 43 per cent of de facto cases.[174] However only 12 per cent involved questions about whether the entire relationship had crossed the threshold to become a de facto relationship.[175] Cleary said that there is no

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172 Margaret Briggs "The Formalization of Property Sharing Rights For De Facto Couples in New Zealand" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 329 at 337.

173 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 9–10; Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (University of Otago, 2012) at 3.27; and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 8.

174 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012). Cleary identified and analysed 316 electronically available cases on the Brookers and LexisNexis legal databases involving relationship property disputes. At 9: "From the reported judgments 144 relationship property cases involved de facto partnerships or de facto relationships that had evolved into marriage. In 83 of these cases the existence of a de facto relationship was not an issue but in 61 cases s 2D was an issue. This represents 42.7% of de facto cases involving issues around whether they existed in their entirety or at certain points." See also Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (University of Otago, 2012) at [3.26].

175 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 9.

real need to change the definition unless it catches people unintentionally.[176] He concluded that the cases seem to suggest that the definition is working as the Parliamentary select committee intended (see paragraph 6.3).[177] This research is, however, based on data drawn from reported cases and only gives us information about the small proportion of de facto relationships that end in a dispute resolved by the court. These are more likely to be contentious cases because they involve unusual facts. We do not know what happens in those cases that are resolved out of court, which makes public consultation on this issue important.

6.51 Whether the definition of de facto relationship achieves an appropriate balance between flexibility and certainty is an important question:

(a) The PRA has significant implications for de facto relationships. If a de facto relationship lasts for three years, the general rule of equal sharing usually applies. People should know if they are subject to the PRA so they can organise their personal affairs accordingly. If the definition is sufficiently certain, couples can make a conscious decision whether to enter a de facto relationship. They can also make better informed decisions about resolving any disputes.

(b) If the definition is too uncertain, it can:

- undermine the right to contract out of the PRA,[178] if partners do not appreciate that they are drifting towards a de facto relationship or that they are already in one, they will not have the same opportunity to exercise this right; and
- increase the need for couples to obtain legal advice or litigate to determine whether they are in a de facto relationship, which may undermine the principle in section 1N(d) that issues should be resolved "as inexpensively, simply, and speedily as is consistent with justice."

176 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 9.

177 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 10.

178 The Property (Relationships) Act 1976 is an "opt-out" regime because it applies to a de facto relationship unless the partners have agreed on a different way to divide property: see pt 6.

CONSULTATION QUESTION

B7 Does the definition of de facto relationship achieve the right balance between flexibility and certainty?

Options for reform

6.52 If the issues identified above require reform, there are three possible options that could achieve a better balance between certainty and flexibility, or would better capture the essence of what it means to be in a de facto relationship for the purposes of the PRA.

Option 1: Make section 2D(2) an exhaustive list of factors

6.53 One option is to limit the matters that are relevant when determining whether two people live together as a couple to the factors specified in section 2D(2). A court would no longer have the discretion to consider all the circumstances of the relationship.[179] This would make section 2D(2) an exhaustive (rather than inclusive) list of factors.[180]

6.54 This option would increase certainty by restricting a court's inquiry to a known list of factors that capture what might be considered to be key matters relevant to determining whether two people live together as a couple. It is, however, unlikely to increase certainty in a significant way unless the list of factors is prioritised or reduced. This is because the list is so wide-ranging that it is said to convey "virtually every aspect of human interaction."[181]

179 Property (Relationships) Act 1976, s 2D(2).

180 The current definition of de facto relationship requires a court to consider all the circumstances of the relationship, including any relevant s 2D(2) factors: Property (Relationships) Act 1976, s 2D(2).

181 Property (Relationships) Act 1976, s 2D; *L v P* 26 FRNZ 946 (HC) at [44]; and Virginia Grainer "What's Yours is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand" (2002) 11(2) Pacific Rim Law & Policy Journal 285 at 303.

Option 2: Give more weight to one or more section 2D(2) factors

6.55 This option could be achieved by requiring a court to have *particular regard* to one or more of the section 2D(2) factors in deciding whether two people live together as a couple.[182] The remaining section 2D(2) factors would remain relevant as "indicators" to be considered, where relevant.

6.56 This option could increase certainty and give more weight to factors considered more important characteristics of a relationship to which the PRA should apply. It could address issues for particular groups. For example, giving more weight to common residence would make it harder for some couples in LAT relationships to qualify as de facto partners. It would retain elements of section 2D and some associated case law may therefore remain relevant. Giving more weight to some factors as opposed to making them requirements would retain a relatively high level of judicial discretion and flexibility.[183]

Option 3: Introduce rebuttable presumption(s) that two people are in a de facto relationship

6.57 The final option we are considering is adopting one or more rebuttable presumptions that two people are in a de facto relationship if certain factors are present.

6.58 The American Law Institute's[184] proposed definition of "domestic partners" is an example of this approach. That definition contains three elements:[185]

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182 The factors we considered at [6.29]–[6.39] were common residence; financial interdependence and support; mutual commitment to a shared life; and the care and support of children.

183 We have not put forward, as a separate option, making some or all of the factors listed in s 2D(2) mandatory requirements. While this would significantly increase certainty, it would also be considerably less flexible than the current approach. We think that it risks excluding relationships to which the Property (Relationships) Act 1976 should apply. It would also impose requirements on de facto relationships that do not exist for marriages or civil unions (see [6.31]) and may raise issues under human rights law.

184 The American Law Institute (ALI) is an independent organisation in the United States that produces scholarly work to clarify, modernise and improve the law: see <www.ali.org>. In *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) the ALI reviewed and analysed divorce and related family law issues throughout the United States, and described approaches to areas such as child custody, child and spousal support, division of property, marital agreements and unmarried domestic partners. It proposed a wide range of regulations for the legal termination of domestic unions.

185 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03].

(a) first, a basic definition of "domestic partners" as two unmarried people who, for a significant period, share a primary residence and a life together as a couple;[186]

(b) second, an absolute rule that two people are domestic partners where they have maintained a common household with their children for a set period, such as two years;[187] and

(c) third, a presumption that two people without children are domestic partners when they have maintained a common household for a set period, such as three years, which is rebuttable by evidence that the parties did not share a life together as a couple.

6.59 The American Law Institute expected that this approach would minimise the need for detailed inquiry into couples' lives, as most cases would be decided under the absolute rule or the rebuttable presumption.[188]

6.60 A similar approach could be adopted in the PRA. For example, the basic definition of de facto relationship in section 2D could be retained, and new rebuttable presumption(s) could be introduced, for example:

(a) partners are presumed to be in a de facto relationship when they have shared a primary residence and maintained a common household with a child of the relationship for a set period, such as two years;[189] and

(b) partners are presumed to be in a de facto relationship when they have shared a primary residence and maintained a joint household for a set period, such as three years.

186 Whether two people share a life together as a couple is to be determined by reference to all the circumstances, including listed matters such as the extent to which the parties intermingled their finances and the emotional or physical intimacy of the parties' relationship: The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(7)].

187 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(4)]: "[p]ersons maintain a common household when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household."

188 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at 920.

189 We do not adopt the approach of the American Law Institute in making this an absolute rule, as this raises issues under human rights law: see New Zealand Bill of Rights Act 1990, s 19, and Human Rights Act 1993, s 21(l). We also think that it would be too great a generalisation to assume that all couples with children are in a de facto relationship.

6.61 A presumption could be rebutted by evidence that the parties did not live together as a couple, to be determined by considering all the circumstances, including the factors in section 2D(2). This would retain some of the existing building blocks of section 2D while accommodating a need to give more weight to other section 2D(2) factors such as common residence.

6.62 This option could increase certainty and reduce the need for detailed inquiry where a presumption applies, while retaining an element of flexibility and judicial discretion. It would also change which party has the burden of proof. At present the party asserting that a de facto relationship existed must generally prove that in court.[190] This option would shift that burden to the party wishing to avoid the PRA's rules where a presumption applies. This may protect a vulnerable applicant, but also has the potential to harm a vulnerable defendant, for example an older person that drifts into circumstances that satisfy a presumption unawares. The burden of proof in PRA proceedings is discussed further in Part H.

CONSULTATION QUESTION

B8 Would any of these options achieve a better balance between flexibility and certainty, or better capture the essence of what it means to be in a de facto relationship?

Should any changes have retrospective or prospective effect?

6.63 A final issue for consideration is when any changes to the definition of de facto relationship should take effect. The general rule is that new legislation should be forward looking, or prospective, and not apply to peoples' past actions.[191] The 2001 amendments were unusual because they extended the PRA to include de facto relationships on a retrospective basis.[192] This meant that the PRA applied to de facto relationships that began before the amendments came into force on 1 February 2002, and

190 See *H v G* FC Lower Hutt FAM-2005-032-527, 6 December 2006 at [3]; and *M v B* [2006] 3 NZLR 660 (CA) at [39]: "… although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime." See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.23]: "The role of the Courts under the [PRA] is to some degree an inquisitorial one to do justice between the parties rather than to consider a claim in a strictly adversarial context."

191 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

192 Property (Relationships) Act 1976, s 4C.

were still in existence as at that date.[193] As a result, the actions of unmarried couples before 1 February 2002 were given legal consequences they may not have anticipated.[194] There was a delay between the date the amendments were made and the date they came into force to enable people to learn about the new regime and organise their affairs.[195]

6.64 Changing the definition of de facto relationship on a retrospective basis would follow the approach taken in 2001.[196] It would avoid the confusion and complexity associated with having a different definition for relationships that began before any amendments came into force. It would, however, be inconsistent with the general rule that legislation should have prospective, not retrospective effect.[197] Legislation should not interfere with accrued rights and duties.[198] While retrospective legislation might be appropriate where it is intended, for example, to be entirely to the benefit of those affected,[199] a new definition of de facto relationship may not satisfy that goal. A new definition could disadvantage people by eroding their property rights or overturning property arrangements made before the PRA was extended to apply to them.[200]

CONSULTATION QUESTION

B9 Should any new definition of de facto relationship have retrospective or prospective effect?

193 Property (Relationships) Act 1976 (PRA), s 4C; and Property (Relationships) Amendment Act 2001, s 2. Note that an order cannot generally be made under the PRA for the division of relationship property in respect of a de facto relationship of short duration unless the test in s 14A is passed.

194 See Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at PR4C.01.

195 The Property (Relationships) Amendment Bill had its third reading on 29 March 2001: (29 March 2001) 591 NZPD 8640; and received Royal Assent on 3 April 2001. The relevant provisions of the Property (Relationships) Amendment Act 2001 came into force on 1 February 2002: Property (Relationships) Amendment Act 2001, s 2. Note that some contracting out provisions came into force earlier on 1 August 2001: Property (Relationships) Amendment Act 2001, ss 2 and 21(2).

196 Any change to the definition of de facto relationship in the Property (Relationships) Act 1976 (PRA) will also require careful consideration to avoid unintended consequences. This is because the PRA definition in s 2D is also used in other Acts, for example in s 60(1) of the Family Proceedings Act 1990; s 2(1) of the Administration Act 1969; s 2(1) of the Family Protection Act 1955; and s 75A of the Estate and Gift Duties Act 1968.

197 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

198 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

199 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 43.

200 A potential middle ground is a partially retrospective option that applies the Property (Relationships) Act 1976 regime to existing relationships if they continue for a certain period, such as 3 years, from the commencement of the legislation. This option was identified by the Ministry of Justice in advice to the Parliamentary select committee considering Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill (109-2). The Ministry noted that this was likely to be seen as unfairly favouring one class of relationships over another. Another partially retrospective option identified by the Ministry of Justice was to include existing relationships where there were children, which they also noted could be seen as unfairly favouring one class of relationships over another. See Ministry of Justice *Advice to the Justice and Electoral Committee on the SOP to Matrimonial Property Amendment Bill*, (5 September 2000) at [1].

Chapter 7 – Specific relationship types and family arrangements

7.1 This chapter considers issues with the definition of de facto relationship that may arise for specific relationship types and family arrangements. We look at Māori customary marriage, relationships involving young people, contemporaneous relationships and relationships with and between members of the LGBTQI+ community.[201] We also consider whether the PRA should be extended to include other relationship types such as multi-partner relationships and domestic relationships (platonic, interdependent relationships between two people who provide care and support for each other).

Māori customary marriages

7.2 Māori customary marriages have as their basis tikanga Māori and whānau approval. Traditionally it was the public expression of whānau approval, as opposed to a formal ceremony or cohabitation, which established a couple as married.[202] The breakdown of the relationship would bring the union to an end.[203] Metge has said that Māori were "…well ahead of the rest of New Zealand society in accepting de facto unions and non-blame divorce."[204]

7.3 As discussed in Part A, most Māori married according to their own custom until the early twentieth century.[205] Successive marriage laws required Māori to conform more closely to the legal requirements for establishing marriage until, in the 1950s, legal recognition of customary marriage was removed.[206] However

201 LGBTQI+ means Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex+.

202 Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

203 Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

204 Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

205 Megan Cook "Marriage and partnering - Marriage in traditional Māori society" (4 May 2017) Te Ara — the Encyclopedia of New Zealand <https://teara.govt.nz>.

206 Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22. Section 8(1) of the Māori Purposes Act 1951 and s 78 of the Māori Affairs Act 1953 both provided that:

subsequent law changes that eliminated the discrimination of children based on their parents' marital status, and the growing prevalence of de facto relationships among non-Māori, reduced pressure for Māori couples to officially register a marriage.[207] It is not known how many Māori marry according to custom in contemporary New Zealand, but two relatively recent court cases illustrate that the practice continues.[208]

7.4 It likely that a Māori customary marriage would fall within the definition of a de facto relationship.[209] This means that in a formal legal sense Māori who have married according to custom are governed by the PRA, not by principles of whanaungatanga.

7.5 In contrast to the law applying to de facto relationships, customary marriage does not carry with it any rights to property held by the other spouse.[210] For example, it was common practice for the wife's parents to gift land to the married couple.[211] If the land was gifted to the husband, the right to occupy could terminate on the wife's death and the land would revert to her family as gifting only conveyed a temporary right.[212] Whanaungatanga may be more important to property rights than marriage:[213]

> *… because of the emphasis they place on descent, Maori do not in general give marriage the priority over all other relations that it has in law. They accept that there are times and circumstances where a person's loyalty and commitment lies with his or her*

Every marriage to which a Māori is a party shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European; and all provisions of the Marriage Act 1908 shall apply accordingly.

The Māori Affairs Act also invalidated all future Māori customary marriages and any marriages entered into in the past, except as expressly provided by that Act (s 79).

207 Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Review" (1998) 10 Social Policy Journal of New Zealand at 6.

208 *Re Adoption of T* (1992) 10 FRNZ 23 (DC); and *Re R (Adoption)* (1998) 17 FRNZ 498 (FC). Both were cases concerning the Adoption Act 1955 and whether the couples in question could adopt without being legally married: Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 487.

209 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 International Journal of Law, Policy and the Family 327 at 335.

210 Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451. See also the discussion on marriage and property practices in traditional Māori society in Part A.

211 Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451.

212 Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 451, citing N Smith *Māori Land Law* (AH and AW Reed, Wellington, 1960) at 37. Ruru refers to situations where the husband has a blood link to the land and where there are children of the marriage as possible exceptions.

213 Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

descent line before his or her spouse: e.g. with regard to the transmission of ancestral land and taonga, contribution to whanau activities (especially in connection with tangihanga) and support of kin.

7.6 Ruru states that the extension of the PRA to de facto relationships allows someone in a Māori customary marriage to turn his or her back on the nature of the relationship and, upon death or separation, claim a half-share in relationship property as an entitlement under the PRA.[214] Conflict could conceivably arise between the whānau and the person claiming a half-share in property that may, under tikanga, more properly be property of the whānau.[215] However the extent to which this is an issue may be affected by the exclusion of Māori land from the PRA's ambit and the exclusion of taonga from the definition of family chattels.[216]

CONSULTATION QUESTIONS

B10 To what extent should Māori customary marriage be subject to the PRA?

B11 Should different rules apply to Māori customary marriage? If so, what would those rules provide? Would they still apply if the parties to the Māori customary marriage also entered a marriage or civil union? Would they be affected by the PRA's approach to classification of property (discussed in Part C) (including or excluding Māori land from the PRA and taonga from the definition of family chattels)?

Relationships involving young people

7.7 The PRA requires that both partners in a de facto relationship be aged 18 or over.[217] This has two important consequences for young people:

(a) first, a de facto relationship will not be covered by the PRA if it ends before the youngest partner turns 18;[218] and

214 Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 488. See also Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 International Journal of Law, Policy and the Family 327 at 335.

215 Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467at 488.

216 Property (Relationships) Act 1976, ss 2 and 6.

217 Property (Relationships) Act 1976, s 2D(1)(a).

218 Property (Relationships) Act 1976, s 2D(1)(a).

(b) second, a de facto relationship that ends before the youngest partner turns 21 will be a short-term de facto relationship, even if the relationship was longer than three years.[219]

7.8 This means that the earliest point at which a division order could be made, applying the PRA's general rule of equal sharing, is when the youngest partner turns 21. This may disadvantage young people in relationships that, but for the age limit, would be covered or treated differently by the PRA. This is illustrated in the case study below.

Case study: Young people in a relationship

Samara (16) begins a relationship with Marcus (25) that, but for the age limit in the PRA, would immediately qualify as a de facto relationship. They have a child, Asha, who is born when Samara is 18. The relationship lasts for four years, ending when Samara is 20. But for the age limit, this would be long enough for the PRA's general rule of equal sharing to automatically apply. However, due to the age limit, a qualifying de facto relationship only started when Samara turned 18. When the relationship ended Samara was 20, making the relationship a short-term de facto relationship. Samara must therefore satisfy the court that failure to make an order under the PRA for the division of relationship property would cause serious injustice.[220] If she can establish serious injustice, the relationship property will be divided in accordance with each partner's contribution to the relationship.[221]

7.9 The PRA's age limit for de facto relationships is inconsistent with the age limit in the general definition of de facto relationship in the Interpretation Act 1999 (18 years, or 16 or 17 years with the consent of both guardians or, if that cannot be obtained, a Family Court Judge).[222] It is also different to the age for entering a marriage or civil union (18 years, or 16 or 17 years with consent of specified individuals such as guardians).[223] Different treatment based on age raises issues under human rights law.[224] It may also

219 This is because the "clock starts ticking" when the youngest partner turns 18, not when the de facto relationship commenced (if earlier): Property (Relationships) Act 1976, ss 2D(1)(a) and 2E(1)(b). Note that a court can also treat a long-term relationship as a short-term relationship if it considers it just: s 2E(1)(b)(ii). Special rules apply to short-term relationships: s 14A. Short-term relationships are discussed in Part E.

220 Property (Relationships) Act 1976, s 14A(2)(b).

221 Property (Relationships) Act 1976, s 14A.

222 Interpretation Act 1999, s 29A. Note that cl 14 of the Legislation Bill 2017 (275-1) would replace the definition of de facto relationship in s 29A of the Interpretation Act, but retain the age limit and the central concept of two people who "live together as a couple in a relationship in the nature of marriage or civil union."

223 Marriage Act 1955, ss 17 and 18; and Civil Union Act 2004, ss 7 and 19. Note that the Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) proposes that 16 and 17 year olds who wish to marry must obtain consent to the marriage from a Family Court Judge (cl 5). This Bill has arisen out of the concern that some 16 and 17 year olds may be undergoing forced marriage.

224 See Human Rights Act 1993, s 21(1)(i), and New Zealand Bill of Rights Act 1990, s 19(1).

enable partners to escape obligations they would have had, had they been in a marriage or civil union.

7.10 However there is another view that the higher age limit for de facto relationships in the PRA may protect young people who drift into a de facto relationship, as it gives them more time to recognise that their legal status is changing and contract out of the PRA should they wish to.[225]

7.11 Younger people are more likely to be in a de facto relationship.[226] This may in part reflect the legal restriction on people marrying before age 18.[227] We do not know how many young people are adversely affected by the PRA's age limit for de facto relationships. Situations involving young people with substantial assets are likely to be rare, although that will not always be the case, for example where a young person has received an inheritance.[228] There are also restrictions built into the definition of de facto relationship itself, which limit the number of young people in a de facto relationship under the PRA.[229]

7.12 Young people may also look to the general law of contract or equity for a remedy when their relationship ends, for example a claim that a constructive trust existed over certain assets. However those remedies may be difficult and costly to access and may lead to a less favourable result for the claimant than would have been the case if the PRA applied.

7.13 An option would be to amend section 2D(1)(a) to lower the age limit for entering into a de facto relationship. This could be done by amending section 2D(1)(a) to reflect the age limit for entering into a de facto relationship under the Interpretation Act 1999 (see paragraph 7.9).

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225 Note that there is an exception to the general age of contractual capacity (18 years) that allows a minor who is not and has not been in a marriage or civil union to contract out of the Property (Relationships) Act 1976 with court approval. See Minors Contracts Act 1969, ss 2(1) and 6(1), and Property (Relationships) Act 1976, s 21I.

226 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

227 Marriage Act 1955, ss 17 and 18. Consent to marriages between 16 and 17 year olds occurs on average about 80 times each year: Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017 (256-1) (explanatory note) at 1. Consent for a marriage involving a party aged 16 or 17 must be obtained from specified individuals such as the minor's guardians: see ss 17 and 18 of the Marriage Act 1955.

228 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 2.4.3; and Margaret Briggs "The Formalization of Property Sharing Rights For De Facto Couples in New Zealand" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Austria, 2009) 329 at 334.

229 Property (Relationships) Act 1976, s 2D.

CONSULTATION QUESTIONS

B12 Can the age limit of 18 years for a de facto relationship be justified, and if so, on what grounds?

B13 Should the age limit for entering into a de facto relationship be 18 years, or 16 or 17 years with consent of both guardians or, if that cannot be obtained, a Family Court Judge?

Relationships with and between members of the LGBTQI+ community

7.14 The LGBTQI+ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex+) community includes:[230]

> *… people who identify as takataapui, lesbian, gay, bisexual, queer, heterosexual, intersex, female, male, transsexual, transgender, whakawāhine, tangata ira tane, mahu (Tahiti and Hawaii), vakasalewalewa (Fiji), palopa (Papua New Guinea), fa'afafine (Samoa, America Samoa and Tokelau), akava'ine (Cook Islands), fakaleiti or leiti (the Kingdom of Tonga), or fakafifine (Niue).*

7.15 The PRA's definition of de facto relationship clearly includes same-sex relationships that satisfy the criteria in section 2D. Under the PRA, a de facto relationship includes "… a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman) …."[231] The definition does not use the inclusive language now in other statutes such as the Marriage Act 1955, which defines a marriage as the union of two people "regardless of their sex, sexual orientation or gender identity."[232] The same inclusive language is proposed in the Legislation Bill 2017, which would amend the general definition of de facto relationship in the Interpretation Act 1999.[233]

230 Human Rights Commission "Sexual Orientation, Gender Identity, and Sex Characteristics" <www.hrc.co.nz>. The Human Rights Commission defines intersex as a term "…used for a variety of conditions in which a person is born with reproductive or sexual anatomy that does not seem to fit the typical biological definitions of female or male"; a transsexual is defined as "[a] person who has changed, or is in the process of changing, their physical sex to conform to their gender identity"; and a person who is transgender is defined as someone "… whose gender identity is different from their physical sex at birth": see Human Rights Commission "Trans People: Facts and Information Resource – Terminology" <www.hrc.co.nz>. See also Elizabeth Kerekere "Part of the Whānau: The Emergence of Takatāpui Identity *He Whāriki Takatāpui*" (PhD Thesis, Victoria University of Wellington, 2017) for recent research on takatāpui.

231 Property (Relationships) Act 1976, s 2D(1).

232 Marriage Act 1955, s 2(1). The same language is proposed in the Legislation Bill 2017 (275-1) for the general definition of de facto relationship in the Interpretation Act 1999.

233 Legislation Bill 2017 (275-1), cl 14; and Interpretation Act 1999, s 29A.

7.16 The flexibility inherent in the PRA's definition of de facto relationship may work well for some members of the LGBTQI+ community.[234] For example, some people may have trouble evidencing factors in section 2D(2) such as the reputation and public aspects of their relationship because they have not disclosed their sexuality to friends and family.[235] The Lavender Islands study found that only 35 per cent of respondents had disclosed their sexual identity to everyone in their lives, and one per cent said they had not disclosed to anyone and did not plan to do so.[236] The PRA's definition of de facto relationship may, however, be able to accommodate this. In *S v M* the High Court acknowledged there may be situations where a same-sex relationship is kept private, "…[b]ut in a case such as this, where the parties mixed in the gay community, the public appearance or reputation of their relationship may be an important factor."[237] There are also instances where a court has used the flexibility inherent in the definition to consider the clandestine nature of some relationships.[238] But few cases focus on whether relationships involving members of the LGBTQI+ community are de facto relationships. We do not have information about relationships involved in property matters resolved out of court.

7.17 We are interested in whether the definition of de facto relationship, and the way it is applied makes "heteronormative" assumptions. Male and female respondents in the Lavender Islands study experienced same-sex relationships and identity in different ways.[239] We are also cognisant of the "…complex realities of family lives that differ from traditional forms and norms of those headed by heterosexuals."[240]

7.18 We have no evidence that the PRA's three year minimum duration requirement for long-term de facto relationships is causing issues

234 The definition of de facto relationship is flexible because none of the factors in s 2D(2), such as the reputation and public aspects of the relationship, are requirements. No finding in respect of any of them is necessary, and the court is entitled to attach such weight to any matter as may seem appropriate in the circumstances: Property (Relationships) Act 1976, s 2D(3).

235 Property (Relationships) Act 1976, s 2D(2)(i).

236 Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) Journal of Homosexuality 223 at 237. Lavender Islands: Portrait of the Whole Family (Lavender Islands) was a national study of 2,269 lesbian, gay and bisexual individuals conducted in 1994 by the School of Social and Cultural Studies, Massey University at Albany.

237 *S v M* HC Wellington CIV-2006-485-1940, 17 April 2007 at [27].

238 For example in *[LC] v T* [2012] NZFC 1702 the opposite-sex parties generally described their relationship as that of landlord and tenant.

239 Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) Journal of Homosexuality 223.

240 See Families Commission *We're a Family: how lesbians and gay men are creating and maintain family in New Zealand* (Blues Skies Report No 29/09, August 2009) at 7.

that are specific to the LGBTQI+ community.[241] The PRA applies differently to marriages and civil unions that last for less than three years, and usually only applies to de facto relationships that last for three years or more.[242] The Lavender Islands study identified that the average longest same-sex relationship that respondents had (or have) was around six years.[243] There was no significant difference between men and women, and many respondents noted that their longest same-sex relationships were still going on.[244] This study suggests that same-sex relationships at least may not be overly troubled by the three year rule.

CONSULTATION QUESTIONS

B14 Is the PRA working well for members of the LGBTQI+ community?

B15 Is more inclusive language required in the PRA's definition of de facto relationship?

B16 Does the definition of de facto relationship make "heteronormative" assumptions?

Contemporaneous relationships

7.19 The PRA addresses some situations where a person is in two relationships at the same time, in the form of:[245]

(a) a marriage or civil union and a de facto relationship; or

(b) two de facto relationships.

7.20 The PRA calls these "contemporaneous relationships".[246] The special property division rules that can apply to contemporaneous relationships are discussed in Part D.[247]

7.21 Contemporaneous relationships in the form of two marriages, or two civil unions, are not covered by the PRA. This may be

241 Property (Relationships) Act 1976, ss 2E and 14–14A.

242 See Property (Relationships) Act 1976 ss 1C and 14–14A. Relationships of short duration are discussed in Part E.

243 Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) Journal of Homosexuality 223 at 238.

244 Mark Henrickson and others *Lavender Islands: The New Zealand Study* (2007) 53(4) Journal of Homosexuality 223 at 238.

245 Property (Relationships) Act 1976, ss 52A and 52B. The PRA also addresses some situations where a partner has successive relationships, one after the other, with no period of overlap. See Part D.

246 For example, partner A is married to partner B and at the same time is in a de facto relationship with partner C. The contemporaneous relationships are partner A's marriage to partner B, and partner A's de facto relationship with partner C. Some polyamorous relationships, where a partner has intimate relationships with more than one partner, may be contemporaneous relationships for the purposes of the Property (Relationships) Act 1976 depending on the circumstances. For a recent account of polyamorous relationships in New Zealand see Eleanor Black "Polyamory and the complicated lives of those with multiple lovers" (17 September 2017) stuff <www.stuff.co.nz>.

247 Property (Relationships) Act 1976, ss 52A and 52B.

because bigamy is an offence under the Crimes Act 1961.[248] We note however that the definitions of marriage and civil union in the PRA include void marriages and void civil unions.[249] A void marriage or civil union might therefore be treated as a de facto relationship for the purposes of section 52A. But in any event this scenario is likely to be unusual.

7.22 Although the PRA recognises the possibility of some contemporaneous relationships, establishing a contemporaneous relationship under the PRA appears to be difficult in practice.[250] One possible reason for this is that the features of a contemporaneous de facto relationship may differ from an "orthodox" de facto relationship.[251] For example, a contemporaneous relationship may be more clandestine, making it difficult to prove the reputation and public aspects of the relationship.[252] The partners may not share a common residence or be financially interdependent, particularly if the relationship is clandestine. A contemporaneous relationship is also by its nature unlikely to be monogamous. In *M v P* the High Court observed that "[t]he statutory indicia of a shared life are broadly consistent with a substantial degree of exclusivity in qualifying relationships."[253] The Court said that:[254]

> *… contemporaneous de facto relationships are not likely merely because the legislation admits their existence. A contemporaneous de facto relationship with a different partner shows that the relationship before the court lacks the character of a life lived as a couple. The legislation governs division of the property of a relationship between two people and there must be natural*

248 See Crimes Act 1961, ss 205–207. In essence, bigamy is the act of going through a form of marriage or civil union; either on the part of a person already married or in a civil union, or on the part of a person who knows the other party to the ceremony is married or in a civil union.

249 Property (Relationships) Act 1976, ss 2A(1)(a) and 2AB(1)(a).

250 Property (Relationships) Act 1976, ss 52A and 52B. See for example *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905; *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385; and *C v S* FC Dunedin FAM-2005-012-157, 28 September 2006.

251 Unsuccessfully argued on appeal in *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905 at [11]. Application for leave to appeal was declined as there was no question of general or public importance such as to outweigh the cost and delay of a second appeal.

252 Property (Relationships) Act 1976, s 2D(2)(i). Unsuccessfully argued on appeal in *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905 at [11].

253 *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [26]. These comments are described as observations, or *obiter dicta*. This is because the issue on appeal in that case was the end date of the relationship, not whether there were contemporaneous de facto relationships. These comments were, however, said to correctly reflect the law in *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [63]. See also *S v S* [2006] NZFLR 1076 (HC) at [44].

254 *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29]. These comments are described as observations, or *obiter dicta*. This is because the issue on appeal in that case was the end date of the relationship, not whether there were contemporaneous de facto relationships. These comments were, however, said to correctly reflect the law in *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [63].

> *limits to one's capacity to spend the only life that one has in contemporaneous bilateral relationships with more than one person.*

7.23 However the factors in section 2D(2) are simply matters that a court may consider when determining whether a relationship is a de facto relationship. They are not requirements.[255] A court can take a flexible approach, and the Family Court in *Greig v Hutchison* noted that in contemporaneous relationships a common residence is unrealistic.[256] This can be contrasted with a comment made by the High Court in *M v P*, to the effect that contemporaneous relationships may be most likely when the relationships follow an "orthodox" format, i.e. when "A cohabits intermittently with each of B and C, maintaining two households on an indefinite basis."[257]

7.24 Contemporaneous relationships may also be viewed as "primary" and "secondary" relationships, particularly where one relationship is a marriage and is covered by the PRA. This approach may make it difficult for a "secondary" relationship to qualify as a de facto relationship. In *Greig v Hutchison*, the High Court said that to assess the nature of contemporaneous relationships, it is unnecessary to view each in isolation and distinct from the other.[258] Rather, it is appropriate to compare the two relationships.[259]

7.25 The practical difficulties in establishing a contemporaneous relationship risk relationships falling outside the PRA because they do not follow an orthodox format. In an extreme case partner A may escape legal obligations to partners B and C by pleading that neither relationship is sufficiently public, robust or exclusive to qualify as a de facto relationship.[260]

7.26 There may be a case for changing the provisions for contemporaneous relationships to address these practical difficulties. We have considered three possible options for reform:

(a) **Option 1: Amend the definition of de facto relationship or enact a new definition of contemporaneous de facto relationship**: We are not

255 Property (Relationships) Act 1976, ss 2D(2) and (3). See also *S v S* [2006] NZFLR 1076 (HC) at [44].

256 *Greig v Hutchison* [2014] NZFC 2895 at [262].

257 *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29].

258 *Greig v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [57].

259 *Greig v Hutchison* [2015] NZHC 1309. [2015] NZFLR 587 at [57].

260 See *M v P [De facto relationship]* [2012] NZHC 503, [2012] NZFLR 385 at [29].

attracted to this option. It is difficult to see how the existing definition of de facto relationship could be any broader or more flexible than it already is to better accommodate contemporaneous relationships. A new definition of contemporaneous de facto relationship would bring an additional layer of complexity to the PRA to accommodate a situation that may be relatively rare.

(b) **Option 2: Provide guidance in sections 52A and 52B on how to apply the definition of de facto relationship to a contemporaneous relationship**: Guidance may direct a court to take a different approach to the factors in section 2D(2) where there is the possibility of a contemporaneous de facto relationship, for example having particular regard to some factor(s) or giving some factor(s) less weight. Alternatively, guidance may direct a court to take a specific approach, such as considering each relationship in isolation, avoiding a comparative approach.

(c) **Option 3: Exclude contemporaneous relationships**: This would simplify the PRA. It could, however, allow a person in two relationships to avoid his or her obligations to one or both partners. It may also simply shift the point in dispute to which relationship was the qualifying relationship, which would likely result in a bias towards marriages and civil unions and undermining the principle that the law should apply equally to all relationships that are substantively the same. It could also exclude vulnerable people from the PRA's protection.

CONSULTATION QUESTION

B17 How should contemporaneous relationships be recognised by the PRA?

Multi-partner relationships

7.27 The definition of de facto relationship excludes relationships of more than two people (multi-partner relationships).[261] The PRA

261 Property (Relationships) Act 1976, s 2D. We use the general term "multi-partner relationship" to refer to a consensual relationship among an emotionally and/or sexually intimate group larger than two: see Elisabeth Sheff and Megan M

may however cater for some contemporaneous relationships between members of a multi-partner relationship.[262] For example, a relationship which comprised three people may be recognised under the PRA as a series of contemporaneous relationships. We have no evidence as to the number of multi-partner relationships in New Zealand, although the number is likely to be small.

CONSULTATION QUESTION

B18 Should the PRA specifically recognise multi-partner relationships? If so, how should they be defined and what property division rules should apply?

Domestic relationships

7.28 The PRA does not apply to domestic relationships. These are platonic, interdependent relationships between two people who provide care and support for each other. Domestic relationships can include relationships between family members such as siblings, parents and adult children; relationships between unrelated parties such as companions; and relationships between unpaid[263] informal carers[264] and those they care for. Domestic relationships are included in property regimes in several Australian states.[265]

7.29 We know little about the prevalence of domestic relationships in New Zealand. Domestic relationships within families may be more common due to the increasing number of people sharing their household with members of their extended family.[266] Domestic relationships between carers and those they care for may become more common due to the predicted increase in the demand

Tesene "Consensual Non-Monogamies in Industrialized Nations" in J DeLamater and R F Plante (eds) *Handbook of the Sociology of Sexualities* (Springer International Publishing, Switzerland, 2015) 223 for a discussion of non-monogamous relationship forms.

262 Property (Relationships) Act 1976, ss 52A and 52B.

263 Relationships where companionship, care and support are provided for payment or on behalf of another person or organisation (including a government agency, body corporate or a charitable organisation) are not considered to be domestic relationships for the purposes of this Issues Paper.

264 The National Advisory Committee on Health and Disability explains that: Informal caring differs from the usual tasks and responsibilities that form part of a relationship between, for example, partners in older age or a child and parent, because it requires a commitment beyond usual levels of reciprocity. The role is different from formal care supports and services because it is unpaid and is not based on any formal agreement or service specifications, although it can be the carer's main occupation." – National Advisory Committee on Health and Disability *How Should we Care for the Carers, Now and into the Future?* (Ministry of Health, 2010) at 3.

265 See for example Relationships Act 2003 (Tas) and Relationships Act 2008 (Vic). Note however that these states take different approaches to the definition and entitlements arising out of domestic relationships.

266 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5.

for informal caring due to factors such as New Zealand's ageing population.[267]

Should the PRA cover domestic relationships?

7.30 There is a view that the PRA should apply to some domestic relationships. This is because some domestic relationships may be functionally similar to a marriage, civil union or de facto relationship.[268] People in a domestic relationship may live in the same house and provide support and care to each other over a long period. One person may make personal sacrifices for the other to provide services as an informal carer. For example, the relationship between two adult siblings in *Re C (dec'd)* exhibited all of the section 2D(2) factors of a de facto relationship except a sexual relationship and the care and support of children.[269] Excluding domestic relationships functionally similar to qualifying relationships raises questions of discrimination, equality and fairness.[270] It has also been described as a little anomalous because of the PRA's focus on property law rather than the nature of the relationship.[271]

7.31 However, domestic relationships are different to qualifying relationships covered by the PRA. While a sexual relationship is not a prerequisite for a qualifying relationship, it is a common feature that often distinguishes it from a domestic relationship. In addition, a domestic relationship may not give rise to the same expectation of property sharing as a qualifying relationship. For example, siblings may live together for a long period in a domestic relationship while each maintaining the hope of meeting a partner and getting married.

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267 National Advisory Committee on Health and Disability *How Should we Care for the Carers, Now and into the Future?* (Ministry of Health, 2010) at 7, 8 and 45.

268 Margaret Briggs "Rethinking Relationships" (2015) 46 VUWLR 649 at 665, referring to *Re C (dec'd)* HC Dunedin CP18/00, 5 April 2001.

269 *Re C (dec'd)* HC Dunedin CP18/00, 5 April 2001; and Property (Relationships) Act 1976, s 2D.

270 Legal rights for non-sexual relationships received some political attention on this basis in 2004, where Members of Parliament said that civil unions discriminate against non-sexual relationships: Richard Worth MP (9 December 2004) 622 NZPD 17638 (online version); and registering a relationship did not have to be a "bedroom issue": Judy Turner MP (7 December 2004) 622 NZPD 17497 (online version). See also Supplementary Order Paper 2004 (314) Civil Union Bill 2004 (149-2) which proposed removing the provisions of the Civil Union Bill 2004 (149-2) relating to prohibited degrees of relationship. Its purpose was to "wide[n] the number of couples who will be able to register their relationship and enjoy the protection and benefits that the Relationships (Statutory References) Bill may provide."

271 Bill Atkin and Wendy Parker "De Facto Property Developments in New Zealand: Pressures Impeded Progress" in John Dewar and Stephen Parker (eds) *Family Law Processes, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law* (Hart Publishing, Portland, 2003) 555 at 562.

7.32 People in domestic relationships must rely on general remedies in property law or equity, and may have difficulty finding a viable basis for making a property claim when the relationship ends.[272] If a domestic relationship ends on the death of one party, the survivor may have a claim under the Law Reform (Testamentary Promises) Act 1949 and/or the Family Protection Act 1955. Those statutes have their limitations. A successful claim under the Law Reform (Testamentary Promises) Act requires a promise by the deceased to reward the claimant for services by making testamentary provision.[273] A testamentary promise may be absent or difficult to prove in some domestic relationships. A claim for provision from the deceased's estate can only be made under the Family Protection Act 1955 by a partner, children, grandchildren and, in certain circumstances, stepchildren and parents of the deceased.[274] Siblings cannot claim.

7.33 People living in domestic relationships do however have options to secure property rights during the relationship. The parties may change the way property is owned, for example by holding property as joint tenants,[275] creating a trust, agreeing by contract on how their property is to be shared, and/or providing for each other in their wills. However, while these options exist in theory, we do not know how common it is for people in domestic relationships to formalise property sharing rights in this way.

7.34 If domestic relationships should be included in the PRA, there are several parameters that need to be explored. In particular:

(a) **The definition of domestic relationship:** Definitions of caring relationships used in some Australian states may provide a helpful starting point. These generally require care and support.[276] Some also require common

272 See Margaret Briggs "Rethinking Relationships" (2015) 46 VUWLR 649 at 670. In this regard people in domestic relationships are in a similar position to de facto partners prior to the 2001 amendments to the Property (Relationships) Act 1976 (PRA). They have a relationship that is functionally similar to a qualifying relationship but are not entitled to the benefit of the property sharing rules applicable to qualifying relationships in the PRA.

273 The key elements of claim under s 3 of the Law Reform (Testamentary Promises) Act 1949 are: (1) the claimant must have rendered services to, or performed work for, the deceased in his or her lifetime; (2) there must be an express or implied promise by the deceased to reward the claimant; (3) there must be a nexus between the services or work and the promise; and (4) the deceased must have failed to make the promised testamentary provision or otherwise remunerate the claimant.

274 Family Protection Act 1955, s 3.

275 If property is held by two domestic partners as joint tenants, when one of them dies his or her interest in the property accrues by operation of law to the survivor, who then becomes the sole owner. See *The Laws of New Zealand* Land Law at [46].

276 For example, Tasmania has a broad definition of "caring relationship" that hinges on the provision of "domestic support and personal care": Relationships Act 2003 (Tas), s 5.

residence or financial commitment.[277] Relationships where care is provided for fee or reward or on behalf of another person or organisation are excluded.[278] Other qualifying criteria, such as a minimum duration requirement, may also be appropriate.

(b) **Whether a domestic relationships regime should be opt-in or opt-out:** Including domestic relationships in the PRA on an "opt-in" basis through a registration scheme would ensure personal autonomy and take account of the assumptions some people in domestic relationships may have about property rights. Requiring independent legal advice as a prerequisite to registration could help ensure the parties make an informed decision and protect vulnerable people from exploitation. A registration scheme may not, however, best protect the vulnerable because registration rates are likely to be low and domestic partners may not see the need to register.[279]

(c) **Multiple relationships:** People in domestic relationships may also have spouses, civil union partners or de facto partners. It may be unnecessarily restrictive to prevent people in qualifying relationships from having a secondary domestic relationship if the PRA were extended to domestic relationships on a registration basis. The property classification and division rules may, however, be complex and would require careful consideration.

(d) **Property entitlements arising at the end of a domestic relationship:** One option is to treat domestic relationships like marriages, civil unions or de facto relationships. This would be relatively straightforward and would avoid a separate set of rules for domestic relationships. Another option is a discretionary model that allows a court to adjust the parties' property

277 For example, Victoria has a definition of "registrable caring relationship" that require the provision of "personal or financial commitment and support of a domestic nature for the material benefit of the other", but does not require the parties to live under the same roof. See Relationships Act 2008 (Vic), s 5.

278 For example the definition of "caring relationship" in the Tasmanian legislation expressly excludes relationships where domestic support and personal care are provided for fee or payment, under an employment relationship or on behalf of another person or organisation: Relationships Act 2003 (Tas), s 5(2).

279 Rundle notes in her 2011 paper that at the time there were only four registered caring relationships in Australia, all of which were in Tasmania: Olivia Rundle "An examination of relationship registration schemes in Australia" (2011) 25 AJFL 121 at 146.

interests in a way that is just and equitable in the circumstances. However, as Briggs notes, "…the philosophical objection to [a discretionary model] in the New Zealand context would be that singling-out domestic partnerships for different treatment undermines the functional equivalence argument."[280]

CONSULTATION QUESTION

B19 Should the PRA apply to domestic relationships? If so, on what basis?

280 Margaret Briggs "Rethinking Relationships" (2015) 46 VUWLR 649 at 669.

Part C – What property should the PRA cover?

Chapter 8 – What property is covered?

Introduction

8.1 The PRA provides the rules for how partners divide their property when a relationship ends. A key part of this process is to first identify what property should be divided. In this Part we focus on the rules that determine what property should be shared and what property should be kept separate.

8.2 In this chapter we examine the PRA's definitions of "property" and "owner" and consider whether they capture the right types of property. The rest of Part C is arranged as follows:

(a) In Chapter 9 we look at how the PRA classifies property as either relationship property (which is divided equally between the partners) or separate property (which is not). We also look at the classification of debts. We then examine the basis for classification and ask whether this remains appropriate for contemporary New Zealand.

(b) In Chapter 10 we look at situations when a partner's separate property may become relationship property.

(c) In Chapter 11 we concentrate on particular items of property and how the PRA classifies them. This includes ACC and insurance payments, super profits and income-earning capacity, heirlooms and taonga. We also look at student loan debts and inter-family gifting and lending.

The PRA's definitions of "property" and "owner"

8.3 The PRA is concerned with the division of property that is owned by one or both of the partners. Its application is therefore limited by how the PRA defines "property" and "owner".

8.4 The PRA does not define property in an exclusive manner. Instead it lists the types of things that the PRA will include as property. The definition has remained essentially unchanged since 1976[1] and it includes:[2]

(a) real property;

(b) personal property;

(c) any estate or interest in any real property or personal property;

(d) any debt or any thing in action; and

(e) any other right or interest.

8.5 An owner in respect of any property means any person who is the *beneficial owner* of the property under any enactment or rule of common law or equity.[3] A person will normally be a beneficial owner if he or she can enjoy the fruits of that property personally and can dispose of the property for his or her own benefit, either in the present or contingent on some future event.[4] A person may be the beneficial owner of property even if the property is not held in his or her name.[5]

8.6 Property that is owned by a partner in his or her capacity as trustee is not captured by the PRA because that partner is not the beneficial owner of the trust property.[6] In *S v S*, one partner was an artist who intended to give some of his paintings to his two children.[7] The paintings hung in the artist's house until the children were ready to take possession. The Family Court was satisfied that the artist held those paintings on trust for the benefit of his children. As a result, the artist was not the "owner"

1 The definition of "property" included in the Matrimonial Property Act 1976 also followed the definition in its predecessor legislation, the Matrimonial Property Act 1963.

2 Property (Relationships) Act 1976, s 2.

3 Property (Relationships) Act 1976, s 2.

4 See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.6].

5 *Fuller v Fuller* (1978) 1 MPC 85 (SC) per Davison CJ, discussed in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.6].

6 Property (Relationships) Act 1976, s 4B. A person cannot, however, be a trustee and the sole beneficiary under a trust: *Re Cook, Beck v Grant* [1948] Ch 212 (Ch); Re Herberley (deceased) [1971] NZLR 325 (CA); Law Commission *The Duties, Office and Powers of a Trustee* (NZLC IP26, 2011) at [4.3]; and Richard Gray "Creation of Trusts" in Don Breaden (ed) *Law of Trusts* (online looseleaf ed, LexisNexis) at [2.22], all as cited in *Clayton v Clayton* [2015] NZCA 30, [2015] NZLR 293 at [47].

7 *S v S* [2012] NZFC 2685.

of the paintings and those paintings were not captured by the PRA.[8]

8.7 The PRA only applies to property belonging to the partners. It does not apply to property owned by third parties. For example, if the partners live together in a home owned by one of the partner's parents, that property could not be divided at the end of the relationship because it is not "owned" by either partner. However difficulties arise where property that is legally owned by one or more third parties is held on trust (either explicitly or implicitly) for the benefit of one or both partners. In some cases a partner's beneficial interest in trust property may be captured by the PRA. Trust property is discussed in detail in Part G.

Is the PRA limited to conventional types of property?

8.8 Although the PRA's definition of property is broad and inclusive, in the past it has been interpreted by the courts as being a conventional definition which is essentially limited to real and personal property, and rights or interests in such property.[9] The Court of Appeal in *Z v Z (No 2)* emphasised that the PRA uses the same property definition as a great number of other general property law statutes including the Property Law Act 1952,[10] and considered that the consistent, cumulative use of that definition strongly indicated that the conventional understanding of property applied in the context of the PRA.[11] In that case the Court considered whether a partner's income earning capacity was covered by the PRA, but concluded that the conventional understanding of property was limited to rights in things, rather than rights in respect of the person, and it did not include "essentially personal characteristics which are part of an individual's overall makeup".[12]

8.9 In the more recent case of *Clayton v Clayton [Vaughan Road Property Trust]* the Supreme Court emphasised the need to

8 *S v S* [2012] NZFC 2685 at [46].

9 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 268.

10 The Property Law Act 1952 has since been repealed and replaced with the Property Law Act 2007.

11 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279. See also Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17 Trusts & Trustees 866 at 878; and Nicola Peart "Protecting children's interests in relationship property proceedings" (2013) 13 Otago L Rev 27 at 30.

12 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

interpret the meaning of property in a manner that reflects the PRA's statutory context.[13] The Court said that, because the PRA is social legislation, its definition of property is broader than traditional concepts of property, and included rights and interests even if they are not rights or interests in property.[14]

8.10 It remains to be seen whether the Supreme Court's decision in Clayton will have wider implications for what is considered property under the PRA. In that case, the trust deed gave Mr Clayton powers to appoint and remove beneficiaries, distribute any of the trust property to any one beneficiary including himself, and bring the trust to an end. The Supreme Court said that these powers were a right that was captured within the PRA's definition of property. However, as we discuss in Part G, that decision turned on the unusual and specific terms of that trust deed. Therefore the application of that decision may be limited.

Should the PRA apply to wider economic resources?

8.11 The PRA's focus (at least prior to Clayton) on conventional types of property means that wider "economic resources", from which the partners may derive financial advantages, are excluded from the PRA. Partners may have at their disposal resources which can confer on them real financial benefits even though that resource is not traditionally considered property. Probably the most significant example of an economic resource not captured by the PRA's definition of property is a person's capacity to earn an income (earning capacity). The current approach, following *Z v Z (No 2)*, is that the personal skills of an individual do not come within the PRA's concept of property.[15] We discuss how the courts have approached earning capacity in greater detail in Chapter 11. Another example of an economic resource not captured by the PRA's definition of property is property held on trust. Trusts are discussed in detail in Part G.

13 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

14 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

15 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), relied on in *Newman v Newman* [1999] NZFLR 839 (HC), in which the personal goodwill attaching to a surgeon's practice accounted for roughly 60 per cent of the practice's value. The High Court said that the personal goodwill was not property which could be divided between the partners.

8.12 Several overseas jurisdictions require courts to take into account the "financial resources" of the partners when making orders to divide their property.[16] In these jurisdictions, a court's power to make property division orders only applies to conventional property.[17] Nevertheless, the availability of wider resources from which a partner can access financial benefits is highly relevant to the way in which the court can choose to divide the partners' property.[18] For example, in the Australian case *Hall v Hall* the wife's father made provision under his will that a group of companies associated with the family should provide financial support to the wife.[19] The executors of the father's estate, who controlled the group of companies, gave evidence that there was no legal obligation on the companies to make such provision. Nevertheless, the High Court of Australia upheld a finding that if the wife had requested financial support, the executors were likely to have made a voluntary payment in accordance with her father's testamentary wishes. The Court said that the wife's interest was a financial resource.[20]

8.13 Similarly, in the English case *Charman v Charman (No 4)*, the husband established a trust under which he was a discretionary beneficiary.[21] There was a close connection between the husband and the trust, as indicated by the husband having previously told the trustee that he was to be considered the primary beneficiary. The Court of Appeal upheld the High Court's finding that if the

16 See for example Matrimonial Causes Act 1973 (UK), ss 24 and 25(2)(a); Family Law Act 1975 (Cth), ss 75 and 79; and Family Law (Scotland) Act 1985, s 8(2)(b).

17 In England and Wales, s 24 of the Matrimonial Causes Act 1973 (UK) refers to "property to which the first-mentioned party is entitled, either in possession or reversion." The Supreme Court of the United Kingdom has explained that its jurisdiction to make property adjustment orders under s 24 only applies to proprietary rights "with an established legal meaning and recognised legal incidents under the general law": *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [37]. Likewise, in Australia the court is given powers under s 79 of the Family Law Act 1975 (Cth) to make orders "altering the interests of the parties to the marriage in the property." In s 4 of the Family Law Act 1975 (Cth), property is defined in conventional terms as property to which the spouses are entitled in "possession or reversion." The High Court of Australia has, however, said that the term property had to be interpreted to conform with the purposes of the Family Law Act rather than how the term is interpreted in a general property law context: *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [64] per French CJ and at [89] per Hayne and Gummow JJ.

18 It should be noted that in these jurisdictions, particularly England, Wales and Australia, the legislation gives the court far more discretion when making property division orders. The New Zealand approach under the Property (Relationships) Act 1976 does not give the courts such leeway. Consequently, caution should be taken when assessing the relevance of the courts' power to account for a partner's financial resources under overseas property division schemes.

19 *Hall v Hall* [2016] HCA 23, (2016) 90 ALJR 695. The case concerned the wife's claim for interim maintenance from her former husband, which required the court of first instance to assess the "financial resources" of the wife under s 75(2)(b) of the Family Law Act 1975 (Cth). When the court makes orders altering property interests, it also relies on the matters listed in s 75(2), therefore the decision in *Hall* is equally relevant to cases of property division.

20 *Hall v Hall* [2016] HCA 23, (2016) 90 ALJR 695 at [45]–[48] and [56]. It should be noted that if Hall was decided by the New Zealand courts under the Property (Relationships) Act 1976, any property the wife obtained under her father's will would probably not be classified as relationship property because inheritances from third parties are generally classified as separate property under s 10.

21 *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246. As we discuss in Part G, a discretionary interest in a trust has not traditionally been considered property.

husband made a request, the trustee would advance all the trust's assets to him.[22] On that basis the Court attributed all the assets of the trust to the husband as his financial resources, and upheld an order that required the husband to pay a lump sum to the wife based in part on the assessment of his financial resources.[23]

8.14 The primary argument for including wider economic resources in the PRA's definition of property is that it would best achieve the policy of a just division of property in cases where those wider economic resources constitute a significant proportion of the partners' combined wealth. Failing to account for those economic resources at the end of a relationship may fail to achieve equal division of the true value attributable to the relationship.

8.15 There are, however, several arguments against broadening the definition of property to include wider economic resources:

(a) First, a novel definition of property under the PRA could create confusion, and there would be a period of uncertainty as lawyers and the courts grapple with the new and unfamiliar definition. For this reason, it might be preferable to maintain a consistent approach to the definition of property across different statutory contexts where possible.[24] The Supreme Court in Clayton may, however, have already signalled a departure from the conventional categories of property in the PRA context, as discussed at paragraph 8.9.

(b) Second, the inclusion of earning capacity and trust property under the PRA will raise complex questions in each case. In particular, it might be difficult to identify the component of those resources that should be considered "relationship property" and shared between

22 *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57]. See also *Thomas v Thomas* [1995] 2 FLR 668 (CA) at 670; and *A v A* [2007] EWHC 99, [2007] 2 FLR 467.

23 *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57]. It should be noted that the Court of Appeal did not order that the assets of the trust should be transferred, nor that the trust be varied. Instead, the Court's orders were in respect of the husband's property, taking into account the additional financial resources he had available by way of the trust.

24 The Supreme Court of the United Kingdom has made similar observations in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415. At [37] per Lord Sumption the Court rejected the argument that a different definition of property should apply under relationship property law, concluding instead that core property law principles should remain constant across different legal contexts:

> *Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.*

Lady Hale, who agreed with the leading judgment of Lord Sumption, said at [87]–[88] that s 24(1)(a) of the Matrimonial Causes Act 1973 (UK) referred only to rights recognised by the law of property and nothing in the wording of the statute nor its history suggested a wider interpretation.

the partners.[25] For example, if a partner's earning capacity is divisible to the extent it has been enhanced by the relationship, how is such enhancement to be ascertained? The valuation of those resources is also likely to be a difficult exercise. The inclusion of such resources may therefore increase the contestability of relationship property matters, undermining the principle that all questions under the PRA should be resolved as inexpensively, simply and speedily as is consistent with justice.[26] We look at these questions in greater detail in Chapter 11 when considering super profits and earning capacity.

(c) Third, there are other ways to recognise and account for the benefits bestowed on one partner by wider economic resources. We discuss some options in respect of trust property in Part G. We also note that the approaches taken in Australia and England and Wales described above do not go as far as dividing a partner's economic resources. Rather, they are taken into account as one among many factors that influence how the courts divide the partners' conventional property.[27] It would be a radical step for the PRA to deem wider economic resources as property which is divisible between the partners.

(d) Fourth, the main criticism regarding the narrowness of the PRA generally focuses on two specific economic resources that are currently not considered "property": earning capacity and property held on trust. We discuss the issues caused by the exclusion of these resources from the PRA in subsequent parts of the Issues Paper.[28] It may be unnecessary to amend the PRA's definition of property to include economic resources generally. Rather, it may be preferable to assess whether the

25 In Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming), Henaghan proposes an approach that would include earning capacity as relationship property in its own right, which would then be divided equally alongside the parties' other relationship property. Henaghan proposes a formula to ascertain the amount of earning capacity to be counted as relationship property. This formula is discussed at n 278 below.

26 Property (Relationships) Act 1976, s 1N(d). See Chapter 3 for a discussion of the principles of the PRA.

27 As noted above at n 18, the courts in England, Wales and Australia have more discretion when making property division orders than the New Zealand courts have under the Property (Relationships) Act 1976.

28 See discussion in Chapter 11 dealing with earning capacity and Part G dealing with trusts.

definition of property should be expanded to include specific resources on a case by case basis as we do in respect of earning capacity and trust property.

CONSULTATION QUESTION

C1 Should the PRA's definition of property include wider economic resources?

Is the definition of property future-proof?

8.16 We have considered whether the PRA can accommodate new and emerging types of property such as:[29]

(a) **Cryptocurrencies (virtual currencies)**: Cryptocurrencies are digital representations of value that can be transferred, stored and traded electronically.[30] A person wishing to hold or trade cryptocurrency must use specific software to allow the currency to be transferred through a peer to peer online network.[31] In the case of the cryptocurrency Bitcoin for example, a "virtual wallet" must be used. Cryptocurrencies are becoming increasingly common and so it is likely that partners in the future will hold some of their wealth in cryptocurrencies. Several hundred virtual currencies are in existence.[32] Each has an exchange rate to conventional currencies. These exchange rates are prone to quite considerable fluctuation.[33]

(b) **Digital libraries**: In previous years, when partners separated they might divide their CD and DVD collections. A modern equivalent might be that partners divide their digital libraries.[34] A digital library might

29 Jade Lattimore, Bryce Menzies and Joe Box "You Sexy Thing: New Property in the 21st Century" (seminar at the National Family Law Conference, Melbourne, 19 October 2016).

30 Judith Lee and others "Bitcoin Basics: A Primer on Virtual Currencies" (2015) 16 BLI 21 at 22.

31 Andrea Borroni "Bitcoins: Regulatory Patterns" (2016) 32 BFLR 47 at 50–51.

32 Judith Lee and others "Bitcoin Basics: A Primer on Virtual Currencies" (2015) 16 BLI 21 at 22–23.

33 Judith Lee and others "Bitcoin Basics: A Primer on Virtual Currencies" (2015) 16 BLI 21 at 23. The authors give the example of Bitcoin which in November 2014 reached an exchange rate of US$1,200 per Bitcoin, whereas at the time of the article's publication it had fallen to US$400 per Bitcoin.

34 There may be some uncertainty when considering digital libraries if the property in question is the digital files and apps themselves, or the licence granted to use the files or apps.

include media collections like movies or music. It might also include a collection of apps.[35]

(c) **Intellectual property rights**: As more people are involved with developing software, apps and other forms of digital design, it is likely that the intellectual property rights to these forms of work will become an issue which is more contested when partners separate.

(d) **Other forms of intangible or digital property**: It is likely that new forms of intangible and digital property will continue to emerge. Customer loyalty scheme credits like frequent flyer points can have considerable value. Even credits earned within computer games, like a Pokémon collection in the game Pokémon Go, can sometimes be traded for large amounts of money.[36]

8.17 We think that the PRA's definition of property, and in particular the catch all "any other right or interest" is wide enough to capture all sorts of intangible things.[37] For example, the Supreme Court has recently found that digital files, such as videos, constituted property under the Crimes Act 1961, which uses a very similar definition of property to the PRA.[38]

8.18 The key question is whether the PRA's definition of property provides partners, lawyers and judges with sufficient guidance on whether new forms of property are indeed property for the

35 Apps refer to computer applications which are used for a range of different activities, such as games, news, weather and social networks: BBC "What is an app?" (2 June 2014) BBC Webwise <www.bbc.co.uk>. Apps are used on devices like a tablet or smartphone.

36 Pokémon Go is a game played through mobile devices. The aim is for players to capture Pokémon. The value of extensive Pokémon collections that some players had captured through the game rose with the widespread popularity of the game. Presenters at the Australian National Family Law Conference raised the example of Pokémon Go collections: Jade Lattimore, Bryce Menzies and Joe Box "You Sexy Thing: New Property in the 21st Century" (seminar at the National Family Law Conference, Melbourne, 19 October 2016).

37 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.3] lists the types of property that the courts have said to be property as "any thing in action, and any other right or interest." The courts have said property includes: assignable goodwill, a transmissible right of action for damages, debts, company shares, an option to purchase, a right to receive an Armed Services Terminal Benefit on future retirement, the right to superannuation benefits contingent upon future events, a life interest, rights pursuant to proprietary estoppel or constructive trust, rights pursuant to a building society secret ballot, fishing rights under the Fishing Act 1983, an interest in an asset in common with a third party, rights under the Accident Compensation Act, and goodwill in a professional practice.

38 In *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 Mr Dixon posted CCTV footage on a video-sharing website. He was then charged under s 249(1)(a) of the Crimes Act 1961 with accessing a computer system and dishonestly obtaining "property." The issue before the Supreme Court was whether the video files Mr Dixon had obtained were property. The Crimes Act defines property in a similar way to the Property (Relationships) Act 1976. The Court concluded that the video files were property within the meaning of s 249 of the Crimes Act and upheld Mr Dixon's conviction. At [25] the Court explained that the files could be identified, they had a value and they were capable of being transferred to others. The Court also considered that the word "property" must be interpreted in the context of the legislation in which it is used. In this case, the Court said it was clear that s 249 was intended to apply to circumstances like Mr Dixon's use of the video files. The Court relied on the High Court of Australia decision in *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89] for this proposition. The Supreme Court's decision in *Dixon v R* suggests that the PRA's definition is broad enough to apply to new forms of property, particularly digital files.

purposes of the PRA. As discussed above, the PRA's definition of property simply lists what is included as property, which is very broad.

8.19 While court decisions (in New Zealand and overseas), academic literature and continuing legal professional development courses will all provide insights into what emerging forms of property come under the PRA, this may not avoid the need to go to court in order to establish whether a new form of property comes within the PRA.

8.20 The main problem with the PRA's definition of property is that it does not explain how or why something should be treated as property.[39] Lawyers may struggle to advise clients on whether emerging forms of property will be treated as property under the PRA. Consequently, valuable items may be omitted from the relationship property pool because they were overlooked. Alternatively, partners may suffer prolonged and costly disputes over whether an item should be treated as property.

8.21 There are also difficulties in valuing emerging forms of property. The future trend of emerging property can be unclear. New technology may become very popular, or it can quickly fade away. These matters are difficult to predict. The value of some emerging property is likely to fluctuate considerably. The value of cryptocurrencies, for example, can be very volatile. Best practices for valuing emerging forms of property may not have developed. How, for example, should the value of a Pokémon Go collection be determined?

Should the PRA include a more prescriptive definition of property?

8.22 While we think that the current definition of property is broad enough to capture emerging forms of property, there may still be merit in changing the definition to provide a way to determine whether an item constitutes property. Some statutes define property with greater prescription than the PRA, although these statutes operate in different policy areas. For example the

39 In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [27] the Supreme Court noted the different definition of property under the Property Law Act 2007: "everything capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property." The Supreme Court said "[t]his is an attempt to define what the concept of 'property' means, unlike the definition in the PRA which is essentially an inclusive definition…."

Criminal Proceeds (Recovery) Act 2009 defines property in a conventional manner: property means real and personal property of any kind and any other right or interest.[40] The Act goes further, however, and defines "interest" as:[41]

> (a) a legal or equitable estate or interest in the property; or
>
> (b) a right, power, or privilege in connection with the property.

8.23 These definitions are supported by section 58 of the Act which provides that where people exercise "effective control" over property, they are to be treated as though they had an interest in the property. The "effective control" definition has been applied where a person controls a corporate structure[42] and trusts.[43] The Act's extended definition of interest exists to fulfil the purposes of that legislation. Principally, the definition is targeted at ensuring all "tainted property" or property to which a forfeiture order may apply comes under the Act. The extended definition also allows for the identification of appropriate parties who may wish to apply for relief from forfeiture.[44]

8.24 The Property Law Act 2007, which deals with certain aspects of the law relating to real and personal property, has adopted a different definition of property to its predecessor legislation.[45] It now provides that property means "everything capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property."[46]

8.25 If the PRA's definition of property was to be amended to provide greater guidance on what property the PRA is concerned with, the definition would need to be drafted to best achieve the PRA's policy objective. Careful consideration would be needed. We are

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40 Criminal Proceeds (Recovery) Act 2009, s 5(1), definition of "property."

41 Criminal Proceeds (Recovery) Act 2009, s 5(1), definition of "interest."

42 *Commissioner of Police v Li* [2014] NZHC 479.

43 *Commissioner of Police v Ranga* [2013] NZHC 745; *Commissioner of Police v Clifford* [2014] NZHC 181; and *Commissioner of Police v Read* [2015] NZHC 2055.

44 Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [CP5.22.01].

45 Property Law Act 2007, s 3. The aim of reformulating the definition of property reflected the Law Commission's recommendation that the elements of the former inclusive definition of property under the Property Law Act 1952 be broken up and placed elsewhere in the Act: Law Commission *A New Property Law Act* (NZLC R29, 1994) at 258. The Property Law Act 2007 now has a very general definition of property under s 4, but the definition of what intangible property may include is found under subpart 5 of pt 2, s 48.

46 Property Law Act 2007, s 4, definition of "property." The Property Law Act 2007 does not, however, define what is meant by ownership, and its definition of "owner" is only in respect of certain conventional interests in land: Property Law Act 2007, s 4, definition of "owner."

currently unaware of any other legislation that would provide a workable precedent for the PRA's statutory purpose.

8.26 A solution may be to retain the current definition but specify particular items that ought to be included. We consider in Chapter 11 whether a partner's earning capacity ought to be included and we consider in Part G whether trust property ought to be included.

CONSULTATION QUESTIONS

C2 Should the PRA's definition of property be retained so that questions of whether the PRA applies to emerging forms of property are left to the courts to decide on a case by case basis?

C3 Should the PRA's definition of property be amended so that it defines property in greater detail? If so, is it preferable to amend the definition to expand the items that are included as property? Which items ought to be included?

Exclusion of Māori land from the PRA

8.27 Land is a taonga tuku iho of special significance to Māori people.[47] For that reason Te Ture Whenua Māori Act 1993 (TTWMA) promotes the retention of Māori land in the hands of its Māori owners, their whānau, their hapū, and their descendants.[48] TTWMA operates as a code, and Māori land can only be sold, gifted or otherwise disposed of in accordance with its rules.[49] Proposed alienations of Māori land must generally be approved by the Māori Land Court.[50]

8.28 Only five per cent of New Zealand's land is Māori freehold land and very little Māori customary land remains.[51] Māori land is typically owned in common with many other owners.[52] It is

47 Te Ture Whenua Māori Act 1993, preamble and s 2.

48 Te Ture Whenua Māori Act 1993, preamble, s 2 and pt 6. Section 2 defines Māori land as Māori customary land (held in accordance with tikanga Māori) and Māori freehold land (Māori customary land to which the beneficial ownership has been determined according to tikanga Māori by order of the Māori Land Court).

49 Te Ture Whenua Māori Act 1993, s 146. Information on Māori land is available on the Māori Land Court website <www.maorilandcourt.govt.nz>.

50 Te Ture Whenua Māori Act 1993, pts 7 and 8.

51 Statistics New Zealand *He Arotahi Tatauranga: Supplementary Information* (August 2014) at 10.

52 Ministry of Agriculture and *Forestry Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 5. Te Ture Whenua Māori Act 1993 (TTWMA), part 12 provides for five types of Māori landowner trusts that may relate to Māori land, other land classified under the TTWMA and shares in a Māori incorporation that is incorporated under part 13 of TTWMA.

largely non-arable and some is landlocked.[53] The importance of Māori land however generally lies not in its monetary value, but in its ancestral, spiritual, cultural and historical value.[54]

8.29 Section 6 of the PRA provides that "[n]othing in this Act shall apply in respect of any Māori land within the meaning of [TTWMA]." As noted by the Family Court in *Rawhiti v Marama*, Parliament's intention seems to have been to exclude Māori land completely from the ambit of the PRA.[55] In doing so, section 6 protects the special status of Māori land and recognises the interests of other people in that land.[56]

What happens when partners separate?

8.30 The exclusion of Māori land from the PRA means that if one or both of the partners owns Māori land, that land will not fall within the pool of relationship property available for sharing upon death or separation. This remains the case even if Māori land was used as the family home, and/or if the non-owning partner made or paid for improvements to the land, thereby increasing its value.[57] Similarly, a court cannot order one partner to transfer Māori land to the other partner for compensation purposes, such

53 The Ministry of Agriculture and Forestry (now Ministry for Primary Industries) estimated that 80 per cent of land held in Māori title is of non-arable class and 30 per cent is landlocked: Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 2.

54 Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 469. In *Yates v Nathan* the Deputy Chief Judge noted that "general land…lacks the same characteristics associated with land to which Māori people are associated in accordance with tikanga." In that case the Deputy Chief Judge exercised jurisdiction under s 44 of Te Ture Whenua Māori Act 1993 (TTWMA) to amend orders of the Court constituting a whānau trust under s 214. The respondent had failed to disclose to the Court the applicant's potential claim under the Property (Relationships) Act 1976 (PRA) in relation to the land which was classified as general land owned by Māori under s 129 of TTWMA. The orders constituting the trust were made conditional on there being no successful PRA claim by the applicant before the Family Court: *Yates v Nathan* (2016) Chief Judge's MB 223 (2016 CJ 223).

55 *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127. Jacinta Ruru and Leo Watson describe this as "good law", recognising "the importance of the blood connection that ties land and taonga to a collective rather than an individual responsibility": Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

56 As discussed in Part A, Māori land was not excluded from the predecessor regime (the Matrimonial Property Act 1963). It was only upon passing of the 1976 Act that Māori land was no longer covered. There was no discussion of the change in Parliament at the time of the 1976 Bill and it seems simply to reflect the evolving paradigm of the 1970s that special rules for Māori land were thought necessary, reflecting the importance of property passing in accordance with the principle of descent in te ao Māori. See Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs, and Mark Henaghan Relationship Property on Death (Brookers, Wellington, 2004) 445 at 464; and Justice Joseph Williams "The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 11.

57 The provisions of the Property (Relationships) Act 1976 in ss 9A and 10(2) which enable separate property to become relationship property do not apply as Māori land is not separate property.

as where one partner used relationship property to pay off a personal debt.[58]

8.31 The rights, if any, of a non-owning partner in respect of Māori land on separation are not covered in TTWMA, although it does provide for a right of occupation when one partner dies.[59] Nor does the Te Ture Whenua Māori Bill 2016, as currently drafted, appear to address the position on separation.[60] In 2008 Ruru referred to this as a legislative gap between TTWMA and the PRA that is unacknowledged by the judiciary and Parliament.[61]

8.32 Historically, owners of Māori land rarely built and resided on their land.[62] However more recently owners are increasingly being encouraged and enabled to live and build on their land,[63] which means questions as to the rights of non-owning partners, particularly in respect of family homes built on Māori land, may arise more frequently in future.

The PRA applies if the family home is a chattel

8.33 As was observed in *Rawhiti v Marama*,[64] because Māori land is exempt from the PRA, a family home that is fixed to Māori land would also be exempt.[65] However buildings and other improvements that are not fixed to the land are regarded in law as chattels, and are therefore not excluded under section 6 of the PRA. This means that improvements that are not fixed to Māori land, such as movable houses, can be classified as relationship property and divided under the PRA.

58 Property (Relationships) Act 1976, s 20E(1)(b).

59 Te Ture Whenua Māori Act 1993, s 328. The right applies where a person has a beneficial interest in that land, such as a life interest devised by will: see s 108(4).

60 Te Ture Whenua Māori Bill 2016 (126-2). At the time of writing, the Bill is currently in the Committee of the Whole House in Parliament.

61 Jacinta Ruru "Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands" (2008) 41 UBC L Rev 315 at 327.

62 Ruru notes that land that stayed in Māori ownership following conversion and alienation through the Native Land Court was often remote and non-arable, and that Māori freehold land titles often have multiple owners and it is nearly impossible for one owner to obtain consent from all the others to build a family home on the land: Jacinta Ruru "Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands" (2008) 41 UBC L Rev 315 at 334 and 337.

63 See, for example, the proposals emerging from the most recent review of TTWMA: Te Ture Whenua Māori Act 1993 Review Panel *Report of the panel appointed to review Te Ture Whenua Māori Act 1993* (March 2014).

64 *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127.

65 This reflects the general property law principle that what is fixed to the soil belongs with the soil: *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL). See further *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); and Jacinta Ruru "Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands" 41 (2008) UBC L Rev 315 at 339.

8.34 The main indicators of whether a building is a fixture rather than a chattel are the degree of annexation and the purpose of annexation.[66] The Māori Land Court used this distinction to provide relief to a non-owner of Māori land in Epiha William Hills – Kaiapoi MR873 Blk XI Sec 71B.[67] In that case the sole owner of Māori land wished to build a house for his family, but could only do so if his wife contributed $200,000 towards its construction. The wife would only do so if she could become joint owner of the land. The Māori Land Court said that it had no jurisdiction to transfer half ownership to her, and declined to exercise its jurisdiction to change the status of the land to general land. But if the house were built so that it could be easily transported away from the land, the Court could make an order declaring the house to be a chattel owned solely by the wife.[68]

A claim in constructive trust

8.35 TTWMA does not prevent constructive trust claims being brought in respect of Māori land. The Māori Land Court has said that, although general principles of property law provide that the owners of the land also own any fixtures, section 18(1)(a) of TTWMA enables the Court to recognise that someone may separately own, by way of a beneficial interest under a constructive trust, an improvement on the land.[69] The Court has used these principles to recognise a non-owner's beneficial interest in buildings fixed to Māori land.[70]

8.36 The leading case is *Stock v Morris – Wainui 2D2B*, decided by the Māori Land Court in 2012.[71] In that case the parties lived together

66 *Nga Uri a Maata Ngapo Charitable Trust v McLeod — Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [41] referring to *Auckland City Council v Ports of Auckland* [2000] 3 NZLR 614 (CA) which adopted the approach of the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687(HL).

67 *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85.

68 *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85 at 89. Kāinga Whenua loans are available to build, purchase or relocate a house on multiple-owned Māori land subject to a tripartite deed between the borrower, owners and Housing New Zealand: see Kāinga Whenua information on the Housing New Zealand website <www.hnzc.co.nz>. The terms of the tripartite deed may stipulate design requirements, such as that the house be built on piles. In *Housing Corporation of New Zealand – Waimanoni 1B3B2A* (1996) 19 Kaitaia MB 227 (19 KT 227) the Court found that the parties to the deed had treated the house as a chattel. In *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206) and *Bennett – Estate of Ronald Clifford Bennett* (2017) 156 Waiariki MB 250 (156 WAR 250) the Court found the house to be a fixture that would only become a chattel if the lender's right to remove the house was triggered by a default by the borrower.

69 See *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [35]; and *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [26].

70 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [30] referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Tauranga MB 150 (73 T 150) and *Brokenshaw – Te Kaha B6X2* (2003) 81 Opotiki MB 18 (81 OPO 18).

71 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).

for eight years on Māori land. The applicant was an owner in the land, and the respondent a non-owner. During their relationship the respondent paid approximately $60,000 for the construction of a cottage on the land. On separation, the applicant claimed ownership of the cottage, supported by her fellow owners. The respondent sought half the value of the cottage. The Court found that the cottage (which had been built on a concrete slab) was part and parcel of the land and could not be treated as a chattel.[72] It could not be uplifted, and the applicant could not afford to purchase the respondent's claimed half-share in the cottage. The central issue for the Court was how it should do justice between the parties, within the parameters of the TTWMA.[73]

8.37 The Court examined the scope of its powers under section 18(1)(a) of TTWMA to hear and determine a claim in equity. It said that the Court could make orders under that section in favour of a non-owner, and had done so in the past.[74] The Court went on to say that where a non-owner is entitled to equitable relief in relation to a fixture on Māori land, the Court should in the first place look to award monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the fixture if it can be removed from the land. The Court will also take into account the non-owner's free occupation of the land.[75] However an order vesting interests in the land, or a right of possession in favour of a non-owner would likely offend the kaupapa and provisions of TTWMA,[76] although it noted that the Court of Appeal had not completely ruled out this possibility.[77]

8.38 The Court in *Stock v Morris* concluded that the applicant was the owner of the cottage but that the non-owner was entitled to compensation. The order declaring the applicant the owner was made conditional upon the respondent paying the non-owner compensation within two years. The Court also issued a charging

72 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [22].

73 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [1].

74 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [64], referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Waikato Maniapoto 150 (73 T 150). See also *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

75 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70].

76 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70]. See also *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2) at [63] and *Owen v Hauiti – Kiwinui A* (2016) 57 Tairawhiti MB 70 (57 TRW 70) at [69].

77 *Grace v Grace* [1995] 1 NZLR 1 (CA) at 5.

debt under section 82 of TTWMA, charging the owner's interest in the home with the sum owing.[78]

Issues with the remedies for family homes on Māori land

8.39 While the Māori Land Court can make an order declaring a house to be a chattel, it can only do so if the house was built so that it could be easily relocatable. If the house is a fixture, the Court cannot say it is a chattel as it only has jurisdiction to declare existing ownership rights and cannot transfer or create new ownership rights.[79] The extent to which the Court can grant equitable relief in respect of houses and other buildings that are fixtures on Māori land remains unclear.[80]

8.40 Ruru notes the reality of removable homes as a solution to the legislative gap is feasible and the concept of removable or relocatable homes is becoming more common.[81] However, removable homes can be both logistically problematic and expensive, and the solution adds another constraint on the effective utilisation of Māori land.[82] It may also be the case that some homes are regarded as a taonga, imbued with a sense of tapu. In this situation, removal or relocation would be contrary to tikanga Māori and therefore unacceptable.[83]

78 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [77]. The Court noted at [74] there was some prospect that the respondent may not receive compensation and that the Court had limited powers to enforce payment.

79 *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [25]. The Court discussed but did not prefer the line of authority which conceptualised the house as a chattel following the making of an order under s 18(1)(a) (the "fixture to chattel" theory): at [43] to [47].

80 Despite the Māori Land Court's willingness to apply constructive trust principles over the family home, there is an argument that a constructive trust over Māori land is inconsistent with Te Ture Whenua Māori Act's prohibition on any form of disposition of any equitable interest in Māori land other than in accordance with that Act: see Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 10; and Te Ture Whenua Māori Act 1993 (TTWMA), s 4, definition of "alienation", para (a)(i), and s 146. The Court in *Stock v Morris* rationalised its ability to "do equity" in relation to Māori freehold land on the basis that the preamble and ss 2 and 17 set the kaupapa of TTWMA and promoted the interests of the owners, but the Court could not allow the actions of owners to cause injustice to non-owners: *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [65]. However, it remains unclear what rights a constructive trust over Māori freehold land could confer that would not be contrary to TTWMA.

81 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

82 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

83 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

8.41 For these reasons, there may be merit in clarifying the legal position of non-owning partners when the family home is on Māori land.

Options to provide for family homes on Māori land

8.42 The current legislative position reflects a policy decision that the retention of Māori land in the bloodline is preferred over an ability of the non-owning partner to claim an interest in the land. We are not considering removing the exclusion of Māori land from the PRA. This would have significant implications for TTWMA and Māori custom law. Further we are not aware of any issues with the exclusion of Māori land other than the issue of addressing improvements made by the non-owning partner, particularly in respect of family homes.

8.43 Enabling a non-owning partner to claim an interest in the family home but not the land on which it sits would represent an alternative policy balance that could be supported on the basis that it enables a just division of property that has a connection to the relationship, either because it is used as the family home or because it is attributable to the relationship.[84] Alternatively, the non-owning partner's actions or contributions to improving the land could be recognised by way of compensation. These options are discussed below.

8.44 In Part H we discuss which court, or courts, should hear claims that raise issues of importance to Māori, including family homes on Māori land.

Option 1: Treating the family home on Māori land as a family home under the PRA

8.45 One option is to enable a non-owning partner to claim an interest in Māori land by treating the family home (but not the land on which it sits) as a family home under the PRA.

8.46 The family home could be classified as relationship property either on the basis that it was for family use or that it was attributable to the relationship through the efforts of the partners. The family home could form part of the relationship property pool and a

84 See Chapter 9 for a discussion of the "family use" and "fruits of the relationship" approaches to the classification of relationship property.

court could make orders with respect to the family home in accordance with the provisions of the PRA.

8.47 In practical terms this would mean that the value of the interest in the family home is brought into the relationship property pool and accounted for from other relationship property, but the land itself is not.

8.48 This would provide a more equal balance between the policies underpinning the TTWMA and PRA. However, a significant practical limitation is that there may be no other assets from which to satisfy the other partner's entitlement to a share in the relationship property.

Option 2: Providing compensation under the PRA

8.49 Another option is to amend the PRA to provide a mechanism to compensate a non-owning partner for his or her actions in increasing the value of Māori land. This would be consistent with the policy and provisions of the TTWMA and would overcome the difficulties identified with the current approach. It would, however, be inconsistent with the focus in the PRA on contributions to the relationship, rather than to specific items of property.[85]

8.50 A new mechanism specifically for family homes on Māori land would recognise the unique policy considerations at play. Amending the PRA's existing compensation provisions will not achieve this and is unlikely to be the best conceptual and practical fit in light of the underlying ownership of the land.[86]

8.51 Amending the PRA's provisions to provide compensation may acknowledge a non-owner's rights but, again, such opportunities can be limited in practice if the owning partner has insufficient

85 See Chapter 2 for a discussion on why the Property (Relationships) Act 1976 replaced the earlier approach in the Matrimonial Property Act 1963 which focused on the contributions of the non-owning partner to specific items of property. The exception is s 9A(2)(b), which applies when an increase in the value of separate property is attributable to the actions of the non-owning partner. That section requires the court to determine the partners' respective shares in accordance with "the contribution of each spouse or partner to the increase in value". We discuss the problems with this approach in Chapter 10.

86 For example, s 17 of the Property (Relationships) Act 1976 could be applied to order compensation to be paid where a partner's separate property has been sustained by the application of relationship property or the actions of the other partner. Alternatively, Ruru and Watson discuss an amendment to enable the Family Court to take Māori land interests into account when considering a compensatory order under s 11B of the PRA for the absence of an interest in the family home: Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Josie Te Rata suggests a provision similar to s 9A that would compensate a non-owning partner by adjusting the division of other relationship property to reflect the increase in value of the land attributable to the non-landowning partner's actions: Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9.

assets from which any compensation can be drawn. Nor would such amendments overcome the difficulties arising from land in multiple ownership as compensation can only be drawn from an owning partner's share in the land.

8.52 Te Rata notes, however, that in trying to strike a policy balance between retaining Māori land in the hands of its owners while compensating non-owning partners for their contributions, direction could be provided to the court on how to determine and give effect to a non-owning partner's rights.[87]

Option 3: Remedies under Te Ture Whenua Māori Act 1993

8.53 TTWMA operates as a code for interests in Māori land. Although a non-owner's interest in a family home may be a product of a relationship, it is arguable that any attempt to fill the legislative gap in relation to contributions to Māori land should more appropriately sit in TTWMA.

8.54 There may be situations where it would be appropriate in the circumstances and in accordance with tikanga for the Māori Land Court to award an interest in land or otherwise provide compensation to a non-owner following a separation. TTWMA currently provides for rights for non-owners, including the provision of a life interest[88] or a financial interest[89] following the death of a partner, and the right of an owner of a beneficial interest to occupy land.[90] These provisions could be adapted, or new compensation provisions added, to recognise a non-owner's contribution to the family home.

8.55 While amendments to TTWMA are outside our terms of reference, we are interested in hearing whether this is an appropriate avenue for reform.

87 Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9 in relation to a suggested amendment similar to s 9A of the Relationship (Property) Act 1976.

88 Te Ture Whenua Māori Act 1993, ss 108(4) and 109(2).

89 Te Ture Whenua Māori Act 1993, s 116. Parliament is alive to the issue of injustice: s 116(3) states

> *"In enacting this provision, Parliament has in mind particularly the possibility of injustice arising in individual cases from the prohibitions enacted by this Act against the alienation of beneficial interests in Māori freehold land to persons outside defined classes, and is therefore desirous of conferring on the court some flexible, if limited, powers to ameliorate any such injustice.*

90 Te Ture Whenua Māori Act 1993, s 328.

CONSULTATION QUESTIONS

C4 Do you think that the law should provide rights or recognise interests in respect of a family home on Māori land, when one partner is not an owner of that land?

C5 If so, what option do you prefer, and why?

Chapter 9 – Classifying relationship property and separate property

9.1 The PRA recognises that certain types of property should be shared between the partners at the end of the relationship, whereas other types of property should not. The PRA calls the types of property that should be divided *relationship property*. Property that is not shared remains each partner's *separate property*. The process of determining whether an item of property is relationship property or separate property is referred to as "classification."

Relationship property, separate property and debts

Relationship Property

9.2 Section 8(1) of the PRA provides that relationship property consists of:[91]

(a) the family home whenever acquired; and

(b) the family chattels whenever acquired; and

(c) all property owned jointly or in common in equal shares by the married couple or by the partners; and

(d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—

(i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and

91 Many of the types of property listed in s 8 of the Property (Relationships) Act 1976 are defined further elsewhere in the Act, for example the family home, the family chattels, a life insurance policy, and a superannuation scheme.

(ii) the property was intended for the common use or common benefit of both spouses or partners; and

(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and

(ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—

(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or

(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and

(f) [Repealed]

(g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and

(h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and

(i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and

(j) all other property that is relationship property under an agreement made under Part 6; and

(k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and

(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

Separate Property

9.3 Separate property generally falls under one of three categories:

(a) **Property of either partner that is not relationship property**. Section 9(1) defines separate property broadly as all property that does not fall within any of the categories of relationship property under section 8. Section 9 goes on to provide that separate property includes:

(i) all property acquired out of separate property and the proceeds of any disposition of separate property;[92]

(ii) any increase in the value of separate property, and any income or gains derived from separate property;[93]

(iii) all property acquired by either partner while they are not living together, or by the surviving partner after the death of one of the partners, unless the court considers it just in the circumstances to treat the property as relationship property;[94] and

(iv) all property acquired by either partner after a court has made an order defining the partners' respective interests in the relationship property, or dividing that property.[95]

(b) **Property acquired by one partner from a third party.** Section 10 provides that separate property includes property a partner acquires from a third person:[96]

(i) by succession;

(ii) by survivorship;

(iii) by gift; or

92 Property (Relationships) Act 1976, s 9(2), which is subject to ss 8(1)(ee), 9A(3) and 10.

93 Property (Relationships) Act 1976, s 9(3), which is subject to s 9A.

94 Property (Relationships) Act 1976, s 9(4).

95 Property (Relationships) Act 1976, s 9(5). This section does not apply in respect of orders made under s 25(3).

96 Property (Relationships) Act 1976, ss 10(1) and 10(2). This includes the proceeds of a disposition of property, to which s 10(1)(a) applies, and property acquired out of property to which s 10(1)(a) applies: ss 10(1)(b) and 10(1)(c). If, however, the property listed in s 10(1) has been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property, it may be classified as relationship property.

(iv) because the partner is the beneficiary under a trust settled by a third person.

These items of property will be classified as separate property even if they fit the description of relationship property under section 8. The family home and family chattels, however, will always be classified as relationship property.[97]

(c) **Special types of property recognised by the PRA**: These are other items of property that ordinarily would be relationship property, but for which the PRA makes specific provision. This includes property that one partner receives by gift from the other partner.[98] It also includes certain types of chattels that would otherwise be classified as relationship property, specifically:[99]

(i) chattels used wholly or principally for business purposes;

(ii) money or securities for money;

(iii) heirlooms; and

(iv) taonga.

Debts

9.4 Partners' debts are classified under the PRA in a similar way to relationship and separate property. A relationship debt is a debt that has been incurred:[100]

(a) by the partners jointly;

(b) in the course of a common enterprise carried on by the partners;

(c) for the purpose of acquiring, improving, or maintaining relationship property;

(d) for the benefit of both partners in the course of managing the affairs of the household; or

97 Property (Relationships) Act 1976, s 9(4).

98 Property (Relationships) Act 1976, s 10(3), unless the gift is used for the benefit of both partners. Note that this does not apply to the family home and family chattels, which remain relationship property: s 10(4).

99 Property (Relationships) Act 1976, ss 2, definition of "family chattels" and 8. See Chapter 11 for a discussion of heirlooms and taonga.

100 Property (Relationships) Act 1976, s 20(1), definition of "relationship debt."

(e) for the purpose of bringing up any child of the relationship.

9.5 A personal debt is any debt that is not a relationship debt.[101]

9.6 The classification of debts can be equally as important as the classification of property. This is because the value of the pool of relationship property to be divided between the partners is calculated by first ascertaining the total value of the relationship property, and then deducting from that total any relationship debts owed by either or both partners.[102] In this way, relationship debts are shared between the partners.[103]

9.7 If one partner has paid a personal debt from relationship property, the court may order that the other partner's share of relationship property be increased or that the partner who paid the debt pay compensation to the other partner.[104] There is no equivalent provision for relationship debts that are paid from separate property.

CASE STUDY: HOW CLASSIFICATION OF PROPERTY WORKS IN PRACTICE

To show how the PRA's rules of classification work in practice, we use the hypothetical example of Rebecca and Wiremu.[105] Wiremu is a successful photographer. When Wiremu and Rebecca were married, Wiremu had already acquired a significant amount of property. He had amassed a significant collection of photographs, both works he created and works by other artists. He also owned a house, although he was still paying off the mortgage on it.

When the partners separate, Rebecca consults her lawyer. Her lawyer says that it is probable that the Family Court would classify the partners' property in the following way:

Item	Classification	Relevant section of the PRA
House registered in Wiremu's name	Relationship property	Section 8(1)(a) – the family home whenever acquired is relationship property

101 Property (Relationships) Act 1976, s 20(1), definition of "personal debt."

102 Property (Relationships) Act 1976, s 20D.

103 It is however only the value of the debt that is shared; the legal obligations each partner has to the creditors will remain unaltered: Property (Relationships) Act 1976, s 20A.

104 Property (Relationships) Act 1976, s 20E.

105 This example is loosely based on the Family COurt's decision in SvS [2012] NZFC 2685.

Rebecca's KiwiSaver Superannuation Policy acquired during the relationship	Relationship property	Section 8(1)(i) – the proportion of any superannuation attributable to the relationship is relationship property
Car registered in Wiremu's name but mostly driven by Rebecca	Relationship property	Section 8(1)(b) – the family chattels, which includes motor vehicles, are relationship property
Money in the partners' bank accounts saved during the relationship	Relationship property	Section 8(1)(e) - all property acquired after the relationship began is relationship property
Small boat used by the partners on holidays	Relationship property	Section 8(1)(b) – the family chattels, which includes boats, are relationship property
Colour printer used by Wiremu for his work as a photographer and bought prior to the relationship	Wiremu's separate property	Section 9(1) – all property which is not relationship property is separate property (or the printer may be considered a chattel used principally for business purposes and so is not a family chattel)
Framed photographs bought by Wiremu prior to the relationship and displayed in the partners' home	Relationship property	Section 8(1)(b) – the family chattels, which include household ornaments
Framed photographs bought by Wiremu prior to the relationship and displayed in his studio (which is separate to the family home)	Wiremu's separate property	Section 9(1) – all property which is not relationship property is separate property
The partners' pet dog, Monty, bought after the relationship began	Relationship property	Section 8(1)(b) – the family chattels, which includes pets, are relationship property
Gifts of jewellery from Wiremu to Rebecca	Rebecca's separate property	Section 10(3) – property gifted by one spouse to the other is separate property
Mortgage over Wiremu's house	Relationship debt	Section 20 – a debt incurred for the purpose of acquiring relationship property is a relationship debt.

Personal debt incurred by Wiremu to buy the colour printer	Personal debt	Section 20 – the debt was not incurred for a purpose that would classify it as a relationship debt, so it is a personal debt.

The basis for classification

9.8 The classification of property is fundamental to the overall scheme of the PRA because it determines which property is to be divided between the partners.

9.9 In Part A we explained why we have the PRA, and the theories and principles on which its rules are based. To recap briefly, the PRA treats a qualifying relationship as a partnership or joint venture to which each partner contributes equally, although perhaps in different ways.[106] Each partner's contributions to the relationship result in an entitlement to an equal share in the property of the relationship.

9.10 The concept of relationship property is intended to capture property that has a connection to the relationship, and which the partners can justifiably consider "theirs", irrespective of strict legal title.[107]

9.11 The PRA classifies two types of property as relationship property:[108]

(a) **Property which is central to family life**. This includes commonly owned and used property such as the family home and family chattels, whenever acquired. We call this the "**family use**" approach to classification.

(b) **Property attributable to the relationship**. This includes property that is directly or indirectly produced by the

106 This is reflected in the explicit and implicit principles of the Property (Relationships) Act 1976, discussed in Chapter 3. See AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 1 and 10. See also AH Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 245 and 247; Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

107 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5–6. The original Matrimonial Property Act 1976 only gave a husband and wife an equal share in the matrimonial home and family chattels. Other items of matrimonial property were divided pursuant to the spouses' respective contributions. The law was amended in 2001 so the Property (Relationships) Act 1976 divided all relationship property equally.

108 See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.5]–[11.6].

joint or several efforts of the partners, such as property acquired during the relationship, the proportion of any life insurance policy or superannuation scheme attributable to the relationship and increases in the value of separate property due to the actions of the non-owner partner. We call this the "**fruits of the relationship**" approach to classification.[109]

9.12 Separate property, on the other hand, is property that is unconnected to the relationship. It is excluded from division on the basis that a partner's contributions to the relationship cannot be said to have had any bearing on the other partner's separate property.

9.13 As discussed in Part A, there is no explicit principle in the PRA to explain this basis for classification. In Chapter 4 we recommended that, as a matter of good drafting practice, the implicit principles of the PRA should be expressly stated in a comprehensive principles section, including the principle that only property that has a connection to the relationship should be divided when the relationship ends.

Is the basis for classification appropriate for contemporary New Zealand?

9.14 An important issue in this review is whether the basis for the way the PRA classifies property remains appropriate in contemporary New Zealand.

9.15 As discussed above, there are two approaches reflected in the classification of relationship property. The fruits of the relationship approach, we think, remains appropriate because it reflects the values and norms of relationships in contemporary New Zealand. As explained above and in Part A, each partner is entitled to an equal share of the relationship property as a result of the equal contributions each makes to the relationship. The fruits of the relationship approach focuses on the product of the partners' joint and several contributions. Conversely, it excludes

109 The term "fruits of the relationship" is commonly used in the literature. See for example *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 569; and *Geddes v Geddes* [1987] 1 NZLR 303 (CA) at 307 per Somers J, "…such a construction reflects the general policy of the Matrimonial Property Act, that, save for express exceptions, matrimonial property is the fruit of the partnership." See also Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). It is also referred to as a "gains" or "acquests" approach.

property which has not been produced or improved by the relationship.

9.16 The ongoing relevance of the family use approach needs to be considered in light of New Zealand's changing social context and overseas trends, as we discuss below.

Does the family use approach still reflect most people's sense of fairness?

9.17 Under the family use approach, property that one partner brings into the relationship or receives from a third party can sometimes be classified and divided as relationship property. The most common example is where the property contributed by one partner is used as the family home or as a family chattel.[110] In such cases, the non-owning partner is entitled to an equal share in that property if the partners separate.

9.18 This might not fit with most people's expectations of fairness in some situations, particularly where one partner brings significantly more property to the relationship than the other.[111] The family use approach might also lead to arbitrary results in some cases, as we discuss below.

The family use approach may lead to arbitrary results

9.19 If one partner brings a piece of furniture or appliance into the family home to be used for family purposes, it is likely to be considered a family chattel and eligible for division as relationship property. If the partner had taken the same item and placed it in his or her office away from the home, or even if it was kept in the home but it was not available for family use, it may retain its character as separate property. In *S v S*, Mr S had acquired an extensive art collection prior to his relationship with Mrs S.[112]

110 The family home and family chattels are relationship property because of their family use, regardless of when or how the property was acquired: Property (Relationships) Act 1976, s 8(1)(a) and 8(1)(b).

111 See Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Fisher argues that the rules of classification and division of relationship property in the Property (Relationships) Act 1976 (PRA) should be based on causation. He says only property that is the "fruit of the relationship" should be divided equally. Fisher claims this approach is the generally accepted view in New Zealand. He criticises the classification of property that was acquired either before the relationship began or from some external source, such as from an inheritance, as relationship property. In particular he criticises the current classification of the family home regardless of how it was acquired as the greatest anomaly within the PRA. This is because of the possibility that a home would be divided even though it was acquired before the relationship began or from some external source.

112 *S v S* [2012] NZFC 2685.

As the artworks were displayed on the walls throughout their home, the Family Court held that Mr S had used the works as a household ornament and so they had become family chattels and therefore relationship property.[113] Mr S's lawyer pointed out that if Mr S had collected stamps and kept the collection in a hall cupboard, the collection would have remained separate property.[114]

9.20 In *Farrimond v Farrimond*, the partners had lived in a home bought by Mr Farrimond two years before the relationship began.[115] The partners' relationship lasted for approximately 10 years. The home's value when the relationship began was $280,000 but that had increased to $830,500 by the date of hearing. Nine months prior to the partners' separation they moved into a property they rented by the beach. Mr Farrimond argued that their former home had ceased to be the family home for the purposes of the PRA, and as a result was his separate property. The Family Court accepted this argument.[116] On appeal, the High Court overturned the decision and said that, notwithstanding the family's relocation, the former home remained the family home within the meaning of the PRA.[117] The High Court reasoned that the family had not been living away from the home for a considerable period of time,[118] nor had they clearly intended to move away from the home on a permanent basis.[119] Had the partners spent longer away from the home, or had they clearly indicated an intention to permanently move away from the property, the house may have ceased to be the family home. As a result the pool of relationship property would have decreased by $830,500.[120] It seems odd that such a significant difference can depend on such minor factors.

113 *S v S* [2012] NZFC 2685 at [89], although the Family Court ordered that there were extraordinary circumstances in this case under section 13 which justified a departure from equal sharing in Mr S's favour.

114 *S v S* [2012] NZFC 2685 at [80]. Mr S's lawyer relied on the case *S v S* (1978) MPC 178 (SC) in which the court said that as the husband had kept several trunks gifted to him by his parents in storage, the trunks remained separate property.

115 *Farrimond v Farrimond* [2017] NZHC 1450.

116 *Farrimond v Farrimond* [2016] NZFC 9599.

117 *Farrimond v Farrimond* [2017] NZHC 1450 at [35].

118 The High Court relied on s 2H of the Property (Relationships) Act 1976 which provides that the use to which property is put is to be determined by the use to which it was being put before the relationship ended. The Court also drew on the decision of *Evers v Evers* [1985] 2 NZLR 209 (CA) in which Richardson J for the Court of Appeal said at 211 that the Court must survey the pattern of use of the particular item up to the time the parties ceased to live together, and this may involve going back some distance in time in order to obtain a fair picture of the use of the property in the period before separation.

119 *Farrimond v Farrimond* [2017] NZHC 1450 at [35].

120 It should be noted that if the house had not been considered relationship property, the wife would probably have been entitled to compensation under s 17 of the Property (Relationships) Act 1976 as had previously been ordered by the Family Court: *Farrimond v Farrimond* [2016] NZFC 9599.

9.21 It could be said that partners who willingly share their property for family use, rather than keep it separate, are disadvantaged by the family use approach to classification. For example, if one partner owns or inherits a house, and lives in that house with his or her partner, the house will likely become relationship property. But if that house was rented out, and the couple lived elsewhere, that house would remain separate property.

The family use approach and the changing social context

9.22 Changing patterns in partnering, family formation, separation and re-partnering mean that relationships in New Zealand have undergone significant change since the PRA's rules of classification were first drafted.[121]

9.23 In the 1970s the paradigm relationship was one in which children were raised and wealth was accumulated over time. Today people are generally marrying later in life,[122] and are more likely to separate and re-partner.[123] In 1971, just 16 per cent of marriages were remarriages.[124] Since 1982 however, approximately one third of all marriages in New Zealand have been remarriages.[125] These statistics do not capture people who enter a de facto relationship after separation. This is likely to be a significant group. One New Zealand study identified that 80 per cent of women who had re-partnered within five years of separation had entered into a de facto relationship rather than remarrying.[126] That study also found that within two years of separation from a first marriage, 30 per

121 We discuss these changes in detail in our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

122 In 2016, the median age at first marriage was 30 for men and 29 for women, compared to 23 for men and 21 for women in 1971, when the marriage rate peaked: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Statistics New Zealand *Information Release – Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 5.

123 The divorce rate has increased from 7.4 per 1,000 existing marriages in 1976, to 8.7 in 2016: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Statistics New Zealand "Divorce rate (total population) (Annual-Dec)" (June 2017) <www.stats.govt.nz>.

124 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

125 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

126 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 238–239.

cent of women had re-partnered, and that women who separated later in the study period (1950–1995) were increasingly more likely to re-partner.[127] While this study is now over 20 years old, it indicates that re-partnering has become increasingly common in New Zealand.

9.24 These social changes mean that more people are entering new relationships later in life, and are therefore more likely to have already accumulated some property. Situations where one partner brings significantly more property into a relationship (such as a house) might be more common. There may also be a question about the extent to which the fruits of a former relationship should be available for division at the end of a subsequent relationship. If the family use approach is considered unfair in these situations, then the issue is more significant than it was in the 1970s, and is likely to grow in the future (although we note that the rate of home ownership is decreasing).[128]

9.25 The family use approach might also raise issues for specific groups of people, in particular stepfamilies and older people.

The impact of the family use approach on stepfamilies

9.26 As the rate of re-partnering increases, stepfamilies have become more common. One New Zealand study identified that, in 2011, approximately 9 per cent of children were living in a stepfamily.[129] Several longitudinal studies suggest that up to 18–20 per cent of all children spend some time in a stepfamily before age 16–17 years.[130]

9.27 If one partner brings property into the relationship for the use of the stepfamily, it will normally be divided between the partners on separation. As we discuss in Part I, children's interests do not

127 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 238–239.

128 In New Zealand the rate of home ownership has decreased from a record high 74 per cent in 1991 to 65 per cent in 2013: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, 2008) at 86 and 96. If this trend continues, fewer couples will have a family home to divide when they separate.

129 Megan Gath *Identifying stepfamilies in longitudinal data* (Statistics New Zealand, Working Paper No 16-01, 2016) at 5.

130 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017), citing Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 72–73; and JM Nicholson, DM Fergusson and LJ Horwood "Effects on later adjustment of living in a stepfamily during childhood and adolescence" (1999) 40 Journal of Child Psychology and Psychiatry 405 discussed in Megan Gath *Identifying stepfamilies in longitudinal data* (Statistics New Zealand, Working Paper No 16-01, 2016) at 7.

generally affect the division of property. However some people we have spoken to in our preliminary consultation think it would be fairer if the partner who contributed the property is able to retain it and use it exclusively for his or her own children. It is unfair, they said, that a partner should be deprived of his or her property in order to support the other partner and that partner's children.

Relationships involving older people

9.28 The family use approach might also raise particular issues for older people who re-partner later in life. Older people will generally enter relationships with a greater property base than younger partners, as it will have been built over a longer period of time before the relationship. When an older person re-partners after the death of a former partner, the property he or she holds may represent the fruits of the previous relationship. We have heard anecdotally that some older people unwittingly enter qualifying de facto relationships and later find they are obliged to divide half the equity in their home and other key items of property. This may create particular financial hardship for older people who are close to retirement or are no longer in paid employment and therefore have no sufficient income stream to acquire further property.

Trends in overseas jurisdictions

9.29 The current trend in overseas jurisdictions appears to be a move away from the family use approach and towards the fruits of the relationship approach.[131] For example, British Columbia's Family Law Act 2011 departed entirely from the previous family use approach.[132] The law now excludes from division all property acquired by a spouse before the relationship began, as well as inheritances and gifts acquired from third parties. Instead, all property acquired after the relationship began is eligible for division.[133] The Law Reform Commission of British Columbia had previously recommended the change, observing that there was "widespread agreement" that spouses who bring assets into a marriage should have a greater claim to them than the law

131 See Chapter 3 for a wider discussion of international approaches to property division.

132 The previous legislation defined a "family asset" (the property eligible for division) as property used by a spouse for a "family purpose": Family Relations Act 1996 (BC) (repealed), s 58(2).

133 Family Law Act 2011 (BC), ss 84–85.

provided.[134] The Government White Paper accompanying the reforms echoed that sentiment.[135] The White Paper stated that the "most compelling reasons" for the fruits of the relationship approach over the family use approach were:[136]

> *to make the law simpler, clear, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship.*

9.30 Similarly, the Netherlands is in the process of reforming its property division laws. Previously the Netherlands was heralded as one of the few examples of a jurisdiction that maintained a "full community of property",[137] meaning that on marriage all property of either partner was subject to division. Draft legislation has recently been approved by both houses of the Dutch legislature that will introduce a limited community of property, under which assets owned before the marriage, or inheritances and gifts, will remain separate property.[138]

The case for retaining the current approach

9.31 There are however several arguments for retaining the family use approach in connection with the family home and family chattels:

(a) First, while the family use approach may be perceived as unfair in some situations, it might still reflect most people's values and expectations in most cases. As discussed at paragraph 9.9, the PRA treats a relationship as an equal partnership or joint venture to which each partner contributes equally. Core assets that form an integral part of family life, like the family home, should arguably be seen as the property of the

134 Law Reform Commission of British Columbia *Report on Property Rights on Marriage Breakdown* (LRC111, March 1990) at 17. The Commission based this assertion on the submissions it had received on its Working Paper, the laws of other Canadian provinces, and what appeared to be the "mainstream approach of the judges in the exercise of discretion with respect to the division of assets brought into marriage."

135 Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislative Office *White Paper on Family Relations Act Reform; Proposals for a new Family Law Act* (July 2010).

136 Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislative Office *White Paper on Family Relations Act Reform; Proposals for a new Family Law Act* (July 2010) at 81.

137 Jens M Scherpe "Marital Agreements and Private Autonomy in Comparative Perspective" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* 443 (Hart, London, 2012) at 448.

138 "Dutch married couples may no longer share 'All my worldly goods'" (17 February 2017) DutchNews.nl <www.dutchnews.nl>; and "Community of property" (2017) De Boorder Schoots <www.deboorderschoots.nl/en>.

partnership. The contribution of pre-acquired property to the relationship partnership could be seen as simply one among many different but ultimately equal contributions the partners make to the relationship. It may be that in most cases the partners treat core family assets that are used for family purposes as their joint property in any event, in accordance with their commitment to a joint life together.[139] The family use approach may therefore be better at implementing the policy and principles of the PRA than a strict fruits of the relationship approach.

(b) Second, division of the family home and family chattels has long been a hallmark of New Zealand's property division law.[140] The equal division of core family assets, regardless of how or when they were acquired, may therefore be established in the public mind. There is also a developed body of case law and understanding regarding the current rules of classification.

(c) Third, the family use approach may be better at serving children's interests. There are several provisions under the PRA which allow the court to make orders which grant relationship property, or the use of relationship property, to meet the interests of children of the relationship. Section 26, for example, provides that the court can set aside relationship property for the benefit of the children. Section 27 allows the court to grant occupation of the family home, or other premises

139 Bill Atkin goes further, arguing that more is needed for the Property (Relationships) Act 1976 (PRA) to reflect the nature of relationships as a partnership: Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Atkin argues that if the principles underpinning the PRA are to be taken seriously, it should be reformed so that all the partners' property would be relationship property and each partner would be entitled to an equal share of the combined pool. Certain assets could be excluded if the relevant partner persuaded the court that the item had nothing to do with the life of the relationship or family. An advantage to this approach is that it may simplify the PRA's complex rules of classification and division. The disadvantage with this option is that it is a radical departure from the current rules. An "all assets" approach may not reflect the values and expectations of most New Zealanders.

140 Fisher suggests that the special status attributable to the family home is historical, that is, it was the battleground on which women's property rights were first developed: see Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Fisher explains that the early reforms that gave women proprietary interests in their husband's property centred on the family home. The Matrimonial Proceedings Act 1963, for example, gave the court powers to make orders granting rights to a spouse to occupy the family home following divorce, regardless of which spouse held title to the property (s 57). That Act also gave the court power to make orders directing the sale of the home and dividing the proceeds between the spouses if each spouse had made a "substantial contribution" to the home, whether "in the form of money payments, or services, or prudent management, or otherwise" (s 58). Similarly, the Joint Family Homes Act 1964 initially allowed a spouse to settle a home in the joint names of both parties to the marriage. The drafters of the Matrimonial Property Bill 1975 described the family home as being "in a category of its own": AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 9.

that are relationship property, to a partner for a certain period. The family use approach focuses on key assets that are important to the children, such as the family home, pets, furniture and other household items. In some cases, this might mean a larger relationship property pool available for division, which can also indirectly benefit children. The family use approach therefore ensures that the orders the court can make for children's interests are targeted at the appropriate property. While sections 26 and 27 could, under a fruits of the relationship approach, be extended to separate property in order to address these concerns, the courts may be less willing to make orders that have the effect of restricting one partner's enjoyment of his or her separate property for any considerable length of time.

(d) Fourth, classification based solely on the fruits of the relationship approach presents a number of practical problems. It is more complex to assess what property the partners entered the relationship with. In the case of a lengthy relationship, it may be impractical to do so. It is unrealistic to expect partners to have kept clear records about the origins of their property. The assets may also have become so intermingled with other property it is impossible to discern what property is pre-relationship property and what property is the fruit of the relationship. In contrast, the default inclusion of the family home and family chattels is a bright-line rule.[141] Because the rules are clear, it is easier for vulnerable partners to prove their relationship property entitlements.

(e) Fifth, any reform to the PRA's rules of classification would inevitably introduce some uncertainty, at least for a short period. Other significant amendments would probably be needed to other parts of the PRA, including sections that deal with the classification of increases in the value of separate property (section 9A), the provisions concerning situations where no family home exists (sections 11A and 11B), the homestead provisions (sections 12 and 12A), and adjustments in

141 Although the question of whether a chattel is a "household" chattel may be open to interpretation in some circumstances.

the case of two family homes (section 16). The fruits of the relationship approach raises complex issues about the treatment of debts such as mortgages. For example it might not be appropriate to treat a pre-existing mortgage as a personal debt when that property is used as the family home. Careful thought would also be needed as to how a partner's protected interest in the family home under section 20B would apply.[142]

9.32 In light of these arguments, we think that a credible case can be made for retaining the PRA's current definition of relationship property, which is based on both a family use approach and a fruits of the relationship approach. While our initial research has identified criticism of the family use approach, we do not know how widespread that criticism is.

Options for Reform

9.33 In light of the criticisms of the family use approach to the classification of relationship property, we consider two options for reform.

Option 1: Move to a pure fruits of the relationship approach

9.34 The PRA could be reformed so that relationship property is defined solely by the fruits of the relationship approach. That would mean, in general terms, the value of property a partner brings into the relationship, and the value of any property a party inherits or receives as a gift from a third party, will remain as separate property. This could apply even if the property is subsequently used as the family home and family chattels, or if the property has been placed in the joint ownership of the partners. Consequently, when the partners separate, they would divide whatever property had been acquired during the relationship.

9.35 Plainly, this approach would be a significant departure from the PRA's current provisions. A number of other amendments

142 The main purpose of the protected interest is to safeguard a partner's relationship property against the unsecured creditors of the other partner in respect to his or her personal debts: Property (Relationships) Act 1976, s 20B(2). The approach currently is to give a partner priority interest in the family home. We examine the protected interest provisions in Part K and discuss whether they ought to remain. Assuming they do remain, and if the family home ceases to be classified in all cases as relationship property, the protected interest will need to attach to other property.

to the PRA would be required, some of which we mentioned at paragraph 9.31 above. For example, when an asset that has been purchased from both separate property funds and relationship property funds, how is any increase in the value of that asset to be treated? We consider this question further below in our analysis of section 9A.

9.36 Another question is whether the PRA should impose an onus of proof on a partner who contends for a certain classification. For example, if a partner argues that an asset, or part of the value of an asset, is separate property, he or she must bear the responsibility for demonstrating that the property was acquired before the relationship or from an external source.[143]

Option 2: Adopt different approaches depending on the length of the relationship

9.37 Another possible option for reform is to apply different definitions of relationship property to relationships of different lengths. The PRA could be reformed so that the relationship property of relationships that endured for a certain length of time could be determined on both a family use and fruits of the relationship approach. If the relationship has not endured for the requisite period, the partners' property could be classified solely on a fruits of the relationship approach. The special rules in the PRA that apply to relationships of short duration could also be reformed by incorporating them into this framework. We examine how this approach might apply to relationships of short duration in Part E.

9.38 The advantage of the family use approach is the certainty it provides through its bright-line rules. However the shorter the relationship, the simpler it will be to trace the separate property a partner brings to the relationship. It is also more likely that the fruits of the relationship approach is considered fairer in shorter relationships. Basing the applicable definition of relationship property on the length of the relationship could lead to a just division of property which is better tailored to the circumstances of the case.[144]

9.39 There may however be disadvantages:

143 A similar approach is taken in British Columbia, Family Law Act 2011 (BC), s 85(2).

144 The Property (Relationships) Act 1976 already provides that in cases of relationships of short duration, it is more appropriate for partners to recover separate property contributions when those contributions have been unequal: see ss 14–14A.

(a) First, it may be challenging to identify when the length of a relationship has crossed the relevant point in time, especially for de facto relationships or marriages and civil unions that were preceded by de facto relationships. This uncertainty may lead to more disputes. Nevertheless, this task is not impossible; the length of de facto relationships is routinely assessed in PRA matters.[145]

(b) Second, this option requires prescribing a relationship length, according to which different relationships would be subject to different rules. There will be a degree of arbitrariness to this. There is little research in New Zealand into relationships, particularly de facto relationships, which makes this task difficult. Careful thought would need to be given to what time frames would be most appropriate for the majority of couples.

(c) Third, having multiple definitions of relationship property may create uncertainty and potentially confusion.

145 The difficulties in establishing when a de facto relationship commences are discussed in Part E.

CONSULTATION QUESTIONS

C6 Do you think the current classification of relationship property on the basis of family use is still appropriate?

C7 Do you prefer any of the options for reform? If you prefer option 2, what length of relationship should justify different rules?

Chapter 10 – When separate property becomes relationship property

10.1 A partner's separate property may not always be kept truly separate from the relationship. The partners might use separate property for family purposes, like the family home. It might be combined with relationship property. For example, the partners may use savings acquired before the relationship to buy property together. One partner may make contributions, either directly or indirectly, to the other's separate property. The separate property may increase in value, or it may produce income which is then used for family purposes. These scenarios reflect just some of the many different ways partners can organise their property for their joint life together.

10.2 In this chapter we address the important issue of when a partner's separate property should no longer be considered separate. The PRA currently provides that separate property may become relationship property in a number of scenarios. In this section we focus on two particular provisions, section 9A and section 10(2), which apply in the following scenarios:[146]

(a) where relationship property has been applied to separate property, increasing the value of the separate property, or producing income or gains from the property (section 9A(1));

(b) where the actions of the non-owning partner have directly or indirectly resulted in an increase in the value of separate property, or income or gains from the property (section 9A(2));

(c) where the income or gains from separate property are used to improve or acquire relationship property (section 9A(3)); and

146 Other sections of the Property (Relationships) Act 1976 provide that separate property becomes relationship property where the court considers it just to treat property acquired after a relationship ends as relationship property: s 9(4); and where the property a partner acquires as a gift or inheritance from a third party is used as the family home or as a family chattel: s 10(4).

(d) where property received from a third party by way of succession, survivorship, as a beneficiary under a trust or by gift has been so intermingled with relationship property that it is unreasonable or impracticable to regard that property as separate property (section 10(2)).

Increasing the value of separate property

10.3 Sections 9A(1) and 9A(2) apply when one partner contributes to the other partner's separate property, and this results in an increase in the value of the separate property.[147] That increase in value is relationship property. It is treated as an independent item of property which is notionally severed from the underlying separate property.[148]

10.4 Section 9A(1) applies where there has been an intermingling of relationship property and separate property. For example, in *Mead v Graham-Mead* the partners built a new milking shed on a farm which was Mr Mead's separate property.[149] The shed had been funded by money from the relationship bank account, and therefore section 9A(1) applied.[150] Under section 9A(1), if the increase in the separate property's value is due, wholly or in part, to the application of the relationship property, then the full increase in value is relationship property.

10.5 Section 9A(2) applies when the actions of the non-owning partner have directly or indirectly increased the value of the separate property. In the leading case of *Rose v Rose*, Mrs Rose had cared for the children and earned a significant portion of the household

147 Section 9A of the Property (Relationships) Act 1976 also applies to any income or gains from separate property, and our discussion of section 9A in this chapter applies equally to income and gains.

148 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [25]. Section 9A was inserted into the Property (Relationships) Act 1976 in 2001 and replaced what was s 9(3). The former s 9(3) had a similar purpose but did not allow for indirect contributions of the non-owning partner. The 2001 changes appear to have been aimed at that omission. However, s 9A includes changes beyond this, including the creation of separate tests for income or gains attributable to the actions of the other spouse, and income or gains attributable to the application of relationship property. The changes also removed a section which allowed for unequal division of non-domestic relationship property assets where one partner's contribution had been clearly greater than the other, which has influenced how the section has been applied subsequently: Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1.

149 *Mead v Graham-Mead* [2015] NZHC 825.

150 *Mead v Graham-Mead* [2015] NZHC 825 at [50]. The issue between the parties was the date from which the increase in value to the farm should be taken. The High Court preferred the earlier date on the basis that at that time the partners had borrowed funds which were then invested in the farming busines: at [54].

income.[151] She argued that these contributions freed up Mr Rose to work in his farming business, including developing a section of land that was his separate property. Mrs Rose's contributions also provided Mr Rose with income that, had it not been available, would probably have caused Mr Rose to sell his land to reduce his indebtedness. Mr Rose also funded the development of his separate property by increasing the relationship debt. On the basis of these indirect contributions, the Supreme Court granted Mrs Rose's claim under section 9A(2).[152]

10.6 Like section 9A(1), when a partner's actions have increased the value of the other partner's separate property, section 9(A)(2) provides that the entire increase in value is treated as relationship property.[153] There is however a major difference in how the two provisions divide the increase in value. Under section 9A(1), the increase in value will be shared equally between the partners. Under section 9A(2), each partner's share will be determined in accordance with the contribution of each partner to the increase in value. This rule has typically led to uneven divisions that favour the owning spouse. In *Rose v Rose* the Supreme Court observed that, where a portion of the increase in value was caused by inflation or a general rise in the value of a certain kind of property, "the ownership of the separate property from which these increases in value sprang should be treated under s 9A(2)(b) as a contribution made by the owner spouse."[154] That contribution should then be evaluated, together with other contributions to the increase in value made by the owner spouse, and weighed against the contributions of the non-owner spouse.[155] In that case

151 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

152 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]–[51]. We note however that Mrs Rose's indirect contributions to the increase in value of the separate property, both her financial and non-financial contributions to the relationship, might not of themselves have resulted in a significant share of the increased value. At [50] the Court noted that on these factors alone "the balance [of contributions] would appear to be substantially in favour of the husband." There was however an "unusual and very important feature", being that Mr Rose had funded the development of his separate property by increasing the partnership's indebtedness and, in doing so, increasing the relationship debt. The other "very significant finding" related to the fact that, had it not been for Mrs Rose's financial contribution, it is likely that the separate property would not have been retained. At [51] the Court said that "[w]hen these features are brought into account the wife's case for a share of the increase is greatly strengthened."

153 Property (Relationships) Act 1976, s 9A(2)(a).

154 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]. The Supreme Court noted another approach would be to set aside external factors that resulted in an increase in the value of separate property, determine the relativity of the other contributions of each spouse and then divide the total increase in value on that ratio. However in respect of that approach the Court said:

> *In many, perhaps most, instances that would not, however, give adequate recognition to the fact that the property was, and remains, separate property (only the increase being relationship property) and that, if it had not been brought into the marriage or acquired during the marriage as separate property, there would have been no asset to produce the inflationary or general gain.*

155 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]. The courts have not tended to separate out the portion of an increase in value that was due to market inflation, instead factoring it into the overall decision as to how to divide the

Mrs Rose's indirect contributions were considered less than Mr Rose's direct contributions.[156] Consequently, the increase in value was divided 60:40 between Mr Rose (who owned the separate property) and Mrs Rose.[157] In other cases there have been splits of 75:25[158] and 80:20[159] between the owner and non-owner partner.

10.7 Both sections 9A(1) and 9A(2) require a partner to show that his or her actions or the application of relationship property caused the separate property to increase in value. Frequently, claims under section 9A fail on the basis that any increase in the value of the property was caused by something else, such as inflation or market growth. In those cases, the non-owning partner would not share in the increase in value of the separate property, even if he or she worked extensively on the property or contributed relationship property towards it.

10.8 The differences in the section 9A(1) and 9A(2) tests are summarised in the table below:

The different tests in sections 9A(1) and 9A(2) of the PRA

Section 9A(1)	Section 9A(2)
Applies to increases in the value of separate property attributable to the **application of relationship property**.	Applies to increases in the value of separate property attributable to the **actions of the non-owner partner**.
Requires **direct causation** between the application of relationship property and the increase in the separate property's value.	Requires **either a direct or indirect causation** between the non-owning partner's actions and the increase in the separate property's value.
Classifies the entire increase in value as relationship property and **divides it equally between the partners**.	Classifies the entire increase in value as relationship property but **divides it accordance with each partner's contribution to the increase in value**.

increase. See also *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [112]–[114].

156 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]–[51].

157 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [51].

158 *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534.

159 *T v W* FC Papakura FAM-2009-055-432, 22 September 2011.

Overlap with section 17 and section 15A

10.9 There is some common ground between section 9A, section 17 and section 15A of the PRA. Section 17 compensates a partner where his or her actions or the application of relationship property has sustained the separate property of the other partner. Applications under section 9A and section 17 will therefore often be made together. There are, however, two important differences between the sections. First, under section 17 a partner needs to show that the separate property was sustained, not that it increased in value.[160] This means that in many cases where a section 9A claim fails, a section 17 claim may succeed. Second, section 9A treats the increase in value as a type of relationship property in its own right. In contrast, section 17 allows the court to either increase the non-owner partner's share of relationship property, or order the owner partner to pay money to the other partner as compensation. No new property arises.

10.10 Section 15A compensates a partner for the increase in value of the other partner's separate property, when:

(a) after the relationship the owner partner's income and living standards are likely to be significantly higher than the other partner's, as a result of the division of functions within the relationship; and

(b) the owner partner acted to increase the value of his or her separate property during the relationship.

10.11 When section 15A applies the court can order the owner partner to pay money or transfer property to the other party.[161] This section deals with the situation where one partner was "freed up" to work during the relationship, and largely spent that time improving the value of his or her separate property, therefore creating an inequality at the end of the relationship.

160 In *A v R* [2007] 2 NZLR 399 (HC) the High Court, citing *French v French* [1988] 1 NZLR 62 (CA) per Cooke P at 65, said at [119]: "Whereas s 9A(1) requires *an increase* in the value of the separate property to be established, s 17 only requires it to be established that the application of the relationship property has *preserved* the value of the separate property and allowed inflation to work" (emphasis in original).

161 This can come from relationship property or separate property: Property (Relationships) Act 1976, s 15A(3).

Does section 15A have a meaningful role?

10.12 Cases involving section 15A are rare. We have not identified any cases where an application under section 15A was successful.[162] The courts have always rejected the claim, usually because the applicant has failed to show that the disparity in income and living standards between the partners was linked to the division of functions in the relationship,[163] or because the applicant failed to show any increase in the value of the other partner's separate property.[164]

10.13 It seems to us that in most cases where section 15A would apply, section 9A(2) would also apply, as the partners' division of functions will have enabled one partner to devote himself or herself to labour or expenditure which increases the value of his or her separate property. This is precisely the scenario in *Rose v Rose*, discussed at paragraphs 10.5–10.6 above.[165]

10.14 An application under section 9A is also likely to be simpler than an application under section 15A, as the applicant does not need to show a future disparity in income and living standards as required by section 15A(1)(a).

10.15 For these reasons, our preliminary view is that section 15A should be repealed.

CONSULTATION QUESTION

C8 Does section 15A perform a meaningful role? Should it be repealed?

Issues with sections 9A(1) and 9A(2)

10.16 The different tests in sections 9A(1) and 9A(2) raise several issues. These issues arise because of the inconsistent approach within section 9A, and between section 9A and the wider PRA framework.

162 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR15A.04].

163 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC); *N v L* FC Gore FAM-2004-017-21, 18 August 2006; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011.

164 *Beran v Beran* [2004] NZFLR 127 (FC); *A v F* FC Manukau FAM-2006-092-2394, 23 December 2009; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011.

165 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

Are the different tests in sections 9A(1) and 9A(2) justified?

10.17 As noted above, there are significant differences between sections 9A(1) and 9A(2). Briggs and Peart argue that the distinction between monetary (section 9A(1)) and non-monetary (section 9A(2)) contributions contravenes the principle that all forms of contribution to the relationship are treated as equal.[166] They observe that section 18(2) gives explicit effect to that principle by stating that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. Yet section 9A makes exactly that distinction.[167] They say the distinction is without rationale and could produce bizarre results.[168] The High Court has also observed that including indirect contributions under section 9A(2) but not section 9A(1) is a "perplexing" distinction.[169]

10.18 However Chief Justice Elias has suggested that the concern may be overstated. This is because sections 9A(1) and 9A(2) are aimed at different circumstances.[170] She explains that section 9A(1) treats the application of relationship property to separate property as a form of intermingling, similar to that provided for in section 10.[171] Section 9A(2) on the other hand is a legislative tool designed to recognise indirect contributions to separate property; something the PRA failed to recognise before section 9A(2) was introduced.[172]

10.19 If the different tests in sections 9A(1) and 9A(2) are not justified, the natural next step is to ask which test should be preferred, if

166 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 18. For a discussion of the principles of the PRA see Chapter 3 of this Issues Paper.

167 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 18.

168 For example, a small amount of relationship property applied to separate property would entitle the non-owning partner to share equally in the consequential increase in value, whereas substantial actions by the non-owning partner are unlikely to result in equal sharing of the increase in value: Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 18.

169 *Hyde v Hyde* [2011] NZFLR 35 (HC) at [33].

170 Sian Elias "Separate Property – *Rose v Rose*" (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 7–8.

171 Sian Elias "Separate Property – *Rose v Rose*" (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 7–8.

172 Sian Elias "Separate Property – *Rose v Rose*" (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 8. Elias does, however, recognise that the division of the increases pursuant to s 9A(2)(b) is a different concept to that applied to the Property (Relationships) Act 1976 as a whole: at 8.

either should. Both tests present their own issues, as we discuss below.

Is section 9A(1) inconsistent with the concept of separate property?

10.20 Under section 9A(1), where there has been an increase in value due to the application of relationship property, the whole of the increase in value is shared equally between the partners. It does not matter whether or not the application of relationship property was the *sole* cause of the increase in value. Briggs and Peart say this approach undermines the concept of separate property, because it allows the non-owning partner to share in any increase in value that is caused by inflation and the owner's own actions.[173]

10.21 There have been cases where the application of relationship property made only a small contribution to the increase in value of separate property, but because of section 9A(1) the non-owning partner could access an equal share in the much larger, overall increase in value. A typical example is where relationship property is used for improvements to land, such as landscaping or the introduction of an irrigation system, but the dominant reason for the increase in the land's value is market growth.[174] The courts have in some cases avoided unjust results by excluding contributions that have had minimal impact on the increase in value.[175] The result is that the courts take an "all or nothing" approach.

Is section 9A(2) inconsistent with the wider framework of the PRA?

10.22 When separate property has increased in value due to the actions of the non-owning partner, the increase in value is shared in accordance with the contribution of each partner to that increase. This method of dividing property is not found anywhere else in the PRA. Rather, the PRA's general rule is that each partner is entitled to an *equal* share of relationship property. The entitlement is based on the principle of the PRA that all

173 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 15–16.

174 These were the facts in *J v K* [2013] NZFC 823.

175 This was the reason given for not making an award in *V v V* [2007] NZFLR 350 (FC), where an increase in value attributable to the input of work and relationship property was estimated to be worth $10,000 of a $1.3 million increase.

forms of contribution to the relationship are treated as equal. The few exceptions to this general rule require the court to divide relationship property in accordance with the contribution of each partner *to the relationship* rather than to the property.[176]

10.23 When Parliament introduced the PRA's general rule of equal sharing, it made a deliberate decision to move away from a contributions-based approach. The previous test under the Matrimonial Property Act 1963 required the court to divide partners' property pursuant to the specific contributions each had made to the property. As we discussed in Chapter 2, this approach was later regarded as fundamentally flawed. It required the applicant to prove specific contributions and have them quantified by the court, which was often impossible in practice and involved a considerable measure of uncertainty in every case.[177] Invariably, disproportionate weight was given to monetary contributions, usually made by the husband.[178] In criticising the courts' approach under the former legislation, Woodhouse J in *Reid v Reid*, called this the "hypnotic influence of money".[179]

10.24 Arguably, the approach taken under the current section 9A(2)(b) resembles a similar downplaying of indirect and non-monetary contributions that the PRA was designed to avoid. As discussed at paragraph 10.6, the courts have tended to place a higher value on the direct work done by an owning partner than the indirect work done by the non-owning partner.[180]

10.25 There are also practical issues in applying the test in section 9A(2)(b). The provision gives no guidance as to how contributions are to be weighted, and the courts have said that determining how the property is to be divided in accordance with contributions "may be little better than a matter of general impression".[181]

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176 The Property (Relationships) Act 1976, s 13 (exceptional circumstances), discussed in Part D; ss 14–14A (relationships of short duration), discussed in Part E; and s 85 (short term relationships ending on death), discussed in Part M. The only other occasion where a contributions-based method applies is where there are multiple claims regarding two different qualifying relationships under ss 52A–52B. That test is unique as it requires the court to allocate property amongst the two relationships in accordance with the contribution of each relationship (rather than each partner) to the acquisition of the property.

177 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5.

178 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 581 per Woodhouse J.

179 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 581 per Woodhouse J.

180 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [51].

181 *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [114].

Do the causal requirements in section 9A lead to unfair outcomes?

10.26 The final issue with sections 9A(1) and 9A(2) is that both require a causal link between the work done or investment made and the increase in value of the separate property. This may lead to unfair outcomes. A classic example is the case of a farm. One partner may have inherited the farm or purchased it before the relationship began, therefore making it separate property. The other partner could do significant farming work over many years during the relationship, performing materially similar work as the owning partner. This might result in no material changes to the farm, but nevertheless the farm may significantly increase in value due to other factors. At the end of the relationship, due to a lack of any causal connection, the non-owning partner may receive nothing under section 9A(2) for the work he or she has done while the owning partner receives the full benefit of the increased value.[182]

10.27 The causal requirement might also lead to unfair outcomes when relationship property is used to pay off debt in separate property, such as a mortgage. Section 9A(1) will not normally apply to the payment of debts, because it has not caused the property to increase in value – it only reduces or discharges the indebtedness secured over the property.[183] This means very different results under section 9A(1), depending on how the relationship property is used. For example, if one partner separately owned a rental property, and relationship property (such as either of the partners' incomes)[184] was used to make improvements to the rental property, the increased value would be shared under section 9A(1). If however relationship property was instead used to meet the mortgage repayments on the rental, section 9A would not apply.

182 This scenario is in essence what occurred in *V v V* [2007] NZFLR 350 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *B v A* (2005) 25 FRNZ 778 (FC); and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

183 *M v G* [2012] NZHC 1798 at [64]. However s 9A(1) may apply if the debt was incurred in order to improve the separate property (rather than to purchase the property), and that debt was paid off with relationship property: *L v L* [2012] NZFC 2545. In that case one partner borrowed money to pay for developments to a farm that was his separate property. Those developments increased the farm's value. The partners used relationship property to meet the loan repayments, and that was an application of relationship property that brought about the increase in value of separate property [69]. Therefore the court said that the increased value of the separate property was relationship property under s 9A(1) of the Property (Relationships) Act 1976.

184 Income earned by either partner is generally classified as relationship property under s 8(1)(e).

10.28 Section 17, discussed at paragraph 10.9 above, might provide a partial answer to these issues. Where the partner's actions cannot be attributed to the increase in the property's value, the courts have sometimes found that the partner has "sustained" the property and therefore can receive compensation.[185] Section 20E might also apply when relationship property has been used to pay debt in separate property.[186] However compensation under section 17 or section 20E may not result in an award of the same size as if the increase in value was classified as relationship property under section 9A(2). This is because these sections focus on compensating the non-owning partner only for the amount of relationship property spent on the separate property or personal debts. However in some cases, awards of up to 25 per cent of the increase in value of the separate property have been made under section 17 as compensation.[187]

Options for reform

10.29 We have considered three possible options for reforming sections 9A(1) and 9A(2). These options address the issues discussed above by removing some of the inconsistencies between the different components of section 9A and between section 9A and the wider PRA.

Option 1: Adopt a single contributions-based test

10.30 Option 1 is to replace sections 9A(1) and 9A(2) with a single test, under which increases in the value of separate property are shared between the partners on the basis of the contributions each partner made to the relationship. Briggs and Peart propose the following wording for consideration:[188]

> *(1) If any increase in the value of separate property, or any income or gains derived from separate property, were*

185 Section 17 awards were made in these circumstances in *V v V* [2007] NZFLR 350 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *B v A* (2005) 25 FRNZ 778 (FC); and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

186 Under s 20E the court may make an order increasing proportionately the share to which the non-owning partner would otherwise be entitled in the relationship property, an order that some of the owning partner's separate property is relationship property for the purposes of division, or an order that the owning partner pays money as compensation to the non-owning partner: Property (Relationships) Act 1976, s 20E(1).

187 *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

188 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

> *attributable wholly or in part, directly or indirectly, to the application of relationship property or the contributions of the non-owning spouse or partner, then the increase in value or (as the case requires) the income or gains are relationship property.*
>
> *(2) In every case to which subsection (1) applies, sections 11(1), 11A, 11B and 12 do not apply and the share of each spouse or partner in the increase in value that has become relationship property is to be determined in accordance with the contribution of each spouse or partner to the relationship.*

10.31 Under this test, the application of relationship property and a non-owning partner's actions are treated alike, reflecting the principle of the PRA that all forms of contributions should be treated as equal.[189] Increases in value caused by external factors such as inflation may be captured, but the second part of the test ensures that the property is divided in accordance with the partners' contributions.[190] The test is also more consistent with the wider PRA framework as it focuses on contributions to the *relationship* and not contributions to the *property*.[191]

10.32 However, this test does not resolve the inconsistency with the principle that all contributions to the relationship are to be treated as equal. This inconsistency is inherent in a contributions-based assessment, and is put in even starker relief if the court has to assess contributions to the relationship rather than to the specific item of separate property.[192] While a similar approach is used elsewhere in the PRA, this is only where there are exceptional circumstances which make equal sharing repugnant to justice (section 13), or where the partners were in a relationship that does not qualify for the PRA's general rule of equal sharing because it was shorter than three years (sections 14–14A). We have doubts as to whether increases in value of separate property that are the result of the application of relationship property or the contributions of the non-owning partner should be treated in the same way.

189 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

190 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

191 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

192 The contributions-based approach is already used in s 13 (exceptional circumstances), discussed in Part D, and ss 14, 14AA and 14A (relationships of short duration), discussed in Part E.

10.33 Neither does this test address the practical issues that arise when the court is required to divide property in accordance with contributions, discussed at paragraph 10.25 above.

Option 2: Adopt a single causation-based test

10.34 The other option Briggs and Peart present is to adopt a narrow causative approach:[193]

> (1) *If any increase in the value of separate property, or any income or gains derived from separate property, were attributable directly or indirectly to the application of relationship property or the contributions of the non-owning spouse or partner, then that part of the increase in value or (as the case requires) the income or gains are relationship property.*

10.35 Alternatively, this test could be broadened so that it also captures the contributions of the *owning* partner to the increase in value, effectively treating all increases other than those caused by external factors such as inflation as relationship property. This alternative is favoured by Fisher, who suggests that gains on separate property during the course of the relationship that are attributable to the joint and several efforts of the partners should be considered relationship property.[194]

10.36 Like option 1, this test removes distinctions between the current sections 9A(1) and 9A(2). Because it provides for equal sharing, it is arguably more consistent with the PRA's principle that all forms of contribution to the relationship are treated as equal. By only allowing increases in value to be shared equally if the increase is *attributable* to the application of relationship property or the contributions of the one or both of the partners, it excludes external causative factors like inflation.[195] The main disadvantage is that the task of apportioning the correct value to the respective separate property and relationship property components of the increase in value will be complex and is also likely to be imprecise. To achieve accuracy, the partners will probably require

193 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

194 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

195 Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

considerable expert assistance, which will increase the costs and length of resolving relationship property matters.

Option 3: Treat all increases in value of separate property as relationship property

10.37 This option proposes more significant reform, by expanding the extent to which a non-owning partner can access the increase in value or income or gains from separate property.

10.38 Under this option the PRA would classify all increases in the value of separate property, or income or gains derived from separate property during the relationship as relationship property. No causative element would be needed. This option would probably mean repealing sections 9A(1) and 9A(2) and introducing a new category of relationship property under section 8.

10.39 The basis for doing so is that it is simply an extension of the rule under section 8(1)(e) that all property acquired after the relationship began is relationship property. There would be no distinction as to whether the property acquired during the relationship was derived from separate property or any other source. The Supreme Court accepted in *Rose v Rose* that, except in the case of a purely passive investment, it is likely that conduct of the non-owning partner will have had some direct or indirect influence on the value of separate property.[196] The Court explained that invariably, one partner's actions will have allowed the owning-partner to devote labour or expenditure to the separate property. Alternatively, the non-owning partner may have provided financial support by paying for household expenditure and thereby enabling the owner of the separate property to pay for work which increases the value of the separate property.[197] If that is the case, it may be sensible to reverse the position of section 9A and deem that all increases in, or gains from, separate property are relationship property. An exception could be retained for cases where the increases in the value of separate property truly have no connection with the relationship.

10.40 This option would also be simpler than options 1 or 2. There would be no need to undertake the complex process of apportioning the increased value of the property to the different

196 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

197 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

contributions of the partners or the application of relationship property.

10.41 The main criticism of this option is likely to be that it undermines the concept of separate property as it would give no credit to a partner who contributed the separate property in the first place. It might also increase valuation costs and the risk of valuation disputes, as the partners would need to determine the extent to which any separate property increased in value during the relationship.

CONSULTATION QUESTION

C9 Is section 9A in need of reform? If so, what is the preferable option for reform? Are there any other potential options we have not considered?

Applying separate property to relationship property

10.42 Section 9A(3) applies where the partners have used separate property for the acquisition or improvement of relationship property. It provides that any separate property[198] is relationship property if it is used:

(a) with the express or implied consent of the owning partner; and

(b) for the acquisition or improvement of relationship property, or to increase the value of relationship property or the amount of any partner's interest in any relationship property.

Does section 9A(3) have a meaningful role?

10.43 Section 9A(3) is of narrow application and is not widely used. This is because other provisions of the PRA will usually classify the property as relationship property without relying on section 9A(3). When separate property is used to acquire or improve relationship property it will generally be converted into that

198 Including any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property: Property (Relationships) Act 1976, s 9A(3).

relationship property.[199] For example, if an item of separate property is sold and the money is used to make improvements on the family home, that money will simply become part of the family home, which is relationship property. Also, section 9A(3) is subject to section 10, which means the specific rules applying to property acquired by gift, succession or under a trust will apply to that type of property.

10.44 Since section 9A(3) was amended in 2001, there have been several cases where the courts have said that section 9A(3) applied. However those courts also found the property to be relationship property for other reasons.[200]

10.45 Some commentators suggest that section 9A(3) resolves conflicts between some of the definitions of relationship property and some of the definitions of separate property.[201] For example, section 9A(3) ensures that when the family home is purchased from the proceeds of separate property, the family home is still treated as relationship property despite section 9A(2) stating that all property acquired out of separate property is separate property. There may be a simpler way to approach this, for example by amending sections 8 and 9 to clarify where the provisions defining relationship property take precedence over provisions defining separate property, and vice versa.

CONSULTATION QUESTION

C10 Do you think that section 9A(3) has a meaningful role? Should it be repealed?

Does the policy of section 9A(3) lead to unfair outcomes?

10.46 Section 9A(3) is based on the presumption that when one partner uses their separate property to acquire or improve relationship property, it is fair to treat the separate property as relationship property from that point on. That might not seem fair in some scenarios, because it gives no credit to the partner providing the separate property. For example, if one partner used his or her

199 In *Hyde v Hyde* [2011] NZFLR 35 (HC) at [39] Ellis J observed that "where separate property is applied to enhance relationship property, the operation of some other provision of the Act will usually transmogrify the separate, into relationship, property in any event."

200 The cases are *Hyde v Hyde* [2011] NZFLR 35 (HC) and *Thackwray v Thackwray* [2014] NZFC 8702. In one other case the court did not attempt to apply s 9A(3) at all due to findings in favour of the partner seeking division of the property on other grounds: see *Herbst v Herbst* [2013] NZFC 4862.

201 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.55].

substantial savings to pay the deposit on the family home that deposit simply becomes part of the relationship property pool.

10.47 If the policy of section 9A(3) no longer reflects what most people think is fair, then this may support the option of amending the definition of relationship property to reflect a pure "fruits of the relationship" approach, which we discussed in Chapter 9. Under this approach the value of any contributions of separate property to the relationship could be preserved. We discuss how this would work below.

Intermingling of gifts and inheritances with relationship property

10.48 Section 10 recognises the special nature of property received from a third party by way of succession, survivorship, as a beneficiary under a trust or by gift. This property will normally be separate property, as will any proceeds from the sale of that property, and property acquired out that property.[202] In this section we refer to these types of property as "gifts and inheritances."

10.49 Section 10(2) provides an exception. The gifted or inherited property will be considered relationship property if it has, with the express or implied consent of the partner who received it, "been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property."[203]

10.50 In *N v N*, for example, the husband received a gift of 247 cattle 20 years before the relationship ended.[204] The cattle had been farmed with other stock that was relationship property. The Court of Appeal upheld the High Court's finding that, because over the 20 year period the original stock had either died, been sold or replaced, they could not be traced. The Court of Appeal therefore said that the cattle were so intermingled with relationship property that it was impractical and unreasonable to treat them as separate property.[205]

202 Property (Relationships) Act 1976, ss 10(1)(b) and 10(1)(c).

203 Property (Relationships) Act 1976, s 10(2). Section 10(3) also provides that a gift from the other partner will be regarded as relationship property if has been "used for the benefit of both spouses or partners."

204 *N v N* [2005] 3 NZLR 46 (CA).

205 *N v N* [2005] 3 NZLR 46 (CA) at [115].

10.51 The courts have noted that there is a distinction between the terms "impractical" and "unreasonable".[206] In *S v W* one partner had purchased a herd of animals from his separate property funds to start a farming business.[207] The business was operated through a partnership between the partners which was also used to operate an art business. The farming business and art business were fully integrated. Revenues and expenses were dealt with through the same account. The High Court observed that the surviving animals were physically identifiable at the time of separation and it was arguably practical to regard the surviving animals in the original herd as the partner's separate property. However, the partners ran the farming business through a jointly operated partnership which intermingled the separate property with relationship property. The partners saw advantages in structuring the operation in this way. The High Court therefore said that it was unreasonable to regard the animals as separate property.[208]

The relationship between sections 8, 9, 9A and 10 is unclear

10.52 The PRA appears to treat gifts and inheritances received from a third party as a special form of separate property. Rather than include gifts and inheritances among the general types of separate property under section 9, section 10 deals with it in isolation. Section 10 also provides specific exceptions in subsections 10(2) and 10(3). It is not clear from the PRA how section 10 relates to the general definitions of relationship property and separate property. This is evident in a number of instances.

Gifts and inheritances acquired in the partners' joint names

10.53 There is some uncertainty about how to classify property that has been acquired in the partners' joint names but was funded by property acquired by gift or inheritance. Section 8(1)(c) provides that property owned jointly or in common in equal shares by

206 *S v W* [2006] 2 NZLR 669 (HC) at [58].

207 *S v W* [2006] 2 NZLR 669 (HC).

208 *S v W* [2006] 2 NZLR 669 (HC) at [73]. A similar decision was reached in *Greenslade v Greenslade* (1978) 2 MPC 69 (SC). In that case Mr and Mrs Greenslade carried on business together through a partnership. Mr Greenslade paid an inheritance he had received into the partners' joint account. The partners pooled all their joint cash resources into the account, regardless of whether the income and expenditure from the account was used for private, domestic or business purposes. The court said at 70 that pooling of the partners' resources in this way reflected their "joint domestic interest" and also the significant help rendered by Mrs Greenslade to the business. Accordingly, the court said that property purchased from the account should be classified as matrimonial property.

the partners is relationship property. However, section 10(1)(c) provides that all property acquired from a gift or inheritance is not relationship property. To confuse matters further, some items of relationship property under section 8(1) are expressly stated to be subject to section 10, but section 8(1)(c) is not so qualified. Yet, section 10(4) provides that regardless of sections 10(2) and 10(3), the family home and family chattels (under sections 8(1)(a) and 8(1)(b)) will always be classified as relationship property. It makes no mention of section 8(1)(c).

10.54 The courts have considered the relationship between section 8(1)(c) and section 10(2) on a number of occasions, but have reached different conclusions.[209] The courts are now tending to follow the High Court's decision in *S v W*.[210] In that case, the High Court observed that the wording of the PRA was not capable of conclusively resolving the issue one way or the other.[211] Nevertheless, the Court said that the underlying intention behind the PRA seemed to be that section 10 alone should govern property acquired by succession, survivorship, as a beneficiary under a trust or by gift. That was because the property had not been produced by the efforts of the partners.[212] On that basis, the High Court saw section 10 as "an exclusive code".[213] While joint ownership of property might reflect an intention to share the property equally, the Court said that this could be displaced where section 10 applied.[214]

Is section 10 subject to section 9A?

10.55 There is also some uncertainty about whether any increases in the value of property obtained by gift or inheritance from a third party can be classified as relationship property. In other words, is section 10 subject to section 9A? The wordings of the provisions

209 The conflicting authorities were helpfully considered by the High Court in *S v W* [2006] 2 NZLR 669 (HC). Cases that decided s 8(1)(c) prevailed over s 10: *Skerten v Skerten* (1978) 1 MPC 193 (SC); *Lewis v Lewis* [1993] 1 NZLR 569 (HC); and *Waller v Hider* [1997] NZFLR 936 (HC) (leave to Court of Appeal refused: *Waller v Hider* [1998] 1 NZLR 412 (CA)). Cases that decided s 10 prevails over s 8(1)(c): *Z v Z* (1988) 5 NZFLR 111 (HC); *Millington v Millington* [1999] NZFLR 829 (HC); *Coley v Coley* FC Manukau FP055/253/02, 24 December 2003; *Macleod v Macleod* FC North Shore FAM-2003-044-1824, 29 June 2004; *P v P* (2002) 22 FRNZ 380 (FC); *S v W* [2006] 2 NZLR 669 (HC); *McDowell v McDowell* (2009) 28 FRNZ 379 (FC); *B v B* FC Christchurch FAM-2005-009-3163, 29 June 2009; *Phair v Galland* FC Oamaru FAM-2008-045-113, 8 February 2010.

210 *S v W* [2006] 2 NZLR 669 (HC).

211 *S v W* [2006] 2 NZLR 669 (HC) at [51].

212 *S v W* [2006] 2 NZLR 669 (HC) at [52].

213 *S v W* [2006] 2 NZLR 669 (HC) at [52].

214 *S v W* [2006] 2 NZLR 669 (HC) at [52].

give no indication of their respective priorities. The ordering of the sections suggests that section 9A is intended as a qualification to section 9. If section 9A was meant to qualify section 10 as well, it may have been logical for section 9A to follow section 10. Section 10(2) also provides its own grounds for when the property listed in section 10(1) may become relationship property. Section 9A is not mentioned. If section 10 is intended to be an exclusive code, as the High Court concluded in *S v W*, section 9A should not apply.

10.56 Nevertheless, the Supreme Court has inferred that section 10 is subject to section 9A. In *Rose v Rose*, one partner inherited land from his father and so it would have been separate property under section 10.[215] The partner developed the land into a vineyard using relationship property. The land increased in value. The Supreme Court said that the increased value could be considered relationship property under section 9A. The Court, however, did not discuss the relationship between section 9A and section 10. It appears simply to have been assumed that section 9A would apply to separate property under section 10.

10.57 Accordingly, while the courts have decided how section 10 should be interpreted in relation to section 8(1) and section 9A, these interpretations are not supported by the clear wording of the PRA. In addition, the extent to which section 10 is a self-contained code is unclear in light of the Supreme Court's decision in *Rose v Rose*.

Is reform required?

10.58 In considering whether reform is required, the primary question is what priority should be given to property that a partner acquires as a gift or inheritance from a third party. Does that property deserve special treatment, or can it be treated as separate property generally and therefore subject to sections 8 and 9A? More specifically, should gifts or inheritances become relationship property when the partners have placed that property into their joint ownership? And should increases in the value of a gift or inheritance that are attributable to the relationship be treated as relationship property?

215 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [28].

10.59 There is little discussion in the legislative material about why the property described in section 10(1) should be treated differently from separate property generally under section 9. The rationale alluded to in the case law is that property acquired from a third party has not been produced by the efforts of the partners and so should not be considered relationship property.[216] But the same can equally be said of other types of separate property that would fall under the definition in section 9, such as property acquired before a relationship.

10.60 One possible explanation is that property acquired by gift or inheritance is unique because of the intentions of the third party who gave the property. It could be argued that the PRA should not defeat or restrict a third party's ability to gift property to a recipient of his or her choosing. For example, parents may wish that their children inherit certain family assets by way of succession. As we explain in Part G it has been common in New Zealand for families to establish trusts in order to pass family farms to the next generation. It might be suggested that the PRA should not disrupt such estate planning. Rather, the PRA should distinguish between gifted and inherited property and separate property generally in order that gifted and inherited property is given extra protections against division.

10.61 The question of whether gifted or inherited property should be treated differently by the PRA is fundamentally a value judgment.

CONSULTATION QUESTIONS

C11 Should the PRA give special treatment to property acquired by one partner from a third party by succession, survivorship, gift or because the partner is beneficiary under a trust?

C12 If so, should such property lose its separate property status if it has been used to acquire property in the partners' joint names?

C13 Likewise, should such property be subject to section 9A?

Should the courts take a more robust approach to intermingling?

10.62 Some commentators criticise the intermingling exception under section 10(2). Fisher argues that separate property such as third party gifts do not lose their character just because they have been

216 *S v W* [2006] 2 NZLR 669 (HC) at [52].

intermingled.[217] Nor does intermingling prevent an estimation of the respective proportions of relationship property and separate property, even if broad and robust estimates are required.[218] Fisher argues that it is far better to undertake rough apportionments in the case of intermingling because it is more consistent with the concept underlying the PRA, that relationship property is divided but separate property remains separate.[219]

10.63 Fisher makes a valid point. It might not seem fair that the recipient of the gifted or inherited property receives no credit for its initial contribution, just because it has been intermingled with relationship property. It is however important to recognise that the courts will only refuse to account for the initial separate property input when the intermingling has made it *impractical* or *unreasonable* to regard the property as separate property. This is a high threshold. The case law shows that intermingling on its own will not deprive a partner of the separate property.

10.64 In *Brenssell v Brenssell* for example, the partners carried on a farming business together as a partnership.[220] The partners initially contributed funds to begin the partnership. The wife injected a sum of money she had inherited as a bequest. The partnership soon began to generate revenue. All funds were credited to and debited from the same account. The wife used a sum of money from the partnership account to purchase shares in a company. She claimed that the money she had withdrawn was the money she had inherited. The question before the High Court was the classification of the shares. This in turn required the Court to consider whether the purchase of the shares could be traced to the funds the wife had inherited as a bequest, or whether the funds in the partnership account were so intermingled it was impractical and unreasonable to consider the purchase funds as the wife's separate property. The High Court observed that at the time of the share purchase, the partnership had acquired insufficient revenue from which to fund the share

217 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

218 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

219 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.63].

220 *Brenssell v Brenssell* [1995] 3 NZLR 320 (HC).

purchase. Accordingly, the purchase funds must have been the from the wife's bequest, at least in substantial part. In those circumstances, the Court said, it was logical to regard the purchase money as the withdrawal of the wife's separate property.[221] While there had been an intermingling of the bequest by depositing it in the partnership account, it was not unreasonable or impracticable to regard the money as the wife's separate property.[222]

10.65 Even if it is practical to apportion the value of intermingled property between the separate property and relationship property inputs, there may be good reasons for treating intermingled property as relationship property where it is *unreasonable* to do otherwise. In the case *S v W* discussed above, one partner had acquired animals from his separate property funds. The High Court recognised, however, that the partner derived advantages through structuring the farming business as a partnership with the other partner and by intermingling property. In that case, the High Court said it would be unreasonable to treat the animals as separate property, even though it was practical to treat them as such.[223]

10.66 In our preliminary view, the intermingling exception under section 10(2) ought to be retained in its current form. Although it could be argued that the courts should take a robust approach and be more willing to apportion the value of intermingled property, section 10(2) is intended to operate in the truly exceptional case. We also see advantages in allowing the court to treat intermingled property as relationship property where it is reasonable.

CONSULTATION QUESTIONS

C14 Should the intermingling exception under section 10(2) of the PRA be retained in its current form?

C15 If not, what is a better approach for when gifts and inheritances have been intermingled with relationship property?

221 *Brenssell v Brenssell* [1995] 3 NZLR 320 (HC) at 330.

222 *Brenssell v Brenssell* [1995] 3 NZLR 320 (HC) at 330.

223 *S v W* [2006] 2 NZLR 669 (HC) at [73].

Implications of moving to a "fruits of the relationship" approach

10.67 In Chapter 9 we considered the option of moving to a pure fruits of the relationship approach. Under that approach, the PRA would define relationship property as property which is attributable (directly or indirectly) to the relationship. Relationship property would no longer be defined based on the use to which property is put.

10.68 If the PRA is reformed by adopting a fruits of the relationship approach, there are implications for section 9A and section 10.

How would separate property be treated under a fruits of the relationship approach?

10.69 The fruits of the relationship approach will require the partners to identify all property they brought into the relationship or acquired during the relationship from a gift or inheritance. This will generally remain separate property even if it is used as the family home (subject to intermingling under section 10(2)). The questions that then arise are:

(a) First, how should increases in value, or any incomes or gains on separate property, be treated?

(b) Second, where new property has been purchased using relationship property funds and separate property funds, how should the new property, and any increases in its value, be shared?

Option 1: Share increases in value and new property purchases between the separate property and relationship property sources

10.70 One option is to share any increases in the value of separate property, or new property purchased using separate property funds, according to the extent they were attributable to the relationship. Fisher, who favours this approach, suggests that increases in value of separate property during the course of the relationship that are attributable to the joint and several

efforts of the partners should be considered relationship property.[224] However, "spontaneous increases in value", such as those attributable to inflation or rises in the value of property, should remain separate.[225] This is similar to the second option for reforming sections 9A(1) and 9A(2), discussed at paragraphs 10.34–10.36 above.

10.71 For new property that is purchased from both relationship property funds and separate property funds, it would be necessary to share the value of the new property according to the relationship property and separate property contributions, including a proportionate share of any increase in value of the new property.[226]

10.72 The advantage of this approach is that each partner is credited for the property they contribute to the relationship, including any additional value gained on that separate property. Likewise, the approach apportions the gains in value that are attributable to the relationship. The main disadvantage is that the task of apportioning the correct value to the respective separate property and relationship property components of an asset will be complex. The task of apportioning value between the various factors, such as the relationship, the input of separate property and inflationary gains, is also likely to be imprecise. To achieve accuracy, the partners will probably require considerable expert assistance, which will increase the costs and length of resolving relationship property matters.

Option 2: Classify increases in the value of any property as relationship property

10.73 A second and alternative approach is to consider any increase in value on any property, whether relationship property or separate property, as relationship property. This is essentially the third option for reforming sections 9A(1) and 9A(2), discussed at paragraphs 10.37–10.41 above.

224 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

225 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

226 Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

10.74 When new property is purchased using a combination of separate property funds and relationship property funds, the partners would keep an entitlement to their separate property contributions, but any subsequent increase in the new property's value would be treated as relationship property.

10.75 The advantage of this approach is that it would be simpler. There would be no need to undertake the complex process of apportioning the increased value of the property to the respective separate property and relationship property inputs. Instead, all gains would be relationship property. The main disadvantage is that it would give no credit to a partner who contributes a significant amount of separate property to the purchase of an asset.

10.76 These options are illustrated in the case study below.

CASE STUDY: How should increases in value be shared?

To explore how a fruits of the relationship approach might work, we use the hypothetical example of Brenda and Martin.

Brenda and Martin decide to move in together. They purchase a house. Brenda uses her savings of $50,000 (which is her separate property) to fund the deposit. The purchase price of the house is $300,000. Brenda and Martin fund the balance of the purchase price by a mortgage of $250,000.

Brenda and Martin meet the mortgage repayments and other expenditure of the house from their incomes.

Three years later Martin receives a $50,000 inheritance from his grandmother's estate (which is his separate property). Martin uses this money to build a double garage and an extra bedroom on the house.

Brenda and Martin separate a year later. Brenda and Martin have repaid $50,000 off the mortgage. An amount of $200,000 remains outstanding.

A valuer tells Brenda and Martin that the market value of the house is $450,000. However, if the house did not have the double garage

and the extra bedroom, it would only be worth $375,000.

How should Brenda and Martin divide the value of the house?[227]

DIVISION UNDER THE CURRENT RULES

The contributions of separate property by both Brenda and Martin are treated as having been converted into the house, which is relationship property. The market value of the house, less the mortgage, is shared equally:

Status quo	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	-	$125,000	$125,000
Martin	-	$125,000	$125,000

DIVISION UNDER OPTION 1

Under option 1, Brenda and Martin would need to share the value of the house between their respective separate property and relationship property contributions.

First, Martin's use of separate property to build the garage and bedroom has increased the house's value by $75,000. That would mean Martin is entitled to his initial separate property contribution ($50,000) and gain ($25,000), totalling $75,000.

Second, the market value of the house after discounting Martin's separate property contribution appears to be $375,000. The house has therefore increased in value by $75,000. Brenda's separate property contribution of $50,000 accounts for one sixth of the initial purchase price. She may therefore be entitled to recover one sixth of the property's increased value ($12,500) as a gain on her separate property contribution. That would mean Brenda is entitled to $62,500 representing her separate property contribution and gain.

Third, the remainder of the house's market value ($312,500) would be relationship property. From this amount, the outstanding $200,000 mortgage debt must be deducted because it is a relationship debt. The relationship property eligible for equal division between Brenda and Martin is $112,500.

Option 1	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	$62,500	$56,250	$118,750
Martin	$75,000	$56,250	$131,250

227 For the purposes of this scenario Brenda and Martin's house is the only item of property. In every scenario, the outstanding mortgage would be a relationship debt. Ordinarily a relationship debt would be deducted from the gross value of the global pool of relationship property. In this example we have only deducted the mortgage debt from the gross value of the house.

DIVISION UNDER OPTION 2

Under option 2, increases in value of all property during the relationship would be relationship property. Accordingly, Brenda and Martin would each be entitled to their $50,000 separate property contributions. All increases in the house's value would be relationship property, against which the outstanding mortgage debt would be deducted. Brenda and Martin's respective shares would be as follows:

Option 2	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	$50,000	$75,000	$125,000
Martin	$50,000	$75,000	$125,000

CONSULTATION QUESTION

C16 If the PRA's definition of relationship property was based solely on a fruits of the relationship approach, how should increases in value be treated? Do you prefer option 1 or option 2? Why?

How would gifts and inheritances be treated under a fruits of the relationship approach?

10.77 Section 10(4) provides that if gifted or inherited property is used as the family home or a family chattel, that property will be classified as relationship property. The PRA therefore gives primacy to the family use approach to classification over the special treatment given to gifted or inherited property.

10.78 Under a fruits of the relationship approach, the family home and family chattels would not automatically be designated as relationship property. Section 10(4) would need to be removed. Consequently, the special status of gifted and inherited property would be enhanced because there would be fewer exceptions under section 10 for when such property could be treated as relationship property. If, however, gifted and inherited property was treated like other types of property and was subject to the same rules and exceptions under sections 8 and 9A, a move to a fruits of the relationship approach would not enhance the special status of inherited and gifted property to the same extent.

10.79 The responses we receive to the question of whether gifted and inherited property should receive special treatment will also be relevant if a fruits of the relationship approach to classification is considered.

Chapter 11 – Issues with particular types of property and debts

11.1 This chapter considers issues with the classification of the following types of property and debts:

(a) ACC and insurance payments;

(b) super profits and earning capacity;

(c) taonga;

(d) heirlooms;

(e) student loan debts; and

(f) inter-family gifting and lending.

ACC and insurance payments

11.2 A partner may have a right to payments in respect of injury or illness under the Accident Compensation Act 2001 or under a private insurance policy. The courts have said that the right to payment constitutes a property right which, if accrued during the relationship, will be classified as relationship property. For ease of reference, we will refer to payments under the Accident Compensation Act 2001 and its predecessors as "ACC payments." We will refer to payments under an insurance policy for personal injury or illness as "insurance payments."

11.3 ACC payments can take several forms.[228] The main ones are:

(a) rehabilitation payments, which are intended as money and support to facilitate the injured person's rehabilitation;[229]

228 For an overview, see Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming). Not listed here are the entitlements available when a partner dies: see Accident Compensation Act 2001, sch 1, pt 4.

229 Accident Compensation Act 2001, sch 1, pt 1. Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming) suggest that rehabilitation payments reflect the statutory purpose in s 3(c) of that Act that "where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation."

(b) lump sum compensation payments for permanent impairment;[230] and

(c) weekly compensation payments, which are to compensate people incapacitated through injury for their lost earnings.[231]

11.4 In *S v S*[232] and *B v B*[233] a partner had received lump sum ACC payments. In both cases, the courts determined that the payments represented the recipient partner's right to compensation under accident compensation legislation. As the rights had accrued during the relationship, they were relationship property pursuant to section 8(1)(e) of the PRA.

11.5 In *C v C* the husband suffered an illness during the course of the relationship which left him disabled.[234] His policy of insurance provided that in the event he suffered a disability that prevented him from working he would be paid a monthly income, both during his notional working life and in his retirement. The High Court said the husband's right to payments was a contractual right under the insurance policy that had crystallised during the relationship.[235] All future payments the husband would receive were attributable to this underlying property right and were likewise relationship property.[236]

11.6 In contrast, if the partner's right to ACC or insurance payments, either as a lump sum or as periodical payments, accrues before the relationship, it will be regarded as the partner's separate property.[237]

230 These payments are designed to compensate the injured person for impairment to their person regardless of whether that causes economic loss: Injury Prevention and Rehabilitation Bill 2000 (90-1) (explanatory note) at 3; and Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, 1967) at [291] cited in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976 (2017) 14(3) Otago Law Review (forthcoming).

231 Accident Compensation Act 2001, s 100(1) and sch 1, pt 2.

232 *S v S* (1984) 3 NZFLR 88 (DC).

233 *B v B* [2016] NZHC 1201, [2017] NZFLR 56. In this case there was an issue as to when the right to payments accrued. The High Court said that, based on s 38 of the Accident Compensation Act 2001, the statutory right to payment accrues when the claimant first receives treatment for the injury, even if the injury itself was suffered and manifested some time earlier.

234 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

235 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [32].

236 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [39].

237 *G v G* [1995] NZFLR 550 (HC); and *T v A* FC Auckland FP 88/00, 20 November 2003.

Should a partner's right to ACC or insurance payments accrued during the relationship be divided as relationship property?

11.7 The classification of a partner's right to ACC or insurance payments as relationship property may be perceived as unfair for several reasons.

11.8 First, ACC payments are usually made either to facilitate a person's rehabilitation from injury or as compensation for impairment or lost earnings. Likewise, insurance payments are received in respect of insured loss to a person's health, often as a means of ensuring income protection. The partner who receives the payments may continue to suffer the injury and loss after the partners' relationship has ended. Nevertheless, the courts have said that the full value of a lump sum payment, or all future periodic payments, is relationship property if the right to the payments accrued during the relationship. It could be argued that, if the payments are to compensate for the loss suffered after the relationship ends, this means the recipient partner is obliged to account for property received in respect of post-separation losses which are unconnected with the relationship.[238]

11.9 Although technically all payments stem from the underlying property right,[239] it could be said that this analysis is not in keeping with classification under the PRA. The general approach is to classify property connected to the relationship as relationship property and all property unconnected with the relationship as separate property.[240] In any event, many people may not agree

238 In some cases, the courts have recognised the difficulties in requiring a partner to share the value of ACC payments that are intended as compensation for loss suffered after the relationship: *P v P* HC Nelson M8-83, 20 July 1983 at 9 per Hardie Boys J: the lump sum compensation was "entirely personal" and intended to compensate the injured husband for losses he would suffer "for the remainder of his days"; and *S v S* (1984) 3 NZFLR 88 (DC) at 92–93. In these cases, the courts applied the exception that extraordinary circumstances rendered equal sharing of the payments repugnant to justice. These cases were, however, decided prior to the 2001 amendments, and there was greater scope under the legislation to depart from equal sharing in respect of property other than the family home and family chattels: see Simon Connell and Nicola Peart "Accident Compensation Entitlements under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming).

239 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [33]–[34].

240 In its 1988 report, the Ministerial Working Group observed that ACC payments are distinct from other types of property a partner may receive during the relationship. Unlike property such as lottery winnings and redundancy payments, the injury for which the partner receives compensation may be permanent: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 24. Ultimately, the Working Group did not make any firm recommendations in respect of ACC payments but expressed the view that earnings-related compensation for the period during marriage should be matrimonial property and earnings-related compensation for a period outside marriage should remain separate (at 25). We also note that s 8(1)(g) of the Property (Relationships) Act 1976 provides that the value of any life insurance policy, or of the proceeds of such a policy, is relationship property to the extent the value is attributable to the relationship. There are, however, key differences between life insurance policies, and ACC payments and other insurance policies (such as income protection policies). Life insurance policies often can be surrendered in

with the distinction made between post-separation income, which is not relationship property, and post-separation ACC payments or insurance payments, which are.

11.10 The law has long recognised that compensation received in respect of bodily injury deserves special treatment.[241] Throughout the history of the accident compensation legislation, a person's entitlements under the legislation have always been inalienable and have never vested in the Official Assignee if the recipient became bankrupt.[242]

11.11 Second, if a partner has received or is continuing to receive ACC or insurance payments, it may mean that his or her ability to work is affected. In some cases the payments may be income on which the partner depends if he or she cannot work. In other cases, the payments will be necessary for the partner's rehabilitation. There will be tensions and practical difficulties if the partner is required to account for half the payments to a former partner after separation.

11.12 The extent to which the current approach to ACC and insurance payments may operate unfairly is best illustrated by the scenario where, at the end of a relationship, one partner is working full time and the other is unable to work due to an injury sustained during the relationship. In this scenario, the partner working full time is not required to share his or her future earnings, while the partner receiving ACC or insurance payments must share any future payments equally with his or her former partner.

Options for reform

11.13 The PRA could be amended in order to respond to these potential issues. Section 8 could classify ACC payments as relationship property only to the extent that they relate to loss a partner has suffered during the relationship. If the payments relate to the loss a partner suffered either before or after the relationship, those payments could be classified as separate property. The task of apportioning payments may be straightforward if the payments

return for a certain payment. Life insurance policies also insure the life of a partner rather than compensate for ongoing loss a person may suffer during the course of his or her life.

241 In *B v N* [2007] NZFLR 1146 (FC) at [23] the Family Court observed that s 123 of the Accident Compensation Act 2001 provided that entitlements under that Act are "not assignable or alienable." The Court said that this provision "very much carries through the philosophy that derives from common law in which actions for damage to the person are sacrosanct."

242 Accident Compensation Act 2001, s 123; Accident Insurance Act 1998, s 124; Accident Rehabilitation and Compensation Insurance Act 1992, s 86; Accident Compensation Act 1982, s 89; and Accident Compensation Act 1972, s 135. See also *B v N* [2007] NZFLR 1146 (FC) at [23] for discussion on the effect of s 123 of the Accident Compensation Act 2001.

are made to the partner periodically. If, on the other hand, the payments are made as a lump sum payment, the partners would have to apportion the lump sum across the respective periods. This could be difficult, particularly when there is no indication of how the lump sum compensatory payment has been calculated.

11.14 The advantages of this approach are that the classification better reflects the nature of relationship property and separate property. We also believe that most New Zealanders would consider this approach to classification to be fairer. The main disadvantage is that it will require partners to undertake the potentially difficult task of apportioning lump sum ACC payments to the pre-relationship period, relationship period and post-relationship period.

11.15 A similar reform could be made for insurance payments made in respect of personal injury or illness. However there may be less basis for doing so, as insurance payments are likely received as a result of the deliberate choice by a couple to purchase an insurance policy and meet the premiums using relationship property. They may be distinguishable therefore from the compulsory social insurance accident compensation scheme, although partners will still have usually contributed to the scheme through levies on their incomes, which will usually be relationship property.[243]

CONSULTATION QUESTIONS

C17 If a right to ACC or insurance payments arises during the relationship (because of a personal injury or illness sustained during the relationship), should all those payments (including future payments) be classified as relationship property?

C18 Should the PRA be reformed? If so, do you agree with our suggested amendment? Should it apply to ACC and insurance payments?

Super profits and earning capacity

11.16 As discussed in Chapter 8, the courts have said that a partner's capacity to earn an income (earning capacity) does not come under the PRA's definition of property. The leading case is the decision of the full Court of Appeal in *Z v Z (No 2)*.[244] In that case

243 Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming).

244 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

Mrs Z had left the labour force when she married Mr Z in order to care for their children and look after the home. Mr Z had developed a successful career in accountancy. At the time the partners separated, Mr Z had become a partner in a successful accountancy firm. Mrs Z suffered from an illness and was unlikely to return to work. Mrs Z argued that her contributions to the marriage had enhanced Mr Z's earning capacity, and that his enhanced earning capacity should be relationship property. Through her care for the children and the home she had supported Mr Z through his study and the development of his career. Mrs Z said that she should be entitled to half the value of Mr Z's earning capacity.

11.17 The Court of Appeal recognised the force of Mrs Z's arguments.[245] However, the Court said that Mr Z's earning capacity could not be considered property under the PRA. The Court noted that the PRA's definition of property was adopted from conventional property law statutes and this strongly indicated the PRA only applied to conventional notions of property.[246] The Court also said that personal characteristics, which are part of an individual's overall make up, cannot constitute property under the PRA.[247]

11.18 Although the Court of Appeal did not accept Mrs Z's argument, that was not the end of the matter. The Court said that Mr Z had a "bundle of rights" that made up his interest as a partner in the accountancy firm. This interest, the Court said, did constitute property under the PRA which should be divided between Mr and Mrs Z.[248] The Court suggested that the best approach to valuing Mr Z's partnership interest was first to ascertain whether the profits he received from the partnership included an element derived from his membership of the firm as distinct from his own earning capacity.[249] The Court referred to these excess earnings as "super profits."

11.19 This approach to valuing a partner's interest in a firm has been followed in subsequent cases. The Court of Appeal case *M v B* is a leading example.[250] The husband was a partner in a large law firm. The Court said that his interest in the partnership was relationship property, but only to the extent that the profits he

245 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 281.
246 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.
247 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.
248 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 286.
249 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 292.
250 *M v B* [2006] 3 NZLR 660 (CA).

derived from partnership were in excess of what his own direct industry would command. His future maintainable earnings in the partnership were estimated at $500,000 per annum.[251] In contrast, the evidence suggested he could earn at least $250,000 as a self-employed barrister.[252] The Court of Appeal said that the annual differential between the husband's actual earnings and the potential earnings from his own industry was $250,000.[253] In terms of *Z v Z (No 2)*, this was the level of "super profit" which was available to the husband on an ongoing basis.[254] The Court of Appeal described the super profits as an income stream from an item of relationship property (the husband's partnership interest) which the husband could continue to access.[255]

11.20 In order to arrive at an accurate valuation of the husband's relationship property interest in the partnership, the Court adopted a multiplier against which to multiply the annual amount of super profits. The multiplier took into account the following factors, which affected the ongoing value of the income stream:[256]

(a) the husband was about 50 years old;

(b) when he ceased to be a partner in the firm, there was no residual value in the partnership to be paid out to him by the remaining partners;

(c) the firm relied heavily on one client, which generated fees at a lower level of remuneration than existed in many firms; and

(d) there was a degree of capture by the firm of its partners because of the relatively restricted nature of the work undertaken.

11.21 The Court decided that a multiplier of three was appropriate. In other words, the value of the husband's relationship property interest in the partnership (the "super profit") was three times his future maintainable earnings, less what was attributable to his personal industry and commitment.[257] Having calculated the value of the super profit at $750,000, the Court of Appeal made a

251 *M v B* [2006] 3 NZLR 660 (CA) at [88].
252 *M v B* [2006] 3 NZLR 660 (CA) at [77].
253 *M v B* [2006] 3 NZLR 660 (CA) at [89].
254 *M v B* [2006] 3 NZLR 660 (CA) at [89].
255 *M v B* [2006] 3 NZLR 660 (CA) at [89].
256 *M v B* [2006] 3 NZLR 660 (CA) at [93].
257 *M v B* [2006] 3 NZLR 660 (CA) at [94].

discount for the tax payable on that income.[258] The net value was $450,000 and that was the sum at which the Court valued the relationship property interest in the partnership.[259] The wife was accordingly entitled to $225,000, being an equal share of that item of relationship property.

11.22 The courts' approach to analysing the relationship property component of a partnership interest in a firm has become a significant topic of debate. This is largely because the issue has been dealt with in a number of appellate cases, such as *Z v Z (No 2)* and *M v B*. A number of issues are raised in the discussions around these cases which are worth highlighting.

Issue 1: The distinction between earning capacity and super profits may be difficult to understand

11.23 The exclusion of earning capacity and the focus instead on super profits from the partnership interest may be difficult to understand. The courts' approach can be understood by following the Court of Appeal's reasoning in *Z v Z (No 2)*. However most people will not be aware of the Court's decision. Instead, most people are unlikely to distinguish between the income attributable to a partner's personal efforts and skills as against the excess income from a partnership interest. Also, as the Court of Appeal accepted in *Z v Z (No 2)*,[260] there is logic in the view that a partner's earning capacity is "human capital" into which both parties in a relationship have invested. Arguably it is sensible that all income derived from that human capital be shared. Consequently, the exclusion of income attributable to the partner's individual skills and industry may appear arbitrary.

11.24 The analysis may also lead to differing and seemingly anomalous results between similar cases. For example, there could be instances where two individuals have the same interest in a partnership under the firm's partnership deed. If assessed under the PRA, their respective interests might be valued at different levels depending on the level of income a court says should be attributed to the partners' personal industry and skill.[261] To take another example, a court may find that if an individual

258 *M v B* [2006] 3 NZLR 660 (CA) at [94].

259 *M v B* [2006] 3 NZLR 660 (CA) at [94].

260 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280-281.

261 This observation was made by William Young P in *M v B* [2006] 3 NZLR 660 (CA) at [167].

was self-employed he or she could command an income at a similar or greater level to that which he or she in fact receives from the interest in the partnership. In that scenario, the court will probably say that there are no super profits arising from the partnership interest, even if the partner does receive income derived from his or her partnership interest.[262]

Issue 2: Valuation of super profits is complex

11.25 The valuation of a partnership interest based on the super profits approach can be complex. The assessment requires a sophisticated analysis of what income should be attributed to a partner's personal skills and industry. The court must then decide on an appropriate multiplier which reflects the peculiarities of, among other things, the nature of the firm's business, the specific terms of the partnership deed, and contingencies relating to the individual partner in question, such as proximity to retirement or other factors affecting work output. In cases where the partnership interest is relatively modest, there are concerns as to whether the costs and depth of analysis can be justified. The case *T v T* provides an interesting example.[263] That case involved what the court described as a "modest trucking business".[264] The central issue was how the trucking business partnership should be valued and divided. The Family Court expressed dissatisfaction that the resolution of this issue had turned into "an astonishingly convoluted legal process".[265] The wife, in attempting to claim a relationship property interest in the partnership, had relied on evidence of the husband's earnings from the business following separation. She presented accounting evidence that, after a fair remuneration from these earnings was deducted, there was a super profit for each financial year.[266] The Court considered that this argument lacked the proper analysis. Rather, the Court focused on the operations of the trucking business. The success of the business was due to the husband's personal relationship with the business's major contractor and the husband's proven reliability. The Court therefore said that the profits generated by the business were almost certainly due to the husband's "singular

262 This observation was made by William Young P in *M v B* [2006] 3 NZLR 660 (CA) at [167].

263 *T v T* [2007] NZFLR 754 (FC).

264 *T v T* [2007] NZFLR 754 (FC) at [1].

265 *T v T* [2007] NZFLR 754 (FC) at [6].

266 *T v T* [2007] NZFLR 754 (FC) at [51].

commitment and energy."[267] This case suggests that sophisticated legal and valuation analysis is needed to effectively present a claim for a relationship property interest in a partnership interest, even if the interest in question is relatively modest.

Issue 3: The super profits analysis may blur the line between income and capital

11.26 Atkin says that the super profits analysis unhelpfully blurs the distinction between income and capital.[268] As a general rule, the income a partner earns following separation will not be relationship property.[269] The super profits analysis, however, focuses on the future income a partner will receive after separation. As explained above, the analysis is based on a partnership interest being relationship property. The income generated from it is likewise relationship property. It is analogous to dividends received on company shares when the shares themselves are classified as relationship property.[270]

11.27 It not always easy to determine when post-relationship income is generated from an item of relationship property. An example is *C v C*, discussed at paragraph 11.5 above. In that case the husband suffered an illness during the course of the marriage which left him disabled.[271] His insurance policy provided that in the event of disability that prevented him from working he would be paid a monthly income, both during his notional working life and in his retirement. The wife claimed that the insurance payments the husband received after separation should be classified as relationship property. In response the husband argued, among other things, that the insurance payments related to his earning capacity and, in accordance with *Z v Z (No 2)*, were not property. The High Court said that the property interest at issue was the husband's contractual right to payments under the insurance policy.[272] As the right had crystallised during the course of the relationship when the husband became disabled, that right was relationship property. All future payments the husband would

267 *T v T* [2007] NZFLR 754 (FC) at [60].

268 Bill Atkin "What Kind of Property is 'Relationship Property'?" (2016) 47 VUWLR 345 at 355.

269 Property (Relationships) Act 1976, s 9(4).

270 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 at [50].

271 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

272 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [32].

receive were attributable to this underlying property right and were likewise relationship property.[273]

11.28 The decision in *C v C* demonstrates the sophisticated legal analysis needed when analysing property rights and income. Many people may struggle to understand the distinction between income received from someone's personal efforts or employment and income received pursuant to some other contractual entitlement, such as a partnership interest or a right under an insurance policy. Atkin's observation about the blurred distinction holds some weight.

Issue 4: The super profits approach singles out people in partnerships and their partners

11.29 A further issue is that the super profits approach will only apply in the small number of cases where a partner has a partnership interest, for example in an accounting or law firm.[274] Not dividing a partner's earning capacity, but dividing super profits, creates a different set of rules that unfairly favours people whose partners have had the opportunity to obtain a partnership interest and disadvantages the partners who have a partnership interest.

11.30 Take an example of two different relationships: Couple A and Couple B. In both relationships one partner stops working to take on the role of supporting the career of the other partner, through such things as child care and housework. In Couple A the working partner develops a successful career in management, and at the time of separation is the chief executive of a large company. In Couple B the working partner trains as a lawyer, and at the time of separation is a partner in a large law firm. The supporting partner in Couple A would have no relationship property interest in the human capital of the working partner. In contrast, the supporting partner in Couple B would have a relationship property interest in the partnership interest, at least to the extent of the super profits. In both relationships the supporting partners made the same level of contributions and support to the relationships, and the working partners may even be earning the same income. Yet

273 *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [39].

274 Bill Atkin "What Kind of Property is "Relationship Property"?" (2017) 47 VUWLR 345 at 355. Atkin notes that "although the Court of Appeal [in *Z v Z (No 2)*] toyed with [the] idea of its reasoning being applied to employment contracts, it is hard to see how super profits or something similar can apply to the regular wage and salary earner."

the supporting partners' entitlements under the PRA are very different as are the effects on the working partners.

Should a partner's enhanced earning capacity be considered relationship property?

11.31 The question of how earning capacity and super profits should be dealt with is a complex one. There are no simple solutions. A possible, though perhaps equally problematic, solution is to move away from super profits and instead deem a partner's earning capacity as an item of property. The extent to which that earning capacity has been enhanced by the relationship could then be classified as relationship property.

11.32 We have already considered in Chapter 8 whether earning capacity should be captured within the definition of property for the purposes of the PRA as a wider "economic resource". We now consider the advantages and disadvantages of including a partner's enhanced earning capacity within the PRA's concept of relationship property.

Advantages of including enhanced earning capacity within the PRA's definition of relationship property

11.33 First, treating a partner's earning capacity as relationship property to the extent it has been enhanced by the relationship is consistent with the principles of the PRA. It would recognise that one partner may make a significant contribution to the other partner's earning capacity and this constitutes a contribution to the relationship. This contribution may result in one partner sacrificing his or her own career, expecting that the investment in the other partner's career will provide financial returns. As the Court of Appeal noted in *Z v Z (No 2)*:[275]

> *it is difficult to refute the contention that excluding a wife whose contribution to the matrimonial partnership has been the management of the home and the care of the children from sharing in the husband's increased earning power, which they had jointly worked for, perpetuates the injustice the Act was aimed at remedying.*

275 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

11.34 Second, treating enhanced earning capacity as relationship property removes the distinction the current law makes between people who have partnership interests and those who do not. Every partner's income-earning potential would be assessed, whether it was attributable to the partner's personal skills and experience or a super-profit derived from a partnership.

Disadvantages of including enhanced earning capacity within the PRA's definition of relationship property

11.35 First, if a partner's earning capacity is treated as property under the PRA, and that capacity is to be relationship property to the extent it has been enhanced by the relationship, it will encourage partners to focus their disputes on their personal characteristics. Separation is generally a time of emotional upheaval, and recently separated partners are often on bad terms. There are therefore good reasons why relationship property issues should be depersonalised as much as possible.

11.36 Second, treating earning capacity as property likely presents more problems than it solves. Concern is often expressed at the difficulty of valuing earning capacity. It is generally acknowledged that the value of an earning capacity is the net present value of the partner's future income stream.[276] A valuation therefore requires estimations of the partner's projected future earnings. These estimations can be imprecise as they rely on speculations about things like the partner's projected career path, the duration of the partner's working life, inflation rates, taxation and other contingencies.[277] Valuation evidence could become more critical

276 The approach of valuing earning capacity as the net present value of the partner's future income stream was taken in the leading case (prior to the law change) of *O'Brien v O'Brien*, 489 N.E.2d 712, 713-714, 716 (N.Y. 1985). The American Law Institute criticised the approach as it observes that "earning capacity" has no meaning or existence independent of the method used to measure it. It concludes that a rule characterising earning capacity as marital property is really a rule that treats future earnings as marital property. American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark 2002) at 694. Calculating this value can be challenging as it requires speculation on the likely income the partner will obtain and possible contingencies.

277 The uncertainty and arbitrariness of valuing earning capacity was one of the principal reasons the Working Group in 1988 recommended against including earning capacity as a potentially divisible item of property under the Matrimonial Property Act 1976: Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 9.

In New York, until recently the courts treated a partner's professional qualifications as property. Reviewing the law, the New York City Bar Association expressed concerns on valuing enhanced earning capacity: New York City Bar Association "Report to the New York State Law Revision Commission by the Domestic Violence Committee, Family Court and Family Law Committee, Matrimonial Law Committee and Sex and Law Committee" (November, 2011) at 6–7:

> *As history has shown, this is…a difficult, imprecise and costly endeavor. It requires assumptions on assumptions: first, project the earnings (especially hard with newly acquired skills, degrees or licenses when hypothetical figures must be used); second, project work-life expectancies, real earnings growth, inflation rates, and taxes; and, third, determine the appropriate interest rates to be used to reduce the figure to present value. As we have seen in recent years of economic upheaval, these assumptions often do not pan out. The result of this analysis is that the payor is held to the resulting number (often paid at the time of the divorce judgment) even if the actual income is not reached or the employment life is reduced (this is*

and, probably as a result, more contestable. This is likely to increase the costs and delay in resolving relationship property matters.[278]

11.37 Third, it may be a complex task to identify the relationship property component of a partner's earning capacity. As explained in Chapter 9, relationship property is property that is either used for family purposes, like the family home and family chattels, or property that has been acquired through the partners' joint and several efforts during the relationship (the "fruit" of the relationship). For example, the partners' income acquired during the relationship is usually relationship property,[279] and the proportion or value of a partner's superannuation scheme entitlements "attributable to the relationship" is relationship property.[280] It follows that a partner's income earning capacity would likewise fall under this "fruit of the relationship" category. A partner's income earning capacity should therefore only be relationship property to the extent the earning capacity *has been enhanced by the relationship*. Therefore:

(a) the partner's income earning capacity must be identified at the point when the relationship began;

(b) it may then be necessary to identify and discount the value of future income likely to be derived from

true even if the results were not due to the actions of the titled spouse). Thus, the payor may be forced to stay in work or employment positions even if it is not a good decision (or sometimes even if it is an unhealthy decision) just in order to pay off the award or the results of the award which cannot be modified.

278 Overseas jurisdictions have developed sophisticated tools, such as tables or online calculators, to help with valuations of a person's future projected earnings. For instance, in the United Kingdom litigants will refer to the Ogden tables to calculate lump sum damages for future losses in personal injury and fatal accident cases: see Government Actuary's Department, *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationary Office, London, 2017) at 8. In *M v B* [2006] 3 NZLR 660 (CA) at [169] to [171] the Court of Appeal commented on the desirability of providing a methodology such as the Ogden Tables that could be applied by "reasonably numerate lawyers and judges" when calculating super profits.

Henaghan suggests several "simple and cost-effective" calculations that could be used to ascertain the "amount of earning capacity to be counted as relationship property." His principal suggestion is for an "income equalisation payment." The partners' respective future incomes for the 12 month period after their relationship ends are calculated and then added together to arrive at the total combined annual income. This is then divided equally, similar to the division of relationship property. In practical terms, it would mean the partner with the larger income earning capacity would need to pay the other partner in order to equalise their incomes. The amount the partner would need to pay the other based on an annual figure would then be multiplied by half the number of years the partners had been together, up to a maximum of 10 years: see Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

However, neither of these approaches isolate the relationship property component of a partner's earning capacity, namely the extent to which it has been enhanced by the relationship. Henaghan for example proposes instead to treat both partners' entire income earning capacity as relationship property.

279 Property (Relationships) Act 1976, s 8(1)(e).

280 Property (Relationships) Act 1976, s 8(1)(i).

enhancements that occurred after the relationship ended, such as any subsequent training or experience;[281]

(c) there may be suggestions that income attributable to the partner's innate talent should be excluded; and

(d) it may also be appropriate to recognise that the partner must undertake the work; earning capacity alone is not enough.

11.38 The task of identifying the relationship property component of a partner's earning capacity can therefore be challenging. It could be so cumbersome and uncertain that the advantages of designating income earning capacity as property are lost.

11.39 Fourth, designating enhanced earning capacity as relationship property may unfairly affect the autonomy of a partner by forcing him or her to continue to work to produce that income stream. One response to this is that property must be valued on the basis that the property will be put to its highest and best use. Otherwise one partner could devalue the partners' relationship property by his or her personal preferences. If that view was followed then partners who do not wish to put their enhanced earning powers to best use should have to pay for that choice.

11.40 Finally, it is rare that overseas jurisdictions treat enhanced earning capacity as property. In earlier years, courts in the State of New York pioneered the treatment of professional qualifications and educational degrees as divisible items of property.[282] However, in 2015 the New York State Assembly amended the law to bar the courts from considering as marital property "the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement".[283] In making its recommendations for reform, the New York State Law Revision Commission recommended "based on widespread consensus" that "one party's "increased earning capacity" no longer be considered as a marital asset in equitable distribution." The Commission noted that:[284]

281 New York State in the United States formerly divided the value of a spouse's qualifications by determining the present value of the spouse's entire future earning stream: see *O'Brien v O'Brien* 489 N.E.2d 712, 713-714, 716 (N.Y. 1985). Frantz and Dagan criticise this approach as going too far because the court in *O'Brien* included value that was "partly attributable to future professional experience, skill development, and seniority": Carolyn Frantz and Hanoch Dagan "Properties of Marriage" (2004) 104 Colum L Rev 75 at 107.

282 *O'Brien v O'Brien* 489 N.E.2d 712, 713-714, 716 (N.Y. 1985).

283 Domestic Relations Law (New York), § 236, as amended by Bill A7645, effective from 23 January 2016.

284 New York State Law Revision Commission "Final Report on Maintenance Awards in Divorce Proceedings" (May, 2013). The New York State Law Revision Commission was created by Chapter 597 of the Laws of 1934 which enacted Article 4-A of the Legislative Law. It consists of the chairpersons of the Committees on the Judiciary and Codes of the Senate

> *The concept of an "increased earning capacity" has much dissatisfaction and litigation because of the asset's intangible nature, the speculative nature of its "value" as well as the costs associated with valuations, and problems of double counting increased earnings in awards of post-divorce income and child support.*

11.41 On balance, our preliminary view is that deeming a partner's enhanced earning capacity as relationship property is not a feasible option. We look at the point again in Part F when considering options to address situations where the economic advantages and disadvantages flowing from the roles each partner took in the relationship are not fairly shared after the relationship ends.

CONSULTATION QUESTION

C19 Is the law regarding earning capacity and super profits problematic?

C20 Do you agree with our preliminary view that it is not feasible to deem a partner's income earning capacity as enhanced by the relationship as relationship property?

Taonga

11.42 In 2001 taonga were excluded from the PRA's definition of family chattels. While there was no discussion of Parliament's intention in making this special rule for taonga, it followed the recommendation in 1988 of a Working Group established to review the Matrimonial Property Act 1976.[285] The Working Group recommended the exclusion of taonga and heirlooms (discussed below) for the following reasons:[286]

> (1) *Heirlooms and taonga are of a special nature as much of their value lies in their individuality; as a family treasure they cannot be replaced by another, although in other ways identical, object. Where an object's value lies partly in the fact that it has been passed down from earlier generations its special character is lost if it passes to someone outside the family or tribal group.*

and Assembly and five members appointed by the Governor. Its role is to examine the common law and statutes of New York State and current judicial decisions for the purpose of recommending law reform: see website at <lawrevision.state.ny.us>.

285 The Working Group was convened by Geoffrey Palmer, then Minister of Justice: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988). The Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i states that the amendments in the Bill (including the exclusion of taonga) were largely drawn from the recommendations of the Working Group.

286 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

> (2) *Other property acquired by succession or survivorship, or under a trust, which does not fall within the category of family chattels, is separate property by virtue of s10. The group is of the opinion that the special nature of heirlooms and taonga outweighs the special nature of family chattels in relation to other types of property.*
>
> (3) *Taonga have a special cultural and ancestral significance for Maori tribes as well as for individual Maori to whom the property may pass. Maori argue that individuals are not seen as owning such property and therefore able to dispose of it as they wish. Instead, a person in possession of taonga is more of a guardian of taonga for the rest of the tribe and for future generations. Maori thus argue that the matrimonial property regime should not apply to such property in order that the property may pass according to custom.*

11.43 The special significance of taonga was also recognised in a 1996 working paper prepared by Hohepa and Williams for the Law Commission's review of the law of succession.[287] In that paper Williams discussed whether tikanga Māori should govern the succession of items defined by general law as personal property, "on the basis that the items are *not* the personal property of the deceased but are taonga of the [hapū] for which the new kaitiaki may well be a person outside the immediate family of the deceased."[288]

Taonga are subject to the PRA

11.44 Unlike Māori land, discussed in Chapter 8, taonga are still subject to the PRA, even if they are excluded from the definition of family chattels. This means that taonga that are chattels will generally be treated as one partner's separate property.[289] As separate property, taonga are subject to the PRA's ordinary rules about when separate property becomes relationship property, including through intermingling,[290] or where the value of the taonga has increased or

287 Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46.

288 Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46 (emphasis in original).

289 This is because s 9(1) of the Property (Relationships) Act 1976 provides that all property of either partner that is not relationship property is separate property.

290 Where property acquired by succession, survivorship, or gift becomes so intermingled with relationship property that it is unreasonable or impracticable to regard it as separate property: Property (Relationships) Act 1976, s 10(2).

income or gains have been made as a result of the application of relationship property.[291]

11.45 Taonga that are *not* chattels are not excluded from the defintion of relationship property. Rather, they are treated like any other item of property that needs to be classified as either relationship property or separate property according to the PRA's rules of classification. For example, land with general title status that nonetheless has ancestral significance is not excluded from the pool of relationship property on the basis that it is taonga, although it may still be separate property under section 9 or section 10. On this point, Ruru suggests that: [292]

> *If whanaungatanga is operative, it should be for the whānau (not necessarily the nuclear family) to appoint the successive kaitiaki (guardian) of the property, here, ancestral land. However, the placement of taonga in the family chattels definition does not permit such a practice to be given effect.*

11.46 Taonga that are in the posession of one partner might, in some circumstances, be regarded by the court as being held on trust, in which case the taonga would be excluded from the PRA entirely.[293]

CONSULTATION QUESTIONS

C21 Should the PRA exclude taonga which fall outside of the definition of family chattels (e.g. land of ancestral significance which is not Māori land)?

C22 Should the PRA provide that taonga which is initially separate property cannot become relationship property in any circumstances?

The courts' interpretation of taonga

11.47 Taonga is not defined in the PRA, but its interpretation in the context of the PRA has been explored in a series of cases.[294]

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291 Property (Relationshps) Act 1976, s 9A.

292 Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 482 (footnotes omitted).

293 This is pursuant to s 4B of the Property (Relationships) Act 1976 (PRA), which provides that nothing in the Act applies where either partner is acting as a trustee. In *B v P* [2017] NZHC 338 the High Court was required to determine whether the ownership of three items of taonga (two taiaha and a tewhatewha) had passed to the applicant as administrator of the deceased's estate. The applicant argued the taonga were the deceased's personal property, while the respondents (the deceased's parents) argued that it was for them, as guardians of the taonga, to decide what should happen to the taonga. The Court held that, in the particular circumstances of the case, the taonga did not fall into the deceased's estate after his death. That was because the deceased had, six years prior to his death, entrusted the taonga to his parents to care for, and in doing so entrusted his parents to make a decision as to how they should be ultimately dealt with after his death: at [151] and [161].

294 The courts' interpretation of the concept of taonga in the context of the Property (Relationships) Act 1976 has been the subject of commentary by Ruru: see Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 and Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

11.48 Initially the courts took a broad approach to the concept of taonga. In *Page v Page* the High Court considered taonga in the context of the PRA for the first time.[295] That case concerned the status of a piece of artwork painted by one partner's mother. Neither partner was Māori. The case was decided in 2001, shortly before taonga was excluded from the definition of family chattels. With that legislative change on the horizon the High Court observed that the "ordinary and everyday use [of the term taonga] would encompass without difficulty the artworks of the mother in this case."[296]

11.49 In *Perry v West* the District Court and High Court had to determine whether a Colin McCahon painting was taonga.[297] Both Courts agreed that the concept of taonga could be applied to describe the relationship between an item of property and a person of any ethnic or cultural background.[298] The High Court set out two ways in which an item could attain the status of taonga:[299]

> *The first is where the object is acquired by an individual because it has a special significance to that individual. The second is where the object assumes the special status of taonga because others also ascribe to it or bestow upon it a special significance.*

11.50 Both Courts found that the husband had failed to establish that the painting was a taonga but for different reasons. The District Court said it could not be a taonga to the husband if he was willing to sell it to realise cash for other routine purposes,[300] while the High Court said it could not be a taonga to the husband because he had failed to consistently maintain his personal attachment to it, having only made a claim to the painting nearly a decade after the divorce.[301]

11.51 In a 2004 article Ruru expressed concern at an emerging precedent by which an item could be classified as taonga although it is not owned or held by a Māori person, was not made by a Māori person and has no Māori association or content.[302] In

295 *Page v Page* (2001) 21 FRNZ 275 (HC).

296 *Page v Page* (2001) 21 FRNZ 275 (HC) at [46].

297 *Perry v West* DC Waitakere FP 239/01, 25 March 2003; *Perry v West* [2004] NZFLR 515 (HC).

298 *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [89]; *Perry v West* [2004] NZFLR 515 (HC) at [37].

299 *Perry v West* [2004] NZFLR 515 (HC) at [37].

300 *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [95].

301 *Perry v West* [2004] NZFLR 515 (HC) at [37(b)].

302 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297.

reference to the judicial approaches in *Perry v West* Ruru noted that:[303]

(a) Neither Court had attempted a particularly comprehensive definition of taonga.

(b) Each Court relied on broad concepts of taonga as employed by the Waitangi Tribunal, but failed to acknowledge that the Tribunal's approach to taonga, while broad, is necessarily still Māori-specific.

(c) Jurisprudence on taonga in other contexts recognises it as a Māori-specific term (as does jurisprudence on Māori concepts in other statutes, for instance, "kaitiaki" under the Resource Management Act 1990).

(d) Each Court noted the importance of the existence of a relationship with the object in question, but placed importance on a personal attachment. Under tikanga, personal attachment to the taonga is largely irrelevant; more important is the kaitiakitanga exercised over the taonga for the purposes of wider family expectations.

(e) The Courts did not discuss Parliament's likely intention in making the special rule for taonga, and did not refer to the 1988 Working Group's reasons for recommending the exclusion of taonga, which referred specifically to the Māori cultural significance of taonga.

(f) The Courts did not consider the effect of the broad interpretation of taonga on the meaning of "heirloom." If taonga is so broadly interpreted, arguably the separate category for heirlooms becomes superfluous.

11.52 In subsequent cases the courts have restricted the interpretation of taonga.[304] In *Kininmonth v Kininmonth* the husband argued that his interest in a family bach was taonga and was therefore excluded from the pool of relationship property.[305] The Family Court, referring to Ruru's article, did not accept that the concept of taonga could be relied upon in respect of a non-Māori asset such as an interest in a bach.[306]

303 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 298–299.

304 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

305 *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008.

306 *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008 at [26].

11.53 In *S v S*, the husband, an artist, claimed that his art collection was a taonga, and thus was excluded from the definition of family chattels in the PRA.[307] The Family Court observed that case law to date provided no definitive definition of taonga.[308] It concluded that the term should be defined within a tikanga Māori construct, noting the reference of the 1988 Working Group to taonga as a Māori concept and the need to avoid interpreting the term through a Pākeha lens. However, it found that the concept of taonga, as defined within a tikanga Māori construct, could be applied "pan-culturally":[309]

> *[P]rovided the central elements of Tikanga Māori can be shown to exist on the evidence before the Court, there can be no sound basis as to why a particular item of property could not be classified as taonga, notwithstanding that the parties to the proceedings are non-Māori.*

11.54 To help identify what made a chattel a "taonga", the Court relied on writings of Professor Paul Tapsell (who also gave evidence in the proceedings) and concluded that:[310]

> *... for an item to become taonga it must be accompanied, through a marae or marae like setting, with elements of whakapapa, mana, tapu and korero. For an item to become taonga it must therefore be presented, either by a group or an individual (but only on behalf of a kin group/tribal group) to another, in a marae like setting. It must additionally have accompanying it a history or whakapapa, some particular significance or mana, and be presented in the context of an oration or korero. Professor Tapsell accepted that application of taonga using this definition could involve non-Māori.*

11.55 Applying that definition, the husband's art collection were not taonga as there was no evidence that he had acquired the paintings in a marae like setting, no evidence of any particular speech or history associated with the paintings and no evidence that the paintings were received on behalf of others who were representatives of a wider group.[311]

307 *S v S* [2012] NZFC 2685.

308 *S v S* [2012] NZFC 2685 at [48].

309 *S v S* [2012] NZFC 2685 at [54(b)].

310 *S v S* [2012] NZFC 2685 at [57].

311 *S v S* [2012] NZFC 2685 at [59].

11.56 Ruru has observed that the Court's decision in *S v S* has provided "a more Māori aligned precedent for understanding taonga."[312]

Should taonga be defined in the PRA?

11.57 Ruru has previously suggested that it would be prudent for Parliament to engage with Māori about a possible definition of taonga for the PRA.[313] This was echoed by the Family Court in *S v S*.[314] The decision in that case however may have "reduced any urgency for the legislature to clarify its intent to confine taonga to Māori generational treasures."[315]

11.58 If Parliament opts not to define taonga, Ruru stresses that there must be ways for evidence from experts on tikanga to be obtained and applied by a court that has a working knowledge of tikanga.[316]

11.59 The use of expert evidence on tikanga was evident in *S v S*, discussed above, and was also demonstrated in the recent High Court case of *B v P*.[317] While this case did not involve a claim under the PRA, the High Court had to decide whether taonga belonging to the deceased should go to his surviving partner or to his parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased's three sons). The Court heard evidence from two kuia. The evidence confirmed that, according to tikanga, taonga had a guardian instead of an owner. If the taonga were entrusted into the care of someone, those people were responsible for protecting and caring for them and for making decisions about what would happen to them. The Court concluded that in the circumstances, the taonga were held on trust by the deceased's parents. At least in this instance, the Court had little trouble resolving the issue with the assistance of the expert evidence from the kuia.[318]

312 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

313 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 299.

314 *S v S* [2012] NZFC 2685 at [48].

315 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

316 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 300.

317 *B v P* [2017] NZHC 338. The facts of this case are summarised above at n 293.

318 Note also the discussion in John Chadwick "Whanautanga and the Family Court" (2002) 4 Butterworths Family Law Journal 91 at 94 where the author noted that whanautanga prevails over the law in relation to matrimonial property because Māori, as a rule, do not have the same emotional attachment to property like family chattels.

CONSULTATION QUESTION

C23 Should the concept of taonga be defined in the PRA? Or should it be left to be considered on a case by case basis with evidence called as necessary in each case?

Heirlooms

11.60 The definition of "family chattels" under section 2 of the PRA excludes heirlooms. That means an heirloom that is a family chattel will not be considered relationship property and it will be excluded from division under the PRA. An heirloom that is not a family chattel is likely to be classified as separate property under section 10.

11.61 The PRA does not define what an heirloom is. The Family Court has said that in order to be an heirloom, an item of property must:[319]

(a) be passed down from one generation to another in accordance with some special family custom;

(b) have unique characteristics or be of particular importance; and

(c) have been in the partner's family for generations.

11.62 The PRA was amended to exclude heirlooms in 2001. This was in response to an earlier recommendation of the Working Group established to review the Matrimonial Property Act 1976. In 1988 the Working Group recommended that heirlooms (and taonga, discussed above) be excluded from the definition of family chattels in recognition of the special nature of heirlooms, which outweighed the special nature of family chattels.[320] The Working Group's reasons for recommending the exclusion of heirlooms are set out in full at paragraph 11.42 above.

11.63 In our view, these reasons remain valid and justify the exclusion of heirlooms from the definition of family chattels. In our research and preliminary consultation we have not come across any significant concerns about excluding heirlooms from the PRA's equal sharing regime.

319 *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005 at [112]. See also *H v F* FC Auckland FAM 2005-004-1312, 27 January 2006 at [48] and *Stuart v Stuart* FC Christchurch FAM 2003-00-5175, 16 March 2005 at [19].

320 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

Should the PRA exclude other property with special significance?

11.64 There may be items of property that do not fall within the definition of heirloom but should be exempt from the PRA regime because of the special significance the property holds.

11.65 Ruru suggests that the interpretation of heirloom as being something which is handed down the generations may explain attempts to categorise non-Māori items of property, such as an art collection, as taonga.[321] It is significant that all the cases arising to date where one partner has sought to rely on the exclusion for taonga have not involved separating Māori couples or traditionally treasured Māori items.[322] This may suggest a legislative gap for items of special significance other than heirlooms or taonga.[323]

11.66 It may, however, be challenging to describe with precision what types of property ought to escape division under the PRA. Partners will no doubt attribute value and significance to a diverse range of property. The unique characteristics and importance that makes an item of property significant are likely to be intangible and subjective.

11.67 We suggest two categories of property that, like heirlooms, might deserve to be expressly excluded from the definition of family chattels:[324]

(a) First, property that has special meaning for a partner and is irreplaceable. Such property might include:

(i) a gift from a close friend or family member who has died; or

(ii) a trophy or ornament awarded for a particular achievement, like winning a sporting event or a long-service award from a workplace.

321 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 299.

322 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

323 Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 299.

324 If the Property (Relationships) Act 1976 (PRA) is amended to abolish the family use approach to the classification of relationship property, discussed in Chapter 9, property would not become relationship property solely because they were used as family chattels. We note therefore that although the PRA could exclude other forms of property from the definition of family chattels in addition to heirlooms and taonga, moving away from a family use approach could achieve a similar outcome.

(b) Second, property which is in the nominal ownership of one of the partners but, owing to its wider cultural significance, should not form part of the partners' relationship property pool. The traditional construct of property rights, which undoubtedly the PRA's definition of property embodies, may appear alien to or be unsuited for different cultural groups within New Zealand. It may be appropriate for the PRA to make exceptions for other property of cultural significance.

CONSULTATION QUESTION

C24 Should the PRA expressly exclude property with special significance from the definition of family chattels in addition to heirlooms? If so, what types of property ought to be exempt?

Student loans

11.68 The PRA treats student loans like any other debt. That means the classification of a student loan as either a personal debt or a relationship debt under section 20 will depend on the purpose for which the debt has been incurred.[325] The cases show that a student loan incurred before the relationship began will generally be classified as a personal debt.[326] That is because the debt cannot have been incurred for relationship purposes, such as a common enterprise between the partners, or for the purposes of acquiring, improving or maintaining relationship property.[327]

11.69 If, however, a partner incurred a student loan during the course of the relationship, the position may be different. A student loan may comprise a debt that was partly used to pay the partner's course fees and partly used to pay for the family's living costs. In some cases, the courts have classified the component of the debt

325 Property (Relationships) Act 1976, s 20. The treatment of student loan debts was raised by several submitters during the Parliamentary select committee's consideration of the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report). In particular, several submitters argued that it was unfair if both partners had a student loan, but one partner pays off his or her loan while working while the other stays at home (for example to look after children) and does not: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16. The National Council of Women submitted that a student loan should be a relationship debt unless this would be repugnant to justice: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16. The select committee concluded, however, that a student loan debt was no different from any other type of debt and should be classified in accordance with the normal rules.

326 *O'Connor v O'Connor* FC Christchurch FP 1720/94, 16 December 1996; and *Kauwhata v Kauwhata* [2000] NZFLR 755 (HC). See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR20.01].

327 *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [51].

that relates to course fees as the partner's personal debt. But the courts have classified the component of the debt that relates to the family's living costs as a relationship debt.[328] Similarly, if a partner has undertaken the study as part of a common enterprise of the partners, or for the benefit of both partners, the courts have classified the entire student loan as a relationship debt.[329] For example, in *Jayachandran v Daswani* the partners were married in India but came to New Zealand to live, study and work.[330] The husband incurred a student loan to enable him to study in New Zealand. The Family Court accepted that the entire debt should be classified as a relationship debt.[331] It said that the husband's study and accompanying loan had been incurred as part of the partners' common enterprise to relocate to New Zealand. It had also provided both partners with benefits as, among other things, the husband's study allowed the wife to obtain a work visa.

11.70 If a student loan is classified as a relationship debt, the net value of the partners' relationship property will be calculated by deducting the student loan debt.[332] That will mean both partners share the debt equally. On the other hand, if a partner's student loan is classified as a personal debt the amount of that debt will not be shared equally between both partners. If the partner has paid back some of the loan with relationship property, such as with his or her salary, section 20E will apply. Section 20E provides that a partner who has paid his or her personal debt from relationship property is obliged to compensate the other partner. The recent case *Shaws v Reed* provides a good example.[333] Ms Reed had completed her degree shortly before her relationship with Mr Shaws began. She had incurred a student loan of $49,643.04. Her qualification allowed her to secure specialist employment during the course of the relationship from which she received considerable remuneration. Her income was pooled with Mr Shaws' income. From that income, Ms Reed repaid her student loan. Mr Shaws sought compensation under section 20E on the grounds Ms Reed had paid her personal debt with relationship property. The Family Court agreed and awarded Mr

328 See for example *C v B* FC Hamilton FAM-2005-019-991, 7 June 2006. The Family Court said that the part of the loan that was used for managing the affairs of the household and bringing up a child of the marriage came within the meaning of a "relationship debt" under s 20(1)(d).

329 *S v S* [2012] NZFC 4050.

330 *Jayachandran v Daswani* [2015] NZFC 5238.

331 *Jayachandran v Daswani* [2015] NZFC 5238 at [44]–[45].

332 Property (Relationships) Act 1976, s 20D.

333 *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243.

Shaws compensation.[334] The Court recognised, however, that Mr Shaws had received the benefit of Ms Reed's income during the relationship and that should be recognised in the compensation to which he was entitled.[335] The Court therefore awarded Mr Shaws a "broad brush" sum of $10,000.

11.71 Student loans are likely to be an increasingly common debt, particularly for younger partners. As at 30 June 2016, there were 731,754 borrowers in the Student Loan Scheme.[336] The average student loan amount for all borrowers in 2016 was $20,983, which has increased from $19,731 in 2011.[337] Of the total borrowers, 30 per cent are inactive, mostly because their income is below the repayment threshold which means they do not have any repayment obligations.[338] The median repayment time for all borrowers who left study in 2014 is projected to be 8.4 years.[339] This is longer than the median repayment time of 7 years for borrowers who left study in 2011.[340] Females make up a greater proportion of borrowers than males and are projected to take slightly longer to fully repay their loans.[341]

11.72 Given the prevalence of student loans, we are interested in views on whether the PRA should provide any special rules for dealing with them.[342] In particular, we are interested in whether there could be better provision for two likely scenarios.

11.73 The first is where a partner has repaid a student loan that is classified as a personal debt from relationship property. This is likely to be the most common scenario, as a student loan borrower must make repayments when the borrower's income reaches a

334 *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [52].

335 *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [56].

336 The Ministry of Education "Student Loan Scheme Annual Report 2015/2016" (December 2016) at 32. Of the 731,754 borrowers, 621,015 were New Zealand-based borrowers. The number of borrowers in 2014 and 2015 were 721,437 and 728,354 respectively.

337 The Ministry of Education "Student Loan Scheme Annual Report 2015/16" (December 2016) at 34.

338 Twenty two per cent of borrowers are New Zealand-based borrowers who are inactive, and eight per cent are overseas-based borrowers who are inactive: The Ministry of Education "Student Loan Scheme Annual Report 2015/16" (December 2016) at 35.

339 The Ministry of Education "Student Loan Scheme Annual Report 2015/16" (December 2016) at 37.

340 The Ministry of Education "Student Loan Scheme Annual Report 2015/16" (December 2016) at 37. The Ministry notes at 36 that many factors may affect times for repayment, such as the government policy towards student loans and the strength of the labour market.

341 The Ministry of Education "Student Loan Scheme Annual Report 2015/16" (December 2016) at 37. For borrowers who completed study in 2014, the projected median time for a male to repay his loan is 7.9 years whereas a female's projected repayment time is 8.8 years.

342 We again note that the issue was considered by the Parliamentary select committee during the 2001 amendments: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

certain level,[343] and a borrower's repayments will be automatically deducted from employment income.[344] Consequently, in most cases a partner will pay back a student loan, at least in part, through his or her earnings, which will generally be classified as relationship property under section 8(e). Section 20E will apply, and the partner will need to pay compensation to account for the relationship property he or she has applied to a personal debt. The matter may become more complicated if the court is required to calculate a discount to reflect the benefit the other partner has received from the partner's qualification and enhanced earning capacity. We are also conscious that the rules relating to the classification and allocation of debts may be overly complex.

11.74 The second scenario relates to the division of functions in a relationship. One partner may have maintained steady employment and made significant repayments to his or her student loan. The other partner may have performed other contributions to the relationship that limited his or her capacity for paid employment. For example, the other partner may have cared for children at home. In contrast to the employed partner, it may be unlikely that this partner can make meaningful repayments to his or her student loan. The result may be that, if the relationship ends, one partner has discharged his or her student loan whereas the other partner's student loan remains unpaid. Even if the employed partner is obliged to pay compensation for applying relationship property to his or her student loan, it can be argued that the non-employed partner is still at a disadvantage.

Option for reform

11.75 A possible reform option could be to classify a student loan that either partner brings into the relationship as a relationship debt. The classification could be subject to limited exceptions, such as if the classification of the student loan as a relationship debt is repugnant to justice.[345] The advantage of this approach is that it avoids difficult assessments of whether a student loan

343 The income threshold is currently set at $19,084 a year: The New Zealand Government "Paying back your student loan" (8 May 2017) <www.govt.nz>.

344 Inland Revenue "Employer Responsibilities – Deducting Student Loan Repayments" (23 October 2013) <www.ird.govt.nz>.

345 This was the approach suggested by the National Council of Women to the Parliamentary select committee when the Property (Relationships) Act 1976 was amended in 2001: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

is a personal debt or a relationship debt. It also avoids complex accounting exercises to determine the level of compensation that should be payable under section 20E. In addition, it obliges both partners to share the burden of their respective student loans if one partner has been unable to repay his or her loan owing to the division of functions within the relationship.

11.76 On the other hand, the current rules arguably provide for a more nuanced approach. Student loans will be incurred in different circumstances and for different reasons. It may be unfair to classify all student loans as relationship debts, particularly if one partner's loan is sizeable and provides little benefit for the partners. Moreover, if the PRA treats student loans differently from other debts, student loans may be seen as an anomaly. It is unclear whether the potential issues we have identified above justify special treatment.

CONSULTATION QUESTION

C25 Are the current rules regarding the treatment of student loans adequate? Could the rules be improved? For example, should all student loans whenever acquired be treated as a relationship debt?

Family gifting and lending

11.77 We have learned through our research and preliminary consultation that transfers of property between family members may be increasingly common. This is partly attributable to the fact that New Zealand may be becoming more culturally diverse and intergenerational wealth transfers may be more prominent among different cultures.[346] It may also reflect the increasing financial assistance partners require in order to buy their first home.[347]

11.78 While intergenerational transfers of wealth themselves do not appear to create significant legal problems, disputes can arise when it is unclear whether the transfer was intended as a gift or a loan. The distinction is important when determining property interests at the end of a relationship. If, for example, the parents of one partner gift property to that partner to help him or her purchase a first home, the gift would constitute relationship

346 See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

347 See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

property if that home is used as the family home.[348] If, on the other hand, the transfer is a loan to help purchase a home, the loan is likely to be a relationship debt which is then deducted from the partners' relationship property.

11.79 Some legal rules attempt to simplify the process of determining whether a transfer is a gift or loan. The law presumes that when parents transfer property to their children they intend to do so as a gift.[349] This rule is sometimes called the "presumption of advancement." Consequently, if a partner argues that the advance was a loan, he or she must prove that the advance was indeed intended as a loan.

11.80 In *S v C* the husband, who was from Hong Kong, and the wife, who was a New Zealander of European descent, separated.[350] The husband's family members had advanced the partners money which was used to buy a house. The issue before the Family Court was whether the advance was a gift or a loan. The husband argued that in Chinese culture there was a very clear expectation that these types of advances were loans. The Family Court accepted that the transactions should not be evaluated in terms of the expectations of a New Zealand lawyer.[351] Rather, the formalities of the transactions reflected the cultural context in which they occurred.[352] The Court said that on the evidence there was no doubt that there was an obligation and the husband was expected to repay the advances made.

11.81 Similarly, in *Zhou v Yu* the husband argued that the fact that the advance took place in a Chinese family was enough for the court to be satisfied the advance was not intended to be a gift.[353] In that case the husband's parents had made an advance to him. The husband produced evidence that in Chinese culture there was an expectation that an advance is treated as a loan.[354] The Family

348 Assuming that no contracting out agreement under pt 6 of the Property (Relationships) Act 1976 classifies the advance.

349 In *Narayan v Narayan* [2010] NZFLR 161 (HC) at [46] the High Court applied the presumption in a case where a husband contended that an advance from his parents was a loan whereas the wife argued it was a gift. The husband's parents had executed a document described as an "irrevocable document" in which they recorded that they had loaned the partners the money. The High Court said at [48] that the document was direct evidence that the advance was intended as a loan. Although the presumption that the advancement was a gift applied, the Court said that in these circumstances the document rebutted that presumption. The presumption of advancement does not, however, apply to gifts between a partner and a son in law or daughter in law: *Knight v Biss* [1954] NZLR 55 (SC); and *Terry Schwass Company Ltd v Marsh* [2017] NZHC 1382 at [20].

350 *S v C* [2003] NZFLR 385 (FC). The Family Court's judgment regarding the advances and their classification as relationship debts was accepted on appeal to the High Court: *C v S* [2005] NZFLR 400 (HC) at [53].

351 *S v C* [2003] NZFLR 385 (FC) at [8].

352 *S v C* [2003] NZFLR 385 (FC) at [8].

353 *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [400].

354 *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [407].

Court did not directly decide whether or not the presumption of advancement should be rebutted when the advance occurred within a Chinese family. The Court said however that in this particular case there was a lack of surrounding evidence supporting the husband's assertion that the advance was a loan.[355]

11.82 As we think it probable that family gifting and lending will increase in New Zealand, it is appropriate to consider whether any reform to the PRA is needed to respond to these types of transactions. In particular, we are interested in views on whether the PRA should provide that the presumption of advancement does not apply.[356] Removing the presumption could better reflect current (and potentially future) practices in New Zealand, particularly among some sections of society. On the other hand, it could make situations where the nature of an advance is unclear more contestable. That would potentially stimulate disputes between partners and wider family members. It could also be contrary to the principle that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.

CONSULTATION QUESTION

C26 Is reform to the PRA needed to respond to the rise in family gifting and lending? Should the presumption of advancement be expressly excluded by the PRA?

355 *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [428].

356 Section 4(3) of the Property (Relationships) Act 1976 already provides that many presumptions that existed under the former law no longer apply. For example s 4(3)(a) provides that the presumption of advancement does not apply between a husband and wife.

Part D – How should the PRA divide property?

Chapter 12 – The general rule of equal sharing and exceptions

Introduction

12.1 The division of property is the PRA's main purpose. It is characterised by the general rule that each partner is entitled to an equal share of the couple's relationship property. The focus of this chapter is whether the general rule of equal sharing, and the exceptions to it, remain appropriate in contemporary New Zealand. The rest of Part D is arranged as follows:

(a) In Chapter 13 we look at how property is valued under the PRA. We examine the various approaches to valuation and the issues that might arise in PRA proceedings.

(b) In Chapter 14 we focus on how the courts implement a division of property. We look at the range of orders a court can make and whether there are any restrictions which limit a court's ability to implement a just division of property.

Equal sharing

12.2 Section 11 provides that on the division of relationship property under the PRA, each partner is entitled to share equally in:

(a) the family home;

(b) the family chattels; and

(c) any other relationship property.[1]

12.3 Section 11 is the centrepiece of the PRA's framework. It characterises the PRA as an "equal sharing regime." It is important

[1] Prior to the amendments to the Property (Relationships) Act 1976 in 2001, the Matrimonial Property Act 1976 had slightly different rules for the division of property. It provided that the family home and family chattels would be shared equally, but that the balance of relationship property (then referred to as matrimonial property) was subject only to a presumption of equal sharing. That property could be divided according to the contributions each spouse had made to the relationship, if one spouse's contributions had clearly been greater than that of the other spouse: Matrimonial Property Act 1976, s 15.

to note, however, that the general rule of equal sharing is not absolute. Section 11 is subject to other provisions that govern the division of property which we discuss further in paragraph 12.7.

12.4 A partner's entitlement to share equally in relationship property will not necessarily result in the equal division of every specific item of relationship property. Rather, a court has a wide discretion to decide how the division of the partners' shares in relationship property should be implemented.[2] We examine the types of orders a court can make, and what issues may arise, in Chapter 14.

12.5 A court will usually determine the partners' shares in the relationship property as at the date their relationship ended.[3] If the partners' relationship has not ended, the date will be the date of the application to the court.[4] The property will usually be valued as at the date of the application to the court.[5]

Does the rule of equal sharing remain appropriate in contemporary New Zealand?

12.6 Our preliminary view is that the general rule of equal sharing remains appropriate in contemporary New Zealand, for three reasons:

(a) First, we think equal sharing reflects the values we should attribute to relationships. As we explain in Part A, the PRA sees a qualifying relationship as a partnership or a joint venture.[6] Key principles of the PRA include that men and women have equal status, and that all forms of contribution to the relationship are treated as equal.[7] The PRA therefore treats non-monetary contributions as having equal worth to monetary contributions. When the relationship ends, the PRA grants each partner an entitlement to an equal share of relationship property based on the equal contributions each partner has made to the

2 Principally, ss 25 and 33 of the Property (Relationships) Act 1976.

3 Property (Relationships) Act 1976, s 2F(1)(b).

4 Property (Relationships) Act 1976, s 2F(1)(a).

5 Property (Relationships) Act 1976, s 2G(1). The court of first instance or an appellate court does have the discretion to determine that a different date should apply: s 2F(2).

6 See Part A, paragraph [3.6] and [4.7]–[4.11].

7 The principles of the Property (Relationships) Act 1976 are discussed in Chapter 3.

relationship. Historically, women tended to make non-monetary contributions to relationships which, prior to the PRA, made it difficult to claim interests in property when relationships ended. The PRA overcomes this difficulty by recognising the true value each partner contributes to the relationship partnership. In doing so the PRA promotes gender equality. We think this view of relationships, and the values and norms it reflects, is now firmly established and accepted in New Zealand.

(b) Second, through our research and preliminary consultation we have been struck by the extent to which the equal sharing rule is familiar to the public. We believe that many if not most people are generally aware that when a relationship ends the partners are required to divide their relationship property equally. Because the PRA is social legislation and affects so many people, there is a great deal of value in public awareness of the law.

(c) Third, the equal sharing rule is easy to understand and simple to apply which in turn makes the law more predictable. It provides a "bright-line" test for determining each partner's share of the relationship property. This helps partners to understand their rights and empowers them to resolve property matters out of court, which is central to the principle that disputes should be resolved inexpensively, simply and speedily as is consistent with justice.[8]

Exceptions to equal sharing

12.7 The general rule of equal sharing is not absolute. The PRA gives a court powers to depart from equal sharing in several different situations, including where:[9]

(a) there are extraordinary circumstances that make the equal sharing of property repugnant to justice (section 13);

8 Property (Relationships) Act 1976, s 1N.

9 There are other provisions in the Property (Relationships) Act 1976 (PRA) which allow the court to make an adjustment to the general rule of equal sharing, including s 16 (two houses when the relationship began), ss 17–17A (where a partner has sustained or diminished the other's separate property), s 20E (where a partner has paid a personal debt from relationship property) which we discuss further below, and ss 44 and 44C (where a partner has disposed of property to defeat the other partner's claim or rights under the PRA).

(b) the partners' relationship was shorter than three years (sections 14–14A);

(c) the income and living standards of one partner are likely to be significantly higher than the other partner because of the effects of the division of functions in the relationship (section 15);

(d) one partner made contributions to the relationship or dissipations of relationship property after the relationship ended (section 18B and section 18C); and

(e) there are successive and contemporaneous relationships (sections 52A and 52B).

12.8 Short-term relationships are considered in Part E, and section 15 adjustments for economic disparity are considered in Part F. In the rest of this chapter we explore issues identified with some of the other exceptions to equal sharing. We also discuss the limited effect of misconduct on the division of relationship property.

Extraordinary circumstances

12.9 If a court considers there are "extraordinary circumstances" that would make equal sharing "repugnant to justice", section 13 provides that a court may order that each partner's share of the relationship property be determined in accordance with their contributions to the relationship.[10]

12.10 Section 13 sets a high threshold for departing from equal sharing. The courts have repeatedly remarked on the strength and stringency of the words "extraordinary circumstances" and "repugnant to justice".[11] This is premised on the view that in most cases relationship property should be shared equally.[12] It may be easier to establish an exception to equal sharing if the relationship has only marginally satisfied the technical criteria for equal sharing.[13] For example, section 13 might apply if a relationship is only just longer than three years, or if property has only been

10 Section 18 of the Property (Relationships) Act 1976 lists the types of contributions the court will take into account.

11 See for example *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111 per Richardson J; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 125: "It is difficult to envisage any stronger use of language than is reflected in 'extraordinary circumstances' and 'repugnant to justice' to emphasise the stringency of the test which has to be satisfied in order to justify departure from the equal sharing regime."

12 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.28].

13 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.29]–[12.30].

used as a family home or family chattel for a very short period of time.

12.11 Section 13 is largely unchanged from when it was first introduced in 1976.[14] It might have been thought that the courts would be more willing to apply section 13 following the 2001 amendments, which brought more property within the general rule of equal sharing.[15] The courts have, however, confirmed the test remains as rigorous as it did before 2001.[16]

12.12 The courts have found that there were extraordinary circumstances that would have made equal sharing repugnant to justice in situations where:

(a) one partner contributed $129,000 to the relationship that he had received as a beneficiary under a trust six months before the partners separated;[17]

(b) one partner contributed all the deposit for the family home, paid the mortgage from her salary and supported the other partner through his mental illness, which limited his contribution to the relationship;[18]

(c) the partners were married for just over three years, and the husband had contributed almost all of the property to the relationship (even the wife's income was derived from selling art work produced by the husband);[19]

(d) one partner concealed his own property and contributed very little property to the relationship;[20] and

(e) the relationship lasted for three years and two days, one partner contributed all capital assets to the relationship and the partners acquired no relationship property during the relationship.[21]

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14 Section 13 of the Property (Relationships) Act 1976 was originally enacted as s 14 of the Matrimonial Property Act 1976.

15 See above n 1. The Property (Relationships) Amendment Act 2001 extended the general rule of equal sharing to all relationship property, when previously it applied only to the family home and family chattels.

16 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [138].

17 *A v C* (1997) 16 FRNZ 29 (HC). See also the similar cases *B v B* (1986) 2 FRNZ 430 (HC); and *W v W* (1990) 6 FRNZ 683 (DC).

18 *P v P* [1980] 2 NZLR 278 (CA).

19 *S v S* [2012] NZFC 2685.

20 *H v M* (2001) 21 FRNZ 369 (FC). In addition, the husband had promised to enter a contracting out agreement but then evaded signing. He also refused to leave the family home when the relationship broke down so he could avoid the rules relating to relationship of short duration in the Property (Relationships) Act 1976.

21 *B v B* [2016] NZHC 1201, [2017] NZFLR 56.

12.13 A court might also consider that there are extraordinary circumstances that make equal sharing repugnant to justice when children's interests are involved, however we have not identified any successful cases of this kind.[22]

12.14 If a court is satisfied that section 13 applies, it will then look at the contributions each partner made to the relationship and divide the relationship property based on those contributions. Section 18(1) provides that contributions to the relationship are all or any of the following:

> (a) the care of—
>
> (i) any child of the marriage, civil union, or de facto relationship:
>
> (ii) any aged or infirm relative or dependant of either spouse or partner:
>
> (b) the management of the household and the performance of household duties:
>
> (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:
>
> (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
>
> (e) the payment of money to maintain or increase the value of—
>
> (i) the relationship property or any part of that property; or
>
> (ii) the separate property of the other spouse or partner or any part of that property:
>
> (f) the performance of work or services in respect of—
>
> (i) the relationship property or any part of that property; or
>
> (ii) the separate property of the other spouse or partner or any part of that property:
>
> (g) the forgoing of a higher standard of living than would otherwise have been available:

22 An unsuccessful application was made in *M v M* [2012] NZFC 5019 however the Family Court did not exclude the possibility that children's interests could constitute exceptional circumstances warranting an unequal division.

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i) enables the other spouse or partner to acquire qualifications; or

(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

12.15 There is no presumption that financial contributions are of greater value than non-financial contributions.[23]

The continued role of section 13 in the PRA framework

12.16 In our view, there remains a need for a provision that permits a court to depart from equal sharing in appropriate cases. The circumstances of each relationship differ so greatly that it is impossible to draft general rules of property division that will achieve a just division of property in every case. This is particularly so given that relationships in New Zealand are becoming more diverse.[24] We therefore consider if section 13, or an equivalent provision, should have a continuing role in the PRA.

12.17 We also think that there should be a high threshold for departing from the general rule of equal sharing, in order to preserve the principles of the PRA, discussed at paragraph (a) above and in more detail in Chapter 3.

12.18 It is difficult, however, to say precisely what the test ought to be for departing from the equal sharing rule. This is because section 13 operates as an exception that applies when the general rules in the PRA will not achieve a just division of property. In this Issues Paper we are considering reform of some of the PRA's general rules, such as the rules for the classification of property. Therefore it will not be clear what the precise role of section 13, or an equivalent provision, should be until there is greater clarity about how the PRA's general rules ought to operate.

23 Property (Relationships) Act 1976, s 18(2).

24 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

Is the section 13 test uncertain?

12.19 Nonetheless, we have concerns about the test used in section 13. The phrase "extraordinary circumstances" requires a court to test the case at hand against a whole range of relationships to determine whether it can be characterised as extraordinary.[25] But as relationships continue to diversify, it is increasingly difficult to identify what are "ordinary" circumstances. We are therefore concerned that deciding what constitutes "extraordinary circumstances that make equal sharing repugnant to justice" will become more difficult in the years to come.

12.20 Options for reform might include prescribing in greater detail the matters a court should take into account when deciding whether section 13 should apply, setting out examples in the PRA of how the exception is intended to operate,[26] or replacing the test in section 13 with a new formula. As noted above, any options for reform will need to be considered in light of any reforms to the PRA's general rules.

CONSULTATION QUESTIONS

D1 Should the PRA continue to have an exception provision like section 13?

D2 Is the current wording of section 13 satisfactory? If not, how might the test for departing from equal sharing be formulated?

Misconduct

12.21 The misconduct of one partner has very little influence on the division of property under the PRA. We noted in Chapter 3 that an implicit principle of the PRA is that misconduct during a relationship is generally irrelevant to the division of property. Section 18A makes this position clear.

12.22 Section 18A(1) provides that "a court may not take any misconduct of a spouse or partner into account in proceedings under this Act", except as permitted in sections 18A(1) and 18A(2).This general rule influences how the PRA's rules of division are to be interpreted. For example, the courts have said that

25 *J v J* (1993) 10 FRNZ 302 (CA) at 307.

26 See for example Copyright Act 1994, s 122A; Personal Property Securities Act 1999, s 41; and Accident Compensation Act 2001, s 114 as amended by the Interest on Money Claims Act 2016, s 29 which will come into effect on 1 January 2018. The Property (Relationships) Act 1976 itself contains some examples in ss 2B and 2BAA.

because of section 18A(1), misconduct is not an "extraordinary circumstance" that will allow a departure from the general rule of equal sharing under section 13.[27]

12.23 Section 18A(2) provides that a court can only take into account a partner's misconduct when deciding:

(a) a partner's contributions to the relationship under section 18;[28]

(b) whether to make an order under section 26 to settle relationship property for the benefit of children;

(c) whether to make an order postponing division,[29] granting one partner the right to occupy the family home or a home rented by the family,[30] or granting one partner the temporary use of furniture or household items;[31] or

(d) whether to make an ancillary order under section 33.[32]

12.24 Importantly, section 18A(3) provides that a court may only take misconduct into account that is "gross and palpable" and has "significantly affected the extent or value of relationship property". Misconduct that has no effect on the relationship property will be irrelevant, regardless of how severe the misconduct may have been. For example, in *W v G* there was evidence that one partner had committed "gross and repeated" violence to his partner over a long period of time, including both physical and sexual abuse.[33] However because the District Court found no causative link between that conduct and the value of the relationship property, the partner's misconduct had no impact on the division of property.[34]

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27 *J v J* (2005) 25 FRNZ 1 (CA) at [11] per William Young J. See the discussion at Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR13.06]. The author exemplifies the extent of the exclusion by the case *E v W* [2006] NZFLR 1140 (FC) where one partner was convicted of sexually abusing the other partner's children. The Family Court said this misconduct was not relevant to s 13 of the Property (Relationships) Act 1976.

28 One partner's support and tolerance of the other partner's misconduct might also be seen as a positive contribution to the relationship under s 18 of the Property (Relationships) Act 1976: *J v J* (1993) 10 FRNZ 302 (CA) (wife coping with her husband's alcoholism); and *W v W (No 2)* (1999) 19 FRNZ 24 (DC) (wife supporting husband through mental illness).

29 Property (Relationships) Act 1976, s 26A.

30 Property (Relationships) Act 1976, ss 27–28.

31 Property (Relationships) Act 1976, ss 28B–28C.

32 The court's ancillary powers under s 33 of the Property (Relationships) Act 1976 are for the court to give effect to any substantive orders it makes dividing the partners' relationship property under s 25.

33 *W v G* DC Wellington FP 558/92, 16 August 1995.

34 *W v G* DC Wellington FP 558/92, 16 August 1995 at 12–13.

12.25 The effect of section 18A is that misconduct will generally not affect a partner's share of relationship property, even if that misconduct was gross and palpable and significantly affected the value of the relationship property. Misconduct will only have a bearing on a partner's share of relationship property when there are other exceptional circumstances that make equal division repugnant to justice under section 13, or when the relationship is a short-term relationship.[35]

12.26 There have, however, been cases when a court has taken misconduct into account as a question of fact when considering other provisions of the PRA. For example in *N v N* the Family Court accepted that if one partner's violent conduct causes the other partner to take on more of the childcare responsibilities, or prevents them from taking on employment, then that violence may result in a division of functions for the purposes of section 15.[36]

12.27 A court can also make orders where one partner has taken "deliberate action or inaction" that has "materially diminished" the other partner's separate property (section 17A) or the relationship property after separation (section 18C).

Should misconduct have more weight in the division of relationship property?

12.28 There have been calls for a partner's misconduct to have a greater bearing on the division of relationship property, particularly in cases of family violence.[37]

35 Section 18A(2)(a) of the Property (Relationships) Act 1976 permits misconduct to be taken into account when determining the contribution of a partner to the relationship under s 18. Section 18 is only relevant when s 13 (extraordinary circumstances) or ss 14–14A (short-term relationships) apply. These sections provide for the division of property in accordance with the contribution of each partner to the relationship.

36 *N v N* [2004] NZFLR 942 (FC) at [98]. Section 15 of the Property (Relationships) Act 1976 is discussed in Part F.

37 See for example Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151; and Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003). During the lead up to the 2001 amendments to the Property (Relationships) Act 1976 (PRA), several submitters said to the Justice and Electoral Select Committee that family violence needed to be taken into account under the Property (Relationships) Act 1976 regime: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 14–15. Note we use the term "family violence" rather than "domestic violence" to reflect the current terminology in the Family and Whānau Violence Legislation Bill 2016 (247-2).

12.29 New Zealand has the highest reported rate of intimate partner violence[38] in the developed world.[39] The consequences of family violence can be devastating for the victims and their families. Discussing intimate partner violence, Cohen writes:[40]

> *Terrible and tragic things happen within the contexts of battering relationships, even beyond the violence and resultant injury itself. These tragedies include the death of the battered victim; the physical and psychological abuse of others, especially children, within the household; the destruction of employment situations and opportunities; the withering away of basic trust, particularly trust in intimacy; and, often, the waste of what might, and should, have been rewarding and productive lives.*

12.30 Several reasons have been given why family violence should have a greater bearing on the division of relationship property:

(a) Family violence can be seen as a repudiation and a negation of the violent partner's commitment to the relationship.[41] As we discussed in Chapter 3, the PRA is built on the theory that a qualifying relationship is an equal partnership or joint venture, to which partners contribute in different but equal ways. Misconduct of this severity has the effect of undermining that partnership and should have consequences.

(b) Family violence can have significant ongoing economic consequences that may not be reflected in the reduced value of relationship property. For example, a partner who has suffered physical or psychological abuse may experience a deterioration of his or her performance at work or in study.[42] That partner will therefore potentially suffer a drop in work productivity, inhibited career advancement, or even loss of employment and

38 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 187 describes "intimate partner violence" as "[a]ny behaviour within an intimate relationship (including current and/or past live-in relationships or dating relationships) that causes physical, psychological or sexual harm to those in the relationship".

39 Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015) at 4–5.

40 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) citing Jane Maslow Cohen "Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?" (1995) 57 U Pitt L Rev 757 at 762.

41 *G v G* [1998] NZFLR 807 (FC) at 814.

42 Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 19.

loss of income. These consequences are not reflected in the PRA's division of property.[43]

(c) There is an increasing awareness of the damaging effects of family violence, the need for perpetrators to take responsibility for their actions and the need to discourage family violence.[44]

12.31 To date Parliament has resisted calls to give misconduct greater weight in the division of property. In the lead up to the 2001 amendments the Select Committee responded to these calls by saying it was undesirable to introduce fault or misconduct as a basis for division.[45] The Committee explained it would represent a significant departure from the current scheme and it could lead to pressure for other fault-based conduct to be taken into account.[46] The Committee concluded that issues concerning the impact of family violence are most appropriately addressed in the context of the Domestic Violence Act 1995 and general criminal law.[47]

12.32 Under the Domestic Violence Act 1995 a court can make orders that affect the partners' property. For example, a court can grant an applicant the right to personally occupy a house,[48] or to possess furniture, household appliances and household effects.[49]

12.33 We recognise the important considerations on both sides of this issue. We are aware of the grave effects of family violence.[50] Family violence should be firmly discouraged and the perpetrators should face consequences.

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43 The Ministry of Justice note the significant economic cost of family violence to New Zealand, from the impact on the healthcare system through to the cost of low productivity: Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015) at 3. The estimated cost of intimate partner violence and child abuse to New Zealand's economy in 2014 is between $4.1 billion to $7 billion: Sherilee Kahui and Suzanne Snively *Measuring the Economic Costs of Child Abuse and Intimate Partner Violence to New Zealand* (The Glenn Inquiry, 2014).

44 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 153. The Family and Whānau Violence Legislation Bill 2016 (247-2) currently before Parliament is aimed at (a) recognising that family violence in all its forms is unacceptable, (b) stopping and preventing perpetrators from inflicting family violence, and (c) keeping victims safe from family violence (cl 1A).

45 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

46 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

47 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

48 Domestic Violence Act 1995, s 53(1).

49 Domestic Violence Act 1995, s 67(1).

50 See for example Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016); and Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016).

12.34 We acknowledge, however, the merits of dividing partners' property without reference to the moral failings of each partner. It is undesirable to enable or encourage disputes that focus on fault and misconduct, particularly at separation, which is the most dangerous time for victims of family violence.[51] This is also in keeping with the principle that questions under the PRA about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

12.35 There might also be practical difficulties in proving misconduct and its economic impact on the relationship property. Questions about the interaction of the PRA and criminal proceedings, and what standard of proof would be required, would also need to be given careful thought.[52]

Options for reform

12.36 If the PRA is to be reformed to give greater prominence to the effects of misconduct in a relationship, the question would be how to achieve this. We have explored two options for reform.

Option 1: Provide for misconduct to be considered an "extraordinary circumstance"

12.37 One option is to amend section 18(2) to provide that a court can take into account a partner's misconduct when deciding whether there are extraordinary circumstances which make equal sharing repugnant to justice under section 13. The result would be that misconduct could be taken into account in deciding how the relationship property should be divided, if the test in section 13 is met. Section 18A(3) would ensure that only misconduct that is "gross and palpable" and has "significantly affected the extent or value of relationship property" could be considered under section 13. The court would retain a discretion to decide whether the misconduct satisfies the test under section 13 in the particular circumstances of each case. This option relies on the courts to

51 The Law Commission noted evidence that women are most likely to be killed by an abusive partner in the context of an attempted separation: Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 31 citing Walter S DeKeseredy, McKenzie Rogness and Martin D Schwartz "Separation/divorce sexual assault: The current state of social scientific knowledge" (2004) 9 Aggression and Violent Behavior 675 at 677.

52 Zoë Lawton "One Court, One Judge: An Integrated Court System for New Zealand Families Affected by Violence"(discussion paper, 2017) available at <www.lawfoundation.org.nz> considers how an integrated domestic violence court might operate in New Zealand.

develop an approach to determining when misconduct satisfies the test under section 13.

Option 2: A specific exception for family violence

12.38 Parker explains that family violence may not be so uncommon as to constitute "extraordinary circumstances", and argues there should be no requirement that the violence be extraordinary before the PRA responds.[53] Neither should the victim have to prove that the misconduct was gross and palpable and devalued property.[54] Rather, she says that the violence should be seen as an injustice in its own right which should, as a standalone exception, displace the general rule of equal sharing.[55] Therefore another option would be a new provision alongside section 13 that specifically deems family violence as a standalone exception to equal division.[56]

CONSULTATION QUESTIONS

D3 Should misconduct, and in particular family violence, have a greater bearing on how property is divided between the partners?

D4 If it should, do you have a preferred option for reform? Are there viable options for reform we have not considered?

Dissipations of relationship property

12.39 If a partner's "deliberate action or inaction" after separation has "materially diminished" the value of relationship property, section 18C permits a court to order that partner to compensate the other partner.[57] Compensation can be in the form of a payment of a sum of money or a transfer of relationship or separate property.

53 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154. See also *S v S* DC Whangarei FP 888/218/82, 22 April 1991. A husband had been abusive in the past on four specific occasions. The District Court noted the time that had elapsed between each episode, the fact that assault is regrettably not so uncommon in relationships and that the husband had generally been a good father and provider. The Court said that no extraordinary circumstances existed.

54 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

55 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154.

56 Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 154. Callister also supports this approach: see Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 39.

57 Property (Relationships) Act 1976, s 18C.

12.40 Section 18C sets a high threshold. The partner must have deliberately acted or failed to act in order to reduce the value of the property.[58] This can be difficult for the other partner to prove.

12.41 Examples of the courts awarding compensation under section 18C include where:

(a) one partner made significant drawings for personal expenditure on a company in which both partners were shareholders, which led to the value of the company decreasing;[59] and

(b) one partner sold an item of relationship property at undervalue.[60]

Does the PRA deal adequately with the dissipation of property during a relationship?

12.42 The PRA may not deal adequately with the dissipation of property during a relationship, when that property would have been characterised as relationship property and would have otherwise been available for division on separation.

12.43 We have been told that it is common for one partner during the course of the relationship to use significant amounts of relationship property for personal use, such as gambling, or to incur personal debts, such as credit card debts, for which both partners are liable.[61] We have also heard stories of one partner draining the partners' joint bank accounts before or immediately on separation.

12.44 Section 18C will not apply in these circumstances. It only applies when a partner has deliberately reduced the value of relationship property after the relationship has ended.

12.45 Rather, section 19 provides that, unless the PRA provides otherwise, nothing affects the power of either partner to deal

58 *M v M* [2013] NZCA 660, [2014] NZFLR 418 at [37]. The Court of Appeal said that any diminution in value taken into account must have been deliberate. The Court rejected the argument that the word "deliberate" simply referred to the action or inaction. In declining leave to appeal, the Supreme Court said the Court of Appeal's comments about the use of the word deliberate were "clearly right": *M v M* [2014] NZSC 32, [2014] NZFLR 599 at [4]. See discussion in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR18C.05].

59 *S v S* [2012] NZFC 4050.

60 *C v C* FC Auckland FAM-2002-004-2658, 8 September 2004.

61 See for example Susan Edmunds "Kiwis Warned of Sexually-Transmitted Debt Epidemic" (13 February 2017) Stuff <www.stuff.co.nz>.

with or dispose of property as if the PRA had not been enacted. So while the partners remain together, they may each deal with their property without any obligation to recognise the rights the other partner may have under the PRA if the relationship was to end. There are, however, a number of provisions in the PRA which can affect this general rule.

Section 44

12.46 The courts have sometimes relied on section 44. Section 44 provides that when a partner has disposed of property in order to defeat the other partner's claim or rights under the PRA, a court may order that the property be transferred back, or that the person who received the property pay compensation. In *N v R*, for example, one of the partners in a de facto relationship had died.[62] In the years prior to the partner's death, he had suffered from Alzheimer's disease. During this period the other partner had transferred significant amounts of money from the partner to her own account. In the Family Court proceeding she would not explain what had happened to this money. The Family Court said that section 44 applied. The Court ordered that the partner repay the unaccounted sums to the deceased partner's estate.

12.47 Section 44 is not usually the appropriate tool to use in circumstances where a partner has dissipated property. Partners who have been disadvantaged by the disposition of property bear the burden of proving that the partner who made the disposition intended to defeat his or her claim or rights under the PRA.[63] In some cases this can be difficult.[64] The other major problem with section 44 is its remedies. It provides that the person who receives the property must return the property or pay compensation for it. In cases where one partner has repeatedly dissipated property on a number of occasions to a number of third parties, such as by gambling over an extended period of time, it is not possible for an affected partner to recover the property. The third party who receives the property will not be ordered to return the property or pay compensation if the property was received in

62 *N v R* [2014] NZFC 5380.

63 The level of intention required has been substantively lowered in recent cases. In *R v U* [2010] 1 NZLR 434 (HC) the High Court accepted that a partner's knowledge of the effects of the disposition can be equated with an intention to bring about that effect.

64 See our comments regarding s 44 of the Property (Relationships) Act 1976 in Part D.

good faith and for consideration.[65] For most third party suppliers or service providers, such as casinos, shops or bars, the third party will have a good defence to the recovery of the property.

Section 20E

12.48 The courts sometimes rely on section 20E to treat the expenditure as personal debts that have been paid from relationship property. In *W v W*, after the partners had separated the wife had spent approximately $38,000 on what the Family Court described as "clothing, toys and trinketry".[66] The Court said that, unlike things like groceries, the wife's purchases could not be regarded as expenditure reasonably required for her maintenance. Rather, the Court said that the expenditure was used to meet her personal debts.[67] The Court ordered the wife to pay compensation to the husband for two-thirds of the amount of the expenditure. Although the expenditure in this case had occurred after the partners had separated, the Court noted that section 20E does not specify any time limits for when the partner paid his or her personal debt from relationship property. Consequently, section 20E could be applied.

12.49 In *B v B* a husband said that in the last 18 months of the partners' marriage, his wife incurred considerable personal expenditure on personal items.[68] He argued that this expenditure should be considered the wife's personal debts that she had paid from the partners' relationship property. The Court said that section 20E did not apply in this instance. The wife's expenditure was no more than normal everyday expenditure tacitly approved and expected in most relationships.[69]

12.50 We consider that section 20E does not provide a suitable remedy in these types of cases. The transactions in these cases involved a contemporaneous exchange of cash for the item that was purchased. They cannot properly be described as a debt.[70]

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65 Property (Relationships) Act 1976, ss 44(2) and 44(4).

66 *W v W* FC New Plymouth FAM-2004-043-891, 18 April 2007 at [49].

67 *W v W* FC New Plymouth FAM-2004-043-891, 18 April 2007 at [49].

68 *B v B* FC Christchurch FAM-2004-009-3656, 13 July 2006.

69 *B v B* FC Christchurch FAM-2004-009-3656, 13 July 2006 at [56]. The husband also complained that his wife had spent considerable sums of money gambling. The Court found that the husband had gambled alongside his wife on several occasions. The Court said at [63]–[64] that the partners' joint gambling was a common enterprise which therefore characterised the debt as a relationship debt.

70 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [18] and [186].

Consequently, section 20E is arguably the wrong provision to use in cases of one partner's excessive expenditure of relationship property.

12.51 Furthermore, section 20E only applies to situations where the personal debts of one partner have been paid from relationship property. It does not apply to situations where one partner pays the other's personal debts from separate property.

12.52 In light of the shortcomings we have identified with these various provisions, the question arises whether the PRA should be better equipped to deal with one partner's excessive personal expenditure or other dissipation of relationship property during the relationship. Any change would need to clearly exclude normal expenditure that is reasonably incurred and discourage partners from scrutinising and disputing each other's spending during and after the relationship, except in truly inappropriate circumstances.

CONSULTATION QUESTIONS

D5 Does the excessive expenditure or dissipation of relationship property by one partner during or after the relationship often lead to an unjust division of property?

D6 Are the current provisions of the PRA adequate to deal with excessive personal expenditure or the dissipation of relationship property?

Successive and contemporaneous relationships

12.53 The PRA provides special rules of division in sections 52A and 52B for successive and contemporaneous relationships.[71] These rules apply when competing claims are made in respect of the same relationship property but in relation to different relationships and there is insufficient property to satisfy the claims.[72]

71 Sections 52A and 52B of the Property (Relationships) Act 1976 (PRA) were based on a provision recommended in the Law Commission Report *Succession Law: A Succession (Adjustment) Act* (NZLC R39 1997) at 141 and C200–C206: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 27. The provision recommended by the Law Commission was designed to manage competing claims in respect of contemporaneous relationships where there are insufficient assets in the deceased's estate to fully satisfy orders and awards. It was developed in a different context involving only two living partners, the common partner being deceased. It was not developed to address a scenario where all three partners are still alive, where the relationships were successive but not contemporaneous, or where one relationship ends and the other continues.

72 Sections 52A and 52B of the Property (Relationships) Act 1976 apply when two or more formal claims have been filed in court for orders under ss 25–31 or 33: s 52A(4); and *[LC] v D* (FC) Waitakere FAM-2008-090-000304, 20 September 2011 at [53].

12.54 Successive relationships are those that occur one after the other, with no period of overlap. For example, after partner A's marriage to partner B ends, he or she enters into a de facto relationship with partner C. Section 52A applies if partner A and partner B do not resolve their property matters before partner A's new de facto relationship with partner C ends, and partner C seeks a division of property under the PRA. If partner A and partner B had been in a de facto relationship rather than married, then section 52B would apply.

12.55 Contemporaneous relationships arise when one person is in two or more relationships at the same time. For example, partner A is married to partner B and at the same time is also in a de facto relationship with partner C. Contemporaneous relationships were discussed in Part B.

12.56 If the relationships are successive, the relationship property is divided in accordance with the chronological order of the relationships.[73] This recognises that the first relationship will generally stop accumulating relationship property when it ends. The common partner will only take property into his or her second relationship that is not claimable by the first partner.[74] This means that the first partner's claim is determined first, in order to ascertain the balance of property available to satisfy the second partner's claim. The rules for successive relationships are not a true exception to the general rule of equal sharing as they simply set out a mechanism for determining the priority of claims. The general rule of equal sharing still applies to the division of property between the partners to each relationship.

12.57 If the relationships were contemporaneous, then there is a two stage process:

(a) to the extent possible, the claims must be satisfied from the property attributable to each relationship (stage one); and

(b) to the extent that it is not possible to attribute property to either relationship, the property is to be divided in accordance with the contribution of each relationship to the acquisition of the property (stage two).

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73 Property (Relationships) Act 1976, ss 52A and 52B.

74 See Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39 1997) at [C204].

12.58 The rules for contemporaneous relationships are an exception to the general rule of equal sharing. They are also an exception to the general approach of examining contributions to the relationship, which is the approach that applies when there are exceptional circumstances under section 13 and when the relationship is a short-term relationship.[75] The approach in sections 52A and 52B is attractive in this context as it avoids comparing the worth of the two contemporaneous relationships.[76] Such value judgements would be difficult to make and inconsistent with the principles on which the PRA is based.[77]

12.59 There is limited case law on sections 52A and 52B. This may be because it is relatively rare for competing claims from different relationships to be made. It may also be due to the difficulty of establishing a contemporaneous relationship (discussed in Part B). Nonetheless we have identified several potential issues with how sections 52A and 52B operate in practice.

Issues with sections 52A and 52B

12.60 The issues we have identified are with the way sections 52A and 52B work both generally and for contemporaneous relationships. We have not identified any material issues that are unique to the way sections 52A and 52B work for successive relationships.

12.61 The issues are:

(a) **The rules are unclear**. Reid says that the main problem with sections 52A and 52B is their lack of clarity.[78] For example, it is unclear at what stage of proceedings sections 52A and 52B apply[79] and how a court will

75 Property (Relationships) Act 1976, ss 14–14A.

76 However the situation is different where there is only one relationship. See Chapter 10 for a discussion of the problems with dividing relationship property on the basis of contributions to property, rather than to the relationship, in the context of s 9A(2) of the Property (Relationships) Act 1976.

77 See Chapter 3 for a discussion of the principles of the Property (Relationships) Act 1976. These include the principle that men and women have equal status and their equality should be maintained and enhanced, and the principle that all forms of contribution to the relationship are treated as equal.

78 Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 57. This Dissertation also identifies other technical and procedural issues with ss 52A and 52B of the Property (Relationships) Act 1976.

79 Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 25-29. Reid says at 26 that "[t]he question that arises when considering sections 52A and 52B is whether they dictate what relationship property is available to be divided between the parties to each relationship, or whether property orders are made under the usual division of relationship property sections of the [PRA], and sections 52A and 52B only apply to rank the property orders made if there is insufficient property to satisfy them."

determine which property is "attributable" to which relationship.[80]

(b) **The rules favour the common partner.** This is because, however property is divided between contemporaneous relationships, if the general rule of equal sharing applies within each relationship, the common partner will receive half of the relationship property divided under section 52A or 52B, which amounts to half of the total.[81] Reid says that:[82]

> *…sections 52A and 52B inevitably bring a result that is incongruous with the rest of the [PRA], with the common partner retaining half of the property while the other partners share the remainder in a way that it is hard to predict. It seems that the common partner is allowed to have their cake and eat it too, while the others must fight over the crumbs.*

(c) **The rules may be used strategically to defeat or reduce one partner's claim.** For example, if only one of the relationships has ended, it is in the interests of the partner to the continuing relationship to bring a claim under section 52A or 52B to preserve as much property as possible for the continuing relationship.

(d) **The rules are difficult to reconcile with the PRA's rules around misconduct.** In the lead up to the 2001 reforms the Principal Family Court Judge highlighted the difficulty for the courts in reconciling section 18A with sections 52A and 52B.[83] Section 18A allows "gross and palpable" misconduct that has "significantly affected the extent or value of relationship property" to be taken into account in determining a partner's contribution to the relationship. Such conduct can

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80 The term "attributable" is not defined in the Property (Relationships) Act 1976 (PRA), although it is used in other sections of the PRA in different ways, for example, ss 8(1)(g), 8(1)(i) and 9A(2). The way an attribution analysis works in these other contexts could inform the interpretation of ss 52A and 52B. Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 7 makes the point that stage one of the test is redundant because "all property that is relationship property of a relationship is attributable to that relationship."

81 See Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 36.

82 Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 60.

83 Principal Judge Mahoney "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 6.

also be taken into account in determining what order to make under particular provisions of the PRA.[84] The Judge gave the example of a husband who throughout the marriage supports a clandestine relationship with considerable financial contributions sourced from relationship property, for example earnings.[85] Henaghan says that there is an argument that a clandestine contemporaneous relationship may in fact satisfy the misconduct test in certain circumstances.[86]

(e) **The existing rules do not clearly cater for situations involving more than two contemporaneous relationships.** For example, partner A is married to partner B and is also in de facto relationships with partner C and partner D at the same time. However this scenario may be unusual in practice.

CONSULTATION QUESTIONS

D7 Are there any issues with the way sections 52A and 52B work for successive relationships?

D8 Do the rules for contemporaneous relationships have the potential to lead to an unjust result? If so, in what circumstances?

Options for reform

12.62 Our preliminary view is that there is a need for provisions setting out the priority of claims when there are successive or contemporaneous relationships. The rules already provide mechanical clarity for successive relationships, but not for contemporaneous relationships. As relationships in New Zealand are becoming more diverse, there may be an increasing need to better provide for contemporaneous relationships.

12.63 We consider several options for reform below. However we also note that some of the issues with sections 52A and 52B may be less acute if the PRA's rules of classification are changed. As we have discussed in Chapter 9, one option is to move to a pure "fruits of the relationship" approach to the classification

84 Property (Relationships) Act 1976, s 18A(2)(b). However see [12.25] above.

85 Principal Judge Mahoney "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 6.

86 Mark Henaghan "The three of us" (paper presented to the New Zealand Law Society Family Law Conference, October 2001) at 9-10.

of property, which would likely reduce the pool of relationship property that is divided between the partners in many cases. This may reduce the risk that sections 52A and 52B lead to an unjust result when applied to contemporaneous relationships.

Option 1: Amend sections 52A and 52B to address their lack of clarity

12.64 This option would accept that the policy underpinning sections 52A and 52B is basically sound. It would retain attractive aspects of the current rules, for example the nuanced approach and the focus on contributions to the property as opposed to contributions to the relationship. Careful consideration would be needed as to what directions the provisions could give to determine when property is attributable to a relationship.

Option 2: Divide all relationship property equally between all partners entitled to share it

12.65 Option 2 is to replace sections 52A and 52B with a new provision that says property that is relationship property of more than one relationship contemporaneously be divided equally between all the partners entitled to share in it.[87]

12.66 There is some precedent for this approach in the Administration Act 1969, which contains rules that apply when the deceased is survived by multiple partners who are entitled to succeed on intestacy.[88] Those rules provide that the partners share equally what one of them would have received if only one partner had survived the deceased.[89] This approach would have the advantage of clarity, but may in some circumstances deliver "rough justice" as opposed to a just result. An option to address this would be to include an element of judicial discretion, for example giving a court flexibility to depart from the rule to avoid serious injustice.[90]

87 Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 58.

88 Administration Act 1969, s 77C.

89 Administration Act 1969, s 77C.

90 A "serious injustice" test is already used in other provisions of the Property (Relationships) Act 1976, for example ss 14A and 21J. See also Adrianne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 57–58.

Option 3: Amend the PRA to better reconcile the rules around misconduct with the rules for contemporaneous relationships

12.67 Another option is to amend sections 13, 18A and/or 52A and 52B to expressly recognise clandestine or unsanctioned contemporaneous relationship(s) that significantly affect the extent or value of the relationship property attributable to each relationship as a form of misconduct that renders equal sharing repugnant to justice. This option has some similarities with option 1 under misconduct, discussed at paragraph 12.37 above.

12.68 Under this option the common partner's share of relationship property could be reduced and the share of the other partner(s) increased. This could mean that the common partner bears greater responsibility for the property consequences of maintaining contemporaneous relationships.

CONSULTATION QUESTIONS

D9 Do the rules for contemporaneous relationships require reform? If so, which of the options we have identified (if any) do you prefer and why?

D10 How should sections 52A and 52B relate to the rules on misconduct in section 18A?

Chapter 13 - Valuation

Valuation of property in the PRA's overall scheme

13.1 Usually relationship property is divided as a global division. This means a court will first determine the value of individual items of relationship property to assess the total relationship property value. The valuation of property is integral to ensuring that each partner obtains an equal share of the global relationship property pool.[91] As the Court of Appeal explained in *Reid v Reid*:[92]

> *[T]he overall purpose of having various assets valued is to produce in a global sense a fair estimation of the worth of the matrimonial property so that its subsequent division will be achieved in a way which will be just as between the husband and wife.*

13.2 The valuation of relationship debts is similarly important because those debts are deducted from the total value of the partners' relationship property. It is only the remaining net value of the relationship property that is divided between the partners.[93]

13.3 Once a court has calculated the net value of relationship property it will then decide which assets go to each partner, with monetary adjustments to ensure equal sharing of all relationship property.[94]

Valuation and compensation

13.4 In certain cases a court must also value contributions and items of separate property in order to calculate compensation payments or adjustments to the global division of relationship property. The PRA has several provisions that allow a court to order one partner to pay compensation to the other.[95] In each case, a court

91 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9]. The author explains that valuation is essential to global division process as value is "used as the medium for determining the respective entitlements in the overall division."

92 *Reid v Reid* [1980] 2 NZLR 270 (CA) at 272, judgment of Woodhouse and Richardson JJ delivered by Woodhouse J.

93 Property (Relationships) Act 1976, s 20D.

94 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9].

95 For example a court may order one partner to pay compensation to the other if, owing to the division of functions during the relationship, that partner is likely to enjoy significantly higher income and living standards than the other partner after separation: s 15; a court may require one partner, whose separate property has been sustained by the other

would have to assess the value of certain things. Under section 15 for example, a court must determine the likely economic disparity between the partners to quantify the appropriate level of compensation. Under sections 17 and 18B, a court must consider the value of a partner's contributions. If a partner has taken care of the partners' children after separation and a court determines that compensation under section 18B is appropriate, it could receive valuation evidence of the costs of providing a nanny in lieu of the care the partner provided.[96]

Determining value

What is value?

13.5 The PRA is silent on what the term "value" means. Instead, its interpretation has been left to the courts to decide.[97] We note four points regarding the courts' approach to valuation.

13.6 First, valuation of property is a separate exercise to the initial exercise of taking stock of the partners' property. The PRA will only apply to items that fall within the definitions of "property" and "owner" under section 2.[98] A valuer might be able to ascribe a value to a particular item, but that item would not be property for the purposes of the PRA. For example, a person's earning capacity is not property although the present value of a partner's future income can be determined.[99]

13.7 Second, a court must determine the appropriate standard of value. The PRA frequently refers to the word "value." It can, however, have several meanings because, as a matter of valuation practice, different standards of value are applied in different instances. In

partner, to pay compensation: s 17; a court may recognise a partner's contributions to the relationship after separation by requiring that a partner compensate the partner who made the contributions: s 18B; and if one partner has materially diminished the value of relationship property after separation, the court can order that partner to pay compensation to the other: s 18C.

96 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

97 In the years following the enactment of the Matrimonial Property Act 1976 the Court of Appeal addressed the question of valuation in a number of cases: see principally *Haldane v Haldane* [1981] 1 NZLR 554 (CA); and *Holt v Holt* [1987] 1 NZLR 85 (CA). The Court of Appeal's aproach was later upheld on appeal: *Holt v Holt* [1990] 3 NZLR 401 (PC).

98 See Chapter 8 for a discussion of these terms.

99 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) the Court of Appeal said that although the person may obtain considerable financial benefits from his or her qualifications, skills and experience, those aspects are purely personal characteristics which do not come within the Property (Relationships) Act 1976's definition of property.

Haldane v Haldane, the Court of Appeal explained that "value" could refer to the market value of the property, its intrinsic value to the owner, or its replacement cost.[100] The Court concluded that ordinarily a just division of property under the PRA will require a court to use the "fair market value" of the property.[101] This is determined by assuming a hypothetical sale between a willing but not anxious seller and a willing but not anxious buyer.[102] It should be noted, however, that a court may not always adopt a fair market value standard. In some cases the courts have considered whether to use an alternative standard of value.[103]

13.8 Third, the PRA gives no guidance on the methodology to determine value. The courts have said no specific methodology should be elevated into a test for what value means, rather that valuation methodologies are aids.[104] Some assets are simple to value. For example, a fair market value of a family car can be appraised by a second-hand car dealer.[105] The task is more complex when a court must determine the present value of an asset that will produce future income. The most common example of such assets in relationship property cases are company shares and superannuation scheme entitlements. The courts will usually accept a valuation based on a discounted cash flow analysis.[106] This involves working out a present value by assessing future

100 *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562 per Richardson J.

101 *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562 per Richardson J. This is the standard of value usually applied in relationship property cases: see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9]; and Nichola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2G.06]. Similarly, the courts will usually value relationship debts on a fair market value standard: *Walker v Walker* [2007] 2 NZLR 261 (CA) at [37-40] (in other words, what a willing but not anxious purchaser would pay for the debt). The fair market value of the debt may differ from the book value of the debt depending on several factors, such as the debtor's ability to repay the debt.

102 This test was adopted by the courts when determining value under estates and gift duty legislation and applied to the Matrimonial Property Act 1976 context: see *H v Commission of Inland Revenue* [1963] NZLR 641 at 661 (CA); *Clark v Clark* [1987] 2 NZLR 385 (CA) at 388; *Z v* Z [1989] 3 NZLR 413 (CA) at 415; *Holt v Holt* [1990] 3 NZLR 401 (PC) at 402-403; *Sojourner v Robb* [2007] NZCA 493, [2008] 1 NZLR 751 at [38]; *Boat Park Ltd v Hutchison* [1999] 2 NZLR 74 (CA) at 83–85; *Sayes v Tamatekapua* [2012] NZCA 524 at [21]; *Sturgess v Dunphy* [2014] NZCA 266 at [148]; *Morganstern v Jeffreys* [2014] NZCA 449 at [61]; and *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [242].

103 See for example *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011. The Family Court addressed the question of how shares in a family company that operated a farming business should be valued. The Court considered at [29]–[33] whether it would be appropriate to value the shares on a "fair value" basis rather than on a "fair market value" basis. Although the Court did not reach a clear conclusion on the applicable standard, it said that it was not appropriate to give a discount on the shares that would normally be expected if valuing a minority shareholding interests pursuant to a fair market value standard.

104 *H v Commissioner of Inland Revenue* [1963] NZLR 641 (CA) at 661; *Jamieson v Cox* [1990] NZFLR 165 (CA) at 167; *Pountney v Pountney* CA45/91, 20 September 1991 at 20; and *Carter v Carter* [2001] NZFLR 180 (HC) at 189–190.

105 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

106 Brendan Lyne and Robyn von Keisenberg "Valuation and Expert Financial Evidence in PRA Cases" (paper presented to the New Zealand Law Society Seminar, June 2016) at 27 and 36; and Shelley Griffiths "Valuing 'bundles of rights' for the Property (Relationships) Act 1976; when neither art nor science is enough" (2011) 7 NZFLJ 98 at 100.

income streams from the property and discounting for risks and contingencies.[107] Valuations based on complex methodologies will often require high level expert input. Sometimes expert valuers undertake extensive analysis and present that evidence in court. Issues around the value of property or debt can therefore increase the costs and time to resolve a dispute.[108] Valuers will also need access to information about the property which can be difficult to obtain.

13.9 Fourth, if a court takes a fair market value approach, it will not usually consider the personal intentions or sentiments of the partners regarding the property. Instead, a court will make certain assumptions regarding the hypothetical market that may not accord with the facts of the case.[109] In *Holt v Holt*, the partners could not agree on how the husband's shares in a company should be valued.[110] The company was used to carry on the business of a family farm. The husband said he intended to bequeath his shareholding to his children so that the farm would stay in the family. The husband argued this intention should diminish the value of the shares. The Court of Appeal said that in hypothetical negotiations between the willing buyer and seller, purely sentimental matters and questions of personal financial need or wealth had to be put aside.[111] As the husband was under no obligation to bequeath his shares, the Court said it had to ignore the husband's assertion. Instead, the Court said that the notional vendor and purchaser are arriving at a commercial bargain uninfluenced by generosity or the prospect of generosity.[112]

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107 Brendan Lyne and Robyn von Keisenberg "Valuation and Expert Financial Evidence in PRA Cases" (paper presented to the New Zealand Law Society Seminar, June 2016) at 27 and 36; and Shelley Griffiths "Valuing 'bundles of rights' for the Property (Relationships) Act 1976; when neither art nor science is enough" (2011) 7 NZFLJ 98 at 100.

108 In some cases, if there is significant uncertainty as to the value of an asset, the courts will sometimes order that the property be sold and the proceeds divided equally between the partners. See *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 at [25]. In February 2017 the Supreme Court heard an appeal from the Court of Appeal's decision. The Supreme Court has not yet issued its judgment.

109 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). In RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.11] the author says that valuation is usually abstracted from the "personal whims" of the partners.

110 *Holt v Holt* [1987] 1 NZLR 85 (CA). The Court of Appeal's decision was later upheld on appeal: *Holt v Holt* [1990] 3 NZLR 401 (PC).

111 *Holt v Holt* [1987] 1 NZLR 85 (CA) at 90.

112 In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 the Supreme Court said that Mr Clayton's powers under the trust deed gave him the unfettered ability to appoint all the trust property to himself. The Court said that these powers were property in their own right for the purposes of the Property (Relationships) Act 1976. As Mr Clayton had the ability to distribute all trust property to himself, the Court said at [104] that the value of the powers would equate to the value of the underlying trust property. Mr Clayton argued that valuing the trust property in this way would preclude the possibility that he might exercise his powers to appoint the property to other beneficiaries. The Court said at [102] this consideration was irrelevant. See also *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [113]–[114].

At which date should property be valued?

13.10 The date at which the property's value should be assessed is often a contentious issue in relationship property disputes. That is because the value of property can fluctuate. The date at which the property's value is assessed will therefore determine the extent to which the partners' share in any increases or decreases in the property's value.

13.11 Section 2G(1) lays down a general rule that the value of any property to which an application under the PRA relates is determined at the date of the hearing by the court of first instance.[113] Section 2G(2), however, provides that a court may decide that the value of the property be determined as at another date.

13.12 The basis of the general rule in section 2G(1) is that a contemporary valuation of the property will usually provide a just division of that property.[114] If the property has increased in value since the partners separated because of the market inflation, it is usually considered fair that the partners share equally in the increase. In *De Malmanche v De Malmanche*, the family home had a value of $500,000 at the date the partners separated.[115] By the hearing date, the property had increased in value to $640,000. The evidence before the Court showed that the increase in the property's value was attributable to market forces rather than the efforts of either partner. The High Court said that the property should be valued as at the hearing date. The Court said it would be unjust to deny each partner an equal share of the advantages of the post-separation increase in value.[116]

13.13 If the post-separation increase or decrease in value is attributable to the actions of one partner, it may not be just to share those increases or decreases equally. Prior to the 2001 amendments, a court was limited in its ability to take the post-separation actions of one partner into account. Its primary tool was to adjust the

113 The court of first instance is the court that hears the party's application for the first time. This will usually be the Family Court although some cases are heard for the first time by the High Court. The appellate courts (the Court of Appeal and the Supreme Court) will not be the courts of first instance.

114 *Jorna v Jorna* [1982] 1 NZLR 507 (CA) at 511: "[i]n a general way and in the absence of particular circumstances a contemporary valuation will produce equity."

115 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC).

116 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [148].

date of valuation so as to exclude the increases or decreases attributable to one partner alone.[117]

13.14 Following the 2001 amendments, a court's discretion to adopt a different valuation date under section 2G(2) is of less significance. That is because a court may now award compensation to a partner under section 18B for contributions the partner has made to the relationship after separation. Likewise, a court can award compensation under section 18C against a partner who has materially diminished the value of the partners' relationship property through deliberate action or inaction. The courts have said that the valuation date should not be changed under section 2G(2) if section 18B or section 18C applies.[118]

13.15 If one partner has retained use and enjoyment of the property after separation, but the property has depreciated, section 2G(2) may be relevant.[119]

Evidence of value

13.16 A court will usually determine the value of property by relying on the evidence each partner presents to the court. The most common way partners give evidence of value is to rely on an expert valuer.

13.17 How expert valuers give evidence in court proceedings is governed by the rules of evidence, which are found under the Evidence Act 2006 and the relevant court rules.[120] We will not examine these rules but simply mention a few important aspects.

13.18 First, experts are under an overriding duty to assist the court.[121] This reflects the position that expert evidence assists the fact-

117 For example, if one partner had made improvements to property after separation but prior to the hearing and those improvements increased the value of the property, the court may have ordered that the value of the property be ascertained at the date before the improvements were made. See for example *Meikle v Meikle* [1979] 1 NZLR 137 (CA).

118 *Fowler v Wills* (2003) 23 FRNZ 703 (CA); and more recently *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772. See also *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129 at [25].

119 Nichola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2G.03] relying on *G v G* (2002) 22 FRNZ 990 (FC); and *Loader v Loader* [2003] NZFLR 553 (FC).

120 Although s 12A of the Family Courts Act 1980 provides that in Property (Relationship) Act 1976 proceedings, the court may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

121 High Court Rules 2016, r 9.43 and sch 4 (Code of conduct for expert witnesses), cl 1. The Code of conduct is incorporated into the District Court Rules 2014: r 9.34. All expert witnesses in the Family Court are expected to comply with the Code of conduct in preparing any witness statement or in giving any evidence in court: Nichola Peart (ed) *Brookers Family Law — Family Procedure* (online looseleaf ed, Thomson Reuters) at [EF4.1.03].

finder in a court case.[122] In the PRA context, the role of expert valuers is to assist the court in finding the correct value of the property. A court will weigh the opinions presented by the expert. This will normally require a court to scrutinise the qualifications and credibility of the expert, and the reasons for each opinion and the facts and other matters relied on by the expert.[123]

13.19 Second, a court can manage how expert evidence is given. A court can direct a conference of experts in order for them to try to reach agreement on certain matters, and prepare joint statements on the matters on which they agree and do not agree.[124] A court can also direct that experts give evidence at the same time and in each other's presence.[125] This process has become known as "hot tubbing".[126] A judge can ask the same questions to both experts at the same time. A judge effectively facilitates debate between the two experts. This process may be more efficient than if each party called their own expert and the other party cross-examined that expert.

13.20 Third, a court can appoint its own expert. This ability is found in both the court rules[127] and the PRA itself.[128] Under section 38 of the PRA a court may appoint a person to inquire into the matters of fact in issue between the parties. The provision has occasionally been used by a court to determine the value of property.[129] Section 38 inquiries are discussed further in Chapter 25.

122 Evidence Act 2006, s 25; and *A v R* [2010] NZCA 57, (2010) 25 CRNZ 138. The court explained at [19] that the admission of expert evidence of opinion is an exception to the ordinary rules that a witness's task is to speak facts rather than to offer opinions. See generally Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA25.01]; and Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA25.1]–[EVA25.2].

123 *Crichton v Crichton* [1991] NZFLR 529 (HC) at 534-535. See generally Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA25.01]; and Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA25.1]–[EVA25.2].

124 High Court Rules 2016, r 9.44; and District Court Rules 2014, r 9.35. See discussion in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

125 The procedure is available under High Court Rules 2016, r 9.46.

126 See discussion in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

127 High Court Rules 2016, r 9.36; and District Court Rules 2014, r 9.27.

128 Property (Relationships) Act 1976, s 38.

129 See for example *J v J* [2005] NZFLR 301 (HC); and *Cleland v Dixon* HC Hamilton CIV-2006-419-571, 21 July 2006 cited in Nichola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR38.02(1)].

Issues and options for reform

Valuation disputes contribute costs and delay to the resolution of property matters

13.21 When all relationship property is to be sold and the proceeds shared, valuation disputes rarely arise. But sometimes one partner may want to retain a particular item of relationship property, such as the family home or company shares. In other cases the property cannot actually be sold, such as a partnership interest in a professional firm or company shares that are subject to sale restrictions. Partners will often disagree on the value of these items of property. That is because the value ascribed to these items will determine how much property the other partner should receive, either from the remaining pool of relationship property or by way of a monetary payment from the partner who keeps the property.

13.22 We have no way of determining what proportion of property disputes involve issues over the valuation of property because many disputes are resolved out of court. From our research and our preliminary consultation with lawyers we have heard that disputes over the value of property are common, especially when the valuation exercise is complex. The partners may seek extensive expert evidence to support their preferred valuation. This can cause delay to the resolution of disputes and the partners may incur considerable cost. Prolonged disputes may contradict the principle in section 1N(d) that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.

13.23 The complexities and contest over valuation evidence is often seen in the courts' decisions. A recent example is *T v T*, where the Family Court had to ascertain the value of shares in a tourist business negatively affected by the Canterbury earthquakes.[130] The partners presented valuations of the shares which were approximately $680,000 apart. The experts could not agree on the correct valuation methodology, including what underlying

130 *T v T* [2014] NZFC 5335, [2015] NZFLR 185. See also commentary on this case in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

assumptions to make about the future outlook of the business. The hearing took four days and numerous valuation reports and updates to those reports were presented to the Family Court.

13.24 If disputed valuations are adding costs and delay to the resolution of property matters, the question that arises is whether any improvements to the PRA's rules can be made. The PRA does not prescribe the standard and methodologies that should be used when assessing the value of property. Instead, the courts are left to adopt a value that reflects a just division of that property. In our preliminary view, much can be said for providing a court with this flexibility. Some property will be inherently difficult to value. The value will depend on many factors that are specific to the case. In *T v T*, the value of the company in question had been affected by the unprecedented effects of the Canterbury earthquakes on the tourism industry.[131] The present value of the shares was based on the future income streams to the company which depended on the recovery of Christchurch from the earthquakes. The Family Court acknowledged that the valuation of the shares was a "speculative exercise."[132] Valuers can legitimately hold different opinions on these matters.[133] As the Court of Appeal explained in *Holt v Holt*:[134]

> *The valuation of shares in a family company is notoriously difficult. If the valuation of the appellant's shares had been submitted to five valuers, it would not be unlikely that five different answers would have resulted.*

13.25 It is not apparent to us whether any measures could be taken to help partners agree the value of their property out of court. We anticipate that in most cases, the majority of the partners' property will be fairly easy to value, such as vehicles, furniture, savings and residential property. For these types of property, we are unsure whether reform is required to assist the partners and advisers. Rather, disputes over valuation that end up in court tend to arise where the value of the asset in question depends on estimated future income flow, such as shares or partnership interests in professional firms. Such valuations are often difficult and depend on many factors.

131 *T v T* [2014] NZFC 5335, [2015] NZFLR 185.

132 *T v T* [2014] NZFC 5335, [2015] NZFLR 185 at [185].

133 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

134 *Holt v Holt* [1987] 1 NZLR 85 (CA) at 95 per McMullin J.

13.26 The main option for reform we can see is to introduce rules into the PRA that prescribe in greater detail how property should be valued. We are unsure, however, whether this would reduce valuation disputes. The rules must still be applied to the circumstances of each case. There would probably still be scope for argument. In *M v B (Economic Disparity)*, the husband and wife each engaged expert valuers to value the husband's interest in a law firm.[135] Both valuers were given the same set of instructions on how the interest should be valued. The valuer engaged by the wife arrived at a value of $1.341 million whereas for the husband the valuer gave a value of $182,000.[136]

13.27 If the rules were too prescriptive and inflexible, they could jeopardise a court's ability to arrive at a value that is fair in the circumstances of each case.

13.28 Instead of amendments to the PRA, an alternative approach could be to reform the procedure around expert valuation evidence. Jefferson and Moriarty suggest that the courts could make greater use of expert conferences.[137] These conferences could be like mediations between the experts. They could assist a court by assisting the experts to identify on which matters they agree or do not agree. Also, the courts could better use the powers under section 38 of the PRA to appoint a single expert to undertake a valuation.[138]

13.29 Again, we are unsure whether reforms of this nature would be effective at minimising the length and costs of disputes around valuation. Jefferson and Moriarty suggest that if a court appoints a single expert, the partners may well retain their own "shadow experts" to challenge any report from the single expert.[139] Similarly, if each partner's expert must attend a conference of experts, the time and cost to each partner could be significant.

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135 *M v B (Economic Disparity)* [2006] 3 NZLR 660 (CA).

136 *M v B (Economic Disparity)* [2006] 3 NZLR 660 (CA) at [59]–[60].

137 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

138 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

139 Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

13.30 Finally, some people we spoke with in our preliminary consultation suggested there may be greater scope to offer partners tools that calculate an approximate value of their property. For example, online calculators could be developed to provide approximate valuations for things like superannuation scheme entitlements and company share valuations. Such tools would give partners a rough idea of the value of their property without engaging expensive expert assistance. The valuations given would have no binding effect; the calculation tools would be for estimation only.[140] If the partners have available a means of determining the approximate value of their property, they may be better equipped to resolve property matters themselves.

13.31 We have doubts about the efficacy of such tools. As we have noted, disputes over value mostly arise where the asset's value is likely to be high but reasonable experts may differ on applying an appropriate methodology. We are unsure whether measures such as online calculators would assist with complex share valuations, or dissuade the partners from retaining their own experts and contesting the issue.

CONSULTATION QUESTIONS

D11 How often will a dispute between the partners involve a contest over the value of property?

D12 Are there any ways the PRA and/or dispute resolution processes could be improved to avoid disputes regarding valuation?

Is the fair market value standard relied on too often?

13.32 As we have noted, the PRA does not define what value means. There are however many standards against which property can be valued. Usually valuers will be instructed to determine the fair market value of property. As we explained above, this requires an analysis of what price a willing but not anxious buyer would pay for the property and at what price a willing but not anxious seller would sell.

13.33 Through our preliminary consultation we have heard that in the vast majority of cases lawyers will instruct valuers to value

140 The Inland Revenue's online Child Support – Liability/Entitlement Calculator serves a similar function. See Inland Revenue "Child Support Liability/Entitlement Calculator" <www.ird.govt.nz>.

property on a fair market basis without considering whether an alternative standard may be appropriate. Sometimes a fair market value standard may not be the best approach because the fictitious willing buyer and willing seller analysis ignores the reality of the partners' circumstances.[141]

13.34 A good example is the way the courts sometimes value shares in a company. Where a small company is run as a partnership between two shareholders, and the shareholders fall out, one shareholder may buy the other shareholder's shares. In these circumstances a fair value of the shares may not be captured by assuming a hypothetical arm's length transaction. For instance, on a market value approach, there would usually be a discount for the shareholder's minority interest in the company, whereas in reality the remaining shareholder would obtain a majority interest in the company. The outgoing shareholder will also give up a great deal losing his or her interest in the quasi-partnership. Again, this loss may not be accurately reflected in a willing but not anxious seller analogy.

13.35 In these circumstances the courts sometimes adopt a fair value standard rather than a fair market value standard. Under a fair value approach, the value the court endeavours to ascertain is a value that is fair as between the vendor and purchaser.[142] A court does this by recognising what the seller gives up in value and what the buyer acquires through the transaction.[143] The fair value approach realises that the market value of the property is not actually the real or intrinsic value of the property.[144]

13.36 We are interested in responses to whether the courts should be more willing to value property against a different standard than the market value of the property. We can identify several items of property that may have greater intrinsic value to the partners over the property's market value. The partners may have great affection and attachment to a family pet or a work of art. As part of the division of the partners' relationship property, a court could order that the pet or artwork vest in one partner. That partner must

141 Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

142 *Fong v Wong* [2010] NZSC 152 at [7-8]; *Re James Davern Ltd* (1996) 9 PRNZ 456 (CA) at 459; and Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

143 *Re James Davern Ltd* (1996) 9 PRNZ 456 (CA) at 459.

144 Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

then account for half the property's value to the other partner.[145] The price a third party would be likely to pay for the pet or artwork in a hypothetical arm's length transaction may not reflect the sentimental value the partner accords to the property but is forced to give up. Division of the property's fair market value may not be a just division.

13.37 To take another example, the partners may have carried on business together through a company in which both partners hold shares. As part of the division of the partners' relationship property, one partner may allow the other to acquire his or her shares. Based on our discussion above, this may be a case where the remaining shareholder would have to account for the fair value of the outgoing partner's shares rather than the fair market value. The issue was considered by the Family Court in *Foley v Foley*.[146] There the expert valuers had disagreed on whether the shares in the company through which the partners conducted a farming business should be valued at a fair value or fair market value. The Family Court noted that the concepts had never been fully analysed in any prior decision.[147] Ultimately, the Court did not express a preference on the standard of value. The Court did, however, value the shares based on what the husband would obtain by acquiring the wife's shares in the actual circumstances of the case rather than on a hypothetical market price.[148]

13.38 However we also see the advantages of valuing property by fair market value. A fair market value can be determined objectively, and the courts do not have to consider a partner's subjective intentions and sentiments regarding the property. This means that one partner cannot unfairly skew the valuation by what may sometimes be spurious or subjective claims about the property.

CONSULTATION QUESTIONS

D13 Should the courts be more willing to value property against a different standard than the market value of the property?

D14 In what circumstances should property be valued under an alternative standard of value?

145 See discussion on pets below in Chapter 14.

146 *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011.

147 *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011 at [29].

148 *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011 at [44].

Chapter 14 – How a court implements a division of property

14.1 In Chapter 12 we looked at each partner's right to an equal share in relationship property. That does not mean that every asset is literally halved. As explained in Chapter 13, the partners share in the value of the global pool of relationship property, after the value of relationship debts has been deducted. Once the net value of each partner's half share is ascertained, the court will make orders allocating certain items of relationship property (or a portion of their sale proceeds) to each partner.

14.2 In this chapter we focus on this process. We consider the orders a court can make to implement or facilitate the division of relationship property (division orders), and the court's powers to grant interim distributions of property.

14.3 We also look at other orders a court can make that grant a partner certain temporary rights to property, but do not divide that property. We call these orders non-division orders. They include:

(a) occupation orders (section 27);

(b) tenancy orders (section 28); and

(c) orders for furniture required to equip another household (section 28C).

14.4 Finally, we consider the PRA provisions that protect a partner's rights before the relationship property is divided.

Division orders

14.5 Although the PRA has very clear rules about each partner's right to an equal share of relationship property, the PRA is less prescriptive about how a court implements or facilitates a division of the property.

14.6 Section 25 is the key provision that enables a court to make any order it considers just, deciding the respective shares of each partner in the relationship property or dividing relationship property between the partners.

14.7 A court can make a range of orders to implement a decision it makes about property division under section 25. These are "ancillary" orders because they must only give effect to a court's decision under section 25.[149]

14.8 The court's primary source of power to make ancillary orders is set out in section 33. Section 33(1) gives a court a general power to:

> *… make all such orders and give such directions as may be necessary or expedient to give effect, or better effect, to any order made under any of the provisions of sections 25 to 32.*

14.9 The ancillary powers under section 33 can also be exercised in relation to orders under other provisions of the PRA, such as sections 44 and 44C.[150] Section 33(3) sets out a non-exhaustive list of examples of powers a court could employ to carry out this task.

14.10 A court may exercise its powers under section 33 more than once in the same court proceeding. For example, section 33 can be used where there has been or will be an attempt to give effect to the court's substantive order, but that has not or may not achieve the intended result.[151] However a court cannot reopen its substantive findings and decisions on property shares and their division in a later application under section 33.[152] The powers in section 33 can also implement a contracting out agreement and consent orders, but cannot be used to alter their terms.[153]

14.11 The PRA also gives a court specific powers to divide particular types of property:

(a) hire purchase agreements (section 29);

(b) insurance policies (section 30); and

(c) superannuation rights (section 31).

14.12 Finally, a court has powers to make certain orders to provide for children:

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149 *C v C* [1993] 2 NZLR 397 (CA), at 408.

150 Section 44 of the Property (Relationships) Act 1976 (PRA) gives a court the power to set a disposition of property aside in certain circumstances and s 44C provides for compensation where relationship property has been disposed of to a trust. The ancillary powers in s 33 also apply to orders under other provisions of the PRA, such as ss 44 and 44C, by virtue of s 25(1)(b), which empowers a court to "make any other order that it is empowered to make by any provision of this Act."

151 *Lee v Lee* (1987) 3 FRNZ 310 (HC) at 315.

152 *Weir v Weir* (1987) 3 FRNZ 289 (HC) at 293.

153 See for example *Belt v Belt* (1989) 5 FRNZ 258 (FC); and *C v C* FC Waitakere FAM-2006-090-1281, 18 June 2008 at [57].

(a) settling relationship property for the benefit of children (section 26);

(b) postponing vesting any share in relationship property (section 26A); and

(c) making or varying any order regarding maintenance and child support (section 32).

14.13 We discuss orders under sections 26 and 26A in Part I of this Issues Paper.

Can a court make orders about property owned by a third party?

14.14 Section 25(3) provides that a court: "may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just." This suggests that a court can make orders or declarations regarding any property, regardless of ownership. However the courts have said that section 25(3) is supplementary to section 25(1), which limits a court to orders regarding relationship property and other orders it is empowered to make under the PRA.[154] Section 25(3) is simply intended to better empower a court to make appropriate orders within the general scheme and framework of the PRA.[155]

14.15 It is unclear whether, within the general scheme of the PRA, a court has the power to make orders regarding third party property. Sometimes the partners will have an interest in property that appears to be owned by a third party. A common example is a trust.[156] In *Yeoman v Public Trust* the High Court explained that if a third party disputes a partner's property interest claim, a court has no jurisdiction under the PRA to determine the issue.[157] Instead, the claim would need to be determined in separate proceedings. As we explain in Part H, this issue often comes up when a partner claims that a trust connected with the relationship is invalid.[158]

154 *ANZ Banking Group (NZ) Ltd v Wrightson* (1992) 9 FRNZ 1 (HC) at 8, referring to *Hall v Hall* (1989) 5 FRNZ 309 (FC) at 313.

155 *ANZ Banking Group (NZ) Ltd v Wrightson* (1992) 9 FRNZ 1 (HC) at 8, referring to *Hall v Hall* (1989) 5 FRNZ 309 (FC) at 313.

156 Another example is family homes built on Māori land. Māori land typically has multiple owners or is held on trust for the descendants of a common tipuna. Māori land is excluded from the Property (Relationships) Act 1976, but the position in respect of family homes that sit on the land is unclear. See the discussion in Chapter 8.

157 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39]. In *Jew v Jew* [2003] 1 NZLR 708 (HC), the High Court went further. It held that it was inconceivable that the Family Court had jurisdiction under s 25(3) of the Property (Relationships) Act 1976 to make declarations as to ownership in respect of property owned by third parties.

158 See Part H.

14.16 It is also unclear whether any decision under the PRA about a partner's interest in property which appears to be owned by a third party binds that third party. Again, in *Yeoman v Public Trust* the High Court explained that a decision under the PRA cannot bind third parties.[159]

14.17 These issues tie into the overall jurisdiction of the Family Court to consider claims that determine the rights of third parties. There is no settled view among the cases.[160] We discuss these problems in relation to trusts in Part G and in relation to the jurisdiction of the Family Court in Part H.

Can the court vary trusts?

14.18 There is also uncertainty about a court's ancillary powers regarding trusts. Section 33(3)(m) provides that a court can make "an order varying the terms of any trust or settlement, other than a trust under a will or other testamentary disposition." This appears to give a court broad powers to vary a trust deed, including to add or remove trustees or beneficiaries, vary the final distribution date or give one partner an interest in income of the trust.

14.19 However, there are several limitations on a court's use of section 33(3)(m):

(a) First, as discussed at paragraphs 14.7–14.9 above, section 33 does not provide originating jurisdiction regarding trusts. The power to vary a trust can only be exercised if it is necessary or expedient to give effect or better effect to orders made under another provision of the PRA.[161]

(b) Second, if trust property is not beneficially owned by one or both of the partners, it will be outside the jurisdiction of the PRA unless the PRA provides the court with specific powers to make orders in respect

159 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39] and [44]. In some instances however the Property (Relationships) Act 1976 gives the Family Court specific powers over property held by third parties (see s 31 in relation to superannuation scheme entitlements; and ss 44–44C in respect of trusts).

160 See for example *F v W* (2009) 2 NZTR 19-024 (HC) where the High Court held the Family Court did not have jurisdiction to declare that a trust was a sham in proceedings under the Property (Relationships) Act 1976. In contrast, in *B v X* [2011] 2 NZLR 405 (HC) the High Court held that the Family Court did have jurisdiction to declare that a trust was a sham, as did the High Court in *F v F* [2015] NZHC 2693.

161 *G v R* FC Porirua FAM-2007-091-892, 4 September 2008; *B v M* [2005] NZFLR 730 (HC) at [223]; *P v P (No 4)* (2005) 25 FRNZ 320 (FC); and *C v C* HC Auckland CIV-2005-404-7124, 27 November 2006.

of the trust property.[162] This appears to limit section 33(3)(m) to cases where sections 44 and 44C apply.[163] However section 33(3)(m) does not expressly refer to those provisions. Section 33(3)(m) might also be used where the purported transfer of property to a trust is invalid or ineffective, but this is unclear given the uncertainty around the extent of a court's jurisdiction under the PRA, discussed above.[164]

(c) Third, as we discussed above it does not appear that a court can make orders under the PRA binding on third parties, including trustees.[165] While trustees may be joined as third parties in PRA proceedings under section 37,[166] the courts have observed this does not entitle a court to make an order affecting that party's property entitlements.[167]

14.20 For these reasons we think that the application of section 33(3)(m) would benefit from clarification.

14.21 A further issue with section 33(3)(m) is that there is no requirement to consider the interests of the other beneficiaries. While a court would likely do so, it is desirable that this be clarified in the PRA.

CONSULTATION QUESTION

D15 Have we identified all of the issues with the operation of section 33(3)(m) to vary trusts?

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162 See discussion in Part G. However it seems that section 33(3)(m) would be able to be used to vary trusts where one party has a vested or contingent interest in trust property, on the basis that such an interest is considered "property" for the purposes of the Property (Relationships) Act 1976, and can therefore be classified as relationship property. However note the problems identified at [14.15]–[14.16] above. See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR33.13]; and *C v C (No 2)* [2006] NZFLR 908 (FC).

163 As discussed at [14.9], s 33 of the Property (Relationships) Act 1976 applies to ss 44 and 44C by virtue of s 25(1)(b). See *S v M* FC Tauranga FAM-2004-070-823, 16 November 2006 at [54]. The Family Court relied on the High Court's decision in *McGill v Crozier* (2001) 21 FRNZ 157 (HC) whereby section 33(3)(m) was used to vary the terms of the trust in relation to a yacht. However, the High Court in *McGill v Crozier* determined at [41] that the powers given by s 33(3)(m) had been invoked by the Family Court after it had acted under s 25 to determine that the wife's half share remained relationship property. The Family Court in *S v M* instead used the s 33(3)(m) powers, via s 25(1)(b), to directly order the trustees to sell a home if the husband was unable to otherwise pay compensation due under s 44C.

164 See *McGill v Crozier* (2001) 21 FRNZ 157 (HC). In that case there were no third party trustees so the purported transfer "must have been ineffective to convey title in those circumstances": at [41].

165 See discussion in Part H; *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39] to [45]; and *F v F* [2015] NZHC 2693 at [102]-[103].

166 Section 37 of the Property (Relationships) Act 1976 requires the court to notify any third party who has an interest in property that is affected by an order and to give the third party an opportunity to be heard as a party to the proceedings.

167 *Chesham v Chesham* [1991] NZFLR (HC) 546 at 554. See also *Johanson v Johanson* (1993) 10 FRNZ 578 (CA) at 581. The Family Court in *Naidu v Naidu* FC Auckland FAM-2005-004-2700, 10 September 2009, at [55]-[58] invited the wife to join the family trust as a party if she intended to pursue an order requiring the trustees to vary the trust to transfer the former family home into her name. The wife was relying on the court's decision in *S v M* FC Tauranga FAM-2004-070-823, 16 November 2006, discussed above, to make the order.

Is there a need for clear guidance on when a court can vary trusts under that provision?

D16 Are there any other issues with the operation of section 25 or section 33 we have not identified?

Problems dividing particular types of property

Superannuation scheme entitlements

14.22 Under section 8(1)(i) of the PRA "the proportion of the value of any superannuation scheme entitlements … that is attributable to the relationship" is relationship property. A "superannuation scheme entitlement" is defined in section 2 and only includes superannuation schemes where the benefit derives from contributions made by the person or an employer. It does not apply to State pension benefits.[168]

14.23 Applying the PRA to superannuation is complex when it comes to valuing and dividing the benefits from a scheme. Usually the benefit will not accrue until some point in the future. The Court of Appeal has suggested that to achieve a clean break, the best option may be for one partner to pay a lump sum to the other from other property to account for the value of the superannuation scheme entitlement.[169] The courts have, however, acknowledged that there will be cases where a lump sum payment is not suitable, particularly when the contributing partner does not have enough assets available to make the payment.[170] In this situation there are two options under the PRA. One is to provide for a deferred payment. The other option is to make an order under section 31.

14.24 Section 31 enables a court to make an order requiring the superannuation scheme manager to pay the non-contributing partner out of that scheme. The court's order is conditional on the partners entering a deed or arrangement which binds the manager of the scheme.

168 GJ van Bohemen "Superannuation schemes and the Matrimonial Property Act 1976" (1979) 10 VUWLR 63 at 65. This is unlikely to be an issue in many cases; State pension benefits are universal so both partners will be equally eligible for benefits.

169 *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 557.

170 *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 556.

14.25 Atkin says that section 31 does not seem necessary.[171] This is because section 33(3)(l) and section 33(6) provide a court with the required powers to make orders to distribute payments from superannuation schemes.[172] It is difficult to reconcile the broader, general powers in these sections with the more limited, specific power in section 31. We think this should be clarified.

14.26 Problems also arise under section 31 where there are other possible beneficiaries of the partner's superannuation scheme entitlement. For example, when the contributing partner enters a new relationship the new partner may have rights to the fund on the death of the contributing partner. This scenario arose in *Sidon v Sidon*.[173] There the High Court made no section 31 order because it considered it would be inappropriate to alter the rights that the former partner and the new partner had under the scheme. Instead, the Court ordered that the value of the contributing partner's future scheme entitlements should be quantified as at the date of separation, but payment of half that value to the former partner could be deferred. The rights the new partner had on the death of the contributing partner were left unaffected.

14.27 It is not clear whether a section 31 order impacts on the way a superannuation entitlement is valued. In theory, when a section 31 order is made there should be no deduction for contingencies or the present value of money. That is because the non-contributing partner will only receive the money from the scheme at the later date and will take on the risk of the contingencies and the cost of not having the money until retirement. Cases in which a section 31 order is made have not included reductions for contingencies in valuing the superannuation scheme.[174] Sometimes an award has been made to the value of the scheme at separation date (including contingencies) plus interest.[175]

14.28 There are also issues with the process contemplated under section 31. The benefit in requiring the parties to enter an arrangement or deed is unclear. Evidence about the superannuation scheme and contributions to the scheme would need to be provided to

171 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

172 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

173 *Sidon v Sidon* (1991) 7 FRNZ 351 (HC).

174 In *Turner v Turner* (1987) 3 FRNZ 419 (HC) the High Court saw avoiding having to consider contingencies as a factor in favour of making a s 31 order under the Property (Relationships) Act 1976. Contingencies were not applied in *Callaghan v Callaghan* [1987] 2 NZLR 374 (CA). However, very few cases have addressed valuation in the context of s 31 orders.

175 *Brown v Brown* (1994) 12 FRNZ 633 (DC).

a court to identify the proportion of superannuation funds that constitute relationship property under section 2 and section 8(1)(i), and their value. In addition, evidence may need to be provided to the court to ensure consistency between the terms of a superannuation scheme and any agreement regarding contributions, including where there are other beneficiaries to the scheme.[176] It would therefore seem more efficient to include the terms of the agreement about superannuation rights within the order itself and not require parties to enter any subsequent arrangement or deed.

14.29 The chief significance of a deed as contemplated by section 31 is that it appears to provide an additional mechanism for the partner concerned to enforce their rights against the superannuation fund manager.[177] However, it is not clear if the extra protection a deed would provide, over a court order containing the terms of the arrangement, warrants the extra resource required.

14.30 A court order detailing the agreement would also minimise any risk that a later arrangement or deed made under section 31(1) contradicts directions in the order. There is a requirement to serve the arrangement or deed on the superannuation scheme provider under section 31(2) but not the order made under section 31(1). This should also be addressed.

CONSULTATION QUESTIONS

D17 Is it preferable for a court to have a specific power to deal with superannuation scheme entitlements rather than use its generic powers under section 33?

D18 Is the requirement under section 31 for a deed or arrangement useful or would a court order on its own be enough for the division of superannuation rights under the PRA?

KiwiSaver

14.31 KiwiSaver is similar to private superannuation schemes because both comprise a combination of employer and employee contributions and are often only accessible on turning the age of 65. However in some cases it may be incorrect to describe a KiwiSaver account as a superannuation scheme. This is because people can withdraw money from their KiwiSaver scheme before

176 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR31.03] recommends that counsel should make submissions as to the necessary paragraphs in any order and that trustees of the fund be called to confirm that the proposed terms come within the terms of the superannuation deed.

177 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

the age of 65 in certain circumstances, for example, to fund the purchase of their first home or when they are experiencing significant financial hardship.

14.32 The Court of Appeal has said that the definition of a superannuation scheme entitlement in section 2 is wide enough to include an interest in a KiwiSaver scheme, although that case was not about dividing a KiwiSaver account under the PRA.[178] Section 127 of the KiwiSaver Act 2006 recognises that a court can make orders under section 31 of the PRA in relation to KiwiSaver schemes, which indicates an intention that KiwiSaver schemes would fall under the superannuation provisions of the PRA.

14.33 In other cases under the PRA the courts have treated KiwiSaver entitlements as the equivalent of money in a bank account which can be split evenly.[179] This approach ignores the contingent nature of KiwiSaver entitlements. It may be unfair on the contributing partner as he or she must account for half the value of the KiwiSaver scheme when the actual funds cannot usually be accessed for many years. The time value of money is not considered in making half of the account payable on separation. These issues have not yet been raised in any cases. This might be because KiwiSaver is a relatively new scheme and as a result the sums of money in KiwiSaver accounts are usually small when compared to the size of the overall relationship property pool. However as KiwiSaver accounts become larger over time, the fact that the funds cannot be accessed immediately may see the courts move to treating KiwiSaver accounts as if they are superannuation schemes. This might also create issues, due to the unique aspects of the KiwiSaver scheme described at paragraph 14.31 above.

CONSULTATION QUESTION

D19 Should KiwiSaver schemes be treated in the same way as superannuation schemes on the division of relationship property? Or should there be a different approach? What would that approach look like?

ACC payments

14.34 In Chapter 11 we explained how an entitlement to payments under the Accident Compensation Act 2001 and its predecessors

178 *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 at [53].

179 Examples of this include *S v S* [2012] NZFC 2685; *B v C* [2015] NZFC 8940; and *R v L* FC Gisborne FAM-2011-016-147, 6 October 2011.

(ACC payments) will be classified as relationship property if the entitlement arose during the relationship. It is not clear how ACC payments should be divided.

14.35 Section 123 of the Accident Compensation Act provides that all entitlements under the legislation are "absolutely inalienable." Section 124 provides that the Accident Compensation Corporation must provide the entitlements only to the claimant. There are limited exceptions to these rules, such as deductions for child support, but division of relationship property under the PRA is not included.

14.36 The KiwiSaver Act 2006 has similar restrictions. Section 127(1) provides that a member's interest or any future benefits in a KiwiSaver scheme cannot be assigned or passed to another person. Section 127(2), however, provides that interests can be passed to another person if required by any enactment, or by court order, "including an order made under section 31 of the [PRA]." The Court of Appeal has said that this express reference to section 31 indicates that any derogation from the clear language of section 127(1) of the KiwiSaver Act should be clearly and expressly provided for in some other enactment.[180]

14.37 There is no equivalent of section 31 to enable a court to make orders regarding a person's ACC entitlements under the PRA. Nor does section 123 of the Accident Compensation Act refer to the PRA. It is therefore unclear whether the PRA gives a court power to make orders dividing a partner's ACC entitlements. The contrary view, however, is that notwithstanding the prohibition on alienation under sections 123 and 124 of the Accident Compensation Act, the PRA will prevail. That is because section 4A of the PRA provides that every other enactment must be read subject to the PRA. Regardless, we think it is desirable that this be clarified in the PRA.

CONSULTATION QUESTION

D20 If ACC entitlements can be classified as relationship property, should section 123 of the Accident Compensation Act 2001 be amended to expressly allow division under the PRA?

180 *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 at [53].

Pets

14.38 The PRA's definition of "family chattels" under section 2 includes "household pets". Pets are therefore theoretically treated like any other item of property when partners' property is classified and divided. Pets are, however, different from other types of family chattels. They are living creatures, and their ongoing care must be factored into the division of relationship property. A partner's attachment to and affection for a pet is also likely to be of a different quality than their attitude to other types of property.

14.39 The PRA gives little direction on how these special considerations are to be taken into account when dealing with pets. The courts have, however, established some fairly clear principles:

(a) First, the courts have followed the PRA's provisions and included pets when dividing the partners' relationship property equally. In the case *S v S* for example, the Family Court ordered that the partners' dog Milo was to stay with Mr S at Mr S's rural property.[181] The Court accepted however that Milo was relationship property and that Milo's value had to be shared equally. The Court ordered that Mr S pay Mrs S half Milo's value, which was assessed at half the price Milo had been bought for.[182]

(b) Second, even though the value of the pets will be shared, the courts will determine which partner the pet should live with based on the best interests of the pet. For example, in the case *Pence v Pence*, the Court had to decide which partner the couple's two chihuahuas should live with.[183] One partner argued that each partner should be awarded one dog. The Court did not agree. The Court said that it was in the best interests of the chihuahuas that they live together. The Court noted that four reasonably large dogs frequently visited one of the partner's homes, and considered that the larger dogs would not be appropriate company for the smaller chihuahuas. The Court therefore awarded ownership of the chihuahuas to the other partner.[184]

181 *S v S* [2012] NZFC 2685.

182 *S v S* [2012] NZFC 2685 at [30].

183 *Pence v Pence* (1978) 2 MPC 146 (SC).

184 See also *O'Brien v Tuer* DC Waitakere FP090/327/03, 9 September 2003; *S v S* [2012] NZFC 2685; and *Casey v Lyttle* [2013] NZFC 9109.

14.40 Although these principles appear fairly well settled, there are potential issues. The main concern is whether the PRA should contain more direction to the courts on how it should make orders regarding pets. Some overseas commentators suggest that the principles governing the post-separation placement of family pets should be dealt with expressly through legislation.[185] The Swiss Civil Code, for example, provides that ownership of a pet may only be awarded to the partner who offers the better conditions of animal welfare in which to keep the animal.[186]

14.41 There is also uncertainty regarding pets that cannot be properly described by the term "household pets" used in section 2. A family may have an equally strong attachment to a pet horse or sheep, even though these animals are not technically "household pets". There is also some uncertainty regarding the classification and valuation of pets used partly for business, like showing or breeding.[187]

14.42 Although these concerns are legitimate issues, we are unsure whether in practice they are creating problems to an extent that requires reform of the PRA.

CONSULTATION QUESTION

D21 Do the PRA's provisions regarding pets give sufficient direction to a court? Are the provisions inadequate in relation to non-household pets?

Interim property orders

14.43 Separation or the death of one partner can have immediate financial consequences for the partners involved.[188] When property matters under the PRA are disputed this can tie up a

185 See Tony Bogdanoski "Towards an Animal-Friendly Family Law – Recognising the Welfare of Family Law's Forgotten Family Member" (2010) 19 Griffith L. Rev. 197; and Paula Hallam "Dogs and Divorce: Chattels or Children? – Or Somewhere In-between?" (2015) 17 S. Cross U. L. Rev. 97.

186 Discussed in Paula Hallam "Dogs and Divorce: Chattels or Children? – Or Somewhere In-between?" (2015) 17 S Cross L Rev. 97; and Swiss Civil Code 1907, art 651a. In contrast, some Canadian courts have resisted calls to determine the living arrangements for pets in a similar way to the guardianship of children. See *Ireland v Ireland* 2010 SKQB 454, 367 Sask R 130 at [12] "[A] dog is a dog. Any application of principles that the court might normally apply to the determination of custody of children are completely inapplicable to the disposition of a pet as family property" cited with approval in *Henderson v Henderson* 2016 SKQB 282.

187 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PRA 2.12.02].

188 See Law *Commission Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 referring to the findings of the Auckland University of Technology study regarding the economic cost of separation in Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017).

large proportion of a partner's wealth until those matters are resolved. This can take a long time, often years, especially if the partners go to court.[189]

14.44 Sometimes a partner will need interim access to relationship property in order to pay for day-to-day living expenses or cover the additional costs of moving out of the family home, setting up a new home and/or getting legal advice. When relationship property is in the other partner's name, and the partners cannot agree on how interim costs are to be met, an application for an interim property distribution may be necessary.

Interim distributions under section 25(3)

14.45 Section 25(3) provides that "the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property it considers just." Section 25(4) then states that:

> *To avoid any doubt, but without limiting subsection (3), if proceedings under this Act are pending, the court, if it considers it appropriate in the circumstances, may make an interim order under that subsection for the sale of any relationship property, and may give any directions it thinks fit with respect to the proceeds.*

14.46 A court can therefore order an interim distribution of property under section 25(3), and it can give effect to that order by making ancillary orders under section 33.[190]

14.47 The PRA does not provide any guidance on when an interim distribution should be made. However the courts have recognised a range of relevant factors, including:[191]

(a) the purpose and principles of the PRA;

(b) the needs and circumstances of the applicant;

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189 Of the PRA cases that proceeded to a hearing and were disposed in 2015, 93 per cent had taken more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016). In 2016, the average time the Family Court took to resolve an application (either through the Court granting or dismissing an application, or through the application being discontinued, withdrawn or struck-out) from the time it was filed was approximately 74 weeks: this figure is from provisional analysis made by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution, having analysed data from the Ministry of Justice's Case Management System and provided by email to the Law Commission (26 September 2017). See Chapter 25 for further discussion on court processes.

190 *Murray v Murray* (1989) 5 FRNZ 177 (CA); and *Harrison v Harrison* [2009] NZCA 68, [2009] NZFLR 687. We discuss child support in Part I.

191 *H v P* FC Tauranga FAM-2009-070-817, 11 January 2011 at [26]; and *M v B* [2013] NZHC 1056 at [30].

(c) the purpose for which interim distribution is sought;

(d) the applicant's likely share of relationship property;

(e) the respondent's ability to give effect to an order;

(f) the length of time until the hearing of the substantive issues;

(g) delays to date, and who had caused them;

(h) any uncertainty as to the applicant's entitlements under the PRA;

(i) the effect of an order on the parties' willingness and determination to finalise their claims;

(j) whether or not the respondent has dissipated relationship property;

(k) any possible prejudice that might arise from making a proposed order; and

(l) whether an interim distribution will cause further delays in finally determining the relationship property claim.

Limitations of section 25(3)

14.48 Because section 25(3) has not been designed solely for interim distributions,[192] there are a number of limitations that undermine its effectiveness.

14.49 First, orders can only be made in relation to specific items of property. Section 25(3) cannot be used to make an interim distribution of a sum of money that represents part of the value of the global pool of relationship property.[193] A court would instead need to order specific property to be vested in one partner or to be sold, with orders as to how the proceeds should be distributed between the partners.[194]

192 Section 25(3) of the Property (Relationships) Act 1976 is also useful, for example, where partners are seeking a declaration on the status of a single item of property to assist the parties to resolve their property matters out of court, or where proceedings have been filed and the parties seek an order for sale so that they can take advantage of a favourable market.

193 *Munro v Munro* [1997] NZFLR 620 (FC); and *Burton v Burton* [2002] NZFLR 172 (HC). Although the Court of Appeal has observed that there is nothing to prevent the court from achieving a general division of relationship property by making a series of orders in relation to each specific asset owned by each of the parties: *Public Trust v W* [2005] 2 NZLR 696 (CA) at [21].

194 Property (Relationships) Act 1976, subs 25(3) and (4). In *K v B* FC Waitakere FAM-2001-090-1013, 5 March 2009, the Family Court ordered chattels to vest in the applicant, which could then be sold, unless the respondent paid a specified

14.50 Second, it is unclear whether a court can make an order under section 25(3) in respect of general funds. While orders have been made in relation to funds held in lawyers' trust accounts,[195] the High Court in *Owen v Thomas* noted there were "serious difficulties" in obtaining an order under section 25(3) for the payment of a sum of money, because it does not readily fit within the description of "specific property."[196] The Court distinguished money frozen in an account by agreement or court order, from funds that can move in and out of a bank account and which can be replaced by funds of a different or mixed character in terms of being either relationship or separate property.[197]

14.51 Third, there is uncertainty as to whether section 25(3) can be used to make orders in relation to separate property. The High Court has observed on several occasions that section 25(3) appears to extend to separate property,[198] and in *R v G* the Family Court made orders under section 25(3) vesting in the respondent certain property which the partners had agreed was the applicant's separate property.[199] However in the more recent case of *Owen v Thomas* the High Court, while not deciding on the matter, observed that it would need to be satisfied that the circumstances of the parties justified the separate property of one party being drawn into the pool of relationship property.[200] Otherwise, the Court said, section 25(3) would enable a court to order an interim distribution of property that could not be distributed by way of a final order.[201]

14.52 Finally, an interim distribution converts the property into one partner's separate property, so the effect of the order is final and cannot be revisited or recalled.[202] A court must therefore be

sum on a specified date.

195 *Murray v Murray* (1989) 5 FRNZ 177 (CA); and *M v M* [2007] NZFLR 933 (FC). In *Burton v Burton* [2002] NZFLR 172 (HC) the High Court held at [21] that it is not possible at law to take possession of money without vesting the ownership of it.

196 *Owen v Thomas* [2014] NZHC 2200 at [28].

197 *Owen v Thomas* [2014] NZHC 2200 at [29].

198 *Cossey v Bach* [1992] 3 NZLR 612 (HC) at 639; and *M v B* [2013] NZHC 1056 at [31]. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.59].

199 *R v G* FC North Shore FAM-2009-044-920, 31 March 2010.

200 *Owen v Thomas* [2014] NZHC 2200 at [25].

201 See *Burton v Burton* [2002] NZFLR 172 (HC).

202 *B v B* [2012] NZHC 1951 at [12]; and *Burton v Burton* [2002] NZFLR 172 (HC). Note that orders for possession under s 25(3) of the Property (Relationships) Act 1976 are not final in effect: *Brown v Cheung* [2016] NZHC 2408, [2016] NZFLR 860.

certain that an interim distribution will not exceed the applicant's entitlement. As the Family Court observed in *A v R (No 2)*:[203]

> *The challenge, therefore is to determine the amount which can be safely released to the applicant at this stage without putting the Family Court in any difficulty when it comes to make [its] final determination under the Act.*

14.53 This requires a court to have sufficient information regarding the value of both the specific item of property that is the focus of the section 25(3) application and the global pool of relationship property. This can be challenging when there are unresolved disputes about the relationship property.[204] In Chapter 13 we discussed how disputes over the value contribute to costs and delay to the resolution of property matters. This is also an issue for interim distributions.

Relationship between section 25(3) and the other pillars of financial support

14.54 In Chapter 2 we identified the different pillars of financial support available to families when relationships end. These are maintenance (including interim maintenance), child support and State benefits.[205] Each addresses a different issue and together with the PRA they establish a framework of financial support.

14.55 Often these pillars of financial support will be better at meeting one partner's interim living costs than an interim distribution of property under the PRA. While our review does not extend to these other pillars of financial support, it is important to understand how they operate to ensure there are no gaps or overlaps in terms of what each pillar is designed to achieve. We discuss interim maintenance below, as this is directly relevant to the role of interim distributions under the PRA. Maintenance is discussed further in Part F and child support is discussed in Part I.

Interim maintenance under the Family Proceedings Act 1980

14.56 One partner may be entitled to maintenance from the other partner to the extent that it is necessary to meet their

203 *A v R (No 2)* FC Christchurch FP/009/1430/99, 18 August 2004.

204 See for example *B v B* [2012] NZHC 1951 at [13].

205 Other pillars of financial support may be available when a relationship ends on death, as discussed in Chapter 2.

reasonable needs if they cannot meet those needs themselves.[206] Maintenance may be available for married and civil union partners both during the relationship and after the relationship has been dissolved, and for de facto partners after the parties cease to live together.[207] A partner seeking maintenance must apply to the Family Court or District Court under the Family Proceedings Act 1980.

14.57 Interim maintenance can be ordered when an application for maintenance has been filed but not yet finally determined.[208] A court can make an interim maintenance order for the payment of "such periodical sum as the [court] thinks reasonable."[209] A court will consider the reasonable needs of the applicant, with reference to the partners' previous standard of living, the applicant's ability to meet those needs and the other partner's ability to pay.[210] Interim maintenance orders can only be made for a six month period,[211] and are a stop-gap measure designed for quick and easy access to the courts.[212] Interim maintenance is often sought immediately following separation when the final outcome of the partners' relationship, parenting and property matters is unknown.[213]

14.58 During preliminary consultation we heard from lawyers that applications for interim maintenance are relatively common and often a vital source of aid for many applicants. However, there can be delays in applications being heard and subsequent applications are often required once the six month time limit expires because the parties are still sorting out their affairs. We also heard that partners will often make private arrangements for the payment of

206 Family Proceedings Act 1980, s 64. Section 2 defines maintenance as the provision of money, property and services and includes, in respect of a child, provision for the child's education and training to the extent of the child's ability and talents, and in respect of a deceased person, the cost of the deceased person's funeral.

207 Family Proceedings Act 1980, ss 63 and 64. Under s 70A maintenance cannot be ordered if a partner has entered into another marriage, civil union or de facto relationship. Note that costs for children cannot be included in adult maintenance claims: child support may be claimed for children under the Child Support Act 1991 and maintenance orders under s 79 of the Family Proceedings Act 1980 may be ordered against a natural parent.

208 Family Proceedings Act 1980, s 82.

209 Family Proceedings Act 1980, s 82(1). The court is not bound by the factors relevant to determining substantive applications, but is not prevented from considering those factors: Family Proceedings Act, s 61; *Ropiha v Rohipa* [1979] 2 NZLR 245 (CA); and *Langridge v Langridge* [1987] 2 NZLR 554 (HC).

210 *Ropiha v Rohipa* [1979] 2 NZLR 245 (CA).

211 Family Proceedings Act 1980, s 82(4). New applications can be made if Property (Relationships) Act 1976 proceedings have not been resolved or the substantive maintenance proceedings have not been heard: *Zola v Abel* [2015] NZFC 9058, [2016] NZFLR 81; and *Cooper v Pinney* [2016] NZHC 1633.

212 *Beck v Beck* [1975] 2 NZLR 123 (SC) at 125; and *G v [LC]* FC Auckland FAM-2011-004-2021, 16 December 2011 at [9].

213 *H v H* [2014] NZHC 211, (2014) 29 FRNZ 727 at [36].

maintenance in the short-term following separation, often for six months, reflecting the time limit in the Family Proceedings Act.

14.59 A court can make a final order for maintenance where a partner cannot meet their reasonable needs due to specified circumstances, such as the partner's ability to become self-supporting due to the effects of the division of functions in the relationship, or ongoing childcare responsibilities.[214] A court must take into account a number of factors in assessing quantum, including the reasonable needs, means, and responsibilities of each partner.[215] There is no time limit for final maintenance orders but partners must assume responsibility for their own needs within a reasonable time after the relationship ends.[216]

When should maintenance be ordered pending the determination of property matters?

14.60 Maintenance clearly has a role to play following a relationship breakdown. This is recognised in the PRA. Section 32 requires a court to have regard to any prior maintenance orders, and permits a court to make, vary or discharge an order for maintenance when dealing with property matters under the PRA.[217]

14.61 Maintenance will not, however, always be sufficient in meeting the needs of one partner pending the determination of property matters under the PRA. For example, when the partners only possess capital assets and have limited income streams there may be an inability to pay a reasonable amount of maintenance. There are also restrictions within the maintenance regime. For example, lump sum payments cannot be awarded for interim maintenance,[218] and legal and accounting costs cannot be claimed in applications for final maintenance.[219]

14.62 For these reasons we think there remains a need to provide for interim property distributions under the PRA. We discuss below

214 Family Proceedings Act 1980, s 64.

215 Family Proceedings Act 1980, s 65.

216 Family Proceedings Act 1980, s 64A. Liability for maintenance may continue if the conditions in ss 64A(2) and 64A(3) are satisfied. This will ultimately depend on the circumstances of each case.

217 Similar provisions also exist in s 65(2)(a)(i) of the Family Proceedings Act 1980.

218 Family Proceedings Act 1980, s 82.

219 *C v G* [2010] NZCA 128, [2010] NZFLR 497: such costs are not likely to be an ongoing expense. We discuss further issues with maintenance in Part F.

some options for reform that are designed to address the current limitations of section 25(3).

Options for reform

Option 1: Provide for interim lump sum distributions

14.63 One option is to retain section 25(3) but give the court a new power to order an interim distribution in the form of a lump sum payment. This would provide an alternative to seeking an interim distribution in relation to a specific item of property. A lump sum distribution could be made where a court was satisfied that funds were available to meet the order. Those funds might not need to be classified as relationship property, but a court would still need to be satisfied that the interim payment will not exceed the value of the recipient partner's share in the global relationship property pool.

14.64 We think that an initial lump sum payment order could address a number of the issues we have outlined. It could also improve accessibility to the law and provide a visible framework to incentivise partners to negotiate their own agreements for interim payments out of court.

14.65 The option of an interim lump sum payment in lieu of maintenance is discussed further in Part F.

Option 2: Provide specific valuation guidance for interim distributions

14.66 In Chapter 13 we discussed some options to address valuation issues, although we are unsure if these reforms would be effective in reducing the prevalence of valuation disputes. One option to address valuation disputes that arise in the context of interim distributions might be to provide guidance on how a court should assign values to property for the purposes of interim distributions. For example, the PRA could provide that, when two different valuations are submitted, a court can accept the lowest reasonable valuation for the sole purpose of making an interim distribution order. The court's decision would be a pragmatic one and would have no bearing on the value to be assigned to the property at the final hearing.

CONSULTATION QUESTIONS

D22 Should a court have the power to order an initial payment not associated with specific items of property? If so on what basis?

D23 Are there any other options to improve the PRA's provisions for interim distributions?

Non-division orders

Occupation and tenancy orders

14.67 Section 27 provides that a court may grant one partner the right to occupy the family home or any other premises forming part of the relationship property, to the exclusion of the other partner.[220] In the PRA the "family home" is not defined by ownership; it simply means the home that is used as the principal family residence.[221] Section 28 provides that a court may make an order vesting the tenancy of any dwellinghouse in either partner.[222]

14.68 Occupation orders can also be obtained under the Domestic Violence Act 1995 when there is an urgent need to respond to family violence.[223] While there is overlap between the PRA and the Domestic Violence Act, we think it is coherent and does not create confusion or gaps in provision.[224]

14.69 In Part I we discuss whether the occupation and tenancy order provisions in the PRA are effective in addressing the interests of children. Another issue is whether an occupation order is available for the family home when it is held on trust or in a company, either on separation or when the partner who was the trust beneficiary dies. We discuss this issue below.

220 Despite some ambiguity in the drafting of s 27(1) of the Property (Relationships) Act 1976, it is accepted that s 27 applies only to relationship property including but not limited to the family home. The Family Court in *R v R* [2010] NZFLR 555 (FC) said that one or both of the partners had to be the beneficial owner of the property and the property interest in question had to be relationship property.

221 Property (Relationships) Act 1976, s 2 definition of "family home".

222 Property (Relationships) Act 1976, s 2 definition of "dwellinghouse".

223 Domestic Violence Act 1995, ss 52–61.

224 See also the Family and Whānau Violence Legislation Bill 2017 (247-2) which is currently before Parliament and proposes to amend the provisions of the Domestic Violence Act 1995 in relation to occupation orders.

Are occupation orders available for trust and company property?

14.70 Property held on trust cannot normally be divided under the PRA if one or both of the partners has only a discretionary interest in the trust. That is because a discretionary interest in trust property is not considered "property" for the purposes of the PRA. Sometimes, the courts have also said there is no jurisdiction to make an occupation order where the family home is held on trust, unless one or both of the partners has a vested or contingent interest in the trust assets and that interest is relationship property.[225] In *R v R*, however, the Family Court held that while one or both partners must have an "interest" in the family home, it was not possible to generalise what constitutes a property interest in a trust.[226] There is, the Court said, a continuum of interests in different trusts and each case must be considered to see where it falls on this continuum.[227]

14.71 The Family Court also has held that it has no jurisdiction to make an occupation order if a company holds the home, unless the company is a sham.[228]

14.72 Peart argues that precluding jurisdiction under section 27 because the family home is held on trust or owned by a company misunderstands the requirements of section 27.[229] Rather than focusing on whether there is a property interest sufficient to give ownership of the home, the proper question for section 27, Peart argues, is whether there is a "use and occupation" interest sufficient to give a right to possess the home.[230] Close scrutiny is required of the terms of the trust or the shareholder's interest, and the decisions by the trustees or arrangements made by the company that allowed one or both of the partners to occupy the

225 *Gao v Elledge* [2003] NZFLR 378 (DC); and *Keats v Keats* [2006] NZFLR 470 (FC). *Keats* was followed in *C v H* FC Hamilton FAM-2008-019-992, 11 March 2009.

226 *R v R* [2010] NZFLR 555 (FC).

227 *R v R* [2010] NZFLR 555 (FC) at [60]. In that case the family home was owned by a partnership of two mirror trusts established by the partners during marriage. The Family Court held that it had jurisdiction to make an order under s 27 of the Property (Relationships) Act 1976, applying the "bundle of rights" doctrine referred to by the Court of Appeal in *M v B* [2006] 3 NZLR 660 (CA) at [112]–[119]. Under that doctrine, a partner's powers to control a trust are a "bundle of rights" that has value as property. See *M v B* [2006] 3 NZLR 660 (HC) at [112]–[119]; and *Walker v Walker* [2007] NZFLR 772 (CA) at [48]–[49]. However, despite these references, the bundle of rights argument has not been widely adopted. See the discussion in Part G.

228 *S v S* [2008] NZFLR 711 (FC).

229 Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357.

230 Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357.

home during and after the relationship.[231] If there is an express or implied authority to occupy the home, and that has not come to an irreversible end, then Peart argues that property interest is sufficient for the purposes of an occupation order[232]

14.73 However, where the partner with a discretionary interest in the trust dies, this interpretation of section 27 is unlikely to assist the surviving partner. A partner's beneficial interest in a trust is personal to them and ceases on their death.[233] Therefore even if a right to exclusive occupation could amount to a property interest under section 27, the right to occupy may end on the death of a partner depending on the terms of the trust deed.[234] There is no jurisdiction for a court to grant an occupation order under section 27 to the surviving partner based on the deceased's interest prior to death.

14.74 For example in *C v H*, Mrs C was 74 years old when her 83 year old de facto partner of eight years died.[235] The family home was held on trust but Mrs C was not a beneficiary. Mrs C was denied an occupation order pending the disposition of the PRA proceedings because the right granted by the trust to her de facto partner to reside in the family home had been terminated by his death.

14.75 We think it is desirable that the application of section 27 to property held on trust or by a company be clarified in the PRA. If occupation orders should be available in respect of trust and company property, then section 27 could be amended to clarify that a court may make an occupation order when, during the relationship, the partners jointly had a right, either expressly granted or inferred from arrangements, to exclusive possession of the property. Special provision may be required to ensure that an occupation order may be granted to a surviving partner, if the deceased was the trust beneficiary.

14.76 In Part G we also identify an option for reform that would expand the definition of property in the PRA to include broader rights and reflect a partner's true interest in a trust. This may also go some way to recognising the true nature of a right to occupy the home

231 Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357–359.

232 Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 359.

233 *S v N* FC North Shore FAM-2010–044–1254, 30 June 2011 at [39].

234 See Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357 and discussion above about the potential proprietary nature of interests that give rights to exclusive possession for the purposes of occupation orders made under the Property (Relationships) Act 1976.

235 *C v H* FC Hamilton FAM-2008-019-992, 11 March 2009.

under a trust arrangement as a property interest for the purpose of occupation orders.

CONSULTATION QUESTIONS

D24 Should occupation orders be available where the property in question is held on trust or by a company? If so, in what circumstances?

D25 If occupation orders should be available regarding trust and company property, would clarifying that an occupation order could be made where either partner could have exclusive possession of the property achieve this purpose? Are there any other options?

Is there appropriate guidance on interest awards and occupation rent?

14.77 When one partner occupies the family home after separation, the other partner might be compensated for their loss of enjoyment of that property. Interest awards can be made by a court to compensate one partner for denied or delayed access to the capital he or she is entitled to under the PRA. This applies to the period up until the date of judgment.[236] Interest awards are usually made under section 33(4). Alternatively, a court may require one partner to pay compensation to the other when their entitlement was delayed under section 18B of the PRA. An interest award under either section 33(4) or section 18B may be based on a calculation of interest on the partner's share of the property that the other partner had the use of.[237]

14.78 Occupation rent can also be awarded under section 18B.[238] Section 33 does not specifically address occupation rent, but section 33(3)(i) empowers a court to make an order for the payment of a sum of money by one partner to the other.

14.79 It is not clear whether there is a difference between awards of interest and occupation rent. Some cases suggest that occupation rent is equal to an interest order.[239] If they serve the same function, then an allowance of interest on occupation rent has

236 Interest awarded becomes a fixed sum post-judgment and thereafter attracts interest at the prescribed rate under the Judicature Act 1908.

237 *Griffiths v Griffiths* [2012] NZFLR 327 (HC).

238 Occupation rent can also be ordered under s 343(f) of the Property Law Act 2007, requiring the payment by any person of a fair occupation rent for all or any part of the property which is split between co-owners via a court order under s 339 of that Act.

239 *E v G* HC Auckland CIV–2005–485–1895, 18 May 2006 at [24].

aspects of double counting.[240] However in *T v G* the High Court observed that an award of interest should not be confused with orders for compensation for lack of use of a family home, or occupation rent which might be made under section 18B.[241]

14.80 There appears to be no settled approach on whether an award of occupation rent or an award of interest is appropriate to compensate a partner for their loss of enjoyment of the family home. The High Court has also observed that there appears to be "no clear or coherent principles to guide a Court in the exercise of its discretion in awarding interest" in PRA cases.[242] The interest rates stipulated in section 87 of the Judicature Act 1908[243] which apply in most commercial disputes may "not always be appropriate in a family law context."[244]

14.81 Another issue on which guidance would be desirable is that of grace periods in awards of occupation rent or interest. Currently there is no consistent approach on whether there should be a period immediately following separation when occupation rent or interest is not applicable.[245] It has also been suggested that the occupying party should not be liable for occupation rent until they receive notice from the non-occupying party that an adjustment for occupation is being sought.[246] The occupying party should have the opportunity to vacate the property and seek alternative accommodation before occupation rent or interest starts accruing.

Occupation rent when the home is held on trust

14.82 If occupation orders are available in respect of trust and company property, then specific provision may be needed to provide for

240 *Wicksteed v Wicksteed* [2002] NZFLR 28 (HC) at [60].

241 *T v G* [2013] NZHC 2976 at [81].

242 *Wicksteed v Wicksteed* [2002] NZFLR 28 (HC) at [59].

243 Section 87 of the Judicature Act 1908 will no longer apply to proceedings commenced after 1 January 2018 when the Interest on Money Claims Act 2016 comes into force: Senior Courts Act 2016, ss 2(2)(b) and 182(4); Interest on Money Claims Act 2016, s 2. The Interest on Money Claims Act 2016 provides a regime for the award of interest as compensation for a delay in the payment of debts, damages, and other money claims in respect of which civil proceedings are commenced: s 3.

244 *Johnston v Johnston* HC Auckland CIV-2008-404-817, 23 April 2008 at [45]. This confirms earlier dicta from *Cook v Cook* (1981) 4 MPC 43 (HC) at 45 where the Court said "that commercial rates are inappropriate in matrimonial property proceedings." In *J v J* [2016] NZHC 1606 the Court and counsel accepted at [25] that the application of the New Zealand average annual bank term deposit rates as set out in a website <www.interest.co.nz> was a fair indication of New Zealand interest rates.

245 *K v M* FC Auckland FAM-2004-004-3382, 17 May 2007 at [21]; compare with *Griffiths v Griffiths* [2012] NZFLR 327 (HC) at [39]. See also *Jacobson v Guo* (2008) 9 NZCPR 850 (HC) and *M v M* [2012] NZFC 680.

246 See *S v S* FC Blenheim FAM-2009-006-245, 13 May 2010 at [67] citing *C v C* FC Nelson FAM-2006-042-184, 5 August 2008.

occupation rent or interest. Currently section 18B only provides for compensation in respect of relationship property. Where the occupying party is making use of a home held on trust, there is no jurisdiction to make an order for compensation under section 18B.[247] However in *T v G* the High Court held that it was not prohibited from awarding an interest payment simply because the asset (the family home in this case) was held in a family trust.[248]

CONSULTATION QUESTIONS

D26 Should occupation rent or interest be available?

D27 Should more guidance be given?

Protection of rights under the PRA

14.83 The PRA has several provisions that protect a partner's rights before a court determines the division of the partners' property.

Section 42 notices of claim

14.84 Section 42 is an important provision. It allows a partner with a claim or interest in land under the PRA to register a notice on the title of the land. Section 42(5) provides that a notice can be registered even though no PRA proceedings are pending or in contemplation.

14.85 A notice of claim has been described as a "stop sign" because when registered on the title to land it prevents dealings with the land.[249] It prevents the registered owner from selling or otherwise disposing of the land to a third party. A notice of claim can protect a potential interest regarding:

(a) land claimed as relationship property (such as the family home) where it is in the name of one partner;

(b) land that is one partner's separate property if there is a potential claim against that land, such as a challenge

247 *X v Y* [2015] NZHC 1166, [2015] NZFLR 664 at [25].

248 *T v G* [2013] NZHC 2976 at [79].

249 *Moriarty v Roman Catholic Bishop of Auckland* (1982) 1 NZFLR 144 (HC) at 146. Section 42(1) of the Property (Relationships) Act 1976 deems the alleged claim or interest to be a registerable interest under the Land Transfer Act 1952. Section 42(3) of the Property (Relationships) Act 1976 provides that a notice once lodged has effect as if it were a caveat.

against a section 21 agreement,[250] or a claim under section 9A;[251] and

(c) land purchased after separation where a partner has a potential claim under section 44 or section 44C, or where it is argued that the land is held on trust and that the trust is a "sham."[252]

14.86 A notice of claim protects the claimant from the date of lodging the notice, but it does not affect any claims arising before that date. If the land has already been disposed of, then an application under section 44 may be necessary.[253]

14.87 Notice of claims, once lodged, can only be removed by order of the Family Court, District Court or High Court.[254] A notice of claim will be removed if a court is satisfied that the claimed interest is unsustainable or suspicious or the notice has done its work.[255]

14.88 The notice of claim procedure appears to be widely used. In the last ten years, the number of notices registered against land under section 42 each year has ranged from a low of 794 registrations in one year, to a high of 1,255 registrations in another year.[256] These statistics show that many partners are using their rights under section 42 which suggests that many people consider that the notice of claim procedure is a useful mechanism.

14.89 Despite the significance of section 42, we have encountered little criticism with the notice of claim procedure. There may, however, be issues with how the notice of claim procedure works in practice. For example, the authors of Family Property say:[257]

> *The form prescribed for s 42 notices is poorly worded. The use of the present tense to describe the claimant's relationship to the*

250 *C v C* (1989) 5 NZFLR 398 (HC); and *Doyle v Doyle* [2004] NZFLR 43 (CA).

251 *M v W* FC Kaikohe FAM-2009-027-327, 30 November 2009.

252 See *H v D* FC North Shore FAM-2003-044-33, 19 June 2008; *W v L* FC Waitakere FAM-2005-090-1441, 19 November 2008; and *C v C* FC Rotorua FAM-2007-063-652, 20 June 2011, where the notices of claim protected the applicants' claims under ss 44 and 44C of the Property (Relationships) Act 1976.

253 Section 44 of the Property (Relationships) Act 1976 is discussed in Part G.

254 Property (Relationships) Act 1976, s 42(3).

255 See *Gregan v Gregan* [1983] NZLR 555 (CA); *Laing v Laing* (1988) 4 NZFLR 629 (HC); *Doyle v Doyle (No 2)* [2004] NZFLR 43 (CA); *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *C v C* FC Auckland FAM-2009-004-1390, 8 September 2009.

256 The number of registrations each year have been as follows: 2007: 1,255 registrations; 2008: 1,170 registrations; 2009: 993 registrations; 2010: 942 registrations; 2011: 862 registrations; 2012: 855 registrations; 2013 841 registrations; 2014: 752 registrations; 2015: 794 registrations; 2016: 881 registrations: email from Land Information New Zealand to the Law Commission regarding data on notice of claim registrations (28 April 2017).

257 Nicola Peart (ed) *Brookers Family Law —Family Property* (online looseleaf ed, Thomson Reuters) at [PR42.05].

> *owner of the land presupposes that the parties are still married or in a civil union or de facto relationship. It does not provide for the possibility that the parties may have separated or that one of them has died. Yet, claims under the Act are obviously possible in those circumstances... Section 42 notices must therefore be available to protect interests in land that could be the subject of those claims.*

Are notices of claim available for trust property?

14.90 It is uncertain how the notice of claim procedure applies to certain types of property.[258] In particular it is difficult to sustain a notice of claim in respect of property legally owned by a third party, such as a company or trustee.[259]

14.91 A section 42 notice cannot be used where a partner only has a discretionary interest in the trust property,[260] or to protect some interest outside the PRA, such as an interest claimed under a constructive trust.[261] Ownership of company shares does not create a beneficial interest in company property, and therefore a section 42 notice cannot be sustained in respect of company property,[262] unless there is a claim under section 44 or 44C.

14.92 We think that the availability of notices of claim in respect of trust and company property should be clarified. We are interested in views on what types of property interests the procedure should be able to protect. We expect that if the remedies in the PRA regarding trust assets are improved, as discussed in Part G, applying section 42 will expand to include trust property subject to such potential claims.

14.93 A notice of claim can also affect the rights creditors claim to the land, particularly if the creditor's interest in the land is unregistered or if it has been registered after the notice of claim

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258 *H v JDVC* [2015] NZCA 213.

259 A notice of claim against trust property can only be maintained where there is a claim under ss 44 or 44C of the Property (Relationships) Act 1976: see *W v L* FC Waitakere FAM-2005-090-1441, 19 November 2008 and *C v C* FC Rotorua FAM-2007-063-652, 20 June 2011); where a partner has a vested or contingent interest in the trust property; where a partner has a beneficial interest in trust property on the basis of the Supreme Court's interpretation of "property" in *Clayton v Clayton*: see *B v B* [2016] NZFC 2668, [2016] NZFLR 944 citing *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; or where it is alleged that the trust is a sham: see *H v D* FC North Shore FAM-2003-044-33, 19 June 2008; *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; and *B v B* [2016] NZFC 2668, [2016] NZFLR 944.

260 *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *Thompson v Parlour* [2012] NZHC 3096.

261 *B v B* [2017] NZHC 131.

262 *Straight Views Ltd v Hannaway* (2005) 6 NZCPR 725 (HC); and *C v C* (1989) 5 FRNZ 694 (HC).

is lodged. We discuss how section 42 can affect the rights of creditors in Part K.

CONSULTATION QUESTIONS

D28 Should the notice of claim procedure under section 42 be able to protect interests in trust property, where a partner only has a discretionary interest or a constructive trust claim?

D29 Are there any other issues with the way the notice of claim procedure is working in practice?

Section 43 orders restraining the disposition of property

14.94 Section 43 applies when a disposition of property is about to be made to defeat a partner's claim or rights under the PRA. A court has the power to restrain the impending disposition, or order that any proceeds from the disposition be paid into court, where it is satisfied that a disposition is about to be made to defeat the claim or rights of a person under the PRA.[263] While "disposition" is not defined in the PRA, the High Court has held that it covers all forms of alienation, whether for value or not.[264] Orders can be made in relation to both relationship property and separate property.

Is the threshold for section 43 too high?

14.95 Section 43 requires a predictive assessment of both the likelihood of the disposition being made, and the intention of the party claimed to be making the disposition.[265]

14.96 The test for establishing intention is the same as that under section 44, which applies where a disposition has been made and an application is made asking a court to set aside that disposition. The applicant must establish that the person making the disposition is doing so "in order to defeat the claim or rights" of any person under the PRA.[266] The courts have taken the approach that, when a person must have known that disposing of property

263 Property (Relationships) Act 1976, s 43(1).

264 *Re Polkinghorne Trust* (1988) 4 NZFLR 756 (HC).

265 *P v D* [2012] NZHC 2757 at [39].

266 Property (Relationships) Act 1976, ss 43(1); and 44(1).

would expose their partner to a significantly enhanced risk of not receiving their entitlement under the PRA, they must be taken to have intended that consequence, even if it was not actually their wish to cause the partner loss.[267] The Court of Appeal recently confirmed this approach in *P v H*, stating:[268]

> *… the inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights, from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence.*

14.97 While the approach of the courts, confirmed in *Potter v Horsfall*, may make it easier to meet the threshold for section 43, we are interested in views on whether the threshold is appropriate. Section 43 is a precautionary measure that functions as a statutory form of interim injunction,[269] and cannot be used to recover property already disposed of, unlike section 44.[270] Setting aside a disposition under section 44, it seems, carries greater consequences than preventing a disposition until proceedings are dealt with under the PRA. It may, therefore, be appropriate to have a lower threshold, such as an effects-based test.[271] Section 44C, for example, enables a court to make an order of compensation where relationship property has been disposed of to a trust and the disposition has the effect of defeating the claim or rights of one of the partners. However lowering the threshold may be unnecessary if, as an alternative, a section 42 notice of claim can be lodged on the title of the property.

CONSULTATION QUESTION

D30 Is the threshold test in section 43 too high? If so, would an effects-based test be appropriate?

267 *R v U* [2010] 1 NZLR 434 (HC) at [33] applying *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J. *R v U* was cited with approval in *W v C* [2013] NZHC 396, [2014] NZFLR 71 at [69]. However note the decisions in *K v V* [2012] NZHC 1129; and *P v D* [2012] NZHC 2757.

268 *P v H* [2016] NZCA 514, [2016] NZFLR 974 at [41] in relation to s 44 of the Property (Relationships) Act 1976. Leave to appeal to the Supreme Court has been granted: *H v P* [2017] NZSC 21.

269 *S v S* [2008] NZFLR 227 (HC) at [26].

270 Under s 44(2)(a) of the Property (Relationships) Act 1976 property can be recovered if it has been received otherwise than in good faith and for valuable consideration.

271 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Lexis Nexis) at [9.42] fn 13 notes the Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30 - 31 recommended expanding ss 43 and 44 and the Family Court in *Taylor v Taylor* DC Christchurch FP 009/752/96, 18 June 1996 added that "it should be enough if the effect of the disposition is to defeat the claim or rights of any other person rather than importing notions of motive."

Part E – How should the PRA treat short-term relationships?

Chapter 15 – The three year rule

Introduction

15.1 A marriage, civil union or de facto relationship must usually have lasted for three years or more before qualifying for the general rule of equal sharing.[1] If a relationship lasts for less than three years, it is a "relationship of short duration" (short-term relationship) under the PRA, and different property division rules apply.[2] In this Part we examine how the PRA applies to short-term relationships.

15.2 In this chapter we consider the reasons for treating short-term relationships differently to qualifying relationships, and ask whether the minimum duration for qualifying relationships (the three year rule) remains appropriate. The rest of Part E is arranged as follows:

(a) In Chapter 16 we look at the property division rules for short-term marriages and civil unions.

(b) In Chapter 17 we focus on short-term de facto relationships. We ask whether the PRA should continue to treat short-term de facto relationships differently to short–term marriages and civil unions.

Options for reform in Part E may have human rights implications

15.3 The options explored in Part E may raise issues under human rights law. As we explained in Chapter 2, the New Zealand Bill of Rights Act 1990 prohibits unjustified discrimination, including indirect discrimination, on a range of grounds such as marital status and family status.[3] Any option for reform of the PRA that proposes to treat relationships differently based on the type of relationship (marriage, civil union or de facto relationship) or

1 Property (Relationships) Act 1976, ss 1C and 2E. The scope of Part E is limited to relationships ending on separation. A relationship may also be ended by the death of one partner. The provisions that apply to relationships that end on death are significantly different and are considered in Part M.

2 Property (Relationships) Act 1976, ss 2E, 14, 14AA and 14A.

3 New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, ss 21 (prohibited grounds of discrimination) and 65 (indirect discrimination).

the presence of children would need to be to be demonstrably justified in order to avoid contravening human rights law.[4] Any recommendations we make in our final report will be reviewed for consistency with domestic human rights law and relevant international obligations.

Should the PRA have different rules for short-term relationships?

15.4 The PRA has always included a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships. This is because the PRA can have significant consequences at the end of a relationship, which are only justified if a relationship has demonstrated a sufficient level of commitment and permanence.

15.5 A minimum duration requirement is a necessary (although blunt) way to distinguish fragile relationships from relationships to which the partners are assumed to have made a certain degree of commitment. As Atkin and Parker observe, it is not the PRA's intention to create a property sharing regime for "transient or fleeting associations".[5] A minimum duration requirement recognises that commitment grows over time[6] and avoids applying the general rule of equal sharing to early-stage relationships. It also provides some protection against a manipulative partner who enters a relationship with the aim of acquiring a share of the other partner's property.[7]

15.6 A minimum duration requirement also recognises that equal sharing is justified only where contributions to the relationship are equal.[8] As Peart observes:[9]

4 New Zealand Bill of Rights Act 1990, s 5.

5 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 86.

6 See Vivienne Elizabeth and Maureen Baker "Transiting through cohabitation to marriage: emerging commitment and diminishing ambiguity" (2015) 4(1) Families, Relationships and Societies 53.

7 Bill Atkin "Property division: Lessons from New Zealand" in Panagiotis I Kanellopoulous, Elini Nina-Pazarzi and Cornelia Delouka-Inglessi (eds) *Essays in Honor of Penelope Agallopoulou* (Ant N Sakkoulas, Athens, 2011) 129 at 138.

8 See discussion in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at 2.

9 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PRIntro.05(2)]. See also *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [39]; and *Burgess v Beavan* [2010] NZCA 625, [2011] NZFLR 609 at [32].

In short duration relationships the contributions are usually unequal, because there is often not enough time to build the non-financial contributions to a level where they can be appropriately equated with financial contributions.

15.7 There will, of course, be short-term relationships where contributions are equal, for example where both partners have made financial contributions, or where one partner cares for a child while the other partner provides financial support for the family. How the PRA should operate in these circumstances is explored in the following chapters.

15.8 For these reasons our preliminary view is that the PRA should continue to include a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships. What that minimum duration requirement should be, and how property should be divided when a short-term relationship ends, are the focus of this part of the Issues Paper.

CONSULTATION QUESTION

E1 Do you agree that the PRA should have a minimum duration requirement for qualifying relationships and special property division rules for short-term relationships?

How does the three year rule operate?

15.9 The three year rule has applied to marriages since the PRA was first enacted as the Matrimonial Property Act in 1976,[10] to de facto relationships since 2001 and to civil unions since they were introduced in 2005.

15.10 Section 2E is the basis for the three year rule. It provides that a relationship of short duration is one in which the partners have lived together in a marriage, civil union or as de facto partners for a period of less than three years. A court can also treat a longer relationship as a short-term relationship if, having regard to all the circumstances, it considers it just to do so.[11] This might be appropriate if, for example, there have been long periods

10 See Matrimonial Property Act 1976, s 13(3) (as enacted).

11 Property (Relationships) Act 1976, s 2E.

of separation during the relationship or some other factor has affected the quality of the relationship.[12]

Historical background

15.11 As early as 1975 there were calls for limited property rights for de facto relationships lasting longer than two years.[13] In 1988 a Working Group reviewed the legal provision for de facto relationships and also recommended a minimum duration of two years before special rules of property division should apply, observing that:[14]

> *It does not seem to the group that the threshold for a de facto marriage need to be the same as the threshold for a short marriage under the Matrimonial Property Act. It must be remembered that until a de facto relationship has lasted for two years (if that period is chosen) there would be no rights at all of a matrimonial nature for the de facto partners. The situation under the Matrimonial Property is not analogous.*

15.12 The amendments introduced into Parliament in 1998 proposed a minimum duration of three years for de facto relationships, consistent with the existing provisions for short-term marriages.[15] The 1998 amendments, however, went further than the Working Group's recommendations because they also covered short-term de facto relationships.[16]

15.13 The Select Committee considering the 2001 amendments received submissions favouring several different qualifying periods for de

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12 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [4.3.2]. See also *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 where the High Court said at [33] that it is appropriate to have regard to the factors in section 2D of the Property (Relationships) Act 1976 when assessing whether a relationship of longer than three years should be treated as a short-term relationship.

13 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12–13. The Minister of Justice, responsible for introducing the Matrimonial Property Bill, noted there was a strong case for including de facto relationships within the new matrimonial property regime, on "practical and humanitarian grounds". However the Matrimonial Property Bill as enacted did not extend to de facto relationships. See Chapter 2 for further discussion of the legislative history of the Property (Relationships) Act 1976.

14 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (1988) at 67. The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships.

15 De Facto Relationships (Property) Bill 1998 (108–1), cls 42–43. The De Facto Relationships (Property) Bill proposed a separate property division regime for de facto relationships. However following a change of government in 1999 the Bill was withdrawn and amendments were proposed to the Matrimonial Property Amendment Bill to include de facto relationships within that regime. The three year minimum duration for qualifying de facto relationships, and provision for short-term relationships, was however carried over from the De Facto Relationships (Property) Bill: see Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2). See paragraph 17.3 below.

16 De Facto Relationships (Property) Bill 1998 (108–1), cl 59.

facto relationships.[17] These ranged from two, three, five and seven years (but a shorter period where there are children).[18] Other submitters suggested that the PRA should only apply to de facto relationships if there are children.[19]

15.14 The Select Committee concluded that three years was an appropriate length of time before the general rule of equal sharing should take effect for de facto relationships.[20] It also noted that three years was consistent with the principles of the Human Rights Act 1993 which prohibits discrimination on the grounds of marital status.[21]

Determining the duration of a relationship

15.15 Determining when a relationship begins and ends is important as it may decide whether the PRA's rules for short-term relationships apply. Relationship duration is also relevant to the classification of property under the PRA[22] and to whether maintenance is available to de facto partners under the Family Proceedings Act 1980.[23]

Start and end dates

15.16 Determining the start and end dates of a relationship can be difficult as they are not necessarily linked to specific events.

15.17 A marriage will often have a start date that is earlier than the date the partners actually married, because the PRA counts any time the partners spent together in a de facto relationship immediately before marrying.[24] Research indicates that most people live in a de

17 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

18 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

19 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9.

20 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 9–10.

21 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10; and Human Rights Act 1993, s 21(1)(b).

22 Property (Relationships) Act 1976, ss 8 and 9. The start and end dates of the relationship are relevant to the classification of property as relationship property or separate property because the status of some property is determined by when it was acquired or whether it is attributable to the relationship.

23 Family Proceedings Act 1980, s 70B. Maintenance is only available in limited circumstances to partners who were in a short-term de facto relationship.

24 Property (Relationships) Act 1976, s 2B.

facto relationship before marriage.[25] Therefore when the duration of a marriage is an issue, a court will often need to decide when the preceding de facto relationship began. This also applies to civil unions preceded by de facto relationships.[26]

15.18 A de facto relationship begins when the criteria in the definition in section 2D are satisfied. This has been described by the Family Court as the point at which the relationship assumes a significant degree of mutual commitment and permanency, and at which the partners' lives become significantly intertwined.[27] This is not necessarily linked to when the partners moved in together. It can be difficult to determine when a de facto relationship began if the relationship gradually evolved over time from an initial phase of living in the same house that could be seen as "co-residential dating" to a de facto relationship.

15.19 A relationship ends if the partners cease to live together as a couple or if one of the partners dies.[28] Marriages and civil unions may also end on the formal dissolution of that relationship.[29] In *O'Shea v Rothstein* the High Court said that separation does not automatically bring a relationship to an end.[30] While sometimes that will undoubtedly be so, there will be other situations where that is not the case:[31]

> *There can be no hard and fast rule because all the circumstances of the particular matter under consideration have to be taken into account. The reasons for, and duration of, the separation are likely to be important considerations. An indicator that separation does not automatically bring a relationship to an end and that intermittent relationships were within the contemplation of the legislature can be found in s 2E which defines "relationship of short duration."*

25 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

26 Property (Relationships) Act 1976, s 2BAA. We do not know how common it is for couples to have a de facto relationship immediately preceding their civil union, however we have no reason to believe that it would be different to the prevalence of de facto relationships preceding a marriage. See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

27 *Boyd v Jackson* FC Napier FP041/363/01, 6 March 2003 at [3].

28 Property (Relationships) Act 1976, ss 2A(2), 2AB(2), 2D(4).

29 Property (Relationships) Act 1976, ss 2A(2) and 2AB(2).

30 *O'Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [22]. This case was concerned with the end date of a de facto relationship, but its principles appear to be equally applicable to marriages and civil unions. See also *Richmond v Richmond* [2013] NZFC 6022 at [33].

31 *O'Shea v Rothstein* HC Dunedin CIV-2002-412-8, 11 August 2003 at [22].

Intermittent and sequential relationships

15.20 Sometimes partners will have an intermittent relationship. When determining the duration of an intermittent relationship a court may exclude a period of resumed cohabitation of up to three months and that had the motive of reconciliation.[32]

15.21 As noted above, sometimes partners will have been in two different types of relationships together, one after the other. The most common example is a de facto relationship preceding a marriage.[33] If so, the period of each relationship is usually added together to determine the overall length of the relationship.[34]

Should the qualifying period be longer?

15.22 The three year rule does not appear to cause issues for marriages. The median duration of marriages ending in divorce has been rising since the early 1990s, and was 14 years in 2016, compared to 12 in 1977.[35] This data does not capture any time spent in a de facto relationship immediately preceding marriage, which is also counted when calculating the duration of a marriage under the PRA.[36] Although this data must be treated with caution,[37] it suggests that few marriages are short-term marriages, and that few marriages are likely to be affected by a three or even five year qualifying period. This data includes civil unions that end in dissolution, although this is likely to be a small group.[38]

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32 Property (Relationships) Act 1976, s 2E(2).

33 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

34 Property (Relationships) Act 1976, ss 2B–2BA.

35 Information prior to 1977 is not available. Median duration of marriage includes civil unions ending in dissolution. The median is the mid-point value. See Statistics New Zealand "Divorces by duration (marriages and civil unions) (Annual-Dec)" (2017) <www.stats.govt.nz>.

36 Property (Relationships) Act 1976, s 2B.

37 This data does not necessarily suggest that marriages are longer lasting than other relationship types, as a couple may be separated for some time before divorcing. It does not include the period of any immediately preceding civil union or de facto relationship, which counts as part of the marriage for the purposes of the Property (Relationships) Act 1976: see ss 2B and 2BA. This is important because most people live in a de facto relationship before marriage: see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

38 As noted in n 35 above, the median duration of marriage includes civil unions ending in dissolution. The number of people entering into civil unions has remained small, accounting for 1.4% of all marriages and civil unions between 2005 and 2013, and has dropped since same sex marriage was legalised in 2013 so that civil unions only accounted for 0.2% of all marriages and civil unions in 2016: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 citing Statistics New Zealand "Marriages and civil unions by relationship type, NZ and overseas residents (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

15.23 The three year rule is more significant for de facto relationships. This is because short-term de facto relationships are not normally covered by the PRA, as we discuss in Chapter 17.[39] Whether or not a de facto relationship satisfies the three year rule is a question that carries significant consequences under the PRA.

Issues with the three year rule

15.24 During our research and preliminary consultation we noted the concern that the three year rule is not achieving a just division of property when some de facto relationships end. Some may argue that a longer qualification period is needed because:

(a) Some people drift into de facto relationships without focusing on the property consequences. While partners that marry or enter into a civil union can reasonably be expected to understand that property consequences will follow under the PRA, this expectation might not apply to partners in de facto relationships. They need longer to recognise their legal state is changing and organise their affairs accordingly.

(b) De facto relationships take longer than marriages and civil unions to reach functional equivalence, or to "mature" into the kind of relationship to which the general rule of equal sharing should apply.

(c) De facto relationships have a different status to marriage because one is commonly a stepping stone to the other, and because of the way marriage is considered by some to strengthen the commitment between partners. We discuss what we know about the similarities and differences between how different relationships function in Chapter 17.[40]

(c) People who have more than one intimate relationship in their lifetime need a longer qualifying period to protect their assets from gradual erosion.[41]

39 Property (Relationships) Act 1976, ss 1C(2)(b) and 14A.

40 Most people live in a de facto relationship before marriage: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

41 See data on re-partnering after separation in Chapter 4 of Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

(d) It would be more consistent with certain religious beliefs (for example the special status of marriage) and cultural or social values to have a longer qualifying period for de facto relationships.

15.25 These arguments need to be evaluated in the light of what we know about the duration of de facto relationships.

What do we know about the duration of de facto relationships?

15.26 The Parliamentary select committee considering the 2001 amendments was advised that there was no available data on the average length of de facto relationships in New Zealand.[42] We face the same challenge in 2017. While some evidence suggests that many de facto relationships result in marriage, there is little available data on the duration of de facto relationships that continue long-term or end in separation. We explore the data that is available in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (Study Paper).[43]

15.27 There are conflicting views on whether de facto relationships are more fragile than marriages. One New Zealand study from 1995 identified that first cohabiting unions[44] have become increasingly more likely to end in separation rather than marriage.[45] Among those who entered into their first cohabitation before 1970, 75 per cent had married and 14 per cent had separated within five years. In contrast, of those who entered their first cohabitation between 1980–1989, 41 per cent had married and 45 per cent had separated within five years.

15.28 That study also identified, however, that the proportion of first cohabiting unions that were still intact five years on had increased, from 11 per cent of cohabitations entered into before

42 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 10.

43 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)*.

44 That is, where the participant's first union was cohabitation rather than marriage. "Cohabitation" refers to couples who were in an intimate relationship and living together in the same household but who were not married. Some cohabitations, but not necessarily all, will be de facto relationships under s 2D of the Property (Relationships) Act 1976.

45 The New Zealand Women: Family, Employment and Education survey was a nationwide retrospective survey of 3,017 women aged 20–59. The survey investigated family formation and change between 1950–1995. For a discussion of the methodology and results of this survey see Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 3, citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 237 and Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 18 and 26 (Table 2.9).

1970, to 14 per cent of cohabitations entered into between 1980–1989.[46] It was said that this "fits with the argument that enduring cohabiting unions were increasingly likely to be acceptable to the wider community and in that sense 'formalised'".[47]

15.29 That study is now over 20 years old and was undertaken before the PRA was extended to include de facto relationships. It is unknown whether the trends it identified have continued or if they have been altered by subsequent changes to the legal and social context, such as greater legal recognition of de facto relationships[48] or increasing public acceptance of de facto relationships.

15.30 More recent research from Australia suggests that cohabiting unions may now be more enduring than the New Zealand study suggests.[49] Research in England and Wales also challenges the view that cohabiting relationships are more fragile than marriages.[50] That research observed that, while statistics may indicate that marriages, on average, last longer than de facto relationships:[51]

> *The evidence suggests that if we compared like with like, for example young secular childless couples, or older couples in a long-term union with children, there would probably be little difference between separation rates for cohabiting couples and married couples.*

46 The study also identified that cohabiting unions that followed marriage were less likely to end within a given duration than other cohabiting unions: Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 237.

47 Subsequent cohabiting unions include cohabitations that were preceded by an earlier cohabitation or marriage, or both. These results are discussed in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

48 Note the Relationships (Statutory References) Act 2005 which amended Acts and regulations that contained unjustified discrimination on the grounds of marital status or sexual orientation.

49 An Australian study based on data collected in the Household, Income and Labour Dynamics in Australia Survey identified that 61 per cent of cohabiting couples were still cohabiting three years on (from 2001 to 2003). Nineteen per cent had separated and 20 per cent had married. This excluded those cohabiting couples for whom no information was available in 2003: see Lixia Qu, Ruth Weston and David de Vaus "Cohabitation and Beyond: The Contribution of Each Partner's Relationship Satisfaction and Fertility Aspirations to Pathways of Cohabiting Couples" (2009) 40(4) Journal of Comparative Family Studies 587, as cited in Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 3.

50 Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) CFLQ 383 at 388. Note that the legal situation in England and Wales is very different because the statutory property regime (the Matrimonial Causes Act 1973 (UK)) does not apply to de facto relationships.

51 Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) CFLQ 383 at 389.

Duration of de facto relationships in PRA cases

15.31 Research into a snapshot of reported PRA cases from 2002 to 2009 found that in 44 per cent of cases involving a de facto relationship, the relationship was shorter than five years.[52] This appears to suggest that a longer qualifying period might be better at capturing only those partners that intended to enter a de facto relationship (or should have reasonably known that they were entering a de facto relationship) while reducing the risk of capturing partners who slip inadvertently into one.[53]

15.32 This data must, however, be treated with caution. It only gives a snapshot of the small proportion of de facto relationships that end in litigation. It does not capture de facto relationships where property matters are resolved out of court or where the partners are unaware that the PRA applies to them. It also does not capture de facto relationships that "end" in marriage or civil union, or that are ongoing. Perhaps more importantly, the prevalence of cases involving de facto relationships shorter than five years might simply reflect the fact that these relationships fall into the "grey area" where the existence of a qualifying relationship might be contestable if the start and/or end dates of the relationship are unclear.[54]

Advantages of the three year rule

15.33 Despite its issues, the three year rule has a long history, is simple to remember and sets a "bright-line test." Changing the qualifying period for de facto relationships without a solid evidence base would be difficult to justify and is likely to cause confusion.

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52 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 4 and 9. Cleary identified and analysed 316 electronically available cases on the Brookers and LexisNexis legal databases involving relationship property disputes. See also Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (Commission for Financial Capability, August 2012) at [3.26].

53 Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012) at 9. See Mark Henaghan and others *Property (Relationships) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?* (Commission for Financial Capability, August 2012) at [3.26].

54 As we discuss in Chapter 6, some research suggests that it may be more common for couples to dispute the start and end dates of a de facto relationship than the existence of a de facto relationship. See Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012). This study found that an issue about whether a relationship was wholly or in part a de facto relationship arose in 43 per cent of de facto cases. However only 12 per cent involved questions about whether the entire relationship had crossed the threshold to become a de facto relationship.

15.34 Changing the qualifying period might raise issues that are more significant than the issues associated with the current approach. A longer qualifying period risks excluding relationships that should be covered by the PRA and may not provide the best protection for a vulnerable partner when a relationship ends. It may not reduce disputes but simply shift the likelihood of disputes to longer relationships. Excluded partners may still seek other legal remedies.[55]

15.35 The three year rule does not exist in isolation: a relationship must also qualify as a de facto relationship before the general rule of equal sharing applies. Therefore concerns that the PRA does not apply to the right relationships may be addressed by other means. These include changing the definition of de facto relationship (see Chapter 6) and engaging the PRA's rules around contracting out (see Part J).

CONSULTATION QUESTIONS

E2 Do you think the three year rule is fair, or is it problematic for some or all relationship types?

E3 Do you think the three year rule is well understood?

Options for reform

15.36 We explore some different options below, should reform be necessary to address the concern that the three year rule is not achieving a just division of property when some de facto relationships end.

15.37 Whether reform of the three year rule is necessary, and if so what option is preferred, must be considered in light of any changes proposed elsewhere in this Issues Paper. It is important that the minimum duration requirement is appropriate for the rules that apply when that requirement is met. For example, a three year qualifying period may remain appropriate if the PRA's core rules remain the same, or if the definition of relationship property is narrowed so there is a smaller pool of property available for division at the end of a relationship (see option 4 below).

55 Legal remedies may include a claim in equity such as a constructive trust claim. Prior to the inclusion of de facto relationships in the Property (Relationships) Act 1976 regime in 2001, constructive trust claims were the main avenue of redress for de facto partners. This was a difficult process and a key aim of the 2001 reforms was to avoid the need for de facto partners to make such claims.

15.38 Some of these options work together. It may be possible to implement option 1 (increasing the qualifying period for all relationship types) with or without option 3 (allowing a court to treat a short-term relationship as a qualifying relationship), depending on the length of the new qualifying period. Option 2 (increasing the qualifying period for some or all de facto relationships) and option 3 must be implemented together to avoid injustice.

Option 1: Increase the qualifying period for all relationship types

15.39 This option would treat all relationship types the same, but in practice it could have a disproportionate effect on de facto relationships if those relationships are generally shorter than marriages. We have no way of knowing how many de facto relationships would be disadvantaged by this option as we lack data on the average duration of de facto relationships. While many PRA cases that make it to court involve de facto relationships under five years, for the reasons given at paragraph 15.322 we are not convinced that this alone points to a problem with the qualifying period being too short.

Option 2: Increase the qualifying period for some or all de facto relationships

15.40 This option could accommodate concerns that the three year rule is not achieving a just division of property when some de facto relationships end. A longer qualifying period could apply to either some or all de facto relationships. For example, de facto relationships with children could remain subject to the existing three year rule. This would recognise the importance of children as an indicator of the kind of relationship to which the PRA should apply, and the PRA's role in protecting children's interests (see Part I). Under this option, a court should be able to treat a short-term relationship as if it were a qualifying relationship in certain circumstances to avoid injustice (see option 3).

15.41 This option is consistent with the view that different relationship types tend to form, function and endure in different ways, and that treating all relationships in the same way does not does not always lead to a just result. Giving the courts a power to treat

short-term relationships as qualifying relationships in certain circumstances could mitigate injustice or disadvantage resulting from the distinctions drawn by this option.

15.42 This option would be a significant departure from the PRA's current rules and, in our preliminary view, a backwards step. It would effectively treat relationships differently depending on the form the relationship took, rather than how that relationship functioned. Different treatment raises issues under human rights law. It may devalue de facto relationships and relationships without children, and stigmatise these groups as less worthy of statutory protection than couples in other types of relationships. While there is some evidence that might support this approach, as noted above, we are not convinced that the evidence available is sufficiently robust to support this option.

Option 3: Allow the court to treat a short-term relationship as if it were a qualifying relationship

15.43 Currently there is no discretion for a court to treat a short-term relationship as if it were a qualifying relationship.[56] This may not be an issue if the three year rule remains because it is unlikely that there are many relationships shorter than three years to which the general rule of equal sharing should be applied. If, however, option 1 or option 2 is adopted, there may be a need to allow a court to depart from the minimum duration requirement in certain circumstances. This is because longer the qualifying period, the greater the need for flexibility to avoid unjust outcomes for some short-term relationships.

15.44 The PRA could be amended to give the court discretion to treat a short-term relationship as if it were a qualifying relationship if satisfied that failure to do so would result in "serious injustice." This would set a high threshold, recognising that the qualifying period should be fit for purpose for most relationships. This option may, however, complicate the PRA as "serious injustice" tests are already used in other provisions.[57] This may raise issues as to whether case law on those provisions is (or should be) relevant in this context.

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56 In contrast, a court can treat a qualifying relationship as if it were a short-term relationship if it considers it just, having regard to all the circumstances of the relationship: Property (Relationships) Act 1976, s 2E.

57 See for example Property (Relationships) Act 1976, ss 14A and 21J. See paragraph 17.5 in relation to s 14A.

15.45 An alternative is to give a court discretion to treat a short-term relationship as if it were a qualifying relationship if the partners lived together as a couple for a "significant period of time" and the court considers it just. This would draw on a concept developed by the American Law Institute, which suggested using a "significant period of time" requirement rather than a set period for some relationships.[58] Whether the requirement is met would be determined in the light of a list of factors (similar to the list in section 2D(2)), and the extent to which those factors wrought change in the life of one or both partners.[59] The greater the change, the shorter the period necessary to satisfy the requirement.[60] Other factors that may be relevant might include a substantial contribution to the relationship or a considerable intermingling of property.[61] This option may require a court to focus on circumstances related to the character and quality of the relationship (as it currently does with the existing discretion to treat a qualifying relationship as if it were a short-term one) and the significance of the life events that occurred during the relationship.

Option 4: Retain the three year rule and address issues with its application to de facto relationships in other ways

15.46 The final option is to retain the three year rule for relationships, recognising that its advantages outweigh the issues we have identified with its application to de facto relationships. These issues might then be addressed in other ways, for example:

(e) changing the definition of de facto relationship (see Chapter 6);

(f) changing the definition of relationship property (see Chapter 9); and

58 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)].

59 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)].

60 The American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark, 2002) at [6.03(6)] and 924.

61 See Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (1988) at 67.

(g) promoting awareness of the PRA's rules including the ability to contract out (see Part J) through a public education campaign (see Chapter 4).

CONSULTATION QUESTION

E4 Which option for reform do you prefer, and why? If you prefer option 1 or option 2, what should the qualifying period be increased to?

Chapter 16 – Short-term marriages and civil unions

16.1 Short-term marriages and civil unions are automatically covered by the PRA.[62] A court can order the division of relationship property according to the applicable rules, and can make non-division orders such as occupation and tenancy orders.[63]

16.2 Section 14 sets out the property division rules for short-term marriages. These rules are mirrored in section 14AA, which applies to short-term civil unions. The discussion in this chapter primarily concerns section 14 as that section has a longer legislative history and has been the subject of more extensive judicial debate. We have no reason to believe that this discussion is not equally applicable to short-term civil unions.

The property division rules

16.3 Section 14 dilutes the general rule of equal sharing in certain specified circumstances. In those circumstances some or all relationship property is shared on the basis of each spouse's contribution to the marriage.

Dividing the family home and chattels

16.4 Section 14(2) provides that the general rule that the family home and family chattels are shared equally[64] does not apply:

(a) to any asset owned wholly or substantially by one spouse at the date on which the marriage began; or

(b) to any asset that has come to one spouse, after the date on which the marriage began,—

(i) by succession; or

(ii) by survivorship; or

62 Property (Relationships) Act 1976, ss 2A(1)(a), 14 and 14AA. The definitions of "marriage" in s 2A and "civil union" in s 2AB include a marriage or civil union that is void.

63 Property (Relationships) Act 1976, ss 27, 28 and 28A.

64 Property (Relationships) Act 1976, ss 11(1)(a), 11(1)(b), 11A, 11B and 12.

(iii) as the beneficiary under a trust; or

(iv) by gift from a third person; or

(c) where the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse.

16.5 In *Chesham v Chesham* the High Court considered what "substantially" owning an asset meant under section 14(2)(a).[65] It said that a house purchased before marriage by the spouses as tenants in common in equal shares was not "owned wholly or substantially" by one spouse. Rather, it was wholly owned by both spouses.[66] The Court then considered the position if the legal title were ignored, and said that "[a] three to one disparity does not bring the house within the concept of substantially owned by one."[67]

16.6 A sense of relativity between each spouse's contribution to the marriage is incorporated into the test in section 14(2)(c).[68] In *Burgess v Beavan* for example the Court of Appeal said that not only must the financial contribution of one spouse be clearly greater, it must also have brought a disproportionate benefit to the other spouse, having regard to the tangible and intangible contributions made by the other spouse to the marriage.[69]

16.7 If one of the section 14(2) exceptions applies, each spouse's share of the affected property (the asset that satisfies the test in section 14(2)(a) or 14(2)(b), or all relationship property if the test in section 14(2)(c) is satisfied) is determined in accordance with his or her contribution to the marriage.[70] Contributions are set out in section 18, and include monetary contributions and non-monetary contributions such as childcare and the performance of household duties. It is open to a court to take a technical approach to determining each spouse's contribution (whereby a numerical weighting between financial and non-financial contributions is determined and applied) or to make a "broad-brush" assessment.[71]

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65 *Chesham v Chesham* [1993] NZFLR 300 (HC). See also *Treloar v Treloar* (1988) 5 NZFLR 209 (HC).

66 *Chesham v Chesham* [1993] NZFLR 300 (HC) at 310.

67 *Chesham v Chesham* [1993] NZFLR 300 (HC) at 312.

68 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 4.3.2(a).

69 *Burgess v Beavan* [2010] NZCA 625, [2011] NZFLR 609 at [31]. See also *L v H* [2015] NZFC 1426 and *Miramontes v Brennan* [2017] NZFC 4298.

70 Property (Relationships) Act 1976, s 14(3).

71 *Jackman v Clague* [2016] NZCA 463 at [16]–[17].

Dividing other relationship property

16.8 Section 14(4) provides that other relationship property (excluding the family home and family chattels) is shared equally unless one spouse's contribution to the marriage has clearly been greater than the other's. If that test is satisfied, each spouse's share in any other relationship property is determined in accordance with his or her contribution to the marriage.[72]

Issues with sections 14 and 14AA

What is a just division of property at the end of a short-term marriage?

16.9 It is not clear what a just division of property at the end of a short-term relationship looks like, and whether that goal is achieved by the existing rules for short-term marriages and civil unions in sections 14 and 14AA.

16.10 Section 14 assumes that a just division of property at the end of a short-term marriage generally requires equal division, but that division on a contributions basis may be just in certain circumstances. This incomplete displacement of the general rule of equal sharing may cause perceived unfairness in some circumstances. For example, if one spouse purchased the family home one month before the marriage, the exception under section 14(2)(a) would apply and the general rule of equal sharing would be displaced in relation to that asset. If, however, that partner had waited, and purchased the family home one month into the marriage, section 14(2)(a) would not apply and the property would be shared equally, unless the partner successfully argues that section 14(2)(c) applies.

16.11 The exceptions in section 14(2) are said to represent "untidy qualifications" to the simple, alternative proposition that the general rule of equal sharing has no relevance to a short-term marriage.[73] It might, however, be considered appropriate that section 14 is weighted in favour of equal sharing of the family

72 Property (Relationships) Act 1976, s 14(5).

73 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.78]. Fisher notes "the simple formula that ss 11, 11A, 11B and 12 should not apply to marriages of short duration did not find favour."

home and family chattels because they are central to family life (see further discussion of the "family use" approach in Chapter 9).

The tests in section 14 are unclear and incomplete

16.12 Section 14 has been described as an "indirect and incomplete" statutory route to achieving the apparent legislative purpose of deferring equal sharing of some relationship property until a marriage has survived its initial period as a short-term relationship.[74]

16.13 Specific issues with the section 14(2) exceptions include:

(a) The degrees of ownership implied by the concept of substantial ownership in section 14(2)(a) is difficult to reconcile with the PRA's definition of "owner".[75] Under the PRA an "owner" is the person who is the beneficial owner of the property (see Chapter 8). If a person is the beneficial owner of the property it does not matter that the property is heavily mortgaged or otherwise encumbered.[76]

(b) Sections 14(2)(a) and 14(2)(b) do not appear to extend to the proceeds of sale of a qualifying asset.[77] If that is the case, proceeds are subject to the general rule of equal sharing unless section 14(2)(c) applies.[78] This is different to the way the PRA treats the proceeds of sale and any increase in the value of separate property in sections 9, 9A and 10 (see Chapters 9 and 10).

(c) The degree of disparity required by section 14(2)(c) is unclear. The word "disproportionately" has been described as an "unfortunate choice" as its literal meaning assumes the existence of a desirable standard against which any given proportions are to be

74 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.78].

75 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79] identifies tenancy in common and hire purchase as possible objects of the phrase "wholly or substantially" in Property (Relationships) Act 1976, s 14(2)(a).

76 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79].

77 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.79].

78 Property (Relationships) Act 1976, ss 11(1)(a) and 11(1)(b), 11A, 11B and 12. These rules will not apply if the test in section 14(2)(c) is satisfied.

measured.[79] One interpretation is that section 14(2)(c) requires a greater degree of disparity than that required for other relationship property in section 14(4) ("been clearly greater").[80] This is said to reflect the special position of the family home and chattels, and means that those assets are more likely to be shared equally.[81]

16.14 It could also be clearer how debts are to be dealt with when an exception in section 14 applies to an asset over which a relationship debt is secured. Section 14 does not address debts.

Options for reform

Option 1: Amend the tests in sections 14(2) and 14(4)

16.15 Option 1 retains the current rules of division for short-term marriages and civil unions but makes some changes to sections 14(2) and 14(4) (and the mirror provisions in section 14AA) to address identified issues.

16.16 Options to amend the tests include:

(a) Deleting the words "wholly or substantially" in section 14(2)(a) to reconcile the concept of ownership with the definition of "owner" in section 2 of the PRA.

(b) Amending sections 14(2)(a) and 14(2)(b) to include any increase in value or proceeds of the sale of any qualifying asset. This would mean that property acquired out of a qualifying asset is treated in the same way, enabling a partner to trace his or her assets into other forms of property, as is generally the case with separate property under the PRA.

79 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84]. See also *Treloar v Treloar* (1988) 5 NZFLR 209 (HC) at 215: "This clumsy phrase with its double adverbs has caused some trouble" referring to s 13(1)(c) of the Matrimonial Property Act 1976, which also contained the phrase "clearly been disproportionately greater."

80 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84].

81 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR14.06].

(c) Amending the threshold tests in sections 14(2)(c) and 14(4) to clarify the required degree of disparity in the contributions of the spouses. Options include:

(i) A "bright-line" test, such as a disparity of 60:40 or greater for section 14(2)(c) and a disparity of 55:45 or greater for section 14(4).[82] This would have the advantages of being clear and accessible. However it might be difficult to apply to non-financial contributions.

(ii) Replacing the phrase "clearly been disproportionately greater" in section 14(2)(c) with "significantly greater" to achieve a discretionary standard that is higher than the threshold test in section 14(4) but avoids the issues raised by the current drafting.

Option 2: Adopt contribution-based rules of property division

16.17 This option is to replace the current rules of division for short-term marriages with one rule for all relationship property. A court would determine the share of each spouse in all of the relationship property in accordance with the contribution of each spouse to the marriage. It would effectively eliminate the exceptions in section 14 and extend the property division rules that currently apply when those exceptions are satisfied to all relationship property. It would be consistent with how property is divided when a short-term de facto relationship meets the requirements specified in section 14A(2) (discussed in Chapter 17), and when exceptional circumstances exist that make equal sharing of relationship property repugnant to justice (section 13). There is, therefore, an established body of case law that considers this approach to property division.

16.18 This option would be simpler than the current approach, because one set of rules would apply to all relationship property. It would also end special treatment of the family home and chattels, which may be considered less appropriate in a short-term relationship (see the discussion of the family use approach to classification in Chapter 9). Removing the presumption of equal sharing

82 See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.84].

of the family home and chattels could, however, increase the likelihood of unequal division when a short-term marriage ends. This may favour the partner that has made a substantial financial contribution where the marriage has not lasted long enough for the other partner's non-financial contributions to build up.

Option 3: Equal sharing of the fruits of the relationship

16.19 In Chapter 9 we considered the option of a different definition of relationship property for shorter relationships based on a "fruits of the relationship" approach.[83] Under that approach, the property one partner acquires before the relationship, or receives as a gift or inheritance during the relationship, will generally remain separate property. This applies even if the property is used as the family home or as a family chattel. When the partners separate, they would only divide the property that had been acquired during the relationship.

16.20 The fruits of the relationship approach may have particular appeal for short-term relationships as it focuses on the product of the partners' joint and several contributions and excludes property which has not been produced or improved by the relationship. This may better align with the values and norms of relationships in contemporary New Zealand. The rationale for special treatment of the family home and chattels may be weaker in a short-term relationship because the partners have had less time to build a close association with the property and make it "theirs" (see the discussion of the family use approach to classification in Chapter 9). Adopting this option would, however, lead to two definitions of relationship property and associated uncertainty unless this approach is also extended to qualifying relationships. This is considered as an option in Chapter 9.

16.21 This option is different to the current rules in section 14. For example, a family home or chattel that was wholly owned by one partner before the marriage began would probably remain that partner's separate property under a fruits of the relationship approach. It would not be divided at the end of the relationship. Under section 14, such assets would probably be divided based

83 See also Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

on each partner's contribution to the relationship. This option would therefore remove the special status of the family home and chattels and is likely to reduce the property pool available for division at the end of some short-term relationships. In Chapter 9 we discuss in more detail the advantages and disadvantages of the different approaches to defining relationship property.

CONSULTATION QUESTION

E5 Which of these options do you prefer, and why?

Chapter 17 – Short-term de facto relationships

17.1 Short-term de facto relationships, unlike short-term marriages and civil unions, generally fall outside the PRA.[84] A court cannot make a property division order in respect of a short-term de facto relationship unless the test in section 14A(2) is passed. That test does not apply to short-term marriages or civil unions.

17.2 If the section 14A(2) test is passed, the rules of division that apply to short-term de facto relationships are different to those that apply to short-term marriages and civil unions. If the test is not passed, partners in short-term de facto relationships do not have property rights under the PRA.

Background to section 14A

17.3 Section 14A was carried over from the De Facto Relationships (Property) Bill 1998 (Bill).[85] That Bill sought to provide a different property division regime for de facto relationships, recognising the view that they should not be equated with marriages.[86] The Bill did not progress and instead the 2001 amendments extended the PRA to cover de facto relationships. Despite the PRA's equal treatment of qualifying relationships, there remained a view that it would generally be unfair to equate short-term de facto relationships with short-term marriages and civil unions.[87] This was probably based on the idea that short-term de facto relationships lacked the required degree of commitment and permanence.[88] Section 14A was likely retained as a safety valve to cater to exceptional circumstances where the general exclusion of short-term de facto relationships would cause injustice.

84 Property (Relationships) Act 1976, s 4(5). As discussed in Chapter 16, marriages and civil unions are automatically covered by the Property (Relationships) Act 1976.

85 De Facto Relationships (Property) Bill 1998 (108-1), cl 59.

86 (26 March 1998) 567 NZPD 7918.

87 See paragraph 15.54 above.

88 See Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 208.

17.4 The section 14A test has been the subject of considerable judicial debate. Parts of section 14A have been described as "inherently vague".[89] This has the potential to undermine the principle that questions arising under the PRA be resolved as inexpensively, simply, and speedily as is consistent with justice.[90]

The section 14A(2) test

17.5 A short-term de facto relationship must pass the test in section 14A(2) before a court can order the division of property under the PRA. Section 14A(2) is a two-step test:

> (2) If this section applies, an order cannot be made under this Act for the division of relationship property unless—
>
> (a) the court is satisfied—
>
> (i) that there is a child of the de facto relationship; or
>
> (ii) that the applicant has made a substantial contribution to the de facto relationship; and
>
> (b) the court is satisfied that failure to make the order would result in serious injustice.

17.6 The meaning of "child of the de facto relationship" in section 14A(2)(a)(i) is wide.[91] It includes two categories of children: any child of both de facto partners; and any other child who was a member of their family at the relevant time. The second category has been construed narrowly,[92] but may potentially include stepchildren, foster children and some children who are also members of another household, such as where care is shared. The definition is discussed in detail in Part I.

17.7 The "substantial contribution" requirement in section 14A(2)(a)(ii) was considered in *S v J*.[93] In that case the applicant had carried out the full range of domestic tasks, provided some funds used to buy a car, worked hard in the other partner's business, and gave

89 Bill Atkin "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in Recent New Zealand Legislation" (2008) 39 VUWLR 793 at 809.

90 Property (Relationships) Act 1976, s 1N(d).

91 Property (Relationships) Act 1976, s 2 definition of "child of the de facto relationship".

92 *M v L* (2005) 24 FRNZ 835 (FC).

93 *S v J* [2005] NZFLR 932 (FC).

up her life overseas to make a life with the other partner in New Zealand.[94] The Family Court was satisfied that this amounted to a "substantial contribution."

17.8 Even if one of the criteria in section 14A(1)(a) is met, the applicant must still satisfy the court that a failure to make a property division order would cause "serious injustice." This test was satisfied in *L v D* because the High Court considered it would have been a serious injustice for the applicant not to share in capital gains that were a result of her substantial contribution to the development and management of the other partner's vineyard.[95]

The property division rules

17.9 If the test in section 14A(2) is satisfied, the property division rules in section 14A(3) apply. That section provides that each partner's share of relationship property is to be determined in accordance with his or her contribution to the de facto relationship. Contributions are listed in section 18, and include monetary and non-monetary contributions.

Issues with section 14A

The PRA treats short-term de facto relationships differently to short-term marriages and civil unions

17.10 The key issue with section 14A is that it treats short-term de facto relationships differently to short-term marriages and civil unions. Short-term de facto relationships must meet additional requirements before a court can make a property division order, and even if those requirements are met, the rules of division that apply to short-term de facto relationships are different. The general rule of equal sharing, which still applies to short-term marriages and civil unions in some circumstances, does not apply at all to short-term de-facto relationships.[96]

94 *S v J* [2005] NZFLR 932 (FC) at [68]–[69].

95 *L v D* HC Blenheim CIV 2006-406-293, 2 November 2010 per Wild J at [56].

96 The general rule of equal sharing will apply to short-term marriages and civil unions when the specified circumstances in ss 14(2) and 14AA(2) of the Property (Relationships) Act 1976 do not apply.

17.11 In Chapter 3 we explained that an implicit principle of the PRA is that the law should apply equally to all relationships that are substantively the same. This principle is driven by equality as expressed in anti-discrimination laws and reflects a shift in family law policy towards greater recognition of a wide range of family relationships. In Chapter 5 we expressed our preliminary view that the PRA should continue to apply in the same way to all qualifying relationships that are substantively the same, regardless of relationship type. The issue here is whether the PRA should also apply equally to all short-term relationships, regardless of relationship type.

17.12 It might be argued that the current approach is appropriate because short-term de facto relationships are different to short-term marriages and civil unions, and as such equal treatment would not lead to a just division of property for short-term de facto relationships. This might be because commitment in a de facto relationship may be ambiguous or low at the beginning due to the way commitment in informal relationships grows over time, and it would be unfair to impose the PRA on unsuspecting persons. It is not as easy to say the same of marriages, which are commonly preceded by a de facto relationship, are registered "opt-in" relationships and generally involve a public ceremony. People who get married can be reasonably expected to appreciate that their change of legal status will carry some property consequences.[97] Some of the arguments for a longer qualifying period for de facto relationships (see paragraph 15.24) may also support a view that the PRA should treat short-term de facto relationships differently.

17.13 We are not, however, convinced that different rules for short-term de facto relationships are justified in contemporary New Zealand. There are few areas of law that still distinguish between relationship types in this way.[98] More people are living in de facto relationships and social attitudes towards them are likely to have changed.[99] It may now be considered unfair, unjust and

97 See Margaret Briggs "The Formalization of Property Sharing Rights for De Facto Couples in New Zealand" in Bea Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna, 2009) 329 at 340. Civil unions are in a similar position to marriages.

98 Note the Relationships (Statutory References) Act 2005 which amended statutes and regulations that contained unjustified discrimination on the grounds of marital status or sexual orientation.

99 See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

inconsistent with anti-discrimination laws to deny legal rights to people on the basis of their marital status.[100]

17.14 Equal treatment of short-term relationships in the PRA would not necessarily mean equal division, because the PRA's special property division rules for short-term relationships can dilute or displace the general rule of equal sharing. Nor would this necessarily "open the floodgates", because a relationship must still qualify as a de facto relationship in the first place, and this qualification should restrict the PRA's application to relationships that are substantively the same.

17.15 Whether different rules for short-term de facto relationships should continue needs to be evaluated in the light of what we know about the similarities and differences between different relationship types.

Similarities and differences between how relationships function

17.16 Some overseas experts see relationships between partners that live together as very similar to marriage, "…just a modern, private, 'do it yourself' form of marriage, in which couples are 'as good as' married."[101] Others see these relationships as very different to marriage, or as a "try and see" strategy only part way to the full mutual commitment of marriage.[102] Another view again is that these relationships are preferable to marriage, "…part of a liberating shift towards more egalitarian gender roles …in which couples only stay together if the relationship continues to meet their individual needs."[103]

17.17 There is little New Zealand research on the similarities and differences (if any) between relationship types. Many still see

100 The New Zealand Bill of Rights Act 1990, s 19 and the Human Rights Act 1993, s 21 prohibit unjustified discrimination on the grounds of marital status and family status.

101 Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) Journal of Socio-Economics 552 at 554, citing Anne Barlow and others *Cohabitation, Marriage and the Law* (Hart, Oxford, 2005); Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) CFLQ 383; and J Lewis *The End of Marriage* (Edward Elgar, Cheltenham, 2001).

102 Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) Journal of Socio-Economics 552 at 554 referring to C Smart and P Stevens *Cohabitation Breakdown* (Family Policy Studies Centre, London, 2000); and J Ermisch and M Francesconi "Patterns of household and family formation" in Richard Berthoud and Jonathan Gershuny (eds) *Seven Years in the Lives of British Families* (Policy Press, Bristol, 2000) 21.

103 Carolyn Vogler, Michaela Brockmann and Richard D Wiggins "Managing money in new heterosexual forms of intimate relationships" (2008) 37(2) Journal of Socio-Economics 552 at 554, referring to A Giddens *The Transformation of Intimacy* (Polity Press, Cambridge, 1992); and U Beck and E Beck-Gernsheim *The Normal Chaos of Love* (Polity, Cambridge, 1995).

marriage as the "gold standard" of commitment.[104] Commitment for couples that live together is more often seen as a private matter and something that grows over time,[105] emerging at some point prior to marriage if the relationship takes that path. Some New Zealand research has found that married and unmarried couples who have children describe commitment, and what it means to them, in similar ways.[106] We know very little about civil unions in New Zealand as this relationship type is relatively new and few people enter into civil unions.[107] Literature on money management within New Zealand relationships is sparse and based on older data. A small New Zealand study of unmarried couples calls into question the strength of the association between relationship type and money management style.[108] Money management in relationships is discussed in Chapter 6.

17.18 These different views on the similarities and differences between relationship types are likely due to a number of factors, including different religious and social values, the diversity of couples that live together and the changes that occur as these relationships progress. Baker and Elizabeth identified four types of unmarried couples that live together:[109]

(a) **Co-residential dating**: These relationships are said to be very much about the here and now, without any particular thought to the future.[110] This is said to be a

104 Maureen Baker and Vivienne Elizabeth *Marriage in an Age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 184.

105 Vivienne Elizabeth and Maureen Baker "Transiting through cohabitation to marriage: emerging commitment and diminishing ambiguity" (2015) 4(1) Families, Relationships and Societies 53 at 67.

106 Jan Pryor and Josie Roberts "What is Commitment? How married and cohabiting parents talk about their relationships" (2005) 71 Family Matters 24 at 31. The 2003 New Zealand Relationship Commitment Study examined the accounts of 30 married and 20 cohabiting couples with children in Wellington. There was no difference in the time they had been in their current relationships (12.5 years). Researchers in the United Kingdom also say that "[e]mpirical studies, including our own, routinely record expressions of commitment by cohabitants that are little different from those of married spouses": Simon Duncan, Anne Barlow and Grace James "Why don't they marry? Cohabitation, commitment and DIY marriage" (2005) 17(3) CFLQ 383 at 388 citing J Ekelaar and M Maclean "Marriage and the moral bases of personal relationships" (2004) 31(4) Journal of Law and Society 510. See also L Jamieson et al "Cohabitation and commitment: partnership plans of young men and women" (2002) 52(3) Sociological Review 354; C Lewis, A Papacosta and J Warin *Cohabitation, Separation and Fatherhood* (Joseph Rowntree Foundation, 2002); and J Lewis T*he End of Marriage? Individualism and Intimate Relationships* (Edward Elgar, 2001).

107 Partners have been able to enter into a registered civil union in New Zealand since 2005: Civil Union Act 2004, s 2. See n 38 above and Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1 for statistics on the number of people entering into civil unions.

108 See Vivienne Elizabeth "Managing money, managing coupledom: a critical examination of cohabitants' money management practices" (2001) 49 Sociological Review 389.

109 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 8–9.

110 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 9. Co-residential dating can be seen as an initial phase of a relationship where partners live in the same house.

common pattern, especially among young people.[111] It is unlikely that many of these early-stage relationships are de facto relationships under the PRA.

(b) **Trial marriage**: Living together is thought to take the form of a trial marriage for the majority of opposite-sex couples.[112] It allows couples to see if they are suitably matched and can "justify the next step." As we discuss in our Study Paper, living together has become the normal precursor to marriage for the vast majority of couples.[113]

(c) **An alternative to marriage**: These couples may reject the patriarchal, heterosexual or religious overtones associated with marriage.[114]

(d) **The same as marriage**: This group includes long-term, opposite-sex couples that live together, often with children.

17.19 The available research suggests that the reasons couples live together will vary, as will their level of commitment, the degree of relationship fragility and their intentions to enter a marriage or civil union. Couples will also vary in why they married or entered into a civil union, how their marriage or civil union functions, and their level of commitment to the marriage or civil union.

111 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 9.

112 Maureen Baker and Vivienne Elizabeth *Marriage in an age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 8 citing Gordon A Carmichael and Andrea Whittaker "Living Together in Australia: Qualitative Insights into a Complex Phenomenon" (2007) 13(2) Journal of Family Studies 202; Ernestina Coast "Currently Cohabiting: Relationship Attitudes, Expectations and Outcomes" in John Stillwell, Ernestina Coast and Dylan Kneale (eds) *Fertility, Living Arrangements Care and Mobility: Understanding Population Trends and Processes* (Springer, Dordrecht, 2009) 105; Wendy Manning, Jessica A Cohen and Pamela J Smock "The Role of Romantic Partners, Family, and Peer Networks in Dating Couples' Views About Cohabitation" (2011) 26(1) Journal of Adolescent Research 115; and Lixia Qu "Expectations of Marriage Among Cohabiting Couples" (2003) 64 Family Matters 36.

113 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 1.

114 Maureen Baker and Vivienne Elizabeth *Marriage in an Age of Cohabitation: How and When People Tie the Knot in the Twenty-First Century* (Oxford University Press, Canada, 2014) at 9 referring to Vivienne Elizabeth "Something Old. Something Borrowed. Something New. Heterosexual Cohabitation as Marriage Resistance? A Feminist Deconstruction." (PhD thesis, University of Canterbury, 1997).

The section 14A(2) test is unclear

It is unclear what constitutes a "substantial contribution to the de facto relationship"

17.20 The PRA does not define or provide any guidance on what constitutes a "substantial contribution" to the de facto relationship.[115] The courts have developed different and sometimes conflicting approaches.[116]

17.21 Early Family Court decisions assessed whether the contribution was a departure of some degree from "the norm."[117] However in *L v P* the High Court considered it was difficult to assume a supposed norm of contributions or even a "norm" of a de facto relationship.[118] The Court considered it more helpful to focus on the natural meaning of the word, noting that the dictionary definition of "substantial" was something of "real importance or value", and that therefore there was no need to refine the meaning further.[119] The High Court in *L v D* however said that "substantial" was a well understood word and did not see the need to resort to dictionary definitions.[120] In *H v H* the High Court was attracted to the "departure from the norm" approach originally taken by the Family Court, but thought that attempts to define the precise degree of departure from the norm required were not of particular assistance.[121] The Court said that a "substantial contribution" is a contribution of real importance or value over and above what would usually be expected from the partners in the normal course of their relationship.[122] More recently, the High Court in *Picton v Uxbridge* was not convinced that it is necessary to limit the natural meaning of "substantial contribution" as it

115 Property (Relationships) Act 1976, s 14A(2)(a)(ii). Contributions to the marriage, civil union or de facto relationships are however defined in s 18.

116 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.05] referring to *Schmidt v Jawad* (2003) 23 FRNZ 101 (FC) and *S v J* [2005] NZFLR 932 (FC).

117 For example, in *Schmidt v Jawad* [2003] NZFLR 1050 (FC) at [15] the Family Court held that a substantial contribution to a de facto relationship is one which goes far beyond the norm. In *S v J* [2005] NZFLR 932 (FC) at [66] the Family Court disagreed, saying that a substantial contribution may need to be beyond the norm, but not far beyond the norm.

118 *L v P* [2008] NZFLR 401 (HC) at [70].

119 *L v P* [2008] NZFLR 401 (HC) at [70].

120 *L v D* HC Blenheim CIV-2006-406-293, 2 November 2010 at [47].

121 *H v H* [2013] NZHC 443, [2013] NZFLR 387 at [55].

122 *H v H* [2013] NZHC 443, [2013] NZFLR 387 at [56].

was in *H v H*.[123] The Court said that the applicant's contribution need not be out of the ordinary or far beyond the norm, and that it is sufficient if it is substantial in the sense of being of real importance or value.[124] As a result of these differing approaches there is said to be a lack of consistency and predictability in how the courts apply this requirement.[125]

The threshold for "serious injustice" is unclear

17.22 The phrase "serious injustice" is not defined in the PRA.[126] It has been described as "inherently vague"[127] and is said to provide "fertile ground for legal argument and judicial interpretation."[128]

17.23 In *Gibbons v Vowles* the Family Court said that a comparison is needed between the consequences for the partners if an order is made and if it is not.[129] The High Court took a similar approach in *L v P*:[130]

> *In assessing "serious injustice" it is legitimate to apply the concept of a party getting a just return for "contributions"… It is also relevant to consider the concepts that have been developed in constructive trust cases relating to de facto relationships, referred to in Lankow v Rose [1995] 1 NZLR 277, (1994) 12 FRNZ 682 (CA). The concept of a return for contributions and the notion of a constructive trust can be seen as a benchmark of entitlement, against which the position of the applicant if a Court does not interfere can be measured. If the status quo after separation without the intervention of the Court results in a return that is less than the entitlement under s 14A(3) and Lankow v Rose, there will be a serious injustice.*

17.24 The meaning of the phrase "serious injustice" has been considered in several cases.[131] In *Schmidt v Jawad* the High Court said that

123 *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41].

124 *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41]-[42].

125 Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 208.

126 Property (Relationships) Act 1976, s 14A(2)(b).

127 Bill Atkin "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in Recent New Zealand Legislation" (2008) 39 VUWLR 793 at 809.

128 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.06].

129 *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [9]. The Family Court also said at [6] that "serious injustice" is a higher threshold than merely "unjust" as used in s 21(8) of the Matrimonial Property Act 1976 and a lower threshold than "repugnant to justice" as used in the exception to equal sharing in s 13 of the Property (Relationships) Act 1976.

130 *L v P* (2007) [2008] NZFLR 401 (HC) at [75]. See also *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [8]–[12].

131 For example, *S v J* [2005] NZFLR 932 (FC) at [73].

"serious injustice" means what it says: it is more than an injustice – it is a serious injustice.[132] It warned that using other words instead of "serious" risks changing the test.[133]

17.25 The issue is further complicated because a "serious injustice" test is used in other sections of the PRA. For example, a court may set aside an agreement under section 21J if giving effect to it would cause "serious injustice".[134] There are different views as to whether the phrase "serious injustice" should be interpreted in a similar fashion throughout the PRA.[135]

17.26 The PRA does not expressly indicate who must experience "serious injustice" if an order is not made.[136] The focus is usually on the applicant. Arguably serious injustice for children of the de facto relationship if an order is not made should be considered in a more direct way.[137] This would be consistent with the existing requirement to have regard to the interests of any minor or dependent children of the relationship in PRA proceedings.[138] It would also be consistent with the focus on children in section 14A(2)(a)(i).

The test sets a high bar for relationships with children

17.27 Short-term de facto relationships with children pass the test in section 14A(2) if a court is satisfied that failure to make an order would cause "serious injustice". The requirement for serious injustice sets a high bar. It means that a court will not be able to make a property division order for some short-term de facto relationships with children.[139] Yet an increasing number of

132 *Schmidt v Jawad* [2006] NZFLR 410 (HC) at [34]. See also *Public Trust v W* [2005] 2 NZLR 696 (CA) in the context of an application for leave to apply for an order under section 88(2) of the Property (Relationships) Act 1976. In that case the Court of Appeal said that the "serious injustice" test can be applied directly, and there is no need to put a gloss on the words used by Parliament.

133 *Schmidt v Jawad* [2006] NZFLR 410 (HC) at [34].

134 Property (Relationships) Act 1976, s 21J.

135 See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [5], the discussion in *S v W* [2006] 2 NZLR 669 (HC) at [132] and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR14A.06].

136 Property (Relationships) Act 1976, s 14A(2)(b).

137 There is an argument that the interests of children are indirectly recognised if serious injustice exists due to the resulting economic disparity created because one partner assumed primary care of the child after the relationship ended: see *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10].

138 Property (Relationships) Act 1976, s 26(1).

139 Compare Family Law Act 1975 (Cth) (Australia), s 90SB.

children are born outside marriage.[140] In 2016, 46 per cent of all births in New Zealand were ex-nuptial, up from 17 per cent in 1976.[141] There is also some evidence about commitment and the management of money in relationships that questions the basis for distinguishing between parents based on relationship type (see paragraph 17.17). It might also be argued that a child is a sufficient marker of commitment in a short-term de facto relationship and that all such relationships should be subject to the PRA due to the change in the partners' relationship and obligations wrought by parenthood.

Options for reform

Options for reforming section 14A(2)

17.28 It is important that options for reforming the section 14A(2) test are considered in the light of the property division rules that would apply when the test is satisfied or if it no longer applies. For example, if equal sharing of the fruits of the relationship (as explained in option 3 of Chapter 16) applies, option 1 (repeal section 14A(2)) may be considered appropriate because a fruit of the relationship approach may achieve a just division of property without the need for an additional test.

Option 1: Repeal section 14A(2)

17.29 Our preliminary view is that in contemporary New Zealand it is difficult to justify a provision like section 14A(2) that treats short-term de facto relationships so differently to short-term marriages and civil unions. It follows that our preliminary view is that section 14A(2) should be repealed. This would remove a significant hurdle for short-term de facto relationships and bring the PRA's treatment of short-term de facto relationships more in line with the treatment of short-term marriages and civil unions. It would also reduce complexity of the law and, in doing so, promote the resolution of property matters out of court.

140 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 2.

141 Statistics New Zealand "Live births by nuptiality (Māori and total population) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

17.30 This option would likely increase the number of short-term de facto relationships covered by the PRA. Short-term relationships would, however, still need to satisfy the definition of de facto relationship in section 2D in order to be covered by the PRA. That definition is designed to capture relationships that are substantially the same as marriages and civil unions. The definition of de facto relationship is discussed in detail in Chapter 5. A de facto relationship would still need to satisfy the minimum duration requirement before the general rule of equal sharing applied.

Option 2: Retain section 14A(2) but clarify its application

17.31 If there is a need to retain section 14A(2), then another option is to clarify its application. This option has two elements. The first is to clarify the threshold in section 14A(2)(a)(ii) of a "substantial contribution to the de facto relationship". This could be achieved by adopting either:

(a) A threshold guided by the plain meaning and dictionary definition of "substantial" in the sense of being of real importance or value. Panchal considers this approach would be most in line with the policy behind the 2001 amendments and the principle of inexpensive, simple and speedy resolution of property matters as is consistent with justice.[142] It would also follow more recent cases like *Picton v Uxbridge*, where the High Court said that a substantial contribution may not be an unusual feature of a short-term relationship.[143] This approach would also avoid comparisons with other relationships, which can be unhelpful given the variety of relationships the PRA covers.[144]

(b) A threshold that asks whether the contribution is beyond, or far beyond, "the norm". As already noted, there is no such thing as "normal" in relationships given the range and variety that exist. It is even difficult to say what is "normal" in a specific relationship given that

142 Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 212–213.

143 *Picton v Uxbridge* [2015] NZHC 1050, [2015] NZFLR 935 at [41].

144 See Tejal Panchal "Relationship property de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 212–213.

a substantial contribution is likely to reflect the wider context.[145]

17.32 Our preliminary view is that, of these two alternatives, we prefer the first.

17.33 The second element of option 2 is to provide the courts with guidance on what constitutes "serious injustice" for the purposes of section 14A(2)(b). The PRA could be amended to include a list of relevant factors. This could include matters such as:[146]

(a) the PRA's policy of a just division of property at the end of a relationship;[147]

(b) a comparison between the likely consequences for the parties and any children if an order is made, and if an order is not made;[148]

(c) whether the ongoing daily care of children may create a serious degree of economic disparity between the partners on separation;[149]

(d) whether there has been such a disparity of contributions that a refusal to address it could amount to serious injustice;[150]

(e) the availability and ease of obtaining alternative remedies under any other enactment or rule of law or of equity;[151]

(f) any other matters that a court considers relevant.

145 Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 209.

146 There is precedent for this approach in s 21J(4) of the Property (Relationships) Act 1976 which lists factors the court must have regard to when deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice: see Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 213.

147 *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [7]. The policy of the Property (Relationships) Act 1976 is discussed in Chapter 3.

148 See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [8].

149 See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10]; and Property (Relationships) Act 1976, s 15.

150 See *Gibbons v Vowles* (2003) 22 FRNZ 946 (FC) at [10]. An approach that requires the balancing of each party's contribution to the relationship was also taken in *L v P* (2007) 26 FRNZ 946 (HC) and *L v D* HC Blenheim CIV 2006-406-293, 2 November 2010..

151 Tejal Panchal "Relationship property and de facto relationships of short duration: how can we fix the law?" (2016) 8 NZFLJ 206 at 214.

Option 3: Introduce a different test for short-term de facto relationships with children and give the courts greater discretion

17.34 This option would introduce different eligibility criteria for de facto relationships with children. As with options 1 and 2, a relationship would still need to qualify as a "de facto relationship." This option could work together with option 2.

17.35 One approach would be to remove the requirement to satisfy the "serious injustice" limb of the section 14A(2) test and treat short-term de facto relationships with children the same as short-term marriages and civil unions. This would mean that all short-term de facto relationships with children would be covered by the PRA, regardless of whether failure to make an order would cause serious injustice.[152]

17.36 An alternative approach would be to lower the threshold in section 14A(2)(b) from "serious injustice" to "injustice" for short-term de facto relationships with children.

17.37 In each case the court should have discretion to treat a short-term de facto relationship without children the same as a short-term de facto relationship with children, if it is just to do so having regard to all the circumstances of the relationship. This is important to help mitigate injustice or disadvantage that may result from the distinction drawn between short-term de facto relationships with and without children.

17.38 This option may indirectly benefit some children through their parent's claim, but it also has the potential to disadvantage other children where the applicant is not the primary caregiver.[153] For example, it could disadvantage children of the de facto relationship that are the applicant's stepchildren and who, going forwards, will be living with the other partner. This option must also be considered in light of the definition of "child of the de

152 This would broadly follow a recommendation made by the Law Commission of England and Wales in its review of aspects of the law relating to unmarried couples that live together. It recommended that couples with a child together ought to be eligible to apply for financial relief on separation without having to satisfy any minimum duration requirement. See Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (LAW COM No 307, 2007) at [3.26]–[3.31]. See also Family Law Act 1975 (Cth) (Australia), s 90SB, which provides that a court can make certain orders in relation to a de facto relationship if there is a child of the de facto relationship: no additional "serious injustice" test applies.

153 See the discussion in *H v C* FC Christchurch FAM-2007-057-000337, 30 August 2011 at [44]–[47].

facto relationship" and the option considered in Part I of a broader definition of "member of the family."[154]

17.39 Because this option treats relationships differently based on family status, it may raise issues under human rights law.[155] Different treatment may also devalue de facto relationships without children and stigmatise this group as less worthy of statutory protection than couples with children.

Options for reforming section 14A(3)

17.40 We are not convinced that different rules for short-term de facto relationships are justified in contemporary New Zealand. It follows that our preliminary view is that the same property division rules should apply to all short-term marriages, civil unions and de facto relationships. This could be achieved by adopting, for all short-term relationships, either:

(a) the rules for short-term marriages and civil unions in sections 14 and 14AA, with amendments to the tests in sections 14(2) and (4) as explained in option 1 of Chapter 16;

(b) the rule for short-term de facto relationships in section 14A(3), which provides for the division of relationship property on a contributions basis, identified as option 2 of Chapter 16; or

(c) equal sharing of the fruits of the relationship as explained in option 3 of Chapter 16.

17.41 Adopting the same property division rules for all short-term relationships would address the issue we have with the way the PRA treats short-term de facto relationships differently to short-term marriages and civil unions. It recognises the implicit principle that the PRA should apply equally to all relationships that are substantively the same. It would be a simple, clear and consistent approach to property division at the end of a short-term relationship. This option is not, however, consistent with the view that different relationship types tend to form, function and endure in different ways, and that treating all relationships in the same way does not does not always lead to a just result. As noted

154 Property (Relationships) Act 1976, s 2 definition of "child of the de facto relationship."

155 Human Rights Act 1993, s 21(1)(l). See the discussion of human rights law issues in Chapter 16.

at paragraphs 17.16 to 17.19, the available research does not, however, necessarily support that view.

17.42 The property division rules for de facto relationships could be changed independently of the rules for marriages and civil unions, for example by adopting a fruits of the relationship approach for de facto relationships only. However we do not favour this option as it would still treat short-term de facto relationships differently to other short-term relationships.

CONSULTATION QUESTIONS

E6 Which option for the reform of section 14A(2) (options 1 – 3) do you prefer, and why?

E7 Should there be one set of property division rules for all short-term relationships? If so, what rules should apply and why?

Part F – What should happen when equal sharing does not lead to equality?

Chapter 18 – Does section 15 achieve post-separation equality?

Introduction

18.1 Section 15 of the PRA provides that a court can order one partner to compensate the other when there is likely to be a significant difference in income and living standards post-separation, as a result of the division of functions within the relationship. Broadly speaking, section 15 seeks to address situations where the general rule of equal sharing does not lead to a just division of property. Our preliminary view is that section 15 has had limited success in achieving this objective.

18.2 In this chapter we review the history of section 15 and analyse how it has been applied by the courts, including how the courts determine the amount of compensation payable when a section 15 claim succeeds. We also identify issues with how section 15 operates.

18.3 In Chapter 19 we discuss three potential options for reform. Option 1 focuses on improving the operation of section 15. Option 2 looks at how the objective of section 15 could be achieved by changing other PRA rules. Option 3 is to combine section 15 compensation payments and maintenance payments into one regime of "financial reconciliation" payments.

18.4 At the time of writing, a decision of the Supreme Court on the operation of section 15 is pending.[1] This is the first time section 15 has come before the Supreme Court. The Court's decision is likely to have implications for interpreting and applying section 15 but at this point we can only take the lower courts' decisions into account in our discussion.

1 Leave to appeal and cross-appeal was granted in *Scott v Williams* [2016] NZSC 149. The case was heard by the Supreme Court in March 2017.

Historical background

18.5 The concerns that led to the enactment of section 15 in 2001 go back to 1988, when a Working Group was established to review the Matrimonial Property Act 1976.[2] The Working Group looked at the "considerable topical concern" that *equal* division of matrimonial property had failed to secure an *equitable* result.[3] The heart of the debate about equality and equity, the Working Group said, was "the economic consequence of current sex roles in our society."[4] It did not, however, "see matrimonial property law as a feasible vehicle for securing equality of outcome between the sexes when a marriage breaks down."[5]

18.6 In 1996 the Court of Appeal acknowledged the limitations of the Matrimonial Property Act in *Z v Z* (No 2).[6] The Court was asked to consider whether earning capacity was "property", and whether enhanced earning capacity could be "matrimonial property" under the Act.[7] The Court said that earning capacity did not fall within the Act's definition of property, and that it was not Parliament's intention to include enhanced earning capacity within the scope of matrimonial property to be divided at the end of a relationship.[8] The Court reached this conclusion "notwithstanding the strength of the argument… that to treat enhanced earning capacity as matrimonial property is consistent with the policy and spirit of the legislation."[9]

18.7 The Court noted that the Matrimonial Property Act had been harsh on women:[10]

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2 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships. The Working Group was to deal with the broad policy issues, rather than to produce a blueprint for new legislation: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

3 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4–15.

4 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

5 Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 12. The Working Group did however recommend changes to the rules of division that "go some way towards alleviating the detrimental effects of marriage breakdown". These recommendations included extending the general rule of equal sharing to all categories of relationship property (previously it only applied to the family home and family chattels). This effectively brought more assets into the pool of matrimonial property available for equal division (at 13).

6 *Z v Z* (No 2) [1997] 2 NZLR 258 (CA). The decision was given by the full bench of seven judges of the Court of Appeal.

7 Pursuant to s 8(e) of the Matrimonial Property Act 1976.

8 *Z v Z* (No 2) [1997] 2 NZLR 258 (CA) at 280.

9 *Z v Z* (No 2) [1997] 2 NZLR 258 (CA) at 280–281.

10 *Z v Z* (No 2) [1997] 2 NZLR 258 (CA) at 275.

> *There is growing recognition that the division of matrimonial property under the Matrimonial Property Act is operating harshly on those women who have foregone their own participation in the workforce, other possibly than on a part-time or temporary basis, and who have supported the advancement of their husbands' careers by managing the household and caring for the children of the marriage. At the same time their husbands who have remained in employment, have acquired experience, skills or qualifications which have increased their earning capacity. At the time of the dissolution of the marriage they are then in the advantageous position of being able to recover from the effect of the division of the matrimonial assets and earn, sometimes in a relatively short time, a substantial income. By comparison, because of the role which she has assumed in the marriage, the wife is ill-equipped to rejoin the workforce and earn an income. Further, where the efforts of the couple during the marriage have been directed at building up the husband's income-earning potential, the wife's share of the matrimonial home and other matrimonial assets may not be significant. Many such wives, as in this case, become beneficiaries while their husbands continue to earn a substantial income.*

18.8 Something more than an equal division of relationship property was required to ensure a just result. The Matrimonial Property Amendment Bill was introduced into Parliament in 1998, but it was not until a change of government in 1999 that amendments were made to the Bill addressing "the issue of economic disadvantage suffered by a non-career partner when a relationship breaks down."[11] These amendments included section 15 and would permit departure from equal sharing where necessary to give effect to justice.[12]

18.9 The Parliamentary select committee considering the proposed amendments inserted a set of principles into the Matrimonial Property Act, now to be renamed the PRA. These included the principles that "men and women have equal status, and their equality should be maintained and enhanced",[13] that a "just division of relationship property has regard to the economic advantages or disadvantages" to the partners arising from their

11 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and 74-75.

12 Other provisions that were inserted into the Property (Relationships) Act 1976 in order to address economic disadvantage suffered by a non-career partner were ss 9A(2) and 15A: Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71–72. These provisions are discussed in Chapter 10.

13 Property (Relationships) Act 1976, s 1N(a).

relationship or from the end of the relationship,[14] and that "all forms of contribution to the… relationship are to be treated as equal."[15] Section 15 must be read in the context of these principles.[16]

18.10 The "underlying notion" in introducing section 15 was one of equity; "that it is sometimes fair to treat people differently to achieve a just outcome."[17]

What is section 15 trying to achieve?

18.11 The PRA generally treats a qualifying relationship as a partnership or joint venture to which each partner contributes equally, although perhaps in different ways.[18] Each partner's contributions to the relationship result in an entitlement to an equal share in the property of the relationship.

18.12 Section 15 recognises that equal sharing will not always result in a just division of relationship property. One partner (**partner A**) can be compensated by the other partner (**partner B**) when the post-separation income and living standards of partner B are likely to be significantly higher than partner A because of the way the partners carried out their respective functions during the relationship. This is because it would be unjust for partner B to enjoy the full benefits of the relationship partnership or joint venture, in which both partners had worked and had expected to share into the future.

18.13 Section 15 is not about addressing post-separation *needs*. When partners cannot meet their own post-separation needs or those of their children, other "pillars of financial support" are available.[19] These are maintenance, child support and State benefits. Each addresses a different issue and together with the PRA they establish a framework of financial support and influence post-

14 Property (Relationships) Act 1976, s 1N(c).

15 Property (Relationships) Act 1976, s 1N(b).

16 The policy and principles of the Property (Relationships) Act 1976 are discussed in Chapter 3.

17 Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 NZFLJ 276.

18 This is reflected in the explicit and implicit principles of the PRA, discussed in Chapter 3.

19 See discussion in Chapter 2 and also Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in J Eekelaar and R George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) at 141.

separation financial recovery. We discuss maintenance in Chapter 19.[20]

18.14 We continue to use the terms "partner A" and "partner B" throughout this Part. In keeping with the language of section 15, partner A is the applicant for an order under section 15 (or the "non-career partner")[21] and partner B is the other partner.

What is "economic disparity"?

18.15 The term "**economic disparity**" is often used in connection with section 15, even though it is not used or defined in the section itself.[22] In this Part we use the term economic disparity in the narrow sense, to mean the requirement in section 15 that the income *and* living standards of partner B are likely to be *significantly* higher than partner A.

18.16 Economic disparity alone does not satisfy the requirements of section 15. The economic disparity must be caused by the effects of the division of the functions within the relationship while the partners were living together. We refer to this as the "**division of functions**."

What is a "division of functions"?

18.17 The most common division of functions in section 15 cases is where partner A does not participate in the paid workforce and instead manages the household and raises the children while partner B performs paid work and provides the family income. We use the term "**household management**" as shorthand for the role of partner A in this scenario, for ease of reading.

18.18 There can, however, be many variations to this scenario. Partner A may:

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20 Although maintenance is outside the terms of reference for this project, its overlap with s 15 of the Property (Relationships) Act 1976 requires us to consider its role in addressing the economic disadvantages one partner may suffer at the end of a relationship.

21 The term "non-career partner" was used during Parliament's consideration of the 2001 amendments. See for example Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-2) (explanatory note) at 71 and Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

22 We note that s 15 does not expressly refer to the term "economic disparity", although the heading of that sub-part of the Property (Relationships) Act 1976 is "Court may make orders to redress economic disparities." The courts use the term "economic disparity" in different ways.

(a) take just a few years off paid work in order to look after children or a dependant relative;

(b) work part-time and also perform a household management role and support partner B in a high-stress occupation;

(c) relocate to another region or country to accommodate partner B's work; or

(d) work in a particular job to ensure income for the family while partner B is studying for a qualification that enhances longer term earning capacity.[23]

18.19 A division of functions can lead to economic disparity in situations where the partners have no children. Men as well as women can be partner A or partner B.[24]

When does section 15 apply?

18.20 In broad terms, divisions of functions result in two scenarios which may lead to economic disparity under section 15:

(a) First, where partner A has suffered a loss arising from the division of functions. The loss can be viewed in several ways:

(i) a lost opportunity to develop a career or explore an economic opportunity;

(ii) loss as a result of performing an unpaid role in the relationship;

(iii) loss of income and living standards enjoyed during the relationship; or

(iv) loss arising from investing in partner B's career throughout the relationship and then losing the

23 Where both partners continue to work a claim under s 15 of the Property (Relationships) Act 1976 has been harder to establish, as was the case in *A v A* [2008] NZFLR 2007 297 (HC) where both partners were teachers and worked throughout the marriage except for a two year maternity leave by partner A to have the partners' two children. At the date of hearing partner B was a principal and therefore receiving a much higher salary than partner A, who was a teacher. Despite acknowledging that partner A had greater responsibility for the children, it found that the disparity was not caused by the division of functions in the relationship.

24 For cases where men in the position of partner A have brought claims under s 15 of the Property (Relationships) Act 1976 see, for example, *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC); *R v F* FC Rotorua FAM-2006-069-80, 4 August 2008; *H v H* FC Nelson FAM-2005-042-527, 29 March 2007; *G v G* FC Gisborne FAM-2010-016-232, 22 August 2011; *Van Amelsford v Leender* [2013] NZFC 8113; *Elliot v Elliot* [2005] NZFLR 313 (FC) (which was successful and the husband was awarded $15,000 (adjusted for inflation) which was the lowest sum ever awarded in a s 15 claim); *J v D You cna find out mroe about our review* FC North Shore FAM-2008-044-833, 13 May 2011 (a s 15A claim only); and *N v S* [2012] NZFC 7043.

benefits of that investment on separation.

(b) Second, where partner B has advanced his or her career or other economic opportunity due to functions (such as household management and other support) performed by partner A. Of course, partner B's success may be in part due to factors intrinsic to partner B, such as a brilliant mind or individual talent. However as the Parliamentary select committee observed:[25]

> *… although the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training, and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of functions during the relationship.*

Partner B's success will therefore be a consequence of how the functions of the relationship were divided between the partners. After separation Partner B continues to benefit from the division of the functions within the relationship and partner A does not.

18.21 Both scenarios may occur simultaneously, potentially resulting in a "double loss" for partner A. As Lord Nicholls in the House of Lords in *McFarlane v McFarlane* said:[26]

> *… the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution of her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as a home-maker and child-carer.*

18.22 A typical scenario that section 15 was intended to address is in this case study:

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25 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 18–19.

26 *McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618 at [13] per Lord Nicholls of Birkenhead.

Case study: When section 15 is intended to apply

Victoria and Fergus met just as they both started work as junior lawyers. After five years together they married and soon after had their first child, Alice. Victoria left her job and remained at home to look after Alice and a second child, Bella, born three years later. Fergus continued working as a lawyer to provide the family income and he became a partner in a law firm. Victoria and Fergus separated when Alice was five and Bella two.

Fergus was earning a salary of $350,000 and after the separation Victoria found a job as a junior solicitor earning $40,000. The children lived with Victoria during the week and would stay with Fergus in the weekends. Their main asset was the mortgage-free family home. The value of the home was shared equally under the rules of the PRA. With her share of the equity Victoria purchased a new house, but could only afford a smaller home in a cheaper neighbourhood that was 30 minutes' drive away from Alice's school and 45 minutes' drive from her work. In order that Victoria could work, Bella was put into a private childcare facility (she was too young to go to kindergarten). Bella was not yet entitled to receive a subsidy for the costs of her childcare. The costs of the childcare were shared equally by Victoria and Fergus. Victoria's share amounts to a significant proportion of her salary.

Fergus also used his share in the equity from selling the family home to buy a new house. Because his salary was significantly higher, he was able to buy a similar sized house in the same neighbourhood in which the family had lived before the separation. Fergus's salary also made payment of the costs of childcare easy, and he had enough income to spend money on leisure activities for himself and the children. Victoria's standard of living dropped because of the reduced income into her household and the long commuting time each day, leaving less time and money for Victoria to maintain her home and care for the children as she would have liked, or participate in leisure activities herself.

When does section 15 not apply?

18.23 Section 15 does not capture all forms of financial inequality between the partners at the end of a relationship. Economic disparity is, as we discuss at paragraphs 18.31–18.43 below, a very narrow concept.

18.24 There will also be cases where there is economic disparity but it is not attributable to a division of functions. This is illustrated in the case study below:

Case study: When section 15 does not apply

Jo and Billie work in the same jobs they have had since they first met. Jo is a surgeon and Billie is a nurse. They have twin girls aged three. First Billie and then Jo took six weeks off when the twins were born. Jo and Billie have separated.

Billie has remained in the family home with the twins but is struggling to pay the mortgage and other bills. In this case Billie would not appear to have a claim under section 15 because any economic disparity between Jo and Billie is not due to the division of functions during the relationship. The economic disparity between them is more likely to be because Billie has a lower income and/or because she now has ongoing day to day care of the children.

18.25 In this case study, Billie might be entitled to maintenance and child support, but is unlikely to have a claim under section 15. We discuss the overlap between section 15 and maintenance in Chapter 19 with respect to option 3.

How does section 15 work in practice?

18.26 Section 15 provides:

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to—
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
>
> (c) any other relevant circumstances.
>
> (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—
>
> (a) order party B to pay party A a sum of money out of party B's relationship property:
>
> (b) order party B to transfer to party A any other property out of party B's relationship property.
>
> (4) This section overrides sections 11 to 14A.

18.27 Section 15 applies "on the division of relationship property", after the relationship ends. This suggests that partner A cannot make a section 15 claim independent of an application for orders dividing relationship property under section 25(1) of the PRA.[27]

18.28 There is no onus of proof in the conventional sense on partner A.[28] Partner A does not carry the sole responsibility for proving to a court that he or she deserves compensation under section 15. A court can make its own determination on the evidence before it.[29] The Court of Appeal in *M v B* said that:[30]

> *The imposition of an onus of proof would be a further impediment to the obtaining of just entitlements under the statutory regime given that, in many respects, the relevant evidence is more than likely in the possession of the titled partner (who more often than not is a man).*
>
> *There is some validity in this concern. The Act is about property rights and entitlements. The Act, and the regulations which have been promulgated pursuant to it, make it clear that, although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.*

18.29 A court must still be satisfied that the different elements of section 15 are satisfied. The Court of Appeal has described these as "hurdles" that "must be overcome" in order for partner A to succeed under section 15.[31] These hurdles are:

(a) a significant disparity in the income and living standards of partner A and partner B (which we call "economic disparity");

(b) the economic disparity was caused by the division of functions between partner A and partner B within the relationship; and

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27 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.3]. This has several consequences. First, it means that a court cannot make an award under s 15 of the Property (Relationships) Act 1976 during a relationship. See by contrast s 25(3), which allows a court at any time to make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just. This difference risks an order being made pursuant to s 25(3) without regard to any potential award under s 15. Second, a s 15 claim cannot be brought after the partners' relationship property has been divided.

28 See also the discussion of onus of proof in Chapters 6 and 25.

29 The Court of Appeal clarified in *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [96] that "there must be material before the Court from which a Judge can determine that the threshold disparity has been met."

30 *M v B* [2006] 3 NZLR 660 (CA) at [38] and [39].

31 *M v B* [2006] 3 NZLR 660 (CA) at [125].

(c) compensation is just in the circumstances.

18.30 The discussion in this section is based on our review of the case law, and that undertaken by Green[32] and Henaghan.[33] Section 15 claims have come before the Court of Appeal only four times, the last decision being in 2016,[34] and the Supreme Court only once, in March 2017 (decision pending).[35]

Hurdle one – economic disparity

18.31 For a claim to succeed under section 15, there must be economic disparity between partner A and partner B. Disparity must exist in both income and living standards. In looking at what the income and living standards of the partners are "likely" to be, the assessment is prospective, or forward-looking. A court must therefore speculate based on the information provided to it. Evidence on each partner's future income and living standards is usually provided by experts, such as forensic accountants or actuaries who can provide, for example, a valuation of potential pay-scales for a foregone career.[36] Expert evidence assists the court, but the cost and time associated with preparing such evidence is considerable and can place section 15 beyond the reach of potential claimants.

The overlap between income and living standards

18.32 A section 15 claim will fail unless a significant difference in both income and living standards is established. Section 15 does not indicate whether income or living standards are more important and it is unclear why establishing disparity in both elements is required.

18.33 In *X v X* the Court of Appeal recognised that in reality there is often an overlap between income and living standards.[37] A high

32 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013). Green analysed section 15 cases and surveyed legal practitioners around New Zealand about their views on section 15.

33 Mark Henaghan "Exceptions to 50/50 Sharing of Relationship Property" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

34 *N v N* [2005] 3 NZLR 46 (CA); *M v B* [2006] 3 NZLR 660 (CA); *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; and *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499.

35 *Scott v Williams* [2016] NZSC 149 (granting leave to appeal to the Supreme Court).

36 See for example *M v B* [2006] 3 NZLR 660 (CA); and *X v X* [2009] NZCA 399, [2010] 1 NZLR 601.

37 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [79].

income usually means a high standard of living and if there is a significant disparity in income then there is usually a significant disparity in living standards. The Court considered that a separate analysis of income and living standards was not usually required, although both must be established.[38]

18.34 It might not always be the case, however, that a higher income means a higher standard of living. The partners might have different incomes but not different living standards. For example, partner A may have a lower income than partner B, but may inherit a substantial sum of money or enter a new relationship with a new partner who can support a standard of living at least equivalent to that of partner B. It is also possible that partners have equivalent incomes but different living standards. For example, if partner A has responsibility for the ongoing care of a dependant parent his or her living standards may be lower, or if partner B inherited a substantial sum of money his or her living standards may be higher.

18.35 It is also possible that partner B could suffer a drop in living standards, despite having a larger income than partner A. This was the case in *L v B* where the Family Court said there was no disparity.[39] The Court referred to ongoing maintenance commitments, the need to support Partner B's new wife and expected child, the long term occupation of the family home by Partner A, and that Partner B could not rehouse himself from relationship property proceeds.

What is "income"?

18.36 Income is not defined in the PRA but was described by the Court of Appeal as something to be "considered in the round, [and] includes all periodic streams of money."[40] So income as assessed for taxation is only one measure and regard may be had further afield, for example, to losses that may be written off by a self-employed partner.

18.37 If partner B is unemployed but has previously been in employment, a court may consider clear evidence of partner

38 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [81].

39 *L v B* [2012] NZFC 9534.

40 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [88].

B's ability to find employment at a comparable pay rate to that previously held.[41]

What is meant by "living standards"?

18.38 "Living standards" is different to "lifestyle".[42] The exact boundaries of what can be considered "living standards" are not clear. Factors considered relevant have included: ownership of one's own home, ability to work, amount of leisure time, flexibility in time free to work, ability to make lifestyle choices regarding work, care of children and living arrangements, holiday opportunities, the ability to save money, and any separate property owned.[43] In *K v K* the Family Court found that the fact the husband chose to live with his parents meant he had higher living standards than the wife who had limited financial resources, restricting the choices she was able to make.[44]

18.39 St John suggests that living standards are affected by a number of factors, not determined solely by income.[45] Relevant questions may include how many people are being supported by each partner's income, the relevance of economies of scale, assets at the disposal of each partner, the utility of assets at a partner's disposal (for example a house which a partner cannot maintain), whether third parties (such as parents) are able to assist in the day-to-day running of the house, "perceptions of fairness", and "intangibles such as enjoyment of children".[46]

Date of assessment

18.40 The date at which the likely future income and living standards are to be assessed is the date of separation, as this is when the division of functions within the relationship ends. The High Court in *X v X [Economic Disparity]* stated that:[47]

41 *S v S* FC North Shore FAM 2004-044-1890, 12 May 2006 at [55].

42 *V v V* [2002] NZFLR 1105 at [12]; *N v N* [2003] NZLR 46 (FC) at [3].

43 See as examples *K v K* FC Papakura FAM-2003-055-406, 3 July 2007; *Smith v Smith* [2007] NZFLR 33 (FC); and *S v S* FC North Shore FAM 2004-044-1890, 12 May 2006 at [66].

44 *K v K* FC Papakura FAM-2003-055-406, 3 July 2007.

45 Susan St John "Economist's Perspective: Prospects for Equality" (paper presented to the Property (Relationships) Act 1976 Spotlight Seminar, Wellington, August 2001) at 4.

46 Susan St John "Economist's Perspective: Prospects for Equality" (paper presented to the Property (Relationships) Act 1976 Spotlight Seminar, Wellington, August 2001) at 5.

47 *X v X [Economic Disparity]* [2007] NZFLR 502 (HC) at [88].

> *at separation the division of functions in the marriage has come to an end. That is the point as which its effects must be judged, using whatever evidence is available at the time of the hearing to inform the process.*

18.41 As we discuss at paragraph 18.701, the partners' post-separation division of functions is largely irrelevant under section 15.

18.42 The disparity period continues until either there is no longer a significant difference in income or living standards or the difference is no longer caused by the division of functions in the relationship.[48]

"Significant" disparity

18.43 Use of the word "significant" in section 15 "denotes a more than trivial disparity."[49] What amounts to significant disparity requires a subjective assessment and is a "factual question."[50] What appears to be a small difference for high income earners (for example a difference in income of $8,000) could be significant for low income earners. Disparity is assessed relative to the partners. If both partners' incomes are low then the disparity may be significant even if there is a small difference between the incomes. For partners with significant wealth and income then a significant disparity would require a large gap in income. Where a gap in income is very large, a gap in living standards will "inevitably" be found.[51]

Hurdle two – the economic disparity is caused by the division of functions

18.44 The second hurdle is that the economic disparity must have been caused by the division of functions within the relationship (the causation hurdle). Based on our review of the cases, we estimate that approximately 20 per cent of claims under section 15 do not meet this hurdle.

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48 *X v X [Economic Disparity]* [2007] NZFLR 502 (HC).

49 *X v X* [2009] NZCA 399 at [77]. It was described as "noteworthy or important" in *P v P* [2003] NZFLR 925 (FC) and "somewhere between clearly greater and disproportionately greater" in *N v N* [2003] NZLR 46 (FC).

50 *X v X* [2009] NZCA 399 at [83].

51 *B v M* [2005] NZFLR 730 at [120].

The division of functions does not have to be the sole cause of economic disparity

18.45 In early decisions under section 15 the courts indicated that the division of functions must be the principal or dominant cause of economic disparity for a section 15 award to be made. More recent decisions, however, take a different approach. Although a clear, causal link must be established, it need not be the only causative link. In *M v B* the Court of Appeal said:[52]

> *In* G v G *[2003] NZFLR 289 (FC) Judge Ellis (in the context of a claim for a compensatory award under s 15) stated at [127] that the test for causation was that "the 'division of functions' must not only be a 'real and substantial cause' but must be the principal cause of the economic disparity." This puts the jurisdictional bar too high. The "principal cause" of the husband's present earning capacity is his skill as a lawyer. But that consideration alone does not preclude a redistributive award.*

18.46 This was applied in *S v C*, where the High Court overturned the Family Court's decision rejecting partner A's section 15 claim.[53] The High Court held that, although other factors had played a role in the economic disparity, such as partner B's qualifications and partner A's "emotional difficulties following the marital breakdown", which "might have delayed her ability to begin work", so did the division of functions within the marriage.[54] The Court was satisfied that partner A had suffered reduced earning capacity and this was caused by the division of functions in the relationship.[55]

18.47 A similar approach is taken to assessing eligibility for maintenance under sections 63 and 64 of the Family Proceedings Act 1980. Those sections allow a court to consider the ability of a partner to become self-supporting, having regard to "the effects of the division of functions" within the relationship.[56] In that context the Court of Appeal in *Slater v Slater* said there could be more than one operative cause.[57]

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52 *M v B* [2006] 3 NZLR 660 (CA) at [201] per Young P.

53 *S v C* [2007] NZFLR 472 (HC) at [27].

54 *S v C* [2007] NZFLR 472 (HC) at [32]–[35].

55 *S v C* [2007] NZFLR 472 (HC) at [35].

56 Family Proceedings Act 1980, ss 63(2)(a)(i) and 64(2)(a)(i).

57 *Slater v Slater* [1983] NZLR 166 (CA) at 174.

Does the decision relating to how the functions are divided in the relationship have to be mutual?

18.48 A second uncertainty, now resolved by the courts, was whether the division of functions within the relationship had to be agreed upon. Arguably a unilateral choice by one partner not to undertake paid work would cause economic disparity, rather than the division of functions. During our preliminary consultation we were told that it is not uncommon for partner B to argue that partner A chose to stay at home and that partner B did not agree with that choice. There may also be cases where partner A stopped paid work without there being a conscious decision by the partners for this to happen, for example if partner A was made redundant.

18.49 In *X v X* the Court of Appeal considered whether a decision not to work should be assumed to be mutual or whether a court should hear evidence that one person could have furthered their career but unilaterally chose not to.[58] Before *X v X*, there were cases where partner B disputed that the decision was mutual and this was sometimes treated as a reason not to make a section 15 award.[59]

18.50 The Court of Appeal in *X v X* said to "ensure that the reality of decision-making in relationships is reflected, it should be presumed that functions within a marriage are agreed to by both parties."[60] Reversing that presumption would require compelling evidence to the contrary.[61] The Court also said that the merits of the partners' decision as to the division of functions is irrelevant under section 15:[62]

58 *X v X* [2009] NZCA 399, [2010] NZLR 601 at [101]–[105]. In that case Mr X had argued at [68(c)] that throughout the marriage Mrs X was not motivated to work and chose to remain out of the workforce when that was not necessary for the maintenance of the family relationship.

59 In *K v K* FC Auckland FAM-2004-004-509, 27 August 2008 and on appeal *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009 the husband claimed that the wife insisted on taking exclusive care of the children and that was not his preference. The High Court (reversing the approach of the Family Court) took the approach that the decisions were a part of the choices of the relationship such as having children and regardless that the wife had stopped work against the wishes of the husband, the result was a qualifying division of functions. However, the Court then took the unusual step of dismissing the claim on the basis it was unconvinced by the evidence put forward as to what the wife would have earned but for the division of functions. In the context of a significant disparity and a clear division of functions it would seem that this should have been a question of quantum rather than causation. In *M v M* FC Wellington FAM-2007-091-767, 23 September 2009 the Family Court dismissed the application and included amongst other factors that the wife had not pursued her career for a number of years of the marriage before the partners had children.

60 *X v X* [2009] NZCA 399, [2010] NZLR 601 at [105].

61 *X v X* [2009] NZCA 399, [2010] NZLR 601 at [105]. In that case the court observed that there was "no compelling evidence" that the decision that Mrs X not return to the workforce was not a mutual one. The presumption of mutual decision-making had to be "meaningfully impugned" if it is to be overturned.

62 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [104].

> *I reject any suggestion that an enquiry ought or needs to be made into the merits of a decision made by the parties as to the division of domestic roles for a causal relationship under s 15 to be established. [The applicant] was correct to submit that where a state of affairs exists – namely, in this case, Mrs X's protracted absence from the workforce and her support of the children and Mr X – there is a presumption, in the absence of clear evidence to the contrary, that it was pursued by both parties to the marriage. Evidence that a party did not return to the workforce when they could have, or chose to pursue a domestic life instead of a professional career, may, however, be relevant to the Court's exercise of its discretion under s 15(3).*

Establishing causation requires a retrospective assessment

18.51 When assessing causation, a court must look back at what happened during the relationship. Causation is more easily established where there is evidence that the division of functions in the relationship clearly affected partner A's and/or partner B's earning capacity. Examples of evidence that might establish causation include evidence relating to partner B's absence from the household due to employment, partner A's relocation to support partner B's career, or sacrifice of partner A's professional career.

18.52 Claims where partner A seeks to show that the economic disparity arises from a loss in potential earnings because of the division of functions (referred to as "diminished earnings claims") have generally had the most success. Claims that seek to show the disparity arises from the enhancement of partner B's earning potential due to the division of functions (referred to as "enhancement claims") have been more difficult to establish.[63]

63 We have identified from our research that approximately 20 per cent of cases under s 15 of the Property (Relationships) Act 1976 discussed the prospect of an enhancement award and in just under 10 per cent of s 15 claims an enhancement award was made. Note however the decision in *W v W* FC Auckland FAM-2007-004-663, 12 December 2007 where the Family Court said that such enhancement awards should not be available at all, stating

> *"I find as a matter of law that s15 is only available to compensate party A for diminished income and living standards caused by the division of functions within the marriage or relationship. It is not available to compensate based on enhanced future earnings. I am bound by the Court of Appeal decision in Z v Z. If Parliament intended to change the law established in Z v Z it should have specifically said so, or amended the definition of "property" or altered ss 8(e), 8(ee) and 9(4). I therefore do not accept the submissions … that compensation is available on a redistributive basis."*

This was founded on the reasoning that s 15 provided for compensation, not for treating future earning potential as property, and therefore conceptually it could only provide for losses rather than to redistribute benefits. The Court could not see any way of granting a payment for enhancement that did not treat enhanced income as relationship property. This has not been the approach in other cases, probably because a simple application of s 15 allows for an order of transfer of property for any disparity caused by a division of functions in the relationship, regardless of what the conceptual basis for that order would otherwise be.

18.53 Both types of awards are, however, possible. In *P v P* the High Court said:[64]

> *We are satisfied that in principle both the depression of A's earning capacity and the enhancement of B's earning capacity are relevant in the s 15 context. Essentially this conclusion reflects the terms of s 15(1) whereby jurisdiction is dependent upon the likelihood that party B's income and living standards will be significantly higher than those of party A. In light of this jurisdictional requirement we think there is no basis to exclude an enhanced income position from consideration provided, of course, the relevant causative nexus is also made out.*

18.54 In *M v B* the Court of Appeal was open to the argument there may be a redistributive quality to section 15. The Court said that "both compensatory and redistributive exercises may be appropriate under s 15", a view which "accords with *P v P*",[65] and that in some circumstances "an enhancement of earning capacity will properly be redistributable under s 15."[66] The possibility of enhancement awards was also recognised by the Court of Appeal in *X v X*:[67]

> *If there had been evidence in this case that the effect of the division of roles during the relationship was to enhance the income capacity or living standards of Mr X on an ongoing basis after separation, the section 15 award would have needed to reflect that.*

Establishing causation in enhancement claims can be difficult

18.55 In enhancement claims, partner A is claiming that the division of functions has "freed up" partner B. Partner B is able to develop work skills and experience thereby enhancing his or her earning potential. A good example is the case of *Williams v Scott* in the Family Court.[68] Mr Williams developed a successful law firm. Ms Scott was credited with "providing care to the parties' sick son, hosting functions with real estate agent offices, building up the

64 *P v P* [2005] NZFLR 689 (HC) at [56].

65 *M v B* [2006] NZFLR 641 (CA) at [199] per Young P citing *P v P* [2005] NZFLR 689 (HC) at [56] and *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [164]. In that case the High Court found that causation had not been established and that the disparity was due to the applicant husband's age (21 years older than the wife) and his redundancy. See also *J v J* [2014] NZHC 1495 at [41] where the High Court said:

> *the discussion can be reduced to the simple proposition outlined in* X v X*: "Did [the wife] support [the husband] to obtain his qualification and gain the experience that provided him with an enhanced earning capacity?"*

66 *M v B* [2006] NZFLR 641 (CA) at [200] per Young P.

67 *X v X* [2009] NZCA 399 at [237].

68 *Williams v Scott* [2014] NZFC 7616 at [317]; *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355; and *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499. Judgment of the Supreme Court pending.

firm's strong conveyancing business, and carrying out significant accounting tasks."[69] These latter contributions added value to the law firm and enhanced Mr Williams' income. In the Family Court Ms Scott received an award under section 15 for enhancement on this basis.[70]

18.56 Where the enhancement is less clear a section 15 claim is harder to establish. In *P v P* the High Court said that "some comparative evidence was necessary to enable Mr P's earnings pattern to be assessed against that of others" in a similar career.[71] Without that evidence the Court was reluctant to make an order under section 15.[72] In *M v B* the court observed:[73]

> *A woman who stays at home and looks after children frees up her partner's time and energy, and in this way, may facilitate an enhancement of his earning capacity. Thinking along these lines is reflected in s 15 and in some circumstances, such an enhancement of earning capacity will properly be redistributable under s 15. But, as this case illustrates, it is not always easy to move from the general to the specific.*

18.57 In *E v E* the Family Court said that section 15 "requires circumstances that are truly causative, not merely permissive."[74] In that case the Court found no enhancement despite agreeing that partner A had "released [partner B] from family duties" meaning partner B "was not hampered in the pursuit of his career". Other cases focus on specific sacrifices or steps taken by partner A that benefited partner B. In *H v S* and *J v J* choices to move overseas to support partner B's career were critical.[75] In *H v H [Economic Disparity]* the husband's maritime career depended on him not having to be at home and in *C v C* the wife had contributed to the administration of the husband's business.[76]

18.58 Other cases hint at a more relaxed approach to the relationship between the division of functions and enhancement. In *C v C*

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69 *Williams v Scott* [2014] NZFC 7616 at [317]. Judgment of the Supreme Court pending.

70 The award was confirmed in the High Court and Court of Appeal although the amount awarded in the Family Court ($850,000) was reduced to $280,000 in the High Court and then raised to $470,000 in the Court of Appeal. This case is currently on appeal to the Supreme Court.

71 *P v P* [2005] NZFLR 689 (HC) at [61].

72 *P v P* [2005] NZFLR 689 (HC) at [61].

73 *M v B* [2006] NZFLR 641 (CA) at [199]–[200] per Young P.

74 *E v E* [2012] NZFC 830 at [140].

75 *H v S* [2012] NZFC 7543; and *J v J* [2014] NZHC 1495.

76 *H v H [Economic Disparity]* [2007] NZFLR 711 (HC); and *C v C* FC Lower Hutt FAM-2007-032-170, 25 September 2008.

[Economic Disparity] the High Court noted in finding causation that "the division of roles assisted Mr C to pursue his professional career free of day to day child care responsibilities."[77] In *W v H* the Family Court found that:[78]

> *[Mr W] was able to commit himself to a fulltime position with [X firm] at an important stage of his working life… Household duties or childcare duties or the other spouse's career did not impact on him because this couple had made a joint decision that [Ms H] would manage those functions… I accept Mr Higgins evidence that it is likely that his salary was enhanced by his ability to commit to a fulltime position and to enhance his skills through training.*

18.59 Both cases resulted in successful enhancement claims.

The courts take different approaches to determine causation

18.60 There is inconsistency in the way causation is dealt with by the courts. In a few cases, the courts will assume causation where there is economic disparity and the division of functions is clear, particularly where children are involved. More often, however, the courts require evidence of loss of earning ability by partner A or enhancement of partner B's earning capacity. This might include evidence about the career partner A would have pursued, evidence of an abandoned career or other additional factors.[79]

18.61 There are striking examples. One is *CH v GH*.[80] The husband and wife married and had children at a very young age (the wife became pregnant with their first child at age 16). They had two more children. The husband became an electrician and the wife committed her time to household management and looking after the children. It took a long time post-separation for an application to be made (and ultimately 13 years before the dispute was heard by the Family Court).[81] The Family Court looked at the actions of the wife in the interim period, where she largely continued as an active mother and grandmother while working part-time. The Court concluded that because the wife's first child had been born

77 *C v C* [Economic Disparity] HC Auckland CIV-2003-404-002392, 28 November 2003.

78 *W v H* [2015] NZFC 3413 at [85].

79 *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009 where the claim failed because there was no evidence of what job the wife might have had if she had been able to work.

80 *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.

81 The primary issue for the Family Court was whether there was a valid settlement agreement between the partners that the Court should give effect to either wholly or in part, pursuant to section 21H of the Property (Relationships) Act 1976.

when the wife was so young she had had no opportunity to start a career and "it is therefore very difficult for her to show that there is a detrimental effect on a career development because she did not have one in which to develop."[82] The Court found no causation, even though there was a very significant disparity as the husband had accumulated "approximately $1 million" post-separation while the wife had "increasingly gone into debt."[83] The Court noted that there was no evidence of enhancement.[84]

18.62 This decision is in stark contrast with *H v H [Economic Disparity]*.[85] In that case the wife left school at age 15 when she became pregnant with their first child. They had two more children. The husband was a fisherman and ultimately the skipper of a vessel while the wife remained at home and raised the children. After the partners separated there was a large disparity in income and living standards. The High Court considered that causation was overwhelming as both partners had started with no qualifications and the husband had pursued his career while his wife "exclusively looked after the three children and cared for the household until the parties separated."[86] The Court found that partner A had enhanced partner B's career prospects, stating that "[w]ithout his wife…it was unlikely that he would have been able to build up his maritime experience and qualifications to the same degree."[87] The Court calling it "added value."[88]

18.63 The key difference between these two cases is that in *H v H [Economic Disparity]*, the husband's job as a fisherman required him to be away from home for large amounts of time. Otherwise the facts are similar.

18.64 Another example is *Douglas v Douglas*.[89] Partner A brought four dependent children into the marriage from a former relationship. The marriage lasted 17 years.[90] The Family Court emphasised the fact of a clear division of functions and how partner A supported

82 *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [49].

83 *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [50].

84 *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008 at [51].

85 *H v H [Economic Disparity]* [2007] NZFLR 711 (HC).

86 *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 711.

87 *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 712.

88 *H v H [Economic Disparity]* [2007] NZFLR 711 (HC) at 717.

89 *Douglas v Douglas* [2013] NZHC 3022. The case was known in the Family Court as *A v A* [2012] NZFC 10192.

90 Partner A had five children from a previous relationship but only four were dependent. The partners also fostered another child on and off throughout the relationship.

partner B's career through the relationship, including partner B's ability to train for a three year apprenticeship.[91] Overall there was a clear commitment to prioritise partner B's career over partner A's. The Family Court also stated that:[92]

> *In general where one partner has stayed home and has had a protracted absence from the work force in support of the children there will need to be compelling evidence in order for a court to determine that the disparity has* ***not*** *been caused by the division of functions.*

18.65 This statement was not repeated in the High Court on appeal. The fact partner A brought four dependent children into the relationship influenced the High Court's reasoning. The Court found partner A would likely have done the exact same thing (work part-time while mostly committing to looking after the children) if there had been no relationship. The High Court overturned the section 15 award of $63,000 in the Family Court.

18.66 The two decisions in *Douglas* reflect the two approaches taken by the courts. One is to view the purpose of the "division of functions" requirement as being to ensure awards are made if there is a division of functions and resulting economic disparity. Questions of loss of earning ability by partner A in diminished earnings claims, or earning enhancement by partner B in enhancement claims, are not important. The alternative approach emphasises the causal relationship between the division of functions and lost earning potential or earning enhancement. This approach requires more of partner A in presenting evidence, and invites argument on whether work options were available, how choices were made within the relationship and whether there is evidence of an alternative career the applicant would have pursued.[93] A higher evidential burden (and the costs involved in presenting that evidence) can render section 15 an unattractive option in seeking a departure from equal sharing.

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91 *A v A* [2012] NZFC 10192.

92 *A v A* [2012] NZFC 10192 at [50] (emphasis added).

93 Other cases where there has been a significant disparity and a clear division of functions but an award was declined due to lack of evidence of an alternative career include *K v K* FC Auckland FAM-2004-004-509, 27 August 2008; *K v K* HC Auckland CIV-2008-404-6161, 31 July 2009; *M v M* FC Dunedin FAM-2003-005-66, 27 November 2006; and *H v [LC]* FC North Shore FAM-2009-044-966, 27 April 2011. In *L v L* FC Christchurch FAM-2007-009-504, 28 November 2008 the Family Court dismissed the claim due to lack of evidence of an alternative career. Similarly, in *Walker v Walker* [2006] NZFLR 768 (HC), the High Court dismissed the case for causation reasons noting "a paucity of evidence about career paths, current opportunities, pay scales, and available positions." Although it was not the only reason for dismissing the claim, in *H v H* [2012] NZFC 4543 the Family Court noted at [63] that "there is no evidence about the wife's work or prospects before the parties were married or when she stopped work to have children." The lack of an alternative career was a significant factor (amongst some others) in the Court refusing to give an award in *L v B* [2012] NZFC 9534.

Consequences of different approaches relating to the causation hurdle

18.67 Different approaches to the causation hurdle risks inconsistency between cases. It also risks decisions failing to fulfil the purpose of section 15. Green suggests that:[94]

> *The court decisions… indicate the inherent difficulty of applying the provision, particularly in achieving the correct balance between being unduly restrictive, rarely finding that the economic disparity was a result of the division of functions, to lowering the jurisdictional bar so that the causation test is effectively meaningless.*

18.68 The differing approaches to the causation hurdle illustrates that section 15 is insufficiently clear as to the proper approach.

18.69 An underlying issue is whether the causation hurdle creates a distracting and unnecessary level of analysis. The burden it places on partner A can be significant in terms of the evidence that may be required. A difficulty that often arises is that the courts find there is insufficient evidence to establish a link between the role of party A within the relationship, such as household management, and his or her low earning capacity post-separation. This means that the current application of section 15 does not necessarily lead to compensation for cases where economic disparity and a division of functions is established, unless detailed evidence is presented of a hypothetical career partner A could have enjoyed, but for the division of functions.

18.70 The causation hurdle means that not all cases of economic disparity will be recognised and addressed under section 15. The risk of failing to capture otherwise valid claims also arises because section 15 emphasises the division of functions *during* the relationship. This fails to recognise that the roles played by the partners can continue after the relationship. This is notable where the partners have dependent children. What happens if partner A is pregnant with the partners' first child at the end of the relationship? There has not been a "division of functions in the relationship" (partner A has not yet undertaken childcare responsibilities) that caused the economic disparity (for the period when partner A stays at home to care for the child). This raises the question of whether it is more in keeping with

94 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 55.

the policy and principles of the PRA to address any economic disadvantages arising from the end of the relationship, not just those directly caused by a division of functions within it.

Hurdle three – compensation must be just in the circumstances

18.71 If a court is satisfied there is economic disparity caused by the division of functions in the relationship, then it may make an order under section 15(3) "if it considers it just."[95] In *X v X* the Court of Appeal said:[96]

> *The s 15(3) discretionary assessment is not amenable to a prescribed formula, and the justice of an award in any particular case will depend on a comprehensive assessment of the parties' respective financial positions, their earning prospects going forward, their current obligations in respect of any children of the partnership, and other matters that go to the overall fairness of an award.*

18.72 Section 15(2) provides that a court in deciding whether to make an order may have regard to:[97]

(a) the likely earning capacity of each partner;

(b) the responsibilities of each partner for ongoing daily care of any children of the relationship; and

(c) any other relevant circumstances.

Cases where the court considered an order under section 15 was not just

18.73 There are cases where the Family Court has indicated it would not have exercised its discretion to make an award under section

95 In *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002393, 28 November 2003, the High Court found that failing to exercise the discretion was an error.

96 *X v X* [2009] NZCA 399, NZFLR 985 at [115], per Robertson J. This judgment was quoted directly in *K v B* FC Lower Hutt FAM-2009-032-92, 5 October 2010. In *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672 the High Court also referenced Robertson J but did not offer additional discussion about the exercise of the discretion in that case.

97 Although s 15(2) of the Property (Relationships) Act 1976 envisages a comprehensive assessment and indicates that a court can be wide-reaching in its inquiries, there are certain factors that are not relevant. In *X v X* the Court of Appeal confirmed that the intrinsic benefits arising from the relationship, for example the wealth of the partners which led to a high living standard, were not relevant, nor was a large distribution of relationship property: *X v X* [2009] NZCA 399, NZFLR 985 at [114]. This is logical where the focus is on recognising and addressing the disparity between the partners themselves. In other words, the fact that partner A has a relationship property entitlement worth several million dollars and will therefore be significantly wealthy compared to most other people is not relevant when partner A is in a position of economic disparity in relation to partner B.

15 even if the other hurdles had been met. In *M v M* the Family Court said that even if the economic disparity was caused by the division of functions, it would have hesitated to exercise its discretion.[98] This was due (among other things) to the property partner A would receive from the division of relationship property, her lack of good faith in some dealings, her ill health hindering work efforts, and the relatively low relevance of the division of functions to any disparity.[99] Another case is *Wills v Catsburg*, where the Family Court said it would not have exercised its discretion to make an award under section 15 because partner A had made a lifestyle choice not to work in paid employment.[100]

18.74 In *E v E* the Family Court did not make an award under section 15 despite concluding there would be economic disparity caused by the division of functions for a period of four years when partner A would be looking after the child of the relationship, requiring her to work part-time instead of full-time.[101] The Court considered, however, that the money lost would be "significantly less" than the $64,000 claimed. It factored in the impact of a section 15 award on partner B's living standards and partner B's contribution of separate property at the start of the relationship, from which partner A derived a benefit.[102]

18.75 In *L v B* the Family Court's reasons why an award under section 15 was not just appear to undermine the compensation purpose of section 15.[103] In that case the Court was not satisfied that there was either economic disparity or a causal link to the division of functions, but went on to say:[104]

> *If I am wrong in the above findings, if I stand back and look at the overall discretion and determine whether an award for economic disparity is just, I am not persuaded that such an award is just. I take into account the deferment of the sale of the home, the ongoing requirement for child support and spousal maintenance and the fact that the Court has declared the D Street property to be the wife's separate property, albeit with her obligations to the family, with their consent, this could*

98 *M v M* FC Wellington FAM-2007-091-767, 23 September 2009.

99 *M v M* FC Wellington FAM-2007-091-767, 23 September 2009 at [61].

100 *Wills v Catsburg* [2016] NZFC 851 at [52].

101 *E v E* FC New Plymouth FAM-2007-043-396, 18 December 2009.

102 *E v E* FC New Plymouth FAM-2007-043-396, 18 December 2009 at [83].

103 *L v B* [2012] NZFC 9534.

104 *L v B* [2012] NZFC 9534 at [70].

> *provide a source of income for her on an ongoing basis. I do not consider that it would be fair to make a substantial redistributive award. I consider that the wife will be able to plan to re-enter the workforce as a result of this judgment and will be able to either upskill, or retrain or alternatively enter the workforce now. I take into account that the clean break principle in a sense is being deferred and that provides ongoing support for the wife. While she has the ongoing responsibility for the children she will now be able to phase in and plan for the reintegration back with the workforce. Taking her age into account that will still be achievable. I do not consider it is appropriate to compensate from the husband's share of relationship property for any adjustment. I take into account that there has been reasonably significant spousal maintenance paid by the husband post-separation and child support. I accept that he should not be rewarded for doing what he is responsible for doing in the first place but on the other hand I have to acknowledge that it has been paid and that there is going to be continued liability. I also take into account the ages of the children.*

18.76 Factors taken into account in that case, such as maintenance and child support, are to meet the financial needs of the partner and children, not to compensate partner A for the economic disadvantages he or she suffered as a result of the division of functions. By taking these payments into account the Court essentially conflated the two separate concepts of needs and compensation.[105]

Is the reasoning used by the courts consistent with the purpose of section 15?

18.77 The decision in *L v B* is not a one-off example of a court considering factors that seem inconsistent with the compensation purpose of section 15. In other cases the courts have also considered:[106]

(a) whether economic disparity is likely to be long-term or short-term;[107]

105 We consider the overlap between s 15 of the Property (Relationships) Act 1976 and maintenance in Chapter 19 with respect to option 3.

106 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR15.15].

107 *Monks v Monks* [2006] NZFLR 161 (HC).

(b) whether there are causative factors other than the division of functions and the weight of those other factors;[108]

(c) the clean break concept;[109]

(d) availability of part-time rather than full-time work for partner A;[110]

(e) post-separation support such as mortgage payments;[111]

(f) voluntary payment of spousal maintenance;[112] and

(g) age of the partners and the number of years left in the workforce.

18.78 The courts' consideration of these factors suggests a disinclination to find that a section 15 claim has been established. It is hard to see how many of these factors are relevant to compensation for economic disparity. For example, whether or not partner B *voluntarily* paid maintenance as opposed to being forced to pay maintenance by a court order seems irrelevant to whether economic disparity caused by the division of functions should be compensated. While the age of the partners and the length of the economic disparity may indicate a level of need (perhaps caused by the economic disparity and perhaps not), section 15 is focused on compensation. Meeting needs is a separate issue that is dealt with under maintenance and child support where relevant. We discuss the overlap between section 15 and maintenance in Chapter 19 with respect to option 3.

18.79 The discretion under section 15(3) is broad and we consider that its exercise has resulted in cases where an award was not made or was reduced for reasons unrelated to compensating for economic disparity resulting from the division of functions.

Ability to review the court's discretion under section 15(3)

18.80 Because a court's decision to make a section 15 award is an exercise in discretion, the extent to which a higher court can

108 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC).

109 *M v B* [2006] NZFLR 641 (CA); and *L v B* [2012] NZFC 9534 at [70].

110 *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003.

111 *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003.

112 *C v C [Economic Disparity]* HC Auckland CIV-2003-404-002392, 28 November 2003 at [63].

review it is limited.[113] A higher court can only intervene if the lower court had:[114]

(a) made an error of law or principle;

(b) took into account an irrelevant consideration;

(c) failed to take account of relevant considerations; or

(d) made a decision that was plainly wrong.

Determining the amount of section 15 awards

18.81 If the three hurdles in section 15 are satisfied a court may order partner B to transfer a sum of money or any other property from partner B's share of relationship property to partner A.[115] This is most commonly implemented by adjusting each partner's share of the pool of relationship property (for example partner A receives 65 per cent and partner B receives 35 per cent of the relationship property pool). After the court has made the monetary award the relationship property is then shared equally.

Overview of amounts awarded under section 15

18.82 Our research identified approximately 100 cases in which a court decided a claim under section 15.[116] Roughly 40 per cent of claims were successful, resulting in a compensatory award under section 15. The amount awarded ranged from $15,000 to $470,000. The largest amount awarded was in *Scott v Williams*, but in that case the Family Court had originally awarded $850,000, which was lowered to $470,000 on appeal.[117] On average, the amount awarded was approximately $96,000.[118]

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113 The High Court in *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [50] stated that:

> *If the threshold requirements of s 15(1) are established, s 15(3) enables the Court to make an economic disparity award "if it considers it just" to do so. This involves the exercise of a discretion and therefore the limits on an appeal in respect of the exercise of a discretion apply, as earlier discussed.*

114 *J v J* [2014] NZHC 1495at [24] and [80]; see also *Simon v Wright* [2013] NZHC 1809 at [42].

115 Property (Relationships) Act 1976, s 15(3).

116 "Case" in this context means that a unique application was made under s 15 of the Property (Relationships) Act 1976. Thus each "case" includes any appeals in that matter.

117 The amount awarded in the Family Court ($850,000) was reduced to $280,000 in the High Court and then raised to $470,000 in the Court of Appeal. This case is currently on appeal to the Supreme Court

118 See Vivienne Crawshaw "Section 15 – A Satellite Overview" (2009) 6 NZFLJ 155 for an earlier review of the case law.

18.83 We could not determine, in every case, the amount of the section 15 award as a proportion of the overall relationship property pool.[119] While in some cases the amount awarded was given as a percentage of the relationship property pool, in others the amount awarded was given as a monetary sum and the value of the relationship property pool was not stated. In some cases the value of a large asset (such as a house) was given and we nominated a maximum proportion based on that figure.

18.84 Of the cases we could measure, the section 15 award was, on average, 7.4 per cent of the overall relationship property pool. The amount awarded in *Scott v Williams*, while the largest monetary sum on record, represented just 5.2 per cent of the overall relationship property pool.[120] We identified eight cases where the proportion was above 10 per cent, and two cases in which the section 15 award represented a much larger percentage of the relationship property pool. In *J v J* the award amounted to 30 per cent of the relationship property pool,[121] and in *Fischbach v Bonnar*, the first reported case to consider section 15, the award amounted to 21 per cent.[122] The lowest proportion we identified was in *M v M*, where the award of $31,000 (adjusted for inflation) amounted to 1.4 per cent of the relationship property pool.[123]

How the courts calculate the award

18.85 The PRA itself offers little guidance on how a section 15 award should be determined, beyond stating that the purpose of the award is to compensate partner A. The Court of Appeal has noted that calculations of section 15 awards "have not exactly been a model of clarity".[124] In *M v B* the Court of Appeal said that

119 Miles says that there is "anecdotal evidence" that in a "big money" case where an equal division gives each party a substantial tranche of assets, "judges would be unlikely to exercise their discretion under s 15 of the Property (Relationships) Act 1976, even if jurisdiction is made out": Joanna Miles "Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 267 at 296-297. Such an outcome:

> *subverts the entitlement plus compensation rationale of the Act with a needs-based approach. The fifty per cent is awarded on the basis of entitlement, not need. Compensation is awarded on the basis that one party remains substantively better off than the other, and does so because the functioning of the relationship has generated compensable losses.*

120 *Scott v Williams* [2016] NZCA 356. Judgment of the Supreme Court pending.

121 *J v J* [2014] NZHC 1495. Awarded in the Family Court and upheld on appeal in the High Court. The wife received 70 per cent of the relationship property pool in total.

122 *Fischbach v Bonnar* [2002] NZFLR 705 (FC). The wife received 65 per cent of the relationship property pool in total. The award in *Waters v Waters* FC Hamilton FP-2003-019-815, 25 August 2004 was 16 per cent of the relationship property pool in total.

123 *M v M* FC Papakura FAM-2004-055-398, 15 June 2006.

124 *M v B* [2006] 3 NZFLR 660 (CA) at [721].

compensation should be determined by reference to what partner A could have earned after the relationship but for the effect of the division of functions during the relationship.[125]

18.86 The majority of the Court of Appeal in *X v X* said that "the statutory requirement is that the award be just, and that is the overriding consideration."[126] It endorsed the methodology adopted in the Family Court,[127] which was as follows:[128]

(a) calculate the difference between the income partner A would have been earning but for the division of functions, and what partner A is projected to actually earn working to the full extent of his or her capacity (known as the "but for" income);

(b) make any necessary deductions to the "but for" income to reflect the time value of money and the chances of non-collection of future income (because of reduced time in the workforce for reasons such as death, deteriorating health, changes in personal priorities, re-partnering or early retirement); and

(c) halve the resulting net present value of the "but for" income (this is the "halving step", which is discussed below).

18.87 The majority considered that such an approach could offer "value in providing some structure for the exercise that judges are required to undertake, which should enhance the predictability of awards."[129] It was emphasised that the formula was not the only approach that could be taken recognising that "the judge is required to make judgements on matters which are inherently imprecise."[130] The methodology is not suitable where partner A had no career prior to the relationship. An example of this would be where the partners met when they were young and had children

125 *M v B* [2006] NZFLR 641 (CA) at [206] per Young P.

126 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [175] per O'Regan and Ellen France JJ.

127 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [172]–[176] per O'Regan and Ellen France JJ. Other lower court decisions that had used comparable methodologies were: *V v V* [2002] NZFLR 1105 (FC); *McGregor v McGregor* (No 2) [2003] NZFLR 596 (FC); *P v P* [2005] NZFLR 689 (HC); *T v T [Economic disparity]* [2007] NZFLR 754 (FC); and *W v W* FC Auckland FAM 2007-004-663, 12 December 2007.

128 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [172] per O'Regan and Ellen France JJ.

129 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [175]. It is noted however that the use of independent experts may be necessary to give effect to the formula, for example in valuing and identifying career projections.

130 A similar approach had been used in earlier cases including *V v V* [2002] NZFLR 1105 (FC); *McGregor v McGregor* (No 2) [2003] NZFLR 596 (FC); *P v P* [2005] NZFLR 689 (HC); *T v T [Economic disparity]* [2007] NZFLR 754 (FC); and *W v W* FC Auckland FAM 2007-004-663 12 December 2007.

early on so partner A never had the opportunity to build a career (as in *CH v GH*).[131]

18.88 In his minority decision in *X v X*, Robertson J considered that section 15 "should not be locked into any particular prescription"[132] and cited his own judgment in *M v B* where he said that "section 15 awards are necessarily a matter of impression and rote applications of a formula will not be appropriate."[133] Robertson J preferred that the approach to determining the amount of compensation was to have regard to all the facts and that the approach was discretionary and not formulaic.

18.89 Since *X v X* several cases have taken a less formulaic approach and instead relied on a more comprehensive analysis of the particular facts. In *Williams v Scott* the Family Court considered factors such as partner A's IQ and income earning potential when assessing what loss she may have incurred.[134]

18.90 In *H v S* partner A had no established career as she had stayed at home to take care of the children, although toward the end of the relationship she had begun a teaching career with some success.[135] The Family Court said that a more comprehensive approach allowed it to consider the fact that both partners were close to retirement. There was little evidence on what earning potential partner A could have had, so the Court assessed the likely future "but for" income as $80,000 per annum, her actual income as $60,000 per annum and decided that compensation should be available to reflect a disparity period of five years.[136] From that the Court deducted sums for tax, the time value of money and contingencies to reach a sum of $41,000 adjusted for inflation. Although this still involved more calculation, the Court was prepared to substitute intuition for precise evidence on what partner A would have earned in an alternative career.

18.91 In *J v J* partner A had a career as a nurse and had a child from a former relationship.[137] The High Court said that caring for that child had not impacted on her career, but there were two children

131 *CH v GH* DC Auckland FAM-2007-004-1129, 24 December 2008.

132 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [125].

133 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [125] citing *M v B* [2006] 3 NZFLR 660 (CA) at [147].

134 *Williams v Scott* [2014] NZFC 7616.

135 *H v S* [2012] NZFC 7543.

136 *H v S* [2012] NZFC 7543 at [76]–[78].

137 *J v J* [2014] NZHC 1495.

of the marriage that partner A gave up work to care for. Partner A also relocated to support partner B's career. The Family Court awarded partner A an additional 30 per cent of the relationship property pool, by far the highest proportion ever awarded in a section 15 case. This resulted from a "broad brush approach."[138] The Court identified the factors relevant to a just award, including how the division of functions led to the disparity and other factors including the size of the property pool and each partner's age, stage of career and income, and partner A's continued responsibility for one child.

18.92 This decision was upheld on appeal. The High Court noted that:[139]

> *While the loss sustained by [partner A] could have been calculated with more precision by reference to the income she could be expected to earn as an enrolled nurse and her remaining years in the workforce before retirement,* ***the loss she sustained as a result of her foregone career is not the main operating factor in the disparity.***

18.93 The final phrase in the above quote highlights a shift away from the formulaic approach that relied on past and potential income to look more broadly at all the circumstances when calculating the section 15 award. The Court then said that:[140]

> *The justice of the situation is influenced by the position of the parties upon entering the relationship, the length of the marriage, the size of economic disparity and the marked inequality of income earning capacity.*

18.94 The Family Court in *Williams v Scott*[141] followed a similar approach and made an award of 10 per cent of the relationship property pool. On appeal, the High Court and Court of Appeal shifted back towards an approach involving specific calculation. A further appeal in this case is being considered by the Supreme Court.[142]

138 *M v B* [2006] 3 NZLR 660 (CA).

139 *J v J* [2014] NZHC 1495 at [82] (emphasis added).

140 *J v J* [2014] NZHC 1495 at [83].

141 *Williams v Scott* [2014] NZFC 7616.

142 At the time the proceedings were started the older child was 17 years old and the younger child 15 years old. However by the time of the Family Court judgment *Williams v Scott* [2014] NZFC 7616 they would have been around 24 and 22 years old respectively.

Adjustments for contingencies (provision for possible future events)

18.95 Based on our review of the cases, approximately 20 per cent of awards under section 15 included some reduction to allow for contingencies. The reduction varies significantly, from five per cent in *Woodman v Woodman* to 50 per cent in *S v S* and *K v B*.[143]

18.96 A reduction or discount for contingencies is made by a court to recognise possible future changes to circumstances. The discount appears to depend on several factors. One is the estimated length of time the economic disparity will continue for (disparity period). Usually when partner A has only been out of the workforce for a short time it will not take long for him or her to regain full earning potential. The courts have made discounts to awards to reflect the lengths of the estimated disparity periods. There is no consistency as to the discount applied for similar time periods, as demonstrated in the table below.

DISCOUNTS APPLIED AND ESTIMATED PERIOD OF DISPARITY			
Case	Year	Estimated period of disparity	Discount applied
McGregor v McGregor[144]	2003	One and a half years	7.5 per cent
Humphrey v Humphrey[145]	2003	Three and a half years	25 per cent
P v P[146]	2005	Seven years	25 per cent
S v S[147]	2006	Five years	50 per cent[148]
H v K[149]	2009	Seven years	25 per cent[150]
K v B[151]	2010	Seven years	50 per cent[152]
H v S[153]	2012	Five years	25 per cent

143 *Woodman v Woodman* FC Auckland FP004/598/02C, 28 July 2004; *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006 and *K v B* FC Wellington FAM-2009-032-92, 5 October 2010.

144 *McGregor v McGregor* [2003] NZFLR 596 (DC).

145 *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005.

146 *P v P* [2005] NZFLR 689 (HC).

147 *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006.

148 This discount encompassed "tax, mortality, loss of employment, re-partnering, illness and other contingencies": *S v S* FC North Shore FAM-2004-044-1890, 12 May 2006 at [91].

149 *H v K* FC Whangarei FAM-2006-088-712, 27 October 2009.

150 This discount took into account other factors including the range of possible career paths for the applicant: *H v K* FC Whangarei FAM-2006-088-712, 27 October 2009 at [78].

151 *K v B* FC Wellington FAM-2009-032-92, 5 October 2010.

152 In this case there was an additional "contingency" because the applicant had pursued a different, potentially less lucrative, career than before: *K v B* FC Wellington FAM-2009-032-92, 5 October 2010 at [147].

153 *H v S* [2012] NZFC 7543.

18.97 Some judges appear more sceptical of discounts for contingencies than others. The High Court in *S v C* declined to make a discount for contingencies, "which in the absence of evidence of any specific contingencies must be regarded as neutral."[154] Another example is in *Woodman v Woodman*, where the Family Court applied a five per cent discount for "genuine contingencies (such as death)" and dismissed other contingencies as speculative, noting that examples raised included re-partnering and winning Lotto.[155]

The halving step

18.98 We identified 11 cases where the halving step was applied. There is mixed academic opinion on the halving step, which is to take the resulting value of a section 15 award, treat it as relationship property and therefore halve it. Atkin has argued that:[156]

> *… we need to ensure that in curing one injustice we do not create another. Whatever the claimant receives by way of compensation comes from the other party – as the claimant goes up, the other party goes down. By halving the final figure, we make sure that both meet half way. Failing to halve may mean that the other party incurs a loss that creates a disparity in the other direction.*

18.99 Caldwell has pointed out there is nothing in the wording of section 15 to require that awards made under section 15 should be halved. He notes that to halve an award risks preserving an existing disparity.[157]

18.100 This part of the calculation exercise has something of a controversial history. Its early evolution is traced back in *P v P*:[158]

> *[43] In my decision in V v V [2002] NZFLR 1105 I calculated an amount for s 15 compensation and reduced it by 50%. That is because I approached the matter upon the basis that the reduction in the applicant's income earning ability was not the result of any wrong that had been done to her by the other party: it was the effect of the division of functions between them. Accordingly I took the view that the claim should be compensated*

154 *S v C* [2007] NZFLR 472 (HC) at [40].

155 *Woodman v Woodman* FC Auckland FP004/598/02C, 28 July 2004.

156 Bill Atkin "The Disparity in Economic Disparity" (paper presented to New Zealand Law Society Family Law Conference, October 2005) at 220.

157 John Caldwell "The Various Disparities of section 15" (paper presented to Family Court Judges' Conference, Gisborne, 24 October 2008).

158 *P v M* FC Manukau FAM-2004-092-924, 29 May 2006.

> *out of the relationship property pool. That approach to the matter does not sit completely easily with the words of s 15 which speak baldly of compensating Party A by ordering Party B to pay Party A a sum of money out of Party B's relationship property. The ongoing negative financial impact of the relationship upon Party A was caused by the division of functions between the parties, not by something that was done to Party A by Party B.*
>
> *[44] That approach has not generally been followed. For example it was not part of the process applied in P v P [2005] NZFLR 689, nor by the Court of Appeal in M v B.*
>
> *[45] My view of this matter has been nudged forward by the broad discussion of the historical development of this legislation contained in the judgment of Hammond J in M v B. I now regard it as reasonably just that the respondent in this case should be compensated by the applicant in respect of the ongoing financial curb which their division of relationship functions places upon her.*

18.101 In *W v W* the Family Court discussed the halving step and rejected it in diminished earnings claims, acknowledging that it would be more suited to enhancement claims.[159] However, the courts applied the halving step more often after *P v P*. It was applied in five further cases before the leading case, *X v X*.[160] There the Court of Appeal was split on the issue. The majority supported the halving step but Robertson J did not.[161]

18.102 The majority in *X v X* explained the rationale for the halving step as follows:[162]

> *[232] During the relationship, the economic consequence of the decision is that there is no earnings contribution by one partner (or a lower contribution than would otherwise be the case), and the cost of that is borne by the relationship partners. In some cases, there will be no overall cost to the partners because the division of roles allows the earning partner to increase his or her earnings by more than the non-earning partner would have contributed. To the extent that the foregone income impacts on the relationship property available at the end of the*

159 *W v W* FC Auckland FAM-2007-004-663, 12 December 2007.

160 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601.

161 Judge Robertson noted where the halving step had been rejected as "it was fallacious to characterise the s 15 award as an item of relationship property…when it is a unique kind of compensatory award": *McGregor v McGregor* [2003] NZFLR 596 (DC); see also *Fischbach v Bonnar* where the Family Court calculated the award as a percentage of the respondent husband's relationship property (the wife received a total of 65 per cent of the relationship property which included 40 per cent of the husband's portion of the relationship property pool) thus the question did not arise: *Fischbach v Bonnar* [2002] NZFLR 705 (FC).

162 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [232]-[233].

> *relationship, the cost is also shared through the 50/50 regime for division of relationship property. If the relationship endured, the consequences of the disadvantaged partner's diminished income-earning capacity would continue to be shared. The end of the relationship prevents that sharing from occurring unless the Court intervenes under s 15.*
>
> *[233] The object of the award under s 15 should be to ensure that the disadvantaged partner is not worse off after the end of the relationship than he or she was during the relationship. In effect, what he or she has lost is the ability to continue the position that applied during the relationship, ie the sharing of the ongoing consequences to the disadvantaged partner as a result of the division of roles. In principle, therefore, we consider that it is appropriate that the income shortfall amount derived from the methodology used in this case should be halved. That means that Mr X, as the advantaged partner, is required to pay his share of the loss represented by the reduced future income-earning capacity of Mrs X.*

18.103 Since *X v X* we have only seen the halving step used in two cases: *E v E*[163] and *Scott v Williams*.[164] In *J v J* the High Court rejected the halving step, referring to the Court of Appeal's emphasis in *X v X* that the halving step was not always necessary, and noting that the Court of Appeal's primary consideration, that the disparity could be shifted from Mrs X to Mr X, did not arise in that case.[165]

Other issues with section 15

Cost of making a section 15 application

18.104 We understand from our preliminary consultation that lawyers will advise clients that a section 15 application is only worthwhile if the income discrepancy is large (for example if partner B's income is at least two times the income of partner A) or if the relationship property pool is significant, so that even an award of a small percentage of the relationship property pool would merit the time and cost involved. The cost of making an application would otherwise mean that any compensation awarded under section 15 would not make it worthwhile.

163 *E v E* [2012] NZFC 830.

164 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499.

165 *J v J* [2014] NZHC 1495 at [85].

18.105 Section 15 claims that proceed to hearing can incur significant legal fees and fees for expert evidence from actuaries and forensic accountants. Despite the guidance in *X v X* on how to determine the amount of an award, there is still room for argument and this can cause significant costs. Green noted in her thesis:[166]

> *In practice the evidence of experts, human resource consultants and accountants has become the means to gather the requisite evidence required…this approach may have a flow-on effect that creates problems in practice that are associated with additional costs, uncertainty regarding projections, and extensive input from experts.*

18.106 As noted at paragraph 18.278 above, it seems unlikely that a partner can make an application under 15 without also applying for orders dividing relationship property under section 25(1) of the PRA.[167] This might involve significant additional costs, such as preparing valuation evidence for different items of relationship property.

18.107 An unsuccessful claim will also risk an order for costs against the applicant. The courts' approach to costs in PRA cases is discussed in Chapter 25.

Length of time for section 15 applications to be decided

18.108 We have tried to estimate how long section 15 applications take to be finally determined.[168] Keeping the limitations of the method in mind, we estimate that the average time it takes to determine a case that includes a section 15 application is approximately three years. We found only one case which was determined in the same year it was filed.[169] The majority of cases took two to three years. The longest time taken (excluding a 14-year case struck out for time delay) is *Scott v Williams*, which has so far taken eight years

166 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 50. We note from lawyers that the reference to human resource consultants is outdated as these are seldom used now.

167 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.3].

168 This was done by comparing the year in the filing number with the year of the date of judgment. There are clearly some problems with this approach. We do not know what time of year applications were filed so it is possible that applications take a longer or shorter time than the year number indicates. We have not always been able to find the Family Court judgment so we were unable to find the length of time for some appeal decisions. This may mean the average provided here is lower than the true average as appeals extend the length of time it takes to reach a final outcome. Finally, the filing date represents the original application rather than the specific application under s 15 of the Property (Relationships) Act 1976.

169 *W v W* FC Auckland FAM-2007-004-663, 12 December 2007.

with the case being heard by the Supreme Court in March 2017 and the decision pending. These findings are broadly consistent with case disposal data from the Family Court. As we discuss in Chapter 25, half of all PRA cases disposed of in 2015 had taken over two years.[170]

18.109 A key consequence of the time it takes to obtain a decision under section 15 is that it can leave partner A with reduced economic resources for a long time. Simply having the resources to pay for legal assistance to bring a section 15 claim can be difficult.

18.110 There will be an unknown number of cases where section 15 compensation is agreed between the partners (often on the advice of their respective lawyers as to likely outcomes).

Section 15 awards are restricted to the relationship property pool

18.111 Section 15 awards can only be paid from partner B's share of the pool of relationship property.[171] This is problematic when the size of the relationship property pool is limited. Take for example the partners who stay together for a decade and during that period partner A manages the household and looks after the children, supporting partner B who undertakes studies to become a surgeon. During this period income is limited and the partners cannot accumulate any assets. At the date of separation, partner B has just signed an employment contract worth $300,000 a year (expected to rise rapidly). A section 15 claim is established but the relationship property pool is minimal, so partner A receives very little. partner B however retains the benefit of his or her future income. There is no ability under the PRA to order future payments to partner A from partner B's income. This leaves the potential for an otherwise established section 15 claim to go without an effective remedy.

18.112 It is difficult to say how often this restriction hampers an otherwise strong section 15 claim, as a claim in this scenario is unlikely to ever make it to court. As discussed at paragraph 18.1045 above, a lawyer would likely advise their client that it is not worthwhile making a section 15 claim if the relationship

170 This refers to cases that proceeded to a hearing. In 2015, 93 per cent of cases took more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016).

171 Property (Relationships) Act 1976, s 15(3).

property pool is minimal. In her research, Green identified that such a scenario was "not isolated."[172] Green referred to the reasoning of Lord Nicholls in the House of Lords in *McFarlane v McFarlane* when he said:[173]

> *If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage.*

18.113 The widespread use of trusts in New Zealand is discussed in Part G. We note that the use of trusts may remove assets which would otherwise be in the pool of relationship property. This has the potential to negatively affect the scope of relationship property, undermining the ability of section 15 to address economic disparity.

172 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 320.

173 *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 per Lord Nicholls of Birkenhead at [32].

Chapter 19 – Options for reform

Is reform needed?

19.1 Our preliminary view is that section 15 is failing to achieve its objective of providing for a just division of property in circumstances where equal sharing would not lead to an equitable result. Reform is needed. As Green concludes "New Zealand needs a practical, solution-based outlook to solve economic disparity."[174]

Is there still a need for section 15 or a replacement adjustment mechanism?

19.2 Relationships that are characterised by a division of functions into income-earning and household management roles are common. In 2016, 33 per cent of couples with children were characterised by one partner working full-time and with the other partner not in paid employment.[175] While some socio-economic groups may be experiencing a generational shift, with more partners sharing the functions within a relationship more equally (such as more women remaining in the workforce after having children and more men taking on greater childcare responsibilities),[176] there remains a strong correlation between having children and reduced workforce participation for women. As discussed in our Study Paper, *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (Study Paper),177 women are more likely to leave the workforce or work part-time when they have children, while men tend to remain in work and provide the family income.[178]

174 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 327.

175 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 6 citing Bryan Perry *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2016* (Ministry of Social Development, July 2017) at 147.

176 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)* at Chapter 6.

177 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

178 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)* at Chapter 6.

19.3 There will also always be relationships where, for a range of reasons, partner A stops work or takes a sideways or backwards move in his or her career in order to support partner B's career. For example, partner A might relocate so partner B can take up a job opportunity.

19.4 We think that there remains a need to provide for situations where the division of functions within a relationship results in an economic disadvantage for partner A and/or economic advantage for partner B.

Summary of options

19.5 In this chapter we set out three options for reform:

(a) **Option 1: Retain section 15 but lower the hurdles that partner A must overcome for a claim to succeed.** Under this option the need to establish economic disparity would be replaced with a simpler requirement to show "financial inequality" at the end of the relationship. The requirement to establish causation would also be replaced with a rebuttable presumptive entitlement to compensation if there was financial inequality and a division of functions within the relationship. We also explore options for satisfying a section 15 award from future income, rather than being limited to the relationship property pool.

(b) **Option 2: Repeal section 15 and address financial inequality in other PRA rules.** Here we consider whether financial inequality attributable to the relationship is better addressed elsewhere in the PRA. Specifically, whether the PRA should treat the earning capacity of partner B as "property" that can then be divided equally as relationship property to the extent it has been enhanced by the relationship.

(c) **Option 3: Replace section 15 with financial reconciliation orders.** These orders would be a hybrid of compensating loss and meeting needs. Such orders would likely replace maintenance at the end of a relationship.

19.6 Our preliminary preference is for option 3. We express this view mindful of the significant further work required to develop any of

the options presented, and the possibility that other viable reform options may be identified during consultation.

19.7 Before exploring these options we first set out some common objectives and characteristics of any option for reform.

Common objectives and characteristics of section 15 reform

Replacing the narrow concept of economic disparity with financial inequality

19.8 Section 15 currently only applies where the income and living standards of partner B are likely to be significantly higher than partner A. We refer to this as "economic disparity."

19.9 As explained in Chapter 18 the concept of economic disparity is not sufficiently wide enough to cover every scenario of financial inequality between the partners at the end of the relationship. We consider in particular that the requirement to demonstrate a significant disparity in living standards in section 15 is not useful. Living standards imply choice. If, for example, partner A chooses to invest in a large house rather than to rent a modest property and invest the resulting savings for future use, then partner A's living standards might differ. We doubt the value of comparing choices about living standards in the context of section 15. We consider the focus should be on disparity in income or other financial resources, not on living standards. We refer to this as "financial inequality."

Balancing a clean break with a just result – the case for future payments

19.10 Currently section 15 awards are limited to partner B's share of relationship property. An important consideration in these options is whether the property pool for any payments or transfers of property to address financial inequality should be broadened to include separate property and/or future income.

19.11 Broadening the scope of section 15 or a replacement adjustment mechanism to include future income may offend the concept of a "clean break". While we acknowledge the general attraction of a clean break in property matters, we consider it is less relevant when there are children of the relationship or the end of the relationship gives rise to financial inequality due to the division of functions. In these circumstances we consider the clean break concept is a secondary consideration. As Lord Hope stated in *McFarlane v McFarlane*:[179]

> *…achieving a clean break in the event of a divorce remains desirable, but if this means that one party must adjust to a lower standard of living then this result is that the clean break is being achieved at the expense of fairness. Why should a woman who has chosen motherhood over her career in the interests of her family be denied a fair share of the wealth that her husband has been able to build up as his share of the bargain that they entered into?*

19.12 While we do not consider the clean break concept should be a paramount concern in cases of financial inequality, we are however interested in an option that will help the partners to move on with their lives as quickly as possible.

Any reform must promote the principles of the PRA

19.13 In Chapter 3 we set out the explicit and implicit principles of the PRA. Any reform of section 15 must promote the principle that:[180]

> *… a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union or de facto relationship or from the ending of their marriage, civil union or de facto relationship:*

19.14 The following principles should also underpin any option for reform:

(a) Questions arising under the PRA should be resolved "as inexpensively, simply, and speedily as is consistent with justice."[181]

179 *McFarlane v McFarlane* [2006] UKHL 24, 2 AC 618 at [120] per Lord Hope.

180 Property (Relationships) Act 1976, s 1N(c).

181 Property (Relationships) Act 1976, s 1N(d).

(b) Men and women have equal status, and their equality should be maintained and enhanced.[182]

(c) A just division of relationship property should have regard to the interests of children of the relationship.[183]

(d) All forms of contribution to the relationship are to be treated as equal.[184]

19.15 Green observes that "research findings are conclusive: traditionally the non-monetary contributions of one partner are under-valued or disregarded."[185] To the extent that section 15 fails to treat monetary and non-monetary contributions equally, this should be addressed in any option for reform.

Simple and inexpensive enforcement mechanisms may be needed

19.16 We are aware from our preliminary consultation that one of the principal concerns in relation to any reform is enforceability. Child support and maintenance payments are deducted from a payee's salary at source if there is a child support or maintenance debt. Any enforcement measure will have associated costs and resource implications to be borne in mind. Our preliminary view is that any option ultimately recommended should have built-in enforcement mechanisms. This may require the State to play a role, as it does in the child support and maintenance recovery regimes.

The need to provide clear guidance for the courts

19.17 The courts' approach to section 15 cases over the last 16 years has been at times inconsistent and generally conservative, resulting in few awards of small amounts. This is in part due to the lack of statutory guidance on key issues such as the requirement to establish causation (the causation hurdle) and the appropriate method for deciding the amount of a section 15 award.

182 Property (Relationships) Act 1976, s 1N(a).

183 We refer to this as an implicit principle of the Property (Relationships) Act 1976, as is reflected in ss 1M(c) and 26(1).

184 Property (Relationships) Act 1976, s 1N(b).

185 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 293.

19.18 Any change to the law must provide clear direction on how Parliament intends any discretion within section 15 or its replacement to be exercised and how the discretion should be used in order to give effect to the policy of the PRA. One potential solution is to include examples or case studies after the relevant statutory provisions to illustrate the statutory objective.

How should the amount of an award for financial inequality be decided?

19.19 One key consideration for further development is how to determine the amount of a financial inequality award. Effective implementation of the options below would "require the development of proxy measures of economic loss that will inevitably involve some sacrifice of accuracy and theoretical purity."[186] To avoid using extensive expert evidence (with its associated costs), our preliminary view is that it would be preferable to have adaptable measures to quantify the loss and determine the increased share of property or payment to be taken by partner A.

Consideration needed of children's interests and interaction with child support

19.20 Whether the options should be conditional on there being children of the relationship is another matter that requires further consideration. A variation on this would be to impose a higher threshold for qualifying for an adjustment in the share of relationship property if there were no dependent children. If a distinction was drawn on this basis issues under human rights law may arise.[187]

19.21 How any reform would interact with child support will also require consideration.

186 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 7.

187 See our discussion in Chapter 2 on New Zealand's human rights obligations.

Option 1: Retain section 15 but lower the hurdles that partner A must overcome

19.22 This option retains section 15 but makes some important changes to:

(a) remove reference to living standards, and focus instead on financial inequality (see paragraph 19.9 above);

(b) replace the causation requirement with a rebuttable presumptive entitlement to compensation if there are both financial inequality and a division of functions;

(c) broaden the property that can be used to satisfy a section 15 award.

Replacing the causation requirement with a rebuttable presumption

19.23 A key issue undermining the effectiveness of section 15 is the difficulty in establishing causation. One solution would be to remove the causation test and replace it with a rebuttable presumptive entitlement to compensation. The section 15 hurdles would then be:

(a) financial inequality between the partners at the end of the relationship;

(b) a division of functions during the relationship (that is, partner A was responsible for the household management or made some other contribution to the relationship that reduced partner A's earning capacity or enhanced partner B's earning capacity); and

(c) compensation is just in the circumstances.

19.24 Replacing causation with a presumptive entitlement may help reduce litigation. It sends the clear signal that if partner A was responsible for the household management or made some other contribution to the relationship and at the end of the relationship there was financial inequality between the partners, then partner B must pay compensation. The key question that remains is how much that compensation should be. Without a clear indicator, the

question of how much to pay will continue to lead to disputes, including the need to go to court to resolve the issue.

19.25 Consideration would be required as to when it would not be just in the circumstances to award compensation. Without clear guidance, this test could itself lead to an increase in litigation.

19.26 Compensation could then take one of two forms:

(a) a share of partner B's future income for a specified period; or

(b) an increased share of the relationship property.

Presumptive entitlement to a share of partner B's future income

19.27 We have identified three advantages with this approach:

(a) It addresses scenarios where the payment of a capital sum may not be possible due to a limited relationship property pool.

(b) Periodic payment awards do not require speculation about future contingencies because they can more easily be altered in response to a change in circumstances.

(c) We understand from our preliminary consultation that ongoing payments may be more palatable than lump sum payments, especially when there are children of the relationship.

19.28 We have also identified four disadvantages of this approach:

(a) To the extent it is of concern, this approach undermines the concept of a clean break. Future periodic payments from one party to the other create an ongoing tie. This may build resentment. Should partner A enter a new relationship, partner B may feel resentful about having to continue to provide payments. Should partner B enter a new relationship there is the potential for resentment to broaden, and there will likely be greater burdens on partner B's income.

(b) This approach may risk incentivising improper behaviour in order to avoid having to share income,

such as leaving the work force or taking a lower paid job.

(c) If variation of the order was needed and could not be agreed upon by the parties then returning to court would take additional time and cost more money. Issues of enforcement may also arise.

(d) Having to continue to rely on a former partner for money can be demoralising and negatively affect an ongoing relationship between the former partners, especially as parents. We have heard about partners using the threat of non-payment of money to intimidate and "punish" the other party. If there are children of the relationship then the negative relationship between the partners can have flow-on effects to the children.[188]

Presumptive entitlement to an increased share of the relationship property

19.29 The second approach is to adjust the relationship property division based on a percentage that reflects the financial inequality.[189] For example, an additional 2.5 per cent of the relationship property pool could be given to partner A for every year spent not in paid work up to a set maximum of the total relationship property pool (partner A being entitled to 50 per cent of the relationship property pool in any event).

19.30 We have identified three advantages with this approach:

(a) Over time these percentage bands could become established and be used by lawyers and their clients in negotiations, avoiding the need to go to court.[190]

(b) It provides the partners with a clean break.

(c) It may also address some issues highlighted elsewhere in this Issues Paper in relation to the interests of children of the relationship.[191] For example, if the

188 For more on this discussion see Chapter 3.

189 This approach is discussed in Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

190 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 331.

191 See Part I.

primary caregiver received a greater proportion of the relationship property he or she might be able to keep the family home.

19.31 The main disadvantage that we have identified with this option is that it may fail to achieve a just outcome if the relationship property pool is small, but partner B's future earning capacity is significant. A small relationship property pool would mean little improvement in partner A's situation.

Option 2: Repeal section 15 and address financial inequality in other PRA rules

19.32 Some commentators suggest that a solution to the problem of financial inequality is to include earning capacity as property in its own right. It could then be divided equally alongside the partners' other relationship property.[192]

19.33 In Chapter 9 we considered whether a partner's income earning capacity should be treated as an item of property for the purposes of the PRA. In Chapter 11 we then considered whether a partner's earning capacity should be divisible as relationship property to the extent it had been enhanced by the relationship. We outlined the advantages and disadvantages for each question.

19.34 In addition to the advantages identified in the earlier chapters, treating enhanced earning capacity as relationship property could address many of the problems section 15 was intended to resolve. In many relationships, partner B's earning capacity is the main economic resource the partners have been able to build up, due in part to the efforts of partner A who performed household management functions.[193] Dividing partner B's earning capacity as relationship property to the extent it has been enhanced by the relationship allows both partners to share equally in the economic advantages the relationship has bestowed on partner B. Conversely, equal sharing of the enhanced earning capacity may address the disparity and economic disadvantages partner

192 Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming); and Carolyn Frantz and Hanoch Dagan "Properties of Marriage" (2004) 104 Colum L Rev 75.

193 Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

A suffers from sacrificing paid work in order to support the relationship.

19.35 By considering a partner's enhanced earning capacity as property divisible between the partners, the PRA would actively implement the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the partners arising from the relationship.[194]

19.36 Also, the PRA's equal sharing rules would apply. Many of the problematic elements of section 15, such as establishing a division of functions, disparity and causation, and then persuading the court it is just to award compensation, would be avoided.

19.37 On the other hand, in Chapter 11 we identified some major challenges which, in our preliminary view, mean on balance it is not feasible to treat a partner's enhanced earning capacity as relationship property. These challenges include the complexities and imprecision of valuing enhanced earning capacity and the difficulties of measuring the extent to which the relationship has enhanced a partner's earning capacity.

19.38 An alternative approach could be to give the court power to adjust the partners' shares in relationship property when the court is satisfied that equal sharing of relationship property does not fairly allocate the economic and advantages a partner derives from the relationship and the economic disadvantage a partner suffers from the relationship. Scotland takes a similar approach.[195] The aim of the Scottish law is to equalise any imbalances in the economic impact of the partners' contributions to the relationship.[196]

19.39 When assessing economic advantages and disadvantages, the court will take into account any gains in income and in earning capacity a partner receives during the relationship.[197] Importantly, the court does not divide the partner's earning capacity as if it were an item of property. Rather, the court divides the partners' conventional property but with regard to the partners' relative earning capacities.

194 Property (Relationships) Act 1976, s 1N(c); Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

195 Family Law (Scotland) Act 1985, s 9(1)(b); Family Law (Scotland) Act 2006, s 28(3) (which applies to cohabiting couples rather than married couples).

196 Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 73.

197 Family Law (Scotland) Act 1985, s 9(2); and Family Law (Scotland) Act 2006, s 28(9).

19.40 It is likely, however, that the option would suffer from similar difficulties as section 15 or if earning capacity were to be treated as property. Partners would still be required to prove they suffer economic disadvantages, or that the other partner unfairly enjoys economic advantages, because of the relationship. When deciding a fair adjustment of shares in relationship property, a court would probably have to measure the respective advantages and disadvantages each partner faces after the relationship.[198] This will require an assessment of future earning capacity which is subject to the same speculation and imprecision.[199]

Option 3: Replace section 15 with financial reconciliation orders

19.41 The third option is to introduce a regime of "financial reconciliation payments" to support partner A until the financial inequality resulting from the division of functions during, and after, the relationship, ends. This combines the functions of section 15 awards and maintenance payments under the Family Proceedings Act 1980.[200]

19.42 We propose this option in recognition of the practical difficulties the courts have grappled with in trying to compartmentalise the different roles of section 15 and maintenance. In reality both can achieve the same outcome of transferring value from the partner with a higher income to the partner with the lower or no income. As Miles notes:[201]

198 In the Scottish case *C v C* 2004 Fam LR 2 (CSOH) the wife claimed that she had suffered economic disadvantage because she had given up her career to care for the children and household. The court relied on evidence on what the wife would have been earning had she not left her career. The court noted that the wife would receive half the couple's matrimonial property based on the general principle of equal sharing of matrimonial property. The wife's half share would give her substantial property which, if invested, could have provided the wife the same income as if she had maintained her career. The court was satisfied that any economic disadvantage would be corrected by the equalisation process: at [72]. Similarly, the court rejected the argument that the husband had derived economic advantages because the wife gave up her career. The court held that had the wife continued to work the husband would have had needed to hire help for childcare and household management. But the court noted at [38] that if the wife had worked she would have brought more income to the household. The proper measure, the court said, was whether the husband's position had been advantaged beyond what it would have been had he not been married. The court was not satisfied it was: at [39].

199 In an empirical study of family law practitioners' views on the Family Law (Scotland) Act 1985 and Family Law (Scotland) Act 2006, researchers found that there was a perception that it was hard to obtain a departure from equal sharing in order to address economic disadvantages. The practitioners responded that claims were complex to argue and difficult to prove given the difficulties of quantifying economic advantages and disadvantages: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 75.

200 Since 2001 maintenance has been available to de facto partners as well as married (and now civil union) partners. In this Issues Paper we refer to "maintenance" rather than "spousal maintenance" as it is commonly termed.

201 Joanna Miles "Principle or Pragmatism in Ancillary Relief: The virtues of flirting with academic theories and other jurisdictions" (2005) 19(2) IJLPF 242 at 252.

> *Where claimants seek compensation these claims will often correspond with claimants' needs. Where this is so, whether the claim is conceptualised in terms of need or compensation will make no practical difference…*

19.43 Financial reconciliation orders would have a dual function: to meet partner A's reasonable needs post-separation, and to compensate partner A for the loss suffered as a result of the end of the relationship.

19.44 We start with a brief summary of what we know about the financial needs that arise when a relationship ends. We then give a brief overview of maintenance and discuss the overlap between section 15 and maintenance before outlining what it would look like to unite the two concepts. We also discuss the Canadian experience of spousal support (similar to maintenance in New Zealand) which addresses both financial need and financial inequality.

Financial needs that arise when a relationship ends

19.45 The end of a relationship almost always has negative financial consequences for both partners, as the resources that were used to support one household must now support two. The benefits from economies of scale will be lost, and the costs of establishing a new household and rearranging lives (such as increased childcare costs to meet longer hours at work, or reduced work hours and income to facilitate childcare arrangements) need to be met.

19.46 We explore the economic cost of separation in our Study Paper.[202] Recent research by Fletcher into the economic consequences of separation among couples with children confirms that on average total family incomes decline substantially for both men and women following separation.[203] On average women experience a reduction in family income by 41 per cent and for men the

202 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper) at Chapter 8.

203 *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)* (Study Paper) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 183. This research was limited to opposite-sex couples who separated in 2009. It looked at the short to medium term financial consequences of separation by analysing the incomes of over 15,000 people in the Working for Families dataset who separated in 2009 and who, prior to separating had at least one child living with them, and comparing outcomes with similar, still partnered individuals. For further information about this dataset see Study Paper at Chapter 8.

reduction is 39 per cent in the first year after separation.[204] However because men on average experience a larger reduction in family size post-separation compared to women (reflecting the care arrangements for children) their available income needs to be shared among fewer people. After equivalising family incomes to account for differences in family composition women are substantially worse off post-separation, and on average experience a drop in equivalised income of 19 per cent.[205] In contrast, men are on average better off, experiencing a rise in equivalised income of 16 per cent.[206] Beyond those averages, however, lies a wide dispersion of incomes and effects. Among both men and women, some are significantly better off and some are significantly worse off.[207] These results are broadly consistent with studies carried out in other countries.[208]

19.47 Fletcher also compared the relative financial consequences of separation between partners.[209] He identified that:

(a) It is rare for separation not to be associated with a significant financial impact for at least one of the partners.[210] In only 3 per cent of cases neither partner

204 This analysis compares a person's income in 2008 (the year prior to separation) with their income in 2010 (the year following separation): see *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122 and 183.

205 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (*NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122.

206 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 122.

207 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)* at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 184–185.

208 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 184–185.

209 Outcomes for 7,749 couples were analysed for the first post-separation year, and 5,781 couples for the three post-separation years: see *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 128-129.

210 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

experienced a change in income of at least 10 per cent in the first year after separation.[211]

(b) The impact of separation on incomes persists over the medium term, in the three years' following separation.[212]

(c) The most common scenario is where the woman is worse off after separation while her former partner is better off.[213] In 35 per cent of cases the woman's equivalised income *reduced* by more than 10 per cent and her partner's income *increased* by more than 10 per cent. These couples were characterised by a high average income before separation which came primarily from the man's earnings. After separation the average number of children living with the man had fallen substantially (from 1.99 to 0.16 children), and while the woman's post-separation earnings increased substantially, this is insufficient to offset the loss of her partner's income.[214] This group had the largest gap in terms of the average number of children living with the partners in 2010 (1.4 for women and 0.16 for men).[215]

(d) Another way of analysing post-separation outcomes is to compare the *relative* consequences of separation, irrespective of whether individuals are better or worse off compared to their own situation prior to separation. On this analysis, Fletcher identified that 70 per cent of men had equivalised incomes that were higher than

211 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

212 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 187.

213 This accounts for 46 per cent of cases. Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 131.

214 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 186.

215 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 134-135.

their partners, and 25 per cent of men had equivalised incomes more than double their partner's.[216]

(e) Child support payments provide little support to many separated partners with the primary care of children.[217] Of those partners receiving child support, average receipts were $2,367 for women and $709 for the men per annum.[218]

(f) Separation significantly increases benefit uptake in the short and medium term. In the first year following separation, 24 per cent of men and of 47 per cent of women received a benefit.[219]

(g) Separated partners are also more likely to be in poverty. The estimated impact of separation was to raise the poverty rate by 9 per cent for men and by 16 per cent for women.[220]

19.48 Overall, Fletcher identified that average total family income (that is, the combined income of the former partners) rises by $14,600 (23 per cent) in the year following separation.[221] This is due to a combination of increased workforce earnings, benefit receipt[222] and child support. However this increase is not sufficient to avoid

216 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 140-141.

217 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 137-138 and 152.

218 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 138.

219 Compared to 15.3% of all families in the dataset who received a benefit: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 143.

220 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 144 and 186.

221 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 148-149.

222 A key State benefit that can meet post-separation financial needs is Sole Parent Support. This replaced the Domestic Purposes Benefit in 2013. Sole Parent Support is available to a single parent or caregiver with a youngest dependent child under age 14. At the end of March 2017, 92 per cent of Sole Parent Support recipients were female and 76.2 per cent of recipients had been receiving Sole Parent Support for more than one year: Ministry of Social Development *Sole Parent Support – March 2017 quarter* (March 2017) at 1.

an overall decline in average equivalised incomes across both households.[223] Men are, on average, approximately $5,000 better off in equivalised income terms and women are approximately $7,000 worse off.[224]

19.49 Fletcher also identified that couples where the woman was significantly better off and the man worse off post-separation were characterised by more equal sharing of pre-separation earning and a reasonable combined level of income.[225] It is possible that as full-time employment becomes more common among women with dependent children, this pattern of outcomes will become more common.[226]

19.50 We recognise there are also societal factors (unrelated to any particular relationship) that mean the negative financial consequences of a relationship breakdown can be harsher and longer-lasting for women.[227] This includes the "gender pay gap", which was last assessed by Statistics New Zealand as 9.4 per cent, and the "motherhood penalty", last assessed at 12 per cent.[228] Another factor is the availability of subsidised childcare. In New Zealand there is no universal entitlement to subsidised childcare for children under the age of three. Childcare can be a significant post-separation cost, especially when those costs are borne by one partner. Caregivers who work shift work or non-standard hours face additional challenges in organising and paying for childcare.

223 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 149.

224 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 148.

225 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

226 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 151.

227 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 7.

228 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei (NZLC SP22, 2017)* at Chapter 7 citing Statistics New Zealand "Gender pay gap smallest since 2012" (press release, 1 September 2017); and Statistics New Zealand and Ministry for Women *Effect of motherhood on pay – summary of results: June 2016 quarter* (February 2017) at 5. The gender pay gap is the difference between median hourly earnings of men and women in full-time and part-time work. The motherhood penalty is the difference between the pay gap between male parents and female parents, and the pay gap between male non-parents and female non-parents.

The role of maintenance in addressing financial inequality

19.51 Maintenance is available at the end of a marriage, civil union or de facto relationship[229] when one partner cannot meet his or her reasonable needs because of one or more of the circumstances listed in sections 63 and 64 of the Family Proceedings Act 1980.[230] These circumstances include the division of functions within the relationship, ongoing responsibility for daily care of any minor or dependent children, the standard of living of the partners when they were together and any undertaking of training by a partner to eliminate the need for maintenance of that partner.

19.52 Maintenance seeks to give temporary relief to enable the applicant to construct a new life after separation.[231] Section 64A of the Family Proceedings Act is, on the face of it, an adoption of the clean break concept.[232] Section 64A(1)(a) provides that:

> each spouse, civil union partner, or de facto partner must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs;

229 De facto partners are treated differently to married and civil union partners under the maintenance provisions in the Family Proceedings Act 1980. First, the factors listed as affecting "ability" to be self-supporting under s 63(2)(a) that apply to marriages and civil unions are different to those in s 64(2)(a) that apply after dissolution of a marriage or civil union or where a de facto relationship ends. For example, in the former, personal disability and the labour market may affect ability to work whereas in the latter they do not. Second, the requirement in s 64A that parties must assume responsibility for meeting their needs within a reasonable time does not apply to a marriage or civil union that has not been dissolved. Third, maintenance is not available at the end of a short-term de facto relationship (lasting less than three years) unless the test in s 70B is met. No such test applies to short-term marriages and civil unions. Fourth, maintenance is available during a marriage or civil union under s 63. No such entitlement exists for de facto relationships.

230 Section 2 of the Family Proceedings At 1980 defines maintenance as the provision of money, property and services and includes, in respect of a child, provision for the child's education and training to the extent of the child's ability and talents, and in respect of a deceased person, the cost of the deceased person's funeral.

231 The courts have confirmed that maintenance is a temporary entitlement. In *Slater v Slater* [1983] NZLR 166 (CA) at 174 maintenance was described as for a "transitional period" and at [176]: "Maintenance is ordinarily…a bridge to assist the party concerned while he or she is consciously moving towards self-sufficiency." Similar sentiments were expressed in *C v G [Maintenance of Former Partner: Period of Liability]* [2010] NZFLR 497 (CA) at [31] and [32]. The Court of Appeal cautioned in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 293 and 295 that nothing "requires this objective to be carried through to the point where the provisions operate unfairly and harshly on one or other of the spouses", cautioning against "undue rigidity" in applying the principles expressed in *Slater v Slater*.

232 Joanna Miles has commented that the clean break concept has nonetheless influenced the size of maintenance awards which she describes as "quite parsimonious": Joanna Miles "Financial Provision and Property Division of Relationship Breakdown: A Theoretical Analysis of the New Zealand Legislation" (2004) 21 NZULR 267 at 301 expressly referencing *B v B* [2004] NZFLR 127 (FC)). See also John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

19.53 Yet section 64(2) provides such broad exceptions as to undermine that policy intention. Any "relevant circumstances" may be grounds for extending the temporary nature of maintenance.[233]

19.54 A court may order interim maintenance. We understand that this is a vital source of aid for many applicants as it gives them access to funds for daily living and for paying legal fees while relationship property matters are being resolved. We understand, however, that there can be delays in applications being heard. The fact that interim maintenance can only be ordered for a maximum of six months (after which a further application is needed) places a heavy burden on the applicant and his or her lawyer to make ongoing applications.

19.55 Partners may also enter a maintenance agreement, which can be administered by the Inland Revenue Department. Such an agreement does not preclude a party from applying for maintenance from the Family Court. The Family and District Courts have a wide power to vary, discharge or suspend any existing maintenance order.

19.56 A court may order maintenance to be paid as periodic payments or as a lump sum (in instalments if needed). A court must have regard to the following factors in determining how much maintenance is to be paid:[234]

(a) the means of each partner, including potential earning capacity, and means derived from any division of property under the PRA;

(b) the reasonable needs of each partner, having regard to the standard of living of the partners while they were living together;[235]

(c) the financial and other responsibilities of each including support of any other person;

(d) conduct by the applicant to prolong the inability to meet his or her reasonable needs or misconduct that would make granting maintenance repugnant to justice; and

233 Family Proceedings Act 1980, s 64A.

234 Family Proceedings Act 1980, ss 65(2) and 66.

235 Family Proceedings Act 1980, s 65(5).

(e) any other circumstances that make one party liable to maintain the other.

19.57 Although maintenance is collected and enforced by the Inland Revenue Department, it is separate from child support. Section 62 of the Family Proceedings Act also confirms that "the liability to maintain any person under this Act is not extinguished by reason of the fact that the person's reasonable needs are being met by a domestic benefit." The Court of Appeal confirmed in *Richardson v Richardson* that the domestic purposes benefit and Working for Families Tax Credits are not to be considered when assessing maintenance.[236]

19.58 There are several key points of difference between section 15 and maintenance:

(a) Maintenance focuses on the present needs of the applicant without requiring reference to the history of the relationship.

(b) Maintenance is a response to unmet needs whereas section 15 compensates for economic disparity, whether or not the applicant has financial needs.

(c) At least *in theory*, maintenance and section 15 applications are considered at different times. Interim maintenance can be ordered soon after an application is made (with final orders being made at a later stage) whereas a section 15 application takes a notoriously long time to be heard and it is made at the time relationship property is divided. We have also been told that interim maintenance applications can take a long time to prepare and several weeks, if not months, to be heard.

The overlap between section 15 and maintenance

19.59 Despite being in different statutes and with different statutory objectives, there is a clear link between section 15 and maintenance.[237]

236 *Richardson v Richardson* [2011] NZCA 652, [2012] 1 NZLR 796.

237 The overlap of policies and complementarity between the Property (Relationships) Act 1976 and Part 6 of the Family Proceedings Act 1980 was judicially acknowledged in *N v N* (1984) 3 NZFLR 277 (HC) at 280 and in *M v B [Economic Disparity]* [2006] NZFLR 641 (CA) at [220].

19.60 Claims to maintenance are often conflated with section 15 claims. During our preliminary consultation we were told that in practice when partner A makes a claim under section 15, partner B may be more inclined to resolve that claim out of court by making a lump sum payment, which partner B is likely to view as similar to a payment for maintenance. Section 15 claims may also be resolved where partner B agrees to pay periodic maintenance. In these cases, partner A's financial needs may be met and he or she may be less inclined to pursue a section 15 claim.

19.61 These observations suggest that people may perceive section 15 claims as directed toward addressing post-separation financial need, rather than compensating partner A for economic disparity caused by the division of functions within the relationship. This perception raises two questions:

(a) Do New Zealanders prefer a response to post-separation financial inequality that addresses need (often with the children as indirect recipients of the payment) rather than providing compensation to partner A for loss linked to the division of functions in the relationship?

(b) Or is the willingness to pay for and accept a maintenance-based sum only a pragmatic reflection of the time, cost and uncertainty involved with pursuing a section 15 claim?

19.62 Empirical research by Green also indicates that in practice maintenance is often relied upon to do the job of section 15.[238] This results in a mixing of the tests for meeting needs (maintenance) and compensating for financial inequality (section 15).

19.63 One approach is simply to merge the two and deal with them together.[239]

238 Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013).

239 A key question that would need to be considered if this option were to be developed and considered in the future is whether a separate maintenance regime would be required in certain circumstances, for example, as is currently the case under section 63 of the Family Proceedings Act.

Case law dealing with maintenance and section 15

19.64 We have identified 14 cases in which both a section 15 award and maintenance were ordered.[240] The approach taken by the courts in considering the overlap and procedural ordering of maintenance and a claim under section 15 is inconsistent.

19.65 In *Williams v Scott* the Family Court traversed the case law on the relationship between maintenance orders and section 15 awards, providing a useful summary. The key points are:[241]

(a) An award under section 15 should not be capitalised maintenance.

(b) A decision on whether partner A should receive a section 15 award should be made before any assessment of the need for maintenance.

(c) A court must have regard to any means deriving from relationship property in determining whether partner A cannot meet their own reasonable needs.

(d) An assessment of partner A's reasonable needs cannot be made until relationship property is divided.

19.66 There are several cases where, as occurred in *Williams v Scott*, an adjustment to one award has been made in light of the other.[242] For example, in *Barnett v Barnett* the Family Court declined an application for ongoing maintenance, and one reason given was the existence of a section 15 award which provided recognition of the lower living standards the wife would enjoy post separation and compared to during the marriage.[243] In other cases, such as *Monks v Monks*, maintenance has been determined entirely independently of a section 15 award.[244] In *E v E* there was a lump

240 The cases that are recognised as authoritative on the relationship between maintenance and section 15 awards are: *M v B* [2006] 3 NZLR 660 (CA); *P v P* [2005] NZFLR 689 (HC); and *S v C* [2007] NZFLR 472 (HC).

241 *Williams v Scott* [2014] NZFC 7616 at [471]–[472]. The law as stated in *Williams v Scott* is not a complete picture. In *M v B* [2006] 3 NZLR 660 (CA) Young J took a different view to Robertson J, indicating that he did not think the order in which the applications for maintenance and a claim under s 15 of the Property (Relationships) Act 1976 were determined made a difference. Hammond J did not indicate a view.

242 Under s 32(1)(a) of the Property (Relationships) Act 1976, a court must have regard to any maintenance order made under the Family Proceedings Act 1980. Under s 65(2)(a)(ii) of the Family Proceedings Act 1980 a court must have regard to means derived from a division of property under the Property (Relationships) Act 1976 when determining the amount of maintenance payable.

243 *Barnett v Barnett* [2004] NZFLR 653 (FC). In *V v V* [2002] NZFLR 1105 (FC) the Family Court made a maintenance award but deemed the award under s 15 of the Property (Relationships) Act 1976 to be part of the wife's income for the purposes of calculating the required sum. In *Smith v Smith* [2007] NZFLR 33 (FC) the court factored in the s 15 award in giving a small past maintenance award.

244 *Monks v Monks* [2006] NZFLR 161 (HC), although this was solely for past maintenance as it was for a period after separation it still overlapped with the period for which the award under s 15 of the Property (Relationships) Act 1976

sum section 15 award of $170,000 but this was not considered in calculating maintenance.[245]

19.67 Crawshaw observes that "it is questionable whether Parliament intended that a section 15 claim would be thwarted by the payment of maintenance or a statutory period of occupation, especially at the stage of determination of living standards. Importantly, Parliament has not made spousal maintenance and [section] 15 mutually exclusive."[246]

Uniting maintenance and section 15

19.68 In 1988 the Working Group established to review the Matrimonial Property Act 1976 dismissed the role of maintenance to remedy financial inequality. The Working Group said that "a move to reinstate long term periodical maintenance would bring about no improvement in the situation of women."[247] It raised criticisms that continue to apply to the maintenance regime in 2017, namely:[248]

(a) the practical financial difficulty of supporting two households on one income;

(b) the resentment felt by one partner (and potentially his or her new partner) over the legal obligation to provide permanent maintenance to a former partner; and

(c) difficulties in enforcing payments by unwilling payers.

19.69 The Parliamentary select committee considering the 2001 amendments viewed maintenance as "complementary" to section 15.[249] The 2001 amendments extended coverage of maintenance to include de facto partners and to provide the courts greater flexibility when awarding maintenance.[250] The committee

was relevant.

245 *E v E* [2012] NZFC 830. Similarly, in *T v T [Economic disparity]* [2007] NZFLR 754 (FC) an award for maintenance in arrears was treated independently of the claim under s 15 of the Property (Relationships) Act 1976.

246 Vivienne Crawshaw "Section 15 Refined" (paper presented to the New Zealand Law Society Family Law Conference, October 2015) at 471–472.

247 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12.

248 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 12–13

249 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3) (select committee report) at 20.

250 The select committee noted that while s 64 of the Family Proceedings Act 1980 applies to married and civil union couples as well as de facto couples, s 63 does not. It explained that the difference is because de facto relationships end on separation and do not need to wait for a two year period prior to dissolution, in which maintenance still may be required: Ministry of Justice *SOP to Matrimonial Property Amendment Bill Departmental Report* (August 2000) at 21–22. This

noted that the "maintenance provisions list more factors than the new economic disparity sections for the court to consider when determining whether to make an award."[251] Given that maintenance was viewed as complementary but ultimately different to section 15, the committee did not believe that "the factors governing the exercise of the Court's discretion need[ed] to be parallel."[252]

19.70 Uniting section 15 and maintenance into one doctrine could, however, help address existing problems. There are parallels between section 15 and maintenance; however an approach that combines them would be new to New Zealand. Such an approach would not solely be focused on either needs or compensation, nor would it be limited to the short term; rather it would be a hybrid of meeting needs and compensating loss and could continue indefinitely if appropriate. This approach is taken in Canada.

19.71 We have looked with interest at the Canadian experience for two reasons. First, maintenance (or spousal support, as it is known in Canada) is used to address both financial inequality arising from the division of functions in the marriage and financial needs arising at the end of a marriage. Second, non-binding guidelines have been developed to enable lawyers and couples to determine how much spousal support is to be paid without the need to go to court.

The Canadian experience – spousal maintenance and the spousal support guidelines

19.72 Canada deals with the division of relationship property separately to maintenance. Every Canadian province has its own laws to

does not account for the fact that s 63 allows maintenance to be awarded whether a married or civil union couple have separated or not. The effect is that de facto couples do not have the same entitlement to maintenance as married and civil union couples. This difference is aggravated due to the grounds in s 64 being narrower than those in s 63, as they do not include physical or mental disability or the inability to obtain work (being grounds unrelated to the relationship).

251 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3) (select committee report) at 17.

252 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000(109-3)(select committee report) at 17.

address the division of matrimonial property.[253] Spousal support is dealt with by federal law, under the Divorce Act 1985.[254]

19.73 The Divorce Act provides that a court may make an order (including an interim order) requiring a spouse[255] to pay such lump sum or periodic sums as the court thinks reasonable for the support of the other spouse.[256] There are four statutory objectives of spousal support and these cover both compensation for disparity and meeting financial needs.[257] The objectives are to:[258]

(a) recognise any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

19.74 To achieve these objectives when ordering spousal support, a court must consider the condition, means, needs and other circumstances of each spouse, including:[259]

(a) the length of time the spouses lived together;

253 Whether or not the legislative scheme dealing with property applies to de facto relationships (often referred to as "common-law couples") varies between provinces. In Alberta, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Québec and Yukon the legislative schemes granting rights for property sharing upon marriage breakdown or divorce do not apply to de facto couples. Further, the Canadian Supreme Court has held that common-law couples are unable to invoke section 15 of the Canadian Charter of Rights and Freedoms which provides Canadians with rights of equality in order to claim these property rights: *Quebec (Attorney General) v A* 2013 SCC 5, [2013] 1 SCR 61. In provinces where legislative schemes do not apply to them, common-law couples must make a claim under the common law doctrine of unjust enrichment in order to receive a share of relationship property upon the dissolution of a relationship. However, an award for unjust enrichment does not trigger a presumption of equal sharing of property as do statutory schemes for spouses.

254 Divorce Act RSC 1985 c 3.

255 The rights of common-law (or de facto couples) to spousal support depends on the province. For example in Ontario common-law spouses have the same right to spousal support provided they have been living together for at least three years.

256 Divorce Act RSC 1985 c 3, s 15.2(1).

257 Reflecting the two approaches taken in the Supreme Court in *Moge v Moge* [1992] 3 SCR 813 and *Bracklow v Bracklow* [1999] 1 SCR 420.

258 Divorce Act RSC 1985 c 3, s 15.2(6).

259 Divorce Act RSC 1985 c 3, s 15.2(4).

(b) the functions performed by each spouse when living together; and

(c) any order, agreement or arrangement relating to support of either spouse.

The Canadian Spousal Support Guidelines

19.75 In 2008 the Canadian Spousal Support Advisory Guidelines (the Guidelines) were prepared for the Canadian Department of Justice to provide a framework for determining the *amount* and *duration* of spousal support in any given case. This was in response to "growing concern expressed by lawyers and judges that the highly discretionary nature of the current law of spousal support had created an unacceptable degree of uncertainty and unpredictability."[260] The Guidelines and the formulas underlying them are not based on any particular theory; instead they reflected the practice of the courts at the time they were drafted.[261] The formulas typically generate relatively wide ranges for amount and duration of spousal support, rather than precise figures, necessitating a fact-specific determination in each case.[262] Amount and duration can be traded off against each other, to front-end load support or to convert it into a lump sum.[263] The Guidelines do not have legal force, are advisory only and provide a starting point for negotiation between the partners or for use by the courts. They have, however, been judicially endorsed.[264] The Guidelines were revised in 2016.[265]

19.76 The Guidelines take one of two approaches, depending on whether there are children of the relationship. If there are no children the formula is based on two factors: the gross income difference

260 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 9.

261 Advice to the Law Commission from Carol Rogerson and Rollie Thompson (February 2017), on file with the Law Commission.

262 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 252.

263 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 252.

264 They have been cited in over 230 appeal court decisions and over 2,900 trial decisions: Carol Rogerson and Rollie Thompson Spousal Support Advisory Guidelines: The Revised User's Guide (Department of Justice Canada, April 2016) at 1.

265 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* (Department of Justice Canada, April 2016) were earlier revised in 2010: Carol Rogerson and Rollie Thompson *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (Department of Justice Canada, March 2010).

between the spouses and the length of the marriage.[266] Both the amount and duration of spousal support increase incrementally as the length of the marriage increases.[267] This reflects the premise that as a marriage lengthens, spouses increasingly merge their economic and non-economic lives in direct and indirect ways.[268] The longer the marriage, the more intertwined the life choices of the spouses are with the expectation of sharing benefits accrued during the marriage.

19.77 A different formula applies when there are children. This formula reflects the distinct concerns in cases involving children. First priority is given to child support over spousal support, with the result that there is usually reduced ability to pay spousal support.[269] The formula is based around sharing the net pool of income after tax and child support. The basis for spousal support when there are children is also different, captured by the concept of "parental partnership".[270] The Guidelines state:[271]

> *On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, but also after separation.*

266 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) Example 7.1 at 52: Arthur and Ellen have separated after a 20-year marriage and one child. During the marriage Arthur, who had just finished his commerce degree when the two met, worked for a bank, rising through the ranks and eventually becoming a branch manager. He was transferred several times during the course of the marriage. His gross annual income is now $90,000. Ellen worked for a few years early in the marriage as a bank teller, then stayed home until their son was in school full time. She worked part-time as a store clerk until he finished high school. Their son is now independent. Ellen now works full-time as a receptionist earning $30,000 gross per year. Both Arthur and Ellen are in their mid-forties. Assuming entitlement has been established in this case, here is how support would be determined under the without child support formula. To determine the amount of support: determine the gross income difference between the parties: $90,000 - $30,000 = $60,000. Determine the applicable percentage by multiplying the length of the marriage by 1.5–2 percent per year: 1.5 x 20 years = 30 per cent to 2 x 20 years = 40 per cent. Apply the applicable percentage to the income difference: 30 per cent of $60,000 = $18,000/year ($1,500/month) to 40 per cent of $60,000 = $24,000/year ($2,000/month).

267 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 253.

268 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 254.

269 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 255.

270 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 255–256.

271 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at [3.3.4]. The authors of the Guidelines, Rogerson and Thompson, further explain in Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 256 that:

> *The formula is profoundly compensatory in nature, reflecting the need in these cases, not only to compensate for the economic disadvantages that result from past care-giving roles, but also the continuing, indirect costs of childcare on the custodial or primary-care parent.*

19.78 The length of the marriage is considered, but it does not play as large a role under this formula. Other factors such as the number and ages of the children and shared care arrangements are considered. There is a different, hybrid formula for cases where spousal support is paid by the spouse who is the primary caregiver. The Guidelines are also adaptable to situations involving stepchildren[272] and provide for variation in response to changing circumstances such as changes in income, re-marriage and subsequent children.[273]

19.79 Because the Guidelines are non-binding it is easy to amend an agreement if there is a change of circumstances. In order to reduce the risk of an agreement being set aside by a court, the Guidelines provide a list of exceptions to help lawyers and partners assess and deal with any necessary departure from the formulas provided by the Guidelines.[274]

19.80 An example adapted from the Guidelines illustrates how the formula works to give an indicative range of what spousal support should be paid:[275]

Case study: The Canadian Spousal Support Guidelines – with children

Ted and Alice separated after 11 years of marriage. Ted earns $80,000 per year. During the marriage Alice stayed at home with the two children, now aged 8 and 10. After the separation the children live with Alice and she finds a part-time job earning $20,000 per year. Alice's mother provides after-school care for the children. Ted pays child support in accordance with the formula calculation every month. Using the Guidelines, Ted would also be paying spousal support in the range of $474 to $1,025 per month. This means that Alice and the children would receive between 52 to 57 per cent of the combined family income (being the combined incomes of Ted and Alice). If Ted and Alice had only one child, the spousal support range would be higher (reflecting Ted's reduced child support obligations), and if there were three children Ted's ability to pay spousal support would be reduced further. The spousal support figure would also be adapted to take into account

272 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 8.

273 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 14.

274 Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Chapter 12. Exceptions include payment of debts, special needs of a child, illness or disability of partner A, and an exception for shorter marriages.

275 Adapted from Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008), Example 8.1 at 79. See n 266 for an example of the without children formula.

various factors such as childcare. If Alice was paying for after-school care and Ted was paying his share then the range of spousal support would reduce further.

19.81 Canada has taken a pragmatic approach to dealing with the financial need and financial inequality that can arise when partners separate. As is always the case when an approach taken in another country seems attractive, care and consideration must be given to ensure whether this approach would be compatible with the unique attributes of the New Zealand context. A key point to consider would be how such an approach would work with the current child support regime; although we note that in Canada spousal support likewise sits alongside a formula child support regime.

19.82 The authors of the Guidelines, Rogerson and Thompson, note that spousal support is "undoubtedly a contentious remedy".[276] Legal systems around the world have struggled with the difficult question of the appropriate role, if any, for spousal support given the basic principles and values of modern family law.[277] The Canadian approach has answered this question by shifting away from the "clean break" concept and recognising a basis for spousal support on both compensatory and needs-based grounds.[278] Rogerson and Thompson highlight the cultural acceptance of this approach in Canada.[279] Any disputes tend to relate to the amount of spousal support to be paid rather than whether spousal support should be paid at all. There is not necessarily the same acceptance of paying maintenance in New Zealand. Section 64A of the Family Proceedings Act directs that a partner "must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her

276 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 246.

277 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 246.

278 Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Family Law Quarterly 241 at 242. The Supreme Court of Canada rejected the clean break concept as a model of spousal support in *Moge v Moge* [1992] 3 SCR 813. In that case emphasis was placed on compensation for the loss of economic opportunity as the key premise of spousal support. The Court said:

> *"[w]hile spouses would still have an obligation after the marriage breakdown to contribute to their own support in a manner commensurate with their abilities, the ultimate goal is to alleviate the disadvantaged spouse's economic losses as completely as possible, taking into account all the circumstances of the parties, including the advantages conferred on the other spouse during the marriage."*

In *Bracklow v Bracklow* [1999] 1 SCR 420 the Supreme Court noted there was no single theory underpinning spousal support, which must instead retain the flexibility to adapt to the varied circumstances of relationships. See also discussion in Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 7–9.

279 Advice to the Law Commission from Professor Carol Rogerson and Professor Rollie Thompson (February 2017), on file with the Law Commission.

own needs". In contrast section 15(6)(d) of the Divorce Act 1985 (Canada) provides that an order for spousal support should "so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period."

Could financial reconciliation orders replace section 15 and maintenance in New Zealand?

19.83 Whether the Canadian approach is appropriate for New Zealand requires consideration of first, whether there is an appetite in New Zealand for financial reconciliation orders as a concept and second, what financial reconciliation orders would comprise; notably what the test for qualifying for an order would be and how the amount of any award would be assessed. Consideration would also need to be given to the utility of developing guidelines or a formula that could be used by practitioners and partners themselves to enable an agreement to be reached without going to court.

19.84 A court could be required to consider an interim application for financial reconciliation orders within a specified timeframe, such as within six weeks from the date of application.[280] If, on final resolution and distribution of relationship property, there was an ongoing financial inequality, a final financial reconciliation order could be made.

19.85 We do not explore here the different methodologies that could apply to the calculation of financial reconciliation payments, or factors that should be taken into account.[281] Significant further work would be needed if this option is preferred.

19.86 The development of guidelines to help partners manage and negotiate the amount and duration of any financial reconciliation payments by themselves, or with the help of their lawyers, would

280 Also see Chapter 14 for a discussion on interim distributions of property under the Property (Relationships) Act 1976.

281 In Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming) Henaghan proposes that a better way of quantifying a claim under s 15 of the Property (Relationships) Act 1976 would be via the implementation of a combined "income equalisation payment approach." Such an approach might be adopted for financial reconciliation orders. This involves determining the parties' respective future incomes for the 12-month period after their relationship ended and then adding these two figures together to determine the parties' total combined annual income. The parties' total combined income is then divided equally between them, which means the economically stronger party will need to top up the other partner's income until it reaches half of the parties' total combined annual income figure. This annual income equalisation payment should then be multiplied by half of the number of years the parties have been together, up to a maximum of 10 years. Once the annual equalisation payment has been established, the court must use its discretion to make allowances for relevant contingencies such as the parties' respective age, length of time before retirement, health and stability of employments. The final figure might be awarded as a lump sum or be paid on a periodic basis.

greatly aid the effective implementation of financial reconciliation orders.

CONSULTATION QUESTIONS

F1 Should partner A be entitled to more than an equal share of the relationship property pool if there is financial inequality at the end of the relationship as a result of the division of functions in the relationship?

F2 Does your view depend on whether the partners have children?

F3 Do you agree that reform or replacement of section 15 is required?

F4 Which option do you prefer and why?

F5 If option 3 is adopted, do you think there should be a maximum duration for financial reconciliation orders? If yes, should the maximum duration be one year, two years, five years or ten years?

F6 Are there any other options we should consider?

Part G – What should happen to property held on trust?

Chapter 20 – Trusts

Introduction

20.1 Part G addresses the intersection between the PRA and the laws governing trusts. Parliament has sought a balance between the division of relationship property under the PRA and the rules that apply to property held on trusts. This part considers whether the right balance has been struck between enabling a just division of property and the preservation of trusts.

20.2 In this chapter we describe what a trust is and why New Zealanders use trusts to hold property. We then examine how the PRA and the wider law apply when property is held on trust. In particular, we look at the legal remedies available to a partner to seek an interest in the trust property at the end of a relationship. The rest of Part G is arranged as follows:

(a) In Chapter 21 we discuss how problems may arise when partners come to divide their property at the end of a relationship and a trust is involved. We look at how a trust can frustrate the just division of property under the PRA. We also examine the interplay between the PRA and the other remedies outside the PRA in respect of trusts.

(b) In Chapter 22 we suggest some possible options for reform.

20.3 This part focuses mainly on the ways trusts can interfere with the division of the partners' property when a relationship ends on separation. If one partner to a relationship dies, the surviving partner may elect to divide the couple's property under the PRA rather than accept whatever provision is made in the will. The rules that apply to relationships ending on death are discussed in Part M. Many of the same issues discussed in this part may, however, arise if a surviving partner elects to divide property under the PRA.

The use of trusts in New Zealand

20.4 New Zealand has one of the highest numbers of trusts in the world as a proportion of its population. The Law Commission has previously estimated there may be anything between 300,000 to 500,000 trusts in New Zealand.[1] In the 2013 Census, 14.8 per cent of households reported that their home was held on trust.[2] In 2015, Statistics New Zealand found that 19 per cent of households had involvement with a trust, meaning at least one member of the household was involved as a settlor, beneficiary or trustee.[3] Cron described New Zealand's use of trusts in these words:[4]

> *The growth of trusts in New Zealand over the past two decades has been nothing short of phenomenal. Trusts seem to be on par with motor vehicles – every family has one and in some cases two.*

20.5 Widespread use of trusts is potentially a big issue because as a general rule, property held on trust is not divided equally between the partners when the relationship ends. Instead, when someone places his or her property on trust (sometimes referred to as "settling" the property on trust), he or she passes legal ownership of the trust property to the trustees. As a result, the trust property is only divisible to the extent each partner is said to be the beneficial owner of the property. The effect of these rules is that the PRA has no application to a lot of the property used and enjoyed by New Zealand families.

20.6 Many people argue that the PRA should deal with trusts more effectively. Apart from some limited changes made by the 2001 amendments, the PRA's application to trusts has remained largely unchanged. The debate has intensified in recent years as disputes over trust property have gone to court, resulting in several significant developments in the law.[5]

20.7 In 2013, the Law Commission released its final Report in a project reviewing the law of trusts, including the relationship between

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1 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [2.3].

2 Statistics New Zealand *2013 Census QuickStats About Housing* (March 2014) at 12.

3 Statistics New Zealand *Household Net Worth Statistics: Year ended July 2015* (June 2016). The survey excluded independent trustees.

4 J Cron *Family Trusts in New Zealand* (Penguin Books, North Shore, 2010) at 9.

5 See for example *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590; and *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807.

the PRA and trusts.[6] During the project the Commission invited submissions on that issue and the majority of submitters believed that the PRA is ineffective at dealing with trusts.[7] Some submitters said that the PRA did not produce a just division of property. They said that the courts needed greater powers to deal with property held on trust.[8] In spite of these responses, the Commission was cautious about proposing changes to the PRA because relationship property law was broader and involved different considerations to trust law, which was then the Commission's focus.[9] A comprehensive review of the PRA's relationship with trusts was left for another day.

What is a trust?

20.8 At a basic level a trust is a legal relationship in which the owner of property holds and deals with that property for the benefit of certain persons or for a particular purpose.[10] The person who establishes the trust and provides the initial property is called the settlor. The person who receives the property from the settlor to hold on trust is called a trustee.[11] The individuals who will receive the benefit of the property are beneficiaries.[12] The property held on trust is called trust property. Trust property can be most forms of property provided there is enough certainty about what property is the trust property. Trust property may therefore be land, a sum of money or shares in a company.

20.9 The law that applies to trusts distinguishes between the *legal* owner of the trust property and the *equitable* owner of the trust property. The legal owner is the trustee. For instance, if the trust property comprises land, the trustee will be recorded as the registered proprietor of the land in the land register. As the trustee must hold the trust property for the benefit of the

6 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

7 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [17.2].

8 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [17.2].

9 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.2].

10 This definition is taken from the Law Commission's formulation of the essential characteristics of a trust as set out in our final report: Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at R1 p 86. We based the formulation on the widely accepted definition in David J Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (17th ed, LexisNexis, London, 2007) at [1.1]. The Trusts Bill currently before Parliament provides that a trust has the characteristic of being a fiduciary relationship in which the trustee holds or deals with property for the benefit of the beneficiary or for a permitted purpose: Trusts Bill 2017 (290-1), cl 13(a).

11 It is possible for a settlor to also be the trustee. The settlor can declare that he or she holds the property on trust without transferring the property to a third party.

12 It is possible for a settlor and/or a trustee to be a beneficiary. But he or she cannot be the only beneficiary.

beneficiaries, the trustee is not the equitable owner. Instead, the equitable owners (or beneficial owners) of the trust property are usually the beneficiaries.[13] A beneficiary's entitlement to the trust property will depend on the nature of his or her interest under the trust.

20.10 The law imposes duties on trustees to act in the best interests of the beneficiaries. Trustees are required, among other things, to act in accordance with the terms of the trust, to avoid conflicts of interest, and to act honestly and in good faith.[14]

20.11 The most common form of trust is an express trust. This is a trust which has been expressly established by the settlor. The trust instrument identifies or explains the method for identifying the trustees, the trust property and the beneficiaries.[15] Most trusts used by families in New Zealand are express trusts. There are different types of interest that a beneficiary can have in a trust.[16] The most common are summarised below.

Discretionary interests

20.12 Often the trust deed gives the trustees or other specific individuals a power to decide how to distribute the trust's property to the beneficiaries.[17] The trustee may then determine when and to who (amongst the beneficiaries) to give the trust property. In such cases the beneficiaries have a discretionary interest and the trust is usually known as a "discretionary trust."

Vested interests

20.13 A vested interest gives the beneficiary an absolute right to the use and enjoyment of the trust property and does not depend on the

13 It is possible that the equitable estate of the trust property will not be held by the beneficiaries. This may be the case in a purpose trust or charitable trust. There is also debate on where the equitable estate of the trust property is to be found when the trustee has discretion to appoint the property to any beneficiary.

14 There has been some debate regarding a trustee's duties and to what extent they can be excluded by the trust instrument. The Trusts Bill currently before Parliament sets out mandatory trustee duties that cannot be excluded by the trust instrument: Trusts Bill 2017 290-1, cls 22–26.

15 See Andrew Butler "The Trust Concept, Classification and Interpretation" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 69–84. Not all trusts have a document that records the terms of the trust. An express trust can arise by virtue of the settlor declaring that he or she holds the property on trust for the beneficiaries. See for example *S v S* [2012] NZFC 2685 where the settlor declared that he held some paintings hanging in his house on trust for his children. Some trusts, like constructive trusts, will arise by operation of the law and so will not have documents which set out the term of the trust.

16 The complexities are illustrated by Tipping J's decision in *Johns v Johns* [2004] 3 NZLR 202 (CA) at [46].

17 Such a power is called a power of appointment. If the holder of the power has discretion to appoint the trust property to any person, including himself or herself, it is known as a general power of appointment.

trustee's discretion. For example, if money is held on trust and the beneficiary has an interest vested in both interest and possession, then the beneficiary can ask the trustee to transfer the money to him or her.[18]

Contingent interests

20.14 A contingent interest arises where the vesting and possession of the interest depend on the satisfaction of a condition.[19] For example, a trust deed may state that the trustees are to hold the trust property for 20 years. During that 20 year period, the trustees may distribute the trust income to the discretionary beneficiaries. At the end of the 20 year period, the deed may require the trustees to distribute any residual trust property to certain named beneficiaries. These beneficiaries[20] have a contingent interest because their interest depends on them being alive at the end of the 20 year period and trust property being available for distribution.

Trusts used by New Zealand families

20.15 There is very little official information on how trusts are typically structured in New Zealand. There is no official register that lists all trusts,[21] unlike companies or other incorporated entities which must register their formation documents.[22] In any event, the structure of trusts used by families in New Zealand is likely to vary according to the needs of the family and the professional

18 There is a distinction between interests that are vested in interest and interests that are vested in possession. If a beneficiary's interest is vested in interest but not possession, the extent of the beneficiary's interest is determined, but he or she is not yet entitled to possession of the interest. For example, a trust deed might provide that a beneficiary is entitled to $1,000 when he or she reaches the age of 21. In that scenario, the extent of the beneficiary's interest is determined as $1,000 so it is vested in interest. It cannot, however, be enjoyed until the beneficiary reaches the age of 21 so the beneficiary's interest is yet to vest in possession.

19 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [47]; and Jeff Kenny & Jared Ormsby "Powers of Appointment and Powers of Advancement: What Every Lawyer Needs to Know" (paper presented to New Zealand Law Society Trusts Conference, June 2011) at 177.

20 These beneficiaries are often called by different names, such as "final beneficiaries", "residual beneficiaries" or "capital beneficiaries".

21 Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at [9.6]–[9.7]. The trustees are only required to file tax returns in respect of the trust if the trust is engaged in taxable activity. It is thought that a significant number of trusts are used simply to hold assets such as houses and farm property. Those trusts would not need to register with the Inland Revenue Department. Recently, however, the Land Transfer Amendment Act 2015 has introduced a requirement for trusts to obtain an IRD number and file a tax statement when completing a transfer of land: Land Transfer Act 1952, ss 156B and 156C. These measures only apply to transactions where the contract for the sale and purchase of land was entered after 1 October 2015.

22 This is one of the central attractions of trusts: to keep financial affairs confidential.

advice given to them.[23] The structure will also differ from trusts used in other areas. For example, a charitable trust is different to a trust used to hold the family home.

20.16 Nevertheless, we have observed some recurring characteristics from our review of cases and literature, and our consultations with trust experts.

20.17 Before describing these characteristics, we wish to address terminology. In this part we will sometimes use the term "family trust" to refer to an express trust that families in New Zealand commonly use. Several other commentators use this description.[24] We use the phrase purely for convenience. By terming a trust a family trust, we are not implying any particular legal categorisation. Rather a family trust will usually bear the legal characteristics we discuss in the following paragraphs.

20.18 Family trusts are usually discretionary trusts. The deed will then state what happens when the trust comes to an end. A common provision requires all remaining trust property to be distributed to the named beneficiaries.[25] The trust therefore has beneficiaries with discretionary interests and beneficiaries with contingent interests.

20.19 We have also seen that some trust deeds contain provisions that allow the settlor(s) to retain control over the trust.[26] For example, the trust deed may give the settlor the power to appoint or remove trustees. The trust deed might also give the settlor the power to add or remove any of the beneficiaries, producing even greater control over the trust.

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23 Over the years there have also been trends in the way trust deeds have been drafted. Often the trends reflect the tax and legal context in which the trust is designed to operate. A good example is the phenomenon of mirror trusts. Mirror trusts were used by partners as a means of avoiding gift duty. In 1983 the Estate and Gift Duties Act 1968 was amended to allow partners to transfer up to 50 percent of their property to each other pursuant to a contracting out agreement under the then Matrimonial Property Act 1967 without incurring gift duty. The practice emerged of partners receiving a transfer of the property and then each partner would settle the property on trust. Under the trust the other partner would be named as beneficiary along with the partners' children. These types of trusts were known as mirror trusts as the trust each partner settled would be in exactly the same terms for the benefit of the other partner. The ultimate goal of the mirror trust structure was to allow both partners to use and enjoy the whole of their assets through the trusts without attracting gift duty. See WM Patterson "When is a Trust a Trust?" (paper presented to Legal Research Foundation Seminar "A Modern Law of Trusts", Auckland, 28 August 2009) at 4.

24 See for example Andrew Butler "The Trust Concept, Classification and Interpretation" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 62.

25 The law provides that an interest must vest within 80 years or the lifetime of a relevant person plus 21 years. In other words, a trust cannot operate beyond this period. This is known as the rule against perpetuities. It is common for a trust deed to prescribe the lifespan of a trust by specifying a date at which all residual trust property must vest in the beneficiaries. This is sometimes termed the "vesting date" or "date of distribution" in trust deeds.

26 Butler explains that a major attraction of trusts is that the settlor can retain considerable de facto control over, and benefit from, the trust property: Andrew Butler "The Trust Concept, Classification and Interpretation" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 62.

20.20 To explain how a typical family trust might look, we have used the example of Kim.

Case study: The K Family Trust[27]

In 1998 Kim bought a house. Kim's lawyer advised her to set up a trust to hold the house. In July 1999 Kim executed a deed and established the K Family Trust. The trust deed provides that:

a. The trustees of the K Family Trust are Kim and her accountant.

b. Kim has the power to appoint or remove trustees.

c. The beneficiaries of the K Family Trust are Kim, her spouse, and her children.

d. Kim has the power to appoint new beneficiaries and remove existing beneficiaries.

e. The K Family Trust runs until 27 July 2079.

f. Before 27 July 2079, the trustees can distribute the trust property to any of the beneficiaries as the trustees shall decide.

g. On 27 July 2079, the trustees must distribute any remaining trust property equally between Kim's children.

Shortly after the trust deed is executed, Kim transfers the house to the trustees to be held on the K Family Trust.

In this scenario, Kim, her husband and her children have a **discretionary beneficial interest** under the K Family Trust.

Kim's children also have a **contingent beneficial interest** under the K Family Trust.

27 The following example is based loosely on the trust that was the subject of the Court of Appeal case *N v N* [2005] 3 NZLR 46 (CA). The terms of the trust deed are set out in the High Court judgment *N v N* [2003] NZFLR 740 (HC) at [19].

Kim has control over the trust property (the house) as she is a trustee with discretion to distribute property to the beneficiaries. She also has power to appoint and remove beneficiaries.

Why do New Zealand families use trusts?

20.21 The proportion of New Zealand families that use trusts exceeds that of comparable jurisdictions, such as the United Kingdom, Australia and Canada.[28] The reason New Zealanders rely so heavily on trusts is mainly due to New Zealand's tax and legal landscape from the 1950s onwards.[29]

20.22 We think that one reason New Zealand families use trusts is to protect assets from a claim under the PRA. This is because property held on a discretionary trust is largely excluded from the PRA's equal sharing regime. Trusts have therefore emerged as a way for partners to keep property separate when they enter relationships. We have been told that it is common for people entering second or subsequent relationships to want to protect property from potential claims of their new partner, particularly if they want to preserve the assets for the benefit of the children of a former relationship. We have also been told that trusts are often perceived as a more suitable way of excluding assets from the PRA rather than contracting out agreements.[30]

20.23 There are other reasons New Zealanders have set up trusts, including to:[31]

(a) shield assets from creditors;[32]

28 Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at [1.13].

29 Some of this history was traced by the Law Commission in Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010); and Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010).

30 Consultees have told us that trusts are often preferred to contracting out agreements for a number of reasons. First, a trust may be settled before a subsequent relationship is contemplated. A contracting out agreement may only be entered with a prospective or current partner. Second, a partner may unilaterally settle a trust. A contracting out agreement, on the other hand, is more likely to prompt awkward conversations between the partners. Third, contracting out agreements are perceived to be more vulnerable to challenge as the court may set them aside under s 21J of the Property (Relationships) Act 1976 on the grounds they cause a serious injustice. Nicola Peart has discussed the reasons why partners prefer trusts over contracting out. See Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 460.

31 To research the motivations behind the use of trusts in New Zealand, we have relied on WM Patterson "When is a Trust a Trust?" (paper presented to Legal Research Foundation Seminar "A Modern Law of Trusts", Auckland, 28 August 2009). We have also searched the websites of over 40 professional trustee companies, law firms, accountancy practices and community advice bodies for the reasons they give for establishing trusts. The reasons summarised in this paragraph are consistently identified on these websites.

32 A person may settle assets on trust yet retain considerable control and benefit from those assets. If the settlor has only a discretionary beneficial interest in the trust, he or she is deemed to have no property interest in the assets. Only in exceptional cases, such as fraud, can the trust assets be claimed by the settlor's creditors. Professional advisers have therefore recommended that families establish trusts to protect key family assets from liability to creditors.

(b) provide a means of intergenerational transfers of wealth;[33]

(c) manage property for someone who is unable to manage his or her own affairs (for example a minor or person suffering mental incapacity);

(d) put property aside for specific purposes (for example, for a child's education);

(e) avoid estate duty and gift duty;

(f) minimise taxable income;[34] and

(g) qualify for residential care home subsidies.[35]

20.24 Many of these reasons no longer apply. Estate duty and gift duty have now been abolished.[36] Likewise, tax laws have been tightened to prevent tax payers from redirecting income through a trust to take advantage of more favourable tax rates.[37] A person's ability to use a trust as a means of qualifying for residential care subsidies has also been largely limited by a change in the Ministry of Social Development's policy towards trusts.[38] Nevertheless, because the life of a trust can span several decades,[39] many trusts will continue to exist even though they were established for reasons that are now irrelevant.

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33 Unlike a deceased's estate, claims cannot be made against a trust under the Family Protection Act 1955 and the Law Reform (Testamentary Promises Act) 1949. Historically, many families in New Zealand have chosen to settle a farm property on trust. The aim of the trust is, among other things, to ensure the farm assets pass intact to the next generation. We discuss the use of trusts to pass key items of family property to the next generation further below at [21.19].

34 Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) at [2.12].

35 See Bill Paterson "Residential Care Subsidies – Problems and Puzzles" (paper presented to New Zealand Law Society Seminar, 2013) at 134; Theresa Donnelly "Residential Care Subsidies – Problems and Puzzles: Commentary" (New Zealand Law Society Seminar, 2013) 159 at 161–162.

36 Estate duty was abolished through the Estate Duties Abolition Act 1993. Gift duty was later abolished through the Taxation (Tax Administration and Remedial Matters) Act 2011, s 245.

37 The practice of using trusts to redirect income through a trust to minor beneficiaries in order to be taxed at the beneficiaries' lower marginal tax rate was restricted by the Taxation (Beneficiary Income of Minors, Services-Related Payments and Remedial Matters) Act 2001.

38 Previously the Ministry of Social Development would only assess whether an applicant had settled property on trust in the five year period leading up to an application in order to determine whether an applicant had deprived himself or herself of property in order to qualify for the subsidy. See Bill Paterson "Residential Care Subsidies – Problems and Puzzles" (paper presented to New Zealand Law Society Seminar, 2013) 133 at 134; Theresa Donnelly "Residential Care Subsidies – Problems and Puzzles: Commentary" (New Zealand Law Society Seminar, 2013) 159 at 161-162.

39 The law provides that an interest must vest within 80 years or the lifetime of a relevant person plus 21 years.

20.25 We also recognise that the use of trusts has been heavily promoted by professional advisers. The Law Commission has previously noted a "commodification" and "marketing" of trusts.[40]

20.26 There have, however, been no comprehensive studies on why contemporary New Zealand families settle trusts. There are likely to be different reasons for each family. It is nevertheless important to understand the role that trusts play in contemporary New Zealand so that the right balance between relationship property rights and the preservation of trusts can be found.

CONSULTATION QUESTION

G1 Why do families in New Zealand set up trusts? Are there major reasons other than those we have identified?

The PRA and property held on trust

The definition of property under the PRA

20.27 The PRA only applies to property owned by the partners to the relationship. To understand how the PRA deals with property held on trust, the starting point is to look at the PRA's definitions of "property" and "owner". The PRA provides:[41]

> owner, in respect of any property, means the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity
>
> …
>
> property includes—
>
> (a) real property:
>
> (b) personal property:
>
> (c) any estate or interest in any real property or personal property:

40 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [1.26]. Tappenden describes the promotion of trusts to families as "big business": Sue Tappenden "The Family Trust in New Zealand and the Claims of 'Unwelcome Beneficiaries'" (2009) 2 Journal of Politics and Law 17 at 17. The Law Commission's 2012 review of trusts received submissions that legal and accounting professionals recommend that clients establish trusts as part of a package of work being done. Other submitters commented that trusts are sometimes seen as status symbol which people set up to keep up with the neighbours: Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [1.26]. Sometimes, an adviser may have recommended that a client establish a trust even if the client did not fully appreciate whether they needed the trust, or the implications of the trust.

41 Property (Relationships) Act 1976, s 2.

(d) any debt or any thing in action:

(e) any other right or interest

20.28 The PRA's definition of owner means the "beneficial owner" of the property. A trustee, however, is not the beneficial owner of the property. Consequently, the property a partner owns in his or her role as trustee will be excluded from division under the PRA.[42] Neither will the settlor of the trust be considered the owner of the trust property under the PRA. Like trustees, settlors have no beneficial ownership of the property they settle on trust.[43]

20.29 The PRA's definition of property does, however, include any "estate or interest" in property or "any other right or interest." Therefore, a beneficial interest under a trust may constitute property under this definition and that interest may be eligible for division under the PRA.

20.30 Not all types of beneficial interests under a trust, however, will constitute property. The courts have looked to the general law of property and trusts in order to determine which types of beneficial interests are property for the purposes of the PRA.[44] The courts have said that the PRA's use of a standard definition of property strongly indicates that the PRA was intended to draw on a conventional understanding of property law principles.[45] We now turn to look at which types of beneficial interests the courts have said amount to property under the PRA.

Vested interests

20.31 The courts have held that if a beneficiary has a vested interest in a trust, that interest constitutes property under the PRA and the beneficiary is an owner to the extent of his or her beneficial interest. This is because a beneficiary with a vested interest can

42 This position is also reinforced by s 4B of the Property (Relationships) Act 1976 which provides that the normal rules of common law and equity will apply if a partner is acting as trustee.

43 See for example *S v S* [2012] NZFC 2685 in which one partner declared that he held some of the paintings that he owned on trust for the benefit of his children even though the paintings continued to hang in the partners' family home. The partner was both settlor and trustee. The Family Court accepted that a valid trust had been created and therefore the paintings were not items of property that were owned by the partner.

44 This is because the definition of property in the Property (Relationships) Act 1976 is also found in many other statutes that deal with property generally. In *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279 the Court of Appeal listed the statutes that, at the time, had the same "standard" definition of property (albeit sometimes with adaptations): Property Law Act 1905, Child Support Act 1991, Crimes Act 1961, Domestic Actions Act 1975, Family Proceedings Act 1980, Forest and Rural Fires Act 1977, Housing Corporation Act 1974, Legal Services Act 1991, Mortgagors and Lessees Rehabilitation Act 1936, New Zealand Government Property Corporation Act 1953, Property Law Act 1952, Public Trust Office Act 1957, Receivership Act 1993, Simultaneous Deaths Act 1958, Trustee Act 1956 and Wills Amendment Act 1955.

45 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279. See Chapter 8 for more discussion on the definitions of "property" and "owner" in s 2 of the Property (Relationships) Act 1976.

force a trustee to let him or her enjoy his or her beneficial share of the trust property.[46]

Case Study: The AB Family Trust[47]

Atamai and Brenda wish to help their daughter, Caroline, by providing her with a house. Atamai and Brenda buy a house. They then execute a deed of trust to set up the AB Family Trust. Under the deed, Atamai and Brenda are the trustees. Caroline is named as the sole beneficiary. The deed states that:

"The trustees will hold the house in trust for Caroline".

Atamai and Brenda let Caroline live in the house.

Caroline has a vested interest under the trust. The trust deed provides without limitation that she is beneficially entitled to the house. Under the PRA's definitions, Caroline's interest under the trust is property.

Discretionary interests

20.32 A discretionary interest in a trust is not considered property.[48] The reasoning is that a discretionary beneficiary will only obtain the benefit of the trust property if the trustee distributes the property to the beneficiary.[49] The most a beneficiary can have is an expectation or a hope that the trustee will distribute the property to him or her.[50] The trustee may decide never to exercise their discretionary power in favour of the beneficiary.[51]

46 If, however, the interest has not yet vested in possession, the beneficiary will not be entitled to immediate use and enjoyment of the property. Nevertheless, his or her interest will be fixed and will vest in possession eventually, so the courts have viewed the interest as property albeit one that is to be enjoyed at a later stage.

47 The facts of this example are based on the case *Yu Ping Gao v Elledge* [2003] DCR 145 (DC).

48 *N v N* [2005] 3 NZLR 46 (CA) at [74]; and *Q v Q* (2005) 24 FRNZ 232 (FC) at [120]. The point was first stated in *N v N* without discussion. However, in *Q v Q*, the Family Court said that *N v N* had laid down an expectation that the principle would be applied to cases under the Property (Relationships) Act 1976 (PRA). See too *Clayton v Clayton* [2015] 3 NZLR 293 (CA) at [54]. Compare *B v M* [2005] NZFLR 730 (HC) at [98] in which the High Court said it was "certainly arguable" that the definition of "property" in s 2 of the PRA was sufficiently wide to cover the rights and interests of a spouse as a beneficiary under a discretionary trust.

49 The beneficiary does, however, have a number of other rights which are enforceable against the trustee. For example, a discretionary beneficiary has a right to be considered when the trustees decide whether to distribute trust property. Likewise, the trustees have a duty to perform the trust honestly and in good faith.

50 *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11].

51 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [32] per Tipping J citing *Armitage v Nurse* [1998] Ch 24 (CA) at 44. See too *Gartside v Inland Revenue Commissioners* [1967] 3 All ER 173 (CA and HL) at 128 per Lord Reid, "… a right to require trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered; you get it only because the trustees have decided to give it to you."

Case Study: The DW Family Trust

Doris and Warren have run a successful furniture making business for many years. They employ many staff and the business has a bright future. Doris and Warren operate the business through a company in which they are the only shareholders. Doris and Warren are about to retire. They want their two adult children to continue to benefit from the business. They do this by creating the DW Family Trust. Under the trust deed, Doris and Warren's lawyer and accountant are named as the trustees. Doris and Warren transfer their shareholding in the company for the trustees to hold on trust for their children.

Doris and Warren think that their children would not be prudent shareholders if they held the shares personally. They also expect that the children will ask the trustees to distribute money to them regularly. Instead, Doris and Warren want the trustees to manage the shares to ensure the future profitability of the company rather than respond to the children's requests.

Doris and Warren ensure the trust deed gives the trustees discretion on when and how they distribute the company's profits to their children. The children are therefore beneficiaries with a discretionary interest. Under the PRA, the children's discretionary interest under the trust would not constitute property.

Contingent interests

20.33 Whether a contingent interest constitutes property under the PRA is more difficult. It is common for trust deeds to provide that when the trust comes to an end, the residual trust property is to be divided in equal shares between several beneficiaries, sometimes referred to as residual or final beneficiaries. The interest of these beneficiaries is contingent on them surviving until the date the trust is wound up and there being property available for distribution.

20.34 Some courts have said that a contingent interest constitutes property under the PRA.[52] In the case of a discretionary interest, the interest cannot be property because enjoyment of the property is always subject to the discretion of the trustees. A contingent interest is enjoyed as of right under the trust deed provided the condition is satisfied.[53] As we explain further below, some commentators have reservations about this position.

52 *Q v Q* (2005) 24 FRNZ 232 at [125]; *B v M* (2004) 24 FRNZ 610 (HC) at [101]; *O v S* (2006) 26 FRNZ 459 (FC) at ([82]–[88]); *Prasad v Prasad* [2014] NZFC 8298 at [39]; and *H v R* [2017] NZFC 761 at [30]–[31] (involving a determination of whether children's interests as contingent beneficiaries under a trust provided them with a property interest for the purpose of a joinder application under s 37 of the Property (Relationships) Act 1976).

53 This reasoning was articulated by Tipping J in *Johns v Johns* [2004] 3 NZLR 202 (CA) at [49]. His Honour was, however, determining what interest constituted a "future interest" under s 21(2) of the Limitation Act 1950 for the purposes

Case study: The R Family Trust

Raewyn has unexpectedly come into some money. She has no present need for the money and she would like her children and grandchildren to receive the benefit of it. Raewyn sets up the R Family Trust on which to hold the money. Raewyn's accountant is the trustee. The accountant recommends that the money be invested in several funds that will provide a good return over the coming years. To maintain a good rate of return, Raewyn's accountant says it is important to preserve the capital as a whole.

The R Family Trust deed provides there are two types of beneficiaries: discretionary beneficiaries and final beneficiaries. The discretionary beneficiaries are Raewyn's children. The final beneficiaries are Raewyn's grandchildren. The trust deed states that during the lifespan of the trust the trustee may distribute any of the income to the discretionary beneficiaries as the trustee decides. At the end of the trust, which will be in 2097, the trustee is to take the capital out of the investments and divide it equally between any of the final beneficiaries who are still alive. The idea is to maintain the capital in the investments during the life of the trust to ensure a steady stream of income.

The final beneficiaries have a contingent interest under the R Family Trust. Their interest is conditional on them surviving until 2079 and there being capital in the investments left to distribute. A court may consider that the final beneficiaries' interest in the trust is property under the PRA. The discretionary beneficiaries' interest, on the other hand, will not be considered property under the PRA.

Classification of an interest in a trust as relationship property or separate property

20.35 If a partner's beneficial interest in a trust amounts to property, the next step is to consider whether it is relationship property or separate property. Section 10 of the PRA provides that if a partner acquires property because he or she is a beneficiary under a trust settled by a third person, the property will be separate property. The PRA is silent on the classification of the interest if the trust has been settled by one of the partners.

of ascertaining the applicable limitation period for an action for breach of trust. At [49] Tipping J emphasised that the question of whether a future interest constituted an interest must recognise the vital importance of the statutory context and the purpose of the legislation. Notably, his Honour was not determining whether a contingent interest should be deemed property for the purposes of the Property (Relationships) Act 1976 (PRA). Nevertheless, the Court of Appeal's finding that a contingent interest constitutes an interest (albeit for the purposes of the limitation legislation) was applied by the Family Court in *Q v Q* (2005) 24 FRNZ 232 (FC). The Court relied on Tipping J's distinction between a discretionary interest and a contingent interest. It said that Mrs Q's future contingent interest was property for the purposes of the PRA even though the interest in the trust was contingent on Mrs Q's survival to the date of distribution (in 2028) and on there being trust property available for distribution. The reasoning has been questioned. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.47]; and Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) 22(8) Trusts & Trustees 864 at 871–872.

Powers as property – *Clayton v Clayton [Vaughan Road Property Trust]*

20.36 The Supreme Court has recently decided that a person's powers to control a trust can constitute "property" in their own right under the PRA. As explained above, it is common for the people who establish trusts to retain control over the trust property.[54] The Supreme Court case of *Clayton v Clayton [Vaughan Road Property Trust]*[55] is an extreme example. Mr Clayton had settled a trust called the Vaughan Road Property Trust. Mr Clayton was the trustee. He was also a discretionary beneficiary along with his children. The trust deed gave Mr Clayton the role of "Principal Family Member". In this capacity, the trust deed empowered Mr Clayton to appoint and remove discretionary beneficiaries, distribute any of the trust property to any beneficiary, and effectively bring the trust to an end. The Supreme Court described the combination of these powers as amounting to a general power of appointment. That is, Mr Clayton had the power to distribute all the trust property to himself for his personal benefit rather than for the benefit of the other beneficiaries.[56] Importantly, the trust deed specifically stated that, in exercising these powers, Mr Clayton was not constrained by the normal duties that dictate the standards of behaviour expected of a trustee. He could therefore disregard the interests of the other beneficiaries and effectively treat the trust property as his own.[57]

20.37 The Supreme Court held that the powers afforded to Mr Clayton under the trust deed amounted to "property" within the meaning of section 2 of the PRA. The Court noted that although the law traditionally distinguished between powers and property, strict concepts of property may not be appropriate in a relationship property context.[58] The Court felt that "worldly realism" is needed (although this must be balanced with respect for the legal affairs

54 The courts have generally permitted high levels of control. A leading example is *Kain v Hutton* [2008] 3 NZLR 589 (SC). In that case Mrs Couper had settled a trust. The beneficiaries of the trust, who were discretionary beneficiaries, were Mrs Couper and her other family members. Under the trust deed, Mrs Couper had the power to both appoint and remove trustees and also appoint and remove any person from the class of discretionary beneficiaries. The Supreme Court recognised that these powers meant the trust was very much for Mrs Couper's own benefit as Mrs Couper could ensure that the trust property reverted to her: at [22]. The Court described Mrs Couper has exercising "effective control" over the trust property: at [23]. Yet, the Supreme Court did not criticise the degree of control Mrs Couper exercised over the trust.

55 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

56 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [54].

57 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [57]–[58].

58 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [79].

of trusts).[59] The Court concluded that Mr Clayton's powers were rights that gave him an interest in the trust and its assets.[60] Because the powers were "acquired" after the relationship began they were relationship property and their value should be divided equally between Mr and Mrs Clayton.[61]

20.38 On the question of how Mr Clayton's powers were to be valued, the Court noted that Mr Clayton could appoint the assets of the trust to himself at any time. The Court saw no reason to differentiate the value of this power from the value of the trust property.[62] Therefore the value of Mr Clayton's powers was equal to the value of the net assets of the trust.

20.39 The Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* confirmed a new way of looking at a partner's interest in a trust when dividing property under the PRA. Besides looking at a partner's beneficial interest in a trust, the courts may now inquire into whether a partner's powers to control the trust can also be considered property for the purposes of the PRA. As we explain further below, the Supreme Court stressed that the trust and the powers it gave to Mr Clayton were unusual.[63] It is therefore doubtful that the *Clayton* decision will apply to many trusts.

Summary of the PRA's treatment of property held on trust

20.40 It is helpful at this point to recap how the PRA treats property held on trust. First, the property a partner holds as trustee will not be eligible for division under the PRA because the partner is not the beneficial owner of the property and therefore the PRA does not see the trust property as his or her property. Second, the courts have said that a partner's interest as a beneficiary under a trust may be property under the PRA, but only if the beneficiary has a vested or contingent interest. A discretionary interest does not constitute property. Third, following the Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]*, a

59 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [79].

60 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [80].

61 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [86]. At the time the Supreme Court released its judgment, Mr and Mrs Clayton had reached a settlement. It was therefore unnecessary for the Supreme Court to make formal orders dividing the property.

62 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [104].

63 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [14].

partner's extensive powers to control a trust may amount to property within the meaning of the PRA.

Ways in which property held on trust can be shared between the partners

20.41 The PRA will generally not apply to property held on discretionary trusts. When property is settled on a discretionary trust, the partners may lose rights to an equal share in that property under the PRA. There are, however, a number of legal avenues available to address injustice that might arise from the use of trusts. The main avenues are:

(a) section 44 of the PRA;

(b) section 44C of the PRA;

(c) section 182 of the Family Proceedings Act 1980;

(d) the High Court's power to ensure a trust operates properly;

(e) a claim that the trust is invalid or is a sham; and

(f) a constructive trust over property held on an express trust.

20.42 As can be seen, some of these avenues are provided in the PRA. Many, however, are found outside the PRA. These avenues have various limitations. We look at each of them in turn.

Powers within the PRA to recover property – section 44 and section 44C

20.43 Section 44 applies when a person has disposed of property to a trust in order to defeat a partner's claim or rights under the PRA. In these circumstances, section 44(2) gives a court the power to unwind the disposition and recover property from a trust, or order that compensation be paid in order to satisfy a partner's rights to relationship property.

20.44 The key element of section 44 is that the person who disposed of the property to the trust must have intended to defeat the other partner's rights. The courts have clarified that this requirement will be met if a person disposes of property to a trust knowing that as a consequence his or her partner risks losing rights to that

property. There will be an intention to defeat the partner's rights, even if the person transferring the property did not wish to cause the partner loss.[64] Although equating knowledge of consequences with an intention to bring about those consequences is a lower threshold than proving an actual intention, the test is still described by commentators as a "significant hurdle".[65] The Court of Appeal has said that the task is to assess the intention or purpose of the person disposing of the property at the time the disposition is made. That requires an assessment of all the relevant evidence.[66]

20.45 Consequently, the court's powers under section 44 are not used often. In very few cases can a partner show that a disposition of property to the trust was made with the knowledge that his or her rights under the PRA would be defeated.[67]

Case study: The D Family Trust[68]

Desmond has been seeing Malosi for several months now. They decide to start living together. The partners plan that Desmond will sell his apartment and use the sale proceeds to buy a larger house which will be their family home. Desmond and Malosi agree that Desmond will take out a mortgage to cover any shortfall between the price of the new house and the sale proceeds from Desmond's apartment. Both Desmond and Malosi will pay the mortgage payments equally even though Desmond is the only borrower under the mortgage.

A few years ago Desmond went through a painful separation from his former partner. There was a long dispute over relationship property. Desmond knows that if he and Malosi separate, he might be forced to share the equity in their new

64 *R v U* [2010] 1 NZLR 434 (HC) at [33] per French J applying *Regal Castings Ltd v Lightbody* [2009] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J. See for example *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293. Mr Clayton had established two "education" trusts purportedly for the education of the children of the marriage. Mrs Clayton was not named as a beneficiary under the trusts. The trusts were, however, used within Mr Clayton's group of companies for the purpose of minimising business risk. Mr Clayton had funded the purchase of the trust property from, among other sources, the proceeds of a family holiday home. Mr Clayton's fellow trustee gave evidence that Mr Clayton was concerned about the risks identified to his company and banking arrangements if his marriage broke down. The Court of Appeal concluded that exclusion of Mrs Clayton as a beneficiary was "uppermost in Mr Clayton's mind". It was therefore a disposition made to defeat Mrs Clayton's rights for the purposes of s 44 of the Property (Relationships) Act 1976. See too *P v D* [2012] NZHC 2757; *G v G* [2013] NZHC 2890; *W v C* [2013] NZHC 396, [2014] NZFLR 71; and *P v H* [2016] NZCA 514, [2016] NZFLR 974.

65 N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 Trusts & Trustees 866 at 869.

66 *M v ASB Bank Ltd* [2012] NZCA 103, [2012] NZFLR 641 at [53]; and *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [134].

67 This observation is repeatedly made by commentators. See Nicola Peart "Can Your Trust Be Trusted: Inaugural Professorial Lectures" (2009) 12 Otago LR 59 at 69. See also Mark O'Regan and Andrew Butler "Equity and trusts in a family law context" (paper presented to New Zealand Law Society Family Law Conference, November 2011) 269 at 271; and Bruce Corkill and Vanessa Bruton "Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court" (paper presented to New Zealand Law Society Trusts Conference, 2011) 103 at 116.

68 The facts of this example are based on the cases *R v U* [2010] 1 NZLR 434 (HC); and *O v S* (2006) 26 FRNZ 459 (FC).

house, even if he contributes the majority of the purchase funds. To avoid this Desmond arranges with his lawyer to establish the D Family Trust. Desmond is the trustee. The beneficiaries of the trust are Desmond and his children. When Desmond and Malosi find a house they like, Desmond signs the sale and purchase agreement. The purchaser in the agreement is named as Desmond or "his nominee." Desmond then arranges for the trustees of the D Family Trust to purchase the house.[69] The result is that Desmond's and Malosi's home is held on the D Family Trust in which Malosi has no interest even though he contributed to the mortgage.

Malosi may have a claim under section 44 of the PRA. Desmond appears to have intentionally structured the acquisition of their family home so Malosi can claim no rights in the property under the PRA.

Case study: The E Family Trust

Emily has worked as an engineer for nearly 15 years. About five years ago Emily bought a house. Emily's lawyer advised her to set up a trust through which to buy the house. Emily did not understand what a trust was, but followed the advice of her lawyer because the lawyer said the trust would protect her assets. Consequently, Emily set up the E Family Trust and the house was bought in the names of the trustees (Emily and her lawyer). About a year ago, Emily started seeing Felicity. They recently got engaged. They intend to make the house their family home once they are married.

If Emily and Felicity later separate, it would be difficult for Felicity to claim under section 44. She may not be able to show Emily intended to defeat her rights. Emily established the trust before she met Felicity. Emily does not appear to have understood the nature of a trust and how that might affect any rights her future partner would have under the PRA.

20.46 To overcome the limited application of section 44, the 2001 amendments introduced a new provision: section 44C. Section 44C applies when a disposition of property to a trust has the *effect* of defeating one partner's claim or rights under the PRA. There is no need to prove an intention behind the disposition. However, section 44C has several conditions. The property disposed of must have been relationship property. The disposition must have been made after the relationship began. It is also implicit that the disposition of property must only defeat the rights of one partner, not both of them. This is made clear in the wording of section 44C(1)(b) and it is captured in the notion of compensation. The courts have said the section is aimed at ensuring equality

69 In both *R v U* [2010] 1 NZLR 434 (HC); and *O v S* (2006) 26 FRNZ 459 (FC) the courts said that procuring the trustees to purchase the property rather than the partner in his or her personal capacity constituted a "disposition of property" for the purposes of s 44 of the Property (Relationships) Act 1976.

between the parties when a disposition of property has the effect of defeating one partner's rights, but leaving the other partner's rights intact.[70] Even if section 44C applies, the court's power to recover the property disposed of to the trust is limited. Under section 44C(2), the court can only order one partner to compensate the other from relationship property or separate property. As a last resort the court can require the trustees of the trust to pay the affected partner compensation from the income of the trust. However, the court has no power to order that the property be recovered from the trust's capital.

Case study: The E Family Trust continued

In the case of Emily and Felicity, Felicity probably could not make a successful claim under section 44C of the PRA against the E Family Trust. The trust property is a key family asset; the family home that would usually be classified as relationship property. Nevertheless, because the property was acquired by the trustees before Emily and Felicity used the house as their home, it would not have been relationship property when it was acquired by the E Family Trust. Consequently, section 44C would not apply. Even if the home was relationship property when it was acquired by the E Family Trust, the court would have no power under section 44C to order that the home be recovered from the trust and shared equally between Emily and Felicity.

Case study: The I Farming Trust[71]

Ida is a farmer. She has been married to John for about 15 years. During the relationship Ida inherited a farm from her grandparents. Since acquiring it, Ida and John have lived on the property and farmed it as a partnership.[72] About ten years ago Ida's accountant came up with a plan to restructure her financial affairs. First, Ida set up the I Farming Trust. Ida is trustee. Ida, John and their children are all discretionary beneficiaries. Ida then transferred the farm assets to the trust.

Ida's accountant said that the transfer could be structured in a way that meant the trustees did not have to pay the purchase price for the farm assets. Instead, the transfer would be for an interest free loan. The accountant then planned a gifting programme under which Ida would forgive the

70 See for example *N v N* [2005] 3 NZLR 46 (CA) in which the husband had disposed of property to a trust over which the Court of Appeal noted the husband exercised considerable control. The inference was that the husband continued to enjoy the benefits of the property whereas the wife's rights had been compromised.

71 The facts of this example are based on the case *W v W* [2009] NZSC 125, [2010] 2 NZLR 31. Nicola Peart cites *W v* W as an example of the limitations of s 44C of the Property (Relationships) Act 1976: see Nicola Peart "Intervention to Prevent Abuse of Trust Structures" [2010] NZ L Rev 567 at 589.

72 Section 10 of the Property (Relationships) Act 1976 provides that the property a partner inherits is separate property. However, ss 10(2) and 10(4) provide that the property may become relationship property if it is intermingled with relationship property or used as the family home or family chattels. In this scenario it is possible that the farm has become relationship property.

debt owed to her by the trustees. Each year Ida forgave an amount of the debt up to the threshold at which gift duty was payable. When gift duty was abolished in 2010, Ida forgave the balance of the debt.

Ida and John have separated. Ida still lives on the farm and continues to operate the farm business. John has moved to the city. The farm is now valued at nearly $3 million. Ida and John look at what relationship property they have in order to divide it equally between them. It comprises some savings in a bank account, a vehicle and some furniture. John is dismayed to find he will receive about $60,000 in the relationship property settlement but Ida will continue to enjoy the value of the farm property.

John goes to see a lawyer. John's lawyer advises him that, although he may be able to make a claim under section 44C, the court probably will not be able to grant John any meaningful compensation. The court cannot recover the farm assets from the trust under section 44C; it can only make compensatory orders from Ida's share of the relationship property, her separate property, or the trust's income. None of these sources of property are sufficient to compensate John.

The lawyer also says that before gift duty was abolished, claims under section 44C were often more successful because there would be a debt owed by the trustees to the partner who disposed of the assets to the trust. Often a court could make compensatory orders from this debt. Here, however, Ida has forgiven the debt completely.

20.47 The limitations of section 44C are deliberate. In 1988, a Working Group was established to review the Matrimonial Property Act 1976.[73] The Working Group was dissatisfied with section 44. It said that the main problem was with dispositions to trusts where an intent to defeat the legislation does not arise or could not be proved.[74] The Working Group concluded that a court should have wider powers to intervene, and in particular, should have discretion to distribute the capital of the trust in order to make a just division under the PRA.[75] The 2001 amendments partly adopted the Working Group's recommendations. Section 44C was enacted as an alternative remedy to section 44. It differed from the Working Group's recommendation, however, because section 44C does not give the court the power to order compensation payments from trust capital. The reasons for limiting the court's powers under section 44C were to ensure minimal interference

73 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to review the "broad policy issues" with the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

74 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30.

75 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30.

with trusts. The Parliamentary select committee considering the Matrimonial Property Amendment Bill in 1998 received advice from the Ministry of Justice. In its report to the select committee, the Ministry explained:[76]

> *The proposed new sections do not, however, give the Court power to order that the capital of the trust be distributed to the affected spouse. This acknowledges that trusts are created for legitimate reasons (such as estate planning or protection from creditors) and should be permitted to fulfil that purpose, when there was no intention to defeat the spouse's claim when the trust was established. The power to claw property back from a trust could, effectively, result in the trust being unwound to the detriment of other beneficiaries who are likely to include the children of the marriage and the negation of the intended benefits.*

20.48 The select committee appears to have accepted the Ministry's advice. In its commentary on the Bill, the select committee explained that the reason the new section did not give the court power to make orders from the capital of a trust was that trusts are created for legitimate reasons. They should be allowed to fulfil those purposes where there was no intention to defeat a partner's claim when the trust was established.[77]

20.49 Despite its limitations, the courts have granted relief through section 44C in several cases. In many cases, however, section 44C has not been an effective remedy.[78] This was either because the section could not apply because the property in question was not relationship property prior to the transfer to the trust, or because the disposition had not occurred during the relationship. In some cases, there was insufficient property from which to order adequate compensation.

20.50 The final provision in the PRA relating to trusts is section 33(3)(m). This section gives a court the power to vary the terms of

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76 Ministry of Justice *Effect of Clause 47 Matrimonial Property Amendment Bill* (MPA/MJ/3, Ministry of Justice, 7 October 1998) at 3.

77 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xii.

78 In its final report in the Review of the Law of Trust project (Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.12]), the Law Commission reviewed judgments decided between 1 February 2008 and 1 February 2013 in which s 44C of the Property (Relationships) Act 1976 was discussed. The Commission found that often there was insufficient relationship property or separate property outside the trust from which the court could adequately compensate a spouse or partner whose interests were defeated by the disposition to the trust (although in some cases relief was available through s 182 of the Family Proceedings Act 1980). Likewise, Nicola Peart states: "…[section 44C's] ability to achieve a just division of assets produced or enhanced by the relationship is limited both by the section's requirements and by the remedies … it is easy to avoid being caught by section 44C. The section cannot be involved if the trustees acquired the assets directly from third parties, rather than from either of the parties to the relationship. Nor does it apply to trusts that affect both parties equally or that were settled by third parties": see Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1190–1191.

any trust when it is necessary or expedient to give effect to any other orders the court makes under the PRA. The effect of section 33(3)(m) is not to give a court unrestricted power to vary a trust when it considers it fair to do so. Rather, the power can only be used as a means of implementing other orders when a court has jurisdiction to make orders under the PRA affecting a trust. So if a court has the power to order payments from a trust under sections 44 or 44C, or if a partner has a beneficial interest in a trust that is relationship property, a court may be able to make orders under section 33(3)(m).[79] Unless any of these provisions apply, the court cannot use section 33(3)(m).

The power to vary a nuptial settlement - section 182 of the Family Proceedings Act 1980

20.51 Section 182 of the Family Proceedings Act 1980 (section 182) has become an important provision to deal with trusts after a marriage ends. Section 182 applies to what it terms "nuptial settlements" and consequently does not apply to settlements connected with de facto relationships.[80] The courts have held that property held on a discretionary trust can constitute a nuptial settlement provided there is a sufficient connection between the trust and the marriage.[81] Section 182 gives the court power to vary the nuptial settlement for the benefit of the children of the marriage or the spouses.

20.52 Section 182 is very different in approach and philosophy to the PRA. This is because it comes from a very different historical background. The wording of section 182 is similar to the first time the powers were introduced into legislation in England and Wales in 1859.[82] This accounts for the old fashioned language of "nuptial settlements."

79 *B v M* [2005] NZFLR 730 (HC) at [223]. See also discussion in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR33.13].

80 Section 182 of the Family Proceedings Act 1980 also applies to civil unions.

81 *Re Polkinghorne Trust, Kidd v Kidd* (1988) 4 NZFLR 756 (HC); *Chrystall v Chrystall* [1993] NZFLR 772 (FC); *Kidd v van den Brink* HC Auckland, CIV-2009-404-4694, 21 December 2009; *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; *W v W* [2009] NZSC 125, [2010] 2 NZLR 31;and *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590. There is, however, some debate as to whether the settlement refers to the trust itself or the disposition of property to a trust. In *W v* W at [33] the Supreme Court said obiter that the settlement is the trust itself and any trust property (whenever acquired) must be part of the settlement. On the other hand, in *Clayton v Clayton [Claymark Trust]* at [36] said obiter that it could be that each disposition of property to a trust could constitute a nuptial settlement.

82 Matrimonial Causes Act 1859 (UK) 22 & 23 Vict c 61, s 5. The power to vary nuptial settlements was brought into New Zealand law in 1867: Divorce and Matrimonial Causes Act 1867.

20.53 The nuptial settlements to which the legislation was originally intended to apply were marriage settlements. Marriage settlements were used extensively in England during the nineteenth century. They were usually a settlement of property on trust for the benefit of the spouses, the wife alone or their children.[83] The settlement was focused on the marriage. Often the legal instrument creating the settlement would describe it as being "in consideration of the marriage".[84] By the end of the nineteenth century, marriage settlements were less common in both the United Kingdom and New Zealand. Nevertheless, the power to vary nuptial settlements was applied to other forms of nuptial settlements beyond the traditional marriage settlement.[85] Today, section 182 is used almost entirely to address discretionary trusts.

20.54 The Supreme Court explained how the power in section 182 should be applied in *Clayton v Clayton [Claymark Trust]*.[86] Mr Clayton had settled a trust called the Claymark Trust just after the birth of the partners' second child. The beneficiaries of the trust were Mr and Mrs Clayton and their children.[87] Mr Clayton said the reason he established the Claymark Trust was to distance certain assets from creditors connected with his business interests. The trust assets comprised properties adjacent to Mr Clayton's sawmilling operations, the shares in a company which owned an avocado orchard, and a vehicle. The trust also held investments in other companies associated with Mr Clayton. When Mr and Mrs Clayton divorced, Mrs Clayton applied to the court to vary the Claymark Trust under section 182.

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83 For the reasons for marriage settlements see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.17]. Importantly, a marriage settlement was a device through which a wife could retain separate property distinct from her husband: see *Bennet v Davis* (1725) 2 P Wms 316 (Ch); *Rollfe v Budder* (1724) Bunb 187 (Exch Ch) referred to in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.17]. As the settlement was usually in the form of a trust, the early Divorce Court established under the Matrimonial Causes Act 1857 (UK) 20 & 21 Vict c 85 could not treat it as the property of the parties in order to apportion it after the divorce. In response, the legislation soon adopted a provision to allow the court to vary marriage settlements, namely s 5 of the Matrimonial Causes Act 1859 (UK) 22 & 23 Vict c 61 (see comments of Merivale P in *Bosworthick v Bosworthick* [1926] P 159 (Div & Mat) at 163 explaining the history of the legislation).

84 See the description of the "classic" marriage settlement in *W v W* [2009] NZSC 125, [2010] 2 NZLR 31 at [14] per Tipping J.

85 See for example: *Worsley v Worsley* (1869) 1 LR P&D 648 (Div & Mat) which concerned a trust established for the maintenance of a wife after she and her husband had separated; *Bosworthick v Bosworthick* [1927] P 64 (CA) where a wife executed a bond which provided her husband an annuity; and *Lort-Williams v Lort-Williams* [1951] P 395 (CA) where a husband took out an insurance policy on his own life.

86 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590.

87 Mr and Mrs Clayton and their children were described by the court as discretionary beneficiaries. Mr and Mrs Clayton's children were final beneficiaries and held contingent interests in the trust's capital and income when the trust was to come to an end.

20.55 The Supreme Court said that section 182 should be applied in two stages:

(a) Is the settlement a nuptial settlement?

(b) If it is, should the court use its discretion to vary the settlement?

20.56 To determine whether the settlement is a nuptial settlement, the Supreme Court said that the settlement must make some form of continuing provision for one or both of the parties to a marriage in their capacity as spouses. This means there must be some connection between the settlement and the marriage.[88] The Court observed that where a trust is set up during a marriage with one or both spouses as beneficiaries, there will almost inevitably be that connection.[89] The Court raised the possibility, but did not ultimately decide, that where a future spouse is named as a beneficiary but no marriage has taken place, the trust might be a nuptial settlement.[90] Similarly, the Court raised the possibility that a trust may still be a nuptial settlement even though other beneficiaries may obtain considerable benefits from the trust.[91]

20.57 On the question of whether the court should exercise its discretion, the Supreme Court explained that the purpose of the court's discretion was to address the failure of the spouses' expectations that the marriage would continue. To do this, the Supreme Court said the first step is to examine what the husband or wife reasonably expected of the nuptial settlement when they assumed the marriage would continue. The second step is to compare those expectations to the husband or wife's expectations of the settlement in the circumstances after separation.[92] The Court said it was unnecessary to fix a specific point in time to assess the expectations, but rather it is a general comparison between the position under the settlement had the marriage continued and the post-separation position.[93]

88 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34].

89 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34]. The court also rejected Mr Clayton's submission that, because the trust was set up for business reasons, namely the isolation of the trust assets from the bank guarantees, it did not have the character of a nuptial settlement. The court said that this separation of property was for the purpose of protecting family assets: at [39].

90 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [36].

91 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30 [2016] 1 NZLR 590 at [35]–[37].

92 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [53].

93 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [53]. In taking this approach, the Supreme Court departed from the approach taken in its earlier decision *W v W* [2009] NZSC 125, [2010] 2 NZLR 31. In *W v W* the

20.58 The Supreme Court then considered other factors which would influence how it exercised its discretion. The Supreme Court said there was no comprehensive list of relevant factors, but particular attention must be paid to the interests of children.[94] The Court identified other relevant factors: how the trustees would have exercised their discretion, assuming a continuing marriage, the source and character of the assets, the length of the marriage and the suitability of the trust structure because of the changed circumstances.[95]

20.59 In this case, the Court decided that, had the marriage continued, it was reasonable to assume that Mrs Clayton would have enjoyed the continued use of the vehicle, which was trust property, and the availability of other trust property for family purposes.[96] The Court recognised that in the current circumstances Mrs Clayton was unlikely to enjoy distributions as a discretionary beneficiary. As Mr and Mrs Clayton had settled their dispute before the Supreme Court issued its judgment, the Court did not state what specific orders it would have made.

Case study: The KM Family Trust

Kazamir and Mary have been married for about 15 years. They have two children. Five years ago Kazamir inherited a large sum of money under the will of his grandmother. Kazamir and Mary use this money to buy a holiday house for their family holidays. They bought the house jointly in their names. They then executed a deed of trust which established the KM Family Trust. Under the deed, Kazamir and Mary declared that they held the house on trust for the benefit of their family. Kazamir and Mary are named as discretionary beneficiaries with their children.

Two years ago Kazamir and Mary went through an acrimonious separation. They have just formally divorced. Mary no longer wishes to spend family holidays at the holiday house. She says she associates the place with the arguments she and Kazamir used to have in the later stages of their relationship. Kazamir likes the house and he wants to continue to spend holidays there. He does not want to change the trust. Kazamir also believes that because the house was bought with his inheritance from his grandmother's estate, Mary should not have a say in what happens to the property now that they have separated. Kazamir and Mary's teenage children say they do not like the house. Instead they would prefer to spend their holidays closer to home and closer to their friends. Mary asks Kazamir whether the house can be sold, and the sale proceeds resettled onto two separate

Court said it should compare the parties' expectations at the time the settlement was made and their expectations in the post-separation circumstances: at [25].

94 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [58].

95 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [59].

96 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [75]–[76].

trusts. Under one trust, she and the children would be beneficiaries. Under the other trust, Kazamir and the children would be beneficiaries. Kazamir refuses.

Mary may be able to obtain orders from the court that vary the KM Family Trust under section 182 of the FPA. The trust is probably a nuptial settlement as it is closely connected to the marriage. There is also a strong case that Mary's reasonable expectations of the KM Family Trust have been defeated because of the divorce. While the marriage continued, Mary expected to use the holiday house for family holidays. Now that the marriage has broken down and Mary no longer wants to use the holiday house, her expectations of the trust are very different. It is also important that the children no longer want to use the holiday house. These factors may well persuade the court to exercise its discretion to vary the KM Family Trust even if Kazamir does not want the trust to be varied.

20.60 The power in section 182 is much more far reaching and gives a court much more discretion than the powers under the PRA. This has led some people to say that section 182 is an anomaly and inconsistent with the PRA.[97]

High Court powers to ensure a trust operates properly

20.61 The law of trusts equips the High Court with powers to ensure that trusts are operated properly and efficiently. These powers may be useful if the partner seeking the court's intervention is a beneficiary under the trust and wishes to ensure the other partner does not interfere with or otherwise unfairly administer the trust. The High Court's powers arise under the Trustee Act 1956 and the High Court's inherent jurisdiction.[98]

20.62 For example, under section 51 of the Trustee Act 1956, the High Court has the power to appoint and replace trustees when it is inexpedient, difficult or impracticable to do so without the court's assistance. The power has been used in cases where, following a relationship break-up, the soured relationship between the parties has affected the administration of the trust. The High Court also

97 B Atkin and W Parker *Relationship Property in New Zealand* (LexisNexis, Wellington, 2009) at 208; N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 Trusts & Trustees 866 at 873. In *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 counsel for Mr Clayton argued that the restricted approach taken in ss 44 and 44C of the Property (Relationships) Act 1976 impliedly repealed s 182 of the Family Proceedings Act 1980, although the Supreme Court rejected the submission.

98 The Family Court's jurisdiction is founded in statute. Its jurisdiction is therefore limited to the extent of its statutory powers. The High Court, on the other hand, has an inherent jurisdiction to supervise trusts to ensure they are administered in accordance with the terms of the trust instrument and consistently with the wider law of trusts. We discuss the limits of the Family Court's jurisdiction in respect of trusts more fully in Part H of this Issues Paper.

has power to review decisions made by the trustees[99] or order that information be provided to the beneficiaries.[100]

The LM Family Trust[101]

Malu and Leigh have just been through a bitter break up. Malu and Leigh are both trustees of the LM Family Trust. They are both discretionary beneficiaries together with Leigh's children from her first marriage. The home in which the partners reside is held on the trust. Now that they have separated, Leigh wants them to sell the house and distribute the sale proceeds between them. Malu, still angry following their break up, refuses to talk to Leigh. He won't reply to her phone calls or messages. When Leigh goes around to the house Malu says there is no way he will sell the house and he slams the door on her.

Leigh applies to the High Court to have the Court replace both her and Malu as trustees with the Public Trust. The Court will probably order that Malu and Leigh are replaced by the independent trustee. The hostile breakdown of their relationship will impact on their ability to discharge their duties as trustees.

20.63 Although these powers can be very useful in ensuring that a trust is administered properly, their usefulness for partners who have separated may be limited. Notably, the High Court cannot divide and distribute the trust property between the partners, which remains within the discretion of the trustees.

20.64 It should also be noted that if the Trusts Bill currently before Parliament is enacted, it will give wider powers to the Family Court to exercise in PRA proceedings.[102] The purpose of the Trusts Bill is to clarify and simplify core trust principles and trustees' essential obligations.[103] It will govern matters like when a trustee is obliged to provide information about a trust and when the court can remove a trustee. Clause 136 of the Bill provides that, if the Family Court has jurisdiction to hear and determine a proceeding, it may make any order or give any direction available under the Trusts Bill if it is necessary:

99 Trustee Act 1956, s 68. Note an application under this section cannot be initiated by a discretionary beneficiary.

100 The High Court's power to order that information be provided to the beneficiaries is part of its supervisory jurisdiction in respect of trusts. The Supreme Court has recently considered how the court should exercise this supervisory jurisdiction in *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

101 The facts of this example are based on the case *K v K* HC Wellington CIV-2010-485-2444, 8 March 2011.

102 Trusts Bill 2017 (290–1), cl 136.

103 Trusts Bill 2017 (290-1) (explanatory note).

(a) to protect or preserve any property or interest until the proceedings in the Family Court can be properly resolved; or

(b) to give proper effect to any determination of the proceeding.

Claim that a trust is invalid or a sham

20.65 There have been several cases where, following a relationship break up, one of the partners has argued that a trust was not a proper trust.[104] If the court declares that no trust exists, the property reverts back to the person who purported to settle the property on the trust and thus may be relationship property under the PRA.

20.66 The argument that no trust exists generally takes one of two forms in this context. The first is that the trust is invalid because the person who settled the trust did not intend to create a trust. This might be because the trust did not meet the essential elements required of a trust and so no intention to create a trust existed. There are very few cases where this argument has succeeded. In recent judgments, the courts have been reluctant to declare there was no trust. In *Clayton v Clayton [Vaughan Road Property Trust]* the Supreme Court considered whether the Vaughan Road Property Trust was actually a trust.[105] Mr Clayton had reserved for himself such broad powers to access the trust property it was arguable that he had not actually intended to dispose of the property settled under the trust deed in favour of another. The breadth of the powers also conflicted with what has sometimes been called the "irreducible core of trustee obligations", that is, the basic duties a trustee must observe in order for there to be a valid trust.[106] Ultimately the Supreme Court did not decide the issue. It said that the judges did not have a unanimous view and, as the case had settled, it did not need to decide that issue.[107]

20.67 The second argument that no trust exists is that the instrument purporting to create the trust is a sham. The instrument gives the

104 See for example: *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; *O v S* (2006) 26 FRNZ 459 (FC); *Glass v Hughey* [2003] NZFLR 865 (HC); and *Begum v Ali* FC Auckland FP004/128/00, 10 December 2004.

105 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

106 The phrase "irreducible core of trustee obligations" comes from the English case *Armitage v Nurse* [1998] Ch 241 (CA).

107 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [207].

appearance that a trust has been created but the parties intended to create different rights and obligations regarding the trust property. The legal test for establishing a sham is whether both the settlor and the trustee held a common intention that the trust instrument was a sham.[108] Poor administration of the trust or even breaches of trust do not of themselves establish a sham.[109] A sham can be difficult to prove and therefore the claim is of limited use to a partner at the end of a relationship.[110]

Case Study: The N Family Trust[111]

Nigel and Chloe have been in a de facto relationship for about five years. Over the past six months they have been drifting apart. The house in which Nigel and Chloe live is held on the N Family Trust. The trustees are Nigel's lawyer and accountant. Nigel makes all the decisions about the house and treats the property as his own. Once Nigel requested that the trustees borrow money so Nigel could build an extension to the house. The trustees refused as they were concerned about the trust's finances, but at all other times, the trustees have carried out Nigel's instructions without question.

It is unlikely that Chloe can prove the trust is invalid even though Nigel treats the property like his own. There is no evidence to suggest that Nigel did not intend to create a trust. The trustees also appear to be independent third parties and do not appear to have had a common intention with Nigel that there was a sham.

Establishing a constructive trust over property held on an express trust

20.68 Before the PRA was amended to apply to de facto partners, the main remedy non-married partners had for claiming an interest in each other's property was through a constructive trust. If the property was owned by one partner, but the other had made contributions with the reasonable expectation of obtaining a

108 *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; and *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807.

109 *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45 at [94].

110 The courts have been reluctant to extend the grounds on which a trust can be said to be a sham. In *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45 at [57] the Court of Appeal rejected the notion of an "emerging sham." That is a valid trust that is later said to be sham because the parties' intentions change. In the same decision, the Court dismissed the concept of an alter ego trust. That is a trust that is operated as the alter ego of the settlor. The Court explained at [70] that control over a trust alone does not justify the court piercing the trust. In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 the Supreme Court rejected the concept of an illusory trust. That is a trust that is illusory in the sense that there is an illusion that the trust exists, but in reality the settlor never intended to part with the assets purportedly settled on the trust. The Supreme Court said at [124] there was no value in the "illusory" label. The trust is either valid or invalid.

111 The facts of this example are based on the case *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45 (CA).

beneficial interest in the property, the courts would often decide that the non-owning partner's contributions gave him or her an interest in the property. The courts gave effect to this interest by declaring that the owner partner held the portion of the value of the property attributable to the partner's contributions on constructive trust for the non-owner partner.

20.69 As many de facto partners took their disputes through the courts, the requirements a partner needed to satisfy to claim a constructive trust have become fairly well settled. The requirements are that:[112]

(a) the person claiming the constructive trust made direct or indirect contributions to the property in question;

(b) he or she had an expectation of an interest in the property;

(c) the expectation was reasonable; and

(d) the property owner should reasonably expect to yield an interest in the property to the claimant.

20.70 The courts have often said that the same principles can apply when the property to which a partner has contributed is already held on an express trust, including in three recent Court of Appeal cases.[113] Each of the three cases concerned partners who lived in a house that was held on a trust. The trusts were closely associated with one of the partners. When the relationships broke down, the PRA did not apply to the houses because they were held on trust. Instead, the partner who did not stand to benefit under the trusts argued that, because of their contributions in maintaining or enhancing the houses, and their expectations in respect of the contributions, they had an interest in the property under a constructive trust. In all three cases the Court of Appeal allowed the claims. The Court reasoned that the cases were straightforward applications of the principles applying to constructive trusts as summarised above.[114] The Court further explained that if there was no constructive trust, the beneficiaries

112 The elements were summarised in the leading case of *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294 per Tipping J.

113 *Murrell v Hamilton* [2014] NZCA 377; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397. See also *Prime v Hardie* [2003] NZFLR 481 (HC); and *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766.

114 *Murrell v Hamilton* [2014] NZCA 377 at [63]-[64] and [70]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [64]-[65]; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397 at [44].

under the express trusts would receive a windfall from the partners' contributions and therefore be unjustly enriched.[115]

20.71 The potential for a constructive trust claim to be widely used as an alternative to claims under the PRA is explored at paragraph 21.73 to 21.75.

Case study: The P Inheritance Trust

Prudence and David have been in a de facto relationship for about two years. During that time they have lived together on a farm held on the P Inheritance Trust. The farm originally belonged to Prudence's grandparents. Prudence's grandfather settled the farm on the trust to avoid estate duty and to ensure that it stayed in the family. The beneficiaries of the trust are Prudence and her parents. The trustees are Prudence's parents. Since living on the farm, David has done a lot of work by fencing large parts and installing water storage tanks all by himself. David has never been paid for his efforts, but he has been encouraged to work on the farm by Prudence's father's assurances that "now he's part of the family, the farm belongs to him."

Prudence and David have recently separated. David feels like he should have some compensation for all the work he did on the farm.

David might claim a constructive trust over the farm. He has undoubtedly made contributions to the property. The comments made by Prudence's father also suggest there was a reasonable expectation that David would have an interest in the farm.

115 *Murrell v Hamilton* [2014] NZCA 377 at [30]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [68]; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397 at [47].

Chapter 21 – The issues

Issue 1: The priority trusts have over rights under the PRA may be causing problems

21.1 The PRA's approach is that, except in narrow circumstances, a partner's entitlement to relationship property does not justify interfering with property held on a trust.[116] The issue we address here is whether this approach is appropriate. In other words, should the purposes that trusts achieve and the interests of beneficiaries be given first priority? Or is a partner's right to the trust property that he or she would otherwise have had under the PRA more deserving?[117]

21.2 In this section, we focus on the following:

(a) First, we discuss the main problems arising from the PRA's limited provisions to deal with trusts.

(b) Second, we identify the main arguments that support the view that trusts should prevail. We also make observations about these views.

21.3 Our intention is to promote discussion and submissions that identify the merits of each position. This will assist us in assessing whether the current approach of the PRA in prioritising trusts needs reform.

116 The sentiment was captured by the Government Administration Select Committee in its report on the Matrimonial Property Amendment Bill 1998 which we discussed above at paragraphs [20.47] to [20.48]. The select committee explained that the Property (Relationships) Act 1976 (PRA) should have limited powers to interfere with the capital of a trust because trusts were created for legitimate purposes and the PRA ought to ensure trusts were respected so these purposes could be fulfilled: Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xii.

117 The New Zealand Law Society neatly summarised the issue in its submission to the Law Commission during the Review of the Law of Trusts project (Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [16.5]): "A clear decision needs to be made about whether the equal sharing concept should be paramount. If it is to be paramount, the legislation should clearly say so and contain wider discretions giving the courts freedom to make appropriate orders in relation to trust assets that would otherwise have been relationship property or separate property subject to a court order."

The main problems arising from the PRA's limited provisions to deal with trusts

21.4 The PRA gives the courts limited powers to deal with property held on trust when a relationship ends. This gives rise to three main problems.

The PRA may be powerless to ensure a just division of significant amounts of property

21.5 We believe that a significant amount of what otherwise would be relationship property is held on trust in New Zealand. This removes that property from the application of the rules of the PRA. Given the PRA's limited powers to bring these assets within the pool of relationship property, we consider that the PRA often lacks effective mechanisms to achieve a just division of property.[118]

21.6 From our research, review of the court decisions and preliminary consultation, we can identify several areas of potential unfairness because the PRA does not apply:

(a) **Where the trust holds what would otherwise be key items of relationship property.** In some cases a partner may have a strong legal or moral claim to trust property, such as the family home. If the trust did not exist, a partner may have a claim to the property under the PRA but a trust prevents recognition of a partner's interest in the property held on the trust.

118 For instance, in its final report in the Review of the Law of Trusts project, the Law Commission reviewed judgments decided between 1 February 2008 and 1 February 2013 in which s 44C of the Property (Relationships) Act 1976 was discussed. The Commission found that often there was insufficient relationship property or separate property outside the trust from which the court could adequately compensate a spouse or partner whose interests were defeated by the disposition to the trust (although in some cases relief was available through s 182 of the Family Proceedings Act 1980). See Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.12].

Case study: The QR Family Trust[119]

Quinn and Rosaline have been in a de facto relationship for three years. They have just had their first child. Quinn is 32. He works as a builder. Rosaline is 27. She works as a carer at a rest home.

To date, they have been renting their home. They now decide to buy a house. Quinn and Rosaline have a little money they have saved from their respective incomes. Quinn insists that they buy a house through a trust because, he says, the trust will "protect their assets if anything goes wrong." Rosaline is unsure about the suggestion, but she agrees because she thinks that Quinn knows more about these things than her. Quinn and Rosaline set up the QR Family Trust. Quinn and his lawyer are the trustees. Quinn, Rosaline and their children are all discretionary beneficiaries.

Quinn and Rosaline advance their savings to the trustees to use as a deposit. The trustees then buy a house and fund the balance of the purchase price through a mortgage. Quinn and Rosaline pay the mortgage from the income they earn from their jobs.

A year later Quinn and Rosaline separate. Very little relationship property exists. Rosaline asks Quinn if they can sell the house so she can recoup her savings and start a new life. Rosaline argues that she should be entitled to half the home's equity because she helped finance the house purchase. Quinn says Rosaline can't recover money out of the house because the house "belongs to the trust" and the trustees don't want to sell it. Rosaline must make a claim under section 44 or section 44C of the PRA. Alternatively she could apply for a remedy outside the PRA. In either case, she bears the onus of making a claim which is more burdensome than using the general classification and division rules of the PRA. It is also uncertain whether her claims would be successful and actually meet her desired goal, which is to recover the property she has contributed to the relationship through the trust.

(b) **Where the trust is unsuitable for post-separation circumstances.** In some cases, a trust will be an inappropriate means through which a family holds and uses property after the relationship ends. Often, the partners may have set up a trust assuming that their relationship would continue. Many trusts may be structured to provide financial support for the partners on the premise they remain together. If the partners separate, the PRA provides no mechanism through which to revisit trust structures. Property may be locked in the trust and there may be difficulties in working

119 The facts of this example are based on the case *O v S* (2006) 26 FRNZ 459 (FC).

out how the trust is to be administered if the partners' ability to deal with each other has deteriorated.

(c) **Where trust assets are controlled by one partner.** As we have noted, it is quite common for a partner to exercise a high degree of control over a trust. The partner may be a trustee and have the power to distribute the trust property to the beneficiaries (including to himself or herself) at his or her discretion.[120] Yet, the PRA's conventional analysis of beneficial interests may often ignore who in reality enjoys or controls the trust property as if he or she were owner.[121] In light of the Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]*, the courts may be prepared to deem that powers expressly stated in the trust deed are property. That case was, however, unusual because of the extent of the powers Mr Clayton had under the trust. It is, therefore, uncertain (and probably unlikely) that in future cases the courts will consider lesser powers than those held by Mr Clayton to be property.[122]

Case study: The U Family Trust[123]

Umar and Ariana have been in a de facto relationship for nearly four years. Last year they moved into a house that was under construction. The house was held on the U Family Trust, of which Umar and his accountant are the trustees. Umar and his children from a former relationship are the discretionary beneficiaries. Ariana helped Umar finish the house. She helped landscape the garden and

120 In the recent cases *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397, the Court of Appeal said (at [70] and [44] respectively) that the reality of the New Zealand trust landscape was that "a good proportion of property is held in discretionary family trusts and trustees are more often than not the beneficiaries of those trusts and in control of them."

121 In its Review of the Law of Trusts project, the Law Commission identified the effective control of trusts as an increasing area of concern for the courts: see Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) at [5.34]. Similarly, many submitters reported the problem to the Commission: see Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, 2012) at [16.7]). Subsequent commentators have identified the control of a trust as an area where the law has inadequate remedies. See Anthony Grant "An important case on constructive trusts and settlor control" Law News (online ed, Auckland, 2 September 2016) at 4.

122 The Supreme Court emphasised that the terms of the Vaughan Road Property Trust deed were unusual: *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [14]. Consequently, it is unlikely that the judgment in *Clayton* will apply to many trusts. The Court expressly noted (at fn 81) that it left for another day what would be the position had the trust powers been less extensive – both whether the powers were property and, if so, how they would be valued. In the recent case *Da Silva v Da Silva* [2016] NZHC 2064 at [53] the High Court held that the trustee's powers could not amount to property because, unlike the trust in *Clayton*, there was no express provision in the trust deed that said the trustee did not have to observe the ordinary fiduciary duties. See too *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529.

123 The facts of this example are based on the case *Murrell v Hamilton* [2014] NZCA 377.

decorate the interior. Ariana says she did all this work because she and Umar planned to live at the house as partners and she would enjoy the benefits.

Ariana knew the house was owned by the U Family Trust, but Umar treated the property like he was the owner. Umar had managed the construction of the house by himself. He would regularly contract tradespeople by himself without the involvement of his co-trustee. There are no trust records, financial statements or trustee resolutions. Umar seldom contacts his co-trustee.

Ariana and Umar have recently separated. Umar currently lives in the house. Ariana has moved out. Ariana feels she should have some compensation for all the work she put into the property. Ariana goes to see a lawyer and complains that it is unfair that Umar gets to keep the fruit of all her hard work. Ariana's lawyer says that even though it might look like the house belongs to Umar, it is actually held on a discretionary trust. The lawyer advises Ariana she probably cannot claim an interest in the house under the PRA.

In practice, partners may divide trust property as if the trust did not exist

21.7 The second reason the PRA's limited powers against trusts may be a problem is because the PRA does not authorise what appears to be common practice. During our preliminary consultations, we have received anecdotal evidence that often partners will agree to a division of the trust property as if the trust did not exist.[124] Although there is no way for the Commission to test whether the division of trust property is contrary to the terms of the trust in each individual situation, it is reasonable to assume that sometimes the division would constitute a breach of some principles of trust law. For instance, the partners' decision and the trustee's agreement may be an improper surrender of the discretion given to the trustees by the trust deed. Alternatively, the division between the parties may be contrary to the interests of other beneficiaries, such as the children of the relationship. The PRA gives the parties no mandate to divide the trust property in this way. Rather, its aim is to preserve trust structures. This may suggest that some New Zealanders want more flexibility to deal with trusts than the PRA currently gives.[125] In Part J we discuss

124 For example, in the recent Supreme Court case *Thompson v Thompson* [2015] NZSC 26, [2015] 1 NZLR 593 at [18] and [73] the partners had agreed to treat the assets held on a trust as in effect relationship property.

125 This problem also reveals that many New Zealanders who use trusts may not understand the consequences of settling property on trust. Through our research and consultation in this project so far, we have learned that many people who have settled property on a trust have a misconception that they remain the owner of that property. Frequently, people refer to a trust as "their" trust or as "having a trust." There is often little understanding that the property must now be administered in accordance with the terms of the trust and wider trust law.

whether the law should provide the partners and trustees with more flexibility to deal with trusts through a contracting out agreement under Part 6 of the PRA.

Inconsistencies within the PRA

21.8 The PRA's limited powers to affect trusts are arguably incongruous with its provisions regarding contracting out agreements (which allow partners to enter an agreement that determines how the parties will deal with their property if the relationship ends).[126] A trust can have a similar effect to a contracting out agreement because the creation of a trust can also exclude property from division under the PRA.

21.9 The major difference between using a contracting out agreement to exclude property from the PRA and using a trust is that contracting out agreements require the agreement of both partners and are subject to safeguards. The PRA requires that the contracting out agreements be in writing.[127] Each party to the agreement must have independent legal advice before signing the agreement.[128] The signature of each party must be witnessed by a lawyer.[129] The lawyer who witnesses the signature of the party must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.[130] If any of these requirements is not satisfied, the contracting out agreement is void.[131] While the PRA allows people to manage their financial affairs differently to the PRA, these safeguards ensure that partners do not give away their rights under the PRA without knowing what they are doing.[132]

21.10 In contrast, partners can settle property on trust during the course of their relationship without any safeguards to ensure they know what rights they are giving up under the PRA. If the property is held in the name of only one of the partners, that partner can unilaterally settle the property on trust without having to involve the other partner. There is therefore real scope for trusts, more

126 Property (Relationships) Act 1976, pt 6.

127 Property (Relationships) Act 1976, s 21F(2).

128 Property (Relationships) Act 1976, s21F(3).

129 Property (Relationships) Act 1976, s21F(4)

130 Property (Relationships) Act 1976, s 21F(5).

131 Property (Relationships) Act 1976, s 21F(1).

132 For further discussion see Part J of this Issues Paper.

than contracting out agreements, to be used to take property outside the PRA, in a potentially unfair way.

Why should the protection of trusts be more important than relationship property rights?

21.11 We have identified three main reasons to justify the PRA's limited application to trusts.

Trusts serve legitimate purposes and bestow interests on third party beneficiaries

21.12 Throughout our preliminary consultation, most people we spoke to supported measures to increase the PRA's powers to access property held on trust. Nevertheless, as we have explained, the PRA is founded on the view that the PRA should not interfere with trusts so that the legitimate purposes that trusts serve may be fulfilled, and the legitimate interests of beneficiaries may be protected.[133] We make the following observations in response.

21.13 First, we note that what is considered the "legitimate use of trusts" has changed over time. The abolition of estate duty and gift duty has removed a key motivation for New Zealanders to set up trusts. The Ministry of Social Development will now take into account any disposition of property made to a trust during the applicant's lifetime when deciding whether the applicant has deprived himself or herself of property in order to qualify for a residential care subsidy.[134] Also, the practice of using trusts to redirect income through a trust to beneficiaries in order to be taxed at the minor beneficiaries' lower marginal tax rate was restricted by legislative amendment in 2001.[135] These changes demonstrate that Parliament has been willing to prioritise other

133 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xii. As we have explained, the Parliamentary select committee that reviewed the draft s 44C during the 2001 amendments reasoned that the provision should not include a power to make orders in respect of trust capital because trusts should be allowed to fulfil the legitimate purposes they perform.

134 Previously the Ministry would only assess whether an applicant had settled property on trust in the five year period leading up to an application in order to determine whether an applicant had deprived himself or herself of property in order to qualify for the subsidy. See Bill Paterson "Residential Care Subsidies – Problems and Puzzles" (paper presented to New Zealand Law Society Seminar, 2013) 133 at 134; and Theresa Donnelly "Residential Care Subsidies – Problems and Puzzles: Commentary" (paper presented to New Zealand Law Society Seminar, 2013) 159 at 161–162.

135 Taxation (Beneficiary Income of Minors, Services-Related Payments and Remedial Matters) Act 2001. In the commentary to the Taxation (Beneficiary Income of Minors, Services-Related Payment and Remedial Matters) Bill, the Finance and Expenditure Committee explained that the goal of the amendment was to prevent some families from gaining an advantage over others through the use of a trust: Taxation (Beneficiary Income of Minors, Services-Related Payments and Remedial Matters) 2000 (70-2) (select committee report) at 2–3.

considerations over what has traditionally been regarded as a permissible use of a trust.[136] There nevertheless remain many reasons why families in New Zealand choose to create trusts, such as to provide property for vulnerable persons or to pass assets to the next generation.

21.14 Second, a partner's freedom to remove assets from the relationship property pool by settling those assets on trust (subject to sections 44 and 44C of the PRA) is inconsistent with the PRA's provisions that apply when partners enter a contracting out agreement. Under those provisions, an agreement that affects a partner's relationship property entitlements but does not comply with the requisite formalities under section 21F is void. In contrast, there is relatively little preventing one partner altering the partners' respective entitlements under the PRA by using a trust.

21.15 Third, trusts are used to protect assets from claims by creditors or from a challenge to a person's will.[137] Even if a court could recover assets from trusts to meet relationship property entitlements, it does not mean that the remainder of the trust assets can then be claimed by third parties. Any third party claims would still be governed by a different part of the law.

21.16 Fourth, a focus on a trust's ability to protect property from creditors, or from tax liability, may overlook the fact that the preservation of the trust property is not the overall objective. Rather, the purpose of the trust is the protection of assets *for the benefit of the beneficiaries*. The view that trusts serve legitimate purposes should arguably focus on the nature of the beneficiaries' interests under the trust and how the trust deals with the property for their benefit. If, for example, a trust is used to protect assets for partners' use, there may be compelling reasons to distribute the trust property under the PRA's equal sharing regime when the partners separate. Conversely, if a trust has been established to ring fence assets for children's education costs or for charitable giving, there is arguably less fairness in redistributing those assets to meet relationship property claims.

136 We are mindful that none of the relevant law changes in the examples we have given had the effect of changing the law so that assets can be removed from trusts. Rather, the changes allow decision-makers to include or exclude assets a person has settled on trust when assessing that person's income or personal assets. In contrast, any amendment to the Property (Relationships) Act 1976 would probably provide greater powers so that trust property could be divided as relationship property.

137 In particular, a will can be challenged under the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955 whereas a trust cannot.

In short, it is more helpful to analyse for whose benefit or for what purpose the trust assets are protected, rather than upholding protection of assets as an end in itself.

21.17 Fifth, in some circumstances it may not seem right that a beneficiary should have a greater interest than the partners to what would otherwise be relationship property. A beneficiary will not normally have provided valuable consideration in return for the interest he or she receives under the trust. The interest will usually be a gift. In contrast, a partner's interest in relationship property under the PRA is usually to recognise that a partner is entitled to the property because of his or her contributions to the relationship.[138] The PRA's priority of those entitlements is central to the PRA's concept of a just division of property.[139]

21.18 On the other hand, there may be cases where it would be unfair to deny beneficiaries their interest under the trust. In some cases, the partners may have jointly settled the trust expressly for the benefit of a third party knowing the consequences of the trust on their personal rights. For example, parents may have genuinely wished to gift property to their children to provide for their needs and chose to use a trust to do so. In those circumstances, it is arguably less fair to allow the partners to reclaim the trust property as relationship property.[140]

21.19 There may also be cases where the trust property is provided from an external source rather than through the joint and several efforts of the partners in the course of their relationship. For example, a partner may have settled the trust long before the relationship began. Alternatively, a third party may have settled the trust. In New Zealand, some families have created what can be described as "dynastic trusts". Dynastic trusts are established to hand down key family assets from parents to children and grandchildren.[141] Dynastic trusts have commonly been used to

138 See Part C – for disucssion of the definition of relationship property.

139 The Property (Relationships) Act 1976 gives priority to a partner's interest in relationship property in the sense that the rights to an equal share in relationship property displace the ordinary legal rules of ownership that would apply between the partners (s 4). In some circumstances, the partner's interest in relationship property will prevail over third parties, like unsecured creditors: see s 20B and the priority it gives to a partner's "protected interest", discussed further in Part K of this Issues Paper.

140 Peart raises the valid point that when partners separate and a partner makes a claim in respect of trust property, the court's focus is on giving effect to the dominant social policy of equality between parties to a relationship. The interests of other trust beneficiaries, including children of the separated partners, are subordinated to the policy of equality between the parties: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13 Otago LR 27 at 35.

141 Jessica Palmer "What to do about trusts?" (paper prepared for University of Otago Colloquium on '40 Years of the PRA: Reflection and Reform' 8-9 December 2016) at 3; and Nicola Peart "The Property (Relationships) Act 1976 and Trusts:

hold farm property.[142] If the trust property is not attributable to the relationship, the partners have a very weak claim to that property based on the principles of the PRA. The case of dynastic trusts raises the question of whether the wishes of a person (most likely from a previous generation) to pass assets to his or her descendants should stop a partner from making claims against that property under the PRA.[143]

21.20 It is important to note that a partner may be able to make claims in relation to property held on a trust settled by a third party. There may be cases where a partner has made significant contributions to the trust property. Those contributions may have maintained or enhanced its value.[144] For example, partners who have lived and worked for over twenty years on a farm held on trust will usually have had an impact on the farm's sustained or enhanced value. If those contributions were coupled with a reasonable expectation that the partner would gain an interest in the property, the partner could potentially claim a constructive trust over the trust property.[145] It may be preferable that all remedies that a partner may bring against a trust in respect of contributions made during a relationship are contained within the PRA. We discuss this point and constructive trusts claims further below.

21.21 It is difficult to weigh up the competing claims of the partners, settlors and the beneficiaries to trust property. In each case their interests, needs and expectations regarding the trust will differ. The following examples indicate some of these difficulties.

Case study: The TT Education Trust

Clarissa and Anuj have two daughters: Tabitha and Tessa. Tabitha and Tessa are aged 14 and 12. They are both doing very well at school. They both say that one

Proposals for Reform" (2016) 47 VUWLR 433 at 456.

142 Jessica Palmer "What to do about Trusts?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming); and Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 456. There is, however, some indication that trusts may be less popular as a way of passing family farms to the next generation. Instead, more farmers may be relying on corporate structures to allow children to take a passive ownership over the farm asset. See Robin Martin "Dairy farmers struggle to pass on the family farm" (18 April 2017) Radio New Zealand <www.radionz.co.nz>.

143 See discussion in Chapter 10 in relation to whether gifts and inheritances from third parties should be treated as a special form of separate property.

144 When a partner's actions or contributions of relationship property enhance or maintain the separate property of the other partner, the contributing partner may be entitled to a relationship property interest in the enhanced value (s 9A) or compensation (s 17).

145 See discussion on constructive trusts above at [20.68]–[20.71].

day they would like to study at university. Clarissa and Anuj recently subdivided the land on which their home sits. They then sold the new section. Clarissa and Anuj agree that they will settle the sale proceeds on a trust called the TT Education Trust. The purpose of the trust is to save money for Tabitha and Tessa to use in the future towards their university fees. Clarissa and Anuj are the trustees of the TT Education Trust. Tabitha and Tessa are discretionary beneficiaries.

A year later Clarissa and Anuj separate. As they divide their property they realise that the property and income they had collectively as a family will not stretch as far, once divided across two households. Clarissa and Anuj start to wonder whether they can unwind the TT Education Trust.

Case study: The H Trust

Vincent and Maia have recently decided to live together. They would like to buy their own house but cannot afford to do so. Vincent's parents purchase a house through the H Trust. The H Trust was created several years ago by Vincent's parents. Vincent is a discretionary beneficiary along with his parents and siblings. Vincent's parents allow Vincent and Maia to live in the house. Over the course of the relationship Vincent and Maia pay no rent to the trustees for living in the house. They do, however pay all other outgoings, such as rates, insurance and the costs of basic maintenance, from their incomes.

Their relationship lasts four years and then they decide to separate. Maia would like to claim an interest in the house. Vincent and his parents reject the claim. They say that the house was provided through the trust. Maia is not a beneficiary. Any contribution Maia made over the course the relationship was offset by the considerable benefits she received by living there rent free.

Case study: The Z Family Trust

Hao and Yu worked very hard over the course of a 30 year marriage to build up a successful pharmaceutical business. Hao was a skilled salesperson and was the public face of the business. Yu was a very good administrator and performed an invaluable role in keeping the company's accounts and records in order. Some years ago, the partners made plans to return to China for their retirement. They wanted to provide an income stream for their two children in New Zealand. Consequently, they set up the Z Family Trust. The trustee is their accountant. The discretionary beneficiaries of the trust are their two children and grandchildren. Hao and Yu then settled the shares they held in the pharmaceutical company on the Z Family Trust.

About six months ago Hao told Yu he was leaving her. He returned to China and took with him the majority of the partners' savings. Since the separation, Yu has also become estranged from her two children.

She now wishes to unwind the trust. She wants to regain control of the shares in the business she spent so many years building up.

Case study: The J Family Trust

Micah and Yvonne live in Hamilton. They have been married for 8 years. Micah's parents are farmers. They hold the farm on the J Family Trust. They created the trust to ensure the farm property could pass intact to any of their children who had an interest in continuing the farm. Micah is a discretionary beneficiary of the J Family Trust. Micah's parents decide it is time for them to retire, but they would like Micah to carry on the family farm. Micah and Yvonne agree. They sell their home in Hamilton and move onto the farm. They decide to invest the proceeds from the sale of their Hamilton home into the farm by funding the development of raceways and an irrigation system. Micah and Yvonne work long hours on the farm.

Some years later Micah and Yvonne separate. The partners own few assets. Yvonne would like to recover a portion of the farm's value which she says has been enhanced by the investment of the proceeds from the sale of their house in Hamilton and her labour. Micah does not accept Yvonne's claim to the farm. He thinks that the farm was provided by his parents and it is a key asset that he would like to remain in his family. If Yvonne is to be paid what she claims, part of the farm must be sold. Micah is reluctant for that to happen.

These scenarios are intended to show how partners' wishes regarding a trust can compete with the other interests in respect of the trust. It is often difficult to decide whose interests should take priority.

There is no proper basis to grant partners greater rights to recover trust property over other deserving parties

21.22 Just as trusts have the potential to defeat a partner's rights to property under the PRA, a trust may prevent other parties from claiming against the trust property. For example, a debtor's creditors will (subject to exceptions such as fraud) have no ability to claim against property that the debtor has on trust. Similarly, if a person owes money to the state, such as an unpaid tax liability, property cannot be recovered from the trust. If the PRA was amended to give a partner greater rights to recover property held on trust, the amendment might be seen as giving a partner superior rights regarding trusts than other deserving third parties.[146]

146 Peart has written about the Law Commission proposals to extend the ambit of s 44C: Nicola Peart "Protecting Children's Interests in Relationship Property Disputes on Separation" (paper presented to New Zealand Law Society CLE Ltd

21.23 In our view, there are two reasons why it might be appropriate for a partner to have greater rights. First, a partner's claim to property under the PRA is different to the claims of most creditors. A partner's claim to the property is not a debt or liability; it is an entitlement to the property that arises because of the equal contributions of the partners to the relationship.[147]

21.24 Second, partners should not be treated the same way as creditors because the nature of the relationship is different. Voluntary creditors enter an agreement balancing the benefit with the risk that the other party may fail to pay the debt and there may be no assets that the creditor can touch. Partners contribute directly and indirectly to accumulate relationship assets without undertaking the same risk analysis.[148] Given that partners do not approach each other "at arm's length" as creditors do, it is perhaps unreasonable to expect them to do so.

The law ought to allow people to hold and deal with property as they wish

21.25 A partner's freedom to deal with his or her property during the relationship as he or she wishes is a key feature of the PRA. Section 19 provides that nothing in the PRA prevents a partner from disposing or entering any legal transaction as if the PRA did not exist. Section 19 allows a partner to settle his or her property on trust even if that property is in fact relationship property and would therefore be divided equally if the partners were to separate.[149] The ability to unwind a partner's actions and take property out of a trust would arbitrarily interfere with the freedom to deal with his or her property. Indeed, the PRA would not usually restrict a partner's rights to gift his or her property outright to third parties. Why should there be an exception for trusts?

Conference "The PRA in the GFC – uncertainty in uncertain times", 22 February 2013). Among other things, Peart says it is not obvious why spouses or partners should have far reaching remedies to recover property from trusts, when other deserving groups, such as creditors and the taxpayer, do not enjoy these rights and protections: at 32.

147 See *S v S* [2001] NZFLR 367 (FC) at [37]–[51]. The Family Court applied this reasoning to hold that a wife's claim under the Property (Relationships) Act 1976 against her bankrupt husband did not require the leave of the High Court under the Insolvency Act 1967 because the wife's claim under the Insolvency Act was not a debt or liability for the purposes of the Act.

148 Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" 2010 NZ L Rev 567 at 570.

149 The main exceptions to this are if one partner disposes of the property in order to defeat the rights or claims of the other partner under s 44 of the Property (Relationships) Act 1976, or, if the property in question is land, the non-owner partner has lodged a notice of claim on the title under s 42 of the Act.

21.26 The counterargument is that it has always been possible to unwind transactions under the PRA when there is a threat to relationship property rights. Sections 44 and 44C are examples of such provisions. The question is whether the right balance has been struck between a person's freedom to deal with property on the one hand and properly recognising a person's entitlements to relationship property on the other. The problems with the PRA's current provisions, particularly sections 44 and 44C, suggest the right balance may not have been struck and that greater protection of entitlements to relationship property is needed.

CONSULTATION QUESTIONS

G2 Are there any other reasons why people create trusts that we have not mentioned?

G3 Do you agree that the protection given to trusts over the rights of partners under the PRA is a problem?

G4 Do you agree with the reasons we have identified for and against the PRA's current position towards trusts? Do you have any other reasons to add?

G5 For what reasons and in what circumstances should a partner have rights under the PRA to recover property from a trust?

Issue 2: It is unclear whether an interest in a trust is property

21.27 The second issue we have identified is that the PRA struggles to analyse interests in a trust in a clear and consistent way. There are three particular areas of difficulty:

(a) interests under a trust and the PRA's definition of property;

(b) interests under a trust and section 44C of the PRA; and

(c) the classification of an interest in a trust.

Interests under a trust and the PRA's definition of property

21.28 Under general legal principles, some of the interests that arise under a trust are property interests and some are not. As we have

explained earlier in this part, the conventional position under the PRA is that:[150]

(a) a vested beneficial interest constitutes property;

(b) a contingent beneficial interest constitutes property; and

(c) a discretionary beneficial interest does **not** constitute property.

21.29 The courts' view that discretionary beneficial interests are not property is based on the conventional principle that a discretionary beneficiary has no more than a hope or expectation that the trustee will exercise his or her discretion in the beneficiary's favour.[151] The difficulty with this analysis is that it does not address the situation where it is highly likely that the trustees will in practice exercise their discretion in the beneficiary's favour.

21.30 It may appear contrary to common sense that the courts should ignore this likelihood, especially when the likelihood can be clearly discerned. Other laws go as far as to identify factors to assess whether a discretionary beneficiary will receive a benefit from the trust. For example, regulation 8(4) of the Legal Service Regulations 2011 provides that when an applicant's eligibility for legal aid is assessed, the Legal Services Commissioner will assess an applicant's discretionary beneficial interest in a trust with regard to:

(a) how the trust arose or was created;

(b) the terms and conditions of the trust;

(c) the person or persons who have power to appoint and remove trustees or beneficiaries;

(d) the history of the trust's transactions (for example, distributions);

(e) any change in the membership of trustees;

(f) any changes in the class of beneficiaries; and

(g) the source of income or capital that the trust receives.

150 See paragraphs 20.30–20.34. Note, the classification of beneficial interests into vested, contingent and discretionary interests is a general breakdown and there are many further subtleties in the legal analysis of these issues.

151 See paragraph 20.32 above; and *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at [11].

21.31 Some expert valuers also suggest that a discretionary beneficial interest under a trust can be valued like any other item of property.[152] They list similar factors when assessing how the interest can be valued.[153]

21.32 Nevertheless, in cases under the PRA the courts have been reluctant to determine whether a discretionary beneficial interest amounts to property based on the likely benefit a beneficiary will receive from the trust.[154]

21.33 Although the courts have said that a final beneficiary's contingent interest constitutes property under the PRA, the courts' analysis has not taken into account the likelihood that the beneficiary will ultimately receive no property from the trust.[155] The courts appear to have based their view on the Court of Appeal's comments in *Johns v Johns* that a contingent interest is enjoyed "as of right" when the condition is satisfied.[156]

21.34 We understand that most family trusts in New Zealand are structured so that:

(a) the trustees have power to distribute trust property to discretionary beneficiaries; and

(b) at the date the trust comes to an end, the trustees are required to distribute any residual trust property to the "final" beneficiaries.

21.35 The final beneficiaries in this situation have a contingent interest. But their interest is reliant on:

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152 Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" (2013) 7 NZFLJ 223; and Brendan Lyne "Valuation and Expert Financial Evidence in PRA Cases" (paper presentedNew Zealand Law Society PRA Intensive, October 2016).

153 Barkley identifies nine factors to determine the value of a discretionary beneficial interest: (1) the intentions of the settlor; (2) the fiduciary duties of the trustees; (3) the number of beneficiaries; (4) the manner in which the power has been exercised in the past; (5) the size of the trust fund; (6) any criteria, including a letter of wishes, provided by the settlor in relation to the exercise of discretion by the trustees; (7) the number and identity of default beneficiaries; (8) the existence of any other powers such as a power to reduce or enlarge the class of discretionary beneficiaries; and (9) the relationship of the beneficiaries to the settlor and the trustees. See Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" (2013) 7 NZFLJ 223 at 225.

154 In some cases, however, the courts have referred to a partner's powers to control a trust as a "bundle of rights" that has value as property see *M v B* [2006] 3 NZLR 660 (CA) at [112]–[119]; and *Walker v Walker* [2007] NZFLR 772 (CA) at [97]–[98]. Despite these references, the bundle of rights argument has not been widely adopted: see Chris Kelly and Greg Kelly "Trusts Under Attack: The Legal Landscape Following the Clayton Litigation" (paper presented to Cradle to Grave Conference, Auckland, May 2016) at 14. The Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 is an instance where the Court looked beyond Mr Clayton's interest solely as a discretionary beneficiary. However, in that case, the Court found that Mr Clayton's powers as "Principal Family Member" were tantamount to a general power of appointment, which is beyond the interest of a discretionary beneficiary.

155 *Q v Q* (2005) 24 FRNZ 232 (FC) at [125]; *B v M* (2004) 24 FRNZ 610 (HC) at [101]; *O v S* (2006) 26 FRNZ 459 (FC) at ([82]–[88]); *Prasad v Prasad* [2014] NZFC 8298 at [39]; and *H v R* [2017] NZFC 761 at [30]–[32].

156 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [49]. Followed in *Q v Q* (2005) 24 FRNZ 232 (FC) at [120]–[127].

(a) their survival to the date the trust is wound up; and

(b) there being residual trust property remaining for distribution.

21.36 Sometimes it may be very unlikely that the final beneficiary would receive a distribution of the residual trust property. The beneficiary may not survive until the date of distribution because that date extends beyond the expected lifespan of the beneficiary. Alternatively, it may be very likely that the trustees will distribute all the trust property to the discretionary beneficiaries before the date of distribution. These considerations have prompted some commentators to say that a contingent interest should not constitute property under the PRA until the contingency is satisfied and the beneficiary is entitled to the trust property.[157] Nevertheless, the courts have not relied on this analysis.

21.37 The courts' focus on conventional principles rather than the actual nature of a trust may also have a bearing on procedural matters. Section 37 of the PRA provides that any person "having an interest in the property" which would be affected by a court order under the PRA has a right to be heard in proceedings before the court. In one case, the Family Court said that beneficiaries with only a discretionary interest will not have an interest in the trust property that entitles them to be heard.[158] The Court relied on the cases that found a discretionary beneficial interest does not come within the PRA's meaning of property.[159] The Court said that beneficiaries with a contingent or vested interest, however, will have an interest in the property that will entitle them to be heard.[160] On this analysis, it is possible that a partner could have settled a trust with a clear and informed intention that the trust would provide irrevocable benefits to third party beneficiaries. The trust instrument may, however, only provide that the beneficiaries have a discretionary interest. In that situation, the beneficiaries would have no right under the PRA to defend their interest before the court if a partner challenged the trust. It may be fairer that all

157 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.47]; and Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) 22(8) Trusts & Trustees 864 at 873. See also *Ma v Ma* [2016] NZHC 1426. In that case the High Court held that a beneficiary's contingent interest in the trust as a final beneficiary did not constitute a caveatable interest. The Court reasoned that the beneficiary would only receive a vested interest on vesting date and therefore she had no present interest in the property on which to support a caveat.

158 *H v R* [2017] NZFC 761 at [26].

159 *H v R* [2017] NZFC 761 at [26].

160 *H v R* [2017] NZFC 761 at [30].

parties who have a realistic prospect of benefiting from the trust are entitled to be heard.

Interests under a trust and section 44C

21.38 In cases under section 44C of the PRA, the courts have not treated interests in a trust consistently. Section 44C offers a remedy in the situation where placing property on trust means that only one partner's interest in the property is lost. However, in several cases a partner has disposed of property to a trust in which both partners have only discretionary beneficial interests.[161] If a discretionary beneficial interest does not constitute property, section 44C could not apply because technically both partners' rights to the property under the PRA have been defeated.

21.39 The courts have been prepared to depart from this approach. In *R v R* partner A made a claim under section 44C.[162] The other partner (partner B) argued that he was also disadvantaged by the disposition because he was only a discretionary beneficiary under the trust. The High Court observed that partner B was a shareholder and director of the company that acted as trustee of the trust and that he had personally made all decisions as to drawings from the trust property. The Court said these factors gave the partner control over the trust even though he was a discretionary beneficiary.[163] The Court concluded that section 44C applied. It said that section 44C should be interpreted in a way that recognised the partner's control over the trust even if he only had a discretionary beneficial interest.

21.40 The High Court's approach in *R v R* is an unspoken acknowledgement that a partner who controls a trust *in fact* has a property interest. It seems odd however that on the same facts, the court would probably find that the partner had no property interest for the purpose of dividing relationship property under the PRA.[164]

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161 See for example *N v N* [2005] 3 NZLR 46 (CA); and *R v R* [2010] NZFLR 82 (HC).

162 *R v R* [2010] NZFLR 82 (HC).

163 *R v R* [2010] NZFLR 82 (HC) at [31]–[34]. The court drew on the reasoning of the Court of Appeal in the leading case *N v N* [2005] 3 NZLR 46 (CA). In that case Mr N made a transfer of relationship property to a trust under which he and Mrs N were both discretionary beneficiaries. The Court of Appeal noted at [149] that Mr N had considerable power over the trust and that this was a case in which Mr N could be required to compensate his wife under s 44C of the Property (Relationships) Act 1976. In the later case of *S v L* FC Taumarunui FAM-2007-068-78, 19 June 2009 at [72] the Family Court held that compensation orders under ss 44C(2)(a) and 44C(2) (b) of the Property (Relationships) Act 1976 should only be made against a partner who had effective control of the trust.

164 As we have already explained, the Supreme Court has recently accepted that in certain circumstances a partner's powers to control a trust can amount to property under the Property (Relationships) Act 1976: *Clayton v Clayton [Vaughan Road*

Classification of an interest under a trust as relationship property or separate property

21.41 The PRA classifies property acquired by a partner because he or she is a beneficiary under a trust settled by a third person as separate property.[165] The PRA is silent on the classification of the property if the trust has been settled by one of the partners. It is unclear how that property should be classified.

21.42 The Supreme Court has suggested that if the interest under the trust was acquired after the start of the relationship, it would be relationship property (because of section 8(1)(e) of the PRA). In *Clayton v Clayton [Vaughan Road Property Trust]*, the Supreme Court said that Mr Clayton's powers over the Vaughan Road Property Trust amounted to property. As those powers had been acquired after the relationship with Mrs Clayton began, the Court said they were relationship property.[166]

21.43 The Court also decided that the trust property would have been relationship property if it had not been settled on the trust.[167] The Court added that if the trust property had been separate property, it may have been appropriate to invoke the exception to equal sharing under section 13.[168]

21.44 Contrary to the Supreme Court's view, the authors of *Fisher on Matrimonial and Relationship Property* suggest that if, before the partner settled property on the trust, it was his or her separate property, the partner's powers or other interest in that trust should remain the partner's separate property.[169]

21.45 The classification of an interest in a trust settled by one of the partners therefore remains questionable, although the Supreme

Property Trust] [2016] NZSC 29, [2016] 1 NZLR 551. As we explain, at [21.46] to [21.52], the Supreme Court's reasoning is unlikely to apply widely because few trusts grant powers as extensive as those enjoyed by Mr Clayton. Consequently, it is probable that the courts will continue to accept a lower threshold when analysing a partner's interest in a trust for the purposes of s 44C than it would if analysing whether that partner's interest constitutes property.

165 Property (Relationships) Act 1976, s 10.

166 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [85]–[90].

167 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [80]. The Court's finding that the trust property would otherwise have constituted relationship property came from a concession made in the Family Court that the value of Mr Clayton's separate property before the relationship began was $500,000.

168 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [89]. Section 13 of the Property (Relationships) Act 1976 allows the court to depart from equal sharing if there are "extraordinary circumstances that make equal sharing … repugnant to justice." Section 13 is, however, not aimed at injustices regarding the classification of property but rather when equal division is repugnant to justice.

169 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.47].

Court's judgment suggests that the interest will be relationship property if acquired after the relationship began.

Issue 3: The Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* did not resolve the tension between the PRA and trusts

21.46 The decision in *Clayton v Clayton [Vaughan Road Property Trust]*[170] is the first time the New Zealand Supreme Court has held that powers to control a trust can constitute property under the PRA. However, the decision does not resolve the underlying tension between relationship property rights and trusts.[171]

The Supreme Court's reasoning in *Clayton v Clayton [Vaughan Road Property Trust]* is fact specific

21.47 The Supreme Court found that Mr Clayton's powers over the Vaughan Road Property Trust amounted to property because they were so extensive. In particular, Mr Clayton had a collection of powers under the trust deed that allowed him to give all the trust property to himself without considering the interests of other beneficiaries. The trust deed modified the fiduciary duties that would ordinarily control Mr Clayton's actions as trustee. He was authorised to exercise his powers to benefit him even if it conflicted with the interests of the other beneficiaries.

21.48 The Supreme Court stressed that the terms of the Vaughan Road Property Trust deed were "unusual."[172] Evidently the Supreme Court did not think its decision in respect of the peculiar and far reaching terms of the Vaughan Road Property Trust deed would apply to many trusts. There have been a small number of subsequent cases in which one partner has argued the other partner's powers amount to property based on the Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]*.

170 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

171 The Supreme Court was not, of course, attempting a comprehensive reform of law in this area. It dealt with the facts before it and applied the law as it related to those facts.

172 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [14].

In each of those cases the courts distinguished the terms of the trust from the Vaughan Road Property Trust on the basis that the partner's powers in those cases were not as extensive as Mr Clayton's and therefore did not amount to property.[173]

The concept of trust powers as property is complex

21.49 We also think that partners will struggle to apply the *Clayton v Clayton [Vaughan Road Property Trust]* decision to their disputes regarding trusts.[174] The basis of the Supreme Court's approach in *Clayton v Clayton [Vaughan Road Property Trust]* was its view that because the PRA is social legislation, the definition of property should be interpreted more broadly than traditional concepts of property. The Court considered that property may include rights and interests that would not, in other contexts, be property rights or property interests.[175] To decide the case before it, the Supreme Court did not need to explain what other rights and powers to control a trust would amount to property, nor what the position would have been if Mr Clayton's powers been less extensive.[176]

21.50 Butler cautions that a departure from traditional property principles without firm legislative guidance undermines the certainty and predictability that the law requires.[177] Other commentators are concerned with what they see as considerable uncertainty as to what powers will amount to property and how those powers are to be valued.[178]

21.51 A further question arising from the *Clayton v Clayton [Vaughan Road Property Trust]* decision is whether a finding that powers

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173 *Da Silva v Da Silva* [2016] NZHC 2064; *B v B* [2017] NZHC 131; and *Goldie v Campbell* [2017] NZHC 1692, [2017] NZFLR 529.

174 Again, we emphasise that the Supreme Court was not attempting to propose a simple reform to the law that would resolve the underlying difficulties posed by trusts in the context of Property (Relationships) Act 1976 claims.

175 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38]. The Supreme Court of the United Kingdom has taken a different approach to Clayton. Prior to the Clayton decision, it said that the same principles of property law applied in family law as in other areas of law. In *Prest v Petrodel Resources Ltd* it was argued that, owing to the high degree of control the other partner exercised over a number of companies, the property belonging to those companies could be equated as the partner's property. The Supreme Court of the United Kingdom rejected the submission that a special and wider principle applied when interpreting the concept of property under the legislation. Lord Sumption reasoned (*Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [37]):

> *Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.*

176 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [80].

177 Andrew Butler in Mark O'Regan and Andrew Butler "Equity and trusts in a family law context" (paper presented to New Zealand Law Society Family Law Conference, 21 November 2011) 269 at 292.

178 Chris Kelly and Greg Kelly "Trusts Under Attack: The Legal Landscape Following the Clayton Litigation" (paper presented to Cradle to Grave Conference, May 2016) at 14–15.

amount to property means that the person who holds the powers has a direct interest in the trust property.[179] This issue becomes particularly important in cases concerning a notice of claim over trust property.[180] Section 42 of the PRA enables a partner who claims an interest in land to lodge a notice of that interest on the title to the land. There have been three cases since *Clayton v Clayton [Vaughan Road Property Trust]* in which the courts have considered an application to remove a notice of claim one partner has lodged on the title to land held on trust.[181] In each case, the partner seeking to justify the notice of claim argued that the other partner's powers to control the trust gave an interest in the trust assets, being the land. The courts came to different decisions. In *U v M* the High Court held that the partner was able to support a notice of claim against land held on trust on the basis that the other partner had the power to appoint and remove the beneficiaries of the trust.[182] In contrast, in *H v JDVC* the Court of Appeal held that a partner's power to appoint trustees and beneficiaries could not give rise to an interest in land.[183] The Court held that until the husband exercised the power to appoint himself as a beneficiary, he did not have a present interest in the trust property.

21.52 The concept of powers as property is unlikely to prove a workable solution to resolve the many issues that trusts pose to relationship property rights.

179 At one point in the judgment, the Supreme Court said that Mr Clayton's powers gave him an interest in the Vaughan Road Property Trust and its assets: *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [80]. Later in the judgment, the Court questioned whether Mr Clayton did indeed have a direct interest in the underlying assets of the trust, and preferred to "leave that issue for argument in a future case": at [104], n 101.

180 The application of s 42 notices of claim to trust property is also discussed in Chapter 14.

181 *U v M* [2015] NZHC 742; *H v JDVC* [2015] NZCA 213, (2015) 30 FRNZ 521; and *B v B* [2017] NZHC 131.

182 *U v M* [2015] NZHC 742. See too *B v B* [2017] NZHC 131 in which a partner argued he had an interest in the land by virtue of the other partner's powers over the trust that held the land. The High Court dismissed the argument by distinguishing between the powers enjoyed by the partner in this case and the greater powers enjoyed by Mr Clayton in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551. At no point in the judgment did the Court say the notice of claim could not be sustained because the partner's powers did not give an interest in the underlying trust assets. The High Court referred to *U v M* [2015] NZHC 742 but it did not refer to the later Court of Appeal judgment *H v JDVC* [2015] NZCA 213, (2015) 30 FRNZ 521.

183 *H v JDVC* [2015] NZCA 213, (2015) 30 FRNZ 521 at [53]. The Court of Appeal did not refer to the High Court's decision in *U v M* [2015] NZHC 742.

Issue 4: Remedies outside the PRA to recover property held on trust are inconsistent and create procedural difficulties

21.53 A partner whose relationship property entitlements have been frustrated by a trust may look to avenues outside the PRA to claim an interest in that property. We have set out above the main alternatives to the PRA. To summarise, they are:

(a) a claim under section 182 of the Family Proceedings Act 1980;

(b) a claim that the partner's contribution to the trust property has given rise to a constructive trust;

(c) a claim that the trust is invalid or a sham; and

(d) the court's intervention to ensure the proper administration of the trust.

21.54 Generally, the alternative avenues do not sit happily alongside the PRA regime or even with each other. They are based on different policy grounds or seek to protect interests in the trust property which are different in nature. The courts appear to have relied on these remedies because they are frustrated with discretionary trust structures and the limited powers under the PRA to deal with them.[184] The result is that the courts are developing remedies that create inroads into trusts that are far wider than the PRA would otherwise allow.

21.55 The most striking contrast is perhaps between section 44C of the PRA and section 182 of the Family Proceedings Act.[185] Section 44C is intended to protect a partner's rights to relationship property. It will apply when transferring property to a trust defeats a partner's

184 In *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [70] the Court of Appeal justified the imposition of a constructive trust over property held on an express trust because the Court needed to recognise the "reality of the New Zealand trust landscape". In the Law Commission's Review of the Law of Trust's project, the Commission noted that the court's development of the "bundle of rights" concept (the idea that rights in a trust form property in their own right, similar to the principle developed in Cla*yton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551) appeared to have been adopted from frustration at the ability of the Property (Relationships) Act 1976's provisions to deal with discretionary trusts: see Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper* (NZLC IP20, 2010) at [4.33].

185 See discussion in N Peart, M Henaghan and G Kelly "Trusts and relationship property in New Zealand" (2011) 17 Trusts & Trustees 866 at 873 regarding the different policies underpinning the Property (Relationships) Act 1976 and s 182 of the Family Proceedings Act 1980.

rights under the PRA. This section has been purposefully limited so a court cannot make orders in respect of a trust's capital. Section 182 of the Family Proceedings Act seeks to protect a partner's reasonable expectations regarding a nuptial settlement. This section rests on the philosophy that when those expectations are frustrated owing to changed post-separation circumstances, a court may justifiably vary the settlement. The focus under section 182 is not an equal entitlement to relationship property but a partner's reasonable expectations of the benefits he or she would have received had the marriage continued.[186] A court has a largely unfettered discretion as to how it varies a trust under section 182. It can therefore make orders regarding a trust's capital.[187]

21.56 A partner may also invoke the High Court's supervisory jurisdiction under the Trustee Act 1956 or the Court's inherent jurisdiction to ensure a trust is being properly administered. Under this type of claim, the Court is primarily concerned that the trust is being administered in accordance with its trust deed and the law of trusts. The Court is not focused on extracting property from the trust to divide between partners. Rather, the court's aim is to ensure the trust structure is respected.

21.57 Likewise, a partner's claim of a constructive trust over the trust property has a different focus. The courts' approach has been to inquire into a partner's reasonable expectations of an interest in the property to which he or she has made contributions. The courts have also said they are keen to ensure the beneficiaries do not obtain a windfall at the contributing partner's expense. The focus is on the partner's contributions to the property rather than the PRA's primary focus on contributions to the relationship.

21.58 The inconsistencies between these remedies are a significant issue for the following reasons:

(a) The PRA claims to be a code which applies over other law.[188] Yet plainly it has not been drafted to provide comprehensive avenues of redress nor prevent the application of the wider law. Instead, the partners will often rely on external avenues of redress that are underpinned by differing, if not conflicting, principles.

186 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [51]–[54].

187 Also, the remedy under s 182 of the Family Proceedings Act 1980 is only available to married couples; unlike the Property (Relationships) Act 1976 it does not apply to de facto relationships.

188 Property (Relationships) Act 1976, s 4.

This undermines the PRA's intent to codify this area of law.[189]

(b) The various remedies create procedural disharmony. As we cover in detail in Chapter 26, the respective jurisdictions of the Family Court and the High Court to consider partners' claims regarding trusts are unclear. In some instances, the courts' respective jurisdictions overlap; sometimes they are distinct. This can create difficulties as to the appropriate court in which to start proceedings, particularly if the proceedings concern questions under the PRA and a claim against a trust under the wider law. There may also be an issue with timing. Section 182 provides that the Family Court has jurisdiction to make orders to vary a nuptial settlement only on or within a reasonable time of making orders dissolving a marriage. Disputes under the PRA may be brought to court even if neither partner has applied for a divorce. The discrepancy in timing may pose difficulties and contribute to delays if a partner is attempting to bring all claims in one proceeding at the same time.[190]

(c) Some commentators have said that the various remedies lead to inconsistent outcomes with inconsistent reasoning. This presents challenges for professional advisers who may struggle to draft effective documents and give clear advice.[191] The law is unpredictable given the evolving nature of the remedies.

21.59 While the inconsistencies between the various avenues of redress are a significant issue, the benefit is that the courts have a range of powers to use in different circumstances. It will be clear from the scenarios discussed in this Part that trusts are created for many different reasons and in many different circumstances. The different remedies at the courts' disposal provide flexibility to address the particular circumstances of each trust.

189 Nicola Peart "Intervention to Prevent the Abuse of Trust Structures New Zealand" [2010] NZ L Rev 567 at 599; and Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.4].

190 A dissolution of marriage or civil union is only available after the parties to the marriage or civil union have been living apart for a period of two years: see Family Proceedings Act 1980, s 39.

191 Greg Kelly "Recent Developments in Trusts" (paper presented to Legalwise Seminar, Wellington, 25 February 2016) at 18.

CONSULTATION QUESTIONS

G6 Do you agree that the remedies to be used for property held on trust give rise to the problems identified?

G7 Should the main avenues for redress be found solely under the PRA? Are there disadvantages in this approach?

Issue 5: Section 182 of the Family Proceedings Act 1980

21.60 In addition to the issues with section 182 of the Family Proceedings Act 1980 (section 182) discussed earlier, we note the following problems.

Section 182 is very broad and its ambit remains uncertain

21.61 Commentators believe that the Supreme Court's decision in *Clayton v Clayton [Claymark Trust]* will lead to more findings of a nuptial settlement and therefore increased application of section 182.[192] That is because the Court confirmed that a nuptial settlement simply requires some connection or proximity between the settlement and the marriage.[193] The Court observed that where there is a trust set up during a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection.[194]

21.62 Commentators also say it is uncertain how section 182 will apply to certain trusts.[195] In particular, they consider that in *Clayton v Clayton [Claymark Trust]* the Supreme Court left open the question of what would happen where:

(a) a trust is settled by a third party during the marriage and one spouse is included among a wider class of beneficiaries; or

192 Chris Kelly and Greg Kelly "Trusts Under Attack: The Legal Landscape Following the Clayton Litigation" (paper presented to Cradle to Grave Conference, May 2016) at 22.

193 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34].

194 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [34]. See too Chris Kelly and Greg Kelly "Trusts Under Attack: The Legal Landscape Following the Clayton Litigation" (paper presented to Cradle to Grave Conference, May 2016) at 22.

195 Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) 22(8) Trusts & Trustees 864.

(b) one party settles a trust with no particular marriage in mind.

21.63 The Supreme Court in *Clayton v Clayton [Claymark Trust]* commented that a trust and any subsequent settlement of property to that trust are distinct.[196] Peart likewise suggests that it is possible for a trust to continue in existence but any additional dispositions of property to that trust are to be seen as a fresh settlement.[197] In contrast, the Court of Appeal in *W v W* rejected the argument that a subsequent disposition of property to a trust after it is settled constitutes a new settlement.[198] The Court said, "[t]he settlement is the trust itself and any trust property (whenever acquired) must be part of the settlement."[199]

21.64 It is difficult for partners to ensure that a trust will not be subject to a section 182 claim. Sometimes partners can agree that they will not make a claim against a trust associated with the relationship. However, the courts have said that only in limited circumstances can the partners effectively make a contracting out agreement under Part 6 of the PRA that they will not make a section 182 claim. In *W v W*, the Supreme Court said that a contracting out agreement could only preclude a claim under section 182 if the trust was part of the contracting out agreement, such as by attaching the trust deed to the agreement or through some other way so that the precise terms of the trust formed part of the agreement.[200] This requires a high degree of formality which many partners may not observe.

21.65 Despite the uncertainties with section 182, there are advantages. First, the remedy gives the court flexibility to intervene in cases involving trusts to divide assets between the spouses. Second,

196 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [36]. The Court's comment was obiter, meaning it was not a ruling of law and therefore not binding on other courts. It is also the view expressed by Kiefel J in *Kennon v Spry* [2008] HCA 56, 238 CLR 366 at [228].

197 Nicola Peart "Relationship property and trusts: unfulfilled expectations" (paper presented to New Zealand Law Society Relationship Property Intensive, August 2010) 1 at 21.

198 *W v W* [2009] NZCA 139, [2009] 3 NZLR 336. Nevertheless, in *Kidd v Van den Brink* [2010] NZCA 169 the Court of Appeal granted leave to appeal on whether further property settled onto an existing trust could be considered a nuptial settlement.

199 *W v W* [2009] NZCA 139, [2009] 3 NZLR 336 at [33]. This view is also supported by the judgment of Heydon J in the High Court of Australia decision *Kennon v Spry* [2008] HCA 56, 238 CLR 366 at [183] in which the Judge rejected the "multi-trust" theory – that every separate disposition creates a new trust.

200 *W v W* [2009] NZSC 125, [2010] 2 NZLR 31 at [33]–[34]. The Court reasoned that, first, if a nuptial settlement is too easily regarded as part of the agreement, the remedial scope of s 182 would be narrowed. The Court noted that the criteria for setting aside a contracting out agreement ("serious injustice") is more onerous than those that apply to vary a trust under s 182. Secondly, in order to be binding, the parties to a contracting out agreement must have first received independent legal advice. The Court cautioned that if a deed of trust is not incorporated into the agreement, the parties may not have had independent legal advice before becoming bound by the terms of the trust. The Supreme Court approved this reasoning in *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [98].

some people say that section 182 respects trusts as the court may only intervene if the trust was first intended to provide for the spouses.[201] If that purpose fails, the court will only vary the trust to ensure the spouses' reasonable expectations of provision from the trust are not defeated.

Section 182 and its relationship with the PRA

21.66 Several commentators have said that Parliament's decision to retain section 182 alongside the PRA is strange.[202] As we have already noted, a court's power to vary a trust under section 182 is far wider than the limited powers the court has under the PRA. It is odd that the Family Proceedings Act and the PRA should take such different positions regarding trusts when both statutes are aimed at resolving partners' property affairs after their separation.

21.67 A possible explanation for Parliament's decision to leave section 182 untouched can be found in the legislative materials to the 2001 amendments to the PRA. The 2001 amendments were, in part, a response to calls to increase the courts' powers to make orders regarding trusts.[203] When reviewing the Matrimonial Property Bill in 1998, the Parliamentary Select Committee considered whether section 182 should be incorporated into the PRA. The Committee received advice from the Ministry of Justice on the point. The Ministry explained that, although the lower courts had permitted the variation of trusts in which a spouse was a discretionary beneficiary, the Court of Appeal had not yet considered the issue. The Ministry advised that it was unclear whether the application of section 182 to discretionary trusts would be upheld by the Court of Appeal.[204] Consequently, the terms of section 182 of the FPA were not brought into the PRA.

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201 Nicola Peart "The Property (Relationships) Act 1976 and Trusts; Proposals for Reform" (2016) 47 VUWLR 443 at 459.

202 Commentators have said that the inclusion of s 182 of the Family Proceedings Act 1980 alongside the relationship property regime is "curious", an "anomaly" and "without a clear rationale and purpose": see Nicola Peart "Relationship property and trusts: unfulfilled expectations" (paper presented to New Zealand Law Society Relationship Property Intensive, August 2010) 1 20; Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) 22(8) Trusts & Trustees 864 at 873; and B Atkin and W Parker *Relationship Property in New Zealand* (LexisNexis, Wellington, 2009) at 208.

203 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (2nd ed, October 1988) at 30.

204 Ministry of Justice *Trusts – Effect of Clause 47 Matrimonial Property Amendment Bill* (MPA/MJ/3, Ministry of Justice, 7 October 1998 at 3; Ministry of Justice *Matrimonial Property Bill – Departmental Report – Clause by Clause Analysis* (MPA/MJ/4, Ministry of Justice, 2 March 1999) at 31. The Ministry of Justice also advised that the proposed amendments to the Property (Relationships) Act 1976 were based on an underlying policy position that dispositions of property to trusts should not be unwound so as to defeat the legitimate purposes for which the trust was created. Subsequent cases and commentators do not appear to have appreciated that the Government Administration Committee had considered the issue.

21.68 Since the 2001 amendments, the Supreme Court has confirmed that section 182 does indeed apply to discretionary trusts.[205] The power in section 182 has emerged as a useful provision to deal with property held on trusts that do not come under the PRA.[206] Consequently, section 182 has taken on greater significance than expected. This may be good cause to revisit whether the two regimes should be brought together.

Section 182 and de facto relationships

21.69 Section 182 applies to marriages and civil unions but not to partners in a de facto relationship. The Law Commission and some commentators believe section 182 should be changed so de facto partners are treated the same as married partners.[207] The partners' separation, rather than the married partners' divorce, would be the event which allows the court to exercise its powers under section 182.

Issue 6: Whether there are adequate remedies in the wider law to deal with trusts and rights under the PRA

Invalid trusts

21.70 Arguably many of the difficulties caused by trusts in the context of relationship property rights could be avoided if the courts more often found that a trust is invalid, either because the intended trust does not meet basic requirements of a trust, or because the trust is a sham.[208]

205 *W v W* [2009] NZSC 125, [2010] 2 NZLR 31; and *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590.

206 Several submitters made this point to the Law Commission during the Review of the Law of Trusts project: Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.41].

207 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.43]–[19.44].

208 See for example Anthony Grant "Effective Control and Sham Trusts" Law News (online ed, Auckland, 23 September 2016); Mark Henaghan "Family Law" [2016] NZ L Rev 356 at 379; Nicola Peart and Jessica Palmer "Double Trouble – The Power to Add and Remove Beneficiaries and the Power to Appoint and Remove Beneficiaries" (paper presented to New Zealand Law Society Trusts Conference, June 2015) 35 at 39; and Kate Davenport and Stephanie Thompson "Piercing the trust structure at a relationship's end: interesting developments in trust law from the New Zealand Supreme Court" (2016) 22(8) Trusts & Trustees 864. In recent years the courts have not developed other types of claims to challenge the validity of a trust. In particular, the courts have dismissed the concept of an "alter ego" trust: see *Official Assignee v W* [2008] NZCA 122, [2008] 3 NZLR 45. More recently the Supreme Court has dismissed the concept of an "illusory trust" see *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551.

21.71 In *Review of the Law of Trusts: A New Trusts Act for New Zealand* the Law Commission expressed concern at the lack of remedies where trust property is in reality under the settlor's control.[209] The Law Commission recommended a new Trusts Act that sets out the essential characteristics of a trust and the limits of what settlors can do.[210] These recommendations have largely been taken up in the Trusts Bill which is currently before Parliament.[211]

21.72 A claim that a trust is invalid is unlikely to be a useful tool in PRA disputes. This is mainly because it is difficult to make a claim, both in terms of the evidence required and the complex legal argument needed, to persuade a court that a trust is invalid. If the proposed Trusts Bill is enacted, the claim that a trust does not meet the essential characteristics of a trust may be more straightforward. Nevertheless, it will continue to be difficult to determine whether some trusts are legitimate or not.[212]

Constructive trusts

21.73 The recent cases in which the courts have recognised a constructive trust over property held on an express trust have been criticised.[213] The main complaint about the remedy is that the trustees are not the beneficial owners of the trust property so there is no interest for them to pass on.[214] The remedy is therefore seen as taking the existing beneficiaries' rights in order to compensate a partner for his or her unpaid services in respect of trust property.[215]

21.74 A key aim of the 2001 amendments was to avoid the need for partners in de facto relationships to make constructive trust claims. Prior to 2001, this was the main avenue through which a de facto partner could claim an interest in his or her partner's

209 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [4.13].

210 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [3.23]–[3.41].

211 Trusts Bill 2017 (290-1).

212 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [3.29] in which the Law Commission made a similar observation.

213 Charles Rickett: "Instrumentalism in the Law of Trusts: the Disturbing Case of the Constructive Trust Upon an Express Trust" (2016) 47 VUWLR 463; and Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [TU12.02].

214 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [TU12.02(c)].

215 Charles Rickett: "Instrumentalism in the Law of Trusts: the Disturbing Case of the Constructive Trust Upon an Express Trust" (2016) 47 VUWLR 463 at 473.

assets. It was a difficult process.[216] Court proceedings were often long and complex.[217] Parliament considered that it was preferable to extend the PRA to include de facto relationships as the PRA's rules of property division were seen as a better way to resolve disputes inexpensively, simply and speedily.[218]

21.75 We do not consider that constructive trust claims are a suitable remedy to address the problems caused by trusts in a relationship property context. To require partners to found their interests on constructive trust principles would, in our view, be a step backward given the policy and principles of the PRA.[219]

Ensuring proper administration of a trust

21.76 The remedies that are currently available to ensure the proper administration of a trust have a limited application to relationship property issues. The main remedies include reviewing trustee decisions,[220] replacement of trustees when the partner's separation has negatively affected the administration of the trust[221] and seeking information about the trust.[222] The key limitation is that none of these remedies provide a means of dividing trust property between the partners. A partner who is not a beneficiary has no standing to apply to the court to seek any of these remedies. These remedies therefore have insufficient impact to resolve relationship property disputes when trusts are involved.

CONSULTATION QUESTION

G8 Are there any further issues that trusts cause when a relationship ends?

216 The law culminated in the leading decision *Lankow v Rose* [1995] 1 NZLR 277 (CA). Prior to the inclusion of de facto relationships in the Property (Relationships) Act 1976 (PRA) regime, constructive trust claims under the principles articulated in *Lankow v Rose* were the main avenue of redress for partners who stood outside the PRA.

217 See for example Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 70.

218 There is also an issue of whether a partner's interest under a constructive trust in this context would constitute relationship property and therefore be subject to equal sharing between the partners. This question does not appear to have yet been considered by the courts. The question demonstrates the complexities that can arise when claims through other legal avenues are not harmonised with the scheme of the Property (Relationships) Act 1976.

219 See Chapter 3 for a discussion on the policy and principles of the Property (Relationships) Act 1976.

220 Trustee Act 1956, s 68.

221 Trustee Act 1956, s 52. See for example *Osborne v Wilson* HC Auckland CIV-2005-4054-1252, 8 September 2005; *K v K* HC Wellington CIV-2010-485-2444, 8 March 2011; and *Khanna v Khanna* [2014] NZHC 1715.

222 The High Court has an inherent jurisdiction to supervise the administration of trusts. The Court's supervisory jurisdiction encompasses trustees' decisions to provide information to beneficiaries. See *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320 at [50]-[62].

Chapter 22 – Options for Reform

Reform is necessary – what are the options?

22.1 The central question in this Part is whether the PRA strikes the right balance between enabling a just division of property at the end of a relationship and the preservation of trusts. We recognise that there are good reasons to preserve property on trust, particularly where a trust is legitimately created to provide for third party beneficiaries. On the other hand, we note the many problems that trusts can cause when the partners divide their property at the end of the relationship. Principally, a trust can prevent the partners from sharing in property attributable to the relationship. We have also observed that the effectiveness of sections 44 and 44C of the PRA is limited. Our preliminary view is that the PRA does not strike the right balance.

22.2 We also note that a partner can make several claims against a trust which are outside the PRA. For example, where trusts are involved, many partners will make claims under section 182 of the Family Proceedings Act 1980. It is also becoming more common for partners to claim that a trust is subject to a constructive trust in their favour. These claims are based on different principles. They may need to be brought in separate proceedings in a different court. The result is that the law is complex, unpredictable and procedurally inefficient.

22.3 Our preliminary view is that the PRA should be reformed so that partners' rights under the PRA more readily prevail against trusts. While we have considered the option of making no change to the law as it stands, we do not consider that this is a real alternative.[223]

22.4 Any option for reform in this area would ideally have several characteristics:

223 The Trusts Bill 2017 (290-1) currently before Parliament does not contemplate any substantive amendments to the provisions relating to trusts in the Property (Relationships) Act 1976 or the Family Proceedings Act 1980. The Bill proposes an expansion of the Family Court's jurisdictions to make orders under the legislation when determining proceedings under its own statutory jurisdiction (cl 136). Otherwise, the provisions of the Trusts Bill do not overlap with the options for reform presented in this Chapter.

(a) The reform should enhance the PRA's ability to provide a just division of property when property is held on trust.

(b) Not all trust property should be subject to the PRA. Any new provision needs to be able to distinguish between trust property that should and should not be classified or divided under the PRA. That is:

  (i) The treatment of trusts should be consistent with the wider scheme of the PRA. There are stronger reasons to subject trust property to division between the partners if the property has the character of relationship property. Conversely, trusts that contain what should be classified as the separate property of one of the partners, such as an inheritance from a parent, should not generally be subject to orders recovering that property for division between the partners.

  (ii) When one or both partners established a trust, or settled property on an existing trust, and both partners knew the effect of the trust or the settlement and consented to it, there is less cause to recover the property held on the trust.

  (iii) When one or both partners established a trust, or settled property on an existing trust, with the intention of irrevocably providing third party beneficiaries with the benefit of the property, there is greater cause to prioritise the interests of the beneficiaries over the interests of a partner under the PRA.

(c) Any provision that makes trust property available to meet relationship property entitlements should interfere with the trust to the least extent possible.

(d) Any provision that makes trust property available to meet relationship property entitlements should be simple and lead to predictable outcomes as far as possible.

(e) There are good reasons for the remedies (in whatever form they ultimately take) to be within the PRA. The PRA rests on the implicit principle we identified in Part A that a single, accessible and comprehensive statute should regulate the division of property when partners separate. It is preferable that the remedies within the

PRA be broad enough that partners do not need to seek relief outside the PRA.

22.5 We are conscious that there is no "silver bullet" solution. Given the competing interests at stake in this area, it is challenging to craft an option for reform that will perfectly balance all the issues at stake. There does not seem to be any consensus on how the law in this area should be reformed. We therefore expect that for all options we present below, there will be varying degrees of support and opposition. In short, there is no obvious answer as to how to find the right balance between enabling a just division of property and the preservation of trusts.

22.6 We present four options for reform:

(a) Option 1: revise the PRA's definition of property to include all beneficial interests in a trust;

(b) Option 2: revise the PRA's definition of relationship property to include trust property that is attributable to the relationship;

(c) Option 3: broaden section 44C;

(d) Option 4: introduce into the PRA a new provision modelled on section 182 of the Family Proceedings Act 1980.

22.7 The first two options are aimed at expanding the type of property to which the PRA's equal sharing regime applies. These options could be brought into the PRA to complement the existing remedies in sections 44 and 44C, although section 44C would apply in fewer cases. Option 3 is different. It is aimed at strengthening section 44C. If this option were to be implemented, it would replace the existing section 44C. Option 4 would introduce a power into the PRA to vary trusts. If implemented, it would probably exist alongside section 44C, either in its current or amended form.

22.8 It is possible to implement some of the options in combination with one another. However, options 1 and 2 would both increase the extent of property the PRA would classify as relationship property and potentially overlap. It is also likely that each option individually would significantly increase the property available for division between the partners. For that reason, it may be preferable that only one of the options be implemented.

22.9 Whichever option is preferred, we support the repeal of section 182 of the Family Proceedings Act. It is preferable to have all remedies within the PRA to ensure consistent principles and procedure. It would also improve the accessibility and clarity of the law to have all relevant provisions in the same statute.

22.10 Section 44 of the PRA should not be removed. Section 44's application is broader than dispositions of property to trusts. It applies generally to all dispositions intentionally aimed at defeating claims and rights under the PRA. The law regarding the application of section 44 is now fairly well settled and appears sound.

Option 1: Revise the PRA's definition of "property" to include all beneficial interests in a trust

22.11 The PRA's definition of property could be enlarged to include broader rights and interests than traditional concepts of property.[224] One way of doing this could be to include any interest under a trust through which it is both likely and permissible that the partner will receive a distribution of the trust property.[225] It may include a partner's power of appointment which is exercisable in favour of himself or herself.[226]

22.12 In determining whether a distribution of trust property is likely, the PRA could list several matters the court could take into account, such as the nature of the relationship between the partner and the trustees, the history to the establishment of the

224 Jessica Palmer "What to do about Trusts?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming) in which Jessica Palmer discusses this option.

225 This amendment should expressly exclude trusts in which a partner holds a beneficial interest that falls within what is not commonly understood to be a "family trust". For example, a partner's beneficial interest may arise under a superannuation scheme or an investment scheme that are structured as trusts. In most cases, a partner's interest in such schemes is likely to come within the Property (Relationships) Act 1976 (PRA) because it is either a vested interest, and therefore come under the PRA's existing definition of property, or it is a superannuation scheme entitlement as defined separately by the PRA. Trusts in connection with Māori land within the meaning of Te Ture Whenua Māori Land Act 1993 would also be excluded, see Property (Relationships) Act 1976, s 6.

226 A general power of appointment would already be considered property under the current definition of property in the Property (Relationships) Act 1976 following the Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551. Powers of appointment have had legislative recognition as property in certain instances. See Estate and Gift Duties Act 1968, s 8 (now repealed, but provided that the extent of a dutiable estate included any property over or in respect of which the deceased had at the time of his or her death a general power of appointment); Family Property Act SM 2017, c F25, s 1(1); Family Law Act RSO 1990, c F3, s 4(1); and Family Law Act SBC 2011, ch 25, s 84(3)(b).

trust and the source of the trust property, whether the partner has the power to appoint and remove trustees and beneficiaries, whether any distributions from the trust have been made to the partner in the past, and any other relevant circumstances.[227]

22.13 A similar approach is adopted in many other statutory instruments. For example, in the Child Support Act 1991 and the Legal Service Regulations 2011 there are provisions that direct the court to look at the probable benefits related to a person's interest in a trust.

22.14 These pieces of legislation do not, however, lead to the recovery of property held on a trust, which would be the consequence under the PRA. Rather, they are a way of deeming an interest in a trust to be a person's personal property when undertaking a means testing exercise. These examples also operate in a different policy context. The objective of the relevant legislation is to ensure the State does not shoulder a financial burden which a person is capable of meeting from property at his or her disposal. Nevertheless, the provisions show that it is possible to adopt a definition of property that is focused on the actual benefits a person is likely to enjoy from a trust rather than pursuant to traditional legal concepts.[228]

22.15 The effect of including qualifying discretionary beneficial interests within the PRA's definition of property would be that the interest can be treated like any other item of property under the PRA. It will be classified as either relationship property or separate property. If the discretionary beneficial interest is relationship property, its value will be shared equally between the partners.

22.16 Consequential amendments may be needed to clarify two issues. First, although section 10 provides that property received under a trust settled by a third party is separate property, the classification of property received under a trust settled by one of the partners is not stated. The PRA may need to expressly provide that interests in a trust settled by one of the partners during the relationship are relationship property. Second, there is the argument that if the

227 The list of matters set out in reg 8(4) of the Legal Service Regulations 2011 could provide a useful model for some of the matters the court could take into account.

228 In England and Wales, s 25(2)(a) of the Matrimonial Causes Act 1973 (UK) requires a court to take into account the "financial resources" of the partners to a marriage when making orders dividing their property. In determining what constitutes a financial resource, the courts will attribute the assets of a trust in which a partner holds a beneficial interest to the partner if it is likely the trustees will advance the assets to that partner, even if that beneficial interest is only a discretionary interest: see *Thomas v Thomas* [1995] 2 FLR 668 (CA) at 670; *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467; and *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

underlying trust assets are separate property the partner's interest in that trust should be separate property.[229] Our preliminary view is that a discretionary beneficial interest in a trust that arose under a trust settled by a partner during the relationship should be classified as relationship property in accordance with general rule of classification in section 8(1)(e). If the interest arose under a trust settled by a third party, section 10 would apply and classify the interest as separate property.

22.17 An approach which seeks to quantify the benefit a person can receive under a trust may not take into account the legitimate interests of other beneficiaries, particularly child beneficiaries. We consider that when the court comes to determine a partner's interest in a trust it would need to ensure the legitimate interests and needs of children under a trust are not neglected.[230] This may require a court to preserve an element of the trust property on the same terms for the benefit of the children. Alternatively, a court may wish to settle a share of a partner's property interest on trust for the benefit of the children under section 26 of the PRA.[231]

22.18 As noted above, the courts have held that beneficiaries with only a discretionary interest in a trust do not have a sufficient interest which entitles them to be heard when a court considers whether to make orders in respect of a trust in PRA proceedings.[232] We suggest section 37 would need to be amended to entitle all beneficiaries to be heard in PRA proceedings concerning a trust, not just those beneficiaries with a conventional property interest under the trust.

Advantages and disadvantages of amending the PRA's definition of "property"

22.19 The main advantage of this option is that it addresses a partner's true interest in a trust. A partner could not hide from the PRA's equal sharing regime by settling property on a trust under which he or she holds only a discretionary beneficial interest. The

229 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.47]. See discussion at paragraphs [21.41] to [21.45] above.

230 See the Supreme Court's comments in *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [58].

231 The Supreme Court in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 observed in a footnote that s 26 of the Property (Relationships) Act 1976 gave the courts power to settle property for the benefit of children. A greater reliance on s 26 in this context may need to go hand in hand with reforms to s 26 to increase the section's effectiveness. We discuss potential reforms in Part I of this Issues Paper.

232 See the discussion above at paragraph 21.37. See also *H v R* [2017] NZFC 761 at [26].

focus on the likely distributions of property a partner would receive from a trust could then avoid many of the anomalies that currently arise under the PRA. The inconsistent way in which the PRA currently handles the types of interest in a trust would be less of a problem. If a partner wished to ensure his or her interest under a trust stood outside the PRA regime, he or she would need to enter a contracting out agreement with the other partner in accordance with Part 6 of the PRA. The interests of the other partner are better protected by the safeguards in the contracting out regime.

22.20 The primary disadvantage of this option is the risk that trust structures could be devised in a way that conceals a partner's real interest in the trust. For example, a trust deed might not name a partner as a beneficiary but may give the trustees, or even a third party, the power to add or remove beneficiaries at a later point in time. Under such a structure a partner could be added as a beneficiary and receive distributions of the trust property after a relationship has ended. It might be difficult for the PRA's definition of property to capture such arrangements.[233] Therefore the focus on a partner's interest in a trust as the basis for dividing property under the PRA may not be a reliable factor for determining the extent of property that ought to be shared between the partners. The appearance of the partner's interest in the trust can be easily manipulated.

22.21 Second, the extent or value of a partner's interest in a trust may not be as extensive as the interest the other partner feels he or she should have in the trust property. To take an extreme example, a trust holds significant property that, were it not for the trust, would be considered relationship property. A court may find, however, that it is only likely that the partner will receive a small distribution of property from the trust. Or the interest may have been granted before the relationship began, or from a third party, in which case the interest would not be relationship property. The result would be that the partner's limited interest, if any, would be subject to equal division, but the majority of the trust property, that would otherwise be shared equally, would be untouched.

233 Another example could be if a trust named a company or some other entity that was associated with a partner as a beneficiary. The trust would give the appearance that the partner held no direct beneficial interest in the trust, but in reality owing to his or her connection with the named beneficiary, he or she would be the de facto beneficiary.

22.22 Third, discerning the true nature of a partner's interest in a trust is not a simple exercise. The court would probably need to inquire into many matters to consider the likelihood that a partner would receive a distribution of the trust property, such as the terms of the trust deed, the relationship between a partner and a trustee, the history of the dealings between the trustees and the partner, and the nature of the other beneficiaries' interests. When all this evidence is before the court (which may be challenging in itself if third parties are unwilling to provide information), it may still be a difficult task to determine precisely what interest the partner holds. There is then the further issue of how that interest is to be valued. Although there is consensus that many interests in trusts are capable of valuation,[234] the methodology is not simple. It will require a valuer to take into account many factors.[235] The valuation exercise will involve predictions, namely how the trust is likely to be administered in the future. Such factual and valuation evidence may be expensive to obtain and the issues arising may make any court hearing complex.

Option 2: Revise the PRA's definition of "relationship property" to include some property held on trust

22.23 An alternative way of enlarging the range of property to which the PRA applies is to focus on the underlying trust property rather than a partner's interest in the trust. This option would involve three key changes to the PRA.

234 See Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" (2013) 7 NZFLJ 223; and Brendan Lyne "Valuation and Expert Financial Evidence in PRA Cases" (paper presented to New Zealand Law Society PRA Intensive, October 2016).

235 Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" (2013) 7 NZFLJ 223 at 225 and Brendan Lyne "Valuation and Expert Financial Evidence in PRA Cases" (paper presented to New Zealand Law Society PRA Intensive, October 2016) at 76-77, identify nine factors that a valuer should take into account. Barkley further says there will be considerable contingencies and uncertainties, although Lyne does not agree. Palmer and Peart say that the Supreme Court when valuing Mr Clayton's powers in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 should have allowed a discount to reflect the possibility that Mr Clayton would have exercised his powers as trustee and Principal Family Member to distribute property to other family members: see Jessica Palmer and Nicola Peart "*Clayton v Clayton*: a step too far?" (2015) 8 NZFLJ 114. Kelly and Kelly, when commenting on the Clayton case, say that the valuation should also consider whether Mr Clayton would ever have removed the assets from the protection of the trust: see Chris Kelly and Greg Kelly "Trusts Under Attack: The Legal Landscape Following the Clayton Litigation" (paper presented to Cradle to Grave Conference, May 2016) at 15–16.

(a) Include a new definition of "trust property" in section 2 of the PRA

22.24 First, a new definition of "trust property" would be introduced to section 2 of the PRA. It would provide that trust property means any property (within the meaning of the PRA's existing definition of property) held on a trust, regardless of whether either or both partners settled the trust or hold a beneficial interest under the trust.[236]

(b) Include trust property attributable to the relationship within the PRA's definition of Relationship Property

22.25 The second change would be to amend the definition of relationship property. A proportion of the value of the trust property would be relationship property where two elements are satisfied:

(a) that proportion of the value of the trust property is "attributable to the relationship"; and

(b) the court is satisfied that it is just to treat that proportion of the value of trust property attributable to the relationship as relationship property having regard to –

(i) whether, with informed consent, the partners intended to irrevocably alienate the property for the benefit of third parties;

(ii) whether the trust was intended to meet the needs of minor or dependent beneficiaries;

(iii) whether the trust was intended to provide benefits to the partners on the basis that the relationship would continue;

(iv) whether either or both partners received consideration for any property disposed of to the trust and if so the amount of that consideration;

236 The definition would probably need to expressly state that trust property does not include any property in which a partner has a superannuation scheme entitlement or any trust in connection with Māori land within the meaning of Te Ture Whenua Māori Land Act 1993. That would prevent overlap with the Property (Relationships) Act 1976's separate treatment of superannuation scheme entitlements and its general exclusion of Māori land.

(v) whether the partners received any benefit from the trust during the relationship; and

(vi) any other relevant matter.

22.26 We discuss each of the two elements in greater depth below.

First element: A proportion of the value of the trust property is attributable to the relationship

22.27 The focus of this option is on the character of the underlying trust assets rather than Option 1's focus on the nature of the partner's beneficial interest in the trust.

22.28 The attribution test is used throughout the PRA where the property in which a partner claims an interest is held by a different person. For example, superannuation scheme entitlements, which are held by the superannuation scheme provider, are relationship property under section 8(1)(i) to the extent they are attributable to the relationship.[237] An increase in value of one partner's separate property is relationship property pursuant to section 9A if the increase was attributable to the application of relationship property or attributable to the actions of the non-owning partner.[238]

22.29 There is, however, some uncertainty about what "attributable" means. In interpreting the word as used in section 9A, the courts have relied on the Court of Appeal judgment in *Hartley v Hartley*.[239] In that case, Somers J explained that the word attributable meant "owing to or produced by."[240] Thus, in the context of section 9A, it is only the increase in value of separate property owing to or produced by the application of relationship property or the direct or indirect actions of the non-owning partner that becomes relationship property.[241] Some causative link is required.

22.30 A difficulty is that the classification of property under the PRA generally does not depend on establishing direct causation. As we explained in Part A, the PRA treats a qualifying relationship as a

237 Property (Relationships) Act 1976, s 8(1)(i). See too s 8(1)(g), which refers to the proportion of value of any life insurance policy attributable to the relationship.

238 Property (Relationships) Act 1976, ss 9A(1) and (2).

239 *Hartley v Hartley* [1986] 2 NZLR 64 (CA) at 75 relied on by the Supreme Court in *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [29].

240 *Hartley v Hartley* [1986] 2 NZLR 64 (CA) at 75 per Somers J.

241 *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [29]–[30].

partnership or joint venture to which each partner contributes equally, although perhaps in different ways.[242] When the relationship ends, the PRA grants each partner an entitlement to an equal share of relationship property based on the equal contributions each partner has made to the relationship. It is only in exceptional cases that a partner is required to show that his or her specific contributions have led to the acquisition or enhancement of a specific item of property.[243]

22.31 Consequently, in order to maintain consistency with the general scheme of the PRA, the phrase "attributable to the relationship" should probably not be too strictly construed. It should be understood to encompass property that may have been produced indirectly by the partners' contributions to the relationship.[244] By way of example, in our view a proportion of the value of trust property is likely to be attributable to the relationship where:

(a) **The property was the partners' relationship property before it was settled on trust.** For example, the partners settle their joint savings accumulated during the relationship on trust.

(b) The trust property was acquired from the proceeds of relationship property. For example, the partners pool their savings acquired during the relationship and use them to fund the deposit for a house which is later settled on trust.

(c) **The trust property's value has been sustained or enhanced by the application of relationship property.** For example, the partners use their income to pay for maintenance or improvements to a family holiday home which is held on trust.

(d) **The trust property's value has been sustained or enhanced by the direct actions of either or both partners during the relationship.** For example,

242 This is reflected in the explicit and implicit principles of the Property (Relationships) Act 1976, discussed in Chapter 3.

243 Principally, s 9A(2) provides that where an increase in value of one partner's separate property is attributable to the actions of the non-owning partner, the increase in value is divided in accordance with each partner's contributions to that increased value. The courts have noted that this method of dividing property is not found anywhere else in the Property (Relationships) Act 1976; it is unique to section 9A. See *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [46]. See Chapter 10 for further discussion of s 9A.

244 In discussing the meaning of "attributable to the relationship" in respect of superannuation scheme entitlements in s 8(1)(i), *Fisher on Matrimonial and Relationship Property* suggests that the test will be satisfied when the portion of the superannuation scheme entitlements can be linked to an activity which is recognised as a contribution under s 18 of the Property (Relationships) Act 1976: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.27].

during the relationship either or both partners invest a significant amount of time into making a family business successful, and the shares of the company are held on trust.

(e) **The trust property's value has been sustained or enhanced by the indirect actions of a partner.** For example, during the relationship one partner cares for children and maintains the family household to provide the other partner the opportunity to develop an area of farmland which is held on trust.

22.32 Conversely, the following are examples of trust property that would not be attributable to the relationship:

(a) **The property was provided entirely by a third party.** For example, the parents of one partner settle land or company shares on a trust under which their children are beneficiaries.

(b) **The property was settled on trust before the relationship began and was kept separate from family life.** For example, a partner settles money on trust to provide for his or her children from a former relationship. The trust moneys are kept separate during the relationship and never used for the purposes of the new family.

22.33 Two specific matters are likely to require clarification. First, there is the situation where a third party has settled property on trust which is later used by the partners as the family home or family chattels. Our preliminary view is that this trust property should not be classified as relationship property. The property cannot be attributed to the relationship in the sense that it is produced by the relationship, even though it is used for relationship purposes. If, however, during the relationship the partners have sustained or enhanced the value of the trust property through their actions or through the application of relationship property, that enhanced value might be relationship property. If the enhanced value of the trust property was not considered relationship property, it is possible a partner would claim a constructive trust over the property in any event. It is preferable that these claims be brought into the PRA regime and harmonised with the principles underpinning the legislation.

22.34 Second, if the trust property has increased in value owing solely to increases in inflation, there is a question as to how the increases in value should be treated. The best approach may be to determine whether the underlying asset can be attributed to the relationship and, if so, then attribute any subsequent inflationary gains to the relationship. For example, if the partners purchase a house using relationship property funds and settle the property on trust, the house would probably be attributable to the relationship. If the house increases in value because of the growth in house prices generally, the increase in the trust property's value could also be attributable to the relationship. If, to take a different scenario, a partner's parents provided a house on trust for the partners to live in, and over the course of the relationship the house increases in value, the increase in value attributable to growth in the housing market would not be attributable to the relationship because the house itself is not attributable to the relationship. In Part C we discuss the rules under section 9A that apply when a partner's separate property increases in value because of the application of relationship property or the other partners' direct or indirect actions. We also suggest some options for reform. Our preliminary view is that increases in the value of trust property should be treated consistently with these rules in whatever form they ultimately take.

Second element: The court considers it just

22.35 The second element to option 2 is to provide the court with a residual discretion to treat the value of the trust property attributable to the relationship as relationship property. If the test in the first element is satisfied, the trust property will normally fall into the relationship property pool and defeat the effect of any trust. However, as we have recognised above at paragraph 21.12 to 21.21, trusts may be established for legitimate reasons for the benefit of third parties. The purpose of the court's residual discretion is to prevent trust property from forming part of the relationship property pool when it would be unjust to do so.

22.36 We have identified certain factors above at paragraph 22.4 which are relevant to when a partner's rights under the PRA should take priority over the preservation of a trust. In particular, there are grounds to preserve the trust if the partners genuinely intended to alienate the property by settling it on trust for the benefit

of third parties. The trust may also deserve protection if it was intended to meet the needs of minors or dependents.

22.37 On the other hand, if property has been settled on trust without the informed consent of both partners, there are good reasons to bring the property into the relationship property pool, particularly given the inconsistency with the PRA's contracting out provisions. Similarly, if the trust was intended to provide benefits to the partners on the basis they remained together, it may be preferable to bring the property into the relationship property pool if the partners' separation defeats the purpose of the trust.

22.38 In cases where one of the partners has disposed of property onto the trust, it may be relevant to inquire into whether the partner received consideration. The value of the trust property may be properly reflected in the consideration the partner received which could be divided as relationship property instead of the trust property itself.

22.39 Finally, it may be appropriate for the court to take into account any benefits the trust provided the partners during the relationship. The court could determine whether the benefits received exceeded the contributions the partners made to the trust property. For example, the parents of one partner create a trust in order to provide a house for their child and his or her partner to live in rent-free. During the relationship, the partners carry out renovation work on the house and enhance its value, meaning that the enhanced value is attributable to the relationship. The court could take into account the fact that the partners resided at the trust property rent-free. Such benefits may counterbalance any enhanced value the partners claim an interest in.[245]

22.40 Again, the beneficiaries of the trust should be entitled to be heard by the court, even if they hold only discretionary interests.

245 In claims for a constructive trust based on *Lankow v Rose* [1995] 1 NZLR 277 (CA) the claimant must show that the contributions he or she makes to the property "manifestly exceed" the benefits the claimant receives: *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 282 per Hardie Boys J. In *Blumenthal v Stewart* [2017] NZCA 181, [2017] NZFLR 307 a stepson claimed, among other things, a constructive trust over his later stepfather's estate. The stepson's claim was based on his contributions to the deceased's rural property, such as spraying weeds and maintaining a water pump, and the alleged expectation of an interest in the property. On the other hand, the stepson received considerable benefits from the property. He used the property as a base for his business, and stored items there. He also fattened cattle on the property. At [40] the Court of Appeal rejected the claim on the basis that the contributions were cosmetic and did not add value to the property. Furthermore, at [42] the Court explained that it did not see the contributions as offsetting the overall benefits received by the stepson.

(c) Amend the orders the court can make in respect of trust property

22.41 The final change required under option 2 concerns the types of orders the court could make in respect of the trust property. The court would probably need to be better equipped with a range of orders to ensure the trust property is appropriately divided. The court should be able to make the same orders under the PRA in respect of trust property as it could in relation to other forms of property, such as vesting or sale orders.[246]

22.42 It may also be appropriate for a court to have the power to resettle part of the trust property in order to implement division orders. Although a resettlement might not look like a conventional division of relationship property, it may be an effective means of preserving the original intent of the trust, particularly if other beneficiaries have an interest in the trust property. Although the power to resettle a trust may be seen as providing the court with considerably greater powers under the PRA, we note that section 33(3)(m) already authorises the court to vary the terms of a trust. However, this power is rarely used. It is desirable for the scope of the court's powers and the circumstances in which they are to be used to be clarified.

Advantages and disadvantages of amending the PRA's definition of relationship property

22.43 The key advantage of this option is its consistency with the overall policy and principles of the PRA. The proposed provision draws on the underlying rationale for sharing relationship property and confirms that a partner's rights to the property should generally prevail against trusts. The focus on the relationship property component of the trust property and the court's residual discretion would also exclude many types of trusts that it might be inappropriate to subject to equal sharing. Also, partners can be assured that a trust will be preserved if there is clear evidence that it was established with the knowledge and informed consent of both partners. This will encourage partners to take proper advice and be transparent when settling property on trust. There would

246 Property (Relationships) Act 1976, s 33.

be greater consistency between the PRA's provisions regarding trusts and its provisions regarding contracting out agreements.

22.44 Other than the difficulties around the meaning of the test "attributable to the relationship" discussed above, the main objection to this option relates to the considerable consequences for trusts. In many cases trust property will be subject to equal division between the partners. This would represent a significant change in policy and some people may claim it gives insufficient priority to the preservation of trusts.

22.45 This option would also give the court a residual discretion when determining whether to classify trust property as relationship property and when making orders. This degree of flexibility will introduce some uncertainty to the law and may make it difficult for partners to resolve property matters out of court, at least until some case law has built up.

Option 3: Broaden section 44C

22.46 The third option is to amend section 44C to overcome its main limitations. This would include the following changes:

(a) Section 44C(1) would be amended so that any disposition of property that has the effect of defeating the claim or rights of one of the partners would be caught. The requirements that the disposition be of relationship property and that it must occur after the relationship began would be removed.

(b) Section 44C(2) would be expanded so the court may order the trustees to pay to one partner a sum of money from the trust property or transfer to a partner any property from the trust.[247] The instruction in section 44C(3)(a) that the court should only have recourse to the trust capital as a matter of last resort would be retained.

(c) The matters in section 44C(4) which the court must take into account when exercising its powers under section 44C(2) would be expanded. The court should

247 This proposal has previously been made by the Law Commission: Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 232. There would also need to be a consequential amendment to subs 44C(3)(b)(i) of the Property (Relationships) Act 1976 to replace the reference in that subsection to "distribute the income of the trust" to something like "distribute a sum of money or property of the trust."

be required to have regard to whether the partners put the property on trust with informed mutual consent and with the intention of irrevocably settling the property for the benefit of third party beneficiaries. The court should also inquire into whether the trust has the purpose of providing for the needs of any minor or dependent beneficiary.

22.47 These changes would give section 44C much wider application. It would also be more consistent with anti-avoidance provisions in other areas of law, such as under section BG1 of the Income Tax Act 2007.[248]

Advantages and disadvantages of broadening section 44C

22.48 A major advantage of this option is that it would enhance the court's existing remedial powers while retaining the case law that has been decided under sections 44 and 44C in respect of dispositions of property with prejudicial effects.

22.49 Section 44C(3) allows a court to weigh the overall fairness of ordering compensation. This degree of flexibility is useful in responding to the variety of trusts and circumstances that come before the courts.

22.50 There are, however, several limitations to the approach in section 44C that would not be remedied by this option. First, section 44C focuses on dispositions of property that have the effect of defeating one partner's claim or rights under the PRA. However, a trust may have the effect of prejudicing a partner even though the other partner has made no disposition to that trust. For example, a partner may arrange for the trustees of an existing trust to purchase the property used by the family without either partner

248 Section BG1 of the Income Tax Act 2007 provides that a "tax avoidance arrangement" is void against the Commissioner of Inland Revenue for income tax purposes. A trust can come within the Act's definition of an "arrangement." The Act then defines "tax avoidance arrangement" as an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly (a) has tax avoidance as its purpose or effect or (b) has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the tax avoidance purpose or effect is not merely incidental (see the leading Supreme Court decision on the interpretation of s BG1 of the Income Tax Act 2007 *Ben Nevis Forestry Ventures v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289). A trust may constitute a tax avoidance arrangement: *P and H v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433. Importantly, the reference in the definition of "tax avoidance arrangement" to "its purpose or effect" means the purpose or effect of the arrangement is determined objectively, not by the motive or subjective purpose of any party: *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [36]–[39]. The proposed amendments to s 44C of the Property (Relationships) Act 1976 would enhance it into a more general anti-avoidance provision like s BG1 of the Income Tax Act 2007.

ever owning the property personally.[249] To take another example, parents may provide a house for their child to live in with his or her partner. During the course of the relationship, the partners may apply considerable effort and money to maintain or enhance the property's value. If the relationship has lasted several years, the value of these contributions may be high. Nevertheless, if the partners separate, it is questionable whether their contributions to the enhanced or sustained value of the house constitute a disposition of property within the meaning of section 44C.[250] Yet, if the house had not been held on trust, but instead was relationship or separate property, the partner may have had a valuable claim under the PRA.[251]

22.51 To compound this problem, it may be possible for the partner to claim a constructive trust over the house held on trust. The partner may still look to a remedy outside the PRA to claim property that is connected with the relationship.

22.52 Second, the notion of paying compensation to the affected partner is problematic. Section 44C is concerned with dispositions that defeat the interests of the other partner.[252] As noted above,[253] the courts have said that the partner who placed the property on trust must keep some benefit in the property, such as by controlling the trust. If putting the property on trust defeats both partners' interests then section 44C would not apply. In those circumstances, the court could not properly order compensation as the partner's loss does not mirror the other partner's gain. Arguably, the court should be able to make an order which addresses one partner's loss but is also fair to the other partner. For example, it may be better to recover the property disposed of to the trust in appropriate circumstances.

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249 If a partner arranges to purchase property but, prior to the transfer completing, the partner nominated the trustees of trust to be named as purchasers, the court will probably hold that there has been a "disposition of property" for the purposes of ss 44 and 44C of the Property (Relationships) Act 1976. See *R v U* [2010] 1 NZLR 434 (HC); and *O v S* (2006) 26 FRNZ 459 (FC).

250 There have been some cases with the same fact pattern as this example: *[LC] v S* [2012] NZFLR 939 (FC); and *Kidd v Van den Brink* (2008) 28 FRNZ 82 (HC). In these cases s 44C was not applicable.

251 If the house was relationship property, the value would be divided equally pursuant to s 11 of the Property (Relationships) Act 1976. If the house was separate property, the non-owning partner may have had a claim under ss 9A, 15A or 17 in respect to the enhanced or sustained value of the separate property. In contrast, the Family Court in *Q v Q* (2005) 24 FRNZ 232 (FC) at [149] accepted that the husband's financial and accounting services as well as labour on the trust property constituted dispositions of property for the purposes of s 44C. Few other cases have taken this approach. We also recognise that it may, however, be possible to expressly define "disposition of property to a trust" as including a partner's unpaid labour or services towards the trust property.

252 Section 44C(1)(b) of the Property (Relationships) Act 1976 provides that the disposition must have the effect of defeating the interests of one partner.

253 At [20.46] and [21.38]–[21.40].

Option 4: A new provision modelled on section 182 of the Family Proceedings Act 1980

22.53 This option is based on the Law Commission's recommendations in the *Review of the Law of Trusts: A Trusts Act for New Zealand*.[254] In that report, the Commission proposed that an amended section 182 be retained alongside an amended section 44C, and that it be enlarged to apply to de facto relationships as well as marriages and civil unions. The section would therefore apply to "relationship settlements" rather than "nuptial settlements." The basis for retaining section 182 was that it had proven to be a useful provision that gives effect to the original expectations of the parties that settle trusts and deals with injustice that could otherwise be caused by changed circumstances.[255] Although the recommended amendment would expand the potential class of applicants, the fundamentals of the provision would remain unaltered. The courts would continue to exercise jurisdiction under section 182, which since the Law Commissions report has been further explained by the *Clayton v Clayton [Claymark Trust]* decision.[256]

22.54 Several submitters on the *Review of the Law of Trusts: A Trusts Act for New Zealand* did not favour the retention of section 182. A common complaint was that section 182 was outdated and inconsistent with the PRA. Peart has said that section 182 should be kept as a separate provision, not as part of the PRA.[257] This is to acknowledge that the trust property is not beneficially owned by the partners and therefore different principles should apply than the PRA that only governs property that the partners do beneficially own.[258] Having undertaken research on the origins of section 182 and the way it was viewed in 2001,[259] we believe that the drafters of the 2001 amendments did not foresee the prominence section 182 has achieved in later years. There is a case

254 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 239.

255 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.43].

256 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590.

257 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 433 at 461.

258 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 433 at 461.

259 See the discussion at [21.67] above.

for bringing the section 182 remedy within the PRA. As we have explained at paragraph 22.74, it is preferable that all relationship property matters be dealt with in the same proceedings, pursuant to the same principles found under the same statute. As we explain in Part A, it is an implicit principle of the PRA that a single, accessible and comprehensive statute should regulate the division of property when partners separate.

Advantages and disadvantages of a provision modelled on section 182 of the FPA

22.55 Peart says that section 182 is preferable to other options to recover property from a trust when a relationship ends, because section 182 does a better job of respecting the trust.[260] As section 182 applies to trusts that are intended to provide for the relationship, there should be no surprise if the court makes orders to ensure that happens, albeit in a different form.[261] Section 182 is therefore seen as attempting to preserve the intent of a trust while balancing that intention against property rights following the breakdown of a relationship.[262] It may, however, be an overstatement to say that section 182 preserves the intent of a trust. The Supreme Court in *Clayton v Clayton [Claymark Trust]* explained that the purpose of relief under the section was to ensure that a partner's *reasonable expectations* of the trust were not defeated, not the actual intention behind the trust itself.[263]

22.56 A further advantage of this option is that section 182 gives the court a great deal of flexibility to vary the terms of a trust. This

260 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 433 at 459. Palmer also favours an expanded variation discretion: Jessica Palmer "What to do about Trusts?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

261 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 433 at 459.

262 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [19.39]; and Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 433 at 461.

263 In *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [51]–[52] the Supreme Court carefully pointed out that, when a court exercises its discretion under s 182 of the Property (Relationships) Act 1976, its aim is not to perpetuate the objects of the nuptial settlement per se. Rather, its aim is to remedy the failure of a partner's expectations because the marriage no longer continues. The focus is therefore not on the underlying premise of the trust, but rather on the partner's underlying expectations of a continuing marriage.

Indeed, this reasoning led the Supreme Court to depart from its previous judgment in *W v W* [2009] NZSC 125, [2010] 2 NZLR 31. In *W v W* the Court said that the parties' expectations were to be assessed at the time the settlement was made. In *Clayton* the Court said that a partner's expectations regarding the settlement are not to be assessed at any fixed point in time (perhaps allowing for the situation where the underlying intentions of a trust at the time it was made remain constant, but a partner's expectations change after the settlement but before the relationship break up): see *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [56].

Rather than say s 182 respects trusts, it is perhaps more correct to say that the court's approach under s 182 respects the partners' reasonable expectations of the benefits they would have received under a trust had the marriage continued.

flexibility can be very useful as it allows the court to tailor orders to meet the particular circumstances of each case. In addition, the case law decided under section 182 has now identified many matters the court is to consider when deciding whether to exercise its discretion. Among these matters, the interests of children are to be a primary consideration.[264] The remedy therefore allows the court to consider the overall fairness of a particular case for all concerned.

22.57 As already noted, a major disadvantage with this option is the disharmony between the principles underpinning the PRA regime and those on which the section 182 remedy is based. The court's focus is not on a just division of property in accordance with the principles of the PRA, but rather on a partner's reasonable expectations of the benefits he or she would receive if the relationship continued. Rather than reconcile those differences, maintaining section 182 will reinforce the different approaches to dealing with trust property at the end of a relationship.

22.58 The ambit of section 182 still remains unclear and we have discussed this in paragraphs 21.61 to 21.65

22.59 It is difficult to contract out of section 182. As discussed, the courts require a high degree of formal connection between the trust and a contracting out agreement in order for the agreement to shield the trust from a section 182 claim. The Supreme Court has said that, in order to be effective, the trust deed would need to refer to the relationship property agreement by some means.[265]

CONSULTATION QUESTIONS

G9 Which of the proposed options do you prefer? Why?

G10 Are there any other feasible options for reform we have not considered?

264 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [56], [58], [64] and [67].

265 *W v W* [2009] NZSC 125, [2010] 2 NZLR 31 at [34]. The Court reasoned that, first, if a nuptial settlement is too easily regarded as part of the agreement, the remedial scope of s 182 would be narrowed. The Court noted that the criteria for setting aside a contracting out agreement ("serious injustice") is more onerous than those that apply to vary a trust under s 182. Secondly, in order to be binding the parties to a contracting out agreement must have first received independent legal advice. The Court cautioned that, if a deed of trust is incorporated into the agreement, the parties may not have had independent legal advice before becoming bound by the terms of the trust. The Supreme Court approved this reasoning in *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590 at [98].

Part H – Resolving property matters in and out of court

Chapter 23 – How are property matters resolved in practice?

Introduction

23.1 In this part of the Issues Paper we look at how property matters are resolved when relationships end, both in and out of court. We want to understand whether the PRA facilitates the resolution of property matters in accordance with people's reasonable expectations, and as inexpensively, simply and speedily as is consistent with justice. We focus primarily on how separating partners resolve their property matters, although some of the issues identified in this part may also appear when one partner dies and disputes arise among the surviving partner, the personal representative of the deceased and third parties.[1]

23.2 Separating partners can agree to divide their property in any manner they think fit. They are not required to apply the PRA's rules of division, however, if they want their agreement to be enforceable by a court they must meet certain procedural requirements set out in the PRA.[2]

23.3 Partners resolve their property matters in a range of different ways, including by negotiation, with or without legal advice, or by mediation, arbitration or some other dispute resolution process. We use the term "out of court" to refer to this range of options, unless indicated otherwise. A smaller number of separating partners will have their property dispute determined by a court.

23.4 No information is routinely collected in New Zealand about how people resolve their property matters at the end of relationships. As a result, we lack the necessary information to fully analyse how the PRA is operating in practice. Your views on the practical issues people face when resolving property matters, and how those issues might be addressed, are therefore important to our review.

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1 The special rules that apply to relationships ending on death are discussed in Part M.

2 For an agreement to be binding it must be in writing and signed by both partners. Each partner must receive independent legal advice before signing and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See: Property (Relationships) Act 1976, s 21F.

23.5 In this chapter we explore what is needed to achieve a just and efficient resolution of property matters under the PRA, and summarise what we know about what currently happens *in practice*. The rest of Part H is arranged as follows:

(a) In Chapter 24 we look at how property matters are resolved out of court. We explore the range of information, support and dispute resolution services that are currently available, and ask whether there is a need for the State to do more to encourage out of court resolution in a way that achieves just and efficient results.

(b) In Chapter 25 we identify broader issues with the Family Court's processes and powers, which can hinder the just and efficient resolution of property matters in court.

(c) In Chapter 26 we explore more complex and technical issues with the jurisdiction of the courts to decide property matters that arise at the end of relationships, focusing in particular on the roles of the Family Court and High Court.

23.6 Throughout this part of the Issues Paper we refer to the comprehensive review of the Family Court carried out by the Ministry of Justice in 2011, which led to important changes to the family justice system such as the introduction of the Family Dispute Resolution service for parenting disputes.[3] We refer to this as the "Family Court Review."

Achieving just and efficient resolution of property matters under the PRA

23.7 One of the principles of the PRA is that matters "should be resolved as inexpensively, simply, and speedily as is consistent with justice."[4] In other words, not only should the division of

3 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011).

4 Property (Relationships) Act 1976, s 1N(d). However out of court resolution may not always be consistent with justice where, for example, there is a significant imbalance of power between the partners or information asymmetries. We discuss this issue further in this chapter.

property at the end of a relationship be *just*,[5] the process for arriving at that decision should be *efficient*.

23.8 Inherent within this principle is that partners should be able to resolve property matters out of court wherever possible. Out of court resolution is generally quicker and less expensive than court-based resolution. It can also result in more enduring and satisfactory outcomes, in part because the partners are actively involved in the decision-making, and because it enables more workable and tailored outcomes.[6] Out of court resolution is more likely to preserve the relationship between separating partners, and also achieves better outcomes for children, by reducing inter-parental conflict.[7]

23.9 There is a range of different dispute resolution services available for resolving property matters.[8] We discuss these in Chapter 24. Dispute resolution services are generally more flexible than the court process, and can also be modified to better respond to the needs of Māori, Pacific and other cultures by being inclusive of the wider family.[9] The more informal nature of dispute resolution services can also better enable children to express their views.[10]

23.10 We think that separating partners should be encouraged to resolve their property matters with minimum formality whenever appropriate. The extent to which the State should have a role in promoting out of court resolution is discussed in Chapter 24.

23.11 It will not, however, always be appropriate for separating partners to resolve their property matters without the powers and protections available in the court process. Situations will inevitably arise which could not have been contemplated when the PRA was enacted, and/or which require the application of one

5 A "just" division of property is one that follows the rules of division set out in the Property (Relationships) Act 1976 (PRA), or one which the former partners have agreed to, after receiving legal advice and complying with the other procedural requirements set out in pt 6 of the PRA. Part 6 gives partners the freedom to choose a different property arrangement, provided they do so fully aware of the effect and implications of that arrangement. For more discussion refer to Part A of this Issues Paper, where we explain that one of the principles of the PRA is that "partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards."

6 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

7 See for example Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 13; and Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 5.

8 In the past the terms "alternative dispute resolution" and "ADR" were commonly used to refer to out of court dispute resolution services. More recently there is a preference to simply refer to "dispute resolution." See Chris Gallavin "The system formally known as ADR" (1 August 2014) New Zealand Law Society <www.lawsociety.org.nz>; Arbitrators and Mediators' Institute of New Zealand Inc "What is Dispute Resolution?" <www.aminz.org.nz>.

9 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40 and 42.

10 We discuss the participation of children in the resolution of property matters further in Part I.

or more exceptions to the general rule of equal sharing in order to achieve a just division of property. The lack of guidance in the PRA or existing case law in some situations may make it difficult to achieve a just result out of court.[11] Other situations may involve complex legal questions that require clarification from the courts.

23.12 A similar issue may arise where there is a significant power imbalance between the partners because of information asymmetries,[12] or because the partners have different levels of confidence, education, emotional control or financial support.[13] A power imbalance can also arise where one partner has a history of being violent or intimidating towards the other partner, including financial or economic abuse.[14] Significant power imbalances may result in unjust outcomes so it may be in the interests of justice for such matters to be managed and resolved in court.

23.13 The State has an important role in supporting people who cannot resolve disputes themselves, and in providing legal protection where issues have serious impacts on children and vulnerable people.[15] In the context of post-separation property disputes, when out of court resolution is not appropriate or has been unsuccessful, the State fulfils this role primarily by providing access to the Family Court. Either one or both partners[16] can apply to the Family Court for orders determining their respective shares in relationship property, dividing the relationship property between them and/or making declarations in relation to specific items of property.[17] The Family Court's decision is binding on the parties, subject to a right of appeal to the High Court.[18]

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11 In this situation, arbitration may provide an appropriate alternative to a court determination.

12 For example, when one partner possesses all the financial information about the partners' combined wealth, and there are concerns with the quality and extent of disclosure to the other partner.

13 Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at [180].

14 Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at [180]. In 2013 changes were made to the definition of domestic violence in the Domestic Violence Act 1995 following the Family Court Review. The definition was amended to expressly include: "financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)". See Domestic Violence Act 1995, s 3(2)(c)(iva), inserted on 25 September 2013 by the Domestic Violence Amendment Act 2013. The reference to financial or economic abuse has been carried over into the definition of "family violence" (replacing domestic violence) in the Family and Whānau Violence Legislation Bill 2017 (247-2), cl 9.

15 As expressed as part of the Family Court Review. See Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [27].

16 When one partner has died, their personal representative may apply for orders under the Property (Relationships) Act 1976. However, leave of the Family Court is required if a personal representative seeks orders under s 25(1)(a), determining the respective shares of each partner in the relationship property: s 88(2).

17 Property (Relationships) Act 1976, ss 25(1)(a), 25(1)(b) and 25(3).

18 Property (Relationships) Act 1976, s 39. The Family Court can also transfer cases to the High Court if it thinks that it is the more appropriate venue for dealing with the proceedings: s 38A.

What is needed to achieve a just and efficient resolution of property matters?

23.14 We consider that there are four important elements in achieving a just and efficient resolution of property matters:

(a) **Understanding of legal entitlements:** People need to understand their property entitlements and obligations under the PRA when resolving property matters. However this does not mean that people have to reach an agreement that is consistent with their legal entitlements. People will, and should be able to, do what is right for them in the context of their own lives. In many cases acting "legally rationally" may be seen as inappropriate or too difficult.[19] But people need to know what their legal entitlements are so that they make informed decisions. One way the PRA recognises this is by requiring partners to receive independent legal advice prior to signing a contracting out agreement that will be legally binding and enforceable.[20] The need to ensure people understand their legal entitlements also emphasises the importance of clear and straightforward rules of classification and division in the PRA that people can apply to their property without the need to go to court. If a person's legal position is uncertain, they may form an unreasonable expectation of what they should be entitled to, which can impede attempts to resolve matters in or out of court.

(b) **Access to financial information**: Both partners must have sufficient information about their finances and those of their partner. This includes information about jointly and separately owned property, investments, bank accounts, income streams and any other property interests, including beneficial interests under a trust. Failing to disclose all relevant financial information is a serious impediment to achieving a just outcome and can also result in agreements being challenged.

19 Anne Barlow "Legal Rationality and Family Property – What has Love got to do with it?" in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, Oregon, 2009) 303 at 317–318.

20 Property (Relationships) Act 1976 (PRA), s 21F. A contracting out agreement is an agreement made between the partners under either ss 21 or 21A of the PRA to deal with the status, ownership and division of their property instead of the provisions of the PRA. It can be made before, during or after a relationship ends.

(c) **Appropriate support**: People need to be supported in the resolution process. The extent of support required will depend on the circumstances. People need to be supported by access to appropriate information about legal entitlements and about the different options for resolving property matters. In many cases support will be provided by lawyers. When a person cannot afford to engage a lawyer, legal aid may be available. Dispute resolution services can also support people to resolve property matters. In the minority of cases where out of court resolution is inappropriate or unsuccessful, people need to be supported through the Family Court process. People who represent themselves in court may need an additional level of support in navigating the court process.

(d) **A timely resolution**: People need to be able to achieve a timely resolution of post-separation property matters. But timeliness does not always mean the fastest resolution possible. Sometimes time is necessary, for example, to ensure both partners are well informed, are ready to address the matters in dispute and have an opportunity to be heard. Some matters will raise complex issues. Unreasonable delay, however, can be harmful for children.[21] It can also have significant financial and emotional implications for the former partners.[22] The Ministry of Justice recognised the importance of timely resolution of PRA matters in the Family Court Review:[23]

> *The high value of property involved, combined with the likelihood of other financial obligations, further highlights the benefit of earlier resolution for the parties. More timely outcomes may reduce the psychological impact of uncertainty by enabling the parties to make financial decisions that allow them to move on with their lives rather than having funds tied up.*

21 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 11.

22 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

23 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

Resolving PRA matters in accordance with tikanga

23.15 Māori have different values and different ways of resolving disputes according to tikanga. Māori place greater importance on the whānau than on individuals or nuclear families. Tikanga relies on a "collective sharing of decision making, tied to the community", and differs from both the court process and the underlying assumption that separation is of concern only to the partners, their children and the State.[24]

23.16 Non-Māori often do not recognise the part played in relationship breakdown by tensions inherent in Māori social organisation (such as conflicting whānau loyalties and differences in tikanga between iwi) or resulting from social change (such as the difficulties of parents who grew up in whānau raising children without whānau support).[25] When relationships are threatened with breakdown, relatives have valuable knowledge and skills to offer:[26]

> *Those holding responsible jobs in whānau, hapū and iwi know the ancestors, historical group relationships and stresses involved within the marriage, and are often experienced mediators. Those in close contact with the couple, as members of an effective whānau, can supply information and insights inaccessible to strangers and can offer practical help, especially in terms of child care.*

23.17 In a draft paper prepared for the Law Commission's review of Māori customary law, Durie noted that resolution of disputes according to tikanga depends not upon finding for one or the other, or upon making one subordinate to the other, but upon recognising the status and contribution of each, and upon finding a structure that accommodates the various interests.[27] Ruru has observed that:[28]

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24 Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19; and Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

25 Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

26 Donna M Tai Tokerau Durie-Hall "Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

27 ET Durie "Custom Law" (unpublished confidential draft paper for the Law Commission, January 1994) at [105] prepared for Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

28 Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 Int J Law Policy Family 327 at 336.

> *Overall, the rules relating to marriage and property are haphazard and often contrary to tikanga Maori in that they deny the whanau and hapu the responsibility to mediate and determine rights and responsibilities to property. The rules are based on an ethic that endorses individual rights and ability to own property exclusively.*

23.18 Therefore the whānau, not the State, is seen as the first line of defence in times of trouble.[29] If the whānau is not functioning effectively, the responsibility for supervision and intervention lies next with the hapū and then, if necessary, with the iwi.[30] Only after both options have collapsed should the responsibility fall to the State.[31]

23.19 These cultural practices mean that Māori may rarely use the courts to enforce their rights under the PRA, preferring instead to manage their own dispute resolution processes within their tribal communities.[32] In the Family Court Review, the Ministry of Justice observed that Māori comprised just six per cent of applicants and respondents in PRA cases.[33] There may, however, be other reasons for this trend. Chadwick has observed that:[34]

> *Matrimonial property is the only area of family law that I know of where whanaungatanga prevails regardless of the law. This is because Maori, as a rule, do not have the same emotional attachment to property that the law guarantees. Since 1976 the Family Court, in its matrimonial property jurisdiction, has by and large been the exclusive preserve of the white middle class.*

23.20 When Māori do go to court, they may find it is not responsive to their values and beliefs.[35] The processes, language and culture of the adversarial court system can be mysterious and intimidating[36] and its focus on individuals can be alienating, not only for Māori

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29 Donna M Tai Tokerau Durie-Hall "A view of the Māori family: Whānau, Hapū, Iwi" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

30 Donna M Tai Tokerau Durie-Hall "A view of the Māori family: Whānau, Hapū, Iwi" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

31 Donna M Tai Tokerau Durie-Hall "A view of the Māori family: Whānau, Hapū, Iwi" in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

32 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53 and 238.

33 In contrast, New Zealand European/Pākehā are overrepresented in Property (Relationships) Act 1976 (PRA) cases, comprising 85 per cent of all applicants and respondents. Asian peoples comprise seven per cent, and Pacific peoples two per cent of applicants and respondents in PRA cases. The remaining one per cent is "other" ethnicity. The Ministry notes that these proportions represent only a partial count of ethnicities due to incomplete data: Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 83.

34 John Chadwick "Whanaungatanga and the Family Court" (2002) 4 BFLJ 91.

35 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

36 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53.

but also Pasifika and other cultures who often want to resolve disputes by involving the wider family or whānau.[37] However in recent years the judiciary has made significant efforts to upskill in this area. Tikanga and te reo are important elements in the ongoing judicial education provided by the Institute of Judicial Studies.[38] The court can also use its powers to hear evidence of tikanga. This was demonstrated in the recent High Court case of *B v P*, where the High Court received evidence from two kuia on principles of tikanga relating to the guardianship of taonga.[39]

23.21 The Family Court Review recognised that dispute resolution services, discussed in Chapter 24, are more flexible and can be modified to better respond to the needs of Māori, for example by being inclusive of the wider family.[40] In Chapter 26 we also discuss whether, when out of court resolution is unsuccessful, Māori should be able to resolve their property matters involving issues of tikanga in the Māori Land Court, which has a better understanding of tikanga, instead of the Family Court.

How do people resolve property matters in practice?

23.22 Information about when relationships end and how property matters are resolved is not routinely collected in New Zealand.[41] This makes it difficult to fully analyse how partners resolve their property matters in practice. Below we look at court data, results from our preliminary consultation with family lawyers, and other information and research we have collected in an attempt to analyse how property matters are resolved.

37 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

38 Nick Butcher "The pathway to becoming a judge" Lawtalk 910 (Wellington, September 2017) at 43. This is against the backdrop of what might be a broader shift in public values and attitudes regarding te reo. In 2015 the New Zealand Attitudes and Values Study asked 15,821 adults to rate how strongly they opposed or supported teaching te reo Māori in primary schools and singing the national anthem in Māori. The study found that most New Zealanders were either on the fence or supportive. Only a very small number of people were opposed: see CM Matika "Support for Te Reo Māori in Aotearoa" (New Zealand Attitudes and Values Study Policy Brief 8, 2016) at 1–2.

39 *B v P* [2017] NZHC 338. The issue in that case was whether taonga belonging to the deceased should pass to the surviving partner or the deceased's parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased's three sons). See also *S v S* [2012] NZFC 2685 and Chapter 11 for a discussion of these cases.

40 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

41 The only information available is statistics on marriage and civil union dissolutions (divorces). However, the date the marriage or civil union was dissolved does not reflect when the partners separated, as it is a legal requirement that the spouses have been living apart for two years or more before an order dissolving the marriage or civil union can be made: Family Proceedings Act 1980, s 39. We also expect that many people who have separated have not yet chosen to formally dissolve their marriage or civil union. Information is not available about marriages and civil unions ending on death, or about de facto relationships ending on separation or death.

PRA matters resolved in court

23.23 Relatively few property matters are decided by a court. In recent years the number of PRA applications filed in the Family Court has been declining, as has the number of divorces. In 2016, 785 applications for orders under the PRA were filed in the Family Court.[42] That same year the Family Court granted 8,169 orders dissolving a marriage or civil union.[43] In contrast, in 2006 the Family Court received 1,217 PRA applications and granted 10,065 dissolution orders.[44]

23.24 Most applicants for orders under the PRA are women, comprising from 60–66 per cent of applicants each year since 2004.[45]

23.25 Only about 20 per cent of PRA applications that are filed actually proceed to a hearing. The rest are settled or withdrawn prior to hearing (see Figure 1 below). Around half of those cases that settle involve orders being made by the Family Court.[46] A small number of applications are transferred to the High Court.[47]

23.26 A 2011 review of a sample of PRA cases in the Family Court provides some insights. The review was undertaken by the Ministry of Justice as part of the Family Court Review.[48] The

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42 Data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). In 2016 there were 989 applicants for orders under the Property (Relationships) Act 1976: Provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family data from the Ministry of Justice's Case Management System and provided by email to the Law Commission (26 September 2017). The number of applicants is higher than the number of applications for orders under s 25 of the Property (Relationships) Act 1976, as an application can have more than one applicant.

43 Statistics New Zealand "Divorces (marriages and civil unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>. No information is kept on de facto relationship separations.

44 Data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). In 2006 there were 1,459 applicants for orders under the Property (Relationships) Act 1976: Provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), w analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017). For statistics on dissolution orders see Statistics New Zealand "Divorces (marriages and civil unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

45 These figures are from provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017).

46 In 2016, 170 Property (Relationships) Act 1976 applications went to a hearing, 312 were settled and had orders made by the Family Court, and 298 cases were settled with no orders made: data provided by email from the Ministry of Justice to the Law Commission (5 May 2017).

47 In 2016, 15 Property (Relationships) Act 1976 (PRA) applications were transferred to the High Court: data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). The transfer of PRA applications to the High Court is discussed in detail in Chapter 26.

48 The Ministry of Justice, in collaboration with the judiciary and court staff, reviewed a sample of 88 closed Property (Relationships) Act 1976 (PRA) files that had been opened in 2006 and 2007 across 10 different Family Court locations. The cases reviewed were not intended to be representative of all PRA cases, but were intended to provide insights into the nature of more complex cases. The findings of that case file review were published in Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011), and were also discussed in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22–23.

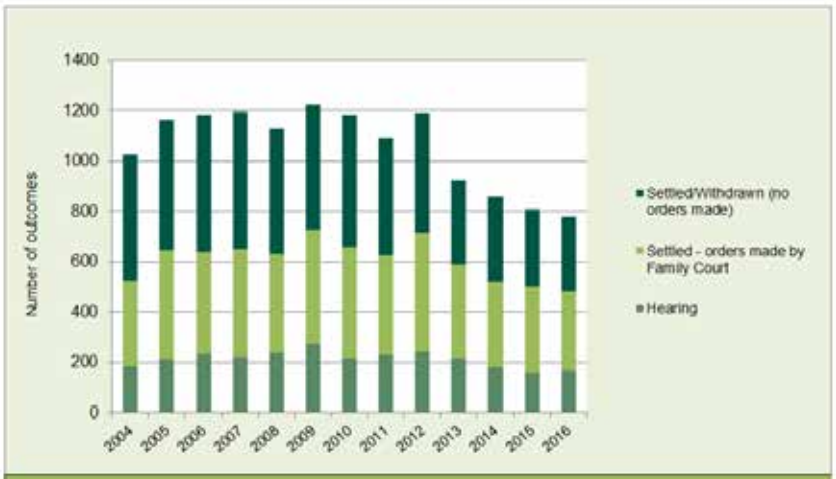

Figure 1 - Outcomes of PRA applications in the Family Court, 2004 - 2016

Ministry chose to review PRA cases because in 2009/10 they were taking on average 478 days to dispose.[49] Key findings of the case review included:

(a) The most common type of property in dispute was residential property, which was in dispute in 74 per cent of cases. Disputes over chattels were evident in 44 per cent of cases and trust property in 14 per cent of cases.[50]

(b) The value of property in dispute was "substantial".[51] In 44 per cent of cases the property in issue was valued in excess of $500,000. Less than 10 per cent of cases involved property valued under $100,000.

(c) Delay in proceedings, as indicated by the frequency of adjournments, was evident.[52] The estimated average number of adjournments per case was 12.[53] Every case reviewed was adjourned at least once and 82 per cent of cases sampled were adjourned more than six times.[54] Adjournments most often occurred in order to obtain information, reports and await the outcome of settlement discussions.[55] Delay "caused by either a

49 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.

50 The range of property in dispute also included investment property, shares, cash and superannuation proceeds: see Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.

51 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.

52 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

53 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

54 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

55 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

party or their lawyer" was also evident in 63 per cent of cases.[56]

(d) The main issues in dispute (identified from the decision) were categorised as follows:[57]

(i) 55 per cent of cases involved "matters requiring consideration of legal issue/s";

(ii) 23 per cent related to "tenancy/occupation"; and

(iii) 22 per cent required "determination of value/division/sale of property/assets" issues.

(e) Only 27 per cent of applications stated the proposed property division, while 70 per cent required the Family Court to determine the division.[58] Where the proposed property division was stated in the application, 75 per cent of applicants sought up to 60 per cent of the property available for division. Eight per cent of applicants sought a share of between 60–75 per cent, and 17 per cent sought a share of over 75 per cent.[59]

23.27 This data suggests that the Family Court is being used as a last resort and that most people are resolving their property matters out of court. When proceedings are filed, the vast majority of cases are resolved without the need for a hearing (around 80 per cent). The Ministry of Justice's case review identified that most applications to the Family Court required consideration of legal issues. The court data does not, in our view, evidence a systemic problem of "too many" PRA matters unnecessarily going to court.

23.28 What the data does show is that the number of PRA matters going to court has declined significantly over the past 13 years. During the period 2004–2016 the number of applicants to the Family Court under the PRA decreased by 39 per cent.[60] The decrease was steeper following changes to the new Family Court fee structure

56 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

57 In addition, eight per cent of cases were categorised as "settled and/or consent memorandum filed" and in eight per cent of cases the main issue was not stated. Note that each file may have had multiple responses. See Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

58 Two per cent of cases are recorded as "not stated." See Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

59 Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

60 This figure is from provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017).

introduced in 2012, and resulted in a noticeable reduction in the proportion of female applicants.[61]

PRA matters resolved out of court

23.29 Most people will resolve PRA matters out of court by negotiating an agreement with their partner. Some will engage lawyers, some will not.

23.30 Preliminary consultation with family lawyers suggests that the vast majority of people who see a lawyer about PRA matters (around 80–90 per cent) will resolve the matter by agreement, negotiated with the assistance of their lawyer. This is often described as lawyer-led negotiation. Around 10–15 per cent of those who see a lawyer resolve their PRA matters by mediation, and a small minority, around 5–10 per cent, have their matters decided by a court.[62]

23.31 We do not know how many people resolve property matters without the assistance of lawyers, but it is likely that this accounts for a significant proportion of separating partners. Research in England and Wales identified that 47 per cent of partners divorcing or separating between 1996 and 2011 did not seek legal advice.[63]

23.32 In Australia, a study of 9,000 parents who had separated in 2006–2007 found that the main pathway for resolving property matters was "discussion with the other parent" (see Figure 2). While Australian data is helpful to look at, particularly given the general similarities in legal systems and the absence of New Zealand data, it is important to recognise that the property division regime in Australia is quite different to the PRA. In particular, the Family Law Act 1975 (Cth) currently provides for a discretionary approach, rather than a general rule of equal sharing. In the

61 The Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR) has undertaken provisional analysis of the Ministry of Justice Family Court Case Management System data. This found an 18 per cent drop in applicants to the Family Court under the PRA between 2012 and 2013 following the introduction of the new fee structure in mid-2012, and that the proportion of female applicants dropped from 65 per cent in 2012 to 60 per cent in 2016: provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017).

62 These figures are an estimate only, based on what we were told during preliminary consultation with a range of family lawyers. However, research in England and Wales identifies similar trends. A study of partners divorcing or separating between 1996 and 2011 identified that of those clients offered lawyer-led negotiation and mediation, 89 per cent took up lawyer-led negotiation while 38 per cent took up mediation: Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 6.

63 Rosemary Hunter and others "Mapping Paths to Family Justice: matching parties, cases and processes" [2014] Fam Law 1404 at 1405.

context of dispute resolution, this makes it difficult for parties to know what their obligations or entitlements in a property division are, and may make it harder for people to resolve property matters without legal advice.[64]

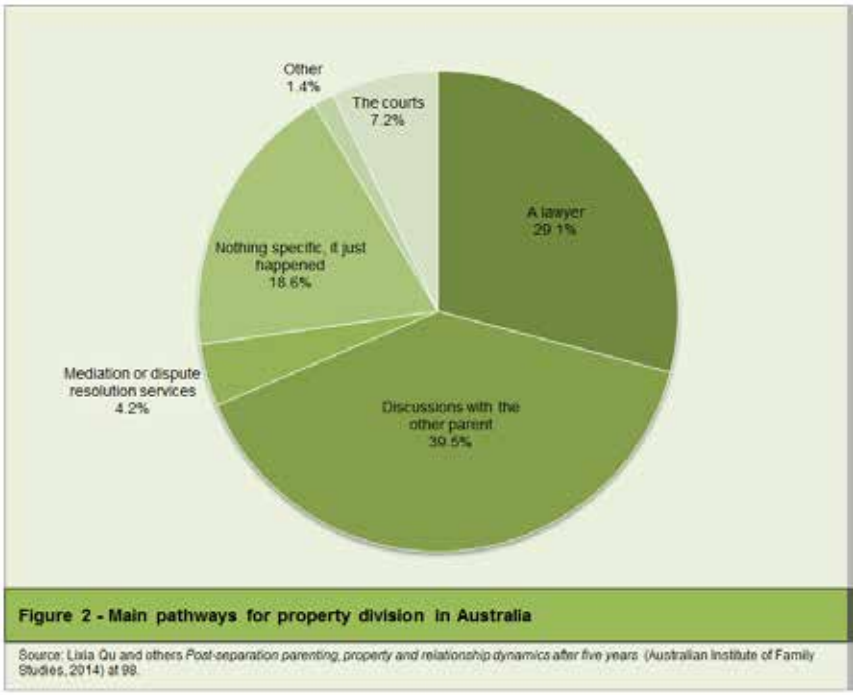

Figure 2 - Main pathways for property division in Australia

Source: Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at 98.

23.33 There might be several reasons why people do not seek legal advice. They may reach an informal agreement and not wish to incur the cost of legal fees. There may also be a concern that involving lawyers may change the dynamics of the separating partners' relationship. Some may prefer to seek support elsewhere, such as from family or whānau, or through culturally focused dispute resolution processes. Finally, separating partners may not address property matters at all, perhaps because they have no property to divide, or because they are unaware that they may have rights or entitlements under the PRA.

23.34 The Citizens Advice Bureau keeps records of the nature of inquiries it receives from the public. The number of relationship property inquiries has steadily increased since it started keeping records in 2011/12. In 2015/16, it received 1,801 relationship

64 These concerns were raised in Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 873–875. The Productivity Commission recommended the property provisions in the Family Law Act 1975 (Cth) be reviewed with a view to clarifying how property will be divided on separation and that review should consider introducing presumptions about equal division as currently applies in New Zealand.

property inquiries, accounting for 13 per cent of all relationship inquiries.[65]

23.35 The information from Citizens Advice Bureau suggests that the number of people who are resolving property matters may be increasing, even if the number of court applications has been declining. While divorce rates have been declining in recent decades, this does not accurately represent rates of separation, in particular because it excludes de facto relationships.[66] Rather, the decline in court applications is more likely to mean that more people are looking to resolve their property matters outside the court system. A key consideration for this review is whether the appropriate information and support is available to those people, to ensure that outcomes reached are just and efficient.

65 In contrast, in 2010/11 the Citizens Advice Bureau received 1,396 relationship property inquires. This rose to 1,425 in 2012/13, 1,551 in 2013/14, and 1,574 in 2014/15: Citizens Advice Bureau "CAB Enquiries relating to "relationships property" and "separation/relationship breakdown" provided by email from the Citizens Advice Bureau to the Law Commission (12 September 2016).

66 For further information about changing patterns in relationship separation see our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

Chapter 24 – Resolving property matters out of court

24.1 Most separating partners will resolve their property matters themselves, with or without the assistance of lawyers. In this chapter we look at the range of information, support and dispute resolution services currently available for resolving property matters out of court, and ask whether there is a need for the State to do more to encourage out of court resolution in a way that achieves just and efficient outcomes.[67]

Do people have access to appropriate information?

24.2 People need to have access to an appropriate range of information when resolving property matters at the end of a relationship. This includes information about:

(a) legal entitlements and obligations under the PRA;[68]

(b) the range of options for resolving property matters out of court; and

(c) the process for making applications to the Family Court, including likely costs and timeframes.

24.3 In the wider context of family law disputes it has also been suggested that people should be able to access information about the benefits of out of court resolution and the disadvantages of going to court, including the effects of prolonged conflict on children.[69]

What information is publicly available?

24.4 There are several sources of publicly available information:

67 We discuss what we mean by "just and efficient" outcomes in Chapter 23.

68 See the discussion above at paragraph 23.14 (a).

69 For example see the discussion in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 35.

(a) The **Ministry of Justice** provides information on its website about issues arising on separation and divorce, including the division of property under the PRA.[70] That information covers applying to the Family Court, including the cost of making an application, the forms that need to be filed, and what happens once an application is filed. It also covers legal aid and includes links to Community Law and Citizens' Advice Bureau websites, and to some of the information provided on the Community Law website, discussed below.

(b) **Community Law Centres** provide free legal help with all kinds of legal problems throughout the country.[71] The Community Law Manual Online provides information about relationships and break-ups, including what happens to property on separation.[72] The Community Law Manual explains the operation of the PRA, the fees for applying to the Family Court and the requirements for a binding contracting out agreement. However, while Community Law Centres can provide initial legal information about the PRA, they generally don't give individualised advice on property matters and many Community Law Centres cannot witness contracting out agreements.[73] They can however refer people to lawyers with the appropriate skills.

(c) **Citizens Advice Bureau** (CAB) provides free advice on a broad range of issues.[74] CAB has offices throughout the country and users of their services can also ask questions on their website or over the phone. The CAB website provides information about the PRA and the rules of division. It also addresses a range of common issues, ranging from what happens when relationships are shorter than three years, what happens if one partner has left with debts owing, and who gets custody of any pets.

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70 See Ministry of Justice "Separation and Divorce: Divide relationship property" (11 January 2017) <www.justice.govt.nz>.

71 More information about Community Law Centres and the services they provide is available at <www.communitylaw.org.nz>.

72 The Community Law Manual Online is available at <www.communitylaw.org.nz>.

73 As discussed in Chapter 23, an agreement under ss 21 or 21A of the Property (Relationships) Act 1976 must be witnessed by a lawyer for it to be valid and enforceable: s 21 F.

74 More information about Citizens Advice Bureau and the information it provides is available at <www.cab.org.nz>.

(d) The **New Zealand Law Society** (NZLS) produces several information pamphlets for the public, including guides to the PRA and what happens when partners separate.[75] These pamphlets are available on its website. NZLS also provides a searchable list of family lawyers on its website.[76]

(e) The **Commission for Financial Capability** also provides a guide to managing finances after separation on its money management website "**Sorted**."[77] This includes some information about the PRA and directs people to the Ministry of Justice and CAB websites.

24.5 If there is a need to improve the information that is currently available, options include:

(a) Improving online resources. International research has identified that, for the general population, the main source of information about out of court dispute resolution is the media/internet.[78] Recent research into parenting disputes in New Zealand observed that initiating parents' natural instinct was to go to a legal/court information source to find out how to settle their parenting dispute.[79] In England and Wales, the Family Justice Review recommended that the process for initiating divorce should begin with a government-run online hub that provides information and support to separating partners, including about the different process options available for resolving disputes.[80] A similar approach is taken in Australia.[81]

(b) Promoting public awareness of the PRA and its rules of property division through a public education campaign.

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75 New Zealand Law Society *Dividing Up Relationship Property: The Property (Relationships) Act* (March 2013); and New Zealand Law Society *What happens when your relationship breaks up?* (July 2014).

76 For more information about the New Zealand Law Society see its website at <www.lawsociety.org.nz>.

77 See <www.sorted.org.nz>.

78 Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 4.

79 Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 14. This research identified that participants typically learned about family dispute resolution (FDR) from their own lawyer, a Child, Youth and Family lawyer, a community law agency, court staff, other ministry staff or the ministry website. They also learned about this service through the Citizens Advice Bureau.

80 Family Justice Review *Family Justice Review: Final Report* (November 2011) at [114]. See <helpwithchildarrangements.service.justice.gov.uk>.

81 See <www.familyrelationships.gov.au>.

(c) Provision of printed leaflets in public spaces, such as in court buildings, libraries, CAB and Community Law Centres.

(d) Providing more information on the PRA and options for resolving disputes through the government-run Parenting Through Separation programme.[82]

(e) Information about the PRA could be provided to people when they make contact with different government departments at different points in time, for example when applying for a marriage licence, registering a birth, buying or selling a house, or when migrating to New Zealand.

24.6 A further question is who should provide such information. In the Family Court Review there were mixed views as to whether it was the role of the Family Court to provide information and help for resolving disputes out of court. Some felt that information is best distributed in partnership with a range of government agencies such as the Ministry of Social Development, and community agencies such as Community Law Centres and iwi groups.[83]

CONSULTATION QUESTIONS

H1 Is the current range of publicly available information about the PRA and options for resolving property matters sufficient? If not, where are the current gaps?

H2 If more information should be publicly available, who should be responsible for providing information, and in what form should this information be available (written/online/telephone)?

82 Parenting Through Separation is a free programme which provides information about the effects of a relationship breakdown. It is part of a wider strategy to support early and out-of-court resolution of parenting disputes. It is funded by the Ministry of Justice and is provided by different community groups across the country. Attendance at a Parenting Through Separation programme will normally be required before the Family Court will consider an application for a parenting order under the Care of Children Act 2004. Under the Care of Children Act 2004 every application for a parenting order, or for the variation of a parenting order, must include a statement by the applicant that he or she has undertaken a Parenting Through Separation course within the preceding two years, or that they are not required to undertake the course because they are unable to participate effectively, or because the application is being made without notice: s 47B(2). Evidence in support of that statement must be included in the application and a registrar may refuse to accept an application if the evidence provided does not adequately support the statement: ss 47B(3)–47B(4). A Family Court Judge may also direct attendance at a Parenting Through Separation course when an application for a parenting order is made: s 46O.

83 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 35.

Is access to legal advice appropriate?

24.7 While the Ministry of Justice, Community Law Centres, CAB and NZLS are all valuable first contact points for separating partners, none are designed to provide tailored advice and ongoing support in the resolution of property matters. Many separating partners will need to consult a lawyer for advice tailored to their particular circumstances.[84]

24.8 The PRA recognises the importance of legal advice in ensuring a just outcome in property matters.[85] It provides that a contracting out agreement will only be legally binding and enforceable in court if the partners both received independent legal advice about its effect and implications, prior to signing.[86]

Is legal advice accessible?

24.9 Not everyone will be able to afford a lawyer to provide tailored advice. In some cases, only one partner may be able to do so. Inability to access legal advice is a concern as it may result in partners making agreements without knowing what their legal entitlements are. If only one partner is able to afford a lawyer, this may create an imbalance of power between the partners.

24.10 Legal aid is available for those who cannot afford a lawyer, but it is limited in respect of PRA matters.[87] Fees are fixed by activity type,[88] and include, for example, $850 for pre-proceeding activities (including taking instructions, applying for legal aid, disclosure, valuations and negotiations between parties), $650 for drafting PRA applications and affidavits and, if agreement is reached

84 Research in England and Wales on people's awareness, usage, experience and outcomes with out of court family dispute resolution found that lawyers were the main source of information for people divorcing or separating. That research identified that people who went to see a lawyer often felt a strong steer from them about the options for dispute resolution, however as many as 47 per cent of people divorcing or separating sought no legal advice about their situation. See Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 4–6.

85 A "just" outcome under the Property (Relationships) Act 1976 (PRA) includes where partners agree to a property arrangement that departs from the PRA's rules of division, provided they do so fully aware of the effect and implications of that arrangement. This reflects the principle that partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards.

86 Property (Relationships) Act 1976, s 21F.

87 The Legal Services Regulations 2011 set out the maximum levels of income and disposable capital of applicants in order to be eligible for legal aid. For example, a single applicant with no dependent children cannot earn more than $23,326, while a single applicant with two dependent children cannot earn more than $53,119 (for applications made between 3 July 2017 and 1 July 2018). The maximum level of disposable capital is $3,500 for a single applicant, with $1,500 being added for each dependent child. See Legal Services Regulations 2011, regs 5–6.

88 Subject to an ability to apply for additional funding in limited circumstances. See Ministry of Justice *Family Fixed Fee Schedules* (July 2016) at 33.

before proceedings are filed, $320 for drafting and certifying a contracting out agreement.[89] Legal aid is considered a loan, and recipients may have to repay some or all of their grant, depending on how much they earn, and whether they receive any money or property when their property matter is resolved.[90]

24.11 Some lawyers we have spoken with have raised the concern that the fees lawyers receive for legally aided PRA matters are not economically viable.[91] We understand that many lawyers do not offer to act on PRA matters under legal aid for this reason. In a survey conducted by the Family Law Section of NZLS in 2014, 89.6 per cent of legal aid providers said that the fee for PRA orders was inadequate, and 93.5 per cent said that the fee for drafting contracting out agreements was inadequate.[92] NZLS observed:[93]

> *In relationship property cases, the law and people's financial structures were increasingly complicated and almost all cases would be fixed fee plus or require amendments to the original grant.*
>
> *Providers indicated that [PRA matters] on legal aid was not economically viable. The work is high risk work from an insurance perspective and requires significant specialist skills. An appropriate level of remuneration is required to reflect this. Providers reported that […] applications for amendments to grants to increase the fee were often required even in order to cover basic negotiations.*

24.12 Concerns with the adequacy of legal aid funding are representative of a wider access to justice issue in family law matters, particularly in regional areas of New Zealand.[94] Between 2011 and 2016 there was a 25 per cent decrease in the number of lawyers providing family legal aid in New Zealand.[95]

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89 Ministry of Justice *Family Fixed Fee Schedules* (July 2016) at 33.

90 Legal Services Act 2011, ss 18 and 21.

91 See also the New Zealand Law Society's submission to the International Bar Association's Consultation Paper on Proposed Guidance/Reforming Legal Aid Systems (Civil, Family, Administrative) (13 September 2017) <www.lawsociety.org.nz>.

92 New Zealand Law Society Family Law Section *Family Legal Aid Fixed Fees* (2014) at 21.

93 New Zealand Law Society Family Law Section *Family Legal Aid Fixed Fees* (2014) at 21.

94 New Zealand Law Society "NZ Law Society welcomes temporary solution to family legal aid lawyer shortage" (30 March 2017) <www.lawsociety.org.nz>; and Radio New Zealand "Family Court lawyer shortage 'critical'" (19 September 2016) <www.radionz.co.nz>.

95 New Zealand Law Society "Falls in family and criminal legal aid providers" (25 August 2016) <www.lawsociety.org.nz>. The Ministry of Justice has reportedly put the drop in providers down to regulation changes that required lawyers to reapply for approval and providers doing little or no legal aid work choosing not to reapply. See Tom Hunt "Legal aid bills skyrocket, but in some cases no lawyer can be found for kids in danger" (4 May 2017) Stuff <www.stuff.co.nz>.

24.13 This reduction means that access to legal advice may be more difficult. In England and Wales, significant reductions in legal aid for family matters resulted in a substantial increase in cases where the parties were self-represented in proceedings.[96] It will also likely mean more people will seek to negotiate an agreement entirely outside the family justice system. This has two consequences in property matters under the PRA. First, people may enter an informal agreement and act on that agreement without knowing what their rights are, and second, because informal agreements are void under the PRA, they may be overturned by a court later on.[97]

24.14 One likely consequence of reduced legal aid, as experienced in England and Wales (see above), is an increase in the number of people who represent themselves in court. As the High Court observed in *Brown v Sinclair*, cases in the Family Court have an emotional component not present in other civil cases, and the inability of the parties to engage lawyers can make matters worse, as:[98]

> *Counsel's detachment is the antidote for unpredictable or irrational behaviour from parties who are guided by emotional responses to an intense personal experience. In the absence of such assistance, it is difficult for Family Court Judges to perform their demanding functions, in resolving the domestic problems that they encounter.*

24.15 The Court noted that self-represented litigants struggle to comply with the detailed rules of court, and that there will often be problems with the preparation and content of documents and evidence that he or she is required to file in accordance with those rules.[99] Self-represented litigants need additional support to navigate the court process, which can add to the workload of the Family Court. It can also create additional expense to the other partner and cause further delay.

24.16 While we recognise the significance of lawyers' concerns about the inadequacy of legal aid funding for PRA claims, our terms of reference do not extend to a review of the legal aid framework.

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96 See Law Commission of England and Wales *Enforcement of Family Financial Orders* (Consultation Paper No 219, 2015) at 4.

97 Section 21F of the Property (Relationships) Act 1976 provides that an agreement entered into to settle property matters is void unless the requirements set out in ss (2) to (5) are complied with. These include the need for the agreement to be in writing, signed by both partners, and signatures to be witnessed by a lawyer, who certifies that he or she explained the effect and implications of the agreement to the partner.

98 *Brown v Sinclair* [2016] NZHC 3196 at [3].

99 *Brown v Sinclair* [2016] NZHC 3196 at [4].

In this chapter we explore other ways to promote access to justice, and in Part D of this Issues Paper we considered how the provisions for interim distributions from relationship property can be improved, including in order to free up funds to enable a partner to instruct a lawyer.

Access to dispute resolution services

24.17 In some cases, party-led or lawyer-led negotiation will not resolve property matters and additional help is required. There is a range of dispute resolution processes available to resolve property matters under the PRA.[100] The widespread use of dispute resolution services and the number of dispute resolution practitioners from various disciplines means there is incredible variation in the practice of dispute resolution.[101] Some services are more suited than others to deal with post-separation property disputes.

24.18 In this section we briefly recount the history of dispute resolution in New Zealand's family justice system and explore four different dispute resolution services that are currently available on a voluntary basis for property matters:

(a) mediation;

(b) collaborative law;

(c) arbitration; and

(d) online dispute resolution.

The history of dispute resolution in the family justice system

24.19 The New Zealand Family Court was established as a division of the District Court on 1 October 1981. An important feature of the Family Court was its therapeutic function, and the Family Courts Act provided for conciliation processes such as counselling and judge-led mediation.

100 Dispute resolution falls into two broad categories: determinative processes like arbitration, and consensual or facilitative processes like negotiation and mediation: see Arbitrators' and Mediators' Institute of New Zealand "What is Dispute Resolution?" <www.aminz.org.nz>.

101 Lola Akin Ojelabi and Mary Anne Noone "ADR Processes: Connections Between Purpose, Values, Ethics and Justice" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 5 at 6.

24.20 Confidential counselling under section 9 of the Family Proceedings Act 1980 was the primary mechanism for people to get assistance with their relationship issues out of court.[102] Counselling was free and was obtained by making a request to the Family Court, but parties did not need to file proceedings, or even intend to file, to be eligible. This recognised that personal and emotional issues rather than legal concerns underpin many family disputes, and provided parties with an opportunity to understand each other's perspective better and to be more open to resolution.[103]

24.21 Parties to certain proceedings in the Family Court (but not PRA proceedings)[104] could also participate in a mediation conference chaired by a Family Court Judge. The Judge chairing the mediation could, with the consent of the parties, make any orders that could have been made by a Family Court, including orders relating to an application by either party for the possession or disposition of property under the PRA.[105] A District Court Judge could issue a summons to a person who had previously failed to comply with a request to attend mediation, requiring their attendance.[106]

24.22 A review of the Family Court was undertaken in 1992 by a committee appointed by the Principal Family Court Judge. That review recommended the establishment of a separate Family Conciliation Service that would utilise mediation as the primary method of dispute resolution.[107] The Family Court would be used only when a decision on a family law issue was required. However those recommendations were not adopted.[108]

24.23 A further review of the Family Court, undertaken by the Law Commission in 2003, recommended better resourcing of the family justice system to reduce delays, a new, expanded conciliation service offering mediation, enhancing information about the court within the community and making court services

102 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

103 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

104 Judge-led mediation was available in respect of applications for a separation order, maintenance order, or parenting order: Family Proceedings Act 1980, s 13(1) (repealed).

105 Family Proceedings Act 1980, s 15 (repealed).

106 Family Proceedings Act 1980, s 17 (repealed).

107 Megan Gollop, Nicola Taylor and Mark Henaghan Evaluation of the 2014 *Family Law Reforms: Phase One: Report to the New Zealand Law Foundation* (University of Otago, February 2015) at 1.

108 Megan Gollop, Nicola Taylor and Mark Henaghan Evaluation of the 2014 *Family Law Reforms: Phase One: Report to the New Zealand Law Foundation* (University of Otago, February 2015) at 1.

more culturally responsive.[109] While legislation was introduced in response to these recommendations providing for mediation, the provisions never came into force.[110] Under the proposed provisions a partner could ask the Family Court to arrange mediation. There did not need to be proceedings for mediation to be available, and the mediation could address any issues between the parties. It was intended that the State would bear the cost of mediation.[111]

24.24 The Government did, however, trial an "Early Intervention Process", in which the Family Court appointed lawyers to act as mediators in proceedings under the Care of Children Act 2004. However, the analysis of the project indicated that when lawyer-led mediation was used it was no more efficient than the pre-existing approach for deciding applications.[112] It was suggested that lawyers appointed by the Family Court to act as mediators may not be as skilled as private mediators, and that their training and background as lawyers made it more likely that they would take a positional rather than neutral approach to mediation, and would be less able to deal with the emotions of parties that may be obstructing resolution of the dispute.[113]

The Family Court Review

24.25 In 2011 the Ministry of Justice undertook a comprehensive review of the Family Court. That review found that the Family Court:[114]

(a) was too often used for private matters that could be resolved without recourse to a judge;

(b) was adversarial, which could exacerbate conflict between parents and the risk of children being adversely affected by parental conflict;

(c) had complex processes and procedures and incentives that cause delay; and

109 New Zealand Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003).

110 Non-judge led mediation was introduced by the Family Proceedings Amendment Act 2008, in response to recommendations made in the Law Commission's 2003 report, *Dispute Resolution and the Family Court*, and its 2004 report, *Delivering Justice for All*. However, the provisions of that Amendment Act were never brought into force, and they were subsequently repealed following the Family Court Review by the Family Proceedings Amendment Act (No 2) 2013.

111 Family Proceedings Amendment Act 2008, s 12 (proposed s 12J of the Family Proceedings Act) (repealed).

112 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 52.

113 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 53.

114 Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [17].

(d) had experienced sizeable growth in costs despite the total number of all types of application remaining relatively stable.

24.26 The Family Court Review resulted in the most significant changes to New Zealand's family justice system since the establishment of the Family Court in 1981.[115] The changes took effect on 31 March 2014 and were largely focused on parenting matters under the Care of Children Act 2004, as this represented the largest single category of applications to the Court (39 per cent of the Court's workload) and where costs had increased the most.[116] Counselling and mediation were replaced with out of court processes including Family Dispute Resolution (FDR) and a parenting information programme, Parenting Through Separation.[117]

What is FDR?

24.27 Family Dispute Resolution, or FDR, is a mediation service that normally must be completed before a person can apply to the Family Court for a parenting order or for directions in a guardianship matter.[118] FDR is fully funded for those who qualify for legal aid, and parties who do not qualify for full funding can access a government-subsidised service which is capped at $390 plus GST per party.[119] A similar requirement to attempt FDR for parenting disputes prior to going to court also exists in Australia.[120]

24.28 An initial review of FDR in 2015 found that while parents and professionals generally supported the concept of out of court resolution of parenting disputes, 40 per cent of parents felt pressured to reach an agreement at mediation due to its long duration and/or the mediator's desire to get a signed agreement in

115 Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [23].

116 Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [26].

117 Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3.

118 Care of Children Act 2004, s 46E. Family Dispute Resolution (FDR) is not mandatory if a party or a child of one of the parties has been subject to domestic violence by one of the other parties, or is otherwise unable to participate effectively in FDR. FDR is also not required if the application is a cross-application, is without notice, is for a consent order, seeks enforcement of an existing order, or relates to a child who is already the subject of proceedings under the Children, Young Persons, and Their Families Act 1989.

119 Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 12.

120 As introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

place.[121] Agreements reached when parents felt pressured tended to be broken shortly after mediation was completed.[122]

24.29 Changes were subsequently made to the funding model so that FDR mediation is now a "process" rather than an "event".[123] Fully funded FDR participants are given a 12 hour allocation of resources over a 12 month period, and those hours can be utilised in any combination agreed by the FDR provider, mediator and the parties.[124] Parties who are not eligible for full funding can only receive five hours of mediation within a 12 month period at the capped price of $390 plus GST, and must pay for any mediation preparation themselves.[125] The Ministry is currently reviewing the effect of the 2014 reforms, and a three year evaluation project is also being undertaken by the University of Otago Faculty of Law and Children's Issues Centre.[126]

24.30 FDR is not designed for PRA matters, however, parents can use FDR to talk about property matters "but only if it helps you agree about how you'll care for your children".[127] We do not know how often it is utilised for property matters, but we have been told by family lawyers that this does occur.

24.31 As a result of the changes to the family justice system there is no longer any conciliation service (counselling, mediation or otherwise) available for PRA disputes out of court, except in the limited circumstances where parents can raise PRA matters in FDR.[128] We discuss FDR as an option for resolving property matters below.

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121 Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 5 and 22.

122 Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 5.

123 Bryan King "FDR mediation – an event or a process" The Family Advocate 18(4) (Wellington, Spring 2017) at 27.

124 Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 17.

125 Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 19. Parties who access the government-subsidised Family Dispute Resolution service can access five hours of mediation twice in one 12 month period, but must pay $390 plus GST per five hours of mediation.

126 University of Otago Children's Issues Centre "Research activities" <www.otago.ac.nz>; and Justice and Electoral Committee 2016/17 *Estimates for Vote Justice and Vote Courts* (1 July 2016) at 5.

127 Ministry of Justice "Separation and Divorce: Divide relationship property" (11 January 2017) <www.justice.govt.nz>.

128 However, where parties file proceedings in the Family Court, a judge can order the parties to attend a settlement conference, presided over by the judge, with the purpose of settling the disputes: Family Court Rules 2002, rr 52(2)(b) and 178. Settlement conferences are discussed in Chapter 25.

The different dispute resolution services available

Mediation

24.32 Our preliminary consultation with family lawyers suggests that around 10–15 per cent of clients with post-separation property disputes go to private mediation.

24.33 Mediation involves an independent and impartial person (a mediator) who helps the parties to resolve their disputes. It is a confidential and voluntary process. The mediator is not a decision-maker, although they may be legally trained.[129] Their role is to facilitate a supportive and supported negotiation environment, empowering the parties and building their capacity to negotiate mutually appropriate outcomes.[130]

24.34 Mediation has many benefits, including its informality, flexibility and less confrontational nature; its ability to promote party self-determination; and its focus on the parties' mutual needs and interests, along with the best interests of the children.[131]

24.35 As discussed in Chapter 23, Māori are underrepresented as applicants and respondents in property matters in the Family Court, and it is recognised that the adversarial court system is not responsive to Māori culture and can be alienating.[132] Dispute resolution services, in contrast, are more flexible than court processes. Dispute resolution can therefore be more accommodating of the needs of Māori and can focus on resolving matters in accordance with tikanga. Some mediators already offer services that are based on traditional Māori values and respect te reo, tikanga and kawa, and the role of the whānau.[133]

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129 Mediation can differ substantially depending on whether the mediator is legally trained. In Australia for example, family dispute resolution is often multidisciplinary, rather than legally-focused. It may draw on affiliated services that support families in dispute, such as counselling, and specialist family violence and Parenting Order programs to assist high conflict separating families. This is contrasted by civil mediations in Australia, which tend to take place "in the deep shadow of the law." See Judy Gutman and Jodie Grant "Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 106.

130 Rachael Field and Jonathan Crowe "Playing the Language Game of Family Mediation: Implications for Mediator Ethics" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84 at 85.

131 Rachael Field and Jonathan Crowe "Playing the Language Game of Family Mediation: Implications for Mediator Ethics" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84.

132 See discussion in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

133 For a discussion on the services offered by FairWay Family Dispute Resolution see Keri Morris "No two families are the same, so why should mediations be?" The Family Advocate 18(4) (Wellington, Spring 2017) at 29.

24.36 There are, however, challenges. The mediation process can ask a lot of parties – they are asked to make a genuine effort and demonstrate at least to some extent a level of rational, reasonable negotiation. This can be challenging in the post-separation period, which is often a stressful and emotional period.[134]

24.37 There can also be ethical challenges for mediators in balancing traditional mediation values, such as the impartiality of the mediator and the flexibility of the mediation, with the need to promote an outcome that is procedurally and substantively "just." There is longstanding debate over whether mediators should have any role at all in ensuring fair outcomes for the parties.[135] Mediators have an ethical obligation to act impartially, and can feel constrained in their ability to provide meaningful information to parties on their legal entitlements.[136] This issue can be heightened when the parties are not legally represented in the mediation, and when the dispute involves complex legal questions. It can result in unrepresented parties being left to make decisions in an "informational vacuum", which often leads to decisions that are not in the parties' long-term interests.[137]

24.38 Another challenge for mediators arises in respect of the key values of self-determination and the promotion of settlement. On the one hand, a mediator is ethically committed to advance party choice. On the other hand, there is mediator knowledge of the law (and what presents a "just" division of property in terms of

134 Rachael Field and Jonathan Crowe "Playing the Language Game of Family Mediation: Implications for Mediator Ethics" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84 at 85–87. The authors also note that there are several assumptions about the mediation process – that the informal process provides a less challenging negotiation environment, and that the emphasis on party self-determination and collaborative negotiation evens out the negotiation playing field – that may not ring true for parties who are inexperienced with the mediation system. These assumptions can potentially create hidden barriers for parties who lack knowledge of the mediation process and the surrounding legal framework. As a result, it is argued that mediators need to play an active role in preparing and supporting the parties to operate effectively within the mediation.

135 Some argue that mediators should be free to intervene to protect one party against a clearly unjust outcome, or to decline to "sanction" an agreement which the mediator has reason to believe would cause injustice to any party, including third parties. Others, however, take the view that it is not the role of the mediator to guarantee a fair agreement. See Bobette Wolski "An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 64 at 78–79. One international study found that most mediators believed they should not be concerned with the fairness of a mediated outcome, although the mediator has a role in ensuring procedural fairness. See Mary Anne Noone and Lola Akin Ojelabi "Ethical Challenges for Mediators around the Globe: An Australian Perspective" (2014) 45 Washington University Journal of Law and Policy 145.

136 See for example Ellen Waldman "Inequality in America and Spillover Effects om Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 24 at 29.

137 There are different perspectives around the connection between justice and mediation processes. Purists might insist that impartiality means mediators are prevented from offering legal and other relevant information to the parties, while others prioritise the need to help the parties better understand their rights and obligations, so that they can make reasonably informed decisions. See Ellen Waldman "Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 24 at 29, 36 and 43.

the PRA). When mediation has a formal role in the justice system (like FDR does for parenting disputes) there may also be mediator responsibilities to ease the court workload and advance the administration of faster, cheaper and more efficient justice.[138]

24.39 These factors suggest that mediation will be an appropriate dispute resolution process for some, but not all, property disputes under the PRA.

Collaborative law

24.40 Collaborative law emerged in the United States in 1995 and is a relative newcomer to dispute resolution in New Zealand, although it is well established elsewhere including in Australia, England and Wales, Scotland and Canada.[139] It developed as a response to lawyers' dissatisfaction with the win-lose culture of litigation particularly in family disputes, and represents a paradigm shift from "positional bargaining" to interest-based mutual problem solving and good faith bargaining.[140] Collaborative law is used primarily, although not exclusively, in the resolution of family law disputes.

24.41 Collaborative law is a negotiation-based approach practiced by lawyers as an alternative to conventional mediation and arbitration. Collaborative law, like mediation, provides a process for people who want to resolve their family disputes themselves. It is considered an "early consensual process" rather than a pre-litigation "intervention" by an expert with authority over the parties (unlike arbitration, discussed below).[141] Unlike mediation, there is no neutral third party facilitator. Instead, each party is represented by a lawyer trained in collaborative practice. Collaborative lawyers advise and represent their clients in the role of advocate and remain bound by their ethical obligations to their

138 Judy Gutman and Jodie Grant "Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 107.

139 For further information about collaborative law see Collaborative Advocacy New Zealand's website at <www.collaborativelaw.org.nz> and the international body promoting collaborative law, the International Academy of Collaborative Professionals at <www.collaborativepractice.com>.

140 Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 4.

141 Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 3.

clients. They also play a more active role in the resolution process than a mediator.[142]

24.42 At the core of the collaborative law model is a commitment by both parties to participate in good faith negotiation through face to face meetings, private settlement and transparent information sharing.[143] At the outset the parties and their lawyers enter into a "participation agreement" that disqualifies the lawyers from representing their client if either or both parties choose to litigate. The agreement creates procedural certainty and commits the parties to confidential, without prejudice and good faith negotiations, which creates a safe environment for interest-based negotiation.[144] The agreement outlines the behaviours expected of clients and professionals, and parties agree to share all relevant information.[145]

24.43 Collaborative practice enables the parties to address overlapping issues such as parenting and property matters in the one process. It can involve professionals in other fields, including communication experts to facilitate effective dialogue, child and family experts, mental health professionals and financial professionals to help with future needs planning.[146]

24.44 Lawyers require special training to practise collaborative law. To practise "collaboratively" it is suggested that lawyers must "unlearn traditional adversarial practices", adopt a non-confrontational approach and incorporate knowledge of people's psychological functioning and particularly how the grief at the ending of a relationship affects a person's decision making after

142 Pauline H Tesler *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, Chicago, 2001) at 1 discussed in Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 8.

143 Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 4.

144 Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 9.

145 There is a lack of consensus among lawyers and academics about the ethics of an agreement with a "no litigation" clause in collaborative law agreements. Some question whether lawyers, in excluding litigation, are breaching their obligations to their clients. See Larry Spain "Collaborative law: A critical reflection on whether a collaborative orientation can be ethically incorporated in to the practice of law" (2004) 56 Baylor Law Review 141; and John Lande "Possibilities for collaborative law: ethics and practice of lawyer disqualification and process control in a new model of lawyering" (2003) 64 Ohio State Law Journal 1315. Both discussed in Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 11.

146 Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 11–12.

a separation.[147] Collaborative Advocacy New Zealand (CANZ) oversees training in New Zealand and provides ongoing practice group support for collaborative professionals, including the publication of practice guidelines for collaborative lawyers.

24.45 International research into the effectiveness of collaborative law suggests high levels of client satisfaction and rates of settlement.[148] Research in England and Wales identified that people who went through a collaborative law process thought it was more supportive than mediation and quicker and less prone to inflame conflict than lawyer-led negotiation.[149]

24.46 A key challenge to greater adoption of collaborative law, however, is cost. The choice to negotiate collaboratively is available for all New Zealanders who can afford it. Research in England and Wales identified that those talking about collaborative law tended to be better educated, more affluent, and generally have more sense of choice and agency about their options after separation.[150]

Family arbitration

24.47 Arbitration is a formal, adversarial dispute resolution service that is more similar to a court process than a facilitative process like mediation or collaborative law. An independent arbitrator is appointed by the parties to make a decision that is binding and enforceable as if it were a court decision.[151] The arbitration process is governed by the Arbitration Act 1996, and rights of appeal from the arbitrator's decision are very limited.

24.48 It appears that arbitration is rarely used in New Zealand for relationship property disputes, and the PRA does not seem to anticipate resolution of disputes by arbitration. However, as the PRA expressly provides for resolution of disputes by agreement, and because contracting out agreements, unlike parenting and maintenance agreements, do not usually require ongoing

147 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 3.

148 J Lande "An empirical analysis of Collaborative Practice" (2011) 49 Family Court Review 257; and Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014).

149 Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 13.

150 Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 6.

151 Arbitration Act 1996, sch 1, cl 35.

monitoring, some argue that they are an obvious candidate for arbitration.[152]

24.49 Arbitration is said to have many advantages over going to court. These include speed, procedural flexibility, confidentiality, choice and continuity of decision-maker, ease of access to the tribunal, finality (given the limited rights of appeal) and, where appropriate, the opportunity to combine arbitration with mediation.[153] The arbitrator's information-gathering powers are considered particularly helpful for PRA disputes. Arbitrators can actively assist in identifying the issues by calling the parties and their accountants to a conference, swearing everyone present as witnesses, and leading a round table discussion on disputed facts.[154] Once issues have been defined, they can seek missing information through directions for targeted discovery, inspection of computer systems, interrogatories, oral questioning or reports by arbitrator-appointed experts such as independent accountants, valuers or experts in information technology.[155]

24.50 Arbitration can however be costly. Partners pay the arbitrator's costs, as well as their own lawyer's costs in preparing for and attending the arbitration. The arbitrator's costs can include an appointment fee, a fee for managing the process up to hearing, forum fees and expenses.[156] Arbitrations are therefore normally more expensive than court proceedings. Arbitration as an alternative to court proceedings will not always be appropriate, particularly if there are related claims under different areas of law, such as claims involving children, unascertained beneficiaries, inalienable family support rights after death or questions of family status. [157]

Online dispute resolution

24.51 As technology develops at a rapid pace, there is a growing expectation that legal issues, like almost everything else, should be able to be sorted out online. Online dispute resolution can

152 Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15.

153 Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 22–24.

154 Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 23.

155 Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 20.

156 See for example Arbitrators' and Mediators' Institute of New Zealand "Schedule of Fees, Costs and Expenses" (Adopted by AMINZ Council, 27 May 2009).

157 Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 20–21.

improve access to justice and may provide a cheap, quick and easy option for some.[158] However, online dispute resolution will not always be appropriate, particularly where complicated legal issues are involved, or where the parties are not committed to taking an open and cooperative approach. In New Zealand, at least one online company provides template contracting out agreements,[159] and another offers online dispute resolution services for PRA disputes.[160] Similar services are also available in Australia.[161]

Is access to dispute resolution services for property matters appropriate?

24.52 Currently there is no State provision of dispute resolution services or a requirement on former partners to attempt to resolve property matters themselves before filing proceedings in the Family Court. This is despite a general trend in family justice systems, both in New Zealand and in other jurisdictions including Australia, towards out of court family dispute resolution. This trend is driven by several factors, including the recognised benefits of early intervention and out of court resolution, and the desirability of reducing costs to the State.[162]

24.53 In Australia, obtaining affordable professional advice and dispute resolution services for property matters has been recognised as a particular problem for low value property disputes.[163] Results from a study of 9,000 parents who separated in 2006–2007 identified that those in the low (less than $40,000) and low-medium ($40,000–$139,000) asset pool ranges were significantly less likely to use dispute resolution services, seek legal advice or go to court than those in the higher asset pool ranges, and were more likely to say that no specific pathway was used to resolve property

158 New Zealand Law Society "Academic highlights ODR's limitations" (22 March 2017) <www.lawsociety.org.nz>; and Robert J Condlin "Online Dispute Resolution: Stinky, Repugnant, or Drab (Legal Studies Research Paper No 2016-40, University of Maryland, 2016).

159 Legal Beagle <www.legalbeagle.co.nz>.

160 Complete Online Dispute Resolution <www.codrco.nz> discussed in Nick Butcher "Online dispute resolution: Filling some of the access to justice void?" Lawtalk 905 (Wellington, 31 March 2017) at 56.

161 Divorce Partners <www.divorcepartners.com.au>.

162 Megan Gollop, Nicola Taylor and Mark Henaghan *Evaluation of the 2014 Family Law Reforms: Phase One* (University of Otago, February 2015) at 21.

163 Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 870–878.

issues.[164] The Australian Productivity Commission concluded that:[165]

> *For some, avoiding the use of formal services for low value property disputes may be a proportionate and appropriate response. However, for others – particularly those who nominate no specific pathway – lack of access to affordable legal and financial advice and dispute resolution services may be a significant factor. This leads to questions about the appropriateness of agreements or outcomes arrived at in these cases.*

24.54 No comparable research has been undertaken in New Zealand. However our initial conversations with family lawyers and community groups suggest the lack of access to low cost dispute resolution services for property matters may be a problem in New Zealand. We are therefore interested in receiving submissions on this question.

CONSULTATION QUESTION

H3 Do you think there is a problem with access to affordable dispute resolution services for property matters in New Zealand?

Options for promoting the use of dispute resolution for property matters

24.55 There are several different ways that use of dispute resolution services for resolution of property matters could be promoted. We consider several options below.

Should FDR be available for property matters?

24.56 Currently FDR is only funded for parenting disputes under the Care of Children Act 2004. Property matters may also be addressed at FDR, but only when they are related to an existing parenting dispute. The position is similar in Australia, and in 2014 the Australian Productivity Commission recommended that

164 Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 872 citing the results of research published in Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

165 Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 872.

the requirement to undertake FDR be extended to property and financial matters.[166]

24.57 Property disputes under the PRA are different in nature to parenting disputes under the Care of Children Act. Quite often PRA disputes will involve complex legal and factual issues. A just outcome is dependent on full and frank disclosure, and will often require the parties to have received and carefully considered legal advice.

24.58 We are aware of concerns with the suitability of FDR to address property disputes. FDR mediators do not need to be legally trained, and lawyers for the parties do not usually attend FDR. Without proper preparation, legal advice and disclosure, discussing property matters in FDR risks partners making an agreement in the absence of all the facts or without knowledge of their legal entitlements. It might also damage relations between the partners if they make an "in principle" agreement during mediation only for one partner to be later advised against that agreement by the lawyer they approach to finalise a contracting out agreement.[167]

24.59 While there is some attraction to extending the FDR service to property matters, we are concerned that the FDR process as it currently operates may not be appropriate.[168] Proper safeguards would need to be built into the process to ensure unjust outcomes do not arise.

Should some other dispute resolution service be designated for PRA matters?

24.60 An alternative to extending FDR is the development of a dispute resolution service specifically for PRA matters. This might enable the development of a service led by dispute resolution practitioners with specialist skills and knowledge of property matters. It might also provide for the involvement of participants'

166 Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 875–877.

167 For a contracting out agreement to be binding each partner must receive independent legal advice before signing and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See Property (Relationships) Act 1976, s 21F.

168 The Australian Productivity Commission observed that issues of training and accreditation of Financial Dispute Resolution providers would need to be worked through prior to the introduction of a requirement to attend FDR for property matters. It considered that a new unit of competency in respect of property and spousal maintenance should be developed as part of the Vocational Graduate Diploma of Family Dispute Resolution: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 75 Vol 2, September 2014) at 875–877.

lawyers, recognising the complexity of the property matters in issue. However at this stage we are not convinced that there is a real need to establish a separate dispute resolution service for PRA disputes. This is for several reasons:

(a) First, we lack evidence of any problems with how people are resolving their PRA disputes out of court, and the volume of cases going to court that could be redirected to dispute resolution do not suggest there is a case to be made for cost savings. PRA cases comprise a very small proportion of Family Court business, and the number of PRA applications is declining.[169]

(b) Second, because parenting issues and property matters often overlap, it would be inefficient to require parties to attend two different dispute resolution services when the issues could be properly resolved at one.

(c) Third, it is not easy to identify what dispute resolution service is most appropriate for PRA matters. There is no "one size fits all" model. Each dispute resolution service has different strengths and weaknesses.[170] We think that the nature of the dispute and the characteristics of the parties will determine whether out of court resolution is appropriate in any given context and, if so, what dispute resolution service should be used.

24.61 If we were to recommend a dispute resolution service for property matters, careful consideration would need to be given to its design, including:

(a) the extent to which legislation should set out the purpose, objectives and/or values to be followed by the dispute resolution service;

(b) the screening process, if any, that should be used to decide whether the dispute resolution service is appropriate given the nature of the dispute, its urgency and the characteristics of the parties;

(c) the role of the person leading the process (the dispute resolution practitioner), and in particular their role, if

169 See Chapter 23, paragraphs [23.23]–[23.24]. In 2009/10 Property (Relationships) Act 1976 applications made up only three per cent of substantive applications to the Family Court. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 19.

170 As identified in UK research. See Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 16.

any, in providing information to the parties on their legal entitlements under the PRA;

(d) the support that should be available to the parties, including issues of legal representation at the dispute resolution event and preparation (legal and/or non-legal) for the event;

(e) the necessary qualifications of the dispute resolution practitioner, and the details of an approval or accreditation process if necessary;

(f) ensuring parties can resolve disputes in a manner consistent with their culture and personal values;

(g) when the dispute resolution event should occur (eg before or after proceedings are filed in the Family Court);

(h) how the dispute resolution service should be funded; and

(i) whether the dispute resolution service should be mandatory before an application can be filed in the Family Court (we discuss this issue below).

CONSULTATION QUESTION

H4 Do you think that FDR (Option 1) or another designated dispute resolution service (Option 2) should be available for resolving PRA matters?

Should parties be required to attempt out of court resolution of PRA matters before going to court?

24.62 Currently there is no obligation on former partners to try and resolve property matters themselves or use a dispute resolution service before filing proceedings in the Family Court. This is in contrast to care of children matters, which must normally go to FDR first.[171]

24.63 Introducing mandatory dispute resolution might result in fewer people going to court. But because the proportion of separating partners who are currently going to court is very small, such a requirement is unlikely to make a significant difference to how most people resolve their property matters. Requiring parties

171 Care of Children Act 2004, s 46E.

to participate in facilitative dispute resolution processes like mediation also raises ethical issues, as it conflicts with core dispute resolution principles such as voluntary participation by the parties, their empowerment in and ownership of their dispute and their self-determination in its resolution.[172] Mandatory participation in dispute resolution may have other unintended consequences for the family justice system. For example, the introduction of mandatory FDR under the Care of Children Act coincided with a sharp increase in urgent (without notice) applications to the Family Court.[173] It has been suggested that this increase is due to people not wanting to complete FDR before going to the Family Court, and/or wanting to be represented by a lawyer.[174]

24.64 Rather than require parties to attend dispute resolution, the parties could instead be required to make a genuine effort and/or use their best endeavours to resolve matters out of court. A good example is the "pre-action procedures" that apply in post-separation property disputes in Australia. These procedures must be complied with before a party can go to court, unless there are good reasons for not doing so.[175] Pre-action procedures include making a genuine effort to resolve the dispute by:[176]

(a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling;

(b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and

(c) complying, as far as practicable, with the duty of disclosure.

24.65 There may be serious penalties imposed by a court for non-compliance with pre-action procedures, including costs

172 Judy Gutman and Jodie Grant "Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 111.

173 In 2016, 75 per cent of the 7,253 parenting applications and 64 per cent of the 1,443 guardianship applications made in the Family Court were without notice applications. See Catherine Hutton "Urgent Family Court cases rise after mediation change" (31 July 2017) Radio New Zealand <www.radionz.co.nz>. Similar trends have also been observed in respect of without notice applications for warrants in relation to breaches of parenting orders. See Shane Cowlishaw "Minister wants answers over rise in without-notice applications" (15 August 2017) Newsroom <www.newsroom.co.nz>.

174 Catherine Hutton "Urgent Family Court cases rise after mediation change" (31 July 2017) Radio New Zealand <www.radionz.co.nz>; and John Adams "Former Family Court Judge: 'Compliance isn't optional'" (8 August 2017) Newsroom <www.newsroom.co.nz>.

175 Family Law Rules 2004 (Cth), sch 1.

176 Family Law Rules 2004 (Cth), sch 1, cl 1(1).

penalties.[177] The pre-action procedure also imposes obligations on lawyers acting for clients with post-separation property disputes, including to:[178]

(a) advise clients on ways of resolving the dispute without starting legal action;

(b) advise clients about their duty to make full and frank disclosure, and possible consequences of breaching that duty;

(c) endeavour to reach a solution by settlement, if that is in the best interests of the client and any child, and tell their client that it is in their best interests to accept a settlement if, in the lawyer's opinion, the settlement is reasonable;

(d) advise clients of estimated costs of legal action, and the factors that may affect the court in considering costs orders;

(e) provide clients with information prepared by the court about legal aid services and dispute resolution services available, and about the legal and social effects and possible consequences for children of proposed litigation; and

(f) actively discourage clients from making extravagant claims or seeking orders that are not reasonably achievable.

24.66 Currently, lawyers acting for parties and proposed parties in the Family Court in New Zealand have a statutory duty to, so far as possible, promote conciliation.[179] It is not clear what is meant by "conciliation", but this appears to encompass facilitative methods of dispute resolution, where parties try to reach agreement, with or without third party intervention or assistance.[180] The Care of

177 Family Law Rules 2004 (Cth), sch 1, pt 1, cl 1(3).

178 Family Law Rules 2004 (Cth), sch 1, pt 1, cl 6.

179 Family Court Act 1980, s 9A.

180 There is no statutory definition of the meaning of conciliation. The Dictionary of Arbitration Law and Practice describes conciliation simply as "a method of resolving disputes by negotiation either between the parties or through the intervention of an independent third body": Eric Lee Dictionary of Arbitration Law and Practice (Mansfield Law Publishers, London, 1986) at 53. The Law Commission's report *Dispute Resolution in the Family Court* (NZLC R82, 2003) at 3 uses the term "conciliation" to encompass services including information, counselling and mediation. Conciliation services, the Commission noted, focus on healing, rather than determination of disputes. The Commission explained at 10 that conciliation encourages each party to understand the other's point of view and to cooperate in finding a resolution that accommodates both parties. This is in contrast to the court process, and arbitration, both of which involve an independent third party adjudicating the dispute and making a determination binding on the parties.

Children Act 2004 also imposes a duty on lawyers, when giving advice about arrangements for the guardianship or care of a child, to ensure the person is aware of:[181]

(a) the mechanisms for assisting resolution of family disputes;

(b) the steps for commencing and pursuing proceedings through the court; and

(c) the types of directions and orders the court may make.

24.67 There is no equivalent duty on lawyers in respect of property matters under the PRA.

24.68 We are interested in your views on whether former partners should be required to attempt to resolve property matters before they go to court. We are also interested in what this requirement might involve. Should it specify the particular steps that should be taken, for example, lawyer-led negotiation or using a particular dispute resolution service? We also want to know whether you think there should be a duty on lawyers advising clients on post-separation property matters to provide them with information about the different options for resolving disputes out of court, similar to what is currently required under the Care of Children Act, or what is required in the Australian pre-action procedures.

CONSULTATION QUESTIONS

H5 Should people with a property dispute under the PRA be required to attempt to resolve the dispute before going to court? If so, what steps should they be required to undertake?

H6 Should there be a duty on lawyers to provide their clients with information about the range of options for resolving property matters under the PRA out of court and the benefits of out of court resolution?

Is there a need for clear disclosure obligations?

24.69 As we explain in Chapter 25, the PRA imposes no express duty of disclosure on partners. The Family Court Rules 2002 provide for the parties to make disclosure when PRA proceedings are filed in

181 Care of Children Act 2004, s 7B. This duty was introduced following the Family Court Review. It was inserted into the Family Court Proceedings Reform Bill by the Justice and Electoral Committee, which considered that the overarching requirement to promote conciliation in care of children proceedings should be reflected in the Bill. See Family Court Proceedings Reform Bill 2013 (90-2) (select committee report) at 5.

the Family Court, or beforehand in very limited circumstances.[182] There are no rules requiring disclosure at the earlier stages of out of court dispute resolution.[183]

24.70 Following the Family Court Review, Cabinet agreed to changes to improve the information available to parties before they bring PRA proceedings in the Family Court.[184] While some changes were made to the Family Court Rules in response, they were limited to improving the quality of information disclosed for the purpose of proceedings, rather than out of court resolution. Because the Family Court Rules are limited to regulating the practice and procedure of the Family Court, separate rules may be needed to regulate dispute resolution practices that take place out of court.[185]

24.71 In Australia, the pre-action procedures for post-separation property disputes sets out the parties' disclosure obligations and a process for exchanging correspondence that applies before either party goes to court.[186] The protocol explains that parties have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely matter.[187] It provides that, when attempting to resolve their dispute, parties should, as soon as practicable, exchange:[188]

(a) a schedule of assets, income and liabilities;

(b) a list of relevant documents in the party's possession or control; and

(c) a copy of any document required by the other party, identified by reference to the list of relevant documents.

24.72 Parties are encouraged to refer to the rules for disclosure of financial information that apply to court proceedings as a guide, and the pre-action procedure sets out a specific list of documents

182 Family Court Rules 2002, r 140 allows the court to make an order for discovery before proceedings are commenced, but only where it is "impossible or impractical" for the intending applicant to formulate their application to the court without reference to a document or class of documents.

183 See paragraphs 25.6–25.12 for a discussion of the current disclosure requirements under the Family Court Rules 2002.

184 Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [99].

185 The Family Court Rules 2004 are made pursuant to s 16A of the Family Court Act 1980, which permits the Governor-General, by Order in Council, to make rules "regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine" (sub-r 16A(1)).

186 Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4.

187 Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4(1).

188 Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4(2).

that the court would consider appropriate to include in the list of documents and exchange with the other party.[189]

24.73 Our preliminary view is that out of court resolution of property matters should be supported by clear rules about what information separating partners need to share with each other. A prescribed process, like the pre-action procedure in Australia, appears to be a good model for New Zealand. The type of information that should be disclosed could mirror the initial disclosure requirements that apply when parties go to court. These are discussed in detail in Chapter 25.

CONSULTATION QUESTION

H7 Do you think that there should be clear rules of disclosure for parties to follow when resolving property disputes out of court?

Should collaborative law be promoted for property disputes?

24.74 Collaborative law, as a relatively new dispute resolution service, could be more formally recognised and provided for in the family justice system.

24.75 In some jurisdictions, court processes have been streamlined or legislation passed to support collaborative practice.[190] In the United States in 2009 the Uniform Law Commission[191] drafted a "Collaborative Law Act" to regulate and standardise the use of collaborative law as a form of dispute resolution across states. Versions of the Act have been enacted in seven states, and recently introduced in two.[192]

24.76 In the United Kingdom, collaborative law is promoted by the State as a way to reach agreement on child arrangements.[193] In Australia, collaborative law is supported at an executive administrative level, with endorsement from the former Federal

189 Family Law Rules 2004 (Cth), sch 1, pt 1, cls 4(3)–4(5).

190 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 11.

191 Also known as the National Conference of Commissioners on Uniform State Laws. The Commission was established in 1892 and provides states with non-partisan legislation to bring uniformity to state law.

192 Alabama, Arizona, District of Columbia, Michigan, New Mexico, Ohio and Texas have enacted versions of the Collaborative Law Act. In 2017 legislation was introduced and is pending enactment in Illinois and Massachusetts. See Uniform Law Commission "Collaborative Law Act" <www.uniformlaws.org>. In California the San Francisco Superior Court has established a Collaborative Law Department of the Court to encourage and support collaborative law, allowing collaborative lawyers to file routine documents with the department and providing access where necessary to judges well informed about collaborative practice.

193 See <helpwithchildarrangements.service.justice.gov.uk>.

Attorney-General, a committee of the Law Council of Australia and the Chief Judge of the Family Court of Australia.[194]

24.77 Following the review of Family Court, the Collaborative Advocacy New Zealand (CANZ)[195] submitted that collaborative law should be adopted and supported in the family justice system.[196] It submitted that parties should be able to undertake collaborative law as an alternative to FDR, and that legal aid should be available for collaborative law in PRA matters.[197] It argued that the current legal aid framework is focused on proceedings rather than out of court resolution, which has the consequence of promoting litigation in order to access legal aid for alternative dispute resolution.[198]

24.78 The Ministry of Justice, advising the Parliamentary select committee on the Family Court reforms, commented that the reforms did not exclude the possibility of collaborative lawyers becoming FDR providers. It also observed that if the parties had just completed a collaborative law process an FDR provider could excuse the parties from undertaking FDR before applying to the Court, on the basis that FDR is inappropriate for the parties to the dispute.[199]

24.79 However, CANZ have told us their concerns about how collaborative law would work within an FDR-type model.[200] Imposing the current time and cost limitations in FDR on a collaborative law process would not provide optimal outcomes for families. The structure of the FDR model, in which the provision of legal advice to a client sits outside the FDR process and the lawyer does not normally attend FDR, is also incompatible with collaborative law practices, which focus on legal advice and advocacy throughout the dispute resolution process. However CANZ maintains that with careful design of the process,

194 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 14.

195 Formerly known as the Collaborative Law Association of New Zealand.

196 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 18–19.

197 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 20–22.

198 The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 22.

199 Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at 76.

200 Information provided by email from The Collaborative Law Association of New Zealand to the Law Commission (10 October 2016).

collaborative law can be incorporated into a funded dispute resolution model.

24.80 We are interested to hear whether there is a need to specifically provide for collaborative law in the context of property disputes, including by way of legal aid eligibility.

CONSULTATION QUESTION

H8 Is legal reform needed to better enable parties to use collaborative law to resolve property disputes?

Does the law need to be clarified to provide for arbitration?

24.81 The Arbitration Act 1996 provides a general structure for arbitration and confirms that an arbitrator's decision is enforceable as a court decision. But the PRA does not make any express provision for arbitration. Instead, the provisions relating to contracting out in Part 6 of the PRA can be used by the parties to agree to resolve any disputes by arbitration.[201] In contrast, in some jurisdictions arbitration is authorised and regulated for property disputes arising on separation,[202] while in others professional arbitration organisations and family law organisations have adopted special rules for family arbitration.[203]

24.82 We are interested in submissions on whether there is a need for the PRA to make special provision for the resolution of property matters by arbitration. This could be by way of reference to arbitrations under the Arbitration Act, or by establishing a specific arbitral regime within the PRA. An example is the regime for construction contracts established under the Construction Contracts Act 2002.

24.83 One possible matter for consideration is whether the grounds of appeal for arbitral awards should be broader in the PRA

201 An agreement entered into under s 21 of the Property (Relationships) Act 1976 (in contemplation of, or during, a relationship) could include an agreement to decide any disputes that arise in future by arbitration. Alternatively, when a dispute has arisen, the parties can enter into an agreement under s 21A to refer the dispute to arbitration for determination. The agreement to arbitrate, under either s 21 or 21A, would need to satisfy the normal procedural requirements for contracting out agreements, and could be set aside if it would cause serious injustice, under s 21J. However, the jurisdiction to intervene under s 21J does not extend to the arbitral award itself – the only grounds of appeal are those set out in the Arbitration Act 1996. For discussion see Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15.

202 In Australia the Family Law Act 1975 (Cth) authorises and regulates arbitration for property settlement, maintenance and financial agreements. Similar legislation supports family law arbitration in some Canadian states.

203 In England and Wales the Institute of Family Law Arbitrators (IFLA) was established to administer a set of rules (the IFLA Scheme) for family law disputes including property disputes. A similar scheme was also set up in Scotland. See Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15.

context. The grounds for setting aside an arbitral award under the Arbitration Act are very limited.[204] There is no general right to appeal the merits of the decision, or to challenge the decision on the basis that it would cause serious injustice. This is in contrast with the general right of appeal from decisions of the Family Court.[205] It is also more difficult to challenge an arbitral award than it is to challenge the terms of an ordinary contracting out agreement, which may be set aside if it would cause serious injustice.[206]

CONSULTATION QUESTION

H9 Is legal reform needed to promote the use of family law arbitration as an alternative to court in property disputes?

204 See Arbitration Act 1996, sch 1, arts 34–36; and sch 2, art 5.

205 Property (Relationships) Act 1976, s 39.

206 Contracting out agreements can be set aside if the court "is satisfied that giving effect to the agreement would cause serious injustice." See Property (Relationships) Act 1976, s 21J. The jurisdiction conferred by s 21J does not extend to the arbitral award itself: "The PRA governs challenges to an 'agreement'; the Arbitration Act governs challenges to an 'award'": Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 19.

Chapter 25 – Going to court

25.1 When separating partners cannot resolve their property matters themselves, they can apply to the Family Court for orders dividing their property. The Family Court hears all applications under the PRA, although it can transfer cases to the High Court when appropriate.[207] We discuss the jurisdiction of the Family Court and the High Court in Chapter 26.

25.2 In this chapter we look at how property matters are dealt with in the Family Court, and identify some practical issues that can hinder the just and efficient resolution of disputes.[208]

PRA proceedings in the Family Court

25.3 The Family Court process is governed by the Family Court Rules 2002 (Rules). The purpose of the Rules is to:[209]

> … make it possible for proceedings in Family Courts to be dealt with—
>
> (a) as fairly, inexpensively, simply, and speedily as is consistent with justice; and
>
> (b) in such a way as to avoid unnecessary formality; and
>
> (c) in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.

25.4 Proceedings commence when one party files an application in the Court for orders under the PRA.[210] The Rules set out the requirements for making an application and the documentation that needs to be filed alongside an application, including a

207 Property (Relationships) Act 1976, ss 22 and 38A.

208 In Chapter 23 we discussed the importance of achieving resolutions that are just and efficient, and what is needed in order to achieve that objective.

209 Family Court Rules 2002, r 3(1).

210 Family Court Rules 2002, r 19. The applicant must complete the general application form G 5 which is set out in the Family Court Rules 2002, sch 1 and is available on the Ministry of Justice's website. See <www.justice.govt.nz>.

supporting affidavit[211] and affidavit of assets and liabilities.[212] Applicants will usually need to pay a $700 filing fee.[213]

25.5 Applications under the PRA are normally made "on notice" to the other party, which means that the applicant's former partner (the respondent) receives a copy of the application and affidavits filed and has an opportunity to respond to them before the matter is heard by the Court.[214] The respondent must file and serve on the applicant an affidavit "sufficient to inform the court of the facts relied on by the respondent" as well as their own affidavit of assets and liabilities within 20 working days of receiving the application.[215]

What information must parties disclose?

25.6 There is no express duty of disclosure on partners in the PRA.[216] However in *M v B* the Court of Appeal confirmed that the law required "total disclosure and cooperation" between parties in PRA proceedings.[217] In *Clayton v Clayton* the Court of Appeal endorsed an approach that recognises that parties "are under an obligation to make full and frank disclosure of all relevant information", in order to ensure that the court is in a position to make appropriate orders under the PRA.[218] This duty of disclosure is enforced through the Rules.

25.7 The Rules provide for initial disclosure by way of the affidavit of assets and liabilities, which must be filed by each party in the prescribed form set out in the Rules.[219] This requires the parties to set out full details of all of their assets (including all legal

211 Also known as an "affidavit in support." See Family Court Rules 2002, r 392, pursuant to rr 20(1)(c) and 21(i). The affidavit in support is intended to include all relevant information, including proposed arrangements for the division of property and matters in issue between the parties: Family Court Rules 2002, sub-r 392(1). The affidavit may have annexed to it a copy of any document relied on by the applicant in support of the application: Family Court Rules 2002, sub-r 392(2).

212 Family Court Rules 2002, r 398. The affidavit of assets and liabilities is form P(R) 1, set out in the Family Court Rules 2002, sch 8 and is available on the Ministry of Justice's website. See <www.justice.govt.nz>.

213 An applicant can ask for the coourt to waive the fee if they are experiencing financial hardship (including if the applicant receives legal aid).

214 Unless rr 24(1) or 24(2) of the Family Court Rules 2002 apply.

215 Unless directed otherwise by a judge or registrar: Family Court Rules 2002, sub-rr 392(3) and 398(2).

216 The Government Administration Committee considered whether there should be an express power to require disclosure in the Property (Relationships) Act 1976 when it reviewed the Matrimonial Property Amendment Bill. However, it concluded that this was unnecessary as the relevant rules already required the filing of an affidavit disclosing a person's property. See Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at vi.

217 *M v B* [2006] 3 NZLR 660 (CA) at [49].

218 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

219 Family Court Rules 2002, r 398 and sch 8, form P(R) 1.

and beneficial interests) and liabilities, as well as details of any income, capital payments, and dealings in assets since the parties separated. The prescribed form provides for supporting documents such as valuations, proof of deposits and financial statements to be attached to the affidavit.

25.8 If the applicant fails to file an affidavit of assets and liabilities with their application, the proceedings can be dismissed or stayed until the affidavit is filed and served.[220]

25.9 When there has been inadequate disclosure of assets and liabilities, there are several orders a court can make to require additional disclosure of relevant financial information from a party. It can order:[221]

(a) the discovery of documents (discussed below);[222]

(b) the administration of interrogatories, which are written questions to a party about matters in issue;[223]

(c) the examination of the non-disclosing party, which requires that party to attend court and be examined on any matter that should have been disclosed in the affidavit of assets and liabilities;[224] or

(d) an inquiry under section 38 of PRA.

25.10 It is for the court to decide the best means by which any information deficit can be remedied, but it must adopt a sense of proportionality.[225] The more serious the default, the more intrusive the remedy is likely to be.[226]

What is the process for discovery?

25.11 Discovery is the process through which each party identifies the documents which are relevant to the proceeding and discloses

220 Family Court Rules 2002, r 399.

221 *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [41]. See also Family Court Rules 2002, r 47. The Family Court Rules also provide ways for a party to obtain admissions or further particulars from the other party, by issuing a notice to admit facts (r 138); a notice to admit documents (r 154); a notice requiring them to file and serve further particulars (r 139); or a notice requiring them to produce specified documents (r 153).

222 Family Court Rules 2002, rr 140–152.

223 Family Court Rules 2002, rr 47 and 137.

224 Family Court Rules 2002, r 400.

225 *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [46] and [53].

226 *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [53].

those documents to the other party.[227] A party must apply to the court for an order for discovery, and that application must be accompanied by an affidavit specifying the extent of the discovery required and the reasons for the discovery.[228] The court then orders the other party to produce an affidavit listing the relevant documents they have in their possession, and any other relevant documents they know to exist.[229] Once that affidavit is filed, the party who made the application for discovery can request the production of any of the documents listed.[230] In 2015 the High Court in *D v K* established some "essential principles" for discovery in PRA proceedings:[231]

> *(a) A robust approach should be taken to discovery consistent with the purposes and principles of the Act: the need for just division, but also inexpensive and efficient access to justice.*
>
> *(b) Such discovery must not be unduly onerous.*
>
> *(c) Such discovery must be reasonably necessary at the time sought.*
>
> *(d) The scope of discovery should therefore be tailored to the need of the Court to dispose, justly and efficiently, of relationship property issues under the Act.*
>
> *(e) More substantial discovery may well be ordered by the Court where it has reason to believe that a party has concealed information or otherwise sought to mislead either the other party or the Court as to the scope of relationship property. But even here, the scope of discovery should be no more than is required for the Court to fairly and justly determine relationship property rights. It is just that in such a situation, more is likely to be required to meet that requirement.*

227 Applications for discovery are normally made after proceedings have been filed and a notice of defence or a notice to appear has been filed: Family Court Rules 2002, r 141. The Rules also provide that applications for discovery can be made before proceedings are commenced, but only if it is impossible or impracticable for the intending applicant to formulate their application without reference to a document or class of documents in the intended respondent's possession: Family Court Rules 2002, r 140. Discovery can also be ordered against a non-party: Family Court Rules 2002, r 143.

228 Family Court Rules 2002, rr 141(1) and 141(2).

229 Family Court Rules 2002, rr 141(2A) and 142.

230 Family Court Rules 2002, r 146.

231 *Dixon v Kingsley* [2015] NZFLR 1012 (HC) at [20]. See also *C v C* FC Rotorua FAM-2007-063-652, 20 June 2011 at [31]; and *J v P* [2013] NZHC 557 at [22].

What are the consequences of non-disclosure?

25.12 There are several possible consequences for failing to comply with disclosure obligations:

(a) The court can impose procedural consequences, including a stay or dismissal of proceedings (in part or in full),[232] restrictions on further participation in the proceedings until disclosure obligations are met,[233] and ultimately contempt of court.[234]

(b) When hearing the issues in dispute, the court can draw inferences that are adverse to the non-disclosing party's position:[235]

> *[T]here is a principle of long standing that a party peculiarly placed to provide evidence as to value must expect assumptions to be made against the party's interests if he or she remains silent.*

(c) Non-disclosure can be taken into account in an award of costs under section 40 of the PRA.[236] Courts have readily awarded costs where a party's conduct has escalated costs to the other party, and have said there is a strong public policy interest in establishing for future litigants that serious conduct, such as lying, obstructing and delaying, will be heavily penalised in costs.[237]

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232 Family Court Rules 2002, rr 17 (failure to comply with the rules), 176 (non-compliance with orders or directions made at a judicial conference) and 399 (failure by applicant to file an affidavit of assets and liabilities).

233 Family Court Rules 2002, r 176. If the applicant fails to comply with an order or direction given at a judicial conference, the court may prevent the applicant from taking further steps until they comply with that order or direction. If the respondent fails to comply with an order or direction, the court may order that the respondent be allowed to appear at the hearing and defend the application only on terms that the court directs. See also r 401 (failure to attend for examination or to comply with directions).

234 Family Court Rules 2002, rr 157 and 401. A person is liable to proceedings for contempt if they refuse to make an affidavit or files an incomplete affidavit of assets and liabilities and then disobeys an order for examination or production of a document (r 157). A person is also liable to proceedings for contempt if, when attending an examination on assets and liabilities, they wilfully and without lawful excuse disobey a direction from the judge (r 401). The District and Family Courts also have the power to punish a person for contempt for disobeying court orders under the District Court Act 2016, s 212 and by necessary implication to enable the court to discharge its statutory jurisdiction effectively. For further discussion on contempt of court see Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017).

235 *J v J* [2005] NZFLR 301 (HC) at [42]. See also *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186]. In extreme cases, non-disclosure may amount to fraud, justifying the setting aside of a contracting out agreement or a decision of the court. See for example: *Sharland v Sharland* [2015] UKSC 60, 2016 AC 871 per Lady Hale. In that case the husband failed to disclose vital information about the value of his company shareholding. That was a fraud that "unravelled all" and enabled the court to set aside the agreement.

236 Family Court Rules 2002, r 400(5). In particular, failure to file an affidavit of assets and liabilities or the filing of an inadequate affidavit of assets and liabilities must be taken into account in exercising the court's power under s 40 of the Property (Relationships) Act 1976.

237 *S v S* HC Whangarei AP 37/92, 22 June 1993. See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.42] on the grounds to award costs, including examples where courts have

How are PRA cases managed through the court?

25.13 While parties must comply with the Rules, there are no prescribed standard steps that all PRA cases must follow. The Family Court Caseflow Management Practice Note (Practice Note) outlines best practice for managing cases through the court system.[238] Judges are, however, ultimately responsible for the way in which they run their cases and there can be considerable variation in the style and practice of judges in the courtroom.[239]

25.14 The Practice Note provides for cases to be managed through the "Registrar's List" to ensure that applications have been served and that steps are taken to further the proceedings.[240] According to the Practice Note, when an application is filed, the Registrar will assign a Registrar's List date for six weeks' time.[241] Parties and their lawyers do not usually need to attend the Registrar's List, but they must tell the Registrar in advance what steps have been achieved and what further directions (if any) are sought.[242] The Registrar's List deals with standard interlocutory matters and ensures that all evidence (including affidavits) is being assembled within the necessary timeframes.[243] At the Registrar's List the Registrar will set the case down for a judicial conference, to be held within 42 days.[244] Alternatively the case might be adjourned. This might be to give the parties more time to assemble their evidence, or to try to resolve the matter by agreement.[245] However, a judicial conference will normally be allocated after two adjournments, or when the Registrar otherwise considers that the delay warrants judicial intervention.[246]

taken into account an unwillingness to provide full and frank disclosure and an increase in court costs due to providing inadequate or false information concerning assets and liabilities.

238 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011).

239 The Principal Family Court Judge, who issues practice notes, would be unlikely to intervene in the way in which a judge chooses to run his or her courtroom barring "clear misconduct or hopeless incompetence." See: Law Commission *Family Court Dispute Resolution: A discussion paper* (NZLC PP47, 2002) at [64] and [68].

240 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.5].

241 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.5].

242 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.7].

243 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.8].

244 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.5].

245 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.6].

246 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.9].

25.15 Judicial conferences are presided over by a judge. Parties are expected to attend with their lawyers,[247] and should have filed and served their affidavits of assets and liabilities beforehand.[248] At the judicial conference the court can make orders or give directions on matters including:[249]

(a) the clarification and/or agreement on the extent of their assets and liabilities;

(b) settling the issues to be determined at the hearing;

(c) setting tasks to clarify the issues and procure further information when necessary;

(d) requiring the parties to attend a settlement conference; and

(e) setting the case down for hearing.

25.16 At a settlement conference the parties try to settle the issues in dispute between them.[250] It is presided over by a judge, and the parties and their lawyers can be required to attend.[251] Settlement conferences are confidential, and any information, statement or admission disclosed at a settlement conference cannot be referred to at any subsequent court hearing.[252] If the judge presiding over the settlement conference is satisfied that the parties cannot resolve the issues, he or she may treat the conference as a judicial conference and may make any of the orders or directions referred to above, including setting down the case for a hearing.[253]

How does the court make its decision?

25.17 In most civil proceedings in New Zealand, the court operates an adversarial process in which the party initiating the proceedings has the burden of proving their claim on the balance of probabilities. In PRA proceedings, however, the court's role is

247 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.7].

248 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.6].

249 Family Court Rules 2002, r 175D; and Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.8].

250 Family Court Rules 2002, sub-r 178(1).

251 Family Court Rules 2002, sub-r 178(2).

252 Family Court Rules 2002, sub-r 178(4).

253 Family Court Rules 2002, r 179A. The judge who presided over the settlement conference must not preside over the hearing unless the parties consent or the only matter for resolution at the hearing is a question of law: Family Court Rules 2002, r 180.

different. It is required to make orders dividing property in a way that achieves justice between the parties, and therefore takes a semi-inquisitorial approach.[254] This was confirmed by the Court of Appeal in *M v B*:[255]

> *The [PRA] is about property rights and entitlements. The [PRA], and the regulations which have been promulgated pursuant to it, make it clear that, although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.*

25.18 In other words, the court needs to be satisfied that a state of affairs existed, but the applicant does not have the burden of proving that to the court.[256] This is an important point, because often the applicant in PRA proceedings will not be the legal owner of the property in dispute, and so the evidence relevant to the applicant's claims is more likely to be in the possession of the responding partner.[257]

25.19 That said, the court can only proceed on the basis of the evidence that is before it. The party making a claim therefore needs to ensure that there is sufficient evidence before the court for it to be satisfied of a particular state of affairs, or that the different elements of a test have been met.[258]

Who pays the costs of going to court?

25.20 The Family Court has the power to make orders as to costs for any proceeding, step in a proceeding or any matter incidental to a proceeding as it thinks fit.[259]

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254 As reflected in the statutory purpose of the Property (Relationships) Act 1976, s 1M. See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.23].

255 *M v B* [2006] 3 NZLR 660 (CA) at [39]. In *T v R* [2010] NZFLR 712 (FC) at [28] the Family Court also acknowledged the different approach required in proceedings under the Property (Relationships) Act 1976 compared to other civil causes of action.

256 *M v B* [2006] 3 NZLR 660 (CA) at [49]–[50]. This has also been accepted by the High Court in the context of maintenance proceedings: *Clayton v Clayton (Maintenance)* [2015] NZHC 765, [2015] NZFLR 501 at [86].

257 *M v B* [2006] 3 NZLR 660 (CA) at [38].

258 For example, where a party claims that an increase in the value of separate property should be considered relationship property under s 9A of the Property (Relationships) Act 1976, the applicant needs to provide an evidential basis for the court to determine that there has, in fact, been an increase in value, and to assess how much the increase in value has been: *N v N* [2005] 3 NZLR 46 (CA) at [80]. See also *X v X* [2009] NZFLR 985 (CA) at [96] discussing the evidential requirements for a claim under s 15. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.27] for a list of circumstances where positive evidence should be adduced.

259 Property (Relationships) Act 1976, s 40. Costs are awarded at the court's discretion and it may apply the provisions of the District Court Rules 2014: Family Court Rules 2002, r 207.

25.21 Traditionally the court took the view that PRA proceedings were a "mutual approach to the court for assistance in dividing property", and therefore each party should bear their own costs.[260] Following the passing of the Matrimonial Property Rules 1988 (the predecessor to the Family Court Rules), it became widespread practice to consider and award costs for improper compliance with procedural directions and rules.[261]

25.22 More recently, the growing trend is to treat costs awards in the Family Court in a similar fashion to how costs are dealt with in other civil proceedings.[262] That is, while costs decisions are discretionary, the court should apply the civil costs regime in the District Court Rules 2014 to PRA proceedings, and any departure "must be a considered and particularised exercise of the discretion".[263] The guiding principle for determining costs in a civil costs regime is that the party who fails should pay costs to the party who succeeds (that is, costs should follow the event).[264]

25.23 The civil costs regime may not, however, be appropriate for PRA proceedings. As we explained above, PRA proceedings are different in nature to other civil proceedings, and this may justify a different approach, for example, if the threat of costs operates as a barrier to accessing justice. Some argue that more flexibility than the approach to costs in civil proceedings is appropriate in PRA proceedings.[265]

CONSULTATION QUESTION

H10 Should costs be available in PRA proceedings on the same basis as in other civil proceedings?

260 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.41] citing *Fitzherbert v Fitzherbert* FC Auckland 1322-D97, 27 November 2001. See also *Martin v Marsh* [2015] NZHC 416 at [7].

261 *Hardisty v Hardisty* (1990) 7 FRNZ 5 (FC) per Judge Boshier.

262 *Van Selm v Van Selm* [2015] NZHC 641 at [34]–[44], adopting the approach in *B v C* HC Auckland CIV-2011-404-1005, 4 October 2011; *T v L* [2012] NZHC 1388; *Thompson v Public Trust* [2014] NZHC 2434; and *Martin v Marsh* [2015] NZHC 416. The change in approach came about following the introduction of r 207 of the Family Court Rules 2002, which provides that in exercising discretion to determine costs, "the court may apply any or all of the following [District Court Rules]": Family Court Rules 2002, sub-r 207(2).

263 *Van Selm v Van Selm* [2015] NZHC 641 at [44]. See also *Gibbs v Gibbs* [2015] NZHC 3043 at [53].

264 District Court Rules 2014, r 14.2(a), incorporated by Family Court Rules 2002, r 207. See also *Anderson v Anderson* HC New Plymouth CIV 2004-443-25, 16 June 2004 at [33].

265 See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 260.

Is the court process operating effectively?

PRA proceedings take a long time to resolve

25.24 Best practice is that standard PRA cases should be disposed of within 26 weeks of filing in the Family Court, and complex PRA cases within 39 weeks of filing.[266] But in reality the vast majority of PRA cases take much longer to resolve. Of the PRA cases disposed in 2015, 93 per cent had taken longer than 39 weeks, and half had taken over two years.[267] In 2016, the average time the Family Court took to resolve an application under the PRA (either through the court granting or dismissing an application, or through the application being discontinued, withdrawn or struck-out) from the time it was filed was approximately 74 weeks.[268] While PRA applications make up a small proportion of the Family Court's workload, they take the longest time to resolve.[269]

25.25 The length of time it takes to resolve property disputes can have significant financial and emotional implications for the parties.[270] For many people, the costs and delays associated with going to court "remain at least as daunting as the bewildering complexity of the law itself."[271] Until the proceedings are resolved the parties live in a state of uncertainty that can prevent them from making financial decisions which could allow them to move on with their lives.[272] When one party has access to the disputed property pending determination of the case, delays can have a disproportionate impact on the other party and potentially any children in their primary care.

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266 Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.1]–[13.2].

267 This refers to cases that proceeded to a hearing. In 2015, 93 per cent of cases took more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016). This is not a new phenomenon. In 2011, the Ministry of Justice's review of the Family Court identified that Property (Relationships) Act 1976 cases took on average 478 days to dispose. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.

268 This figure is from provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, and provided by email to the Law Commission (26 September 2017). The Government Centre for Dispute Resolution (GCDR) noted that the national average is affected by the Family Courts in the Auckland Metro region, which had a far longer resolution timeframe (approximately 96 weeks).

269 Minister of Justice Family Court Review: proposals for reform (July 2012) at [97].

270 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

271 Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 152.

272 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

25.26 Just because a case takes a long time to resolve does not, however, necessarily mean there has been unreasonable delay. PRA cases often involve complex legal and personal problems and disputes require time to be managed and resolved.[273] Sometimes, "fast" justice is not possible and simply speeding up processes will not produce fair or lasting outcomes.[274] The *International Framework for Court Excellence* describes timeliness as a balance between the time required to properly obtain, present and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.[275]

25.27 In this review we are concerned with unreasonable delay caused by inefficient processes or insufficient resources specific to PRA proceedings. We do not address broader issues with Family Court operations as this is outside the scope of this review.[276]

Do PRA proceedings experience unreasonable delay?

25.28 A close examination of a sample of 88 PRA cases by the Ministry of Justice revealed that:[277]

> *Delay in [PRA] proceedings, as indicated by the frequency of adjournments, was evident. While some adjournments are necessary, the estimated average number of adjournments per case was 12, which appears high. Every case was adjourned at least once, with 82 percent being adjourned more than six times. At the extreme end, 13 of the 88 cases sampled had in excess of 20 adjournments with two cases having in excess of 30 adjournments. Adjournments most often occurred in order to obtain information, reports and await the outcome of settlement discussions. Delay caused by either a party or their lawyer was also evident in 55 of the 88 cases.*

273 Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 1.

274 Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 2.

275 International Consortium for Court Excellence *International Framework for Court Excellence* (National Center for State Courts, United States, 2008) discussed in Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 8.

276 The general operation of the Family Court was the subject of a comprehensive review by the Ministry of Justice in 2011, which resulted in significant changes to the court process. However the majority of those changes were limited to applications under the Care of Children Act 2004, which made up the majority of the Family Court's workload.

277 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

25.29 This, considered alongside the raw disposal data for PRA proceedings discussed above, as well as examples of "relatively uncomplicated" claims becoming "mired in a procedural morass",[278] suggests that PRA cases may be more susceptible to unreasonable delay than other types of cases before the Family Court.

PRA cases have unique characteristics which are likely to contribute to delays

25.30 PRA cases are different from most other Family Court cases because they "are not so much about personal relationships as they are about property".[279] They will often involve complex legal and factual issues, such as valuation issues, disputes over the classification of property and issues to do with trust property. Therefore information disclosure is extremely important in PRA cases.

25.31 But PRA proceedings also come after partners have separated, and often at a time of high interpersonal conflict. As the High Court observed in *Brown v Sinclair*:[280]

> *Primarily, disputes requiring resolution of the Family Court, whether involving children or property, have an emotional component that is not present in other civil cases. Two people are hurting from the breakup of a relationship, and all too often one is intent on causing financial or psychological harm to the other.*

25.32 Information disclosure between the parties can be more challenging than in other types of property disputes. This problem can be compounded if one partner managed the partners' finances during the relationship, and as a result has greater knowledge of their financial affairs than the other partner. On separation, this

278 *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [2]. In that case a claim involving property of "average value" was filed in the Family Court in 2011. The parties had signed a settlement agreement at a judicial settlement conference in 2013. The Judge presiding over the settlement agreement did not, however, issue a consent order to settle the issues in accordance with that agreement. The wife wished to have the agreement upheld; the husband did not. The matter went to another Judge of the Family Court in 2015, who opted to treat the settlement agreement as a contracting out agreement under ss 21A and 21H of the Property (Relationships) Act 1976. The husband appealed to the High Court, who heard the appeal in 2015. The High Court upheld the appeal but could not finally determine the issue, and instead had to send it back to the Family Court for final decision. See also *Brown v Sinclair* [2016] NZHC 3196 at [1]:

> *Two people have been married for less than three years. They separate. One files an application in the Family Court to determine their respective shares in relationship property. The other files an application for a protection order. Within six months the person against whom the relationship property application was brought is debarred from participating in that proceeding. Cross applications for protection orders are made. Almost six years later, the parties remain embroiled in litigation in the Family Court and in this Court.*

279 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

280 *Brown v Sinclair* [2016] NZHC 3196 at [3].

imbalance of knowledge can put the one partner at a distinct disadvantage.[281]

25.33 These characteristics mean that PRA proceedings are "notorious for efforts by a wealthier or better informed spouse to confine access to information by the poorer or more poorly informed spouse."[282]

25.34 In a similar vein, tactics aimed at delaying the court process and forcing the other party to incur added expense are also evident in some PRA proceedings.[283] In the Family Court Review the Ministry of Justice observed that the court process placed the onus on the applicant to take action when the other party (the respondent) has failed to comply with the Rules, or will not engage in pre-hearing settlement negotiations. This means that often the applicant is in a vulnerable position, as they may not be in control of the property in dispute yet are forced to undertake expensive and lengthy litigation.[284]

Reform may be needed to address delays in the Family Court

25.35 The unique characteristics of PRA cases point to the need for an efficient case management process, clear disclosure obligations and effective penalties for non-compliance with disclosure and with other procedural requirements.

25.36 We are interested in views on whether the current process for PRA cases in the Family Court is causing unreasonable delay, and if so, what you think are the particular sources of delay. Our initial research and conversations with lawyers working in the Family Court have identified several possible sources of delay in the current court process, including:

(a) the reliance on affidavit evidence to identify the issues in dispute is inefficient;[285]

281 See Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

282 *D v K* [2015] NZFLR 1012 (HC) at [15].

283 See discussion in Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

284 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

285 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

(b) the disclosure obligations are regularly ignored or only partially met.[286] While a party has several options for seeking further disclosure, each of these options require that party to take further steps and incur additional cost and delay.[287] For these reasons lawyers may be reluctant to utilise these options except as a last resort;[288]

(c) the lack of a structured case management process with prescribed timeframes means that it is too easy for one party to slow the process down, for example, by filing incomplete information, making multiple interlocutory applications or seeking multiple adjournments; and

(d) current practice is not to allocate a hearing date early in the process, which means that parties are not incentivised to enter into settlement negotiations early on or to arrange their case in an efficient manner.

CONSULTATION QUESTION

H11 In your experience, do you think there is unreasonable delay in the current court process for PRA proceedings? If so, have we identified all of the particular sources of delay?

Options to improve the court process

Option 1: Introduce pleadings for PRA cases

25.37 Pleadings (such as a statement of claim[289] and statement of defence) are regularly used in other courts to define the matters

286 Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

287 Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8. For example, the Rules require the party applying for discovery to prove that the documents sought are relevant to the issues in the case. The respondent can oppose discovery and argue that other documents are available and sufficient to enable the applicant to prove their case, that valuation is available from other means, or that the claim to the property is remote or uncertain. The use of tactics to avoid a discovery order can lead to delays that can go on for months and even years. See: Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6.

288 Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 156.

289 A statement of claim is a formal document which sets out, or "pleads", all elements of the applicant's claim and the relief the applicant seeks from the court. If the respondent wishes to defend the claim, the respondent files a statement of defence addressing each of the applicant's claims or allegations. The High Court Rules 2016 require that a statement of claim (r 5.26):

(a) must show the general nature of the plaintiff's claim to the relief sought; and

in issue between the parties. Currently there is no requirement to file a statement of claim when making an application under the PRA in the Family Court. Instead, an applicant must fill in a general application form (not specific to the PRA) which requires the applicant to state the nature of the orders sought. However, many applications are made in non-specific terms, simply for "such orders under the [PRA] as the Court deems just."[290]

25.38 In theory, the supporting affidavit filed with an application under the PRA should include details of the proposed arrangements for the division of property and the matters in issue between the parties.[291] There are, however, several potential problems with relying on affidavit evidence to identify the matters in issue:

(a) affidavits filed are often incomplete or inadequate in identifying the matters in issue;

(b) "almost anything can be raised in an affidavit and be regarded as a live issue", which can cause problems when seeking to define the issues or where affidavits stray into inappropriate areas;[292]

(c) the absence of pleadings means a respondent is not obliged (and may not be able) to disclose any defences they rely on, and there is no clear process for applying to strike out an untenable claim or defence before the hearing, or for proceeding by way of default judgment or formal proof;[293] and

(d) the absence of pleadings can make it difficult to identify whether cases have been fully disposed of.[294]

(b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and

(c) must state specifically the basis of any claim for interest and the rate at which interest is claimed; and

(d) in a proceeding against the Crown that is instituted against the Attorney-General, must give particulars of the government department or officer or employee of the Crown concerned.

290 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR 25.01]; and *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005 at [53].

291 Family Court Rules 2002, r 392.

292 *Bergner v Nelis* HC Auckland CIV-2004-404-149 19, December 2005 at [52] discussed in Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 154. See also *Roulston v Roulston* HC Auckland CIV-2004-404-7120, 9 August 2005 at [72(c)]; and *Walker v Walker* [2006] NZFLR 768 (HC) at [11]–[13].

293 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8–9.

294 In *R v P* [2015] NZHC 603 the Family Court had delivered a judgment deciding relationship issues, and the parties subsequently settled a dispute about the implementation of that decision. However because that settlement was not expressed to be "full and final", and because the litigation had not addressed a s 15 claim, it was still open to

25.39 These problems can lead to ongoing interlocutory applications for further evidence, sometimes as a litigation tactic to add cost and delay to the court process.[295] One family lawyer observes that often it is not until expert reports are received (sometimes just prior to a hearing) that it becomes apparent that a particular claim or defence is being argued, which risks issues not being properly investigated or responded to at the hearing.[296]

25.40 However, requiring formal pleadings in the context of the PRA may not be the best response to these issues. In *T v R* the Family Court explained that there is "clearly a distinct difference in approach in the civil jurisdiction of the District Court to that adopted in the Family Court," and as a result the statement of claim and statement of defence procedure "does not sit appropriately in the PRA jurisdiction of the Family Court."[297] Also, it might be very difficult for the parties to identify all of the issues, potential claims and defences without the benefit of disclosure. One party should not miss out on an entitlement simply because it was not pleaded at the outset. Opportunities to refine the issues after disclosure would be necessary, which again raises the risk of litigation tactics (through multiple applications for further particulars and/or amended pleadings). We would be reluctant to make any recommendations that could deter parties from applying to the court when they lack adequate information about their former partner's financial affairs.

25.41 Another option is to require parties to identify issues in advance of the first judicial conference. Currently, parties can be required to file memoranda of issues, and these can be considered at judicial conferences, but this does not happen automatically.[298]

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the applicant to file a new application for orders under s 15 provided that the time limitations under the Property (Relationships) Act 1976 had not been breached: at [40]. The High Court at [32] observed that this issue would not have arisen "if there had been a more rigorous approach to pleading Ms R's case". See Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR25.01].

295 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

296 See discussion in Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8–9.

297 *T v R* [2010] NZFLR 712 (FC) at [28]. In that case the respondent had applied for an order requiring the applicant to file a statement of claim. The Court observed that central to the underpinning of a statement of claim in the civil jurisdiction is the concept of a cause of action, and the onus of proof is clearly on the party asserting the cause of action. In contrast, a Property (Relationships) Act 1976 (PRA) claim is formulated pursuant to a section of the Act, and also unlike civil cases, where there might be one or two causes of action, under the PRA there are frequently multiple issues the Court is required to determine. The Court noted that it is not appropriate for the practice of the Family Court to be changed by a judgment. This was a question of practice, and if a change is sought it should be by way of change to the Family Court Rules, so there can be wide consultation about such a proposal, and the full merits assessed.

298 For example in *T v R* [2010] NZFLR 712 (FC) at [29] the court declined to require the applicant to file a statement of claim, but did require both parties to file a memorandum of issues setting out what was claimed, what section of the

Parties could be required to file a joint memorandum of issues, or, if that is not possible, file separate memoranda ahead of the judicial conference, with an opportunity to respond to the other party's memoranda in the case of disagreement.[299] The judge could then confirm the issues in dispute by issuing a minute after the conference. This might be a better option as it means parties do not have to commit to issues until after disclosure has been made. We discuss options for imposing stricter consequences for non-disclosure below. The potential for delay could be minimised if the case management process includes a clear timeframe for holding the judicial conference, which we discuss below.

CONSULTATION QUESTIONS

H12 Do you think that there is a problem with identifying issues in dispute in PRA proceedings?

H13 If so, do you support a change to the Family Court procedure to either require parties to PRA proceedings to file pleadings (a statement of claim and statement of defence), or to identify the matters in issue in a memorandum of issues filed before the first judicial conference, or some other change in procedure?

Option 2: Introduce a more structured case management process

25.42 While parties must comply with the Rules, there is no prescribed process that PRA cases must follow within specified timeframes. In an earlier report on the New Zealand court system, the Law Commission observed:[300]

> *In our court system, the parties have traditionally controlled the pace of litigation, and the court's role has been passive, waiting for one or the other party to seek intervention.*

25.43 As the Ministry of Justice observed in the Family Court Review, while less prescriptive processes may have the benefit of flexibility, they are also uncertain, less efficient and a cause of delay.[301] It concluded that "the lack of clear processes has

Property (Relationships) Act 1976 was relied on, and any other authority relied on, so that each partner knew the particulars of what was being sought by the other.

299 See for example the process set out in the High Court Rules 2016, r 7.3.

300 Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

301 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 52.

compromised the Court's efficiency and cost effectiveness and has contributed to delay."[302]

25.44 Some argue that a more structured case management procedure, similar to that used in the High Court, may lead to more efficient resolution of PRA proceedings.[303] As it stands, High Court case management is seen by some as a compelling reason for seeking a transfer of PRA proceedings from the Family Court.[304]

25.45 We think that case management is an essential part of an effective and efficient court system.[305] Given that PRA proceedings often involve complex issues and acrimonious relationships between the parties, we think there is value in exploring a more structured case management process than is currently available.

25.46 In an earlier report the Law Commission identified that a case management system should have the straightforward aims of ensuring that:[306]

(a) cases are dealt with consistently, but there should be flexibility for cases that do not fit the usual mould;

(b) the issues are identified as early as possible;

(c) opportunities for settlement are fully explored; and

(d) a hearing date is allocated as early as possible.

25.47 One possible model is the case management procedure used in the District Court.[307] That procedure involves:

(a) the allocation of the first case management conference on the first available date not less than 25 working days

302 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 54. See also Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [17] and [76]. As a result of the Family Court Review a new standard case management process was introduced, but that was limited to applications under the Care of Children Act 2004, as these were the largest single category of applications before the Family Court, and where costs were increasing the most: Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [26].

303 See recommendation in Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 10.

304 Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 157.

305 In doing so we affirm the views in the Law Commission's earlier publication *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

306 Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

307 District Court Rules 2014, r 7.2. Similar rules also applied, until 1 September 2017, in the High Court. The High Court Rules 2016 now provide that parties are first subject to a case management review and at that review the judge can allocate a case management conference if satisfied that the filed memoranda meet the necessary requirements: High Court Rules 2016, r 7.3.

after the statement of defence is filed (or not less than 50 working days after the filing of the proceeding);[308]

(b) an expectation that, prior to the first case management conference, parties will have provided initial disclosure, carefully considered the pleadings and the principal documents disclosed within, discussed and endeavoured to agree on appropriate discovery;[309]

(c) a requirement that the parties file and serve joint memorandum or separate memoranda addressing a range of issues to be discussed at the conference;[310]

(d) a set agenda for the first case management conference, including the making of a discovery order, the hearing and, if practicable, the disposal of any interlocutory applications, the fixing of a close of pleadings date, a hearing date and a date for any further case management, issues or pre-trial conferences;[311] and

(e) subsequent case management, issues or pre-trial conferences, as directed by the judge.

25.48 A similar process might be appropriate for property matters in the Family Court. However, we are mindful that, given the unique characteristics of PRA proceedings identified above, it would be wrong to treat PRA proceedings as being on all fours with civil proceedings in the District Court. Incorporating the same rules and timeframes from the District Court Rules into the PRA might not be practical. Alternatively, more robust procedures could be included as best practice, for example in the Family Court Caseflow Management Practice Note.

CONSULTATION QUESTIONS

H14 Do you think the current case management process for PRA proceedings is problematic?

H15 If so, should a process similar to the District Court case management process be adopted? If not, what?

308 District Court Rules 2014, sub-r 7.2(2).

309 District Court Rules 2014, sch 3.

310 District Court Rules 2014, sub-r 7.2(2).

311 District Court Rules 2014, sub-r 7.2(3).

Should there be specific provision for single issue hearings?

25.49 A related issue is whether the case management process should provide for single issue hearings, where appropriate. Both the District and High Court rules provide for a question or issue in any proceeding to be decided separately, in advance of the substantive hearing.[312] A single issue hearing is usually ordered when it would expedite proceedings, by limiting or defining the scope of the substantive hearing or by eliminating the need for a trial altogether.[313]

25.50 In PRA proceedings, the High Court has recognised the value in single issue hearings where an applicant must successfully argue that a contracting out agreement should be set aside, before the Court considers an application to divide relationship property:[314]

> *I consider that the statutory scheme will ordinarily require that, before a relationship property claim can be brought in the face of a s 21A or s 21P agreement, the party seeking to bring that claim must first meet the hurdle of having the agreement set aside. I consider that this will conform with the principle in s 1N(d) of the Act. The inexpensive, simple and speedy resolution of issues is likely to be assisted by determining first whether the agreement should be set aside, rather than by requiring parties to engage in a relationship property dispute which they have settled. The setting aside of the agreement can properly be dealt with as a preliminary question by the Family Court. That should, except possibly in cases which may raise some particular consideration, mean that the two aspects must be dealt with separately, and sequentially. I do not consider that considerations of case management will routinely justify the substantive relationship property claim being heard before the right to bring it has been determined.*

25.51 The Family Court Rules do not expressly provide for single issue hearings. When the Rules are silent, the judge must deal with any matters "under provisions of these rules dealing with similar matters" if possible, or "in a way decided by the Judge, in the light of the purpose of these rules."[315] The purpose of the Rules is set

312 See District Court Rules 2014, rr 10.20–10.24 and High Court Rules 2016, rr 10.14–10.21 discussed in Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 158–160.

313 *Innes v Ewing* (1986) 4 PRNZ 10 (HC).

314 *Donsford v Shanly* [2012] NZHC 257 at [26]. See also *F v F* [2015] NZHC 2693. Another example where a single issue hearing might be appropriate is where the partners dispute the existence of a qualifying relationship under the Property (Relationships) Act 1976.

315 Family Court Rules 2002, r 15.

out at paragraph 25.36 above. It is similar to section 1N(d) of the PRA, which the High Court has observed can be met by having a single issue hearing. Therefore we think the Family Court can already order single issue hearings, however, there may be merit in including specific provision for single issue hearings in PRA proceedings, similar to those in the District Court and High Court Rules, along with guidance for the Family Court in the exercise of its discretion.[316]

CONSULTATION QUESTION

H16 Should single issue hearings be available for PRA proceedings in the Family Court?

Option 3: Confirm the duty of disclosure in the PRA or Family Court Rules

25.52 The Court of Appeal has confirmed that parties have a duty of full and frank disclosure in PRA proceedings.[317] One option for reform is to simply codify that duty. A new provision in the PRA or the Family Court Rules could provide that parties have a duty to the court and to each other to give full and frank disclosure of all information relevant to the proceedings in a timely manner. A similar provision exists in Australia.[318] Such a provision may encourage greater voluntary disclosure without the need to make an application to the court for discovery orders.

25.53 One family lawyer argues that, instead of a duty to disclose relevant information, the PRA should recognise that each party has an "absolute entitlement" to documents associated with any property that is the subject of a claim, and that those documents must be provided on request.[319] There should be no onus on the applicant to prove the information is relevant, as the relevance test "serves only to invite the respondent to oppose the provision of documents."[320]

316 *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR10.15.06] details the main criteria that have been taken into account in deciding whether to exercise discretion to order a split trial.

317 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

318 Family Court Rules 2004 (Cth), r 13.01.

319 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6–7.

320 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6–7.

Option 4: Amend the Family Court Rules to improve the quality of initial disclosure[321]

25.54 Improved initial disclosure could simplify the court process, reduce the need to take further steps to obtain full disclosure and reduce the number of court events (judicial conferences). It could also assist parties to settle their disputes early on in the court process. There are different ways initial disclosure could be improved:

(a) One option is to require general discovery of all relevant documents (guided by the essential principles of discovery set out at paragraph 25.11 above) in every case at the outset of the proceedings and without the need for a court order. Guidance could be provided on the extent of the obligation, including the type of information and documents that will usually be relevant.[322] However such a broad requirement may add significant cost and delay to the process. General discovery may not always be appropriate, and applications seeking directions from the court clarifying the extent of discovery may be inevitable.

(b) A second option is for a more tailored requirement for initial disclosure similar to the provisions in the High Court Rules 2016. Those rules require a party to serve, at the same time they serve their pleading, a bundle consisting of all the documents referred to in the pleading, and any additional principal documents in the party's control, and that they used when preparing the pleading and on which they intend to rely at the hearing.[323] The initial disclosure requirement is considered to have helped progress cases in the High Court by assisting in the identification of issues and the settling of pleadings, although some lawyers think initial disclosure is inefficient and has increased their

321 This discussion is based on options identified in Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8.

322 For example r 13.04 of the Australian Family Law Rules 2004 (Cth) requires parties to make full and frank disclosure of the party's direct and indirect financial circumstances, and includes a list of specified matters such as sources of earnings, interest income, property and other financial resources.

323 High Court Rules 2016, r 8.4(1).

workload.[324] Because disclosure is tailored to the issues identified by parties in pleadings, this option might go hand in hand with the option of requiring pleadings, discussed above.

(c) The third option is to provide for a two-stage process of disclosure, like that in Australia and England and Wales. Parties could be required to file a comprehensive financial statement when filing an application or responding to an application.[325] Further financial documents, including recent taxation returns, superannuation documents and valuations of property, must then be exchanged by way of disclosure before the first court date and before any settlement conference.[326]

(d) The final option is the simplest, clarifying in the Rules that a party must attach all supporting documents to their affidavit of assets and liabilities when it is filed and served on the other party. The Rules could specify what documents must be included (if they exist), and these could include valuations, tax returns, trust deeds, financial accounts for any entities in which the party is a shareholder, all superannuation and insurance policies and statements of account, and bank account statements.

25.55 In addition, the parties could be required to confirm to the court that they have complied with their duty of disclosure. The current affidavit of assets and liabilities form already includes a statement to the effect that a party making a false statement could result in an order of the court being set aside and a criminal proceedings being brought, however there is concern that this is generally overlooked.[327] It might be more effective to require the party to file a separate certificate confirming they have made full

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324 This is according to a survey of lawyers and judges carried out in 2015 to assess the effectiveness of the reforms to discovery and case management in the High Court. See Justice Winkelmann and Justice Asher "Effectiveness of the 2011–2012 reforms – report to the profession" (February 2015) Courts of New Zealand <www.courtsofnz.govt.nz>.

325 Family Law Rules 2004 (Cth), r 13.05.

326 Family Law Rules 2004 (Cth), pt 13.2. In England and Wales parties are required to exchange a financial statement not less than 35 days before the first court appointment, and must then serve further documents, including a statement of issues between the parties and a questionnaire setting out a request for further information and documents by reference to the statement of issues. The court determines at the first appointment the outstanding questions to be answered and documents to be produced. See Family Procedure Rules 2010 (UK), rr 9.14–9.15.

327 Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 9.

disclosure, or making such a statement directly to the judge at the conference.[328]

Option 5: Impose stricter consequences for party non-disclosure

25.56 There are several ways in which the court's powers to penalise a non-disclosing party could be enhanced.

(a) First, the PRA or Rules could include better guidance about when the court should order costs to be paid for non-compliance with disclosure requirements.

(b) Second, financial penalties for non-compliance with disclosure requirements could be introduced. This would effectively treat non-disclosure as a form of contempt of court. Non-compliance could be classified as a criminal offence, attracting an infringement penalty or fine. Alternatively, non-compliance could attract a civil pecuniary penalty. A scale of financial penalties could apply depending on the stage of proceedings and the seriousness of the non-disclosure.[329] There are a number of examples of offences used to enforce compliance with court orders.[330] However we are not aware of any criminal or civil pecuniary penalties in New Zealand that apply to breaches of rules or court orders regarding disclosure.[331]

(c) Third, a more extreme option is to enable the court to penalise non-compliance directly from the pool of relationship property. This could be achieved by either empowering the court to make an order compensating one partner for the non-disclosure of the other partner, thereby avoiding the need for an order as to costs,

328 Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 9.

329 Care would need to be taken in drafting any penalty provision to ensure that the nature of either option and level of penalty was proportionate and subject to procedural safeguards. Guidance on the creation of new criminal and infringement offences and pecuniary penalties is available in the Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014).

330 Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at Appendix 1. An example where breach of a Family Court order is an offence can be found in the Care of Children Act 2004, s 78 for intentionally contravening a parenting or guardianship order without reasonable excuse.

331 Following the Family Court Review, Cabinet gave approval to enable the Family Court to impose a financial penalty on parties for serious breaches of court procedures: Minister of Justice *Family Court Review: proposals for reform* (July 2012). Subsequent changes to the Rules did not impose penalties for breaches of disclosure obligations.

or by introducing a rebuttable presumption that the non-disclosing party's share of relationship property is reduced by an amount or proportion that the court considers is reasonable in the circumstances. A version of such a presumption has been adopted by the Supreme Court of British Columbia for cases where there is evidence that one party may be hiding assets.[332]

25.57 It is unclear to us whether these stricter consequences for non-disclosure would be any more effective in incentivising full disclosure than the current range of tools that the Court's disposal. Imposing financial penalties for non-disclosure, particularly from relationship property, would be a significant and novel step in New Zealand. We are interested in hearing views about this and other potential ways to encourage a party to comply with disclosure requirements.

Option 6: Introduce sanctions for lawyers in connection with client non-disclosure

25.58 Currently the Family Court does not appear to have jurisdiction to make a costs order against a lawyer representing a party in PRA proceedings, although it has done so on occasion.[333] Following the Family Court Review, Cabinet gave approval to enable the Family Court to impose a financial penalty on lawyers for a serious breach of court procedures.[334] However, no changes resulted. In contrast, in criminal proceedings the District Court can make a costs order against a defendant's lawyer or prosecutor for a procedural failure,

332 *Cunha v Cunha* (1994), 99 BCLR (2d) 93 (SC). See also *Eng v Eng* [1998] BCJ No 2574 (SC); and *Wu v Sun* 2011 BCCA 239, [2011] BCJ No 914. Referring to the non-disclosure of assets at [9] as "the cancer of matrimonial property litigation", the court in *Cunha v Cunha* held at [13] that if non-disclosure is established at any stage, there is an onus on the non-disclosing party to satisfy the court that full disclosure has been made. If the court is satisfied of this, costs might be the appropriate penalty. Where a non-disclosing party has not satisfied the court that full disclosure of assets has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. The court may then vest all disclosed assets in the other party on the basis of equal division between the parties: *Laxton v Coglon* 2008 BCSC 42, [2008] BCJ No 45. An adverse inference attributing income to a non-disclosing party has since been incorporated in legislation: Family Law Act SBC 2011, c 25, s 213. The court in *Nearing v Sauer* 2015 BCSC 58, [2015] BCJ No 67 said at [134] that while the remedy in s 213 may be interpreted as allowing the court to impute property as well as income to a person, the court could continue to follow Cunha and the subsequent authorities as the legislation was not intended to replace the common law.

333 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.41]; and *N v S* [2013] NZFC 1061 relying on *Hughes v Ratcliffe* (2000) 14 PRNZ 690 (HC). In contrast, the High Court can award costs against a lawyer: *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1; and High Court Rules 2016, r 14.1. It also has inherent jurisdiction to discipline and strike lawyers off the roll: Senior Courts Act 2016, s 12.

334 Minister of Justice *Family Court Review: proposals for reform* (July 2012).

but only where the failure was significant and there was no reasonable excuse for that failure.[335]

25.59 Lawyers have professional responsibilities to the court and their client in relation to disclosure. A lawyer must advise their client of the scope of their disclosure obligations and ensure to the best of their ability that their client understands and fulfils those obligations.[336] A lawyer's primary duty is to the court and the lawyer must not continue to act for their client if, to their knowledge, there has been a breach of discovery obligations by a client and the client refuses to remedy that breach.[337] Lawyers must also act in a timely manner and not in a way that undermines the processes of the court, so should not engage in unethical discovery practices for the purpose of delay.[338] Lawyers who breach these requirements can face disciplinary action. Sanctions include censure, fines, requiring the refund of legal fees, payment of compensation, suspension or being struck off the roll.[339] Lawyers can also be found in contempt of court for failing to comply with an order or direction of the court.[340]

25.60 There are examples in other jurisdictions of courts having the power to order costs against lawyers for non-disclosure. In Victoria, Australia, the Civil Procedure Act 2010 enables the court to order costs, including indemnity costs, against a lawyer who is responsible for aiding and abetting:[341]

(a) a failure to comply with discovery obligations;

(b) a failure to comply with any order or direction of the court in relation to discovery; or

(c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

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335 Criminal Procedure Act 2011, s 364. In *R v Walker* [2016] NZDC 15474 the District Court ordered a lawyer to pay $250 to the Ministry of Justice and $250 to the Crown solicitor's office for failing to advise the court that the lawyer was not proceeding with a half day pre-trial fixture.

336 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1 cl 13.9.

337 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1, cl 13 and sch 1, cl 13.9.

338 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1, cl 3 and sch 1, cl 13.2.

339 Lawyers and Conveyancers Act 2006, ss 156, 211 and 242.

340 The High Court in *Chen v Wang* [2015] NZFC 3330, [2015] NZFLR 1025 found a lawyer in contempt of court for failing to comply with a direction to appear in court to explain non-compliance with a court order to transfer funds held in trust for interim distribution under the Property (Relationships) Act 1976. The Court referred the complaint to the New Zealand Law Society Disciplinary Tribunal for consideration.

341 Civil Procedure Act 2010 (Vic), s 56. Other examples include legislation that enables a court to order a lawyer to meet "wasted" or "thrown away" costs. These are costs that result, for example, from a lawyer's improper, unreasonable or negligent act or omission, or non-compliance with court rules or orders. See for example the Family Law Rules 2004 (Cth), r 19.10; Federal Court Rules 2011 (Cth), r 40.07; and Senior Courts Act 1981 (UK), s 51(6).

25.61 We are not aware of concerns about widespread lawyer non-compliance with professional standards relating to disclosure. Enabling the Family Court to award costs or imposing a financial penalty on lawyers would be a significant step. While costs can be awarded in other courts in criminal cases, arguably there is a greater need to protect against procedural failures and delays in criminal proceedings as these could impact on a person's right to liberty and to be tried without undue delay.[342] There is a risk that imposing sanctions on lawyers in the context of a single type of civil proceeding is disproportionate, risks confusion and may lead to inconsistency. In the absence of clear evidence of a widespread problem, our preliminary view is that existing avenues are sufficient and appropriate to address any non-compliance with disclosure requirements or court orders in PRA proceedings, but we are interested in receiving views about this.

CONSULTATION QUESTIONS

H17 Do you think that the current disclosure obligations on parties in PRA proceedings are problematic? If so, have we identified all of the issues?

H18 Which of these options for reform do you support, and why?

H19 Are there any other options for reform that you think we should consider?

Option 7: Encourage better use of section 38 inquiries

25.62 One of the procedural tools available to ensure all relevant information is before the court in PRA proceedings is the power to appoint a person to inquire into and report on facts in issue between the parties under section 38 of the PRA.[343]

25.63 Some lawyers consider that section 38 is underutilised.[344] This may be for several reasons, including:

342 New Zealand Bill of Rights Act 1990, s 22 and 25(b).

343 Sub-rule 400(2)(b) of the Family Court Rules 2002 provides that a party may apply to the court for an order under s 38 of the Property (Relationships) Act 1976 if the other party failed to file an affidavit of assets and liabilities, or if the affidavit was inadequate. However, that does not limit the discretion conferred on the court to direct a s 38 inquiry: *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [47]. The judge may order an inquiry under s 38 at a judicial conference: Family Court Rules 2002, sub-r 175D(2)(n)(i).

344 Anne Hinton "Forensic evidence in relationship property cases" (paper presented to New Zealand Law Society Family Law Conference, October 2007) 199 at 205; Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming); and Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

(a) A referee under section 38 lacks the formal procedural powers of a court. They cannot require a person to attend an interview and answer questions, or require the production of documents. This is not usually an impediment in matters of valuation and analysis of financial records but may make the procedure unsuitable for resolving matters of conflicting credibility or personal conduct, as either partner may refuse to cooperate.[345]

(b) Section 38 inquiries have usually been limited to clearly defined discrete topics, and primarily for valuation issues.[346] Commentary observes that:[347]

> *Tempting though the prospect may be, it may come close to abdicating the Court's function to delegate to a referee without procedural powers a wide-ranging investigation into the parties' affairs in general.*

(c) Section 38 inquiries cannot be ordered simply and primarily to assist a party in the preparation of their case.[348] They will usually be easier to justify at an interlocutory stage than at the substantive hearing, when counsel will normally have assured the court that the case is in all respects ready for hearing.[349]

(d) A court may be reluctant to order a section 38 inquiry because it will inevitably lead to additional delay and expense.[350] The cost of a section 38 inquiry is borne by the Crown, although the court may order a party to refund some or all of the cost if it thinks it proper.[351]

25.64 The test for deciding whether to order a section 38 inquiry was recently considered by the High Court in *B v W*.[352] The Court

345 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

346 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.35]; and Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR38.02]

347 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

348 *C v C* (1989) 5 FRNZ 694 (HC).

349 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

350 Anne Hinton "Forensic evidence in relationship property cases" (paper presented to New Zealand Law Society Family Law Conference, October 2007) 199 at 205; and Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

351 Property (Relationships) Act 1976, s 38(4).

352 *B v W* [2016] NZHC 2481, [2017] NZFLR 258.

explained that section 38 inquiries should not be characterised as a remedy of last resort. While in many cases a section 38 inquiry will not be imposed until after less intrusive remedies have been completed (such as the administration of interrogatories and discovery), there may be circumstances in which the court is so lacking in confidence about the ability of a person to provide adequate disclosure that it concludes an independent inquiry is more likely to yield the information sought.[353] Ultimately the Family Court must determine the best means by which any information deficit can be remedied.[354]

25.65 We are interested in submissions on whether, in light of the High Court's clarification in *B v W*, concerns about the utilisation of section 38 inquiries remain. If so, one option for reform might be to enable the court to direct the parties pay the costs of an inquiry (rather than imposing that cost on the Crown and seeking repayment when proper to do so).

CONSULTATION QUESTION

H20 Do you think that changes need to be made to the power to order section 38 inquiries? If so, what?

353 *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [52]–[53].

354 *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [53].

Chapter 26 – Jurisdiction of the courts

Introduction

26.1 The PRA provides that "every application under this Act must be heard and determined in the Family Court."[355] There is no monetary limit on the cases the Family Court can hear, unlike the District Court.[356] The Family Court can, however, transfer proceedings to the High Court if it decides that the High Court is the more appropriate venue to deal with those proceedings.[357] The High Court also hears appeals of Family Court decisions to make or refuse to make an order, dismiss the proceedings or otherwise finally determine the proceedings.[358]

26.2 In this chapter we discuss the roles of the Family Court and the High Court under the PRA. We identify some issues with their respective jurisdictions and propose options for reform.

The Family Court as a specialist court

26.3 The Family Court is a division of the District Court.[359] It was established by the Family Court Act 1980[360] as a specialist forum for resolving conflicts affecting family life.[361] The Family Court Act includes provisions that promote the specialist nature of the Court:

(a) **Family Court Judges are specialists**: a person cannot be appointed to be a Family Court Judge unless he or she

355 Property (Relationships) Act 1976 (PRA), s 22(1). Section 22(2) states that this is subject to other provisions of the PRA that confer jurisdiction on any other court.

356 The general civil jurisdiction of the District Court is limited to claims not exceeding $350,000: District Court Act 2016, s 74.

357 Property (Relationships) Act 1976, ss 22(2) and 38A.

358 Property (Relationships) Act 1976, s 39.

359 Family Court Act 1980, s 4.

360 The statute was originally enacted as the Family Courts Act 1980, but the title was changed to the Family Court Act 1980 in 2017, pursuant to the District Court Act 2016, s 249(a).

361 The Family Court was established by the Family Court Act 1980, following the recommendation of the Royal Commission on the Courts: David Beattie "Royal Commission on the Courts: Report 1978" [1978] VII AJHR H2 at 146.

is, by reason of "training, experience, and personality, a suitable person to deal with matters of family law."[362]

(b) **The Family Court is accessible:** Family Court Judges are stationed in towns across New Zealand, as determined by the Principal Family Court Judge.[363] In 2017, there were 70 Family Court Judges sitting across New Zealand.

(c) **Proceedings are private:** unless legislation provides otherwise, hearings are not open to the public (although accredited news media reporters and any person whom the Family Court Judge permits to be present can attend),[364] and there are restrictions on the publication of information that could identify parties and other affected persons in certain circumstances.[365]

(d) **Proceedings are informal:** Family Court proceedings must be conducted in such a way as to avoid unnecessarily formality.[366] The Family Court has flexibility in what evidence it may hear.[367]

(e) **Conciliation is promoted:** lawyers acting for any party or proposed party in a Family Court proceeding must, so far as possible, promote conciliation.[368]

(f) **Counsellors may be appointed:** the Family Court may appoint counsellors to assist it to perform its functions.[369]

26.4 In addition to its jurisdiction under the PRA, the Family Court has jurisdiction to determine proceedings under the Marriage Act 1955, the Adoption Act 1955, the Care of Children Act 2004, the Domestic Actions Act 1975, the Family Proceedings Act 1980, the Child Support Act 1991, the Oranga Tamariki Act 1989, the Law

362 Family Court Act 1980, s 5(2)(b).

363 Family Court Act 1980, s 9.

364 Family Court Act 1980, s 11A.

365 Family Court Act 1980, s 11B.

366 Family Court Act 1980, s 10(1).

367 Family Court Act 1980, s 12A enables a Family Court to, in respect of some legislation (including the Property (Relationships) Act 1976), receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

368 Family Court Act 1980, s 9A.

369 Family Court Act 1980, s 8.

Reform (Testamentary Promises) Act 1949, the Family Protection Act 1955, the Civil Union Act 2004 and the Wills Act 2007.[370]

History of the Family Court's jurisdiction under the PRA

26.5 Prior to 2001, the Family Court and the High Court had concurrent jurisdiction to hear proceedings under what was then called the Matrimonial Property Act 1976 (1976 Act).[371] This meant that a person could file an application under the PRA in either court. In 1988 a Working Group was established by the Government to review the 1976 Act, and by that time the "great majority" of cases were being heard in the Family Court.[372] The Working Group recommended that concurrent jurisdiction be abolished, and that all cases be heard in the Family Court.[373] The Government adopted that recommendation and in 1998 introduced legislation that gave the Family Court exclusive jurisdiction under the 1976 Act.[374] The Parliamentary select committee considering the amendments gave the following reasons for abolishing concurrent jurisdiction:[375]

(a) Concurrent jurisdiction with the District Court[376] was retained in the 1976 Act largely for reasons of caution. However since 1976, a specialist Family Court had been created, and it was appropriate to recognise this.

(b) Concurrent jurisdiction was sometimes used for tactical advantage, often to disadvantage the poorer spouse.

(c) The change reflected the more general move to expand the jurisdiction of the District Court (of which the Family Court is a division).

370 Family Court Act 1980, s 11(1).

371 Matrimonial Property Act 1976, s 22.

372 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 39.

373 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 39.

374 Matrimonial Property Amendment Bill 1998 (109-1), cl 23, enacted as the Property (Relationships) Amendment Act 2001, s 23.

375 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 30.

376 Matrimonial Property Act 1976, s 22 (repealed). The District Court was known as the Magistrates Court prior to 1980.

(d) Costs were likely to be lower for proceedings in the Family Court because its procedures are less formal than those of the High Court.

26.6 The 2001 amendments further limited the High Court's role in PRA proceedings by abolishing its power to order the transfer of proceedings from the Family Court, and by restricting the grounds on which proceedings could be transferred.[377] Under the new provisions, only a Family Court judge could transfer proceedings to the High Court, and only when satisfied that the High Court was the more appropriate venue for dealing with the proceedings, "because of their complexity or the complexity of a question in issue in them."[378]

26.7 The High Court in *Corbitt v Rowley* observed these changes "were clearly intended to reinforce the specialised jurisdiction of the Family Court."[379] They were not, however, universally supported. Chief Justice Dame Sian Elias was concerned that the amendments risked undermining the right of litigants to bring cases in the High Court without systematic review.[380] The Chief Justice observed:[381]

> *There are many cases in which matrimonial property and family protection claims are inextricably intertwined with other legal disputes, particularly issues affecting trusts. It would be unfortunate if such cases had to be divided rigidly between the High Court and the District Court.*

26.8 Since 2001, the Family Court's exclusive jurisdiction under the PRA has been revisited on several occasions. In 2011, the Family Court Review identified that relationship property disputes "are not so much about personal relationships as they are about property."[382] It considered whether such cases may be best dealt with in the District or High Courts, given some of the issues involved.[383] While the Family Court's jurisdiction under the

377 Prior to 2001, the threshold for transfer was simply that any proceedings or questions in proceedings "would be more appropriately dealt with" in the High Court: Matrimonial Property Act 1976, s 22(2) (repealed).

378 Property (Relationships) Amendment Act 2001, s 23, adding the new s 22(3) to the Property (Relationships) Act 1976.

379 *Corbitt v Rowley* 27 FRNZ 852 (HC) at [25].

380 Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 1.

381 Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 1.

382 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

383 Including issues about the Family Court's limited powers to deal with matters concerning trusts. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 26.

PRA did not change as a result of that review, the grounds for transferring proceedings to the High Court were broadened to help in "easing the transfer of relationship property disputes from the Family Court to the High Court."[384]

26.9 In 2013 the Law Commission considered the Family Court's jurisdiction under the PRA in the context of its review of the law of trusts.[385] The Commission observed that there was an issue – which we explore in detail below – with the extent of the Family Court's power to resolve PRA proceedings involving trust property. The Commission recommended that the Family Court be given powers to make orders in respect of trusts when it is dealing with PRA proceedings.[386]

The limited role of the High Court in PRA proceedings

26.10 The High Court has a limited role under the PRA to hear and determine:

(a) proceedings transferred to the High Court by order of the Family Court;[387] and

(b) appeals against decisions of the Family Court made under the PRA.[388]

26.11 Although the PRA states that "every application under this Act must be heard and determined in the Family Court",[389] in *Jew v Jew*, the High Court said that the Family Court's exclusive jurisdiction only applies to applications seeking orders for the division of relationship property under section 25(1) of the PRA.[390] This means that the Family Court does not have exclusive

384 Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3.

385 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

386 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 194–196.

387 Property (Relationships) Act 1976, s 38A.

388 Property (Relationships) Act 1976 (PRA), s 39. Appeals to the High Court are by way of rehearing. The approach the High Court takes on appeal is set out in *B v F* [2010] NZFLR 67 (HC) at [8], applying the principles of the Supreme Court decision of *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. The approach in *B v F* has been adopted in several subsequent cases, including *J v J* [2014] NZHC 1495 at [24] and *Grieg v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [11].

389 Property (Relationships) Act 1976, s 22(1).

390 *Jew v Jew* [2003] 1 NZLR 708 (HC) at [41] followed in *B v F* [2012] NZHC 722, [2012] NZFLR 661 at [31]; *Sloan v Cox* [2004] NZFLR 777 (HC) at [39]; *Hayes v Parlane* [2014] NZHC 2416 at [58]; and *Minister of Education v M* [2017] NZHC 47 at [19]. In addition to determining the status of property owned in the name of a trust, the High Court in *Jew v Jew*

jurisdiction to make orders under other sections of the PRA, including under section 25(3) to make declarations relating to the status, ownership, vesting or possession of any specific property.

26.12 In some circumstances therefore the High Court can make declarations affecting rights under the PRA, either in exercising its inherent jurisdiction[391] or its jurisdiction under the Declaratory Judgments Act 1908. In *Jew v Jew*, the High Court determined that it had jurisdiction to make a declaration that a family trust does not hold any property which constitutes relationship property.[392] In *Hayes v Parlane* the High Court determined it had jurisdiction to make a declaration there was no qualifying de facto relationship for the purposes of the PRA.[393]

26.13 The High Court recently confirmed that the effect of *Jew v Jew* is that the High Court has concurrent jurisdiction with the Family Court in at least two situations (provided it is not dividing relationship property):[394]

(a) where the property is vested in a third party (as in *Jew v Jew*); and

(b) where the property is claimed by a third party not in the relationship.[395]

26.14 We discuss the application of the PRA to third parties below.

The PRA is a (partial) code

26.15 Section 4(1) of the PRA provides:

also considered it could make orders against one partner's separate property and in appropriate circumstances utilise the provisions of s 44 of the Property (Relationships) Act 1976: *Jew v Jew* [2003] 1 NZLR 708 (HC) at [44].

391 The High Court exercises inherent as well as statutory jurisdiction. Inherent jurisdiction enables the High Court to deal flexibly with issues not covered by established procedure, and to protect the administration of justice. Inherent jurisdiction is not shared with any other court. See: Law Commission *Delivering Justice for All: A Vision of New Zealand's Courts and Tribunals* (NZLC R85, March 2004) at 258. The jurisdiction of the High Court is affirmed in s 12 of the Senior Courts Act 2016, replacing s 16 of the Judicature Act 1908.

392 *Jew v Jew* [2003] 1 NZLR 708 (HC) at [38]. However, if a question as to relationship property arises in any proceeding it must be determined in accordance with, and by application of, the principles set out in the Property (Relationships) Act 1976 (PRA), pursuant to s 4(4) of the PRA: *Jew v Jew* [2003] 1 NZLR 708 (HC) at [41]; *B v F* [2012] NZHC 722, [2012] NZFLR 661 at [37]; and *Sloan v Cox* [2004] NZFLR 777 (HC) at [40].

393 *Hayes v Parlane* [2014] NZHC 2416 at [67]. In that case the application was made under the Declaratory Judgments Act 1908.

394 *Minister of Education v M* [2017] NZHC 47 at [19]–[24], affirming *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [59]–[61]. See also *Hayes v Parlane* [2014] NZHC 2416 at [59]; and *K v S* [2014] NZHC 2765 at [33].

395 As in *Minister of Education v M* [2017] NZHC 47, where the plaintiff sought to claim an interest in the family home in order to recover the value Mrs M had stolen from a third party.

> This Act applies instead of the rules and presumptions of the common law and equity to the extent that they apply—
>
> (a) to transactions between spouses or partners in respect of property; and
>
> (b) in cases for which this Act provides, to transactions—
>
> (i) between both spouses or partners and third persons; and
>
> (ii) between either spouse or partner and third persons.

26.16 Section 4(4) then provides:

> Where, in proceedings that are not proceedings under this Act, any question relating to relationship property arises between spouses or partners, or between either or both of them and any other person, the question must be decided as if it had been raised in proceedings under this Act.

26.17 Section 4A provides that every enactment must be read subject to the PRA, unless it, or the PRA, expressly provides otherwise.

26.18 The effect of these provisions is that the PRA is a code that "will trump all other regimes (legislative, or common law) where these may otherwise control relationship property, whatever court the issue is being heard in."[396] This is illustrated in *Shirtliff v Albert*, where the High Court determined it did not have jurisdiction to consider the plaintiff's application under the Property Law Act 2007 for orders to sell the jointly owned former family home, as the exclusive jurisdiction of the PRA prevailed.[397]

26.19 The PRA is not, however, an exhaustive code. This is because the PRA only applies to transactions between partners regarding property, and, where the PRA provides, transactions between either or both partners and third parties.[398] The PRA will not apply in all circumstances where the property rights of partners are in issue.[399] As observed in Fisher on Matrimonial and Relationship Property:[400]

396 *Minister of Education v M* [2017] NZHC 47 at [9]. See also *Official Assignee v Williams* [1999] 3 NZLR 427 (CA) at [20].

397 *Shirtliff v Albert* [2011] NZFLR 971 (HC) at [13] and [16].

398 It is observed in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.25] that the intention with respect to third parties seems to be that transactions with third parties are affected by the Property (Relationships) Act 1976 (PRA) only where there are express provisions to that effect. The application of the PRA to third parties is discussed below.

399 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.24].

400 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.23].

> *The [PRA] may therefore be regarded as the principal source of law for determining property disputes between spouses and de facto partners, rather than an exhaustive code as to relationship property rights in all circumstances.*

26.20 There is still scope for the common law and equity to apply in limited circumstances. In *M v M*, the Court of Appeal confirmed that section 4(1) did not preclude a remedy in equity for breach of fiduciary duty by one partner against the other:[401]

> *In terms of s 4(1) the [PRA] has effect in place of the rules and provisions of the common law and of equity to the extent, and only to the extent, that they apply to transactions between husband and wife in respect of property. Its concern is with the identification and classification of interests in property, their value and division. Accounting for a profit arising from breach of fiduciary duty is a different inquiry from the just division of matrimonial property… The section is not directed to a breach of an equitable obligation of that kind resting on all fiduciaries.*

26.21 The courts have also upheld claims between partners outside the PRA for negligent misstatement and deceit,[402] specific performance,[403] and claims in conversion and trespass.[404] Nor does section 4 prevent debt recovery proceedings against a former

401 *M v M* (1996) 15 FRNZ 15 (CA) at 20. See also *D v D* (1995) 13 FRNZ 623 (FC) at 639; and *Q v Q* (2005) 24 FRNZ 232 (FC) at [157]–[164].

402 In *K v K* [2008] NZFLR 30 (HC) at [31]–[35] the plaintiff wife accused the defendant of negligent misstatement, breach of duty of care, and deceit in relation to the transfer of a property to a trust contrary to an agreement and without the wife's knowledge. Note that s 51 of the Property (Relationships) Act 1976 permits spouses and civil union partners to bring proceedings against each other in tort, reversing a previous statutory restriction. The Court of Appeal in *K v K* [2009] NZCA 14, [2009] NZFLR 705 confirmed that this did not override s 4, but, affirming *M v M*, the claim did not hinge on an alleged property transaction and was therefore not barred by s 4.

403 In *Wallis v Wallis* (1990) 6 FRNZ 645 (HC) the plaintiff sought specific performance of an agreement between the spouses as purchasers of a property and a third party as vendor. Proceedings under the Matrimonial Property Act 1976 were pending. Dismissing the defendant's application for a stay of proceedings, the court held that there was no provision in the 1976 Act that enabled the issue (enforcement of an agreement with a third party) to be determined under that Act. See also *Sloan v Cox* [2004] NZFLR 777 (HC), where the plaintiff sought enforcement of an agreement between partners to transfer a formerly jointly owned property to the parties as tenants in common. The defendant applied to strike out the application on the basis that the Property (Relationships) Act 1976 (PRA) was a code that governed property issues between de facto partners. However, it was arguable that there was no qualifying de facto relationship under the PRA, and for that reason alone the court held at [32] that the strike out application failed.

404 In *[LC] v B* [2012] NZHC 898 the High Court determined it had jurisdiction to determine the plaintiff's claim in conversion and trespass to goods, regardless of the underlying relationship property dispute. The plaintiff company, controlled by Mrs B, alleged the second defendant company, controlled by Mr B, had unlawfully removed certain stock and equipment following their separation. The High Court held at [24] and [26] that the proceeding did not relate to the classification or division of relationship property, and s 4 of the Property (Relationships) Act 1976 (PRA) was not engaged. Similarly, in *A v B* [2015] NZHC 487 the plaintiff alleged conversion, trespass and negligence, in relation to the defendant's retention and use of certain chattels and other property following their separation, alongside a claim under the Domestic Actions Act 1975. The defendant filed PRA proceedings in the Family Court. The High Court declined the defendant's application to strike out proceedings, noting at [30] that the claims in tort were not issues which could be readily determined by the Family Court in the context of the PRA.

partner[405] or against a trust established for the benefit of one or both partners.[406]

26.22 Similarly, a relationship property dispute will not stop claims for relief under the Companies Act 1993 regarding companies in which both partners hold shares, including interim relief in an injunction,[407] and prejudiced shareholder claims under section 174 of the Companies Act.[408] While shares in a company can be relationship property, assets of a company are not.[409]

Is this problematic?

26.23 Sometimes a partner may, in addition to a PRA claim, have a claim under another area of the law at the end of a relationship. While this may create some procedural problems (especially if the Family Court does not have jurisdiction under that other area of law), we do not think that the PRA should legislate for all possible eventualities. In other parts of this Issues Paper we explore options to extend the application of the PRA in specific circumstances. In particular in Part G we consider whether the PRA should apply to trust property. However outside these specific circumstances, we think it is appropriate that former partners should continue to be able to exercise rights under the ordinary rules of common law and equity, or claims under another statute, when the PRA does not apply.

405 *[LC] v H* [2013] NZHC 294, [2013] NZFLR 658. See also *K v S* [2014] NZHC 2765, involving debt recovery proceedings brought by the defendant's former partner, and by the former partner's parents, as trustees of a family trust.

406 See *Shailer v Shailer* [2015] NZHC 250 and *R L Humphries Trustee Ltd v Humphries* [2016] NZHC 57. Proceedings against trusts are discussed in greater detail below.

407 In *S v B* [2013] NZHC 497 the parties were in a de facto relationship and had recently separated. They were directors and equal shareholders in a company. The defendant threatened to close down the business, and the plaintiff applied to the High Court for an interim injunction to prevent the defendant from doing so. The Court considered the underlying relationship property dispute but at [8] determined that was not sufficient to persuade the Court that the injunction should not be made.

408 In *B v F* [2012] NZHC 722, [2012] NZFLR 661 a property dispute arose following the parties' separation, but the claims were made as between two trusts. One claim was for relief under s 174 of the Companies Act 1993 in respect of a company that was allegedly held for the equal benefit of the two trusts. The High Court, adopting the decision in *Jew v Jew* [2003] 1 NZLR 708 (HC), considered at [37] it had jurisdiction to hear the claims, and that the effect of s 4(4) of the Property (Relationships) Act 1976 (PRA) was not to oust the jurisdiction of any court hearing proceedings which are not brought under the PRA, but that the court hearing the proceeding must determine any issue relating to relationship property as if it had been raised in proceedings brought under the PRA.

409 *[LC] v B* [2012] NZHC 898 at [23].

Issues with the Family Court's jurisdiction

26.24 While section 22(1) of the PRA states that "every application under this Act must be heard and determined in a Family Court", there are limits regarding:

(a) the PRA's application to property disputes at the end of a relationship; and

(b) the Family Court's jurisdiction to hear and determine such disputes.

26.25 These limits mean that sometimes the Family Court may not have the jurisdiction to resolve all property disputes that arise at the end of a relationship. In these cases, further proceedings in different courts may be necessary. This gives rise to a further issue: the limited role of the High Court in PRA proceedings. This is a particular concern in relation to proceedings involving trusts. We discuss these issues below.

Issue 1: Can the Family Court decide whether a valid trust exists?

26.26 The PRA only applies to property that is owned by one or both partners unless it expressly provides otherwise.[410] This means that property held on trust in which neither partner holds a beneficial interest is normally excluded from the PRA.[411] In Part G we discuss the limited exceptions to this rule and the different actions and remedies that exist outside the PRA in respect of trust property.

26.27 A separate issue is whether the Family Court can, when hearing an application under the PRA, determine whether a valid trust exists. This issue can arise in at least two scenarios:

(a) Where one partner claims that the person who settled the property on the trust (the settlor) and the trustee intended to create different rights and obligations to those set out in the trust deed. In that case there is a

410 *Jew v Jew* [2003] 1 NZLR 708 (HC) at [38]; and *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [63].

411 Section 4B of the Property (Relationships) Act 1976 provides that nothing in ss 4 or 4A affects the law applying to partners acting as trustee, thus preserving the law relating to trusts. See Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1205. While the Family Court has the power under s 33(3)(m) of the PRA to make an order varying the terms of any trust (other than a trust under a will or other testamentary disposition), that does not confer on the Court an originating jurisdiction. That is, orders under s 33 "may only be made if they are necessary or expedient to give effect or better effect to orders made pursuant to ss 25–32: *B v M* [2005] NZFLR 730 (HC) at [223] referring to *Munro v Munro* [1997] NZFLR 620 (FC) at 622.

"sham" and the trust is therefore invalid. If a trust is declared invalid it means that no trust exists, and the property reverts back to the settlor. If the settlor was a partner, then that property may be subject to the rules of division under the PRA.

(b) Where one partner claims that trust property is subject to an institutional constructive trust[412] for the benefit of one of the partners. If a constructive trust exists, the partner's beneficial interest in that trust may be subject to the PRA's rules of division.

26.28 In *Yeoman v Public Trust Ltd* the High Court explored the extent of the Family Court's powers under the PRA.[413] It explained:

(a) Division of relationship property under the PRA includes inventory-taking, ascertaining relationship debts, applying division provisions under Part 4 of the PRA and making orders under Part 7.[414]

(b) At the inventory stage, the Family Court considers whether the item is "property" within the definition in section 2 of the PRA, whether one or both partners has a beneficial interest in that item,[415] and whether the interest is relationship property or separate property.[416] When the Family Court identifies property beneficially owned by one or both of the partners it applies the general rules of property law, including statute law, the common law and equity.[417]

(c) The Family Court's function at the inventory stage is declaratory only. It simply recognises and identifies the property interests held beneficially by the partners. It does not make orders conferring new rights.[418]

412 An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the court simply recognises in a declaratory way, as opposed to a remedial constructive trust, which is imposed by the court as an equitable remedy. See *Fortex Group Ltd (in rec, in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) discussed in *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [36]. The Court of Appeal has, in a series of recent decisions, confirmed that a constructive trust can be imposed over trust property: see *Murrell v Hamilton* [2014] NZCA 377 at [22]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [71]; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397.

413 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

414 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

415 Applying the definition of "owner" in s 2 of the Property (Relationships) Act 1976, which means "the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity."

416 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

417 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [35].

418 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [36] and [38]. The court at [36] referred to the Court of Appeal decision in *Fortex Group Ltd (in rec, in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173, and the distinction between

(d) If an asset is in the apparent ownership of one or both partners, and a third party contends that he or she has an interest in that asset, the Family Court can determine the extent of the third party's interest at the inventory stage.[419]

(e) However, when the Family Court determines which property interests are relationship property, its decision binds only the partners. It does not make determinations that bind third parties.[420]

(f) If one party contends there are assets which belong in the relationship property pool but those assets are in the apparent ownership of a third party, separate proceedings outside the PRA may be required in order to establish relevant beneficial ownership.[421]

26.29 The High Court in Yeoman then explained how the Family Court's inventory function under the PRA operates regarding trust property.[422] It said the Family Court can, at the inventory stage, declare the extent of rights held by the partners regarding trust property, and whether those rights constitute relationship property under the PRA. The Court makes that determination "as between the partners."[423] In the common case where a partner is one of the trustees, and the trustees contend that the partners have no beneficial interest in the trust property, the Court observed:[424]

> *As the situation arises so often, it would be unfortunate if separate proceedings had to be taken in another court to determine the extent of any beneficial ownership. In many cases it should be*

an institutional constructive trust, which arises by operation of the principles of equity and whose existence the court simply recognises in a declaratory way, and a remedial constructive trust, which is imposed by an order of the court and would not exist without such an order.

419 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [43]. See for example *M v N* FC Opotiki FAM 2002-047-42, 18 September 2008. In that case, the respondent claimed at [7] that his legal interest in a residential property was held as a trustee of a constructive or express trust for his mother, and therefore the Family Court did not have jurisdiction under the Property (Relationships) Act 1976 (PRA) to make declarations as to the ownership of that property. The Court rejected that argument, noting at [19] that it is a fundamental function of the Court to determine whether or not the disputed property comes within the definition of relationship property under the PRA. See also *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011, where the High Court suggested that the Family Court may be able to determine third party property interests where there has been a intermingling of third party property with property subject to the PRA. In that case the High Court confirmed at [65] that the Family Court was able to determine the interest that a child of the parties held in the family home in circumstances where the appellant had received an inheritance for the benefit of the child, but had invested it in the family home.

420 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39].

421 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [40].

422 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [44]–[45].

423 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [60].

424 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [45].

> *possible for the Family Court to make findings that bind only the relationship partners as parties to the proceeding and that decide the extent of beneficial ownership of trust assets. Such findings could not bind the trustees, but they may still be adequate to ascertain the extent of assets to be brought into account for a division of relationship property.*

26.30 A similar observation was made by the High Court in *F v F*:[425]

> *It is not unusual for the Family Court to have to determine whether either or both of the parties have, during a relationship, acquired a beneficial or equitable interest in property nominally owned by a third party, including trustees. The PRA requires the Family Court to make such determinations and to then bring any property into account between the parties when determining entitlements under the PRA. There is no limit to the Family Court's jurisdiction in this regard.*
>
> *The limits on jurisdiction for the Family Court only become a potential problem if either of the parties is seeking to obtain judgment against a third party, including trustees, based on a claim in equity such as constructive trust.*

26.31 Accordingly, the Family Court's inventory-taking function under the PRA involves the identification of partners' beneficial property interests. But case law is inconsistent on whether, when performing this function, the Family Court can determine the validity of a trust when that is disputed between the parties.

26.32 In *F v W* the High Court considered that the Family Court did not have jurisdiction to declare a trust a sham in PRA proceedings.[426] It said that if Parliament had intended to give the Family Court a statutory jurisdiction to declare a trust to be a sham it would have said so.[427] In the absence of any clear statutory direction, only the High Court could do so, exercising its inherent jurisdiction.[428] A different conclusion was reached in *B v X*.[429] After noting the decision in *F v W*, the High Court held there was no problem of jurisdiction for the Family Court to consider whether a trust is a sham. To do so is to apply the common law of fraud, and the Family Court, as a statutory court, has the jurisdiction to find

425 *F v F* [2015] NZHC 2693 at [102]–[103].

426 *F v W* (2009) 2 NZTR 19-024 (HC) at [29]–[31].

427 *F v W* (2009) 2 NZTR 19-024 (HC) at [33].

428 *F v W* (2009) 2 NZTR 19-024 (HC) at [31] and [34].

429 *B v X* [2011] 2 NZLR 405 (HC).

facts, including detecting fraud, when examining the dealings of the parties.[430]

26.33 The case law is also inconsistent as to whether the Family Court has jurisdiction to decide if property is held on constructive trust. The High Court in *F v W*, while stating that the Family Court could not declare a trust a sham, did consider that it could determine whether a constructive trust existed over trust property.[431] In contrast is *Clark v Clark*.[432] In that case, the partners had lived together on a farm which was held on trust. Following their separation Mrs Clark filed PRA proceedings in the Family Court and also sought a declaration in the High Court that the farm was held for Mr Clark on either an express or institutional constructive trust. The High Court noted that it "is necessary for her to obtain such an order if she is to obtain any property relationship order in relation to the [farm]."[433] The PRA application was transferred by the Family Court to the High Court who dealt with the issues together, finding that the farm was held on an institutional constructive trust in favour of Mr Clark and that it was therefore his separate property, and within the scope of the PRA.

26.34 These issues were also addressed in the more recent case of *F v F*, where the High Court had to consider if the Family Court could deal with various challenges to the validity of a trust.[434] It said that:[435]

> *Mr Knight suggested that the evidence before the Court provides a basis for allegations of equitable claims "by way of alter ego, sham and tracing". These are not causes of action. Rather, they are matters which the Court may have to consider in determining what property is owned by the parties personally, what dispositions may have occurred in relation to that property and how the ultimate value of that property should be brought into account between the parties on application of the PRA. The Family Court is well used to dealing with such issues. In that context, it is not unusual for the Family Court to have to*

430 *B v X* [2011] 2 NZLR 405 (HC) at [72]–[75].

431 *F v W* (2009) 2 NZTR 19-024 (HC) at [40]–[42]. The court does not explain why the Family Court has jurisdiction to resolve constructive trust claims but not claims of a sham.

432 *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534.

433 *Clark v Clark* [2012] NZHC 3159 at [15].

434 *F v F* [2015] NZHC 2693.

435 *F v F* [2015] NZHC 2693 at [45].

determine whether property is truly held on an express trust or a constructive trust.

26.35 At the time of writing, the Court of Appeal has not had to rule on the Family Court's jurisdiction to determine whether property in dispute is held on an express trust or a constructive trust.

Issue 2: Does the Family Court have a general civil jurisdiction?

26.36 The PRA operates as a partial code, so sometimes a partner may have a claim in common law or equity against a former partner, or against a third party (for example, where trust property is held by a third party trustee). As we have identified above, it is not clear whether the Family Court has jurisdiction under the PRA to decide issues that arise when property is in the apparent ownership of a third party (such as trust property), and enforce its decision on third parties. Sometimes related claims might also arise outside the PRA, such as claims between partners of misrepresentation or deceit during post-separation property negotiations.[436] It is therefore necessary to explore the extent of the Family Court's general civil jurisdiction to hear and determine such claims alongside PRA proceedings.

26.37 The extent of the Family Court's civil jurisdiction, including its jurisdiction in equity, is unclear and is subject to debate and inconsistent decisions.[437]

The Family Court's statutory jurisdiction

26.38 The Family Court is established by statute and it only has jurisdiction over those matters conferred on it by statute. It does not have inherent jurisdiction, unlike the High Court. Within its statutory jurisdiction, however, the Family Court has "the right to do what is necessary to enable [it] to exercise functions, powers and duties conferred on [it] by statute" (its "inherent powers").[438]

436 See paragraphs 26.20-26.21 above.

437 Bruce Corkill and Vanessa Bruton "Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court" (paper presented to New Zealand Law Society Trusts Conference, 2011) 103 at 103. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Thomson Reuters) at [1.36].

438 *F v W* (2009) 2 NZTR 19-024 (HC) at [33]; and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [24] citing *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA), at 276.

26.39 Section 11 of the Family Court Act provides that the Family Court has jurisdiction to hear and determine PRA proceedings and other specific statutes, and "any other enactment for the time being in force."

26.40 The Family Court is a division of the District Court,[439] and section 16 of the Family Court Act provides:[440]

> … the District Court Act 2016 applies, with any necessary modifications, to the Family Court and Family Court Judges in the same manner and to the same extent as it applies to the District Court and District Court Judges.

The District Court Act 2016

26.41 The District Court Act 2016 came into force on 1 March 2017, replacing the District Courts Act 1947 (1947 Act). While the provisions set out below were largely carried over from the 1947 Act, subtle differences in the text may have a significant impact on their interpretation, as we discuss below. As at the time of writing, there have been no relevant judicial decisions regarding these new provisions.

26.42 The District Court has general civil jurisdiction under section 74 of the District Court Act:[441]

> **74 General civil jurisdiction**
>
> (1) The court has jurisdiction to hear and determine a proceeding—
>
> (a) in which the amount claimed or the value of the property in dispute does not exceed $350,000:
>
> (b) that, under any enactment other than this Act, may be heard and determined in the court.
>
> (2) The amount claimed in a proceeding under subsection (1) may be for the balance, not exceeding $350,000, of an amount owing after a set-off of any claim by the defendant that is admitted by the claimant.

439 Family Court Act 1980, s 4.

440 Family Court Act 1980, s 16(1). In the event of conflict, under s 16(2) the provisions of the Family Court Act prevail. Sections (16)(3) and 16(4) list certain provisions of the District Court Act 2016 that do not apply. These provisions relate to the Chief District Court Judge (s 24), court sessions and adjournments (s 72), and appeals to the High Court (ss 125–130).

441 This replaced s 29 of the District Courts Act 1947.

26.43 Section 4 defines "proceeding" as "any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application."[442]

26.44 The District Court Act confers a broad equitable jurisdiction on the District Court under section 76:[443]

> **76 Jurisdiction in equity**
>
> (1) Subject to other provisions in this Act, the court has the same equitable jurisdiction as the High Court.
>
> (2) However, the court does not have jurisdiction under subsection (1) to hear and determine a proceeding in which the amount claimed or the value of the property that is the subject of the proceeding exceeds $350,000.
>
> (3) Subsection (1) does not apply if an enactment (other than section 12 of the Senior Courts Act 2016) expressly provides that the proceeding is a proceeding or class of proceeding that another court has jurisdiction to hear and determine.
>
> (4) Despite subsection (3), the court may make orders under section 49 of the Administration Act 1969.

26.45 The District Court Act also provides, at section 84:[444]

> **84 Remedies**
>
> Subject to section 109, in a proceeding a Judge may, in the same way as a Judge of the High Court in the same or a similar proceeding,—
>
> (a) grant remedies, redress, or relief:
>
> (b) dispose of the proceeding:

442 This definition remained unchanged from the District Courts Act 1947 definition, in s 2.

443 This replaced s 34 of the District Courts Act 1947, which provided that the District Courts have:

> […] the same equitable jurisdiction as the High Court to hear and determine any proceeding (other than a proceeding in which the amount claimed or the value of the property claimed or in issue is more than $200,000): […]

444 Section 84 of the District Court Act 2016 replaced s 41 of the District Courts Act 1947, which was entitled "General ancillary jurisdiction", and provided that:

> Every court, as regards any cause of action for the time being within its jurisdiction, shall (subject to the provisions of section 59) in any proceedings before it—
>
> (a) grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional; and
>
> (b) give such and the like effect to every ground of defence or counterclaim equitable or legal,—
>
> as ought to be granted or given in the like case by the High Court and in as full and as ample a manner.
>
> Section 84 is subject to s 109 of the District Court Act, relating to the operation of equity and good conscience in proceedings in which the amount claimed or the value of property in issue does not exceed $5,000.

(c) give effect to every ground of defence or counterclaim, whether legal or equitable.

26.46 The parties to a proceeding can also consent to the extension of the District Court's jurisdiction:[445]

81 Extension of jurisdiction by consent

(1) This section applies to a proceeding (including a proceeding in admiralty) that, apart from this section, the court would not have jurisdiction to hear and determine because the amount of the claim or the value of the property or relief claimed or in issue exceeds the monetary limit of the court's jurisdiction.

(2) If the parties to the proceeding or to a counterclaim in the proceeding consent,—

(a) the monetary limit of the court's jurisdiction is extended, for the purposes of the proceeding, to the limit of the amount of the claim or the value of the property or relief claimed; and

(b) the court may hear and determine the proceeding on that basis.

The Family Court's civil jurisdiction - the competing authority

26.47 There is competing authority as to whether section 16 of the Family Court Act, which provides that the District Court Act applies to the Family Court and Family Court Judges, confers the District Court's civil and equitable jurisdiction on the Family Court. As we explain below, two separate lines of High Court authority have developed on this issue. One line of authority is that the Family Court has the same equitable jurisdiction as the District Court, and that the Family Court can exercise its District Court jurisdiction contemporaneously. Another line of authority, however, firmly states that the Family Court does not have the civil and equitable jurisdiction of the District Court, although it has jurisdiction to grant equitable relief. We explore these decisions below. We do so chronologically, to understand the developments that have taken place over time.

26.48 In *Granville v Grace*, the District Court determined that the Family Court did not have the jurisdiction in equity conferred on the District Court by section 34 of the 1947 Act (now section 76 of

445 Section 81 of the District Court Act 2016 replaced s 37 of the District Courts Act 1947.

the District Court Act), to identify and enforce a constructive trust in relationship property proceedings:[446]

> *The jurisdiction of the Family Court is circumscribed by the Family Courts Act 1980 and the Matrimonial Property Act 1963 (now repealed) and the Matrimonial Property Act 1976 [now the PRA]. It does not have wider jurisdiction. It is not possible, as I understand it, for the Court to exercise jurisdiction in equity, independent of those codes…*
>
> *The proceedings have been brought in the Family Court, not in the civil jurisdiction of the District Court, and it is that choice which is the obstacle to relief. Section 11(1) of the Family Courts Act does not clothe the Family Court with any form of jurisdiction under the District Courts Act. The District Courts Act does not confer such jurisdiction so s 11(2) does not assist either. The civil jurisdiction of the District Court must be invoked expressly, and the proceedings brought under the District Courts Rules 1992 before a remedy can be given in equity.*

26.49 The Court did not consider the effect of section 16 of the Family Court Act.

26.50 In *Burt v Skelley*, the High Court had to consider the slightly different question of whether the Family Court could grant equitable relief in proceedings under the Family Protection Act 1955.[447] Therefore *Granville v Grace*, which considered the question of equitable jurisdiction, did not assist.[448] The Court in *Burt v Skelley* held that the Family Court had jurisdiction to grant equitable relief, in that case to make an order based on the equitable remedy of tracing:[449]

> *The relevant provision is s 16 of [the Family Court Act] applying the generality of the District Courts Act 1947, with necessary modifications, to Family Courts. That importation into the Family Court structure brings with it s 41 of the District Courts Act 1947 [now s 81 of the District Court Act 2016] conferring general ancillary jurisdiction. The effect is that the Family Court, as regards the Family Protection Act cause of action within its jurisdiction has power (indeed obligation), to grant "such relief, redress, or remedy…" as would be granted in like case by the High Court. This is not conferring additional basic jurisdiction, such*

446 *Granville v Grace* [1995] NZFLR 905 (DC) at 909–910. The District Court considered that, while it had wide ranging jurisdiction in equity under s 34 of the District Courts Act 1947, the obstacle to relief was the applicant's decision to bring proceedings in the Family Court, rather than the District Court.

447 *Burt v Skelley* (1998) 17 FRNZ 152 (HC).

448 *Burt v Skelley* (1998) 17 FRNZ 152 (HC) at 158.

449 *Burt v Skelley* (1998) 17 FRNZ 152 (HC) at 157–158.

> *as the spectre of criminal jurisdiction, but merely conferring an ancillary jurisdiction as to relief necessary for the Family Court to act effectively. That is the nature of an equitable tracing order. It is ancillary relief of a procedural character, necessary at times to enable the effective resolution of a cause of action separately established.*

26.51 In *Singh v Kaur*, the High Court considered the wider issue of the Family Court's jurisdiction to deal with civil matters, including claims in equity.[450] Specifically, it considered the Family Court's jurisdiction to consolidate a District Court claim for exemplary damages with a Family Court proceeding under the PRA. The High Court undertook an extensive consideration of the statutory provisions and the case law. Regarding section 11 of the Family Court Act, the Court observed:[451]

> *Section 11 lists proceedings which must be heard and determined by Family Court Judges (who are also District Court Judges pursuant to s 5); that is the effect of subs (2).* But importantly, s 11 does not exclude Family Court Judges from exercising any of the powers of District Court Judges; *it simply requires that proceedings under specified enactments are to be heard and determined only by District Court Judges who are also Family Court Judges.*

26.52 The High Court considered the decision in *Granville v Grace*, but preferred the approach of the High Court in *Pedersen v Vaughan*.[452] There the High Court had determined that a power vested in the District Court could also be exercised by the Family Court contemporaneously.[453] The High Court in *Singh v Kaur* held:[454]

> *In my view there is nothing in the Family Courts Act 1980 which limits the jurisdiction of the Family Court and Family Court Judges so as to exclude the jurisdiction they exercise as District Court Judges. Rather, as Master Williams [in* Pedersen v Vaughan*] concluded, the jurisdiction conferred on the Family Court by s 11 of the Act is "super-added" to the general jurisdiction of the District Court. By s 16 the provisions of the*

450 *Singh v Kaur* [2000] 1 NZLR 755 (HC).

451 *Singh v Kaur* [2000] 1 NZLR 755 (HC) at [30] (emphasis added).

452 *Pedersen v Vaughan* [1990] NZFLR 203 (HC).

453 *Pedersen v Vaughan* [1990] NZFLR 203 (HC) at 208:

> *When one considers those provisions as a whole, the implication which they strongly give is that a Family Court Judge, who must also be a District Court Judge, can sit in both capacities, simultaneously, and contemporaneously exercise the jurisdiction of the Family Courts and the District Courts. That is to say, the implication is that Parliament intended the special jurisdiction of the Family Court should be superadded to the general jurisdiction of the District Court.*

454 *Singh v Kaur* (1999) [2000] 1 NZLR 755 (HC) at [31].

> *District Courts Act 1947 apply to the Family Court except where there is conflict with the Family Courts Act… Thus, Part III of the District Courts Act 1947 which confers jurisdiction on the District Court (and importantly with relevance to this case and most of the decided cases referred to above, the equity jurisdiction of the District Court conferred by s 34 of the District Courts Act), applies to Family Courts and Family Court Judges.*

26.53 On this approach, the Family Court retained the civil jurisdiction of the District Court and in appropriate circumstances could exercise that jurisdiction contemporaneously with its specialist jurisdiction under the Family Court Act.[455] The decision in *Singh v Kaur* has been applied in several subsequent cases.[456]

26.54 In *F v W*, discussed above, the High Court reached a different conclusion. It did not refer to the decision in *Singh v Kaur*. It noted that the Family Court had often considered that it had jurisdiction in equity (to declare a trust a sham in PRA proceedings),[457] but it considered that such jurisdiction came from the High Court's inherent jurisdiction, and that:[458]

> *The ability to grant remedies in equity is not the equivalent of having inherent jurisdiction in the Family Court to declare a trust a sham. This Court is not bound by Family Court decisions which have effectively held otherwise. I respectfully do not agree with those conclusions as to jurisdiction.* The District and Family Courts jurisdiction arises from statute. Inherent jurisdiction is vested only in the High Court. I do not accept that s 34 of the District Courts Act applies.

26.55 On this view, the Family Court could not set aside a trust on the basis of, and make a declaration that, it is a sham. That required

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455 *Singh v Kaur* [2000] 1 NZLR 755 (HC) at [38]–[39].

456 Including by the High Court in *Perry v West* HC Auckland M1331-SD00, 8 September 2000 at [7], and by the Family Court in *C v C* (No 2) [2006] NZFLR 908 (FC) at [36]; *O v S* (2006) 26 FRNZ 459 (FC) at [75] (following *C v C* (No 2)); *A v B* FC Timaru FAM-2005-076-276, 30 June 2006 at [2]; and *M v N* FC Opotiki FAM 2002-047-42, 18 September 2008 at [13]–[14] and *D v P* [2013] NZFC 1254 at [97]. In *D v P*, the Family Court held at [100] that, while the Family Court could exercise the District Court's civil jurisdiction contemporaneously, an application seeking to have a constructive trust imposed under the District Court's civil jurisdiction needed to have been filed in the District Court before it could be consolidated with Family Court proceedings. However, this seems contrary to the earlier High Court decision in *Pedersen v Vaughan* [1990] NZFLR 203 (HC), which confirmed the Family Court could exercise a power vested in the District Court even in circumstances where proceedings had been filed in the Family Court.

457 *F v W* (2009) 2 NZTR 19-024 (HC) at [29].

458 *F v W* (2009) 2 NZTR 19-024 (HC) at [31] (emphasis added). The court at [35] did not consider this conclusion was inconsistent with *Burt v Skelley*, as in that case "their Honours expressly stated that it was not a question of whether s 34 applied." One commentator suggests that the court in *F v W* misinterpreted *Burt v Skelley*. In *Burt v Skelley* the court did not have to consider s 34 at all, because the Family Court in that case already had jurisdiction under s 11, and the issue of a tracing order was ancillary to that primary jurisdiction. Therefore it was not a question of whether s 34 "applied", it was simply not relevant in that case. See Andrea Manuel "Why the Family Court has jurisdiction in equity" New Zealand Lawyer (New Zealand, 17 June 2011) at 10–11.

an exercise of inherent jurisdiction by the High Court.[459] However, as noted above, the Court considered that the Family Court had jurisdiction to determine whether a constructive trust should be imposed on trust property.[460] The Court did not explain the Family Court's source of jurisdiction for considering constructive trust claims.

26.56 While the High Court's conclusion in *F v W* regarding jurisdiction to declare a trust a sham has not been followed subsequently,[461] its conclusion in relation to the Family Court's equitable jurisdiction was followed by the High Court in *Yeoman v Public Trust Ltd*, which determined:[462]

> *[Section 34 of the District Courts Act 1947] cannot be used to confer jurisdiction on the Family Court for a cause of action founded in equity. Under s 2 of the District Courts Act:*
>
> > *proceeding means any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application:*
>
> *Section 34 accordingly applies only to civil proceedings. Section 11(1) of the Family Courts Act does not expressly confer a civil jurisdiction on the Family Court. "Any other enactment for the time being in force" in s 11(1)(h) is not a reference to s 34. Section 34 confers an equitable jurisdiction on the District Court, but further words are required to confer on the Family Court the civil jurisdiction of the District Court. Those further words are absent. No doubt Parliament intended s 11(1)(h) to operate eiusdem generis – to apply only to family law statutes conferring jurisdiction on the Family Court.*

26.57 The High Court in *Yeoman* placed an emphasis on the word "proceeding" in section 34 of the 1947 Act, and its definition in section 2, in determining that section 34 applied only to "civil proceedings". The word "proceeding" did not appear in section 41. The replacement of the 1947 Act with the District Court Act 2016 challenges this interpretation. In particular, section 76, conferring equitable jurisdiction on the District Court, no longer refers to "proceeding", but the section conferring ancillary jurisdiction to

459 *F v W* (2009) 2 NZTR 19-024 (HC) at [34]

460 *F v W* (2009) 2 NZTR 19-024 (HC) at [40]–[42].

461 As discussed above, in *B v X* [2011] 2 NZLR 405 (HC) the High Court came to a very different conclusion to that in *F v W*, on the basis that it was not a question of whether the Family Court had jurisdiction in equity, but rather, the law of sham is part of the common law of fraud, and the Family Court, as a statutory court, has the necessary jurisdiction to find facts and detect fraud: *B v X* [2011] 2 NZLR 405 at [72]–[75].

462 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [27]–[28].

grant equitable relief does (these sections are set out above). If the interpretation of the 1947 Act rested on the word "proceeding", as suggested in *Yeoman*, then applying that interpretation to the 2016 Act could cause the unworkable situation where the Family Court has equitable jurisdiction, but not the power to grant equitable relief.

26.58 In another decision of the High Court one week after *Yeoman* was decided, a different conclusion was reached. In *L v P* the High Court confirmed that the Family Court "has the equitable jurisdiction of the District Court, which equitable jurisdiction is the same as the equitable jurisdiction of the High Court."[463] In that case the Family Court Judge had jurisdiction in PRA proceedings to make orders creating an interest in the family home in favour of a trustee for the child of the partners.[464] The decision in *F v W* was cited in relation to a separate point in that decision,[465] but not as authority on the question of the Family Court's jurisdiction. The High Court in *F v F* took a similar approach. There, discussed below, the Court proceeded on the basis that the limits on the Family Court's jurisdiction in equity were the same as those on the District Court.[466]

26.59 The competing High Court authorities have been considered by the Family Court, in *C v C*[467] and *F v O*.[468] In *C v C* the Family Court preferred the approach in *B v X*, and doubted the Family Court lacked jurisdiction in equity to consider constructive trust claims.[469] However, in *F v O* the Family Court determined that:[470]

> *[The decision in* F v W*] is not confined to the Court's jurisdiction to find that a trust is a sham: the essential finding is that the Family Court has no jurisdiction of any kind as to the validity of trusts.*

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463 *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [81].

464 *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [85]. This was in circumstances where the child's inheritance had been invested in the family home.

465 *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [21] affirming the Family Court's discussion on continuous relationships for the purposes of the Property (Relationships) Act 1976 in *F v W* (2009) 2 NZTR 19-024 (HC) at [49].

466 *F v F* [2015] NZHC 2693 at [40] and [104], where the court said, "If such a claim [against a third party based on a claim in equity] is for an amount or for property of a value in excess of $200,000, it might be necessary to pursue that claim in the High Court."

467 *C v C* FC Rotorua FAM-2007-063-652, 29 April 2011.

468 *F v O* [2012] NZFLR 541 (FC).

469 *C v C* FC Rotorua FAM-2007-063-652, 29 April 2011 at [17]–[19] and [26].

470 *F v O* [2012] NZFLR 541 (FC) at [84].

26.60 Uncertainty as to the jurisdiction of the Family Court in equity has also been recognised in several High Court decisions. In *H v H*, the High Court recognised that Judges of the Family Court "are Judges of the District Court and have, with necessary modifications, the same jurisdiction",[471] but it did not have to confirm the extent of the Family Court's jurisdiction to determine the equitable claims, as the value of the disputes in issue exceeded the District Court's statutory limit.[472] In *F v O* the High Court declined to address whether the Family Court has jurisdiction to determine the validity of trusts, instead determining that appeal on different grounds.[473]

Discussion

26.61 Two separate lines of High Court authority have developed on the Family Court's jurisdiction in equity.[474] On one line of authority, the Family Court has the same equitable jurisdiction as the District Court, and the Family Court can exercise its District Court jurisdiction contemporaneously: *Pedersen v Vaughan*, *Singh v Kaur*, *Perry v West*, *L v P*, *F v F*. That would enable the Family Court to deal with any equitable claims in PRA proceedings. Another line of authority, however, firmly states that the Family Court does not have the civil and equitable jurisdiction of the District Court, although it has jurisdiction to grant equitable relief: *Burt v Skelley*, *F v W*, *Yeoman v Public Trust*. On that line of authority, separate proceedings in the High Court would probably be necessary to resolve equitable claims arising in PRA proceedings.

26.62 Commentators have questioned the High Court's interpretation of the relevant statutory provisions in *F v W* and the distinction

471 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [44].

472 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [48] where the court said,

> *"Whatever the doubts may be as to the jurisdiction of the Family Court as to equity and trusts, it is quite apparent that it is more probable than not that the disputes between these parties will include applications for relief in equity in respect of assets exceeding $200,000."*

473 *F v O* [2012] NZHC 1021 at [88].

474 A related issue is whether the Family Court can, irrespective of the conflicting authority, consider related claims in equity with the parties' consent under s 81 of the District Court Act 2016. In several Family Court decisions it was determined that the parties could consent to the Family Court determining claims in equity contemporaneously with Property (Relationships) Act 1976 proceedings: *Q v Q* (2005) 24 FRNZ 232 (FC) at [163]; *C v C* FC Rotorua, FAM-2007-063-652, 29 April 2011; and *H v H* FC North Shore FAM-2010-044-1909, 17 June 2011 at [32]–[35]. This was confirmed in *F v F* [2015] NZHC 2693 at [102]–[108]. In *F v W* (2009) 2 NZTR 19-024 (HC), however, the High Court at [31] rejected the idea that the parties could validly consent to the Family Court determining whether a trust was a sham, as it was not given on the basis that there was a waiver to the absence of jurisdiction, because the parties believed jurisdiction in fact existed.

drawn between equitable jurisdiction and equitable remedies, but note there is scope for judicial interpretation:[475]

> *[W]e do not have the benefit of [the Judge's] express views on why s 16(1) of the Family Courts Act 1980, which as noted above provides "the District Courts Act 1947 shall apply, with any necessary modifications, to Family Courts and Family Court Judges in the same manner and to the same extent as it applies to District Courts and District Court Judges", does not mean that s 34 of the District Courts Act 1947 – a provision of the District Courts Act 1947 – applies to Family Courts and Family Court Judges in the same manner and to the same extent as it applies to District Courts and District Court Judges. With respect, that would appear to be the obvious position. Perhaps it can be inferred that His Honour's answer is that a modification is "necessary" so that only the provisions of the District Court Act 1947 that are properly characterised as powers, and not those provisions that confer jurisdiction, apply to the Family Courts. But if that was right, Parliament could have easily stated that was the case. Equally, however, Parliament could have specified in s 11 of the Family Courts Act 1980 – that is, the provision entitled "Jurisdiction of the Family Courts" – that the Family Courts have the same jurisdiction as District Courts. Instead, Parliament has placed the link to the District Courts Act 1947 in a different provision (which admittedly leaves, as borne out by* F v W*, scope for judicial interpretation). It is arguable that Parliament meant to do something other than confer jurisdiction on the Family Court in s 16 (otherwise it would be in s 11).*

26.63 Whatever the correct interpretation, this lack of certainty is problematic. It is already resulting in inconsistent decisions on jurisdiction, and it creates opportunity for delay and dispute on the proper forum for resolving the issues. If the Family Court does not have substantive jurisdiction in equity, then where trust property is in issue, it may not have jurisdiction to resolve all the claims before it in PRA proceedings. This could require dual proceedings in the Family Court and High Court, which again has consequences in terms of cost and delay.

475 Andrew Butler "The Family Court's jurisdiction to deal with equitable matters" in Mark O'Regan and Andrew Butler "Equity and Trusts in a Family Law Context" (paper presented to New Zealand Law Society Family Law Conference, November 2011) 269 at 295–296. See also Andrea Manuel "Why the Family Court has jurisdiction in equity" New Zealand Lawyer (New Zealand, 17 June 2011) at 10–11.

Issue 3: Should the Family Court have jurisdiction under the Trustee Act 1956 and Companies Act 1993?

26.64 A further jurisdictional limitation on the Family Court is its lack of jurisdiction under the Trustee Act 1956[476] and the Companies Act 1993.[477]

26.65 Trust law in New Zealand is contained in both case law and statute, and some of the court's powers relating to trusts are contained in the Trustee Act. The provisions of the Trustee Act relate mainly to the administration of trusts and their oversight by the High Court. The High Court's powers include the power to appoint new trustees,[478] to authorise dealings with trust property,[479] to authorise variations of a trust,[480] to review the actions of trustees,[481] and to relieve a trustee from personal liability for any breach of trust.[482]

26.66 These powers could be engaged where a difficult separation has affected the administration of a trust. A partner could invoke the High Court's supervisory jurisdiction under the Trustee Act to ensure the trust is being properly administered. The High Court's powers do not, however, enable it to divide and distribute the trust property between the partners. Distributions of trust property under a discretionary trust will remain at the discretion of the trustees. Applications to the High Court to appoint a new trustee or concerning any trust property can only be made by a trustee or a person with a beneficial interest in the trust property.[483] The usefulness of the Trustee Act for partners who have separated may be limited.

476 Section 2 of the Trustee Act 1956 defines "court" to mean the High Court. The Court of Appeal in *Morris v Templeton* (2000) 14 PRNZ 397 (CA) confirmed at [9] that the equitable jurisdiction of the District Court under s 34 of the District Courts Act 1947 did not extend to granting relief under s 73 of the Trustee Act.

477 Section 2 of the Companies Act 1993 defines "court" to mean the High Court of New Zealand.

478 Trustee Act 1956, s 51.

479 Trustee Act 1956, s 64.

480 Trustee Act 1956, s 64A.

481 Trustee Act 1956, s 68.

482 Trustee Act 1956, s 73.

483 Trustee Act 1956, s 67. Note that a person with a beneficial interest in trust property does not include a beneficiary with a discretionary interest only.

The Law Commission's review of trust law and the resulting Trusts Bill

26.67 The Law Commission observed in its review of the law of trusts that the lack of jurisdiction under the Trustee Act (regarding the District Court) causes inconvenience and difficulty.[484] The Commission noted that perhaps the District Court's equitable jurisdiction under the District Courts Act 1947 regarding trusts "is rendered ineffective" because it cannot make orders under the Trustee Act.[485] For example, while the District Court has jurisdiction to hear claims for breach of trust, it cannot grant relief under section 73 of the Trustee Act to indemnify a trustee from personal liability.[486] A separate application to the High Court is necessary. As the Law Commission observed:[487]

> *This is not a satisfactory situation because two separate courts will have to consider the same salient facts and make determinations. It may also effectively force such breach of trust cases into the High Court notwithstanding that there are relatively modest sums involved purely to avoid a multiplicity of proceedings.*

26.68 The Commission recommended that both the District Court and the Family Court should have jurisdiction under the new trusts legislation.[488] It observed that the Family Court is required to consider aspects of trust law when they arise in PRA proceedings or the Family Protection Act 1955.[489] The Commission considered

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484 Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at [3.12].

485 Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* NZLC IP28, 2011) at [3.12].

486 This is illustrated in the Court of Appeal decision in *Morris v Templeton* [2000] 14 PRNZ 397 (CA). In that case beneficiaries brought proceedings against a trustee in the District Court alleging that the trustee had breached his trust by investing funds in unauthorised securities. The District Court Judge found for the applicants that the trustee had breached his trust, but then purported to exercise the discretion given to the High Court under s 73 of the Trustee Act 1956 and excuse the trustee from personal liability for losses suffered as a result of the breach. The beneficiaries appealed. Eventually the case reached the Court of Appeal, which held at [9] that "[t]he Legislature specifically reserved the power to grant relief under s 73 to the High Court."

487 Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* NZLC IP28, 2011) at [3.14].

488 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 194–196. The Commission observed in its Issues Paper *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at [3.40] that a line of High Court cases had confirmed that the provisions of the Family Court Act 1980 and District Courts Act 1947 "do not confer the District Court's substantive equitable jurisdiction under section 34 on the Family Court." It cited *Singh v Kaur* [2000] 1 NZLR 755 (HC); *Perry v West* HC Auckland M1331-SD00, 8 September 2000; *F v W* (2009) 2 NZTR 19-024 (HC); and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC). However, as we discuss above, we consider that there are now in fact two distinct lines of High Court cases (including the more recent cases of *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 and *F v F* [2015] NZHC 2693), which calls into question whether this view is correct. Clearly, there is uncertainty.

489 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.19].

that the Family Court should have the same powers as the District Court under the new trusts legislation to better deal with matters properly before it and reduce the need for parties to bring subsequent proceedings in the High Court.[490] Accordingly it recommended that the Family Court be able to exercise powers and make orders under new trusts legislation as an ancillary jurisdiction, to provide a remedy where a matter is already within its jurisdiction:[491]

> *We recommend that the Family Court should be able to make orders under the new Act where these are necessary during the proceedings to protect or preserve any property or interest that is the subject of those proceedings until the issues are fully resolved by the court. Our recommendation would allow the Family Court to, for example, make an order removing one trustee and appointing (even on a temporary basis) a new independent trustee where this is necessary to manage serious deadlock, hostility between trustees, ascertain the nature of the trust assets, or to preserve those assets until the property claims of the parties can be properly resolved.*

26.69 The Commission also recommended that the Family Court have the power to make orders, with the consent of the parties, to resolve a closely related dispute or issue between the parties where this is necessary, or would better promote the resolution of the substantive proceedings between parties.[492] This would give the Family Court power beyond its ordinary jurisdiction to resolve closely related trust matters with the consent of the parties, therefore avoiding the need for a separate hearing.[493]

26.70 In August 2017 the Government introduced the Trusts Bill to Parliament.[494] The Bill includes the following provision, implementing the Commission's recommendations regarding Family Court jurisdiction:

> **136 Jurisdiction of Family Court**
>
> (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.

490 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.22].

491 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.25].

492 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.26].

493 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.26].

494 Trusts Bill 2017 (290-1).

(2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—

(a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or

(b) to give proper effect to any determination of the proceeding.

(3) Where the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute between the parties that is closely related to the proceeding (but only if the Family Court considers that making the order is necessary or desirable to assist the resolution of the proceeding).

(4) Despite subsections (2) and (3), the Family Court does not have jurisdiction to appoint a receiver to administer a trust under section 130.

(5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.

26.71 The Government notes that this provision will give the Family Court the tools necessary to deal with trust matters closely related to proceedings properly before it, reducing the need for parties to bring subsequent proceedings in the High Court to resolve disputes.[495]

Jurisdiction under the Companies Act

26.72 Occasionally end of relationship disputes will involve companies, and one or both partners may seek to rely on the remedies under the Companies Act. This could include interim remedies to prevent one partner from operating in a way not in the best interests of the company,[496] or for relief as a shareholder in that company.[497]

495 Ministry of Justice **Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement** (August 2017) at 28.

496 For example *S v B* [2013] NZHC 497.

497 Section 174 of the Companies Act 1993 enables a shareholder to apply for relief where the acts of the company have been, are or are likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her. See for example *B v F* [2012] NZHC 722.

26.73 The Family Court has no jurisdiction to hear claims under the Companies Act. However it is not clear this is an issue that interferes with resolving relationship property disputes as inexpensively, simply and speedily as is consistent with justice.[498] This is for several reasons. First, unlike dispositions of property to a trust, which results in the complete alienation of that property (and its value), the value of company assets are ordinarily reflected in their share value. Company shares are property under the PRA and are therefore potentially divisible as relationship property.

26.74 Second, there appears to be a clearer distinction between issues of ownership of company shares (which can be relationship property) and issues about the control and management of a company, including company assets, which are governed by the Companies Act. While there could be scenarios where separate proceedings are required under the PRA and the Companies Act (for example where partners run a company together), the issues will be distinct. At this point we are not aware of any problems arising with the Family Court's lack of jurisdiction under the Companies Act.[499]

Summary of issues with the Family Court's jurisdiction

26.75 The issues identified above affect the ability of the Family Court to hear and determine all issues that may arise in PRA proceedings. By far the most significant issue is the Family Court's jurisdiction regarding trust property. Trusts are now widely used in New Zealand to hold property, including the family home. The PRA broadly recognises that when property is transferred to a trust, it is no longer the separate property of the partners, nor is it

498 Property (Relationships) Act 1976, s 1N(d).

499 During Parliament's consideration of the 2001 amendments the question was raised as to whether the Family Court should have jurisdiction under the Trustee Act and Companies Act, but the Ministry of Justice, advising the Parliamentary select committee considering the Matrimonial Property Amendment Bill observed:

> *Proceedings under the 1976 Act are concerned with the division of property between spouses. Proceedings concerning breaches of directors' or trustees' duties and the like are of a different character altogether, although there will be some interrelationship if the shares are matrimonial property or there is jurisdiction to exercise powers under proposed new sections 44A–44F. The relevant considerations and the implications for third parties (including trustees, directors, shareholders and beneficiaries) who may also need to be represented take such proceedings well beyond the scope of matrimonial property proceedings which are essentially family disputes. Accordingly we do not consider it appropriate that such extended powers are granted.*

See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 30–31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill – Departmental Report* (16 August 2000) at 26.

relationship property. However the availability of several remedies (within and outside of the PRA) recognises that sometimes it is appropriate that trust property (or its representative value) is brought into account between the partners for division under the PRA. The adequacy of these remedies is the focus of Part G of this Issues Paper.

26.76 In this section we have canvassed the limitations on the Family Court's jurisdiction to grant those remedies. This includes the PRA's limited jurisdiction regarding third party and trust property, the unresolved question on its ability to hear and determine claims in equity, including constructive trust claims against third party trustees, and its lack of jurisdiction under the Trustee Act 1956 to ensure the proper administration of trusts while property issues are being resolved. The effect of these limitations is that multiple proceedings under different areas of law and potentially in different courts may have to resolve partners' property disputes when they separate. This increases costs to the parties, will likely result in delay in proceedings and risks inconsistent findings of fact.

26.77 We discuss options to address these issues after our discussion of issues with the High Court's jurisdiction.

Issues with the High Court's jurisdiction

26.78 The issues with the Family Court's jurisdiction discussed above highlight another matter – the limited role of the High Court in PRA proceedings.

Issue 4: Should the High Court have greater oversight of PRA proceedings?

26.79 As discussed at the start of this chapter, prior to 2001 the High Court enjoyed concurrent jurisdiction with the Family Court to hear and determine PRA proceedings. The 2001 amendments abolished concurrent jurisdiction, restricted the grounds for transferring proceedings from the Family Court and removed the High Court's power to hear and determine transfer applications itself.[500] These amendments reflected a deliberate policy

500 *Corbitt v Rowley* [2009] NZFLR 676 (HC), confirming that there is no jurisdiction for the High Court to order the transfer of proceedings.

decision that the Family Court should hear and determine PRA proceedings, balanced by a limited exception for particularly complex cases to be transferred to the High Court. While the extent of the High Court's jurisdiction under the PRA was revisited as part of the Family Court Review, resulting in changes to the test for transfer, concerns remain that it is too difficult to have complex PRA proceedings transferred to the High Court.[501]

26.80 The issue is whether Parliament's deliberate decision to limit the role of the High Court in PRA proceedings remains appropriate, and whether the right balance has been achieved.

Test for transferring proceedings to the High Court

26.81 Under the 2001 amendments, PRA proceedings could only be transferred to the High Court where a Family Court Judge was satisfied that the High Court was "the more appropriate venue for dealing with the proceedings, because of their complexity or the complexity of a question in issue in them."[502] Initially the Family Court took a fairly restrictive approach to transfer applications. It interpreted Parliament's intention as being that proceedings should be heard in the Family Court "where at all possible."[503] Transfers were, therefore, rare.[504] However, that restrictive approach was rejected by the High Court in *H v H*[505] and *J v J*.[506] In *H v H* the High Court confirmed that:[507]

> *The safest course when applying statutory criteria is not to gloss them. The statutory test is not a simple complexity test. The test includes complexity but requires a characterisation and evaluation of the complexity against consideration of whether or not the High Court is the more appropriate venue. A case might be very complex but still quite appropriate for the Family Court.*

501 Concerns were raised, for example, during the Law Commission's review of the law of trusts. See *Ministry of Justice Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement* (August 2017) at 28.

502 Property (Relationships) Act 1976, s 22(3) (repealed by the Property (Relationships) Amendment Act (No 2) 2013).

503 See *Sanders v Sanders* FC Auckland FAM-2009-004-1777, 4 November 2009, where the Court observed at [21] that Parliament "intended where at all possible for all first instance proceedings under the Act to be dealt with in the Family Court" and that "[i]t follows that there will be only a very limited number of cases which are sufficiently complex to justify transfer."

504 Vivienne Crawshaw "Jurisdiction Issues – Should I Stay or Should I go?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 2.

505 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [23].

506 *J v J* [2012] NZHC 2292 at [20].

507 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [29] adopted in *J v J* [2012] NZHC 2292 at [19].

26.82 In *J v J* the High Court confirmed that the test requires an assessment of the relative appropriateness of each court to deal with the particular proceedings.[508] In making that assessment, due recognition should be given to the specialist nature of the Family Court and the warranting of judges as being suitably qualified to sit in that jurisdiction.[509] There is no particular onus on the party applying for transfer.[510] There is no jurisdiction to transfer proceedings simply because the parties agree to a transfer.[511]

26.83 Complex or novel legal or factual questions will not justify a transfer to the High Court. The question is whether the High Court is more appropriate than the Family Court to deal with those questions. In *J v J* the High Court observed that the Family Court is often called upon to rule upon issues not previously determined by a higher court.[512] Nor is complexity determined by the amount at stake.[513] Similarly, valuation issues will not usually be of such complexity to justify a finding that the High Court is better equipped to determine such matters. Family Court Judges can be expected to be experienced in addressing valuation issues in the PRA framework.[514] The High Court has also doubted whether the likelihood of further appeals due to complex or novel questions, the value at stake or the distance between the parties' positions would justify a transfer of proceedings, noting that any pre-trial assessment of the prospect of appeal is likely to be highly speculative.[515]

26.84 The complexity test may be satisfied where there is a challenge to the Family Court's jurisdiction to resolve all related issues. In *H v H*, the High Court concluded it was the more appropriate venue as the proceedings involved a challenge to the Family Court's jurisdiction to deal with equitable claims regarding property

508 *J v J* [2012] NZHC 2292 at [21].

509 *J v J* [2012] NZHC 2292 at [21].

510 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [30].

511 *J v J* [2012] NZHC 2292 at [32]. The Family Court is not empowered to make an order for transfer unless it is satisfied that the grounds for transfer have been made out.

512 *J v J* [2012] NZHC 2292 at [25].

513 *J v J* [2012] NZHC 2292 at [25]. The court noted that, if the novelty of the question or the amount at issue were factors favouring a determination that it is appropriate to transfer proceedings to the High Court, Parliament could be expected to have said so. See also *C v C* FC Rotorua FAM-2007-063-000652, 29 April 2011 where the Family Court noted at [12] that the proceeding had always been a complex case involving a number of trusts and companies, but that there was nothing particularly noteworthy which differentiated that case to a number which have been heard by the Family Court and which are still before the Family Court. In that case an application to transfer proceedings to the High Court was declined.

514 *J v J* [2012] NZHC 2292 at [24].

515 *J v J* [2012] NZHC 2292 at [29].

exceeding $200,000 in value.[516] Also relevant was the Family Court's lack of inherent jurisdiction and its inability to exercise powers under the Trustee Act.[517] The High Court observed that, had proceedings not been transferred, the result could have been multiple and overlapping proceedings before the Family Court and High Court contemporaneously, which contradicts the principle of inexpensive, simple and speedy resolution of relationship property disputes enshrined in section 1N(d) of the PRA. In principle, the Court considered that one judge should be seized of such a complex dispute as that involved before him.[518]

26.85 The grounds for transferring proceedings were expanded in 2014,[519] but the central question remains whether the High Court is a more appropriate venue than the specialist Family Court.[520] Section 38A now provides that proceedings may be transferred if a Family Court Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings, having regard to:

(a) the complexity of the proceedings or of any question in issue in the proceedings;

(b) any proceedings before the High Court that are between the same parties and that involve related issues; and

(c) any other matter that the judge considers relevant in the circumstances.

26.86 The new test was expected to lower the barriers to transfer.[521] Family Court data demonstrates that there has been an increase in the number of cases transferred to the High Court, but the numbers remain small.

Number of PRA Proceedings Transferred from the Family Court to the High Court												
2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
3	5	4	12	5	9	11	9	8	6	17	15	15

516 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [35]–[48].

517 *H vH* [2012] NZHC 537, [2012] NZFLR 688 at [48].

518 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

519 Property (Relationships) Amendment Act (No 2) 2013.

520 *A v B* [2015] NZHC 1113, [2015] NZFLR 379 at [26] citing *J v J* [2012] NZHC 2292 at [21].

521 Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.17] and Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [13.29].

26.87 Two decisions under the new section 38A suggest that transfers may continue to be rare. In *H v H*, the Family Court refused an application to transfer proceedings to the High Court, despite accepting these were complex proceedings.[522] Mrs H claimed that the relationship property comprised assets of up to $100 million in value, which were held in at least 28 trusts and 12 companies, while Mr H argued the relationship property was near $10,000 in value.[523] In that case greater weight was given to the anticipated additional costs associated with the High Court hearing the proceedings and the impecunious position of Mrs H, particularly because of Mr H's unwillingness or inability to pay the "substantial" spousal maintenance awarded in her favour.[524] The Family Court Judge considered that it would be "inequitable to force Mrs [H] to litigate in a forum that she is unable to afford, particularly when that inability is directly related to Mr [H]'s failure to pay spousal maintenance that has been ordered."[525] It noted, however, that should Mrs H file proceedings in the High Court seeking to establish constructive trusts, then these proceedings should be conducted from that point in the High Court.[526]

26.88 In *F v F*, the High Court upheld the Family Court's decision refusing to transfer proceedings to the High Court.[527] That case involved a challenge to a settlement agreement and issues on the use of property owned by Mr or Mrs Fisher to acquire trust property. The High Court observed these are claims which the Family Court regularly deals with as part of its specialist jurisdiction.[528] The appellant challenged the Family Court's jurisdiction to deal with all issues raised in the proceeding, arguing that the case involved consideration of whether there was a constructive trust and issues of tracing, the value of which might exceed the limit on the District Court's jurisdiction.[529] The High Court observed that the potential for separate proceedings in that Court could be considered, however, the mere possibility

522 *H v H* [2015] NZFC 635 at [24].

523 *H v H* [2015] NZFC 635 at [9]–[11].

524 *H v H* [2015] NZFC 635 at [39] and [42].

525 *H v H* [2015] NZFC 635 at [42].

526 *H v H* [2015] NZFC 635 at [42].

527 *F v F* [2015] NZHC 2693.

528 *F v F* [2015] NZHC 2693 at [44].

529 *F v F* [2015] NZHC 2693 at [35]. This case proceeded on the basis that the Family Court had the same equitable jurisdiction as the District Court.

of such a claim or a mere statement of intention to bring such a claim is "likely to be of little consequence" and:[530]

> *For this to be a significant consideration there should be some real and substantial evidential basis for such a claim. There should be at least a high likelihood that such a claim will eventuate.*

26.89 The High Court also considered that it was relevant that the parties could agree to the Family Court hearing such claims under what is now section 81 of the District Court Act 2016. The possibility of such an agreement, and the appellant's failure to consider or pursue that possibility, was "another reason why the decision over transfer should not be made on the basis that there will inevitably be proceedings that can be dealt with only in the High Court."[531]

26.90 Further, the Court was not convinced by an argument that the High Court was more appropriate because of its case management protocols and the potential for proceedings to come to hearing earlier:[532]

> *I am not satisfied that the implicit criticisms of the Family Court are justified or that such benefits would necessarily result from the transfer of the proceedings to the High Court.*

26.91 These decisions suggest that the threshold for transferring cases to the High Court will remain high. There must be clear evidence that the High Court is the more appropriate venue, while having regard to the Family Court's specialist expertise in PRA proceedings. Until questions on the Family Court's jurisdiction to determine the validity of express trusts and of constructive trusts (either under the PRA or in equity) are resolved, however, there may continue to be uncertainty and inconsistency in decisions.

530 *F v F* [2015] NZHC 2693 at [41].

531 *F v F* [2015] NZHC 2693 at [108].

532 *F v F* [2015] NZHC 2693 at [111]. In contrast the High Court in *J v J* [2012] NZHC 2292 considered that there was force to the submission that the case management procedures in the High Court would enable the parties to have the comfort of a known hearing date and enable a tidier disposal of interlocutory issues. However, it was noted at [30] that the Family Court Judge had not accepted that the Family Court was not capable of giving the matter a fixture at least as soon as one could be obtained in the High Court, and had indicated that he had given directions to ensure the case received appropriate administrative attention from registry staff.

Issue 5: Should there be a right of appeal for interlocutory decisions?

26.92 Section 39 of the PRA provides a right of appeal to the High Court regarding Family Court decisions to:[533]

(a) make or refuse to make an order; or

(b) dismiss the proceedings; or

(c) otherwise finally determine the proceedings.

26.93 While section 39 refers to any decision to "make or refuse to make an order", this has been interpreted by the High Court to mean only orders that finally determine proceedings:[534]

> *That section confers a right of appeal in respect of orders finally determining proceedings under the Act. While paragraph (a) is not, on the words of that paragraph, limited to orders which finally determine some substantive right of the parties, the use of the word "otherwise" in paragraph (c) makes it clear that paragraph (a) extends only to the making of an order, or the refusal to make an order, which has the effect of finally determining the proceedings. Interlocutory orders are not included.*

26.94 This suggests that orders made during the case management or trial aspects of proceedings may not be appealable under the PRA. This might include any orders made prior to the final determination, including interim distributions of property under section 25(3), orders restraining the disposition of property under section 43, and transfer decisions under section 38A,[535] all of which may have important consequences for one or both parties.

26.95 There is, however, authority that section 124 of the District Court Act 2016[536] provides a right of appeal against interlocutory orders.[537] Appeals under section 124 are heard in the same manner as appeals under section 39 of the PRA.[538]

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533 Property (Relationships) Act 1976, s 39(1).

534 *Dunsford v Shanly* [2012] NZHC 257 at [7] applying *E v E* [2005] NZFLR 806 (HC) and *Crick v McIlraith* HC Dunedin CIV 2004-412-37, 1 June 2004.

535 However we note the High Court in *F v F* [2015] NZHC 2693 proceeded on the basis that s 39 of the Property (Relationships) Act 1976 applied to allow an appeal against the refusal to order a transfer.

536 Formerly s 72 of the District Courts Act 1947.

537 *E v E* [2005] NZFLR 806 (HC); *G v G* [2007] NZFLR 27 (HC); *Dunsford v Shanly* [2012] NZHC 257; and *J v P* [2013] NZHC 557.

538 That is, both are general appeals heard by way of rehearing. The principles in the Supreme Court decision of *Austin, Nichols & Co Inc v Stichting Lodestar*[2007] NZSC 103, [2008] 2 NZLR 141 apply.

26.96 Regardless of the right of appeal under the District Court Act, this is one area that calls for reform. Sometimes an interlocutory decision may be of such importance that an appeal is appropriate. Arguably it is not desirable to have two sources of appeal rights, one under the PRA for final decisions and one under the District Court Act for interim decisions.

CONSULTATION QUESTION

H21 Should section 39 of the PRA be amended to provide for a right to appeal interlocutory decisions under the PRA? If so, should there be guidance as to what interlocutory decisions are appealable?

Options for reforming the jurisdiction of the Family Court and High Court

26.97 We think that all property disputes arising at the end of a relationship should be decided by the same court, at the same time. This is consistent with the principle that all questions arising under the PRA "should be resolved as inexpensively, simply and speedily as is consistent with justice."[539] Existing issues with the Family Court's jurisdiction, in particular to determine issues regarding trust property, and the limited role of the High Court, risk the need for multiple proceedings to resolve related property disputes. This increases costs, will likely delay proceedings and risks inconsistent findings of fact. Reform is called for so that "all issues can be placed before the appropriate Court(s) and dealt with in a principled coherent way."[540]

26.98 The real question is whether, when there are issues outside the PRA that arise in the context of PRA proceedings, that court should be the Family Court or the High Court. The options for reform fall into two broad categories. They favour either providing the Family Court, as a specialist court, with all the powers to hear and determine PRA proceedings and related issues, or a broader role for the High Court in PRA proceedings, so the High Court's wider jurisdiction can be called upon. There are valid arguments to support both approaches. In recent history Parliament has favoured the latter approach, by making changes in 2014 that

539 Property (Relationships) Act 1976, s 1N(d).

540 Bruce Corkill and Vanessa Bruton "Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court" (paper presented to New Zealand Law Society Trusts Conference, 2011) 103 at 106.

were intended to ease the transfer of proceedings to the High Court.[541] The question one commentator raises is "whether that ease of movement to the High Court is also a move towards access to justice."[542]

26.99 We note that while the options below represent two different approaches, they are not mutually exclusive.

Option 1: Extend the jurisdiction of the Family Court to address current gaps

26.100 The first option is to amend the PRA to ensure the Family Court has jurisdiction to hear and determine related matters in PRA proceedings, including trust claims. There are several aspects to this option:

(a) **Confirming that the Family Court has civil jurisdiction to hear claims in equity**. This would resolve the current uncertainty discussed above as to whether the Family Court has jurisdiction to hear and determine a claim of constructive trust against a third party trustee. This could be achieved by way of an amendment to the Family Court Act, confirming that the Family Court has the civil jurisdiction of the District Court, including in equity. However this would have wide application and would affect not only PRA proceedings, but all proceedings of the Family Court. Alternatively the PRA could include a provision conferring such jurisdiction on the Family Court only if the claim is related to PRA proceedings.

(b) **Extending jurisdiction under the PRA to make decisions binding on third parties in limited circumstances**. This would ensure that a Family Court is not limited in its ability to bring trust property into account between the parties when determining entitlements under the PRA, where a third party trustee has legal ownership of the property. It may avoid the need to bring a separate claim in equity against trustees.

541 Those changes were in the context of a review of the Family Court, however, not a review of the Property (Relationships) Act 1976.

542 Vivienne Crawshaw "Jurisdiction Issues – Should I Stay or Should I go?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 2. Crawshaw concludes, at 10, that ideally, parties to litigation should be able to have all issues relating to the relationship property dispute heard in a local court, by a suitably qualified judicial officer, as speedily and inexpensively as possible.

Such provision would require careful consideration in order to avoid unintended consequences. Given the Court would be determining the third party's beneficial interest in the property, appropriate safeguards must be in place to ensure that party can participate in proceedings. One option would be to amend section 37 to enable claims in respect of property owned by third parties to be dealt with alongside PRA proceedings.

(c) **Granting the Family Court jurisdiction under the Trustee Act**. As discussed above, the Trusts Bill currently before Parliament proposes to grant the Family Court ancillary jurisdiction to exercise powers under that Bill in PRA proceedings.

(d) **Granting the Family Court jurisdiction under the Companies Act 1993**. This would give the Family Court an ancillary jurisdiction under the Companies Act, similar to that proposed in the Trusts Bill. However we are not convinced there is a compelling need for the Family Court to have such powers. There appears to be a clearer distinction between issues of ownership of company shares (which can be relationship property) and control and management of a company, including company assets, which is governed by the Companies Act. While there could be scenarios where separate proceedings are required under the PRA and the Companies Act (for example, where partners run a company together), the issues will be separate. At this point we are not aware of any problems arising with the Family Court's lack of jurisdiction under the Companies Act.[543]

26.101 The advantages of extending the Family Court's jurisdiction in these respects is that it would mean the related issues can be

543 During Parliament's consideration of the 2001 amendments the question was raised as to whether the Family Court should have jurisdiction under the Trustee Act and Companies Act, but the Ministry of Justice, advising the Parliamentary select committee considering the Matrimonial Property Amendment Bill, observed:

> *Proceedings under the 1976 Act are concerned with the division of property between the spouses. Proceedings concerning breaches of directors' or trustees' duties and the like are of a different character altogether, although there will be some interrelationship if the shares are matrimonial property or there is jurisdiction to exercise powers under proposed new sections 44A–44F. The relevant considerations and the implications for third parties (including trustees, directors, shareholders and beneficiaries) who may also need to be represented take such proceedings well beyond the scope of matrimonial property proceedings which are essentially family disputes. Accordingly we do not consider it appropriate that such extended powers are granted.*

See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 30–31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill – Departmental Report* (16 August 2000) at 26.

dealt with in the Court with the specialist jurisdiction in this area, and where the hearing costs are less than in the High Court.[544] As one practitioner observes, it means that the judge hearing the case will be:[545]

> *… well aware that the nature of their dispute is not simply ordinary commercial litigation and is conversant with the sensitivities required to manage the previously domestic nature of the parties' relationship and all its attendant emotional turbulence.*

26.102 This option also seems consistent with the general approach in the Trusts Bill, which is to grant the Family Court the necessary powers to deal with ancillary matters arising in the context of PRA proceedings. In the context of the Family Court Review, several legal academics and the Auckland District Law Society recommended that the Family Court's jurisdiction be extended so that it may deal with trust and company issues that must currently be dealt with in the District Court or High Court.[546]

26.103 As well as being a specialist court, the Family Court is also more readily accessible than the High Court for those living outside the major cities.

26.104 There is, however, some concern that the Family Court is not resourced to deal with cases involving complex issues of trust law. While Family Court Judges are specialists in the PRA, the High Court has the advantage of experience in dealing with complex issues of variation of trust and tracing.[547] In its review of the law of trusts, the Law Commission observed that in consultation meetings some practitioners suggested that some members of the Family Court have been operating under a misunderstanding

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544 These advantages were recognised by the High Court, in relation to the question of whether proceedings should be transferred to that Court, in *F v F* [2015] NZHC 2693 at [107].

545 Vivienne Crawshaw "Jurisdiction Issues – Should I Stay or Should I go?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 1–2.

546 See Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at 85. Professor Bill Atkin, Professor Mark Henaghan and the Auckland District Law Society all submitted that the Family Court Proceedings Reform Bill amend the Property (Relationships) Act should extend the jurisdiction of the Family Court in respect of trusts and company issues. The Ministry noted that the Law Commission was currently considering the Family Court's jurisdiction in respect of trust issues and recommended that any change to the Family Court's jurisdiction should await the outcome of the Law Commission's review.

547 The Family Court's lack of expertise to deal with issues concerning the governance of trusts or companies, or the actions of trustees or directors, was cited by the Ministry of Justice in 1999 as the reason for not giving the Family Court powers under the Trustee Act or the Companies Act. See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 30–31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill – Departmental Report* (16 August 2000) at 26. The different expertise of the Family Court and High Court was also recognised, for example, in *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

of trust principles.[548] They therefore questioned how appropriate it is for Family Court Judges to deal with trust cases. During that review, submissions were evenly divided on the Family Court having jurisdiction under the new trustee legislation.[549] However, the prevalence of family trusts in New Zealand means that more and more PRA proceedings involve trusts. As the High Court observed in *F v F*, the Family Court regularly deals with claims in relation to trust property as part of its specialist jurisdiction under the PRA.[550] Not only does this mean that Family Court Judges are now likely to be more familiar with the legal issues this involves, but it may also be difficult to justify a carve out of what is becoming a common aspect of PRA proceedings.

Option 2: Return to concurrent jurisdiction

26.105 The second option is to give the High Court concurrent jurisdiction to hear and determine PRA proceedings, as it had prior to 2001.

26.106 This option would not resolve the issues with the Family Court's jurisdiction, but would instead enable parties to avoid those issues by applying directly to the High Court. The High Court would be able hear and determine all related issues in exercising its inherent jurisdiction (and its jurisdiction under the Trustee Act and Companies Act where appropriate).

26.107 There are several advantages to this option:

(a) The High Court has supervisory jurisdiction over trusts, and has experience in dealing with complex trust issues.

(b) The High Court has a more sophisticated set of rules on discovery than the Family Court, enabling tailor-made discovery and utilising electronic technology,[551] and a more comprehensive and arguably efficient case management system. As a result proceedings can be heard and determined more efficiently in the High Court in some cases.[552] One practitioner notes that, even

548 Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) at [4.56].

549 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [13.23].

550 *F v F* [2015] NZHC 2693 at [44].

551 *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

552 This was raised as a possible reason to transfer proceedings from the Family Court to the High Court in *F v F* [2015] NZHC 2693, however, the High Court at [111] did not accept that "the implicit criticisms of the Family Court are justified

though the High Court is assumed to be the costlier venue (its filing costs and hearing fees are higher than the Family Court), its case management system often enables the High Court to determine PRA proceedings more cheaply and quickly than the Family Court.[553] However these concerns could also be addressed by changes to the Family Court case management procedures, as we discussed in the previous chapter.

(c) With complex or high value proceedings that are likely to be appealed further, the ability to apply directly to the High Court removes a layer of decision-making and enables parties to appeal to the Court of Appeal by right, without leave.[554] However, appeals can already be fast-tracked from the Family Court to the Court of Appeal where the case is exceptional.[555]

(d) This option would be simpler to implement than option 1 (extending the jurisdiction of the Family Court) and would avoid any risk of unintended consequences encompassed within option 1.

(e) Concurrent jurisdiction may avoid the expense and delay associated with an application to transfer proceedings from the Family Court to the High Court, but not where proceedings are first filed in the Family Court.

26.108 Arguments against concurrent jurisdiction remain largely the same as they did in 2001, when Parliament gave the Family Court sole originating jurisdiction under the PRA.[556] At that point in time, very few people were choosing to file in the High Court. The arguments against concurrent jurisdiction include:

(a) The Family Court is a specialist court, with particular expertise in resolving family matters, including PRA

or that such benefits would necessarily result from the transfer of proceedings to the High Court." Similarly, in *H v H* [2015] NZFC 635 the Family Court considered at [37] that it can deal with applications made before it expeditiously.

553 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

554 Decisions of the High Court on appeal from the Family Court can only be appealed to the Court of Appeal with leave, pursuant to s 60 of the Senior Courts Act 2016.

555 As in *Z v Z* [1997] 2 NZLR 258 (CA). See s 59 of the Senior Courts Act 2016.

556 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 30.

proceedings. It is appropriate that the specialist nature of that Court is recognised.

(b) Concurrent jurisdiction is sometimes used for tactical advantage, often to disadvantage the poorer partner. PRA proceedings can occur at a time of emotional distress and can have a deeply personal impact on partners. Disputes can be fraught, and power imbalances between the parties can lead to abuse of process, by filing proceedings in the more expensive forum.

(c) Costs, including filing and hearing costs, are presumed to be lower for proceedings in the Family Court (however as noted above, this may not always be the case). For example, interlocutory applications attract a filing fee of $200 in the High Court, whereas there is no such fee in the Family Court. In an application to transfer a complex proceeding to the High Court, this was noted as a significant factor in declining the application.[557]

26.109 We also note that applications for spousal maintenance and child support are often heard alongside PRA applications, and in rarer situations, applications to vary a nuptial settlement under section 182 of the Family Proceedings Act 1980.[558] The Family Court has jurisdiction to hear those applications,[559] and concurrent jurisdiction under the PRA risks these matters being heard in separate courts.

Option 3: Empower the High Court to transfer proceedings and/or reduce the threshold for transfer

26.110 This option would seek to improve the balance between the Family Court's exclusive jurisdiction and the High Court's limited role in PRA proceedings.

26.111 The High Court can only consider whether PRA proceedings should be heard in that Court on appeal from a decision of the

557 *H v H* [2015] NZFC 635 at [41].

558 We discuss options for reform with respect to s 182 of the Family Proceedings Act 1980 in Part D.

559 Family Court Act 1980, s 11.

Family Court.[560] The retention of the High Court's power to hear and determine applications for transfer was considered by Parliament during its consideration of the 2001 amendments, in response to concerns raised by the Chief Justice Dame Sian Elias.[561] The Ministry of Justice, however, in advising the Justice and Electoral Committee, was concerned that:[562]

> *Reinstating the power for a party to apply directly to the High Court for transfer would risk negating part of the purpose of the change which is to ensure that the parties do not use High Court jurisdiction for tactical advantage.*

26.112 One lawyer also argues there have been conflicting and inconsistent responses to applications to transfer proceedings.[563] Where proceedings only involve PRA matters, and there is no question of other proceedings having been filed in the High Court, there is room for judges to form different value judgements about the appropriate forum.[564]

26.113 As we noted above, the courts have interpreted the test for transfer in section 38A to be a relatively high threshold.[565] Further, the High Court recognises the Family Court's specialist expertise in determining whether transfer is appropriate. In *Corbitt v Rowley* the High Court observed that:[566]

> *… the special skill and experience of Family Court Judges, in my view, put them in as good a position as a Judge of the High Court to determine whether the complexity of the issue warrants transfer.*

26.114 The High Court in *Fisher v Fisher* similarly observed that:[567]

> *It is appropriate for me to recognise the specialist experience and knowledge which the Family Court Judge had in making an assessment as to what were likely to be the real issues in the case,*

560 This was confirmed by the High Court in *Corbitt v Rowley* 27 FRNZ 852 (HC) at [30].

561 Chief Justice Sian Elias "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 1.

562 Ministry of Justice *Advice to Justice and Electoral Committee: SOP to Matrimonial Property Amendment Bill* (21 September 2000) at 5.

563 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1975 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

564 Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1975 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

565 See *Fisher v Fisher* [2015] NZHC 2693.

566 *Corbitt v Rowley* 27 FRNZ 852 (HC) at [25].

567 *Fisher v Fisher* [2015] NZHC 2693 at [8].

how they were likely to be most effectively resolved and whether the High Court was the more appropriate forum for continuing proceedings.

26.115 Because of these cases, it is unclear whether a power to hear an application to transfer proceedings directly would, by itself, effect any change in practice. Accordingly, consideration should also be given to whether the grounds for transfer should be amended, to provide a broader discretion and reduce the threshold for transfer. As we note above, the grounds for transfer under section 38A were only recently reviewed and broadened in 2014, however the overall question remained the same – whether the High Court is the more appropriate venue for hearing the proceedings. Further legislative guidance could be provided as to when this test will be met.

CONSULTATION QUESTIONS

H22 Have we identified all of the issues with the jurisdiction of the Family Court and High Court to determine PRA and related disputes?

H23 Should the Family Court have jurisdiction to determine all issues related to PRA proceedings, in particular to determine issues regarding trust property? (Option 1)

H24 Should the High Court have a broader role under the PRA, to either hear and determine PRA proceedings concurrently with the Family Court (Option 2), or to hear and determine applications to transfer proceedings (Option 3)?

Other jurisdiction issues

Issue 6: How should the courts resolve questions of tikanga Māori?

26.116 Property matters under the PRA, including those where tikanga Māori is especially relevant, may be heard and determined by the Family Court or, in more limited circumstances, the High Court.[568] These and other courts have developed a number of requirements for the recognition of Māori custom law.[569] Māori custom law is part of the common law in New Zealand but what constitutes Māori custom or tikanga in any particular case is a question of

568 Property (Relationships) Act 1976, ss 38A and 39.

569 See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [204]–[220] and [252].

fact for expert evidence, unless the particular tikanga has become notorious by frequent proof and so judicial notice can be taken of it.[570] Customary rules in issue have been proved in evidence by kaumātua or by academics, by reliance on earlier published decisions of the Māori Appellate Court and in an affidavit filed "by a distinguished New Zealand chief".[571] In a recent case under the PRA the Family Court relied on expert evidence from a Māori academic relating to taonga.[572]

26.117 However, there may be other measures that could better enable a court to resolve questions of tikanga Māori. We consider a number of options that may be relevant in the PRA context.

Should the Family Court be able to seek assistance from experts in tikanga?

26.118 David Williams notes that the procedures of the adversarial mode of trial in the general courts may often entail that tikanga Māori elements of cases are overlooked.[573] We noted at paragraph 25.17 that the Family Court takes a semi-inquisitorial approach in making its decisions, but that it can only proceed on the evidence that is before it. Expert evidence may not be given to support an assertion of tikanga or may not be of sufficient assistance to the court.

26.119 One option is to enable the Family Court to obtain advice during the proceedings. Under some statutes, judges can request cultural reports to be completed to provide information that may better inform their decisions and this information may include the cultural ties and values of the people concerned.[574]

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570 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 per Elias CJ at [95]; Richard Boast "Māori Customary Law and Land Tenure" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.2.5]; and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Justice Joseph Williams "The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1. For discussion on the status of tikanga Māori as the first law of New Zealand with respect to which all other law must be negotiated see Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330; and Valmaine Toki "Tikanga Māori in criminal law" [2012] NZLJ 357 for tikanga Māori in the criminal law context.

571 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [205]. See *S v S* [2012] NZFC 2685 and *B v P* [2017] NZHC 338 for recent cases where evidence of tikanga was given.

572 *S v S* [2012] NZFC 2685. See Chapter 11 for a discussion of this case. See also Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

573 David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 41. See also Judge Annis Somerville "Tikanga in the Family Court – the gorilla in the room" (2016) 8 NZFLJ 157 at 159.

574 Oranga Tamariki Act 1989, 187; and Care of Children Act 2004, s 133.

26.120 In option 7 at paragraph 25.62 above we discussed the ability of the court under section 38 of the PRA to appoint a person to inquire into and report on facts in issue between the parties.[575] This procedure could be adapted to enable the court to inquire into matters of tikanga.

26.121 Another option is to empower the Family Court to appoint cultural advisers to assist, as full members of the court, in particular cases.[576]

26.122 The use of experts in tikanga, whakapapa and te reo Māori sitting with judges of the court has significant precedent.[577] The original statute creating the Māori Land Court, the Native Lands Acts 1862 provided for "assessors" to sit with judges. In practice this meant Māori of chiefly status who sat in an advisory capacity.

26.123 There is also precedent in contemporary New Zealand law for experts to sit with the court. Te Ture Whenua Māori Act 1993 (TTWMA) allows experts in tikanga to be involved in the hearing of cases.[578] In addition, the Commerce Act 1986 requires the High Court to sit with two lay members appointed from a pool of people with relevant experience to hear appeals from Commerce Commission determinations.[579]

Should the Māori Land Court and/or Māori Appellate Court have a role in PRA cases involving questions of tikanga?

26.124 The Māori Land Court and/or the Māori Appellate Court and its judges could play an important role in PRA cases involving questions of tikanga. In the Law Commission's 2004 report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* the Commission stated:[580]

> *Tikanga, by its very nature, is difficult to define and not universal. The Māori Land Court and the Māori Appellate Court are markedly more appropriate than any other forum in our court*

575 Property (Relationships) Act 1976, s 38.

576 See David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 43–44; see also the recommendation for the Māori Land Court to be able to appoint pū-wananga to assist the court in Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 240–241; and Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at [24.33].

577 See discussion in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 193.

578 Te Ture Whenua Māori Act 1993, ss 28 and 31–33.

579 Commerce Act 1986, ss 52ZA and 77.

580 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [342].

> *structure to make determinations about tikanga. It ignores the very substance of what requires determination to suggest that decisions can simply be made after hearing competing experts give evidence. The adjudicator needs an understanding of the context, beyond fact and precedent. It involves sets of beliefs and values which are subjected to careful and sensitive assessment.*

26.125 The Māori Land Court is "essentially a family court where te reo Māori is spoken, and where tikanga is observed in the processes of the court."[581] Both the Māori Land Court and Māori Appellate Court have specialist knowledge and expertise in matters concerning Māori land, tikanga and customary practices. The procedure of both courts is flexible, and allows a high degree of judicial discretion. Judges are directed to avoid formality, to apply the rules of marae kawa and to encourage the appropriate use of te reo Māori.[582]

26.126 Justice Durie, (now Sir Edward Taihakurei Durie) former Chief Judge of the Māori Land Court, said in a submission to the 1988 Royal Commission on Social Policy that the Court is both a court of law and one of "social purpose":[583]

> *….as distinct from most courts of law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find solutions for the problems that come before it; to settle differences of opinion so that co-owners might exist with a degree of harmony, to seek a consensus viewpoint rather than to find in favour of one; to pinpoint areas of accord, and to reconcile family groups.*

26.127 It has also been suggested by another former Chief Judge of the Māori Land Court that disputes involving Māori communities are of a similar nature, whether they involve land or other property.[584]

26.128 Broadening the role of the Māori Land Court in some PRA cases would be consistent with recent calls to extend its jurisdiction in other areas of family law that concern Māori. During the Government's review of TTWMA, judges of the Māori Land Court proposed that the jurisdiction of the Māori Land Court be broadened to include claims under the Family Protection Act

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581 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [368].

582 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [308].

583 As cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191.

584 Submission of the Chief Judge of the Māori Land Court cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (2002 NZLC PP52) at 191.

1955 and the Law Reform (Testamentary Promises) Act 1949 concerning Māori land estates.[585]

Enable a Māori Land Court judge to sit in the Family Court

26.129 An option is to enable a judge of the Māori Land Court to sit in the Family Court on PRA matters that are likely to involve questions of tikanga.[586] Family Court Judges are themselves District Court judges that are by reason of training, experience and personality suitable to deal with matters of family law.[587] Another example of the cross-warranting of judges can be found under the Resource Management Act 1991 where Māori Land Court Judges can sit as an alternate Environment Court Judge.[588] This option could utilise the judges' expertise and knowledge of tikanga and may assist with raising the level of understanding of tikanga in the Family Court.

Empower the Family Court to refer questions of tikanga

26.130 Another option is to empower the Family Court to refer a question of tikanga to the Māori Land Court or the Māori Appellate Court for consideration. A process could be adopted similar to section 61 of TTWMA which empowers the High Court to state a case to the Māori Appellate Court on matters of custom. The opinion of the Māori Appellate Court is then binding on the High Court. The Court of Appeal has described this section as giving the High Court access to the expertise of the Māori Appellate Court in respect of matters of fundamental importance, land and tikanga.[589]

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585 Māori Affairs Select Committee *Te Ture Whenua Māori Bill 2016: Submission for the Judges of the Māori Land Court*, 14 July 2016, at [189]–[191]. in relation to the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 discussed in Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 189.

586 It was suggested in submissions to the Law Commission's review of the courts that Māori Land Court Judges could sit in the Family Court in cases involving applications under the Guardianship Act 1968 and the Property (Relationships) Act 1976: see Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 192. The Law Commission subsequently recommended that Māori Land Court Judges be cross-warranted to sit in other primary court jurisdictions (such as the Family Court) as and when appropriate and as resourcing may permit: Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [333] and R119.

587 Family Court Act 1980, s 5(2).

588 Resource Management Act 1991, s 249(2).

589 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [345] citing *Hauraki Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1995] 2 NZLR 702 (CA).

26.131 The Family Court could refer a question of tikanga to the Māori Land Court in the first instance or directly to the Māori Appellate Court. In the Law Commission's report *Delivering Justice for All* the Commission recommended that, in the interests of consistency, efficiency and justice, the expertise of the Māori Appellate Court should be used by all courts where issues of tikanga require determination.[590]

Empower the Māori Land Court and/or Māori Appellate Court to hear PRA cases

26.132 A further option is to grant the Māori Land Court concurrent jurisdiction to hear PRA cases in the first instance. A claimant could have the choice to file their claim either in the Family Court or in the Māori Land Court if there was a question of tikanga.[591] If the parties cannot agree where the case should be heard, the case could be heard by the Family Court by default.

26.133 Alternatively, the Family Court could be empowered to transfer a case to the Māori Land Court, or to the Māori Appellate Court if matters were particularly complex, along the lines of the section 38A process, discussed at paragraphs 26.79 to 26.91 above.

26.134 However, while the Māori Land Court and its judges are specialists in tikanga, there are arguments against the Māori Land Court or Māori Appellate Court hearing PRA cases, including:

(a) the Family Court is a specialist court, with particular expertise in resolving family matters, including PRA proceedings. It is appropriate that the specialist nature of that Court is recognised;

(b) the Māori Land Court and Māori Appellate Court do not have expertise in property relationship matters and there may not be many cases where the question of tikanga is the only matter in dispute; and

(c) the general courts would not be able to build up a body of knowledge of tikanga, which may be useful in other cases, if most or all PRA cases involving a question of

590 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [348]–[349].

591 The Law Commission recently recommended that the Māori Land Court be given concurrent jurisdiction to hear questions about the funeral, burial or cremation of a deceased Māori person: Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at R119.

tikanga were heard in the Māori Land Court or Māori Appellate Court.

Appeals on matters of tikanga

26.135 Appeals from the Family Court in PRA matters are heard by the High Court.[592] Given the Māori Appellate Court's expertise, it may be appropriate to enable an appeal from the Family Court on a matter of tikanga to be heard by the Māori Appellate Court rather than the High Court. However, the arguments against the Māori Land Court and Māori Appellate Court hearing cases noted in points (b) and (c) of paragraph 26.134 above would also apply in relation to appeals.

CONSULTATION QUESTIONS

H25 Should the Family Court be able to seek assistance from experts in tikanga Māori, such as through powers of inquiry or through the appointment of cultural advisers?

H26 Should the Maori Land Court and/or Maori Appellate Court have a role in PRA cases involving questions of tikanga? If so, should that be through:

- Enabling Māori Land Court Judges to sit in the Family Court?
- Referring questions of tikanga to the Māori Land Court?
- Allowing claimants to file a PRA case involving a question of tikanga in the Māori Land Court?
- Enabling the Family Court to transfer a PRA case involving a question of tikanga to the Māori Land Court, or to the Māori Appellate Court if the matter was complex?

H27 Should appeals from the Family Court on matters of tikanga be heard in the Māori Appellate Court rather than the High Court?

Issue 7: Should the separate regime under the Domestic Actions Act 1975 remain?

26.136 The final issue we identify in this chapter does not relate to the PRA itself, but another statue, the Domestic Actions Act 1975. While our review does not extend to the Domestic Actions Act, the way in which it overlaps with the PRA is of concern and, we think, ought to be addressed.

592 Property (Relationships) Act 1976, s 39.

26.137 The Domestic Actions Act was originally introduced to abolish actions for damages for various family-related matters including adultery and breach of a promise of marriage. However Part 2 of that Act also provides for the settlement of property disputes arising out of the termination of agreements to marry. Section 8 of the Domestic Actions Act provides that, where the termination of an agreement to marry gives rise to a property dispute, a party may apply to the Family Court or the High Court for an order that will "restore each party… as closely as practicable to the position that party would have occupied if the agreement had never been made."[593]

26.138 The Domestic Actions Act is an uncomfortable fit with the PRA. The two regimes partially overlap, as the Domestic Actions Act can apply to de facto relationships where the partners were engaged.[594] The difficulty in applying the Domestic Actions Act to this category of relationships was recognised by the Court of Appeal in *Oliver v Bradley*.[595] The parties were engaged in 1980 and purchased a home together where they lived until their separation in 1984. In relation to the plaintiff's application under the Domestic Actions Act, the Court of Appeal commented:[596]

> *My reservation about applying [the Domestic Actions Act] to these circumstances arises from the pending words of subs (1) – "Where the termination of an agreement to marry gives rise to any question between the parties" etc. These parties not only agreed to get married, but they also agreed to live in a "de facto" domestic and sexual relationship, and it was their decision to embark on that which can be seen as leading to the acquisition of the house property and to its maintenance as their family home. Similarly, it was the termination of that relationship which led to the dispute about dividing their property. The concurrent agreement to marry appears to be no more than a facet of that more fundamental association. It seems quite artificial to regard this question about the property as being merely the result of their broken engagement. This is borne out by the difficulties experienced in trying to restore the parties to the position they would have been in if the agreement to marry had never been made, as enjoined by s 8(3).*

593 Domestic Actions Act 1975, s 8(3).

594 The potential for overlapping claims was recognised by the High Court in *M v D* [2012] NZHC 1152 at [66].

595 *Oliver v Bradley* [1987] 1 NZLR 586 (CA).

596 *Oliver v Bradley* [1987] 1 NZLR 586 (CA) at 591–592. These reservations have been shared by other courts, for example in *Lee v Mahon* [2002] NZFLR 1136 (FC) at 1140; and *Nye v Reid* [1993] NZFLR 60 (DC) at 62–63.

> *Rather than introduce into the arena of domestic property disputes a new category of "engaged de factos", I would prefer to see s 8 confined to what I think is its real purpose — namely, the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship. I do not think the legislation was ever intended to apply to the de facto situation in this case... However, in the absence of any argument about the application of the Act, I content myself only with the expression of these reservations.*

26.139 These comments were made in 1987. The Domestic Actions Act has not been updated to reflect the inclusion of de facto relationships into the PRA regime in 2001. It has been described by the High Court as legislation "from another age."[597] However, applications under that Act, while uncommon, are still made.[598] In *A v B*, a case from 2015, the parties were in a de facto relationship and had two children.[599] Following their separation the plaintiff commenced proceedings under the Domestic Actions Act for the return of items allegedly given to Ms B throughout their relationship, or damages of at least $126,900. The defendant applied to strike out the Domestic Actions Act application. The High Court, while "very much doubt[ing]" whether the Domestic Actions Act application would succeed, could not strike out the proceeding as, assuming the pleaded facts were true (as required for strike out applications), the claim was not "clearly untenable."[600]

26.140 The existence of a separate regime for resolving property disputes under the Domestic Actions Act is problematic, as it means a specific category of relationships are subject to two overlapping regimes, each with different aims (restoring the parties to their position but for the engagement under the Domestic Actions Act, as opposed to achieving a just division of relationship property under the PRA). Further, as the High Court has concurrent jurisdiction under the Domestic Actions Act, there is a risk of parallel proceedings in different courts and, as observed in *A v B*,

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597 *M v D* [2012] NZHC 1152 at [66].

598 This is despite the courts having taken a narrow interpretation to its application. Casey J's observation that s 8 of the Domestic Actions Act 1975 should be confined to property acquired to mark the engagement, or in contemplation of the marriage envisaged by it, has been adopted by the High Court in *Zhao v Huang* [2014] NZHC 132, [2014] NZFLR 782 at [39]; and *Stopforth and Roddick* (1990) 6 FRNZ 392 (HC) at 396.

599 *A v B* [2015] NZHC 487.

600 *A v B* [2015] NZHC 487 at [29].

the risk of contradictory findings.[601] The regime created under the Domestic Actions Act is also unnecessary. Parties in a qualifying de facto relationship under the PRA can apply to the Family Court for resolution of their property disputes under the PRA, while partners not subject to the PRA but who were engaged to be married may pursue a claim in equity based on constructive trust.[602]

26.141 Our preliminary view is that Part 2 of the Domestic Actions Act 1975, providing for resolution of property disputes arising out of agreements to marry, should be repealed. Parties would continue to have a claim based on constructive trust, and in respect of qualifying de facto partners, they could apply to the Family Court under the PRA for resolution of their property disputes.

CONSULTATION QUESTION

H28 Should Part 2 of the Domestic Actions Act 1975 be repealed?

601 *A v B* [2015] NZHC 487 at [32]. A further application to transfer the Domestic Actions Act claim to the Family Court to be heard alongside the Property (Relationships) Act 1976 claim was granted: *A v B* [2015] NZHC 1113, [2015] NZFLR 579.

602 In *Oliver v Bradley* [1987] 1 NZLR 586 (CA) at 201 per Henry J the Court of Appeal considered that "an approximately identical result would be achieved whether entitlement is assessed under the Domestic Actions Act 1975 or on a constructive basis." See also the comments of Cooke P at 198–199.

Part I: How should the PRA recognise children's interests?

Chapter 27 – Children and the PRA

Introduction

27.1 Many children experience the separation of their parents or caregivers.[1] A smaller number of children will experience the death of one of their parents.[2] In this part, "children" means minor or dependent children, except where expressly stated.

27.2 In this chapter we explore how the end of a relationship affects children, and the role of the PRA in addressing children's interests. The rest of Part I is arranged as follows:

(a) In Chapter 28 we look at the case for taking a more child-centred approach in the PRA, and consider who is a "child of the relationship" for the purposes of the PRA.

(b) In Chapter 29 we look at what taking a more-child centred approach would look like in practice, with specific options for reform.

27.3 Our discussion in this part of the Issues Paper focuses primarily on the division of property following parental separation.[3] Different issues might arise on the death of one partner when children are involved. This situation is unlikely to arise as often. Children have different property rights when one parent dies, including possible claims under succession law.[4] We discuss how the PRA operates on the death of one partner in Part M. Some of

1 It is difficult to measure rates of relationship separation involving children. In our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 3, we identified that in 2016, 42 per cent of all divorces involved children under 17 years, affecting over 6,000 children in total. But this only captures official divorces. Not all married couples who separate will officially divorce. Nor does this capture de facto separations. Given that almost half of all children are now born outside marriage, the number of children affected by de facto separations is likely to be just as high, if not higher, than those affected by divorce.

2 In the 2013 Census, 6,606 adults aged 15–49 reported they were widowed or a surviving civil union partner, however it is unknown how many of these people were caring for children, and this does not include surviving de facto partners: Statistics New Zealand "Legally registered relationship status by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006, and 2013 Censuses (RC, TA, AU)" <nzdotstats.stats.govt.nz>.

3 In this part, we refer to "parental separation" to include the separation of a child's parents or caregivers.

4 Apart from any inheritance a child may receive under the deceased parent's will, a child may have a claim under the Family Protection Act 1955, Law Reform (Testamentary Promises) Act 1949 and in the case of intestacy, the Administration Act 1969.

the issues and options for reform discussed in this part would, however, also apply when a relationship ends on death.

CONSULTATION QUESTION

I1 Does the way that the PRA operates on the death of one partner raise any specific problems for children?

How does parental separation affect children?

27.4 New Zealand studies observe a steady rate of parental separation in the first few years of a child's life, which means that the number of children experiencing parental separation increases as the children get older.[5] One recent study of 209 children aged 15 found that only 20 per cent had spent all their childhood living with both biological parents.[6]

27.5 Parental separation is a turbulent time for children. They may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may have to change schools, losing ties with their friends and community. For some children, parental separation is associated with a prolonged period of lower living standards.[7]

5 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 3. One New Zealand study of over 1,000 children born in 1972–1973 identified that, on average, 2.3 per cent of the children experienced parental separation each year, and that by age 16, 34 per cent had either experienced parental separation or had entered a single parent family at birth: David M Fergusson and L John Horwood "Resilience to childhood adversity: Results of a 21 year study" in Suniya S Luthar (ed) *Resilience and Vulnerability: Adaption in the Context of Childhood Adversities* (Cambridge University Press, Cambridge (UK), 2003) 130 at Table 1. These findings have also been reflected in the early results of the more recent Growing Up in New Zealand study, which identified that, overall, the number of children living in a single parent household is increasing as the children get older (3 per cent lived in a single parent household before birth, rising to five per cent by age two and eight per cent at age four: Susan MB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now we are Four: Describing the preschool years* (University of Auckland, May 2017) at 39.

6 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 3, citing JL Sligo and others "The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy" [2016] Kōtuitui N Z J Soc Sci Online 1 at 5.

7 Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 188. See description of this study and data used at fn 54.

27.6 Parental separation affects children differently.[8] Some children are harmed by their parent's separation while others benefit.[9] Some experts take the view that:[10]

> *Whether or not the risks for children associated with divorce are actually realised is determined not by the separation itself, but by the complex interplay of other factors that are present before, during, and after separation.*

27.7 There is some evidence that children whose parents separate are at higher risk of an adverse outcome than children whose parents do not, although the extent of that risk depends on a range of factors.[11] Research on parental separation and child outcomes suggests that:[12]

> *…there is an abundance of evidence that children who experience a parental separation are, on average, worse off than their peers in intact families, on a number of measures of wellbeing. However, the scale of the differences in wellbeing between the two groups of children is not large and most children are not adversely affected. Parental separation then bears down most heavily on a minority of children, generally in the presence of other exacerbating factors.*
>
> *Underlying these effects are multiple mechanisms: income declines following separation, declines in the mental health of custodial mothers, interparental conflict and compromised parenting. These mechanisms do not operate independently, but are related in complex ways. …*
>
> *Part of the effects also arise from non-causal mechanisms: that is to say, not all of the adverse child outcomes following separation can be laid at the door of the separation itself.*

8 Mark Henaghan "Legally rearranging families: Parents and children after break-up" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 307 at 309.

9 Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 257.

10 Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 257.

11 See Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 66: "Children from separated families typically have from one-and-a-half times to double the risk of an adverse outcome compared to children from intact original families."

12 Ross Mackay "The Impact of Family Structure and Family Change on Child Outcomes: A Personal Reading of the Research Literature" (2005) 24 Social Policy Journal of New Zealand 111 at 127–128. See also Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 66.

How do parents care for children after separation?

27.8 Parents have legal obligations to care for their children. The welfare and best interests of the child are the first and paramount consideration under the Care of Children Act 2004, which sets out rules about the guardianship and care of children, and provides that a child's guardians (usually the child's parents) are responsible for providing day-to-care and contributing to the child's intellectual, emotional, physical, social, cultural and other personal development.[13] The Crimes Act 1961 also imposes a legally enforceable duty on parents and guardians to provide children with necessaries (such as food, clothing, housing and medical care) and to take reasonable steps to prevent them from injury.[14] Some parents who do not live with their children, or who share care of their children may have an obligation to pay child support (see paragraphs 27.15 to 27.21).[15] The objects of the Child Support Act 1991 include affirming the obligation of parents to maintain their children, and ensuring that obligations to birth and adopted children are not extinguished by obligations to stepchildren.[16]

27.9 Care arrangements for children are likely to change when their parents separate. One parent may become the primary caregiver, or care may be shared, which usually means the children split their time across two different households.[17] Some parents may "live apart" in the same house,[18] or practice "bird's nest parenting",[19] so that the children can stay in the family home for

13 Care of Children Act 2004, ss 4(1), 5(b) and 16 (in relation to the duties, powers, rights and responsibilities of a guardian of a child). A guardian's responsibilities also extend to determining for or with the child, or helping the child to determine, questions about important matters affecting the child, such as where the child lives, medical treatment, education and identity: ss 16 and 36–38. See also Education Act 1989, ss 20, 24 and 29 in relation to the responsibilities of parents and guardians to enrol children at school and ensure their regular attendance between ages 6 and 16.

14 Crimes Act 1961, s 152. See also Family Proceedings Act 1980, s 45.

15 Child Support Act 1991, s 2 definitions of "liable parent" and "receiving carer"; and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

16 Child Support Act 1991, ss 4(b) and 4(i).

17 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017). However information collected on households does not give us information about shared parenting arrangements, as it only counts each child as living in one household, and that is the household where they spend most of their time. A 2012 survey of 8,500 secondary school students found that 29 per cent of students reported that they lived in two or more homes: Adolescent Health Research Group *The Health and Wellbeing of New Zealand Secondary School Students in 2012: Youth'12 Prevalence Tables* (University of Auckland, 2013) at 31.

18 For example where a couple's relationship has ended but both partners choose to remain living in the family home for a time to provide stability for the children or for other reasons. See, for example, Colleen Hawkes "Separated couple save $1500 a week by living together in family home" (29 September 2017) <www.stuff.co.nz>.

19 "Birds nest parenting" is where the children stay in the family home and the parents rotate in and out of the "nest". See for example *K v K* [2005] NZFLR 881 (FC) where the court declined an application for exclusive occupation of the family home where the parties had a "nesting" regime. See also Meshel Laurie "My 'bird-nesting' arrangement with my ex-

a time. Whānau or extended family may become more involved in care arrangements.[20]

27.10 Whatever the care arrangements are when parents separate, they will often change over time.[21] In the period immediately after parental separation, initial arrangements may need modifying as problems surface when arrangements are tried out.[22] More broadly, children's needs change as they grow older, and the circumstances of one or both parents may also change (such as a change in job or re-partnering) so that the existing arrangements no longer work for them.[23]

27.11 The State provides services for separated parents who cannot agree on how their children are to be cared for, including a free parenting information course, Parenting Through Separation, and access to subsidised Family Dispute Resolution services.[24]

What financial support is available for parents and caregivers?

27.12 Ideally, future needs should be met without reliance on State support or intervention. Separating parents should be able to agree amongst themselves on how they will meet the needs of any dependent children. Recognising however that it will not always be possible for families and whānau to support themselves when relationships end, the State ensures that there are other means of financial support available. These means of support, described as "pillars", are discussed in Chapter 2.[25] These are maintenance, child support and State benefits. Each addresses a different issue

husband" (3 July 2016) <www.stuff.co.nz>; and Cosima Marriner "Does the 'bird's nest parenting' solution really work?" (13 September 2016) <www.stuff.co.nz>.

20 For whānau living in accordance with tikanga Māori, the principle of manaakitanga may guide their involvement with children whose parents have separated.

21 One Australian study identified that 60 per cent of children whose parents had separated experienced a change in care arrangements in the first five years after parental separation: Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at xvi–xvii.

22 Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at 69.

23 Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at 69; and Jeremy Robertson, Jan Pryor and Janine Moss "Putting the kids first: Caring for children after separation" (2009) 35 Social Policy Journal of New Zealand 129 at 133.

24 Family Dispute Resolution is discussed further in Chapter 24 of this Issues Paper. Parents who still cannot agree can ask the Family Court to decide care issues for them.

25 See also Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in J Eekelaar and R George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 138 at 141.

and together with the PRA they establish a framework of post-separation financial support.[26]

State benefits

27.13 A key State benefit that can meet children's post-separation needs is Sole Parent Support.[27] This is available to a single parent or caregiver with a youngest dependent child under age 14.[28] Sole Parent Support is currently $329.57 (net) per week, subject to an income test.[29] Alternative State benefits that may be available to single parents and caregivers include Jobseeker Support (which may replace Sole Parent Support when the youngest dependent child turns 14)[30] and the Supported Living Payment.[31] Other benefits that may be relevant include the Disability Allowance and Temporary Additional Support.[32]

27.14 Parents and caregivers may also be eligible for housing assistance,[33] subsidies to assist with the cost of childcare[34] and Working for Families tax credits.[35]

Child support

27.15 Child support is financial support paid by parents who do not live with their children, or who share care of their children with

26 We discussed maintenance under the Family Proceedings Act 1980 in Chapter 19 of this Issues Paper, under option 3.

27 Sole Parent Support replaced the Domestic Purposes Benefit in 2013.

28 See Social Security Act 1964, ss 20A and 20D. Further information is available at Ministry of Social Development "Sole Parent Support" <www.workandincome.govt.nz>.

29 Social Security Act 1964, s 20G and sch 3A. This amount does not change regardless of the number of children.

30 Social Security Act 1964, s 20H, pt 2 and sch 9. Further information is available at Ministry of Social Development "Jobseeker Support" <www.workandincome.govt.nz>.

31 Social Security Act 1964, pt 1E and sch 6. Further information is available at Ministry of Social Development "Supported Living Payment" <www.workandincome.govt.nz>.

32 Further information is available at Ministry of Social Development "Temporary Additional Support" <www.workandincome.govt.nz>.

33 In the form of State-owned housing or the Accommodation Supplement. See Social Security Act 1964, pt 1K and sch 18. Further information is available at Ministry of Social Development "Accommodation Supplement" <www.workandincome.govt.nz>.

34 The Childcare and Out of School Care and Recreation (OSCAR) Subsidies may be available to assist with the cost of childcare. The OSCAR Subsidy income thresholds and maximum rates at 1 April 2017 are available at Ministry of Social Development "Out of School Care and Recreation (OSCAR) Subsidy" <www.workandincome.govt.nz>. The Childcare Subsidy income thresholds and maximum rates as at 1 April 2017 are available at Ministry of Social Development "Childcare Subsidy" <www.workandincome.govt.nz>. The cost of attending an early childhood service or kōhanga reo may be fully subsidised for some children up to six hours a day and up to 20 hours a week: see Ministry of Education "20 Hours ECE" <www.education.govt.nz> for more information.

35 Available for working parents with dependent children under the age of 18. See Inland Revenue *What are Working for Families Tax Credits?* (IR691, March 2016).

someone else, such as another parent.[36] Child support aims to offset the costs to the State of providing financial support for children and their carers by ensuring that liable parents take financial responsibility for their children.[37] Child support also ensures that a parent's obligations to birth and adopted children are not extinguished by obligations to stepchildren.[38]

27.16 A parent can apply to the Commissioner of Inland Revenue for a child support assessment. The amount of child support payable is calculated by a formula set out in the Child Support Act 1991 and is collected by Inland Revenue.[39] The formula takes into account each parent's income, living needs, number of dependent children and care arrangements.[40] Parents can also reach their own private agreement on the payment of child support.[41]

27.17 When a parent is receiving a State benefit such as Sole Parent Support, any child support paid by another parent is first used to recover the cost of that benefit to the State.[42] This means the parent receiving child support will only receive the amount of the child support payment (if any) in excess of his or her net benefit.[43]

27.18 A court can make a departure from the set formula under the Child Support Act in special circumstances.[44] Three requirements must be satisfied:[45]

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36 Child Support Act 1991, s 2 definitions of "liable parent" and "receiving carer"; and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

37 Child Support Act 1991, ss 4(b) and 4(j); and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

38 Child Support Act 1991, s 4(i); and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

39 Inland Revenue can only pay the receiving carer the child support it receives from the liable parent. If the liable parent pays Inland Revenue late, the receiving carer will receive child support late. If the liable parent does not pay Inland Revenue, the receiving carer will not receive child support. Penalties for late payment may, however, apply. See Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 20; and Child Support Act 1991, s 134.

40 Child Support Act 1991, pt 2. See also Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 8–9.

41 If the recipient is in receipt of a State benefit, the agreement must be acceptable to Inland Revenue: Child Support Act 1991, s 50. A voluntary agreement can also be registered if the parties want Inland Revenue to be involved in the collection and payment of child support: pt 3.

42 Child Support Act 1991, s 142.

43 Child Support Act 1991, s 142.

44 Child Support Act 1991, s 106. An application for a departure order may be made by a receiving carer or liable parent if a qualifying formula assessment is in force and certain other criteria are met: s 104. See by way of example *P v R* FC Auckland FAM-2004-004-3234, 30 November 2006 where a departure order was made in respect of ongoing private school and some tertiary fees. The Family Court said at [107]:

> *Why should the children, as a matter of public interest, not have all the advantages they would have had educationally and in their extracurricular activities but for the parents' separation and subsequent inability to reach agreements to better provide for their welfare?*

45 Child Support Act 1991, s 105(1).

(a) First, grounds for departure under the Child Support Act must exist. These grounds include special circumstances relating to a parent's financial needs (including any duty to support another child), the child's special needs and other factors which might make a formula assessment "unjust and inequitable" (including any payments made under the PRA to or for the benefit of the child, or to either party).

(b) Second, it must be "just and equitable" to make a departure order, as regards the child and the parties.

(c) Third, it must be "otherwise proper" to make the departure order.

27.19 Lump sum orders can also be made under the Child Support Act. A court has the discretion to order future or past child support to be paid in a lump sum where it would be just and equitable as regards the child and the parties, and otherwise proper.[46] A court must have regard to listed matters, including the child's proper needs and the financial resources of each parent who is a party to the proceeding.[47] A court may make a lump sum order where a parent has refused or failed to pay child support in the past, or where there is a risk that a parent will fail to pay child support in the future.[48]

27.20 A court must have regard to any child support payable by one partner for a child of the relationship in proceedings under the PRA.[49] Section 32 of the PRA allows a court to make certain orders under the Child Support Act, including departure and lump sum orders, if it considers it just.[50] This ensures that child support arrangements can be revisited, if required, in PRA proceedings. Courts have used this power in a "conservative fashion".[51] In *H v H* the High Court made it clear that the discretion in section 32 is only to make orders under the stipulated provisions of the Child

46 Child Support Act 1991, s 109.

47 Child Support Act 1991, ss 105(4) and 109(3)(c).

48 *L v L* [2015] NZFC 9689 at [60]. Lump sum child support is credited against liability to pay formula-assessed child support unless a court is satisfied that it would be just and equitable as regards the child and the parties, and otherwise proper, not to do so: Child Support Act 1991, s 110.

49 Including child support payable under a formula assessment under the Child Support Act 1991 or by a voluntary agreement: Property (Relationships) Act 1976, ss 32(1)(b) and 32(1)(c).

50 Property (Relationships) Act 1976, s 32(2)(c). A court may also cancel, vary, extend or suspend a voluntary agreement: s 32(2)(d).

51 *F v M* [2012] NZFC 7705 at [110].

Support Act, and that this requires sufficient evidence.[52] The Court went on to say that the amount of a lump sum award was almost certainly limited, in "all but the most unusual circumstances", to a capitalisation of the formula assessment in any given financial year.[53]

27.21 Recent research by Fletcher into the economic consequences of separation among couples with children found that child support payments provide little support to many separated partners with the primary care of children.[54] Of those partners receiving child support, average receipts were $2,367 for women (7 per cent of average total family income) and $709 for men (2 per cent of average total family income) per annum, in the year after separation.[55]

Children may live in poverty despite State assistance

27.22 Some research shows that children in sole parent families are more likely to experience poverty than children with two parents.[56] The main reasons are said to be low rates of paid

52 *H v H* [2007] NZFLR 910 (HC) at [100]. See also *L v L* [2015] NZFC 9689 at [43] as to the evidence required.

53 *H v H* [2007] NZFLR 910 (HC) at [104].

54 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) (Study Paper) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) (Draft Thesis) at 137–138 and 152. This research was limited to opposite-sex couples who separated in 2009. It looked at the short to medium term financial consequences of separation by analysing the incomes of over 15,000 people in the Working for Families dataset who separated in 2009 and who, prior to separating had at least one child living with them, and comparing outcomes with similar, still partnered individuals. While not representative of the whole population, the dataset covers approximately two-thirds of all parents with dependent children in New Zealand: Draft Thesis at 3. For further information about this dataset see Study Paper at Chapter 8. This research took place before changes to the child support formula were introduced on 1 April 2015. The new child support formula includes, among other things, the estimated average cost of raising children in New Zealand (updated annually); a lower level of minimum shared care (now 28 per cent of ongoing daily care, down from 40 per cent of the nights in the child support year); and the child support income of both parents (not just the liable parent): Inland Revenue "What a child support formula assessment is" (31 March 2016) <www.ird.govt.nz>; and Child Support Act 1991, s 30. Fletcher considered whether the new child support formula could be expected to improve outcomes, using data provided by Inland Revenue based on modelling produced from a dataset consisting of just under 90 per cent the total number of cases, and found that it would have little impact on child support payments and receipts overall: Draft Thesis at 176 to 180, and 189 to 191. Data limitations are discussed in the Draft Thesis at 168 to 170 and include the absence of equal-care cases and third-party carers, and the lack of exact information on the distribution and prevalence of shared care below the 40 per cent level.

55 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 135 and 138.

56 Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at Chapter 8. See also Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

employment and low levels of welfare benefits.[57] Fletcher's research suggests that "[i]n simple terms, the level of assistance provided through welfare and family tax credits is often insufficient to ensure individuals are not below the poverty threshold, especially if they have children living with them."[58]

27.23 Experts say that child poverty can negatively affect child development in numerous ways.[59] The issue is, however, complex. One expert says that "[a]lthough there is considerable evidence that poor child and later-life outcomes are correlated with household income in early childhood, this does not necessarily mean that low incomes during childhood cause all of these problems."[60] Housing is also "critically related" to child poverty.[61] Poor quality housing and overcrowding can lead to health issues for children and impact on their mental health, social wellbeing and school performance.[62]

How does the PRA fit in?

27.24 The PRA governs the division of property when relationships end. Decisions under the PRA can have a significant impact on children's lives, influencing where children live and what their standard of living will be after parental separation.

Historical background to the PRA

27.25 The PRA has always recognised the interests of children in property division at the end of a relationship. In a White Paper

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57 Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 6:

> *There are two main reasons why sole-parent families in New Zealand have a high rate of poverty: sole-parents have a comparatively low rate of paid employment by OECD standards, and welfare benefits are low relative to the poverty line*

58 Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 188. See also Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8.

59 Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 14.

60 Dave Grimmond "The economic and social impact of growing up in poverty" *Children: A Newsletter from the Office of the Children's Commissioner* (Issue 79, Summer 2011) at 29. See also David M Fergusson, L John Horwood and Sheree J Gibb "Childhood family income and later outcomes: results of a 30 year longitudinal study" Children: A Newsletter from the Office of the Children's Commissioner (Issue 79, Summer 2011) at 24.

61 Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 45.

62 Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand*: Evidence for Action (December 2012) at 45.

published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice said "[t]he children of a marriage have an indirect but nonetheless important interest in any division of the matrimonial property."[63] The resulting Matrimonial Property Act 1976 contained many of the same provisions that take into account children's interests that are in the PRA today.[64]

27.26 In 1988 a Working Group was established to review the Matrimonial Property Act 1976.[65] The Working Group acknowledged that one partner's responsibility for dependent children following separation may cause problems, such as decreased earning capacity, financial dependency and a much lower standard of living.[66] It recommended changes to bring more property into the relationship property pool available for equal division, which would mean that more women would leave a marriage with an amount of property equal to that of their husbands, going "some way toward avoiding discrepancies in the spouses' standards of living."[67] These proposals were implemented in the 2001 amendments.

27.27 The 2001 amendments largely retained the previous approach in the way that the interests of children were considered on property division, although children of de facto partners were included for the first time.[68] The 2001 amendments also gave a court the discretion to make orders postponing vesting of property if immediate vesting would cause undue hardship for the primary caregiver of ongoing daily care for children.[69] In addition, courts were given the discretion to make orders relating to child support and furniture orders.[70]

63 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

64 See for example the long title and ss 26(1), 26(2), 27, 28 and 33(3) of the Matrimonial Property Act 1976.

65 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to identify the broad policy issues with the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

66 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 6.

67 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 13-14.

68 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 1.6.

69 Property (Relationships) Act 1976, s 26A.

70 Property (Relationships) Act 1976, ss 28B, 28C, 28D and 32.

Recognising children in a law primarily about adults

27.28 The PRA's historical background shows a longstanding willingness to accommodate children's interests in the division of property at the end of a relationship. But how this is meant to work in practice is a complex issue.

27.29 The PRA is primarily about the property entitlements of adult partners that arise at the end of a relationship. As we discussed in Chapter 3, the PRA is built on the theory that a qualifying relationship is an equal partnership or joint venture, to which partners contribute in different but equal ways. Each partner's contribution to the relationship results in an entitlement to an equal share in the property of the relationship. Dividing relationship property according to the partners' entitlements, however, might not always be in the best interests of children. For example, on separation one partner may wish to sell the family home immediately so that he or she can use the proceeds to buy a new home. But the children's interests may favour delaying the sale of the family home, enabling them to remain in the home for a time and maintain continuity while dealing with their parents separation.[71] The focus on the adult partners may also be at the expense of a wider focus on the family. In te ao Māori, there is greater acknowledgment of the interests of the whānau as well as a recognition of children as taonga.[72]

27.30 The PRA must therefore balance partners' property entitlements and children's interests. It must also achieve a balance between parental autonomy and State direction. Partners may highly value their parental autonomy to make decisions about how their children are looked after post-separation, without direction from the State. However, the State has a role in protecting children, and it is concerned with children's welfare and best interests.[73] The State may also incur costs as a result of separation, including direct costs such as one or both adult partners requiring access to

71 See for example *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009 where the High Court said at [99] that "[i]n the general run of cases, a s 27 order that is intended to operate for a term of several years will be regarded as offending against the clean break principle."

72 See Joan Metge "Ko Te Wero – The Māori Challenge" in *Family Court, Ten Years On* (New Zealand Law Society, 1991) at 24–25 as cited in *Re B* [2016] NZFC 7039 at [22].

73 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at [23]. For example the State has obligations under international treaties like the United Nations Convention on the Rights of the Child and has implemented domestic legislation such as the Care of Children Act 2004 that promotes children's welfare and best interests.

State benefits, and indirect costs that might result from longer-term adverse outcomes for children. It is unclear where the balance lies between the role of the State and parental autonomy in some private law disputes, including care arrangements, relationship property claims or claims against an estate.[74]

27.31 The PRA must also achieve a balance between clear rules and discretionary decision-making. Rules and speedy resolution of disputes may favour children because research indicates that "…prolonged exposure to frequent, intense and poorly resolved parental conflict is associated with a range of psychological risks for children."[75] Quick resolution may also be more appropriate to a child's sense of time. However discretion enables a court to treat each child as an individual with his or her own risk factors and interests – which may be different to those of his or her parents.

74 Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at [23].

75 Ministry of Justice *Reviewing the Family Court: A Summary* (September 2011) at 2 referring to J Hunt and L Trinder *Chronic litigation cases: Characteristics, numbers, interventions. A report for the Family Justice Council* (2011); J Tolmie, V Elizabeth and N Gavey "Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand" (2010) 24 NZULR 136; J McIntosh and R Chisholm "Cautionary notes on the shared care of children in conflicted parental separation" (2008) 14 Journal of Family Studies 37; E Cummings and P Davies *Children and marital conflict: The impact of family dispute and resolution* (The Guilford Press, New York, 1994); and J McIntosh "Enduring conflict in parental separation: Pathways of impact on child development" (2003) 9 Journal of Family Studies 63.

Chapter 28 – The case for taking a more child-centred approach under the PRA

28.1 Children have an indirect but nonetheless important interest in property decisions following separation. As explored in Chapter 27, decisions under the PRA can have a significant impact on children's lives, affecting their accommodation, standard of living and ability to maintain relationships with family, whānau, friends and community.[76] Decisions that negatively affect children can not only harm them, but can also result in high future costs to society.[77]

How does the PRA recognise children's interests?

28.2 In Chapter 3 we explained that an implicit principle of the PRA is that a just division of relationship property should have regard to the interests of the children of the relationship.[78] Section 26(1) imposes an overarching requirement on the court to "have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship" in any PRA proceedings. This is of general application and can influence the court's decision on a wide range of matters.[79] It recognises that the interests of children may be considered sufficiently important to warrant some degree of priority over their parents' property entitlements. In practice, however, children's interests are seldom prioritised in this way.

28.3 The PRA also provides a court with powers to make a range of orders that can directly or indirectly benefit children. These

76 Note that the Care of Children Act 2004 ensures that appropriate arrangements are in place for the guardianship and care of children.

77 Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 2.

78 This principle is expressed in several places in the Property (Relationships) Act 1976, including ss 1M and 26.

79 See discussion at paragraph [2929.16].

powers are discussed in detail in Chapter 29, but by way of summary they include:[80]

(a) settling relationship property for the benefit of children of the relationship;[81]

(b) postponing the vesting of a partner's share in relationship property, if that would cause undue hardship for the principal provider of ongoing daily care for children of the relationship;[82]

(c) granting occupation of the family home to one partner, or transferring a tenancy to one partner, so that children can stay in the home for a period of time;[83] and

(d) granting one partner the possession and use of any furniture, household appliances and household effects in order to provide for the needs of any children.[84]

28.4 Despite these provisions, children's interests generally play a minor role in PRA matters. Orders under these sections are rare, and we understand from our preliminary consultation that parents seldom ask the court to make them.

Should children's interests have a role in the PRA?

28.5 The underuse of the PRA's orders that benefit children begs the question: what is the proper role of children's interests in relationship property division? One view is that that the PRA has no role in providing for children's needs. Parents already have a fundamental obligation to support their children,[85] and separating parents should have the freedom to make decisions amongst themselves on how they will meet their children's needs. Where that is not possible, children's needs are addressed elsewhere,

80 Sections 15 and 15A of the Property (Relationships) Act 1976 also require the court to have regard to the responsibilities of each partner for the ongoing daily care of any children of the relationship, when making orders under either section to redress economic disparities.

81 Property (Relationships) Act 1976, s 26.

82 Property (Relationships) Act 1976, s 26A.

83 Property (Relationships) Act 1976, ss 27–28A.

84 Property (Relationships) Act 1976, ss 28B–28C.

85 See Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

under different pillars of financial support (child support, State benefits and maintenance). Any shortcomings would be better addressed by amendments to other legislation such as the Child Support Act 1991 and the Social Security Act 1964, or through broader social action such as eliminating the gender pay gap and child poverty.

28.6 Another view is that the PRA is just one pillar of a wider framework of financial support that ensures that parents fulfil their obligations and children's needs are met. On this view, the PRA's purpose is not to substitute or supplement child support. The PRA is, however, well placed to meet particular needs, such as the need of some children to remain in the family home for a time to minimise disruption while they deal with the after-effects of relationship breakdown. It would be unwise not to take advantage of the PRA as another mechanism through which to support children

28.7 Our preliminary view is that children's interests have an important role in the PRA. Children's interests have been recognised in the statutory property regime since the 1970s, and we think removing children's interests from the PRA would be a backwards step. Rather, as we discuss below, there is now arguably an even stronger case for recognising and protecting children's interests in the PRA because attitudes towards children (and children's rights) have changed. We should not lose the opportunity presented by PRA to make a difference for children.

Should the PRA take a more child-centred approach?

28.8 Our preliminary view is that the PRA should take a more child-centred approach. Our initial consultation indicates that there are concerns that the PRA is not working as well as it could to recognise and protect children's interests. These concerns, and the issues we identify in Chapter 29, suggest that reform is needed.

28.9 The Children's Commissioner explains that being child-centred is a way of elevating the status of children's interests, wellbeing and views.[86] It involves considering the impact of decisions and

86 See Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015).

processes on children, and seeking their input when appropriate.[87] A child-centred approach places children at the centre, but it does not necessarily mean making children's interests paramount over all other considerations, all of the time.[88] The overarching reason to be child-centred is to ensure that children are supported to thrive.[89] We consider the arguments for and against taking a more child-centred approach in the PRA below.

The case for taking a more child-centred approach in the PRA

28.10 First, a more child-centred approach is consistent with the general responsibility parents have for the care, development and upbringing of their children and their duty to provide necessaries.[90] Parenthood changes the relationship between partners because it imposes limitations on their individual financial autonomy, and is said to provide the greatest justification for property alteration.[91] Separation is said to "[change] the financial partnership of parents whereas it ends the partnership of childless couples".[92]

28.11 Second, the case for a more child-centred approach is supported by the level of change in New Zealand society. New Zealand is a much more diverse society than in the 1970s, and many characteristics of relationships and family life have changed.[93] The way we think about children and families has also changed. Children are regarded as people in their own right, entitled to protection and care, and to be treated with dignity and respect.[94]

87 Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

88 Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

89 Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

90 See Care of Children Act 2004, s 5(b); Crimes Act 1961, s 152; and Child Support Act 1991, s 4(b).

91 Patrick Parkinson "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 Federal Law Review 1 at 14

92 Patrick Parkinson "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 Federal Law Review 1, at 14.

93 See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

94 See United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependants – Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303; and Anne B Smith, Nicola J Taylor and Megan M Gollop (eds) *Children's Voices: Research, Policy and Practice* (Pearson Education New Zealand, Auckland, 2000).

28.12 Third, a more child-centred approach is also consistent with the Māori view of children as taonga, who are the privilege and the responsibility of not only parents but the whānau and hapū.

28.13 Fourth, there has been growing recognition of the importance of human rights, including children's rights, over the last 40 years. In 1993 New Zealand ratified the United Nations Convention on the Rights of the Child (UNCROC).[95] UNCROC sets out the basic rights of children, including the right to have their best interests treated as a primary consideration in actions concerning them, the right to be heard on matters affecting them and for those views to be given due weight in accordance with the child's age and maturity.[96] Where possible, New Zealand's domestic law should be interpreted in such a way as to accord with the international treaties New Zealand has ratified.[97] UNCROC, however, is "rarely mentioned" in PRA proceedings.[98] The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 also reflect changes to our approach to human rights.[99]

28.14 Fifth, taking a more child-centred approach in the PRA would also be consistent with other social legislation that directly impacts on children.[100] The Care of Children Act 2004, for example, makes the welfare and best interests of the child the first and paramount consideration under that Act.[101] Principles that must be taken into account when considering the welfare and best interests of a child under that Act include that:[102]

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95 New Zealand maintains some reservations to the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC) in relation to children in work and detention. To have effect in New Zealand, international obligations must be incorporated into New Zealand's domestic law: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at [8.2]; and Alice Osman "Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning" (2014) 12 NZJPIL 345 at 346 citing *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 281. New Zealand submits periodic reports to the United Nations Committee on the Rights of the Child on UNCROC: United Nations Human Rights Office of the High Commissioner "Reporting status for New Zealand" <www.ohchr.org>.

96 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 3 and 12.

97 RI Carter and JF Burrows *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 30.

98 Nicola Peart "Protecting children's interests in relationship property proceedings" (2013) 13(1) Otago LR 27 at 29. A rare example is *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [273]–[286]. In that case the Family Court referred to the United Nations Convention on the Rights of the Child to assist with interpretation of the requirement in s 26 in the Property (Relationships) Act 1976 to have regard to the children's interests in the context of an application under s 33 for an order for the sale of the family home.

99 The New Zealand Bill of Rights Act 1990 came into force on 25 September 1990 and the Human Rights Act 1993 came into force on 1 February 1994.

100 See also Oranga Tamariki Act 1989. The object of that Act is to promote the well-being of children, young persons, and their families and family groups: s 4.

101 Care of Children Act 2004, s 4(1).

102 Care of Children Act 2004, ss 4(2)(a) and (5).

(a) a child's care, development, and upbringing should be primarily the responsibility of his or her parents or guardians;

(b) a child should have continuity in his or her care, development and upbringing;

(c) a child should continue to have a relationship with both parents, and his or her relationship with their family group, whānau, hapū or iwi should be preserved and strengthened; and

(d) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

The case for retaining the current approach to children's interests in the PRA

28.15 The way the PRA currently recognises and protects children's interests might be sufficient, for several reasons. First, as discussed in Chapter 27, the PRA is mainly about how the partners' property is divided when their relationship ends.[103] It overrides general property rights because of the special nature of the relationship between the partners. A greater focus on children might be inconsistent with the PRA's primary focus and the policy on which it is based.

28.16 Second, it is not necessary to give greater priority to children's interests in the PRA because their needs are already met elsewhere. As discussed in Chapter 27, parents have a fundamental obligation to support their children, no matter what the PRA provides.[104] The cost of providing for children's ongoing financial needs is theoretically already shared between parents by agreement or through the Child Support regime, with any unmet need addressed through State benefits.

28.17 Third, giving children's interests greater priority in the PRA and the indirect benefits that could flow to the primary caregiver (for example a higher standard of living) could inadvertently lead to negative consequences for some children. It may encourage the primary caregiver to go to court in the hope of using the children's

103 Property (Relationships) Act 1976, s 1C(1).

104 See Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

interests to obtain a financial advantage, discouraging partners from resolving their property matters out of court and increasing conflict levels. It may distort care arrangements as parents vie for the role of primary caregiver, or it may encourage other strategic behaviour that is not in the children's best interests. Another view is that these risks are already a reality for some children because "end of relationship" issues such as relationship property division, care and child support are inevitably heavily interlinked, and this will continue regardless of what the PRA provides. Some of these risks may be mitigated by taking a more holistic approach to all legal matters arising from parental separation.[105]

28.18 Fourth, giving children's interests a greater priority also risks indirectly lowering the priority given to the interests of other family members. The New Zealand family has changed in the last 40 years. The family home does not always accommodate only a couple and their children. Some families live with several generations in one house. Partners may also have financial obligations to their wider family or whānau, or to a new partner, other children or stepchildren.

28.19 Fifth, giving children's interests a greater priority may require the exercise of more judicial discretion. This is because a rules-based approach could not capture all possible scenarios. The flexibility that can be achieved through judicial discretion would make it easier to recognise children's individual needs. It could, however, mean less certainty for the majority of people who resolve property matters out of court. It could also unduly restrict parental autonomy.

The general rule of equal sharing should remain

28.20 Our preliminary view is that the PRA should take a more child-centred approach. In Chapter 29 we identify specific issues and outline in detail what a more child-centred approach might look like in the PRA.

28.21 A significant question, however, is whether a more child-centred approach means that the general rule of equal sharing of relationship property should be changed. Currently, there are few exceptions to equal sharing. For example section 13 allows

105 See Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependants: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 318.

for a departure from equal sharing where there are "extraordinary circumstances" that make equal sharing "repugnant to justice." Section 26 can also be used to settle property for the benefit of children, but is not authority for simply reducing the proper entitlement of one partner and increasing that of the other.[106] As Atkin has said:[107]

> *The division of property is premised on the right of each adult party to receive a half share, subject to some narrow exceptions. Thus, the primary rules for dividing property have nothing to do with children and regard for their interests cannot upset these primary rules.*

28.22 It could be argued that a more child-centred approach would be to increase the primary caregiver's share of relationship property to ensure that the children are adequately provided for. This could be achieved in one of two ways:

(a) The general rule of equal sharing could be replaced with a new rule or rebuttable presumption that the primary caregiver receives a greater share of relationship property (for example 60 per cent) where there are children. This has the advantage of certainty, particularly for couples making their own arrangements in the PRA's shadow. Litigation would, however, still occur to rebut any presumptive rule and may even increase given that there could be perceptions of unfairness. It may also be too inflexible given other competing interests and possible subsequent changes to care arrangements.

(b) New Zealand could move away from a rules-based property division regime and adopt a more discretionary regime, like in Australia's Family Law Act 1975 (Cth).[108] Although this regime has been criticised for its uncertainty, Peart and Henaghan note that it is common for the party with primary responsibility for children of the relationship to receive between 5 per cent

106 *C v C* (1993) 10 FRNZ 46 (CA) at 58. In that case the Court of Appeal considered a High Court decision to reduce the wife's property entitlement because, among other things, it would be wrong, in the interests of both the wife and the children, to make an order which would be likely to force the husband into insolvency. See also *B v K* HC Wellington CIV-2004-485-611, 16 March 2005 at [59]: "[s]ection 26 is not intended to be an alternative way of dividing the property unequally."

107 Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85.

108 Family Law Act 1975 (Cth), s 79 (see in particular ss 79(4)(e) and 75(2)(c)).

and 20 per cent more of the parties' capital assets.[109] A discretionary regime could better accommodate children's individual needs. However greater discretion inevitably has the effect of making the law less predictable.[110] As most partners settle their property affairs without going to court, it is desirable that the law provides them with as much certainty as possible in order that disputes may be resolved inexpensively, simply and speedily as is consistent with justice.[111] This would be a significant change to the PRA and might increase conflict and litigation.

28.23 Changing the general rule of equal sharing would, however, be a major change to the PRA. Our preliminary view is that, while the PRA should take a more child-centred approach, the general rule of equal sharing should remain. Changing that rule would bring the risks we have identified at paragraphs 28.17 – 28.2019 to the fore. It may also be unnecessary because the legal link between a parent and child is not broken by the end of a relationship, and there are other mechanisms, such as child support, to provide for children's financial needs.[112] Each partner's share of relationship property may need to sustain him or her over a much longer period than that partner, as a parent, is financially responsible to maintain their children. Accordingly, the discussion in Chapter 29 is based on the assumption that the PRA's general rule of equal sharing remains.

CONSULTATION QUESTIONS

I2 Do you agree with our preliminary view that the PRA should take a more child-centred approach, but that the general rule of equal sharing should remain?

I3 How can any risks associated with a more child-centred approach be mitigated?

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109 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

110 In Australia, questions have been raised as to whether the discretionary nature of the property division regime in the Family Law Act 1975 (Cth) should be replaced with a system based on prescriptive principles, in order to promote greater certainty, fairer outcomes and lower costs. In 2014 the Australian Productivity Commission recommended that the Government review whether presumptions should be introduced, as currently applies in New Zealand, in order to promote greater use of informal dispute resolution mechanisms: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 874. In September 2017, the Australian Government commissioned the Australian Law Reform Commission to undertake a comprehensive review of the Family Law Act 1975 (Cth), including the substantive rules and general principles in relation to property division: Attorney-General for Australia "First comprehensive review of the family law act" (press release, 27 September 2017).

111 Property (Relationships) Act 1976, s 1N(d).

112 As noted at paragraph [28.5], any shortcomings may be better addressed by amendments to other legislation such as the Child Support Act 1991.

Which children is the PRA concerned about?

28.24 Section 26 of the PRA requires the court to have regard to the interests of any children of the relationship. It is therefore important to understand who is a "child of the relationship" under the PRA.[113]

28.25 There are three relevant definitions in the PRA: "child of the marriage", "child of the civil union" and "child of the de facto relationship".[114] Where we have no need to distinguish between these in this part of the Issues Paper, we use the term "child of the relationship".

28.26 The three definitions are broadly equivalent. The one difference is that "child of the marriage" includes children of an immediately preceding qualifying relationship between the spouses.[115] This creates a distinction between children on the basis of relationship type for no obvious reason, although it is unlikely to affect many children.[116] Our preliminary view is that the definitions should be consistent.

28.27 The definitions of child of the relationship include "any child", without reference to age or dependence. The definitions include two categories of children:[117]

(a) any child of both partners; and

(b) any other child (whether or not a child of either partner) who was a member of the family of the partners at the relevant time, being:

(i) when they ceased to live together;

(ii) immediately before a PRA application, if they had not ceased to live together; or

113 The term "child of the relationship" is also used elsewhere in the Property (Relationships) Act 1976. For example, the care of a child of the relationship is one of the contributions to a relationship under s 18(1)(a)(i); having a child of the relationship is relevant to the test in s 14A for short-term de facto relationships; and having a child of the relationship is also relevant to the issue of compensating for economic disparity under s 15(2)(b).

114 Property (Relationships) Act 1976, s 2. Note similar definitions of "child of the marriage", "child of the de facto relationship" and "child of the civil union" in s 2 of the Family Proceedings Act 1980.

115 Property (Relationships) Act 1976, s 2.

116 As there are few civil unions in New Zealand, the omission of children from immediately preceding qualifying relationships from the definition of "child of the civil union" is unlikely to affect many children. Similarly, the number of de facto relationships immediately preceded by a marriage or civil union is likely to be small.

117 Property (Relationships) Act 1976, s 2.

(iii) at the date of the death of one of the partners.

28.28 The first category is straightforward, and seems intended to include both biological and adopted children.[118] The second category can include a child of one partner, or neither partner, provided they were a member of the partners' family at the relevant time. It may include stepchildren, foster children and some children who are also members of another household, such as where care is shared.

The courts' approach to other children who are members of the family

28.29 The Family Court took a narrow approach in *M v L*, a case involving a short-term de facto relationship.[119] Section 14A provides that a court cannot make a property division order where there is a short-term de facto relationship unless it is satisfied that there is a child of the relationship or the applicant has made a substantial contribution to the relationship. In either case, the court must also be satisfied that failure to make an order would result in substantial injustice.[120] The Court in *M v L* said that in interpreting "any other child" it should be mindful of the fact that section 14A enables a court to consider an exception to the general rule that the PRA does not apply to short-term de facto relationships.[121] It said that the definition should not mean any child who has lived with the partners, such as an independent child having a month's holiday with a parent at the time of separation.[122] The purpose of section 14A suggested to the Court that:[123]

> *…"children" are those who are wholly or partially dependent on at least one of the parties for physical, material, emotional or social support. A disabled or invalid adult child, a child without another available home at that time may qualify. A degree of dependence and having interests requiring protection not available in other civil proceedings are entailed.*

118 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

119 *M v L* (2005) 24 FRNZ 835 (FC).

120 See discussion in Chapter 17.

121 *M v L* (2005) 24 FRNZ 835 (FC) at [30].

122 *M v L* (2005) 24 FRNZ 835 (FC) at [30].

123 *M v L* (2005) 24 FRNZ 835 (FC) at [33]. The Family Court in *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [49] concurred with this reasoning.

28.30 The Court also considered the phrase "member of the family", saying that:[124]

> *"Member of the family" suggests some presence in or belonging to the particular household. It would not exclude a child away on school camp, hospital or respite care or on holiday. The provision enables the Court to make an order if it considers it necessary because of such a child. It is not to be used in an arbitrary way to mean any child at all who was in the parties' home when the parties lived apart.*

28.31 The approach in *M v L* has been followed in subsequent Family Court cases. In *H v C* the partners were in a short-term de facto relationship.[125] Both had children from previous relationships. The Family Court considered that C's children were children of the relationship because they had lived with the couple every second week for the last nine months of the partners' relationship, and during that week both partners provided full parental care for the children.[126] H's children were not children of the relationship because they had returned to live with their father at the time of separation.[127] In *A v A* the Family Court similarly found that a child being cared for by the partners was a child of the relationship because the child had spent a significant amount of his life in the couple's home and they were effectively providing him with a stable and supportive environment.[128]

28.32 The need to have a presence in the household can have significant consequences for stepchildren. It may mean that stepchildren do not qualify as children of one parent's new relationship, and as a result that their interests are not taken into account if that new relationship ends. In *Public Trust v W* the deceased's children from a previous marriage would not have qualified as children of his new de facto relationship because they lived with their mother.[129] As such, the Court of Appeal did not have to take their interests

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124 *M v L* (2005) 24 FRNZ 835 (FC) at [34].

125 *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011.

126 *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [48] and [49]. At [49]: "Moreover, I concur with the reasoning of [*M v L* (2005) 24 FRNZ 835 (FC)] that is 'they are children who are wholly or partially dependant on at least one of the parties for physical, material or social support.'"

127 *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [26] and [48].

128 *A v A* [2012] NZFC 10192 at [26]–[34].

129 *Public Trust v W* (2004) 24 FRNZ 340 (CA); and Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2.03.01].

into account in PRA proceedings between the estate and the deceased's new partner.[130]

Is the current interpretation of "member of the family" appropriate?

28.33 The current approach to deciding who is a child of the relationship under the PRA (when the child is not the child of both partners) may be too restrictive. The approach laid down in *M v L* involves establishing a presence in the partners' household.[131] This might be too narrow for several reasons.

28.34 First, it may be outdated. Modern New Zealand families take many different forms:[132]

> *Families may have one parent or two, or more; adult family members can be married or living together and sometimes they live in different households. Parents can be same-sex or opposite-sex, biological parents, adoptive parents or step-parents. Adults can formally or informally adopt children, and may have no children, a few children or sometimes many children; they may have adult children and their children living with them, and sometimes other relations and generations too.*

28.35 New partners will often accept the other partner's children from a previous relationship as part of their family, and the children may live with the partners full-time or part-time where care is shared.[133] One New Zealand study suggests that children have an inclusive view of what constitutes a family.[134] New Zealand's growing cultural diversity also brings different cultural perspectives on families, some of which may endorse more collective values and family structures.[135] Superu has identified four core family functions that contribute to family wellbeing.[136] These are to: care, nurture and support; manage resources; provide

130 Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 2; and Property (Relationships) Act 1976, s 26(1).

131 *M v L* (2005) 24 FRNZ 835 (FC).

132 See Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 12.

133 This argument was not successful in *M v L* (2005) 24 FRNZ 835 (FC) at [20].The court rejected the submission that all children of the parties should be regarded as "members of the family" at all material times during the relationship.

134 Andrea Rigg and Jan Pryor "Children's Perceptions of Families: What Do They Really Think?" (2007) 21 Children & Society 17 at 29. Rigg and Pryor examined the perceptions of 111 New Zealand primary and intermediate schoolchildren.

135 Superu *At a Glance – Families: universal functions, culturally diverse values* (July 2017) at 1.

136 Superu *At a Glance – Families: universal functions, culturally diverse values* (July 2017) at 3.

socialisation and guidance; and provide identity and a sense of belonging.[137]

28.36 Second, it may exclude some children (and some short-term de facto relationships) from the PRA. Peart has said that that the approach in *M v L* could be "unnecessarily narrow", as it would potentially exclude children at boarding school who regularly return home during the holidays.[138] It may also exclude some children who are financially dependent on one partner but have no presence in the couple's household. A narrow interpretation of the second category of children makes it harder to pass the test in section 14A for short-term de facto relationships.

28.37 Third, the current approach may also fail to adequately recognise whānau relationships. The PRA does not refer to whānau. While the terms "family" and "whānau" are often used interchangeably, they are not the same.[139] There is no universal or generic way of defining whānau, but there is broad consensus that genealogical relationships form the basis of whānau, and that these relationships are intergenerational, shaped by context and given meaning through roles and responsibilities.[140] Some legislative definitions refer to whānau as a distinct family type.[141]

28.38 It may, however, be appropriate to have a narrow definition of child of the relationship. Some might even argue that it should be interpreted more restrictively, particularly if the PRA is amended to better provide for children on separation, so that any new benefits are available to a more restricted group of children. A narrower definition may also be considered appropriate because it is relevant to other provisions that require a narrow interpretation, for example the test in section 14A for short-term de facto relationships, which can be partially satisfied if there is a child of the de facto relationship (see Part E). There is a view that the PRA should only be concerned with children who

137 Superu *At a Glance – Families: universal functions, culturally diverse values* (July 2017) at 3. See also Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 16.

138 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR2.03.01].

139 Sarah Mckenzie and Kristie Carter *Measuring Whānau: A review of longitudinal studies in New Zealand* [2010] 3 MAI Review at 2.

140 Tahu Kukutai, Andrew Sporle and Matthew Roskruge "Expressions of whānau" in Superu *Families and Whānau Status Report 2016* (July 2016) 51 at 53 cited in Law *Commission Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017)at Introduction. See also Jacinta Ruru "Kua tutu te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds*) Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 59–60.

141 Families Commission Act 2003, s 10(2). The Families Commission Act 2003 requires the Families Commission to have regard to the kinds, structures and diversity of families, and for that purpose a definition of "family" is included. See also the Domestic Violence Act 1995, s 2 definition of "family member."

have a strong connection to the partners' household or who are financially supported by both partners. This is because a concern for a wider group of children would be inconsistent with the PRA's individualistic focus and the primary theory of entitlement. Acknowledging whānau relationships, for example, could increase the number of children recognised by the PRA which might be out of step with its focus on the partners. Widening the definitions may also create new issues of equity, for example between children with different degrees of connection to the household.

CONSULTATION QUESTION

I4 Is the current interpretation of a "child of the relationship" in the PRA too narrow or too broad?

Option 1: Narrow the concept of "member of the family"

28.39 If a narrower concept of "member of the family" is preferred, this could be achieved by introducing a new maintenance requirement. This would require an inquiry into the partners' financial contributions towards the child's upkeep and would restrict the PRA's benefits to children maintained during the relationship. A similar requirement exists in the Family Protection Act 1955 in relation to stepchildren of the deceased entitled to claim for provision out of an estate.[142] Under that Act, only the stepchildren of the deceased who were being maintained wholly or partly, or were legally entitled to be maintained wholly or partly, by the deceased immediately before his or her death are entitled to claim.[143] The PRA, however, has a very different focus and this approach may place too much weight on financial arrangements and insufficient weight on affective factors such as whether the partners treated the child as a member of their family.

Option 2: Widen the concept of "member of the family"

28.40 If, however, a wider concept of "member of the family" is preferred, it could be achieved by a new definition.[144] A new definition of "member of the family" could include a broad list of

142 Family Protection Act 1955, s 3.

143 Family Protection Act 1955, s 3(1)(d).

144 A new definition of "member of the family" would sit in the interpretation section of the preliminary provisions in pt 2 of the Property (Relationships) Act 1976.

factors a court must take into account in determining whether a child qualifies. This option has the advantage of flexibility, but will reduce certainty. A list of factors for a court to take into account in determining whether a child was a member of the family could include:

(a) the nature and extent of the child's presence in, or belonging to, the partner's household (this would reflect the approach in *M v L*);[145]

(b) any arrangements for the financial support of the child (including but not limited to any obligation to pay child support under the Child Support Act 1991);[146]

(c) guardianship responsibilities and day-to-day care arrangements for the child;

(d) the child's identity;

(e) the nature and extent of the partners' role in the care, development and upbringing of the child;

(f) whether the child is a whāngai of one or both partners;

(g) whether the child is a member of the partners' whānau or other culturally recognised group.

CONSULTATION QUESTION

I5 Which children should be children of the relationship?

Whāngai relationships

28.41 Whāngai is a Māori customary practice in which a child is raised by whānau members, such as grandparents, or other members of the same hapū or iwi.[147]

145 *M v L* (2005) 24 FRNZ 835 (FC) at [34].

146 A step-parent may have child support obligations in respect of a stepchild: see Child Support Act 1991, ss 6 and 7(1)(h). A parent or carer of a child may apply to the Family Court for a declaration that a specified person is a step-parent of the child. In determining whether to grant the declaration, a court must have regard to listed circumstances in s 99, including the extent to which that person has assumed responsibility for the maintenance of the child; the liability of any other person to maintain the child; and whether that person has been a guardian of the child.

147 The term whāngai is used in this part of the Issues Paper as it is defined in s 4 of Te Ture Whenua Māori Act 1993. For some iwi the terms "whangai" and "atawhai" have slightly different meanings: Basil Keane "Whāngai – customary fostering and adoption – The custom of whāngai" (1 June 2017) Te Ara – the Encyclopaedia of New Zealand <www.TeAra.govt.nz>.

28.42 Whāngai arrangements have been described as "fluid and open."[148] Fluid, in that the child may return to the care of his or her birth parents or be cared for by another relative. Open because the arrangement is public and the child knows of, and often has contact with, birth parents and whānau. According to traditional Māori custom whāngai placements may be made for many reasons,[149] including to provide a child for people who cannot have children, consolidate land rights[150] or pass down tribal traditions and knowledge.

28.43 The institution of whāngai "remains as a strong vehicle for both the care of children and for the nurturing of whāngai kinship relationships", and it "will be valued and carried into the future."[151] In a recent study of 209 young people aged 15, four had spent time in a whāngai arrangement.[152]

28.44 The PRA does not expressly refer to whāngai, and the status of whāngai for the PRA is not determined in accordance with tikanga Māori.[153] This means that a whāngai child is treated no differently than any other child under the PRA. There are two consequences. First, a child that is whāngai may be a child of the relationship under the PRA in respect of the partners that are raising him or her, even if there is no relationship of descent as determined by the tikanga of the respective whānau or hapū.[154] Second, a whāngai child might not be considered a child of the relationship

148 *Brookers Family Law – Child Law* (online looseleaf ed, Thomson Reuters) at PA2.14.03.

149 Basil Keane "Whāngai – customary fostering and adoption – The custom of whāngai" (1 June 2017) Te Ara – the Encyclopaedia of New Zealand <www.teara.govt.nz>.

150 Māori customary law varies as to whether whāngai may inherit from their foster family: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [326]. Note evidence in *K v P* (2002) 22 FRNZ 792 (CA) that only one category of whāngai may have claim on a deceased estate.

151 Karyn Okeroa McRae and Linda Waimarie Nikora "Whangai: remembering, understanding and experiencing" [2006] 1 MAI Review at 1.

152 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5 citing JL Sligo and others "The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy" [2016] Kōtuitui NZ J Soc Sci Online 1 at 8.

153 The tikanga relating to whāngai varies between iwi: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [315].

154 It is unclear whether a child who is a whāngai would qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 under the first or second category of children. Section 19 of the Adoption Act 1955 generally precludes the recognition of Māori customary adoption. Ruru says that that Act continues to "openly reject" Māori beliefs and practices on several fronts: Jacinta Ruru "Kua tutu te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds*) Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 72. A child who is a whāngai is not a "child" for the purposes of s 3 of the Family Protection Act 1955 (which sets out who is entitled to claim under that Act for provision out of the estate of a deceased person) unless the child has also been adopted by the deceased under the provisions of the Adoption Act 1955: see *K v P* (2002) 22 FRNZ 792 (CA). Although the question arises in a different context, if similar reasoning were followed a child who is a whāngai would only qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 if he or she was a member of the partners' family at the relevant time (the second category of children).

in respect of a relationship involving a biological parent, because that child may not have a presence in the household.

28.45 Te Ture Whenua Māori Act 1993 defines whāngai as a person adopted in accordance with tikanga Māori.[155] This is an exception to the general rule in the Adoption Act 1955, which provides that Māori customary adoptions made after the commencement of the Native Land Act 1909 have no force or effect.[156] However, because the PRA does not apply to Māori land, and focuses primarily on how property is shared between the partners when their relationship ends,[157] there may be less need to provide specifically for whāngai in the PRA.

Should the status of whāngai children be determined in accordance with tikanga Māori?

28.46 The PRA currently applies in the same way to all children, regardless of whether a child is whāngai. It might, however, be appropriate that the question of whether a whāngai child is a child of the relationship under the PRA be determined in accordance with tikanga Māori, as it is under Te Ture Whenua Māori Act for certain purposes.

28.47 Determining whāngai status by tikanga Māori would, however, add a layer of complexity and potentially cost to PRA proceedings. Expert evidence would be needed on the tikanga of the respective whānau or hapū.[158] In Chapter 26 we discussed options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

CONSULTATION QUESTIONS

I6 Should the PRA make special provision for the status of whāngai children as a child of the relationship to be determined in accordance with the tikanga of the respective whānau or hapū?

155 Te Ture Whenua Māori Act 1993, s 4. See also s 115 which relates to the jurisdiction of the court to determine whether a person is to be recognised as having been a whāngai of a deceased owner for certain purposes and the orders a court can make in respect of a whāngai of the deceased owner. Note that Te Ture Whenua Māori Bill 2016 (126-2) seeks to repeal and replace the current law relating to Māori land. The definition of whāngai proposed in cl 5 of the Bill is "someone adopted by Māori customary adoption in accordance with the tikanga of the respective whānau or hapū."

156 Adoption Act 1955, s 19.

157 Property (Relationships) Act 1976, ss 1C(1) and 6.

158 See the discussion in Part H on resolving matters under the Property (Relationships) Act 1976 in accordance with tikanga Māori, including possible options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

The timing requirement is problematic for the purposes of assessing contributions to the relationship

28.48 The timing requirement in the second category of children (see paragraph 28.27(b)) is an issue for the purposes of assessing contributions to the relationship.[159] Contributions to the relationship are relevant in several scenarios under the PRA, including where there are extraordinary circumstances making equal sharing repugnant to justice, where there is a short-term relationship or successive or contemporaneous relationships, or where one party makes post-separation contributions.[160]

28.49 Under section 18(1)(a)(i) the care of a child of the relationship is a contribution to the relationship. However, as one text notes, in a lengthy relationship the chances are high that at least some children that were previously treated as members of the family will, by the time the partners separate, have reached adulthood and left home.[161] They may not qualify as children of the relationship because of the timing requirement, and if so, their care during the relationship would not count as a contribution to the relationship. This is an issue because contributions in the form of childcare are made throughout a relationship, while section 18(1)(a)(i) is confined to the care of a child of the relationship.[162] There are two possible options for reform.

Option 1: Clarify that the care of a child that no longer qualifies as a child of the relationship is still a contribution to the relationship

28.50 One option is to add an extra sub-paragraph (b)(iv) to the definitions of child of the relationship. This could include, for the definition of contribution to the relationship in section 18 only, any child who was a member of the family of the partners during their relationship.

159 Property (Relationships) Act 1976, s 18.

160 Property (Relationships) Act 1976, ss 13, 14–14A, 18B and 52A–52B. Where one of these provisions applies, a court has to assess a partner's share of the relationship property (or in the case of s 18B, the compensation a partner should receive), according to the contribution that partner made to the relationship.

161 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

162 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

Option 2: Remove the timing requirement from the definition

28.51 Another option is to remove the timing requirement from the definitions of child of the relationship. This option would, however, have a broader effect and may risk unintended consequences.

CONSULTATION QUESTION

I7 Is there a need for a timing requirement in the definition of the second category of children?

Minor or dependent children

28.52 The PRA is primarily concerned with the interests of "minor or dependent" children of the relationship.[163] Our preliminary view is that this is appropriate because it focuses on protecting the vulnerable and recognises the obligations of the partners as parents.

Should a "minor" be a person under the age of 18?

28.53 For the purposes of the PRA, a "minor" is a person under the age of 20.[164] This is on the high side when compared to other age limits, and may be out of step with how we think about age limits in 2017.[165] There is a view that the age limit is too high, as by 18 years guardianship responsibilities have ceased and child support may no longer be payable in respect of the child. However parents may still feel a moral duty to support children up until the age of 20, particularly during a period of relationship breakdown and separation.

163 There are only a few provisions of the Property (Relationships) Act 1976 where adult independent children of the relationship are directly relevant: see for example ss 14A(2)(a)(i) and 18(1)(a)(i). See also paragraphs 29.38 to 29.41 where we discuss whether an order can be made under s 26 to settle relationship property for the benefit of adult independent children.

164 Age of Majority Act 1970, s 4(1). See also *B v B* (2009) 27 FRNZ 622 (HC) at [80].

165 For example the age limit for entering into a marriage or civil union is 18 years, or 16 or 17 years with consent of specified individuals such as the minor's guardian: Marriage Act 1955, ss 17 and 18; and Civil Union Act 2004, ss 7 and 19. At 18 years a child is legally independent of guardianship: Care of Children Act 2004, s 28(1); and will not qualify for child support unless he or she is enrolled at and attending school: Child Support Act 1991, s 5(1). For the purposes of the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), a child is a person under the age of 18 years unless under the law applicable to the child majority is attained earlier: art 1.

Option for reform: Define "minor" as a person under the age of 18

28.54 One option is to include a new definition of "minor" meaning "a person under the age of 18 years." This would lower the age limit where the PRA specifically refers to minors without disturbing more general references to children, such as in the context of the test for short-term de facto relationships or the definition of contribution to a relationship.[166]

CONSULTATION QUESTIONS

I8 Do you agree with our preliminary view that the PRA's current focus on minor or dependent children is appropriate?

I9 Should a "minor" for the purposes of the PRA be a person under the age of 18?

Who is a "dependent" child?

28.55 Whether a child is "dependent" for the purposes of the PRA is a question of fact.[167] Adult children may depend on their parents for support if they are physically or intellectually disabled.[168] *B v B* suggests that adult children without a disability and who have not progressed to financial independence due to lack of desire or motivation are unlikely to be "dependent."[169] Our preliminary view is that this approach is sound. It follows the view of children as independent actors who, once they have reached adulthood, no longer need a court's "protective" overview.[170] It strikes an appropriate balance between protecting the vulnerable and recognising the partners' entitlements. The lack of direction in the PRA as to the type or level of dependence required may, however, mean that the PRA is not as accessible or clear as it could be.

Option for reform: Define "dependent child"

28.56 Definitions of "dependent child" in other legislation may provide a starting point for a new definition of "dependent child" in the

166 Property (Relationships) Act 1976, ss 14A(2)(a)(i) and 18(1)(a)(i).

167 *B v B* (2009) 27 FRNZ 622 (HC) at [80]–[81].

168 *B v B* (2009) 27 FRNZ 622 (HC) at [81].

169 In *B v B* (2009) 27 FRNZ 622 (HC) at [88] the High Court declined to make a s 26 order in favour of the parties' 21 year old daughter because she was neither a minor nor dependent on her parents as she was able bodied and could earn income.

170 See Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26.02(2)].

PRA.[171] For example, the Social Security Act 1964 and Income Tax Act 2007 share a core definition of "dependent child" that includes a child whose care is primarily the responsibility of the person; who is being maintained as a member of that person's family; and who depends financially on that person.[172] A similar definition for the PRA would adopt a relatively high threshold and may provide an accessible concept of dependency that is consistent with the purpose of restricting the focus of some of the PRA's provisions to "minor or dependent" children.

CONSULTATION QUESTION

I10 Who should be a dependent child for the purposes of the PRA?

171 See discussion in Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 71.

172 Social Security Act 1964, s 3(1) and Income Tax Act 2007, s YA1. Note that these definitions are not the same and are subject to exclusions, for example some children in respect of whom payments are being made under s 363 of the Oranga Tamariki Act 1989 are excluded. See also Child Support Act 1991, s 35B.

Chapter 29 – Options for reform that take a more child-centred approach

29.1 In this chapter we identify issues with specific provisions of the PRA that affect children's interests and propose some options for reform that would take a more child-centred approach.

Promoting children's interests in the principles of the PRA

29.2 As explained in Chapter 3, the policy of the PRA is the just division of property at the end of a relationship. This policy is reflected in the statutory purpose and principles set out in sections 1M and 1N of the PRA. Children's interests are referred to in section 1M, but not section 1N, although we think the principle that a just division of property should have regard to the interests of children of the relationship is implicit in the framework and rules of the PRA.[173]

29.3 Children's interests have been described as something of an "addendum to the adult considerations" in section 1M.[174] It provides that property division should "take account" of the interests of any children of the relationship.[175] Children's interests are referred to at the end of section 1M and the language used is weak.[176]

29.4 This is an issue because of the role purpose and principle provisions can play in statutory interpretation. The Interpretation Act 1999 provides that the meaning of an enactment must be

173 See discussion in Chapter 3 of this Issues Paper.

174 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

175 Property (Relationships) Act 1976, s 1M(c).

176 The purpose in s 1M(c) of the Property (Relationships) Act 1976 (PRA) reflects the obligation in s 26 to "have regard" to the interests of any minor or dependent children of the relationship in PRA proceedings.

ascertained from its text and in the light of its purpose.[177] The principles form the basis for the PRA's rules.[178] This means that the way children's interests are presented in the purpose provision and their absence in the principles provision can set the theme for the entire PRA. For example, in *B v B* the High Court said that section 26 authorities must be read in the context of sections 1C and 1M, which "recognise the subsidiary nature of the children's interests in the division of relationship property".[179]

29.5 In Chapter 4 we said that the PRA should include a comprehensive list of principles to guide the interpretation of the rules of the PRA. We outline three options for addressing the priority of children's interests in a new explicit principle in the PRA. These options recognise that partners have responsibilities if they are parents and that children's interests must be a consideration in PRA proceedings. These responsibilities underpin the basis for a more child-centred approach in the PRA. Recognition of these responsibilities through a principle that promotes the interests of children would also be consistent with the Care of Children Act 2004 and the Child Support Act 1991 and the view that State assistance is a "safety net".[180]

29.6 Each of these options propose to replace the existing language of children's "interests" with a reference to children's "best interests". The concept of a child's best interests is flexible and must be assessed and determined in light of the child's specific circumstances.[181] This inquiry could help highlight where the child's interests are independent of, or in conflict with, the partner's interests. A reference to children's "best interests" would also align more closely with the wording of the United Nations Convention on the Rights of the Child (UNCROC) and other

177 Interpretation Act 1999, s 5(1). Note that the Legislation Bill 2017 (275-1) currently before Parliament proposes to relocate the Interpretation Act within the new legislation: Legislation Bill 2017 (275-1), cls 10–12 (general principles of interpretation) and cl 150 (repeal of Interpretation Act 1999). See also Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 46.

178 See the discussion on what is meant by a principle in William Dale "Principles, Purposes, and Rules" [1988] 1 Stat LR 15 at 18 and 22. Dale suggests that a principle is a first idea which is the starting point or basis for legal reasoning. A rule in a statute answers the question "what", whereas a principle answers the question "why."

179 *B v B* (2009) 27 FRNZ 622 (HC) at 636.

180 Care of Children Act 2004, s 5(b) (a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians) and Child Support Act 1991, s 4(b) (to affirm the obligations of parents to maintain their children). See also United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 18 and 27.

181 See also Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc CRC/C/GC/14 (29 May 2013) at 9.

child-focused legislation such as the Care of Children Act, where the child's "welfare and best interests" are relevant.[182]

Option 1: Children's best interests as a primary consideration

29.7 One option is to elevate children's best interests to a *primary* consideration.[183] This would require a court to assess children's best interests and take them as a primary consideration when different interests (such as the interests of the partners) are being considered. It may mean that children's best interests are sometimes given greater weight than other considerations when a court is exercising discretion.[184] This option reflects the language of UNCROC, which refers to children's best interests as "a primary consideration" in actions concerning them.[185]

Option 2: Children's best interests as the first and paramount consideration

29.8 Another option is to treat children's best interests as the *first and paramount* consideration. This would adopt a higher standard than option 1. It would give children's best interests the highest priority in the PRA, either generally (with the exception of the general rule of equal sharing) or in relation to specific provisions such as non-division orders. It would mean that children's best interests may trump a partner's interests where there is a conflict. The Care of Children Act 2004 takes this approach, although in a different context, as it requires that the welfare and best interests of the child be "the first and paramount consideration".[186] A similar

182 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 3.1 and 18.1; and Care of Children Act 2004, s 4.

183 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 70.

184 For example, when deciding whether to make a non-division order or to exercise discretion under s 13 of the Property (Relationships) Act 1976. Children's interests have rarely featured as a justification for departing from equal sharing under s 13: Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 20. An unsuccessful application was made in *M v M* [2012] NZFC 5019 (FC), however the Family Court did not exclude the possibility that children's interests could constitute exceptional circumstances warranting an unequal division.

185 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC), art 3.1. See also Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc CRC/C/GC/14 (29 May 2013). Note that art 21 of UNCROC strengthens the right of best interests in respect of adoption.

186 Care of Children Act 2004 (COCA), s 4. It is understandable that the child's welfare and best interests are given paramountcy in COCA as it is principally concerned with children's welfare, care and protection. See also pt 2 of the Oranga Tamariki Act 1989. This can be contrasted with the youth justice provisions in pt 4 of the Oranga Tamariki

approach is taken in the United Kingdom. The Matrimonial Causes Act 1973 (UK) provides that it is a court's duty to give *first consideration,* when granting financial relief, to the welfare of any minor child of the family who has not attained the age of 18.[187]

29.9 This option might not, however, be consistent with the PRA's focus on the division of property between the partners or the primary theory of entitlement. It may put "needs" above "entitlement" and therefore not achieve an appropriate balance between partners' interests and children's best interests. It may not take sufficient account of other legal obligations parents have to maintain their children.[188]

Option 3: Refer specifically to implementation of relationship property division

29.10 A further option is for a new principle recognising children's best interests to specifically refer to the implementation of relationship property division under the PRA. At paragraph 29.20 we consider the option of introducing a specific duty to consider children's interests in the implementation of property division between the partners. If that option is pursued it would be consistent to signal in a new principle that the primary way the PRA prioritises children's best interests is through the use of non-division orders.

Preferred option

29.11 Our preliminary preferred option is to elevate children's best interests to a *primary* consideration (option 1). This would give children's interests a higher priority and align the PRA more closely with the wording of UNCROC.[189] A court would be required to give more weight to children's interests when balanced against

Act where paramountcy of the child's best interests does not apply and guidance is given in the principles in s 208, recognising that there are competing objectives in youth justice.

187 Matrimonial Causes Act 1973 (UK), ss 25(1), 27(3) and 27(3A).We use the term "financial relief" to encompass the court's broad powers to make financial provision orders (s 23); property adjustment orders (s 24); orders for the sale of property (s 24A); pension sharing orders (s 24B); pension compensation sharing orders (s 24E); and orders for financial provision during the subsistence of a marriage (s 27(1)). Note that in England and Wales the matrimonial property regime is a more discretionary regime than the Property (Relationships) Act 1976, and that de facto couples are not brought within the statutory regime for married couples in terms of financial arrangements at the end of the relationship.

188 Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

189 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3.1.

those of the partners and other third parties. For example, a court may be more willing to make non-division orders that would indirectly benefit children, or to take children's interests into account when calculating occupation rent, or to find that children's interests constitute extraordinary circumstances that make equal sharing repugnant to justice for the purposes of section 13. We prefer option 1 over option 2 and option 3 as we think it strikes the right balance between the interests of the partners and children. Option 2 would prioritise children in all cases, which is inconsistent with the PRA's primary focus on the partner's property entitlements, while option 3 is too limited (it is narrower than section 26, which requires the court to have regard to children's interests in all PRA proceedings).

CONSULTATION QUESTIONS

I11 Do you agree with our preliminary view that children's interests should be a primary consideration in PRA proceedings?

I12 Should parents' responsibilities have greater prominence in the PRA's principles provision?

Section 26

29.12 Section 26 is the primary provision through which children's interests are recognised and protected:

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
>
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.
>
> (2) If the court makes an order under subsection (1), the court may reserve such interest (if any) of either spouse or partner, or of both of them, in the relationship property as the court considers just.
>
> (3) An order under this section may be made and has effect regardless of any agreement under Part 6.

The dual functions of section 26(1)

29.13 Section 26(1) has two functions.[190] First, it requires a court to "have regard" to the "interests" of any minor or dependent children of the relationship in PRA proceedings. Second, it gives a court discretion, if it considers it just, to make an order settling relationship property for the benefit of children of the relationship.[191]

29.14 The attempt to deal with two significant and distinct functions in section 26(1) has led to issues of statutory interpretation.[192] Our preliminary view is that section 26(1) should be separated into two stand-alone sections to clarify the purpose and scope of each:

(a) The first function of section 26 should form the basis for a new stand-alone operative provision dealing with the priority of children's interests in PRA proceedings and setting out what that means in practice. This new section would reflect the language of any new principle.

(b) This would leave the existing section 26 to fulfil the function of focusing on orders settling relationship property for the benefit of children.

29.15 The options discussed below are presented on this basis.

Requirement to have regard to children's interests

29.16 The requirement to have regard to children's interests in section 26(1) is of general application. It applies in any proceedings under the PRA, including proceedings where children's interests may not be an obvious concern.[193] Children's interests have been considered relevant in proceedings to set aside a contracting out agreement,[194] and to decline to order compensation for post-

190 See *L v L* (1993) 11 FRNZ 81 (FC) at 82–83.

191 Note that this discretion cannot be exercised in respect of Māori land: see s 6 of the Property (Relationships) Act 1976. See also Matrimonial Property Act 1976, s 26.

192 See paragraphs 29.38 to 29.41 where we discuss whether s 26(1) of the Property (Relationships) Act 1976 should enable a court to settle property for the benefit of children of the relationship that are independent adults.

193 See Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago LR 27; and Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

194 See *A v W* [2012] NZFC 8640; and Chapter 30 of this Issues Paper, where we discuss protecting children's interests in contracting out and settlement agreements.

separation contributions.[195] Children's interests are also arguably relevant to the general exercises of classification, valuation and division of relationship property.[196] Other sections of the PRA also require a court, when considering how it will exercise its powers, to have regard to the position of children, such as sections 15–15A (economic disparity awards), 28A (occupation orders), 28C (furniture orders) and 44C (compensation for property disposed of to a trust).

29.17 A court has a wide discretion in interpreting and providing for children's interests.[197] For example, in *C v B* the Family Court considered that it was in the children's interests to have the security of a home with their mother, and therefore declined the father's application for an order for the sale of the family home.[198] In *J v [LC]*, the Family Court considered the child's interests by giving the wife the first option to buy out the husband's share in the family home.[199]

The requirement to have regard to children's interests has little practical impact

29.18 Section 26 has been criticised for failing to ensure that children's interests are given a sufficiently prominent role in PRA proceedings.[200] There are several reasons why section 26 could be said to have little practical impact:[201]

(a) **Section 26 is of "indirect application" to the implementation of other PRA orders which can benefit children**.[202] Key non-division orders that can benefit children already refer to children's interests. For example, sections 28A and 28C already require a court

195 Property (Relationships) Act 1976, s 18B; and *R v D* [2015] NZFC 9450, [2016] NZFLR 37 at [60]. See Part D where we discuss compensation for contributions made after separation.

196 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago LR 27 at 43.

197 *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [286].

198 *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [287] and [291]. The Court instead made an order that monies due to the father should be paid in instalments and offset against child support payments, at [292].

199 *J v [LC]* HC Auckland CIV-2007-404-2955, 16 November 2007 at [16].

200 See Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85; and Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 1.

201 See also paragraphs 28.20 to 28.23 where we discuss the relationship between s 26 of the Property (Relationships) Act 1976 and the general rule of equal sharing.

202 Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85.

to have particular regard to children's needs in relation to occupation, tenancy and furniture orders.

(b) **The clean break concept can soften the impact of section 26.** The value placed on a clean break for the adult partners can reduce the priority given to children's interests. For example, in *P v P* the wife suggested options enabling her to remain in the family home so that she could live close to services she and the children were used to.[203] The Family Court had regard to the interests of the children, one of whom had a "special need" due to health issues, and for whose benefit $4,000 had already been allocated pursuant to section 26.[204] However, the Court "…did not regard it as a wise exercise of any discretion …to produce a result which will require the parties to continue in partnership in property for longer than is necessary."[205]

(c) **Section 26 uses weak language.** A court is simply required to "have regard" to children's interests. It does not have to have regard to children's *best interests* or treat them as a *primary consideration*.

(d) **No guidance is provided on how children's interests should be ascertained or what they might be.** A court has a wide discretion in interpreting what a child's interests are, and can face a significant challenge in deciding how best to give effect to section 26 in the absence of statutory guidance.

29.19 If children's interests are given a higher priority in PRA proceedings it is critical that the PRA clearly sets out what that means in practice.

Option 1: Give children's interests a higher priority, in particular in the implementation of the division of property between the partners

29.20 One option is to replace section 26 with a provision that does three things:

203 *P v P* FC Auckland FP004/596/94, 18 October 1996 at 3–4.

204 *P v P* FC Auckland FP004/596/94, 18 October 1996 at 4.

205 *P v P* FC Auckland FP004/596/94, 18 October 1996 at 4.

(a) **Retains the general duty to consider children's interests in PRA proceedings.** This would, however, reflect and reinforce the standard set in the PRA's new principle promoting children's best interests (see paragraphs 28.20 to 28.23). While abstract, this would maintain and enhance the current approach and general application of section 26(1) (see paragraphs 29.16 and 29.17). Our preliminary view is that the general duty should be qualified so it is clear that children's interests do not affect the general rule of equal sharing (see paragraphs 28.20 to 28.23).

(b) **Introduces a new specific duty to consider children's interests when implementing a division of property.** This would also reflect the standard set in the PRA's new principle promoting children's best interests (see paragraphs 29.2 to 29.11). This would direct a court to have particular regard to children's interests in determining whether to make non-division orders such as an order postponing vesting, or occupation, tenancy or furniture orders. It would direct a court to give less weight to a "clean break" in this context. The focus of a specific duty is a concrete way to incentivise the use of non-division orders, which can make a practical difference for some children by keeping them in the family home for a time to maintain continuity and help ensure an orderly transition from one household to two. It would also require a court to focus on children's interests when deciding which items of property should be allocated to each partner once the net value of each partner's half share in the global relationship property pool is ascertained. For a discussion on how the court implements a division of property, see Chapter 14.

(c) **Incorporates non-division orders.** Re-worked versions of sections 26A, 28A and 28C(4) (and potentially other sections in Part 7 of the PRA) would emphasise the priority to be given to children's interests in the implementation of the division of relationship property between the partners. Options to re-work these provisions are considered below, and should be considered regardless of what this new section provides.

29.21 This option would recognise that separation can have a significant impact on children and their living standards. It may make it easier to obtain a non-division order if the applicant is the primary caregiver for all children. However, where each partner is the primary caregiver for one or more children of the relationship or care is equally shared it will continue to be a complicated exercise as a court must balance the interests of each child.

Option 2: Retain the general duty but provide guidance in a list of factors to consider when making non-division orders

29.22 Another option is to retain the general duty to consider children's interests in PRA proceedings, reflecting the standard set in the PRA's new principle promoting children's best interests (see paragraphs 29.2 to 29.11), and add a new section to incorporate guidance setting out an inclusive list of matters to which a court must have regard when considering an application for a non-division order. The list of relevant factors could include matters such as the provision of a home for the child; the child's educational requirements; the child's need for suitable furniture, household appliances and household effects (including toys); and the maintenance of the child's relationships with the partners, family and whānau, and friends. This would enhance the duty and may help a court identify children's interests and guide the use of judicial discretion where children's interests are relevant to non-division orders. It may, however, increase uncertainty and raise new practical issues in terms of how evidence is funded and placed before a court (see paragraph 29.26).

Option 3: Require a court to be satisfied that children's needs have been met before making a division order

29.23 Peart and Henaghan have suggested that a court could be mandated not to make a property division order unless it is satisfied that the needs of any minor or dependent children are adequately met.[206] The duty would only apply after the partners' relationship property entitlements had been provisionally determined, including any provision for economic disparity made

206 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Peart and Henaghan note that Marian Hobbs (Wellington Central) made a similar suggestion during the debates on the Matrimonial Property Amendment Bill in 1998: Marian Hobbs (6 May 1998) 568 NZPD.

under section 15 of the PRA.[207] Peart and Henaghan say that this option would better protect children's welfare, provide for a family-centred approach in decisions affecting property division and improve New Zealand's compliance with its obligations under UNCROC.[208]

29.24 Peart and Henaghan refer to children's "needs" in a similar way to which we have referred to children's "interests" in this Issues Paper, and suggest that they should include:[209]

> *…the children's financial needs, their housing, the standard of living enjoyed by the family during the relationship, the manner in which the children were being educated and the parties' expectations as to their children's education, any special needs arising from a child's physical or mental disability, the financial resources available to each party and the children, and the parties' own financial needs.*

29.25 A similar provision exists in the Family Proceedings Act 1980 in relation to an order dissolving a marriage or civil union.[210] It provides that a court must normally be satisfied that arrangements have been made for the day-to-day care, maintenance and other aspects of the welfare of any children under 16 years and those arrangements are satisfactory or the best that can be devised in the circumstances.[211] Unlike this provision, however, Peart and Henaghan's duty would apply following separation and include de facto relationships.[212]

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207 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Another option is for this duty to apply before the partners' relationship property entitlements have been determined, however that may have the effect of changing the general rule of equal sharing. See paragraphs 28.20–28.23.

208 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

209 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

210 Family Proceedings Act 1980, s 45.

211 Family Proceedings Act 1980, s 45. The provisions of the Child Support Act 1991 are of primary importance in determining if child maintenance arrangements are satisfactory: *Laws of New Zealand Dissolution of Marriage* (online ed) at [24]. For example, in *G v M* [2003] NZFLR 97 (FC) at [8] the Family Court said that it was not possible for one partner to claim that unsatisfactory arrangements had been made for the children's maintenance because the other partner was paying child support assessed under the Child Support Act 1991. The Child Support Act 1991 is outside the terms of reference for our review.

212 Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Note that an application for an order dissolving a marriage or civil union may be made only on the ground that the marriage or civil union has broken down irrevocably, and this is established if the court is satisfied that the parties have been living apart for at least two years: Family Proceedings Act 1980, s 39.

29.26 A court would be required to discharge this obligation regardless of the evidence offered by the partners. It would not rely on the partners to proactively raise matters such as the children's accommodation interests. As such, to ensure a court is able to make an informed decision it may also require the power to order that evidence and reports about children (such as social worker's reports) be provided.[213] This raises practical issues in terms of how provision of this evidence would be funded and the threshold for appointment of lawyer for child (see paragraphs 29.69 and 29.70), and may require additional State funding to implement. This option may also be viewed by some as an unacceptable erosion of parental autonomy.

CONSULTATION QUESTION

I13 How should the children's interests be given a higher priority in PRA proceedings?

Property orders for the benefit of children

29.27 The second function of section 26 is to give a court the power, if it considers it just, to make an order settling relationship property for the benefit of children of the relationship.[214] This is an important tool.

29.28 The principles that guide the exercise of the power in section 26 have developed through case law. In *R v R*, the Family Court set out the approach in these terms:[215]

> *(1) Prima facie the matrimonial property is to be regarded as the property of the parties.*
>
> *(2) In every case where there are minor or dependent children the Court is obliged to have regard to the respective interests of each such child.*
>
> *(3) The context of the consideration of the welfare and interests of the children is "In the light of the property division between husband and wife, to ensure their financial protection during minority or dependency"…*

213 See for example Family Proceedings Act 1980, s 46.

214 Note that this discretion cannot be exercised in respect of Māori land: see s 6 of the Property (Relationships) Act 1976. See also Matrimonial Property Act 1976, s 26.

215 *R v R* [1998] NZFLR 611 (FC) at 622. See also *B v K* HC Wellington CIV-2004-485-611, 16 March 2005 at [56]–[57]; and *C v B* [2012] NZFC 7042 at [153].

> *(4) The Court is not precluded from considering the interests of adult children and may have jurisdiction under s 26 to settle property for the benefit of an adult child…*
>
> *(5) It will be the exceptional case where the consideration leads to an actual award for a child.*
>
> *(6) It would be wrong in principle to use s 26 to anticipate succession.*
>
> *(7) Default or inability of a parent to provide appropriate maintenance, upbringing, shelter or nurture for a child are relevant factors, whether or not the default is wilful.*
>
> *(8) In the general run of cases a s 26 order should not be used to substitute or supplement child support arrangements. Nonetheless the Court's discretion is unfettered by statute.*
>
> *(9) Section 26 is not a backhanded means of providing damages to a child for ordinary parenting shortcomings.*
>
> *(10) An award under s 26 must be reasonable in all the circumstances.*

29.29 Peart notes that "…the courts have generally adopted a very restrictive approach by insisting on evidence of exceptional and extraordinary circumstances, such as criminal offending within the family or severe parental neglect."[216] A review of cases supports this:

(a) In *X v X,* one partner had been admitted to a psychiatric hospital with no prospect of recovery.[217] The Supreme Court made an order vesting part of that partner's share of relationship property in a trustee for the maintenance, education and advancement of some children of the relationship who were under the care of child welfare authorities.[218]

(b) In *N v N,* one partner was charged with the murder of the other.[219] The accused renounced their interest under

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216 Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 33–34. Referring to *N v N* (1985) 3 NZFLR 694 (FC); *R v R* [1998] NZFLR 611 (FC); and noting *H v H* [2007] NZFLR 910 (HC). In *H v H* the High Court said at [109] that "An award is normally only justified if, after a division of property and taking into account child support obligations, there are remaining grounds for belief that during a child's minority or dependency he or she will not be adequately provided for by the parents. Settlements appear to occur where the situation is 'somewhat out of the ordinary', there being cited examples of parental disappearance or death; sexual abuse; or some form of physical or mental disability on the part of the child."

217 *X v X* [1977] 2 NZLR 423 (SC) at 424.

218 *X v X* [1977] 2 NZLR 423 (SC) at 428.

219 *N v N* (1985) 3 NZFLR 694 (FC) at 695.

the deceased's will and the children were substituted as legatees. The accused agreed that the estate should be compensated for the loss of value of some property by providing for the accused's share in the family home to be vested in the estate. The Family Court made a section 26 order vesting the family home in a trustee for the children's benefit.[220]

(c) In *S v C*, one partner had killed another person in front of a child of the relationship.[221] That partner had mental health issues and would likely never be subject to less than full-time care and supervision.[222] The Family Court concluded that that partner probably would not have need for the whole of their property entitlement and that some recompense for the most difficult of upbringings could and should in justice be made by settling property on the children.[223]

(d) In *R v R*, a child of the relationship suffered post-traumatic stress disorder as a result of sexual abuse by one partner.[224] The Family Court ordered that a payment be made directly to the child from that partner's estate, and that the child be trusted to apply it to counselling and to setting themselves up in life.[225]

29.30 Despite what these cases suggest, however, the High Court has said that it is not necessary to show "exceptional circumstances" before a section 26 order may be made.[226] Cases where section 26 orders have been made in less extreme circumstances include:

(a) *H v H*, where the partners intended a life insurance policy to be a benefit for their children.[227] The Family Court used a section 26 order to vest one half of a life insurance policy in trust for the children's benefit.[228]

220 *N v N* (1985) 3 NZFLR 694 (FC) at 696.

221 *S v C* (1998) 17 FRNZ 176 (FC) at 177.

222 *S v C* (1998) 17 FRNZ 176 (FC) at 178–179.

223 *S v C* (1998) 17 FRNZ 176 (FC) at 181.

224 *R v R* [1998] NZFLR 611 (FC) at 622.

225 *R v R* [1998] NZFLR 611 (FC) at 623.

226 *B v B* (2009) 27 FRNZ 622 (HC) at [83].

227 *H v H* [2015] NZFC 4376, [2015] NZFLR 107.

228 *H v H* [2015] NZFC 4376, [2015] NZFLR 107 at [36].

(b) *L v L*, where the partners made a joint application for orders by consent vesting part of their relationship property in trust.[229]

29.31 The following are examples of cases where courts have declined to make section 26 orders:

(a) In *M v M*, the dependent child had high and complex needs relating to a medical condition, however the relationship property pool was modest.[230]

(b) In *C v B*, the child did not have a disability or special needs; and the child's primary caregiver was able to provide adequately for the child's needs, which were not found to be exceptional or out of the ordinary.[231]

(c) In *H v H*, the child's attention deficit hyperactivity disorder was not significant enough to be relevant, only a modest amount was in dispute between the parties, each party had a new home and one was paying child support.[232]

(d) In *B v B*, the child had the capacity to earn income while attending university, or to undertake tertiary studies with a student loan.[233] There were no issues of misconduct and the fact that the child was estranged from one partner was not relevant.[234]

29.32 Section 26 orders are contemplated on "rare occasions".[235] Potential reasons for the low number of section 26 orders may be the restrictive approach discussed above; a reluctance to undermine the partners' property rights; insufficient or unavailable evidence; lack of lawyer for child; and/or the low number of applications. The low number of applications may indicate that section 26 orders are not appealing to parents (as the most obvious

229 *L v L* (1993) 11 FRNZ 81 (FC).

230 *M v M* [2012] NZFC 5019 (FC).

231 *C v B* [2012] NZFC 7042 at [157]. See also *H v H* [2007] NZFLR 910 (HC) at [110] where a s 26 application was declined because the child did not have special needs, and both parents were employable and had a demonstrable capacity to earn good incomes.

232 *H v H* [2012] NZFC 4543 at [66]–[70].

233 *B v B* (2009) 27 FRNZ 622 (HC) at [89].

234 *B v B* (2009) 27 FRNZ 622 (HC) at [89]–[90].

235 *De Malmanche v De Malmanche* (2002) 22 FRNZ 145 (HC) at [202]. See also Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 33.

applicants) or that lawyers are not providing advice on section 26 orders because they are not seen as a useful tool.

Courts have taken a restrictive approach to section 26 orders

29.33 The current approach to section 26 demonstrates a reluctance to disturb the partners' property entitlements, which arguably does not sit well with UNCROC[236] and places too much of an adult focus on a child-centred provision.[237] Peart is of the view that: [238]

> *As the constraint is a judicial gloss on the section, there is scope for a more liberal approach that provides better protection for minor or dependent children of the relationship whilst not losing sight of the parties' rights to a just division.*

29.34 The current approach may, however, achieve an appropriate balance between competing interests. A power that takes property and settles it for the benefit of children should only be used sparingly because it is inconsistent with the PRA's primary theory of entitlement on the part of the adult partners. Parents have an obligation to provide for their children's needs regardless of the PRA, and there are other mechanisms, such as child support, to ensure that happens. Parents should have the freedom to use their property to provide for any additional needs as they see fit.

Option for reform: Section 26 orders to meet children's specific needs

29.35 If the approach taken under section 26 is unduly restrictive, an option is to amend section 26 to signal that orders can be made to meet children's specific needs in certain circumstances.[239] Specific needs could include children's educational requirements, high medical costs such as dental costs, or costs arising due to special needs. Other factors may also be relevant in determining whether to make an order, such as whether it would cause hardship, the partners' ability and willingness to provide for the child, and the partners' financial resources and other responsibilities. This could

236 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 52.

237 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 45.

238 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 52.

239 Advice to the Law Commission from Bill Atkin regarding options for reforming s 26 of the Property (Relationships) Act 1976 on file with the Law Commission (5 July 2017).

be recognised by, for example, providing that an order may only be made if it would be just and equitable as regards the child and the partners, and otherwise proper. This option could be accompanied by a more general mechanism that allowed, for example, for an order to be made for the payment of a third party invoice or the payment of money to the child's guardian.

29.36 One concern with this option may be that it is inconsistent with the PRA's main focus on a just division of property between adult partners, underpinned by a primary theory based on entitlement. It could also be said to undermine parental autonomy and may be unnecessary given the other obligations parents have to provide financial support for their children.[240] It would risk extending the PRA into territory already covered to an extent by the Child Support Act 1991.[241] Orders can be made under the Child Support Act to meet some specific needs in special circumstances.[242] It is not the PRA's role to address any actual or perceived shortcomings with the Child Support Act. Further work would be required to consider the risks, complexity and policy difficulties associated with the PRA's interaction with the Child Support Act if this option is favoured. Issues may arise if orders are made at the point property is divided and circumstances subsequently change, or one partner refuses to pay. Such orders may lead to repeat applications to the court, leading to ongoing costs for parents as well as requiring further court resources.

29.37 However, children's needs are already recognised in the PRA, consistent with the secondary theory of need that sits alongside the primary entitlement theory. This option simply recognises the PRA as another way to provide for children's specific needs, at a particular point in time. An order to meet a specific need may be of considerable benefit to children where assessed child support is low or the child has expensive specific needs that cannot be met in another way.[243] It avoids the need to navigate the lump sum provisions of the Child Support Act 1991 (see paragraph 27.19). It may also benefit children where child support is retained by the

240 Child Support Act 1991, s 4(b).

241 Child Support Act 1991, s 4(f), states that an object of that Act is "to provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined."

242 Child Support Act 1991, ss 104–106. Note that s 105(2)(c)(ii) of the Child Support Act 1991 links with the Property (Relationships) Act 1976 and would require careful consideration if this option is pursued.

243 Child Support Act 1991, ss 32 and 72. The minimum annual rate of child support payable under a formula assessment by a liable parent in respect of all of his or her children is $905 for the child support year 1 April 2017 to 31 March 2018: see Inland Revenue "Child support annual adjustments" (9 February 2017) <www.ird.govt.nz>. Note that the minimum rate of child support is adjusted each year in line with inflation.

State to offset a benefit. Some parents may favour this option as a way to ring-fence property for a specific purpose that directly benefits the children, with no implication that the primary caregiver has been unjustly enriched by increasing their share. In our preliminary consultation, we were told by practitioners that often one of the few things parents can agree on is that their children should be adequately provided for.[244]

CONSULTATION QUESTION

I14 In what circumstances should a court settle property for the benefit of children?

Should section 26 allow property to be settled for the benefit of independent adult children?

29.38 Section 26 tries to do two things at once (see paragraphs 29.13 and 29.14). Its first function is clearly limited to minor or dependent children. Whether this limitation extends to the second function has been the subject of debate. This is due to the way section 26 is drafted and the wide definitions of "child of the relationship", which include independent adults.[245]

29.39 In *Re Roberts* the Family Court held that the court had jurisdiction to vest relationship property in a family trust for the benefit of independent adult children.[246] However, more recently in *B v B*, the High Court held that section 26 orders may only be made for the benefit of minor or dependent children.[247] The Court held that settlement of property on an independent adult child would only be justified if the child held property for the benefit of one or more minor or dependent siblings.[248]

29.40 One view is that section 26 orders should only be made for the benefit of minor or genuinely dependent children, and not for the benefit of adult children who remain dependent by reason of lack of desire or motivation to become independent.[249] This approach

244 See also Margaret Casey "Mitigating the Painful Effects of a Clean Break" (paper presented to New Zealand Law Society Family Law Conference, October 2003) 225 at 233.

245 Property (Relationships) Act 1976, s 2.

246 *Re Roberts* (1993) 10 FRNZ 668 (HC) at 675. See also *L v L* (1993) 11 FRNZ 81 (FC).

247 *B v B* (2009) 27 FRNZ 622 (HC) at [83]. The High Court said at [83(a)] that "[s]ettlement of property on an independent adult child is only justifiable if the child holds property for the benefit of one or more 'minor' or 'dependent' siblings."

248 *B v B* (2009) 27 FRNZ 622 (HC) at [83].

249 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 45 and 71–72.

would follow *B v B*, protect the most vulnerable children of the relationship and avoid the risk of claims by independent adult children seeking to anticipate succession. This clarification may also be desirable if section 26 is extended to signal that orders can be made to meet children's specific needs in certain circumstances (see paragraphs 29.35 to 29.37).

29.41 It might, however, be appropriate that a court have the discretion to make section 26 orders in favour of independent adult children in limited circumstances. For example, to address need arising from parental criminal offending or severe parental neglect while the child was a minor, or where a joint application is made by both partners.[250] It may only be appropriate for this power to be exercised in exceptional circumstances. This is because an independent adult can earn income themselves and it should be the parents' decision as to whether any further support is provided.[251]

CONSULTATION QUESTION

I15 Should orders be able to be made settling relationship property for the benefit of independent adult children? If so, should these orders only be made in exceptional circumstances?

Postponement of vesting

29.42 Section 26A gives a court the power to make an order postponing the vesting of any share in the relationship property. There are several limitations:

(a) First, it can only be used for the benefit of the partner who is the "principal provider" of ongoing daily care for one or more minor or dependent children of the relationship (we refer to this partner as the "primary caregiver"). Logic suggests that where ongoing daily care is shared equally neither partner will be the primary caregiver.[252]

(b) Second, a court must be satisfied that immediate vesting would cause "undue hardship" for the primary caregiver.

250 For example *R v R* [1998] NZFLR 611 (FC); *N v N* (1985) 3 NZFLR 694 (FC); and *L v L* (1993) 11 FRNZ 81 (FC).

251 See *B v B* (2009) 27 FRNZ 622 (HC) at [88].

252 See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.02(2)].

In *H v H* the High Court said that the threshold for "undue hardship" is high.[253]

(c) Third, vesting cannot be postponed indefinitely. Vesting can only be postponed for as long as necessary, and only to the extent necessary, to alleviate the undue hardship. A court must specify when vesting will occur, either by reference to a specified future date or a specified event.

29.43 The following cases are examples where children's interests have been considered by the court in deciding whether to make an order under section 26A to postpone vesting:[254]

(a) In *H v D,* the Family Court postponed vesting for three years because, among other things, the children were young, the house was modest and in need of repair, and the wife was not in a position to pay out the husband and purchase reasonable alternative accommodation.[255] The wife did not have to pay interest or occupation rent[256] to the husband because he had traditionally been a poor provider and was at the time in prison and unable to provide for the children either by way of care or child support.[257]

(b) In *E v W,* the relationship ended when Ms W's daughters disclosed that they had been sexually abused by Mr E.[258] Ms W's objective was to remain in the family home to avoid further disruption to the children.[259] Immediate division would involve the sale of the family home, and possibly a move away from the area and a change of school.[260] This amounted to hardship and division was deferred for just over two years, until Mr E's sentence end date, to give the children time to adjust to the separation and Ms W a longer period to improve her circumstances.[261] Mr E was unlikely to be disadvantaged

253 *H v H* [2007] NZFLR 910 (HC) at [114].

254 See also *F v H* FC Porirua FAM-2005-004-1312, 11 April 2011.

255 *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005.

256 See Chapter 14 for a discussion on interest and occupation rent.

257 *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005 at [112].

258 *E v W* (2006) 26 FRNZ 38 (FC) at [1].

259 *E v W* (2006) 26 FRNZ 38 (FC) at [3].

260 *E v W* (2006) 26 FRNZ 38 (FC) at [92].

261 *E v W* (2006) 26 FRNZ 38 (FC) at [92] and [96].

because he was in prison and, even if released early, it would take him some time to obtain employment and find a suitable property.[262]

29.44 Section 26A orders appear to be uncommon,[263] and this is likely due to a combination of reasons. First, few applications are made. Lawyers might not advise their client to seek a postponement order, due to the perceived desirability of immediate vesting, or because the partners might share care, in which case section 26A may not be applicable.[264] Second, there is a high threshold for making a postponement order, which suggests that section 26A was designed to meet exceptional circumstances. Changing social conditions, including residential mobility and re-partnering[265] may also explain why it is difficult for the primary caregiver to show that immediate vesting will result in undue hardship.

29.45 Our preliminary view is that there is a clear need for section 26A. For some primary caregivers, immediate vesting does not result in independence or allow them to "move on" with their lives.[266] Property division often results in the sale of the family home, and the proceeds may not be sufficient to enable the primary caregiver to purchase a new house of the same standard in the same area, although this may also be the result for the other partner. Immediate sale of the family home requires some children to move schools and break ties with friends and community when they are dealing with the trauma of separation. Some primary caregivers and children may be left in difficult circumstances if property is divided immediately.

262 *E v W* (2006) 26 FRNZ 38 (FC) at [97].

263 See Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 36.

264 Property (Relationships) Act 1976, s 23(1). See also Margaret Casey "Mitigating the Painful Effects of a Clean Break" (paper presented to New Zealand Law Society Family Law Conference, October 2003) 225 at 234.

265 In *H v H* [2007] NZFLR 910 (HC) the High Court said at [114] that:

> *In the 1960s and 1970s, agreements were relatively commonplace whereby the primary caregiver and children would remain in a family home with its sale being delayed until certain stipulated events occurred. Social conditions, however, have changed with geographic relocation and relatively rapid re-partnering in the wake of broken relationships being commonplace.*

266 See Margaret Casey "Mitigating the Painful Effects of a Clean Break" (paper presented to New Zealand Law Society Family Law Conference, October 2013) 225 at 234.

Should it be easier for the primary caregiver to obtain a postponement order?

29.46 Postponement orders can have a positive impact for some children, yet section 26A sets a high threshold and the evidence we have suggests that few applications are made. A postponement order can enable children to stay in the family home for a time, postponing the disruption caused by changing schools and communities and allowing for better planning. A postponement order may also assist in circumstances where an occupation order would not. For example, where a primary caregiver has insufficient income to retain the family home post-separation. It would allow for the family home to be sold, a cheaper home purchased, and for the primary caregiver to retain the other partner's share in the equity of the family home to provide the funds to establish the new home for the children.[267] It might also assist when continuing capital provision not necessarily tied to providing a home may be necessary for the benefit of the children.[268] It could, however, be argued that the high threshold in section 26A is appropriate because a postponement order interferes with the other partner's property entitlement, may cause him or her hardship, and means that he or she does not get an immediate "clean break."

29.47 The restrictions on the power to postpone vesting in section 26A are unusual when contrasted with other PRA provisions. For example, the discretion in section 26 to settle property for children's benefit is relatively unencumbered in its drafting, yet it can have the effect of permanently depriving one or both partners of property rights. Another example is the ancillary power in section 33(3)(d) to postpone vesting of relationship property until a specified future date or event. This power has the same effect as section 26A, it may even be used in wider circumstances to postpone vesting, and yet section 33 is not restricted by an "undue hardship" test.

29.48 Section 26A focuses on undue hardship for the primary caregiver. There is no express requirement to consider whether immediate vesting would cause undue hardship for the children. Many children will experience some hardship as a result of immediate

267 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

268 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

vesting because household income generally declines as one household becomes two. Some children may experience a significant decline in housing quality or living standards, disadvantage or risk of negative outcomes if immediate vesting occurs close to a life event such as exams or the birth of a sibling, or the child's special needs going unmet. Courts, however, seem to be alive to the impact of immediate vesting on children's circumstances.[269] This may be due to the general requirement in section 26 to have regard to children's interests in PRA proceedings. Or it may simply be because it is difficult to determine the undue hardship of the primary caregiver without considering the children's situation.[270]

29.49 We explore some options for changing the threshold for section 26A orders below.

Option 1: Expressly refer to undue hardship for children in section 26A

29.50 An option is to extend section 26A to provide that a court may make a postponement order if it is satisfied that immediate vesting would cause undue hardship for children. Relevant factors may include whether a postponement order is necessary in order for the child to remain in the family home, for example where the home has been adapted to accommodate any physical disabilities of the child, or to remain in proximity to the child's school or day care (whether the child remains in the family home or the proceeds of that home's sale are needed to purchase a smaller, less valuable home nearby), or whether a child would face a significant reduction in standard of living if an order is not made. This would ensure that the impact of immediate vesting on children is always considered and recognises that children's interests may be different to those of the primary caregiver. It would retain the well-understood test of "undue hardship". This option may not be a significant change from the current approach given the way the

269 For example, in *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009 the High Court said at [38] that:

> *Undue hardship will generally be reflected in evidence of the inability of the principal provider of care to manage financially in the event that the house is sold immediately. That will usually entail a need to examine income and outgoings, the ability of the claimant to meet his or her own needs, the proper requirements of the children as to schooling and so forth.*

See also *E v W* (2006) 26 FRNZ 38 (FC).

270 See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 23.

courts have interpreted section 26A in practice, but would remove any doubt.

Option 2: Replace the undue hardship test in section 26A with a more general discretion

29.51 This option could be achieved by providing that a court may make a postponement order if it considers it just. Removing the undue hardship requirement would give a court more discretion, however the court would be required to balance the interests of the partners and any children of the relationship. This may not be advantageous for children unless children's interests are given a higher priority in the implementation of the division of property between the partners (see paragraphs 29.20 to 29.21).

Option 3: Automatic postponement of vesting where there are minor or dependent children

29.52 A more significant reform option is a new presumption that vesting must be postponed for a short period in prescribed circumstances unless the partner that is not the primary caregiver can show undue hardship.[271] Automatic postponement could be appropriate where immediate vesting would lead to sudden and significant geographical relocation for the primary caregiver and children. This would recognise the importance of stability and continuity for children in the aftermath of relationship breakdown. It may only be appropriate for an automatic postponement to apply for a period of say six or 12 months from the date of separation, to provide a short window for adjustment and planning.

29.53 This option may not strike an appropriate balance between the interests of the primary caregiver, the other partner, and the children. It may also be too inflexible and unnecessary where there is a large property pool or where the primary caregiver has no need for the property. It may also distort care arrangements and create an incentive for parents, at least initially, to insist that care is shared equally. There are also questions about the practical

271 Note that in 1998 the Commissioner for Children submitted that s 26A be deleted and replaced with a new provision which defers sale of the family home where there are minor dependent children, until the youngest child is 16 or the parties otherwise agree, unless the party seeking to sell the home can prove that deferred sale would cause undue hardship for that party: see Roger McClay "Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998" at 5.

impact this option would have. It may not make much difference where relationship property disputes are resolved through the courts because it is likely that a short automatic postponement period would expire before PRA orders are made. It may influence those settling relationship property disputes in the shadow of the law, however our preliminary consultation suggests that many couples that resolve their property matters out of court already postpone vesting.

CONSULTATION QUESTIONS

I16 Should the threshold for making postponement orders be changed? If so, what should the threshold be?

I17 Should vesting be automatically postponed in certain circumstances?

Occupation and tenancy orders

29.54 Section 27 gives a court jurisdiction to make an occupation order granting exclusive possession of the family home (or other premises) to one partner provided it forms part of the relationship property.[272] Section 28 gives a court jurisdiction to vest the tenancy of any dwellinghouse in either partner. Section 28A is an attempt to improve the chances of primary caregivers staying in the family home with the children in either situation.[273] It provides that a court, in determining whether to make an occupation or tenancy order, and the period and conditions of such an order, "shall have particular regard" to the need to provide a home for any minor or dependent children of the relationship. A court may also have regard to all other relevant circumstances.

29.55 Occupation and tenancy orders can provide children with stability during the upheaval of relationship breakdown by maintaining continuity of housing, schooling, social and sporting activities and helping them cope with stress. They can also ensure that children's need for adequate housing is met.

29.56 In 2016, 785 applications for the division of relationship property under section 25 were filed in the Family Court, but only 59 applications were filed for occupation orders and one application

272 Occupation rent is discussed in Chapter 14 of this Issues Paper.

273 Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.1].

for a tenancy order.[274] We do not know how many of those applications were granted.[275] The low number of applications is likely due to a combination of factors such as couples reaching agreement as part of a wider discussion around childcare and support, trends towards shared parenting, the accommodation needs of children of new relationships, and the possibility that such orders are unattractive to parents, for example due to the prospect of occupation rent.[276] New arrangements such as "bird's nest parenting"[277] or couples "living apart" in the same house[278] may have also eroded the need for such orders.

The priority given to children's accommodation needs

29.57 The need to provide a home for the children of the relationship was initially treated as the first and most important consideration by the courts, and given greater weight than the "other relevant circumstances" that a court may consider under section 28A.[279] In *N v N* the High Court remarked that it must usually be "paramount."[280] More recent cases have taken a more subdued approach. In *G v G* the High Court said that elevating the need to provide a home to the status of paramountcy seemed to go further than section 28A requires.[281] In *W v W* the High Court took a moderate approach, saying that the children's interests should be given weight greater than other considerations, but that where children would not be significantly prejudiced, competing considerations were not to be overlooked.[282]

274 Email from Ministry of Justice to the Law Commission regarding applications filed in the Family Court (5 May 2017).

275 See also Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356.

276 See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.1].

277 "Bird's nest parenting" is where the children stay in the family home and the parents rotate in and out of the "nest." See for example *K v K* [2005] NZFLR 881 (FC) where the court declined an application for exclusive occupation of the family home where the parties had a "nesting" regime. See also fn 19 for recent media coverage of bird's nest parenting.

278 For example where a couple's relationship has ended but both partners choose to remain living in the family home for a time to provide stability for the children or for other reasons. See fn 18 for recent media coverage of couples "living apart" in the same house.

279 See *W v W* (1984) 2 NZFLR 385 (FC) at 389–390.

280 *N v N* (1985) 3 NZFLR 766 (HC) at 769.

281 *G v G* (1988) 3 FRNZ 665 (HC) at 677.

282 *W v W* [1997] NZFLR 543 (HC) at 547.

Option for reform: Give more weight to children's accommodation needs

29.58 An option is to amend section 28A to direct a court to give children's accommodation needs a higher priority when considering occupation or tenancy orders. This could be achieved by replacing the direction to have "particular regard" to the children's need for a home with a direction to treat the children's need for a home as a primary consideration, or even the first and paramount consideration. This would give children's accommodation needs greater weight when balanced against other relevant factors. This may, however, not achieve an appropriate balance between children's interests and the interests of others, such as the partners, other family members or children of new relationships.

CONSULTATION QUESTION

I18 Should more weight be given to the need to provide a home for the children when considering occupation and tenancy orders?

Furniture orders

29.59 The PRA gives a court the discretion to make furniture orders under sections 28B, 28C and 28D. Under section 28B, a court may make an ancillary furniture order giving the use of furniture to the partner in whose favour an occupation or tenancy order has been made. The direction in section 28A to have particular regard to the need to provide a home for children is arguably relevant to the making of an ancillary furniture order under section 28B, however that could be usefully clarified.[283]

29.60 Under section 28C, a court may make a furniture order giving the use of furniture to either partner. In determining whether to make an order under section 28C a court must have particular regard to the applicant's need to have suitable furniture to provide for the needs of any children of the relationship living with him or her.[284] Furniture orders can be made in relation to "furniture, household appliances, and household effects" – this is likely to

283 See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR28B.02].

284 Property (Relationships) Act 1976, s 28C(4).

cover essential items such as cots and car seats, and is arguably wide enough to cover children's toys.[285]

29.61 Furniture orders are uncommon. In 2016, 785 applications for the division of relationship property under section 25 were filed in the Family Court, but only 10 applications were filed for ancillary furniture orders under section 28B and only two applications for furniture orders under section 28C.[286]

There is no separate category of children's property

29.62 Calls have been made for a separate category of children's property in the PRA. In the lead up to the 2001 amendments, submissions were made that children's property should be excluded from relationship property because its inclusion could diminish the caregiver's share.[287] The direction in section 28C to have particular regard to children's needs when making furniture orders was included as a compromise.[288]

29.63 Children's property may include gifts to children, children's bedroom furniture, car seats, clothes, toys, and school and hobby equipment used for and by children of the relationship. A separate category of children's property could help ensure that it is identified, ring-fenced and set aside for their continued use and benefit. It would also recognise children's interests in a way that is independent of those of the partners.

29.64 A separate category of children's property may, however, pose problems and there is a view that it is not required. It may be difficult to determine whether mixed-use assets are children's property. For example, a computer may be used by both the children and the partners. It may also be difficult to determine where children's property should be physically situated when care of children is shared. There are also existing mechanisms in the PRA that can address issues with children's property, such as orders settling property for children's benefit.[289]

285 See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.4].

286 Email from Ministry of Justice to Law Commission regarding applications filed in the Family Court (5 May 2017).

287 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 26.

288 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 26.

289 Property (Relationships) Act 1976), s 26(1). See also ss 26A, 28B and 28C.

CONSULTATION QUESTION

I19 Is there a need for a separate category of children's property? If so, how should it be defined and dealt with under the PRA?

Participation of children in PRA proceedings

29.65 Section 37 sets out who is entitled to be heard in PRA proceedings. It provides that a court may direct that notice be given to any person "having an interest in the property" that would be affected by a PRA order.[290] In *H v R* children with a contingent interest in trust property that would be affected by PRA orders were joined as parties to their parents' relationship property proceedings.[291] One commentator says that it is "rare" for this discretion to be exercised in respect of minor children.[292] Possible explanations for this are the lack of specific reference to children in section 37, the requirement for a property interest and the view that ordinarily children should be kept out of their parents' property disputes.[293]

29.66 Section 37A sets out when a lawyer for child is appointed in PRA proceedings.[294] It provides that a court may appoint a lawyer for any minor or dependent children of the relationship if "special circumstances" make the appointment necessary or desirable. Special circumstances may exist where children are likely to be affected and the assets at stake are unusually high or where property might be settled on children.[295] For example, in *L v P* a lawyer was appointed to represent a child whose substantial inheritance had been partly intermingled with relationship

290 Section 37 of the Property (Relationships) Act 1976 is a right to be heard in the specific matter of interest to the extent that it would be affected by an order: *H v H* FC Wellington FAM-2010-085-450, 17 August 2010 at [6].

291 *H v R* [2017] NZFC 761 at [10], [26] and [29]–[33]. In that case the children's interests needed to be represented because the wife had a conflict in her roles as applicant and trustee, and the other trustee was not actively involved.

292 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 21. See also Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependants: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 310–311.

293 See *H v R* [2017] NZFC 761 at [33(b)] where the Family Court accepted the submission that ordinarily children should be kept out of their parents' property disputes.

294 See also Family Courts Act 1980, s 9B(1).

295 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.82].

property.[296] Peart says that this power is "seldom utilised."[297] The threshold for appointment, the expense that may be incurred by the partners[298] and the potential delay involved are possible explanations.

Should children's voices be heard more often in PRA proceedings?

29.67 Perceptions of children and their rights to be heard in decision-making processes that affect them have changed.[299] This is recognised in the Care of Children Act 2004, which provides for children to be given reasonable opportunities to express views on matters affecting them, not only in care or guardianship arrangements but also in decisions about their property.[300] Any views the child expresses, either directly or through a representative, must be taken into account.[301] However although the outcome of PRA proceedings can affect children, the primary focus is generally on the division of property between the partners.

29.68 Court proceedings can be difficult and stressful for children. Any occasion to be heard would require safeguards that consider the age and maturity of the child, do not require participation and do not require a court to act in accordance with the child's views.

296 *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011.

297 Nicola Peart "Protecting children's interests in relationship property proceedings" (2013) 13(1) Otago LR 27 at 54. For example, in *M v M* [2004] NZFLR 72 (HC) no lawyer for child was appointed in an application for an order to settle property on a child with special needs.

298 Nicola Peart "Protecting children's interests in relationship property proceedings" (2013) 13(1) Otago LR 27 at 54. See Property (Relationships) Act 1976 (PRA), s 37A(2). The amount of the fees and expenses of the lawyer for the child are currently set out on the Ministry of Justice's website <www.justice.govt.nz>. Prior to July 2014, a court could also order payment out of public money appropriated by Parliament for the purpose: s 37A(3) (repealed, on 15 July 2014, by s 4 of the Property (Relationships) Amendment Act 2013).

299 See United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12.

300 Care of Children Act 2004, s 6.

301 Care of Children Act 2004, s 6. See also the Oranga Tamariki Act 1989, ss 5, 11 and 22.

Is the threshold for appointment of lawyer for child too high?

29.69 The threshold for appointment of lawyer for child is relatively high.[302] This may be an issue if there is a risk that children are unable to exercise a right to be heard effectively (particularly if children are given additional rights in PRA proceedings) or in a manner free of parental influence. It may also be an issue if children's interests are inadequately represented by the partners or overlooked, for example if it is not in the partners' interests to raise them or because the partners are distressed or distracted, and not well placed to focus on their children's needs.

29.70 Another view is that more frequent appointments of lawyer for child is inappropriate because of the PRA's focus on the partners and their entitlements, and could turn PRA proceedings into a three-way contest between the partners and the children in which some children feel pressure to choose sides.

How would greater participation of children in PRA proceedings be funded?

29.71 If greater participation of children in PRA proceedings is considered desirable it raises the issue of how the associated costs are funded. Increased costs may be incurred in providing support structures and procedural mechanisms to enable children to express their views, and in the form of lawyer's fees where lawyer for child is appointed.[303]

CONSULTATION QUESTIONS

I20 Should children's views be heard more often in PRA proceedings, and if so, in what circumstances?

I21 Is the threshold for appointment of lawyer for child too high? If so, what should the threshold be?

I22 Who should pay for the cost of greater participation of children in PRA proceedings?

302 In other family law contexts, appointment of lawyer for the child ranges from mandatory (such as in care and protection proceedings under the Oranga Tamariki Act 1989: s159) to discretionary (such as in civil proceedings under the Family Proceedings Act 1980 where a court can appoint a lawyer for the child if necessary or desirable: s 162).

303 See fn 298 above.

Part J – Can partners make their own agreement about property?

Chapter 30 – Contracting out of the PRA

Introduction

30.1 Partners do not have to divide their property according to the PRA's rules of division. Partners can, at any time, make an agreement under Part 6 of the PRA that governs the status, ownership and division of their property and is enforceable by a court. We call this a "contracting out agreement."

30.2 The provisions governing contracting out agreements in Part 6 of the PRA have a significant role in New Zealand's relationship property regime, both in theory and in practice. Over the years, many partners have substituted the PRA's rules with their own arrangements.

30.3 There are two types of contracting out agreements:

(a) Section 21 provides that partners can make an agreement *before* or *during* their relationship, relating to "the status, ownership and division of their property (including future property)" during the joint lives of the partners, or when one partner dies. Section 21 agreements are sometimes referred to as a "pre-nuptial agreements."

(b) Section 21A provides that partners may make an agreement to *settle* any differences that have arisen between them about their property. Section 21A agreements are sometimes called "settlement agreements."[1]

30.4 A contracting out agreement under section 21 can make provision for the death of one partner.[2] Similarly, section 21B provides that when one partner has died, the deceased's personal representatives and the surviving partner may make an agreement

1 If one of the spouses or partners dies either during Property (Relationships) Act 1976 proceedings or before proceedings are commenced, the personal representatives of the deceased spouse can enter a settlement agreement under s 21A: s 21B.

2 Property (Relationships) Act 1976, s 21(2)(b).

to settle any claim with respect to the partners' property.[3] We discuss how these provisions work further in Part M.

30.5 Many separating partners will agree on how their property should be divided, but will not enter into a formal contracting out agreement that complies with the PRA. These informal agreements are generally unenforceable, although a court may enforce them in certain circumstances, as we discuss below.

30.6 In this part we look at the PRA rules governing contracting out agreements and the basis for these rules. We then examine problems with how the rules may operate in practice.

30.7 We address contracting out agreements that involve cross-border issues in Part L.

The law governing contracting out agreements

Why does the PRA allow partners to contract out?

30.8 The PRA is often described as an "opt out system." It will apply to all those in a qualifying relationship and, if those partners wish to deal with their property differently to the PRA's rules, they must "opt out" by entering into a contracting out agreement under Part 6. This promotes couple autonomy rather than individual autonomy, as both partners must enter the agreement.[4]

30.9 When devising the PRA regime, the Government recognised the potential objections to applying general rules of classification and division of property to all relationships. In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice explained that the new law had been prepared on the assumption that most partners would be happy to order their affairs in the way contemplated by the Bill.[5] It was not, however, the Government's policy to "force married people within the straight-jacket of a fixed and

3 If the only personal representative is the surviving partner, the court must approve the agreement beforehand in order for it to be valid: Property (Relationships) Act 1976, s 21B(3). In any case, either or both the personal representatives and the surviving partner can submit the draft agreement to the court for approval: s 21C.

4 See Chapter 3 for a discussion of the principles of the Property (Relationships) Act 1976.

5 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

unalterable regime of matrimonial property."[6] The Minister explained that the Bill therefore granted spouses the freedom to adopt such property arrangements as they saw fit.

30.10 The role of contracting out agreements as described by the Minister of Justice in 1975 has been affirmed and retained. The 2001 amendments strengthened the contracting out provisions to give partners greater certainty that their agreement would be upheld, in light of the PRA's extension to de facto relationships at the same time.[7]

30.11 Several leading cases dealing with contracting out agreements have given similar explanations for why the PRA allows partners to contract out. In *Wood v Wood* the High Court said that contracting out agreements ensured partners are not consigned to "the same Procrustean bed whether they liked it or not."[8] In *Wells v Wells* the High Court observed that the general thrust of the legislation and its legislative history indicated a desire to respect the capacity of persons to contract out of the PRA.[9] The Court said "[p]ublic acceptance of the whole statutory scheme was based in part on the recognition that people could opt out – it was an integral feature of its public legitimacy."[10]

Matters a contracting out agreement may deal with

30.12 Section 21D prescribes the matters an agreement under sections 21 or 21A may deal with. The agreements may do all or any of the following:

(a) provide that any property, or any class of property, is to be relationship property;

(b) define the share of the relationship property, or any part of the relationship property, that each partner is entitled to when the relationship ends;

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6 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

7 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 21. The threshold at which a court can set aside a contracting out agreement was raised. Previously, a court could set aside an agreement if it would have been "unjust" to give effect to the agreement: Matrimonial Property Act 1976, s 21(10). Parliament amended this test to provide that a court could set aside the agreement if giving effect to it would cause a "serious injustice": Property (Relationships) Act 1976, s 21J(1).

8 *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235.

9 *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

10 *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

(c) define the share of the relationship property, or of any part of the relationship property, that a surviving partner and the estate of a deceased partner is to be entitled to on the death of one partner;

(d) provide for the calculation of those shares; and

(e) prescribe the method by which the relationship property, or any part of the relationship property, is to be divided.

30.13 Section 21L confirms that contracting out agreements may be relied upon and enforced like any other contract. It provides that the parties to an agreement enjoy all remedies under law or equity available to enforce contracts to implement an agreement under sections 21 or 21A.[11]

Requirements of a contracting out agreement

30.14 The PRA's provisions regarding contracting out agreements attempt to strike a balance. They promote partners' autonomy by granting them freedom to choose the property consequences of their separation. The PRA is, however, social legislation aimed at ensuring a just division of property between partners who may be of unequal bargaining positions.[12] The contracting out provisions prevent a partner from signing away his or her rights without appreciating the implications of the agreement and entitlements under the PRA. Part 6 also attempts to prevent a partner from entering an agreement when the partner is under improper pressure.[13]

30.15 Section 21F is the principal mechanism through which Part 6 of the PRA attempts to safeguard partners from bad or oppressive bargains. Section 21F provides that a contracting out agreement is void unless several requirements are complied with.

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11 Section 21G of the Property (Relationships) Act 1976 also provides that the particular requirements that apply to contracting out agreements under s 21F do not affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.

12 See AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5. The problems identified with the law under the former Matrimonial Property Act 1963 centred on the onus on a wife to prove specific contributions to identified items of property. This placed a wife in an inferior bargaining position as most often she would seek a share of her husband's property rather than what the law deemed to be their property. The Property (Relationships) Act 1976's approach of classifying certain assets as relationship property and then laying down a general rule of equal sharing of those assets was intended to overcome this disparity by elevating a wife's bargaining position.

13 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

30.16 The first requirement is that the agreement must be in writing and signed by both parties.[14]

30.17 The second requirement is that each party to the agreement must have independent legal advice before signing the agreement.[15] What constitutes adequate legal advice has been considered by the courts on several occasions. The Court of Appeal decision in *C v C* is often cited as the leading case.[16] The case concerned a settlement agreement between a husband and wife who had separated. The husband had complex business affairs. The wife went to see a lawyer some hours before she was due to travel to London. The lawyer advised the wife he had concerns that the timing did not allow for a proper consideration of the extent of the partners' property and her rights to it. The lawyer signalled that he did not have the necessary information regarding the partners' affairs to properly analyse the agreement. The agreement provided for quite a large disparity between what the wife was to receive and what she may have received under the PRA. The wife executed the agreement. The wife later argued that the agreement was void as she had received inadequate legal advice.

30.18 The Court of Appeal said that the lawyer had properly indicated the information he lacked in order to comprehensively advise on the agreement. The Court said that the advice was as complete as it could have been. The lawyer formed a professional opinion on the wisdom of entering the agreement on these terms, which the lawyer advised against. The client was then free to enter the agreement, even though the lawyer believed the agreement was unfair. The lawyer should not have been reluctant to certify that he believed the agreement was unfair.

30.19 In a passage often cited, Hardie Boys J explained what is meant by independent legal advice:[17]

> *Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects that party's interests. The touchstone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms*

14 Property (Relationships) Act 1976, s 21F(2).

15 Property (Relationships) Act 1976, s 21F(3).

16 *C v C* [1993] 2 NZLR 397 (CA).

17 *C v C* [1993] 2 NZLR 397 (CA) at 404.

> *of the agreement. Their implications must be explained as well. In other words the party concerned is entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms. This does not mean however that the adviser must always be in possession of all the facts. It may not be possible to obtain them. There may be constraints of time or other circumstances, or the other spouse may be unable or unwilling to give the necessary information. The party being advised may be content with known inadequate terms. He or she may insist on signing irrespective of advice to the contrary. In such circumstances, provided the advice is that the information is incomplete, and that the document should not be signed until further information is available, or should not be signed at all, the requirements of [section 21F(3)] have been satisfied.*

30.20 In other cases, the courts have said that legal advice has been inadequate where the lawyer purported to give advice even though the lawyer had no information about the partners' circumstances surrounding the agreement,[18] where the lawyer had only a 15 minute interview with the partner,[19] or where the lawyer had previously acted for the other partner to the agreement and was not independent.[20]

30.21 The third requirement is that the signature of each party to the agreement must be witnessed by a lawyer.[21] The courts have said that the lawyer witnessing the signature must be the lawyer who gave the independent legal advice.[22]

30.22 The fourth and final requirement is that the lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.[23] The courts have said that a lawyer's certificate is not conclusive evidence of the adequacy of advice.[24] The courts have also said that the certifying lawyer owes a duty of care to the other partner that advice has been properly given.[25] That means if the advice is inadequate and the agreement

18 *Odlum v Odlum* (1989) 5 FRNZ 41 (HC).

19 *West v West* [2003] NZFLR 231 (HC).

20 *Wells v Wells* [2006] NZFLR 870 (HC).

21 Property (Relationships) Act 1976, s 21F(4).

22 *Williamson v Williamson* (1980) 3 MPC 200 (HC) at 201.

23 Property (Relationships) Act 1976, s 21F(5).

24 *C v C* [1993] 2 NZLR 397 (CA) at 404; and *Wells v Wells* [2006] NZFLR 870 (HC).

25 *Connell v Odlum* [1993] 2 NZLR 257 (CA).

is void for non-compliance with section 21F, the other partner can make a claim against the lawyer.

Agreements that would cause serious injustice may be set aside

30.23 Even if a contracting out agreement satisfies the requirements of section 21F, section 21J(1) provides that a court may still set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice. A partner may apply to a court specifically to set aside the agreement. A court may set an agreement aside under section 21J(1) on its own initiative, in any PRA proceedings.[26]

30.24 In deciding whether giving effect to the agreement would cause a serious injustice, a court must have regard to:[27]

(a) the provisions of the agreement;

(b) the time since the agreement was made;

(c) whether the agreement was unfair or unreasonable because of all the circumstances at the time it was made;

(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);

(e) the fact that the parties wished to achieve certainty on the status, ownership, and division of property by entering the agreement; and

(f) any other matters that the court considers relevant.

30.25 Section 21M provides that if a contracting out agreement is set aside under section 21J, the PRA has effect as if the agreement had never been made.

30.26 The purpose of section 21J is to address the situation where, even though a contracting out agreement complies with all requirements under section 21F, the result the agreement will achieve is seriously unjust. In 2001 Parliament amended

26 Property (Relationships) Act 1976, s 21J(2).

27 Property (Relationships) Act 1976, s 21J(4).

section 21J by raising the threshold for when a court could set an agreement aside, from "unjust" to "serious injustice."[28] Accompanying this amendment was the addition of section 21J(4)(e) which, when considering whether the agreement would lead to a serious injustice, requires the court to consider the fact that the parties wished to achieve certainty in their affairs. The basis for these amendments was the concern that the courts were setting aside contracting out agreements too readily.[29]

30.27 Some examples of notable cases that have interpreted "serious injustice" are discussed below.

Harrison v Harrison

30.28 In *Harrison v Harrison*, the partners encountered difficulties in their relationship.[30] At one point they separated, but discussed reconciliation. The husband refused to reconcile unless the wife signed a section 21 agreement. The partners' principal asset (a farm) had been purchased during the marriage from the sale proceeds of a previous farm owned by the husband. The section 21 agreement protected the partners' pre-relationship property and gave the wife an interest in the new farm and stock. The wife's lawyer advised her that she may have had greater entitlements to the farm under the PRA than what she would receive under the section 21 agreement, because it was acquired for the partners' common use and benefit. The lawyer also advised that the husband had not given adequate disclosure of information. The wife did not follow her lawyer's advice, and instead executed the agreement. After the partners' final separation the wife sought to set the agreement aside on the grounds it would cause her serious injustice. The wife had emphasised the pressure the husband placed on her to enter the agreement as a condition of reconciliation.

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28 The test provides that a court could set aside the agreement if giving effect to it would cause a "serious injustice": Property (Relationships) Act 1976, s 21J(1).

29 In *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235 the Court said:

> *My fear is that these contracting-out agreements are being set aside too readily. Those who criticise the Matrimonial Property Act for the readiness with which it captures property sourced from outside the marriage partnership (pre-marriage assets, third-party gifts and inheritances) are invariably met with the same answer: if people do not like the statutory regime they can contract out of it. One gathers that the same legislative approach is about to be taken with de facto marriage. But if effective contracting out were as difficult to achieve as these Family Court decisions suggest, the answer would be a hollow one. All would be consigned to the same Procrustean bed whether they liked it or not.*

In *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82] the Court of Appeal observed "The Parliamentary history of the 2001 amendments shows that the approach taken by Fisher J in *Wood* (which was seen as raising the bar for setting aside agreements) was welcomed."

30 *Harrison v Harrison* [2005] 2 NZLR 349 (CA).

30.29 The Court of Appeal noted the 2001 amendments and Parliament's intention to raise the test from unjust to serious injustice.[31] The Court explained the benefits of the higher threshold: unless people can have reasonable confidence that the contracting out agreement will be honoured by a court, they will be less likely to attempt reconciliation, like Mr Harrison did here.[32] The Court discussed how the question of serious injustice should be approached, and made these points:

(a) It would be unreal to measure fairness by assessing the extent to which the agreement deviated from the partners' entitlements under the PRA, as the partners have contracted out of those rights.[33] Partners should be free to agree on different arrangements to those otherwise imposed upon them by the PRA.[34]

(b) The position may be different for settlement agreements under section 21A as by that stage a party's relationship property entitlements have already accrued and the agreement should reflect those entitlements.[35]

(c) There will always be pressure when one partner asks the other to enter into a contracting out agreement. Usually there will be an implicit threat that the relationship will be terminated if the agreement is not entered. It would therefore be very destabilising if the Court found this pressure, which is almost always present in these cases, is a reason for holding that the agreement is unjust.[36]

(d) Serious injustice is most likely to be demonstrated by an unsatisfactory process resulting in an inequality of outcome rather than mere inequality of outcome itself.[37]

(e) The Court said that the agreement provided the wife with the entitlements she had accrued when she entered the agreement. Against the higher threshold in the legislation, there was nothing undue about the

31 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [28]–[30].

32 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [88].

33 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [93].

34 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

35 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

36 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

37 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

pressure the husband may have put on the wife to enter the agreement. The Court said that the agreement should not be set aside.

Clark v Sims

30.30 In *Clark v Sims* the partners had entered a section 21 agreement that provided that a block of land was to be Mr Sim's separate property.[38] At the time of the agreement the partners understood the property had an approximate value of $186,000. The land was subject to a covenant which Ms Clark believed prevented the land from being subdivided. About six years after the partners entered the agreement, Mr Sims obtained approval to subdivide the property into ten lots. He sold seven lots for $1.5 million and the remaining sections were valued at $1.5 million.

30.31 The High Court said that the increased value of the property was due to the change in zoning, inflation and the efforts of Mr Sims in obtaining the subdivision. The Court said that, although there was a change in circumstances, the agreement could not be said to have become unfair or unreasonable because of the changed circumstances.[39] The partners were mature and intelligent people with business experience. They understood the agreement and were both independently advised. Although the change of circumstances may have become unfair, the agreement had not.[40]

T v T

30.32 In *T v T* the husband operated a company in Christchurch.[41] The shares of the company were held on trust for the husband and wife. The dividends from the company accounted for roughly 80 per cent of the family income. The partners separated in 2010 and entered a settlement agreement under section 21A of the PRA. The pool of property valued for equal distribution was sizeable, reflecting the valuation of the company shares. Under the agreement, the wife was to resign as trustee of the trusts and forgo any interests in them. That provided the husband with the full benefit of the income and assets from the company. In

38 *Clark v Sims* [2004] 2 NZLR 501 (HC).

39 *Clark v Sims* [2004] 2 NZLR 501 (HC) at [74].

40 *Clark v Sims* [2004] 2 NZLR 501 (HC) at [74].

41 *T v T* [2014] NZFC 5335, [2015] NZFLR 185.

return, the husband agreed to pay the wife her share of the assets by purchasing her a home and making periodic payments up to a certain amount. The purchase of the wife's home was to be financed by a mortgage which the husband took responsibility for paying.

30.33 The Christchurch earthquakes in early 2011 affected the company's business. The husband presented evidence he had received no income from the company since the earthquakes. When the agreement was signed he had expected to receive an annual income of around $230,000-$250,000 from dividends paid by the company. However, the value of the shares in the company had dropped to less than half their earlier value. The husband claimed he did not have sufficient income or assets to meet his obligations under the settlement agreement. He applied to have the agreement set aside under section 21J.

30.34 The Family Court accepted that to enforce the agreement would cause a serious injustice. The agreement had become unfair due to the change of circumstances since the agreement was made. The combination of factors resulting in a considerable loss of value of the company shareholding made it impossible for the husband to meet his payment obligations under the agreement.[42] The Court set the agreement aside under section 21J.

W v K

30.35 In *W v K* the partners separated after a 25 year marriage.[43] Eight years earlier, the husband arranged for his lawyer to draft a contracting out agreement, which the parties entered into. The agreement provided that each partner was to retain the property registered in their sole names. The agreement did not, however, identify any particular items of property or the value of any property. During the relationship, the husband held all valuable property in his own name, such as the family home, company shares and cars. The effect of the agreement was that when the partners separated, the husband retained 100 per cent of the property. The family home alone was valued at over $1 million.

30.36 The High Court held that the agreement should be set aside under section 21J. The Court noted that the provisions of the agreement

42 *T v T* [2014] NZFC 5335, [2015] NZFLR 185 at [202].

43 *W v K* [2017] NZHC 1643.

were unjust. The Court said that the agreement was "opaquely" drafted; it obscured the level of property the husband held and suggested that the wife held property in her own name when she did not.[44] The Court also observed that, as to section 21J(4)(e), while the agreement achieved certainty, there was no obvious benefit in certainty for the wife.[45] The Court noted that the courts in previous cases had said that a disparity in the division of property would not in itself meet the threshold of serious injustice. But given that the agreement split the property 100:0 between the partners to an orthodox 25 year marriage, the Court said "generalities must, in such a case, go out the window."[46]

A court may give effect to non-complying agreements

30.37 Although section 21F provides that an agreement that does not comply with the requirements is void, section 21H allows a court to give effect to non-complying agreements, wholly or in part, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

30.38 The test is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.[47]

30.39 The courts have said there are two elements to consider when determining whether to give effect to a non-complying agreement:[48]

(a) Is there an agreement?[49]

(b) Has the non-compliance materially prejudiced the interests of either partner to the agreement?

44 *W v K* [2017] NZHC 1643 at [63].

45 *W v K* [2017] NZHC 1643 at [73].

46 *W v K* [2017] NZHC 1643 at [80].

47 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [5.73].

48 *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21].

49 There must be an agreement between the parties in terms of s 21 or s 21A of the Property (Relationships) Act 1976 that purports to deal with the status, ownership and division of the property owned by the parties. In *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 a party attempted to enforce a settlement agreement reached at a Family Court settlement conference. The party argued that the agreement was a settlement agreement for the purposes of s 21A although it lacked the solicitor's certificate under s 21F(5). The High Court held that the agreement could not be declared valid under s 21F as it could not constitute a s 21A agreement. That was because the agreement purported to deal with the distribution of trust property which was not property "owned by the parties" in terms of s 21A.

30.40 There have been a few cases where the courts have found that, even if the agreement had complied with section 21F, the partner challenging the validity of the agreement would have entered it anyway. In those cases, the courts have said the non-compliance does not materially prejudice the interests of that partner.[50]

Are the contracting out provisions working well?

30.41 Below we make some preliminary observations on how well we think the contracting out provisions are working in practice.

Who is using contracting out agreements, when and why?

30.42 We do not know how many people enter into contracting out agreements, when they enter contracting out agreements or why they do so. There is no research in New Zealand that comprehensively studies partners who contract out of the PRA.[51] We intend to use responses to this Issues Paper to add to our understanding of how New Zealanders use (or do not use) contracting out agreements.

30.43 Anecdotal evidence we have received as part of our preliminary consultation suggests the following trends:

(a) Some partners will not enter a contracting out agreement, either before or during the relationship, or when the relationship ends. Instead, they will resolve their property division by their own informal arrangements. We are unsure about the number of partners who fall into this category. We are also unsure

50 *McGill v Crozier* (2001) 21 FRNZ 157 (HC); and *West v West* (2001) 21 FRNZ 157 (HC).

51 We are cautious about drawing on studies from overseas jurisdictions in order to infer the rates of contracting out in New Zealand. The reasons why partners choose to contract out, and indeed their ability to do so, reflects the "default system" of legal rules that regulate financial relations between partners in those jurisdictions: see Jens M Scherpe "Introduction" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Oxford, 2012) 1 at 2. The rate of contracting out in other jurisdictions also reflects financial and cultural factors. For example, in France, partners may opt to enter a PACS (Pacte civil de solidarité) agreement. Under a PACS, partners are treated as being married with a separation of property regime so that on leaving the relationship each party retains their own property. On entering the agreement parties may elect to keep certain property in joint names. As well as giving the parties choices in relation to what property will be kept separate, there are certain additional rights that civil servants who have a PACS agreement are entitled to, which helps explain the popularity of the PACS regime. The point being that there are factors unique to France that explain why the PACS is popular, that are unrelated to the flexibility for parties to organise their affairs.

why these partners determine their property relations informally. It may be because partners are happy to divide their property according to their own sense of fairness with no formal agreement.[52] It may be because they do not know they have property rights under the PRA. Or it could be because legal advice is unaffordable.

(b) The majority of partners who enter a contracting out agreement either before or during the relationship are entering a second or subsequent relationship. Their motivations usually include a desire to provide protection or certainty regarding assets obtained prior to the relationship. Sometimes the goal may be to protect assets for the benefit of children from a previous relationship.[53]

(c) High net worth partners are more likely than partners with few assets to enter contracting out agreements before or during the relationship. High net worth partners, although perhaps disproportionately represented among those who litigate their contracting out agreements, are likely to be a small minority of partners.

30.44 Many people are likely to encounter practical challenges which make entering a contracting out agreement difficult. Partners must know contracting out of the PRA is an option. They must then have sufficient resources to obtain independent legal advice. Partners may also find conversations regarding a contracting out agreement uncomfortable. An agreement that supposes the partners' separation and protects their financial interests is likely to be a difficult subject in most relationships, although we have heard that partners entering a subsequent relationship are less troubled by these types of conversations.

30.45 We do not have information about whether Māori are using, or wish to use, Part 6 of the PRA to ensure that they have

52 Anne Barlow "Legal Rationality and Family Property: What has Love got to do with it?" in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, Oregon, 2009) 303 at 317–318. Barlow explains, "People do what is right for them in the context of their own lives and to act legally rationally … is often seen as inappropriate or too difficult."

53 In Part G of this Issues Paper we discuss how trusts are sometimes used for this purpose. The Law Commission of England and Wales has recently undertaken a review of the law in England and Wales governing matrimonial property agreements. The Commission likewise observes that agreements will be helpful in circumstances where the partners have been in a relationship and wish to safeguard a house or other assets for their children from that previous relationship: Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [1.37].

enforceable contracting out agreements which may reflect tikanga Māori.[54] It may be that, as in these circumstances tikanga Māori would itself likely govern the enforceability of agreements, there is little concern about meeting the Part 6 requirements for an enforceable agreement.[55] We would like to hear more about whether this is an issue.

CONSULTATION QUESTIONS

J1 How common is it for partners to enter a contracting out agreement under section 21 or section 21A?

J2 In what circumstances will partners enter a contracting out agreement under section 21 (pre-nuptial agreement)? For what purposes do partners enter section 21 agreements?

J3 How common is it for matters to be settled without a section 21A agreement (settlement agreement)? What prevents people from entering a section 21A agreement?

J4 Are there particular issues in relation to contracting out agreements which reflect tikanga Māori?

Preliminary observations on the policy underpinning Part 6 of the PRA

30.46 Part 6 of the PRA reflects what we have described in Chapter 3 as the implicit principle that, subject to safeguards, the PRA gives partners the freedom to organise their affairs in a manner of their choosing. As we have explained, there are good reasons why partners would want this freedom:

(a) they may wish to shield the assets they each bring to the relationship from equal sharing;

(b) they may wish to safeguard the interests of their children from a former relationship;

(c) they may wish to create a clear method for dividing their property should the relationship end, particularly if their property affairs are extensive or potentially complex.

54 Ruru notes that if a Māori couple want whānaungatanga to determine their property interest, they should make an agreement under s21 contracting out of the Property (Relationships) Act 1976: Jacinta Ruru "Implications for Māori: Contemporarry Legislsation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationhsip Property on Death* (Brookers, Wellington, 2004) 445 at 486.

55 See Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Tikanga Māori continues to govern Māori relationship property disputes concerning family chattels, especially taonga, and "[t]hese couples are not bringing these disputes to New Zealand's courts."

30.47 Partners may have their own sense of what constitutes a just division of property. The PRA has always reflected the position that it is entirely proper that partners are not forced within the straightjacket of an unalterable relationship property regime.[56] This is likely to become increasingly important, given the increasing diversity of New Zealand's population.[57] Partners may wish to contract out of the PRA in a way that allows greater recognition of different cultural values.

30.48 The PRA's contracting out provisions attempt to provide effective safeguards so partners do not sacrifice their rights under the PRA through a lack of awareness or foresight or because of undue pressure. Partners in a relationship and in love may agree to things they would not otherwise contemplate.[58] As the Law Commission of England and Wales has recently observed in its review of the law governing matrimonial property agreements, people in love may have a firm belief the relationship will never end.[59] They may feel pressure, whether pressure is intended or not, to enter an agreement.[60] Sometimes there may be an implicit threat that the relationship will be terminated if the agreement is not entered.[61] As the New Zealand Court of Appeal said in *Harrison v Harrison*, there will usually be some pressure when one party asks the other to enter an agreement.[62]

30.49 The procedural safeguards under section 21F may appear to restrict the partners' autonomy as they can impose a fairly significant administrative and financial burden, such as obtaining legal advice. The PRA is premised on the policy that its principles and rules provide for a just division of property. Therefore few partners would lightly give up their rights.[63] The section 21F requirements are designed to ensure partners enter a contracting

56 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1976" [1975] II AJHR E6 at 11.

57 See our Study Paper Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

58 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.27].

59 Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [5.27].

60 Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) [5.28].

61 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

62 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

63 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1976" [1975] II AJHR E6 at 11. The Minister of Justice claimed that the original Matrimonial Property Act 1976 had "been prepared in the belief that most couples entering marriage will be happy to order their affairs in the way provided."

out agreement with a clear understanding of their rights under the agreement in comparison with their rights under the PRA. The requirements are therefore to enhance the partners' ability to make an autonomous decision.[64]

30.50 We also recognise that contracting out agreements, particularly settlement agreements under section 21A, are integral to the ability of partners to resolve their property matters without expensive and lengthy dispute resolution processes. We therefore see the contracting out procedure as consistent with the PRA's principle that issues should be resolved as inexpensively, simply and speedily as is consistent with justice.[65]

30.51 Although we have come across several deficiencies with the contracting out provisions, which we discuss below, the overall approach appears sound. Our preliminary view is that the contracting out provisions generally strike the right balance between the interests of autonomy and protection.

30.52 The PRA has maintained roughly the same balance between the partners' freedom and procedural safeguards during its 40 year life. The section 21F procedural requirements have always been a feature of the contracting out regime. They have been tested and interpreted often. The only aspect of the regime that has been fine-tuned is the test for when a court can set an agreement aside under section 21J. That test, we think, strikes a satisfactory balance. It equips a court to address unjust agreements while still providing partners an adequate level of certainty as to when their bargain might be overturned.

30.53 We acknowledge that contracting out is likely to be a difficult process for many New Zealanders. Even though we suggest the procedural safeguards are set at an appropriate threshold, many partners may struggle with the process. They may be unaware of the requirements of the contracting out provisions in the PRA. The costs of compliance, such as the cost of legal advice, may be beyond the reasonable means of many New Zealanders. Also, a contracting out agreement is a bargain struck by the two partners. There may be wider family and whānau interests at

64 Jens M Scherpe "Introduction" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Oxford, 2012) 1 at 2. The Law Commission of England and Wales has also cautioned that "autonomy" in this context is not simply the freedom to contract. Rather, it may become the freedom to force one's partner to abide by an agreement when he or she no longer wishes to do so. See Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [5.31].

65 Property (Relationships) Act 1976, s 1N(d).

stake, especially the interests of children. There may be a need for more public education about the opportunity to contract out of the PRA.[66]

CONSULTATION QUESTIONS

J5 Do the contracting out provisions in the PRA strike the right balance between (a) offering partners freedom to arrange their own property affairs, and (b) ensuring each partner contracts with informed consent?

J6 Do any issues arise from New Zealand's increasingly diverse population wishing to contract out of the PRA in order to recognise other cultural norms?

J7 Is more public education needed so people better understand the opportunity to contract out of the PRA?

Issues regarding what a contracting out agreement can cover

30.54 There is significant uncertainty about whether a contracting out agreement may govern:

(a) property held on trust;

(b) claims under section 15 of the PRA; and

(c) KiwiSaver scheme entitlements.

30.55 We discuss each of these below.

Property held on trust

30.56 Many families in New Zealand use trusts as a way to hold property. Nearly 15 per cent of households have reported that their home was held on trust.[67] A member of the household in around 20 per cent of New Zealand households has reported some involvement with a trust, meaning they are a settlor, trustee or beneficiary of a trust.[68]

30.57 In Part G we discussed in greater detail how the PRA responds when property is held on trust. By way of summary, we note that:

66 See discussion in Chapter 4 about public education.

67 Statistics New Zealand "2013 Census QuickStats About Housing" (March 2014) at 12.

68 Statistics New Zealand "Household Net Worth Statistics: Year ended July 2015" (28 June 2016). The survey excluded independent trustees.

(a) Property held on trust is legally owned by the trustees of the trust. The beneficiaries are the beneficial owners of the property.[69] A person can be both trustee and a beneficiary, but he or she cannot be the sole beneficiary. Only beneficial owners are considered owners of property for the purposes of the PRA.[70]

(b) If the trust is a discretionary trust and the beneficiaries' interest depends on the trustees exercising discretion in their favour, the beneficiary will not be an owner of property for the purposes of the PRA.

(c) If a partner transfers property to a trust, the disposition can potentially defeat the other partner's rights to that property under the PRA. Sections 44 and 44C allow the court to recover all or part of that property, or to compensate the other partner, in certain circumstances.

(d) Besides the remedies in the PRA, a partner can look to wider law to claim property held on trust. Section 182 of the Family Proceedings Act 1980 is relevant in this context. It allows the court to vary a "nuptial settlement" (which can include a trust) when a partner to a marriage reasonably expected to benefit from the settlement, but those expectations have been defeated by the dissolution of the partners' marriage.[71] The courts are also prepared in some circumstances to recognise that a trust is subject to a constructive trust in favour of a partner. To establish a constructive trust, the partner must show he or she made contributions to the trust property and that he or she had a reasonable expectation of an interest in that property.[72]

30.58 Given the widespread use of trusts in New Zealand, it is common for trusts to be bound up with partners' property matters. Two important questions arise:

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69 There are, however, different types of beneficial interest under a trust. Notably, a discretionary beneficial interest will not be considered as someone's property for the purposes of the Property (Relationships) Act 1976. The particular rules governing what interests in a trust constitute "property" are discussed in depth in Part G.

70 Section 4B of the Property (Relationships) Act 1976 also preserves the law that applies where either partner is acting as a trustee.

71 For further discussion on s 182 of the Family Proceedings Act 1980, see Part G.

72 For further discussion see Part G. Recent cases in which the courts have recognised a constructive trust over an express trust include: *Prime v Hardie* [2003] NZFLR 481 (HC); *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766; *Murrell v Hamilton* [2014] NZCA 377; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 434.

(a) Can partners agree in a contracting out agreement what will happen to trust property in the event they separate, or if they have already separated?

(b) Can partners settle a claim against a trust through a section 21A agreement?

Can partners agree in a contracting out agreement what will happen to trust property?

30.59 Section 21 provides that the partners may make any agreement regarding the "status, ownership and division of *their* property". Similarly, section 21A provides that the agreement may address property "*owned* by either or both" partners.

30.60 Often, the trust property cannot accurately be described as property owned by the partners. If the partners are not beneficiaries, or have only discretionary beneficial interests, they will have no property interest for the purposes of the PRA.

30.61 In addition, the trustees may be third parties. As legal owners of the trust property, they have a duty to deal with the property in accordance with the terms of the trust. The partners cannot purport to bind third party trustees through their own contract under section 21 or section 21A.[73]

30.62 Sometimes the courts have been prepared to take a more flexible approach. In *M v S* partners entered a contracting out agreement under section 21 that purported to deal with trust assets.[74] The partners had previously established mirror trusts into which significant assets had been transferred.[75] The beneficiaries under the trusts were the partners and their family. The partners later entered an agreement that provided that, if the partners separated, the mirror trusts were to be resettled on separate trusts under which the partners' children were to be the sole beneficiaries. One partner sought to challenge the agreement under section 21J because, among other reasons, the agreement

73 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]; and Vanessa Bruton and Isaac Hikaka "Trusts and Relationship Property for Family Lawyers" (paper presented to the New Zealand Law Society Trusts and Relationship Property for Family Lawyers Conference, 2013) at 70.

74 *M v S* [2012] NZFLR 594 (HC).

75 Mirror trusts are trusts established by each partner which are in identical terms albeit each partner names the other partner as beneficiary of the trust he or she settles along with other family members.

had "wrongly regarded" the trust assets. In response the High Court said:[76]

> *I do not accept the [contracting out agreement] disregarded or wrongly regarded assets when it came to the [the trust property]. There is a growing tendency to treat trusts as transparent for the purposes of a relationship property agreement. The legal basis for drawing trust property into a relationship property assessment is in s 44C of the Act and s 182 of the Family Proceedings Act 1980.*

30.63 The High Court in *M v S* declined to set aside the agreement under section 21J based on how the agreement treated the trust property. Other cases have taken a similar approach.[77]

30.64 In other cases, however, the courts have not taken such a flexible approach. In *Phipps v Phipps* the partners had entered an agreement following a judicial settlement conference in the Family Court.[78] The partners did not then implement the agreement and so the issue was whether that agreement could be viewed as a section 21A agreement. The Court said that a "formidable argument" against treating the agreement as a section 21A agreement was that section 21A could only apply to "property owned by either or both of the spouses or partners" and the agreement purported to deal with property held on trust legally owned by the trustees.[79]

30.65 Regardless of the strict legal position, we understand from our preliminary consultations with lawyers that in many cases involving trusts, the partners will agree to a division of the trust property between themselves as if the property was their own and the trust did not exist. The partners often record their agreement in a contracting out agreement. The trustees will simply accept the

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76 *M v S* [2012] NZFLR 594 (HC) at [76].

77 In *T v T* [2014] NZFC 5335, [2015] NZFLR 185 the family's principal income-earning asset was shares held in a company. The shares were held on a discretionary trust. The trustees were the husband and wife and a third party. When the partners separated, they entered a settlement agreement under s 21A of the Property (Relationships) Act 1976. As part of the settlement agreement, the wife forfeited her rights under the trust and resigned as trustee. In return, the husband promised to use the income earned from the shares to make certain payments to the wife and purchase a house for her. The husband's obligations were secured by a general security agreement over the shares in the company held by the trustees. In an application to set aside the agreement under s 21J, the court noted that the s 21A agreement purported to deal with trust property. The court noted this was trust property, but did not question that the agreement could legitimately deal with the property. The court observed at [68]:

> *Clearly the parties adopted what could be described as an expedient and pragmatic approach by dealing with the trust property in the agreement. I note that there was no provision to have the parties, in their capacities as trustees and [a third party] in his capacity as a trustee sign any collateral agreement so as to legally bind the trusts to the terms of the agreement.*

78 *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554.

79 *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [29].

partners' agreement. We have no evidence to test how widespread this practice is.

30.66 Some have suggested that there are some, albeit limited, ways for partners to resolve questions about trusts when the trust is a discretionary trust and the trustees are third parties. The authors of *Family Property* say that a contracting out agreement can simply record the details of the trust, what is happening with the trust property and what each partner will retain.[80] The authors also say that the agreement can be made conditional upon other arrangements in relation to a trust being completed. This could include the trustees agreeing to exercise their discretion in a manner consistent with the agreement. Other commentators and practitioners affirm this approach.[81] They say the way to deal with trust property through a contracting out agreement is to refer to the property in the agreement. The trustees are then recommended to execute separate documents, such as a deed of ratification, linking the property division in the agreement to the trustees.[82]

Can partners settle a claim against a trust through a section 21A agreement?

30.67 Similar principles apply when a partner makes a claim against a trust. When a relationship ends a partner may make a claim against a trust, such as claims under sections 44 or 44C of the PRA, or under section 182 of the Family Proceedings Act 1980, or a constructive trust. The partners cannot bind third party trustees through a section 21A settlement agreement to use trust property to settle the partner's claim.[83]

30.68 Instead, the trustees may sometimes enter an agreement directly with the partner to settle the claim. Such an agreement would not be a contracting out agreement under the PRA. Rather, it would

80 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]. Likewise, Bruton and Hikaka say that the purported basis for justifying the disposal of trust assets under a contracting out agreement as the parties' property is not sound and is irreconcilable with both the scheme and essence of the Property (Relationships) Act 1976 as well as the trustees' irreducible core obligations: Vanessa Bruton and Isaac Hikaka "Trusts and Relationship Property for Family Lawyers" (paper presented to New Zealand Law Society Trusts and Relationship Property for Family Lawyers Conference, 2013) at 70.

81 Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016).

82 Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 19.

83 It may, however, be possible for one partner to settle the other partner's claim against the trust by using his or her own property by way of settlement.

be a separate agreement exercised pursuant to the trustees' power under the Trustee Act 1956[84] or under the trust instrument to settle claims relating to the trust.[85]

Should the PRA be amended to better enable partners and trustees to resolve matters regarding trusts?

30.69 Based on the law discussed above, the partners cannot bind third party trustees through their own contracting out agreement. Usually the trustees must separately agree to deal with the trust property outside the framework of the PRA.

30.70 There are, however, advantages if the partners and trustees can resolve all of their property matters at the same time and record that agreement in the same document. Given how often families use trusts to hold key items of family property, like homes, the treatment of trust property could well form a key part of the partners' overall bargain about their property matters. It is undesirable for the partners' agreement to be incomplete in the sense that it depends on a separate ratification by the trustees, or the trustees to enter a separate settlement agreement with the partner. The procedure could be made more inexpensive, simple and speedy if the PRA gave the partners and trustees the ability to make agreements regarding the totality of their property matters.

30.71 In any event, it appears from what people have told us during our preliminary consultation that in many instances the partners and trustees will treat the trust property like it is the partners' personal property. The trustees will simply implement whatever agreement the partners reach between themselves. It may be desirable to regulate this practise by expanding the contracting out provisions in the PRA to include trustees.

30.72 If the contracting out provisions of the PRA were expanded to enable partners and trustees to resolve matters regarding trusts, careful consideration would be required on several matters, such as:

84 Trustee Act 1956, s 20(g).

85 For trustees' powers to engage in dispute resolution, see Robert Fisher "Including Trusts in Relationship Property Arbitrations" (2014) 8 NZFLJ 76; and Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at Chapter 5. The Trusts Bill 2017 currently before Parliament contains provisions regarding the trustees' ability to participate in dispute resolution processes: Trusts Bill 2017 (290-1), cls 137–142.

(a) What particular matters should the partners and trustees be able to agree? For example, could the trustees commit through a section 21 agreement to distribute property to the partners according to their respective beneficial interests if the partners separated? What types of claims could the trustees agree to settle through a section 21A agreement?[86]

(b) Should the trustees be subject to the same requirements under section 21F? Should, for instance, they be required to obtain independent legal advice?

(c) How should the interests of other beneficiaries under the trust be protected, particularly if those beneficiaries are minors, incapacitated or unascertained?

CONSULTATION QUESTION

J8 Should the contracting out provisions in the PRA be amended to enable partners and trustees to resolve matters regarding trusts? If so, what would be appropriate amendments?

Can partners contract out of claims under section 15 of the PRA?

30.73 Some uncertainty exists about whether partners can contract out of section 15 of the PRA. Section 15 provides that if, after the relationship ends, the income and living standards of one partner are likely to be significantly higher than the other partner due to the division of functions within the relationship, a court may order that the partner with the higher living standards pay compensation to the other.[87]

30.74 It is unclear whether an agreement that addresses a claim under section 15 can be an agreement regarding the "status, ownership, and division" of the partners' property. Although very few cases have addressed this issue directly, commentators have suggested that an agreement under section 21A to settle the partners' relationship property dispute can properly address a section 15

86 The framework presented in the Trusts Bill 2017 currently before Parliament regarding the trustees' ability to enter alternative dispute resolution procedures could provide a good model: Trusts Bill 2017 (290-1), cls 137–142.

87 Property (Relationships) Act 1976, s 15.

claim.[88] Section 21A agreements are used "for the purpose of settling any differences" that have arisen between the partners about their property. It is reasonable to suggest that such an agreement can settle differences when one partner claims property from the other as compensation under section 15.

30.75 Commentators are less certain about whether a contracting out agreement under section 21 can effectively deal with a section 15 claim. An agreement under section 21 is made either before or during the relationship. If the agreement addressed a claim under section 15, the partners would effectively make promises either not to make a claim or in terms of how they will resolve a claim. The difficulty commentators identify is that when an agreement is drafted, the partners cannot predict how to quantify a section 15 claim.[89] That is because it is difficult to assess an agreement's fairness against any future disparity of income and living standards.[90] An agreement that deals pre-emptively with a claim under section 15 is vulnerable to a challenge under section 21J if the agreement becomes unfair as the partners' circumstances change during the relationship.[91]

30.76 We realise that the uncertainty surrounding section 15 claims may present a challenge to lawyers and partners who draft contracting out agreements under section 21. We are unsure, however, whether any reform to the PRA would resolve what is likely to be an unavoidable uncertainty. Our preliminary view is that the contracting out provisions of the PRA are not in need of substantive reform to address contracting out of section 15.

CONSULTATION QUESTION

J9 Can and should the contracting out provisions in the PRA be reformed to achieve greater certainty regarding the reliability of agreements made under section 21 that address a claim under section 15?

88 John Priestley "Mine, Mine, Mine – Serious Injustice and the Statutory Right to Contract Out" (paper presented to the New Zealand Law Society Family Law Conference, Christchurch, October 2001) and Mark Henaghan "Property Relationship Masterclass" (paper presented to LexisNexis Professional Development, 2006) as cited in Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015).

89 Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 53.

90 Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.

91 Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.

KiwiSaver scheme entitlements

30.77 KiwiSaver providers will not deal with a partner's entitlements in a KiwiSaver scheme solely because the partners have agreed in a contracting out agreement to divide the entitlements. This is based on a decision of the Banking Ombudsman.[92] A husband and wife had separated and entered a settlement agreement.[93] The wife agreed to transfer her savings from her KiwiSaver scheme to her husband's KiwiSaver scheme. The wife's KiwiSaver provider refused to action the transfer. The provider said it required a court order before it could make the transfer.

30.78 The Banking Ombudsman agreed with the KiwiSaver provider,[94] saying that the KiwiSaver funds could not be released under a section 21 agreement. The Ombudsman reasoned that section 196 of the KiwiSaver Act 2006 (which has since been repealed and re-enacted as section 127) provides that KiwiSaver funds may only be released "if required by the provisions of any enactment (including an order made under section 31 of the Property (Relationships) Act 1976)." The Ombudsman said the section therefore required an order under section 31 of the PRA to transfer a partner's KiwiSaver scheme entitlement. A section 21 agreement on its own was insufficient. The Ombudsman explained that a contract represents a voluntary agreement between at least two parties, while a court order is a proclamation determining the legal relationship between the parties.

30.79 It is probable that a court would take a similar view to the KiwiSaver provider and the Banking Ombudsman.[95] This raises a question of whether the PRA should provide that partners can implement a division of a partner's KiwiSaver entitlements by a contracting out agreement made under the PRA.

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92 Banking Ombudsman Scheme "Case – 37858: 2013–2014" <www.bankomb.org.nz>.

93 The Ombudsman's note of the case refers to the agreement as a s 21 agreement, although if the agreement was used to settle the parties' property entitlements it is more likely to have been made under s 21A of the Property (Relationships) Act 1976.

94 Banking Ombudsman Scheme "Case – 37858: 2013–2014" <www.bankomb.org.nz>.

95 The court may, however, use different reasoning and focus more on an interpretation of s 31 of the Property (Relationships) Act 1976 (PRA). In *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 the Court of Appeal considered the issue of whether a bankrupt's interest under a KiwiSaver scheme should vest in the Official Assignee. The Court held at [52] that in order for an enactment to allow divestment of a member's interest in a KiwiSaver scheme, the legislation must expressly provide that the interest can be divested. As ss 101 and 102 of the Insolvency Act 2006 provided in general terms that the property of a bankrupt vested in the Official Assignee, the legislation did not expressly require the vesting of a member's interest in a KiwiSaver scheme. Consequently, s 127(1) of the KiwiSaver Act 2006 prevented the bankrupt's interest in the scheme from vesting in the Assignee and s 127(2) did not apply. In light of this judgment, pt 6 of the PRA is probably insufficient to require a KiwiSaver provider to implement a division of a member's entitlements in the scheme because of the absence of any express reference in pt 6 to the vesting of a member's interest in a KiwiSaver scheme.

30.80 There are several reasons why the PRA should allow partners to adjust their KiwiSaver entitlements by a contracting out agreement.[96] First, given that KiwiSaver schemes have existed for a relatively short time,[97] it is reasonable to assume that interests in KiwiSaver schemes will be an increasingly common asset in relationship property divisions. It may be preferable that, if the actual division of a partner's KiwiSaver entitlements is required,[98] that can happen without the need to apply to a court for orders, given the principle that matters under the PRA should be resolved as inexpensively, simply and speedily as possible.[99]

30.81 Second, other superannuation schemes may be varied by a partners' contracting out agreement. Section 92(1) of the Government Superannuation Fund Act 1956 provides that a retirement allowance under the superannuation scheme established under that Act is not assignable. Section 92(2), however, provides that the prohibition does not prevent "the operation of any agreement entered into under Part 6 of the Property (Relationships) Act 1976." Instead, the section provides that a contracting out agreement is binding in relation to the scheme, so long as it does not alter the liabilities of and contributions to the scheme.

30.82 Third, it should be borne in mind that the partners must go through a reasonably thorough process to create a valid contracting out agreement. Section 21F provides that the agreement must be in writing. Each partner's signature must be witnessed by a lawyer who has given that partner advice on the

96 In addition to the reasons we give here for why partners should arguably have the ability to deal with KiwiSaver scheme entitlements, there are several other potential issues with s 127 of the KiwiSaver Act 2006. Firstly, it is questionable whether s 31 is the only means under the Property (Relationships) Act 1976 (PRA) of implementing a division of a partner's superannuation scheme entitlements. The authors of *Fisher on Matrimonial and Relationship Property* suggest that instead of making orders under s 31, the court could achieve the same effect by using a combination of its powers to transfer rights under certain instruments under s 33(1)–(3) or s 33(6) of the PRA: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39]. A credible argument could also be made that the PRA gives partners the ability to implement a division of a superannuation scheme entitlement through a contracting out agreement: s 21D(1)(e) provides that a contracting out agreement may prescribe the method by which the relationship property is to be divided. The second potential issue is that s 31 provides that an order under the section may be conditional on the partners entering "an arrangement or deed of covenant" which ensures each partner receives his or her share of the property. Section 31(2) then provides that the partners' arrangement or deed may be served on the superannuation scheme manager. The provision does not refer to the court's order being served on the scheme manager but only the arrangement or deed. Consequently, on a plain reading of s 31, there does not appear to be any requirement that a scheme manager be given notice of the court's order.

97 KiwiSaver came into full operation on 1 July 2007: KiwiSaver Act Commencement Order 2006, s 2.

98 When a partner's superannuation scheme entitlements are classified as relationship property, it is not always necessary for those specific funds to be divided between the partners. It may, for example, be preferable to leave the sole rights to the superannuation with one partner and pay an equivalent property or cash value to the other partner. For the common ways in which superannuation scheme entitlements can be dealt with see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.38].

99 Property (Relationships) Act 1976, s 1N(d).

effect and implications of the agreement.[100] That lawyer must then certify that he or she has given the partner the advice.[101] These safeguards may arguably ensure that a partner's KiwiSaver entitlements are not affected without the member partner's informed consent. If the partners deliver a contracting out agreement that complies with the section 21F requirements to a KiwiSaver provider, the provider may have sufficient confidence that the proposed dealing with the partner's entitlement is intended and authorised.

CONSULTATION QUESTION

J10 Should the PRA provide that a contracting out agreement made under the PRA requires a KiwiSaver provider to implement a division of a partner's KiwiSaver scheme entitlements?

Other issues

Can contracting out agreements be signed and witnessed through audio-video communication technologies?

30.83 Audio-video communication technologies have advanced in a way that was probably not foreseen by the original drafters of the PRA in the 1970s or by those responsible for the amendments in 2001. A question often asked is whether a lawyer can witness a client signing a contracting out agreement via an audio-video communication, such as Skype.[102]

30.84 Section 21F(4) simply provides that the signature of each party to the agreement must be witnessed by a lawyer. The Relationship Property Standing Committee of the New Zealand Law Society Family Law Section has said that section 21F(4) implies that the witnessing and certifying lawyer is to be in the physical presence of the party signing the agreement.[103] If the agreement was witnessed via Skype or similar audio-video communication, the

100 Property (Relationships) Act 1976, ss 21F(3)–21F(5).

101 Property (Relationships) Act 1976, s 21F(5).

102 Ingrid Squire "Certifying s 21 agreements" (2013) 15 Fam Advocate 26; Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 24–25; and Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21F.07].

103 Relationship Property Standing Committee of the New Zealand Law Society Family Law Section cited in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21F.07].

lawyer would risk the agreement being set aside and the lawyer being sued if the agreement was voided for lack of compliance with section 21F.

30.85 Squire identifies several issues with a lawyer witnessing a signature through audio-video communications:[104]

(a) the lawyer cannot be certain the document the partner signs and the document the lawyer is to sign are the same agreement;

(b) the lawyer cannot know whether the partner is affected by off-screen influences;

(c) the lawyer may have difficulties verifying the identity of the person who signs the document; and

(d) there may be issues with the quality of the audio-video call which may compromise the quality of advice required by the PRA.[105]

30.86 Some commentators say there are methods through which a lawyer can legitimately witness the signature so it meets the requirements of section 21F, even though the lawyer is not physically present when a partner signs. Donovan and Hawker suggest that the client could attend another lawyer's office at the client's location. The witnessing and certifying lawyer would be connected via a Skype or audio-video connection to the meeting. The lawyer physically present at the office with the client can confirm that the client is alone (so as not to be subject to off-screen influences) and has with him or her, a copy of the agreement the witnessing lawyer has provided.[106]

30.87 There are obvious advantages to allowing an agreement to be witnessed via audio-video communication. If a client is overseas or it is otherwise very impractical or expensive for the lawyer to physically attend when the client signs the agreement, audio-video communication may be useful. We agree there are real concerns with reliability of the witnessing process but, as

104 Ingrid Squire "To skype or not to skype: that is the question" The Family Advocate (Wellington, Autumn 2014) at 17.

105 Kim and Woo also caution that a lawyer who witnesses a partner's signature to a contracting out agreement via video link may be unable to pick up on the social cues which might indicate that the partner did not truly comprehend the effect of what he or she is signing: Jason Kim and Eugenia Woo "Video-conferencing technology and the witnessing of documents" (12 February 2016) Auckland District Law Society <www.adls.org.nz>.

106 Amanda Donovan and Jennie Hawker "Section 21 agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 24–25.

Donovan and Hawker explain, there may be ways to mitigate the risks.

30.88 To date, no case in New Zealand has decided whether a contracting out agreement signed and witnessed through audio-video communication meets the requirements of section 21F.

CONSULTATION QUESTION

J11 Should the PRA allow the signature of a party to the agreement to be witnessed by a lawyer through audio-video communication? If so, what safeguards should be put in place to ensure the reliability of the witnessing process?

Problems in the prescribed form of agreement under section 21E

30.89 When the PRA was amended in 2001, there was debate about whether the requirement to obtain independent legal advice under section 21F would be too costly.[107] The Government and Administration Select Committee kept the requirement for independent legal advice, reasoning that if it was removed, there was a risk that more agreements would be challenged. This would increase costs eventually.

30.90 Instead, the Committee proposed section 21E. It aims to "minimise the legal expenses of people who wish to enter" into a contracting out agreement by providing a model agreement that can be used by the parties. Only one model agreement has been provided under the Property (Relationships) Model Form of Agreement Regulations 2001. Regulation 6 provides that the agreement has no special effect or status just because it is in the prescribed form; it must be treated the same way as any other agreement under section 21.

30.91 The general view is that the model agreement is inadequate. Franks identifies these problems:[108]

(a) the agreement is a pre-nuptial agreement under section 21 of the PRA, not a settlement agreement under section 21A;

107 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 24–25.

108 Stephen Franks "Yes Member: or why the model contracting out agreement is useless" (2001) 3 BFLJ 281; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.02].

(b) the agreement does not record the partners' relationship property;

(c) the agreement does not deal with future property;

(d) the agreement does not deal with situations where separate property can be converted into relationship property under sections 9A, 10 or 15A;

(e) the agreement does not deal with compensation for one partner's contributions to the separate property of the other partner under sections 17 or 17A;

(f) the agreement does not deal with economic disparity claims under section 15;

(g) there is no clause relating to full and final settlement;

(h) there is no clause requiring the partners to disclose to each other all property; and

(i) the agreement does not deal with wills and testamentary intentions.

30.92 The authors of *New Zealand Forms and Precedents* give a very critical appraisal of the model form agreement:[109]

> *The model form is, with respect to the statutory draftsperson, not sufficient in many important aspects (it comprises approximately 8 lines of operative text), and should not be employed (nor certified) by any practitioner. There is a proper basis to suggest that certification of the model form would (absent highly mitigating circumstances (such as an express instruction that the client wishes to execute the agreement notwithstanding competent written advice concerning its inadequacies and risks) found a valid action in negligence against the certifying practitioner.*

30.93 Because of these criticisms it is unlikely any lawyer would draft or certify a contracting out agreement based on the prescribed model form agreement.[110] It therefore fails in its principal objective to minimise legal costs. As the authors of *Family Property* say:[111]

> *[a]prudent lawyer would require a number of amendments to the model form, with the end result being that it would probably be less expensive if the lawyer prepared the agreement from scratch.*

109 Karen Harvey-Vallee (ed) *New Zealand Forms and Precedents* (online ed, LexisNexis) at [3010].

110 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.03].

111 Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.03].

30.94 The criticisms of the model form agreement raise the broader question of whether a template agreement would ever save legal costs. Usually lawyers will have their own precedent documents they prefer to use, given their familiarity with and confidence in the documents.[112] Any template agreement may need to be adapted to the particular circumstances of each relationship and the agreement the partners have reached. The actual drafting of an agreement is only a portion of the work the lawyer must undertake. A lawyer must give an informed professional opinion on the effect, implications and wisdom of the transaction. To do this, the lawyer must have reviewed all information or, at the very least, advised that the information is inadequate and further information is needed. The lawyer must have assessed the partner's entitlements under the PRA and compared them to the partner's entitlements under the agreement. Our preliminary view is that no model agreement will reduce the legal costs of this exercise.

CONSULTATION QUESTIONS

J12 Do you agree that the model agreement prescribed by the Property (Relationships) Model Form of Agreement Regulations 2001 is inadequate as a precedent?

J13 If the model form agreement was amended to address its deficiencies, could it save legal costs for partners wishing to contract out?

Should a court have wider powers to give effect to non-complying agreements?

30.95 Section 21H, discussed at paragraphs 30.37 to 30.40 above, allows a court to give effect to a contracting out agreement that does not comply with section 21F. The test is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.[113]

30.96 We have heard in our preliminary consultations that some partners who separate will make informal agreements to divide their property without observing the formalities under PRA. If this is correct, the question is to what extent an agreement that violates section 21F should be given effect.

112 Stephen Franks "Yes Member: or why the model contracting out agreement is useless" (2001) 3 BFLJ 281 at 281.

113 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [5.73].

30.97 Section 21H may be improved by providing more guidance on when a court should give effect to a non-complying agreement. Sometimes the courts have acted to protect a partner who has performed a non-complying agreement to his or her disadvantage. In *Yates v Yates*,[114] for example, the partners orally agreed prior to their marriage that Ms Yates would provide the equity from her home to purchase a new home jointly in the names of the parties. In return, Mr Yates was to make Ms Yates a director and shareholder of the company through which he conducted business. Ms Yates implemented her side of the agreement and the proceeds from the sale of her home were used to purchase a new house for the partners. Mr Yates, however, did not appoint Ms Yates a director and shareholder. The Family Court said that neither partner would be materially prejudiced by the enforcement of the oral agreement. However, the Court said that to consider the non-complying agreement ineffective would cause considerable prejudice to Ms Yates as she had implemented her side of the agreement without receiving the benefits promised to her.[115]

CONSULTATION QUESTIONS

J14 Is the test in section 21H for when a court can give effect to a non-complying agreement set at the proper threshold?

J15 Would section 21H benefit from additional criteria to guide a court on when a non-complying agreement should be given effect? If so, what criteria should there be?

Should a court have the power to vary or uphold a contracting out agreement in part?

30.98 Section 21J provides that a court may set an agreement aside if the agreement would cause a serious injustice. If a court sets the agreement aside, the PRA has effect as if the contracting out agreement had never been made. There is no ability for a court to salvage a contracting out agreement, either by varying the agreement or by enforcing only part of it. Section 21J stands in

114 *Yates v Yates* [2015] NZFC 1141.

115 *Yates v Yates* [2015] NZFC 1141 at [82]. See also *Hazelwood v Marquand* [2015] NZFC 1499. In that case the partners had kept their income separate in accordance with the terms of an oral agreement. Ms Hazelwood argued the oral agreement was void for non-compliance and should not be enforced under s 21H of the Property (Relationships) Act 1976. The court rejected Ms Hazelwood's argument and held that she would suffer no material prejudice if the agreement was given effect. The court also noted the unfairness of Mr Marquand's income being brought into the relationship property net, when Ms Hazelwood's income was never treated as relationship property: at [194].

contrast to section 21H, as section 21H allows a court to give effect to a non-complying agreement "wholly or in part."[116]

30.99 If partners have attempted to contract out of the PRA, they have intended to regulate their own affairs differently from its provisions. Even if some aspects of the agreement will cause a serious injustice, there may be elements to their bargain they may still like to retain. It may be preferable, therefore, for a court to preserve those aspects of the partners' agreement. Alternatively, the partners' intentions may be better served if the court could vary an agreement that would cause serious injustice.

30.100 If the court was given such powers, the PRA may need to give clear direction on when the court could exercise them. Partners and their advisers would require certainty on when an agreement would be varied or set aside completely. We are mindful too of the sentiment behind the 2001 amendments to raise the threshold in section 21J because of the view that the courts were setting aside agreements too readily. Our preliminary view is there would need to be a high threshold before the court varied or partially saved an agreement.

CONSULTATION QUESTIONS

J16 When exercising its power under section 21J, should a court have the power to set aside an agreement wholly or in part? Should the court have power to vary an agreement?

J17 In what circumstances should the court exercise its powers?

Protecting children's interests in contracting out and settlement agreements

30.101 The contracting out provisions of the PRA do not expressly refer to the interests of children. Section 21D sets out what a contracting out agreement may do. It does not, however, require partners to consider the interests of, or provide for, the children of the relationship. It is, therefore, theoretically possible that an agreement may fail to recognise or provide for the financial needs of the children of the relationship. An agreement could contain terms that disadvantage children.

30.102 By contrast, if the court decides how the partners' property is to be divided, it has jurisdiction to make certain orders to protect

116 Property (Relationships) Act 1976, s 21H(1).

the interests of children. Notably, section 26 requires the court to "have regard" to the interests of any minor or dependent children in any proceeding under the PRA and if it considers it just, the court may make an order settling any property for the benefit of the children.

30.103 In recent years the Law Commission of England and Wales has explored whether pre-nuptial agreements should be recognised under English and Welsh law. Throughout the review process, the Commission was guided by the principle that parties should not be allowed to contract out of their responsibility for any children and that reforms should not disadvantage children and those who care for them.[117] The Commission ultimately recommended that a qualifying agreement should displace a court's discretion to award ancillary relief under the Matrimonial Causes Act 1973.[118] However an agreement would not be valid if it was detrimental to the interests of the children of the family.[119] We recognise that in the United Kingdom, a court's first consideration is the welfare of minor children.[120] New Zealand law differs because the PRA's primary focus is the partners' entitlement to an equal share of relationship property.

30.104 We have not come across any information or commentary in New Zealand on the extent to which children in New Zealand are disadvantaged through contracting out agreements. This suggests there may not be a significant problem. Parents cannot contract out of their basic legal obligations towards children. For example, a partner cannot exclude his or her minimum child support or guardianship obligations through a contracting out agreement under the PRA.[121] We note, however, that children's interests may need to be given greater priority in the division of relationship property. We consider this question in depth in Part I.

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117 Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [1.7], [1.48] and [3.26].

118 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.87].

119 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.87].

120 Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [1.14] and [1.32].

121 Section 21D of the Property (Relationships) Act 1976 provides that an agreement under pt 6 may only deal with matters relating to the classification and division of their property. Any provision in the agreement that purported to exclude legal duties that were beyond the status, ownership and division of property would not be considered a contracting out agreement under pt 6. Rather, the enforceability of those matters would need to be determined pursuant to the law that applied to those matters.

CONSULTATION QUESTION

J18 Should the interests of children be a consideration when partners contract out of the PRA?

30.105 If there is a material problem with protecting children's interests in contracting out agreements, the PRA could be amended to provide additional safeguards. We consider two options below.

Option One: Amend section 21D to require partners to have regard to the interests of their children

30.106 Section 21D could contain an additional provision that requires all partners who enter a contracting out agreement to "have regard to" the interests of their children (similar to the language in section 26), or to ensure that they have made "adequate provision" for the needs of their children. The standard of adequate provision is, however, difficult to define. Inevitably it will depend on the circumstances of every family.

30.107 Any duties imposed by section 21D should follow the wider provisions in the PRA. In Part I of this Issues Paper, we explored wider options for reform that could be made to the PRA regarding the interests of children. The precise nature of any new provision imposing a duty to provide for the needs of their children when entering a contracting out agreement should reflect the preferred option from those we identified in Part I.

Option Two: Amend section 21J(4) to expressly state a court may set aside a contracting out agreement which harms the children's interests

30.108 There is scope for a court to consider the interests of children when faced with an application under section 21J. Section 21J(4)(f) provides that a court may consider "any other matters that the court considers relevant", which could include the interests of children. Section 26 provides that in PRA proceedings, a court must have regard to interests of any minor or dependent children of the marriage, civil union or de facto relationship. Under the current wording of section 21J(4), however, a court must have regard to other competing matters, such as the fact that the

parties to the relationship (the children's parents) wished to achieve certainty.[122]

30.109 It is conspicuous that section 21J does not expressly state that a court is to consider the interests of children who may be affected by that agreement. The matters set out in section 21J(4) can also be contrasted with other sections of the PRA in which, when considering how it will exercise its powers, a court must have regard to the position of children, such as sections 15 (economic disparity awards), 28A (occupation orders), 28C (furniture orders), and 44C (compensation for property disposed of to a trust). There is also the PRA's overarching purpose to provide for a just division of relationship property, *while taking account of the interests of children*.[123]

30.110 It may be possible for children's interests to be overlooked when partners enter into a contracting out agreement, especially if they enter a section 21 agreement before any children are born. The agreement is solely between the partners. It will organise their affairs differently from the PRA's protective provisions. If they take no issue with the agreement, the bargain will not be scrutinised by third parties such as the court. It may therefore be the case that the interests of children are severely disadvantaged, but the agreement is never questioned. Arguably, a court should have a remedial jurisdiction to set aside an agreement when it is against the interests of children, and this should be emphasised in the wording of section 21J.

CONSULTATION QUESTIONS

J19 Should partners be required to have regard to the interests of children, or make provision for the needs of their children, when entering into a contracting out agreement under the PRA?

J20 Should section 21J(4) expressly direct the court to consider the interests of children when assessing whether giving effect to a contracting out agreement would cause serious injustice?

122 Property (Relationships) Act 1976, s 21J(4)(e).

123 Property (Relationships) Act 1976, s 1M(c).

Part K – Should the PRA affect the rights of creditors?

Chapter 31 – The PRA and creditors

Introduction

31.1 The focus of this part is how the PRA deals with the rights of creditors. Partners in a relationship will usually carry debt, either individually or jointly. For example, one partner might have purchased a television on hire purchase or the partners might buy a car through a finance arrangement which is paid off in instalments. A mortgage over the family home is a common example of the debt partners might still have at the end of the relationship.

31.2 The general position taken by the PRA is that the rights of creditors are not affected by the PRA. There are, however, some limited exceptions to this general rule.

31.3 In this part, we address:

(a) The general rule that the rights of creditors are not affected by the PRA;

(b) the exceptions to that rule; and

(c) issues with the way the PRA treats creditors' rights and possible options for reform.

The rights of creditors under the PRA

The general rule – the rights of creditors are not affected by the PRA

31.4 Two key sections in the PRA govern the relationship between partners' relationship property entitlements and the rights of creditors.

31.5 The first provision is section 19, which is fundamental to the overall scheme of the PRA. It states that, unless the PRA expressly provides to the contrary, nothing in the PRA:

(a) affects the title of any third person to any property, or the power of either partner to acquire, deal with, or dispose of any property, or enter any legal transaction as if the PRA had not been passed; or

(b) limits or affects the operation of any mortgage, charge, or other security for the repayment of a debt given by either partner over the property he or she owns.

31.6 Section 19 preserves each of the partner's rights to deal with their property as if the PRA had not been passed, including incurring debts and using their property as security. As section 19 clarifies, this general rule is subject to the other provisions of the PRA. The principal limitations of this general rule are the PRA's rules of division when the relationship ends. The PRA is often called a "deferred" regime, because its rules of property division only apply after the partners have separated. Until that point in time, section 19 preserves the partners' rights to deal with their property. Conversely, section 19 protects the rights of the creditors with whom the partners deal.

31.7 The second provision is section 20A. Section 20A is in very similar terms to section 19. It provides that the secured and unsecured creditors of a partner have the same rights against that partner as if the PRA had not been passed.[1] Like section 19, section 20A is subject to the other provisions of the PRA.

31.8 The general effect of section 19 and section 20A is to provide that creditors suffer no prejudice to their rights unless the PRA expressly provides to the contrary.

1 Likewise, if, had the Property (Relationships) Act 1976 (PRA) not been passed, any property would have passed to the Official Assignee on or following the bankruptcy of a spouse or partner, then that property (and no other property) passes to the Official Assignee as if the PRA had not been passed: s 20A(2). Section 46 also provides for the specific case of secured creditors when the court makes orders under the PRA. Section 46 provides that that the rights conferred on a partner under the PRA will be subject to the rights of a person entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property in respect of which the order is made, provided it was registered before the order was registered or the rights arise under an instrument executed before the making of the court order.

Exceptions to the general rule

31.9 There are only limited instances where the PRA affects the rights of creditors. We set out the main provisions below, although there are other lesser ways in which creditors' rights might be affected.[2]

Protected interest in the family home – section 20B

31.10 Section 20B(1) provides that every partner has a protected interest in the family home.[3] Section 20B(2) provides that the protected interest of a partner is not liable for the unsecured debts of the other partner.[4] In other words, if the creditors of one partner claim the entirety of the family home in satisfaction of that partner's debts, the other partner's interest will take priority to the extent of the protected interest.

31.11 The value of the protected interest is the lesser of either half the equity in the family home[5] or the "specified sum" as set by regulations under section 53A. The specified sum is currently set at $103,000.[6]

31.12 The rationale behind section 20B is clear. The drafters of the PRA saw the family home as the principal family asset that would constitute relationship property under the equal sharing regime.[7] It therefore deserved particular attention.[8] In a White Paper accompanying the Matrimonial Property Bill 1975 the Minister of Justice explained that the basic philosophy of the protected interest provision was that matrimonial property should not be

2 The case *Monocrane NZ Ltd (in liq) v Moncur* [2016] NZCA 139, [2016] NZFLR 455 provides an unusual example. When a husband and wife separated they entered a settlement agreement to settle their property affairs. The agreement included terms in which a company through which the husband conducted business in effect gave up rights against the wife but instead received the benefits of financing secured over the wife's home. In these circumstances, the Court of Appeal held that the company should be estopped from denying it was bound by the agreement and had improperly lost its rights. The Court observed that the agreement conferred considerable benefits on the company and therefore its rights should be properly confined by the agreement made under the Property (Relationships) Act 1976.

3 If no family home exists because it has been sold, or because none existed, or because the family home exists as a homestead, the protected interest applies to the proceeds of sale, or the property or money shared in place of the family home, as the case may be: Property (Relationships) Act 1976, ss 11A–12.

4 Unless the debt has been incurred by the partners jointly or the debt has been incurred by a partner subsequently declared bankrupt for the purpose of acquiring, improving, or repairing the family home: Property (Relationships) Act 1976, s 20B(2).

5 If the home has been sold, the relevant value will be the sale proceeds: Property (Relationships) Act 1976, s 11A. If the partners had no family home, the relevant value will be in the money shared in the absence of a home: ss 11B and 12.

6 Property (Relationships) Specified Sum Order 2002, cl 3.

7 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 8.

8 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 8.

seized to satisfy the purely personal creditors of the other spouse. Otherwise, the Minister reasoned, "a husband, for example, by mounting up excessive debts, could jeopardise not merely what is his, but what in terms of the Bill belongs to his wife."[9]

31.13 The PRA's rules relating to a partner's protected interest are based on the Joint Family Homes Act 1964 (JFHA).[10] The JFHA allows married partners to register the ownership of their home in their joint names.[11] The JFHA does not apply to partners in a civil union or de facto relationship. Once registered, the JFHA gives a spouse's interest in the family home priority over the unsecured creditors of the other spouse.[12] Like the PRA, the JFHA protects a spouse's interest in the home to the extent of a "specified sum."[13] The current specified sum is $103,000.[14] The specified sums under the JFHA and the PRA have been set in tandem.

Notices of claim – section 42

31.14 Section 42 of the PRA allows a partner with a claim or interest in land under the PRA to register a notice on the title of the land. A notice of claim has been described as a "stop sign" because when registered on the title to land it prevents dealings with the land.[15] A notice of claim may affect the rights creditors claim to the land, particularly if the creditor's interest in the land is unregistered or if it has been registered after the notice of claim is lodged.

31.15 Section 42(5) provides that a notice can be registered even though no PRA proceedings are pending or in contemplation. There may not even be a dispute between the partners. Section 42 therefore alters the general rules in sections 19 and 20A that the claims of a

9 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12.

10 When an amendment was made to the Joint Family Homes Act 1964 in 1974, the Minister of Justice, Hon Martyn Finlay, explained that he was shortly to introduce the Matrimonial Property Bill 1975 that would embody the principles of the Joint Family Homes Act 1964: (4 October 1974) 394 NZPD 4833–4834.

11 The benefits of settling a home under the Joint Family Homes Act 1964 were much more significant before the enactment of the Matrimonial Property Act 1976. First, a settlement under Joint Family Homes Act did not attract gift duty. Second, the Property (Relationships) Act 1976 was not yet in force and consequently the family home was not, at that time, automatically classified as relationship property.

12 Joint Family Homes Act 1964, s 9(2)(d).

13 Joint Family Homes Act 1964, s 16(5). The specified sum can be set by the Governor-General by Order in Council.

14 As set by cl 3 of the Joint Family Homes (Specified Sum) Order 2002.

15 *Moriarty v Roman Catholic Bishop of Auckland* (1982) 1 NZFLR 144 (HC) at 146. Section 42(1) of the Property (Relationships) Act 1976 (PRA) deems the alleged claim or interest to be a registrable interest under the Land Transfer Act 1952. Section 42(3) of the PRA provides that a notice, once lodged, has effect as if it were a caveat.

partner under the PRA do not affect the rights of third parties and creditors.

31.16 *Price v Price* is a good example of how creditors' rights may be affected.[16] Mr Price borrowed money from a bank. The loan was secured by a mortgage over a house owned by Mr Price. Mr and Mrs Price separated and Mrs Price lodged a notice of claim against the title to the house. After the notice was lodged, the bank made further advances to Mr Price. When Mr Price defaulted on the mortgage, the bank sold the property through its mortgagee's power of sale. The bank applied to remove the wife's notice of claim. The issue before the High Court was what effect Mrs Price's notice of claim had on the bank's rights. The Court said that the notice of claim gave Mrs Price priority over the bank regarding the advances the bank had made after Mrs Price lodged her notice. This meant that Mrs Price could have her interest in the family home determined and given priority over the rights of the bank to recover the unpaid subsequent advances.[17]

31.17 Creditors whose rights are registered before a notice of claim is lodged can exercise their legal rights despite the notice. The position of creditors is further protected by section 46. That section provides that rights conferred on a partner by any order made under the PRA are subject to the rights of secured creditors if the security was registered before the order was made, or if the rights arise under an instrument executed before the order was made.

31.18 In *M v ASB Bank Limited*, one of the partners had mortgaged his property.[18] The mortgage was in his sole name. In PRA proceedings, the Family Court granted the other partner an occupation order. She registered a notice of claim against the property to protect her interest under the occupation order. The non-occupant partner then ceased making payments under the mortgage (which the Court considered led to an arguable case he had engineered a default under the mortgage to defeat his former partner's rights). The bank exercised its power of mortgagee sale and sought orders removing the occupant partner's notice of claim so the sale could proceed.

16 *Price v Price* [1995] 3 NZLR 249 (HC).

17 *Price v Price* [1995] 3 NZLR 249 (HC) at 256.

18 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641.

31.19 The Court of Appeal said that section 46 was critical. The section gave priority to the rights of a secured party under an instrument executed before an order is made. The bank's rights took priority over the partner's occupation order.[19]

Transactions made to defeat a partner's claim or rights under the PRA – section 43 and section 44

31.20 Sections 43 and 44 of the PRA apply where a disposition of property is about to be made (section 43) or has been made (section 44) to defeat a partner's claim or rights under the PRA. A court has power to restrain the impending disposition under section 43, or order under section 44 that property already disposed of be recovered or compensation for its value paid. A creditor may be party to a transaction intended to defeat a partner's rights under the PRA and, in such circumstances, the creditor's rights may be denied under sections 43 or 44 of the PRA.

31.21 Sections 44 does, however, protect the position of the person to whom the disposition of property is made, if the property is received in good faith and the recipient has altered his or her position in reliance of having an indefeasible interest in the property.[20]

31.22 In *M v ASB Bank Limited*, discussed above, the bank sought to sell a mortgaged property by mortgagee sale even though the property was subject to an occupation order. The occupant partner claimed that the bank was acting with intent to defeat her rights under the PRA and the impending sale should be restrained under sections 43 and 44 of the PRA. The bank argued that its rights under section 46 should take priority. Importantly, section 46 states it is subject to sections 42 to 44. The question was whether the bank's rights under section 46 were displaced by sections 43 and 44.

31.23 The Court of Appeal said that the bank's power of mortgagee sale could not be a disposition of property under section 43 because the bank was not a party to the Family Court proceedings between the parties.[21] Nor had it colluded with the mortgagor partner

19 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641 at [20]–[22].

20 Property (Relationships) Act 1976, s 44(4).

21 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641 at [43].

to defeat the occupant partner's rights.[22] As a result section 43 could not apply. Likewise, section 44 could not apply because the Court found that the bank was attempting to sell the mortgaged property to recover a debt that had fallen due.[23] It was not acting with an intention to defeat the occupant partner's rights.

31.24 The Court also said that, because of the bank's legitimate rights, the sale of the property could not be subject to a condition allowing the occupant partner to reside in the property until the Family Court proceedings had been determined.[24]

31.25 Usually creditors will seek to exercise their rights of recovery in a similar manner to the bank in *M v ASB Bank Limited*. It may therefore be uncommon that the rights of creditors will be affected by sections 43 or 44.

Agreements to defeat creditors

31.26 The PRA addresses the situation where partners make an agreement between themselves regarding their property which defeats the rights of creditors. The situation is dealt with by section 47. The courts have said that because the PRA governs all transactions between the partners,[25] all other legislation is subject to the PRA.[26] The general law of insolvency will not apply in this context.[27] Rather, all questions about the validity of an agreement or transaction between the partners must be dealt with by section 47.

31.27 Section 47(1) provides that any agreement, disposition or other transaction between the partners regarding their relationship property and intended to defeat the interests of the creditors of either partner is void against those creditors and the Official Assignee. This provision is focused on the partners' intentions and whether the loss to creditors was deliberate. If section 47(1) applies, the entire agreement or transaction is void.

31.28 Section 47(2) focuses on the effects of the transaction rather than the partners' intentions. It provides that an agreement,

22 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641 at [43]–[44].

23 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641 at [53]–[54].

24 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641 at [63].

25 Property (Relationships) Act 1976, s 4.

26 *Official Assignee v Williams* [1999] 3 NZLR 427 (CA).

27 The general law of insolvency is primarily governed by the Insolvency Act 2006 and the Property Law Act 2007.

disposition or transaction of relationship property that had the effect of defeating creditors is void against such creditors and the Official Assignee "during the period of two years after it is made."

31.29 There has been uncertainty about the meaning of the two year period referred to in section 47(2). The Supreme Court considered the issue in *Felton v Johnson*.[28] Mr Johnson, through a company, had entered several franchise agreements for distributing a product. Several franchisees expressed dissatisfaction, although at first no litigation was threatened against Mr Johnson personally. Mr and Mrs Johnson entered a relationship property agreement under Part 6 of the PRA. Under the agreement, Mrs Johnson took a greater share of the relationship property.[29] Four years later the franchisees commenced litigation against Mr Johnson personally and sought to set aside the relationship property agreement.

31.30 The question before the Court was whether the reference to the two year period in section 47(2) prevented the creditors from setting aside Mr and Mrs Johnson's agreement. The Court considered two possible interpretations of section 47(2). The first was that the two year period was a limitation period, meaning affected creditors had only a two year period after the agreement was made to treat the agreement as void. The second interpretation was that the two year timeframe was a period in which to determine which creditors could treat an agreement as void. The agreement could only be set aside by a creditor if it became a creditor during the two year period after the agreement was made.

31.31 The Supreme Court favoured the first interpretation. The Court reasoned that an agreement would only be void if a creditor elected to treat it as void within two years of the date of the agreement.[30] The Court said that, as none of Mr Johnson's creditors did anything during the two year period after Mr and Mrs Johnson made their agreement, they could not now seek to challenge the agreement under section 47(2).[31]

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28 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475.

29 Mrs Johnson took most of the partners' assets whereas Mr Johnson took shares in the company. If the shares had been properly valued, the imbalance in the property each partner took was in excess of $550,000.

30 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [21]. The Supreme Court held at [20] that s 47 of the Property (Relationships) Act 1976 (PRA) was an adaptation of the historic law that applied to transactions that defeated creditors' rights (namely, the Statute of Elizabeth 1571 and the Property Law Act 1952). The historic law was liable to be set aside when challenged by an affected creditor. The agreement was not to be treated as void ab initio. The Supreme Court held that s 47(2) of the PRA was to be interpreted the same way: an agreement could only be treated as void if a creditor elected to treat an agreement as void.

31 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [23].

31.32 The courts have said that an agreement will defeat creditors only if the agreement moves property between the partners in such a way as to deplete the resources of one partner available to creditors.[32] If a partner has provided money or other property of the same value as the property he or she has received from the other partner, the effect of the agreement will not defeat creditors. The creditors will have the same total resources of the partner available to them as they had before.[33]

31.33 Section 47(3) provides that when the partners have separated and entered an agreement under the PRA to settle their rights to property, the agreement is "deemed to have been made for valuable consideration."[34]

Issues with the way the PRA treats the rights of creditors

General policy of the PRA

31.34 The general policy of the PRA is that the rights of creditors should remain largely unaffected by the operation of the PRA, except for limited exceptions. Through our research and preliminary consultation, we have found little criticism of the general priority given to creditors under the PRA.

31.35 There are obvious merits to upholding creditors' rights. Usually creditors will be independent third parties who have provided goods or services to either or both partners. In return for the value they have provided, creditors will expect payment under the contractual agreement they have entered. Pending payment, creditors will sometimes receive rights to security. It is arguably unfair that, having benefitted one or both partners, the creditor should have his or her rights affected.

31.36 Any amendment to the PRA that alters creditors' rights could have significant implications. If the rights of creditors under the PRA

32 *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 323 per Richardson J.

33 *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 323 per Richardson J.

34 Consideration means the exchange of a right or benefit in return for what the giver obtains under the contract. In contract law, consideration is an essential element for a contract to be binding.

are diminished when partners separate, it is reasonable to assume that lenders' credit practices would change.

31.37 An absolute priority for creditors' rights may, however, cause unfairness in certain circumstances. *M v ASB Bank Ltd* (discussed above) exemplifies particular difficulties that may arise.[35] There the Court said the bank's right to sell the mortgaged property took priority over the partner's right to occupy the house even though she had been granted those rights by a Family Court order.

31.38 The PRA attempts to address the potential unfairnesses in some cases by apportioning the debt between the partners through the division of the relationship property, but this may be a hollow remedy. For example, partners may incur personal debts for which both are jointly liable, such as credit cards linked to a joint bank account. Under the PRA's rules, the bank may hold each partner jointly liable for the credit card debt. In those circumstances, section 20E may apply. It provides that where one partner has paid a personal debt from relationship property, the court may order that the other partner receive compensation or a greater share of relationship property. This may be an adequate remedy for partners with sufficient relationship and separate property at their disposal from which to pay compensation. However, for other partners their property will be insufficient and the only meaningful remedy a partner can enjoy is to be relieved of liability to the creditor in respect of the other partner's personal debts.

31.39 Despite these issues, we know that any changes to the PRA's provisions regarding the rights of creditors should not be made lightly. We therefore seek submissions on whether the way the PRA treats creditors is appropriate, or if any specific problems justify reform.

CONSULTATION QUESTION

K1 Is the way the PRA treats creditors appropriate or are there specific problems that justify reform?

Role of the Joint Family Homes Act 1964

31.40 There is considerable overlap between the PRA and the JFHA. The PRA classifies the family home as relationship property.[36] This

35 *M v ASB Bank Limited* [2012] NZCA 103, [2012] NZFLR 641.

36 Property (Relationships) Act 1976, s 8(1)(a).

classification recognises the home as the joint property of the partners. It is a very similar result to registering a home under the JFHA. Likewise, the PRA adopts the protected interest scheme from the JFHA.

31.41 The Law Commission reviewed the JFHA in 2001 and recommended that it be repealed.[37] The Commission noted how the overlap with the PRA had led to the "evaporation" of many of the original benefits under the JFHA.[38] The Commission gave additional reasons for recommending repeal, including:[39]

(a) the protection against creditors was of little practical use as most homes registered under the JFHA were mortgaged and the rights of secured creditors remained unaffected;

(b) the fixed specified sum resulted in geographical inequality and often fell short of providing the equity for a home of a reasonable minimum standard;[40]

(c) the Commission reported a significant decrease in the number of registrations under the JFHA in the years preceding its report;

(d) it was open for the partners to use other devices to protect the home, like a trust; and

(e) the JFHA was arguably discriminatory as it did not apply unless the partners were married.[41]

31.42 Since the Commission's report, the removal of gift duty has also reduced the benefits of settling homes under the JFHA.[42]

31.43 The issues with the JFHA continue. In recent years, the rate of registrations under the JFHA has further decreased (although some married partners do continue to register their homes under the JFHA).[43]

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37 See Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001); and Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001).

38 Law Commission *The Future of the Joint Family Homes Act* (NZLC PP44, 2001) at [17].

39 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [8] and [15].

40 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [9].

41 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [12].

42 Gifts made after 1 October 2011 have not attracted gift duty: Taxation (Tax Administration and Remedial Matters) Act 2011, s 245.

43 In 2012, the Joint Family Homes Repeal Bill 2012 (2-1) was introduced to Parliament as a Member's Bill. In addition to the reasons given by the Law Commission, the reasons given in the explanatory memorandum of the Bill for repealing the Joint Family Homes Act 1964 included the low rate of registrations. The decrease in registrations suggested little

31.44 In 2012, the Joint Family Homes Repeal Bill 2012 was introduced to Parliament as a Member's Bill. The Bill was not enacted. The Parliamentary select committee that considered the Bill reported that it should not be passed because there needed to be a mechanism of preserving the rights under the approximately 36,000 existing registrations.[44]

31.45 We recognise that the continued existence of the JFHA is not critical to our review of the PRA. We nevertheless question its continued place in the statute books. The reasons for which the Law Commission previously recommended the repeal of the JFHA remain valid.

Should there be a protected interest in the family home?

31.46 The philosophy behind the protected interest in the family home is that one partner's share of relationship property should not be seized to satisfy the purely personal creditors of the other partner.[45] Our preliminary view is that the PRA should continue to provide partners with a protected interest in some form. The protected interest recognises that a partner's rights and interests under the PRA should prevail against the rights of the other partner's unsecured creditors to the extent of that protected interest. This philosophy is implemented in the PRA by granting a partner priority in the family home to the lesser of half its equity or the specified sum of $103,000.[46] Several issues arise in the way the protected interest attaches to the family home.

support for the scheme: see Joint Family Homes Repeal Bill 2012 (2-1) (select committee report) at 2. In recent years, the number of registrations of joint family homes under the Act have been as follows: 2007: 424 registrations; 2008: 354 registrations; 2009: 294 registrations; 2010: 292 registrations; 2011: 187 registrations; 2012: 164 registrations; 2013: 114 registrations; 2014: 127 registrations; 2015: 94 registrations; and 2016: 86 registrations: email from Land Information New Zealand to the Law Commission regarding data on joint family home registrations under the Joint Family Homes Act 1964 (1 May 2017).

44 In its report, the Law Commission recommended that Parliamentary Counsel consider whether the repealing statute should include express provision to the effect that, upon repeal, the settled property shall remain vested in the husband and wife as joint tenants, but 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 s 18 of the Interpretation Act 1999: Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [22].

45 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 12.

46 Property (Relationships) Act 1976, s 20B.

Rates of home ownership are decreasing

31.47 The rate of home ownership in New Zealand has been in decline since 1991, when it peaked at 74 per cent.[47] In the 2013 census, 64.8 per cent of households responded that they owned their home.[48] The decline in home ownership over the last 25 years has been attributable to a range of factors that have seen house prices increase at a rate that has outpaced rises in average household income.[49]

31.48 Sections 11B, 20B(1)(b) and 20B(3) attempt to provide for a protected interest when the partners have no family home.[50] Section 11B provides that where there is no family home, or the home is not owned by either partner, the court must award each partner an equal share in the relationship property "as it thinks just to compensate for the absence of the family home." Section 20B(1)(b) then provides that a partner's protected interest applies to the property shared under section 11B.

31.49 The fundamental difficulty is that section 11B is very unlikely to apply when creditors claim against the partners' relationship property. This is for two reasons. First, the court will make a compensatory order under section 11B only when a partner applies for division orders under section 25. If the partners have not separated neither partner would seek an order under section 11B. Second, in the ordinary course of property division, there seems little point in section 11B because all relationship property is divided equally in any event.[51] Even if the partners separated and one partner had applied for division under section 25, the court would seldom, if ever, make a compensatory award of relationship property under section 11B.

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47 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 7.

48 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 7.

49 Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 7.

50 Section 20B(1)(a) of the Property (Relationships) Act 1976 also provides that where the family home has been sold, a partner has a protected interest in the sale proceeds. As the proceeds of sale are relatively easy to identify (at least in cases where there has been no intermingling), section 20B(1)(a) is easier to apply than section 20B(1)(b).

51 This observation was made by the Family Court in *P v P* [2003] NZFLR 925 (FC) at [106]. The provision appears to have endured from the Matrimonial Property Act 1976 prior to its amendment in 2001. The former iteration of the rules of division prior to 2001 provided that the family home and family chattels were to be divided equally, whereas the remainder of the partners' relationship property was to be divided in accordance with their contributions: Matrimonial Property Act 1976, s 11. It therefore made sense that the partners were to share equally in an amount of substitute relationship property.

31.50 Nevertheless, section 20B(1)(b) provides that, where section 11B applies, a partner has a protected interest in "the property shared under that section." If the court has not ordered that property be shared under section 11B, there would be no property to which the protected interest will attach.

31.51 As home ownership looks to be decreasing, and because the protected interest is unlikely to apply when the partners have no family home, its benefits will apply to fewer partners. There is arguably an anomaly that the PRA confers greater protections on some partners simply because their partners have invested in a home rather than other types of property.

The 'specified sum' is inadequate and leads to geographical inequalities

31.52 The value of a partner's protected interest in the family home under section 20B of the PRA is the lesser of the "specified sum" (currently $103,000) or half the equity in the family home.[52]

31.53 It is not clear on what basis the specified sum is calculated.[53] It appears, however, that the specified sum under the PRA should fulfil the same role as the specified sum under the JFHA.[54] Case law under the JFHA has established that the purpose of the specified sum is to represent the equity required for a house of a reasonable minimum standard.[55] The specified sum under the PRA is probably intended to represent the same value.

31.54 The specified sum was set in 2002. It has not been increased even though the equity required for a house of a reasonable minimum standard in New Zealand today has increased markedly since 2002. Since mid-2012 alone, nationwide house prices have risen over 33 per cent (which has been underpinned to a large degree by rapid house price inflation in Auckland and post-earthquake accommodation shortages in Christchurch).[56]

52 Property (Relationships) Act 1976, s 20B(3).

53 There is little indication of the specified sum's purpose in the legislative materials to the enactment and amendment of the Property (Relationships) Act 1976.

54 The specified sum for the purposes of the Joint Family Homes Act 1964 is $103,000: Joint Family Homes (Specified Sum) Order 2002, cl 3. The specified sum under both Acts is the same and they were set at the same time.

55 *Official Assignee v Lawford* [1984] 2 NZLR 257 (CA) at 265 per Cooke J.

56 Elizabeth Kendall *New Zealand house prices: a historical perspective* (Reserve Bank of New Zealand, Bulletin 79(1), January 2016) at 3.

31.55 When the Law Commission considered the adequacy of the specified sum in its review of the JFHA in 2001, the Commission criticised the specified sum for taking no account of the regional differences of housing costs.[57] The regional differences in housing costs are likely to be greater in New Zealand today. The Reserve Bank reported that, between mid-2012 and January 2016, Auckland house prices increased by 52 per cent, but house prices in the rest of New Zealand increased by only 11 per cent.[58] By the end of 2015, house prices in Auckland were roughly double house prices in the rest of New Zealand (although other urban centres such as Wellington also have relatively high house prices).[59]

31.56 In considering a better approach, the Law Commission concluded that it would be impossible to devise a specified sum that was suitable nationwide.[60] The Commission also rejected a submission that the specified sum be based on the percentage of the net value of a property. The Commission said it was 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."[61]

31.57 In advice to the Parliamentary select committee considering the 2001 amendments, the Ministry of Justice said that the difficulties of basing the specified sum on a percentage may cause partners to misuse the protections to defeat the interests of creditors.[62] The Ministry explained that partners may prioritise building the equity in the family home to maximise the non-debtor spouse's protected interest. They might for example purchase a home more expensive than they reasonably need. They may have an incentive to repay their mortgage at a faster rate or spend money on improvements to the home at the expense of other creditors.

31.58 We consider these issues are significant. If the specified sum should represent the equity required for a house of a reasonable minimum standard, there are real questions as to whether this can be achieved, particularly in way that is fair nationwide.

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57 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15].

58 Elizabeth Kendall *New Zealand house prices: a historical perspective* (Reserve Bank of New Zealand, Bulletin 79(1), January 2016) at 12.

59 Elizabeth Kendall *New Zealand house prices: a historical perspective* (Reserve Bank of New Zealand, Bulletin 79(1), January 2016) at 11.

60 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [15].

61 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at 8.

62 Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (Ministry of Justice, MPA/MJ/4, 2 March 1999) at 16–17.

The family home will often be mortgaged

31.59 The protected interest may seldom apply often because it does not take priority over secured creditors. As the Law Commission observed in its review of the JFHA, the effectiveness of the protected interest provided by the JHFA is limited because it only prevails above the claims of unsecured creditors.[63] Likewise, the protected interest under section 20B of the PRA only applies against unsecured creditors. It is possible that, where one partner is heavily indebted and facing recovery action from creditors, the family home will already be mortgaged in respect of those debts. In those circumstances, the protected interest may be of little use. There have been few cases where a partner's protected interest has been an issue for the court to consider. This suggests that the protected interest is seldom invoked.

Should the approach to classification of relationship property be changed?

31.60 In Part C we consider whether the PRA's approach to the classification of relationship property should be amended. We contemplate whether the current approach under which the family home is classified as relationship property (the "family use" approach) should be changed. Instead, we consider whether an approach that focused on property that the partners acquired during or as a result of the relationship (the "fruits of the relationship" approach) would be a better way to classify relationship property.

31.61 If the PRA's definition of relationship property was reformed to a "fruits of the relationship" approach, the family home would no longer automatically be designated as relationship property. Consequently, the protected interest provisions under section 20B would also need amendment.

Should the protected interest continue to apply to the family home?

31.62 Despite the problems with attaching a partner's protected interest to the family home, for many partners the family home is likely to continue to be the partners' principal asset. Similarly, the

63 Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at [8].

home is likely to be a significant source of property from which to satisfy creditors' claims. There may be good reason to single out the family home as an asset deserving special protection, such as the importance of the home to children.[64] Furthermore, it may be simpler to identify the extent of a partner's interest in a home rather than in a less discernible global pool of relationship property.

31.63 On the other hand, in light of the problems we have identified with the protected interest attaching to the family home, reform may be required. It may be better that a partner's protected interest should apply to all types of relationship property. That will probably be necessary if the PRA's approach to the classification of relationship property is changed. If a partner's protected interest is to apply to relationship property generally, consideration will need to be given to the appropriate extent of the protected interest.

CONSULTATION QUESTIONS

K2 Should the PRA continue to provide a partner with a protected interest that takes priority against the other partner's unsecured creditors?

K3 If so, should the protected interest apply to the family home or to relationship property generally?

K4 What should be the extent of the protected interest?

Is the section 42 notice of claim procedure adequate?

31.64 Section 42 is a significant provision. It is one of the major exceptions to the general rules on which the PRA is built. In particular, a partner can register a notice under section 42 at any point during the relationship, despite the rule that partners' rights under the PRA are deferred until they separate and their property is divided. As a notice under section 42 can prevent dealings with land, it can affect the rights of creditors whose claims against the

64 It should be noted that the protected interest is not directly targeted at ensuring partners retain occupation rights to the same house. The protected interest provisions do not grant a partner a right to occupy the family home; rather, the provisions ensure that a partner can access some equity for an alternative home. The protected interest therefore proceeds on the basis that the home itself would be sold and the sale proceeds divided among the partner and unsecured creditors.

land have not been registered prior to the notice under section 42.[65]

31.65 We observe in Part D that the notice of claim procedure appears to be widely used, and that, despite the significance of section 42, we have encountered little criticism with the notice of claim procedure.[66] The policy reason for section 42 and the consequences that notices of claim have for third parties appear, from our research and preliminary consultation, to be largely accepted.

31.66 Any criticisms focus on the fact that section 42 is another instance where the PRA gives partners' interests in the family home special protections that are not available in respect of other property.[67] As we have commented elsewhere in this Part, the way the PRA gives special protections to the family home may be arbitrary, particularly as rates of home ownership in New Zealand are decreasing.[68]

CONSULTATION QUESTION

K5 Should the PRA continue to provide partners with the ability to lodge notices of claim in respect of land in which they claim in an interest? Why or why not?

Difficulties in applying section 47(2)

31.67 In *Felton v Johnson*, the Supreme Court said the reference to the two year period in section 47(2) should be interpreted as a limitation period. Creditors must challenge an agreement within a two year period after the agreement is made if the agreement

65 Although, as the authors of *Fisher on Matrimonial and Relationship Property* note, a notice of claim may be of less consequence than it at first appears because the notice of claim procedure does not create a formula for determining substantive rights between the partners, or substantive rights with third parties: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [9.19].

66 However, as discussed in Part D, there are some areas of uncertainty in how the notice of claim procedure applies to certain types of property. In particular, some cases have dealt with the issue of when a notice of claim can be supported by an interest a partner claims in a trust under which the other partner is a beneficiary: see *H v JDVC* [2015] NZCA 213. There has also been uncertainty about whether a partner can register a caveat as an alternative to a notice of claim. This point appears to have been largely resolved in the decision *Huang v Chung* [2015] NZHC 686, (2015) 30 FRNZ 188. The High Court at [18]–[22] explained how the two procedures are conceptually distinct. A caveat may only be supported if the party lodging the caveat has an existing proprietary claim to the land. A notice of claim, on the other hand, supports a partner's inchoate rights to the land which will only be enjoyed once a court grants orders dividing the land under the Property (Relationships) Act 1976 (PRA). Consequently, a right under the PRA was essentially a future interest which could not be used to support a caveat.

67 We note, though, that land is distinct because it is already subject to a registration system under the Land Transfer Act 2017. It is therefore more practical for a partner to register a notice of interest in respect of land than it is in relation to other types of property that are not subject to a registration system.

68 See above at paragraphs [31.47]–[31.51].

is to be void against affected creditors. This interpretation raises several potential issues.

31.68 The first issue is that a two year limitation period may disadvantage creditors. Many creditors will be unaware that partners have entered an agreement until after the period has expired.[69] This will primarily disadvantage unsecured creditors because if partners dealt with security in a prejudicial way it would breach the security agreement and creditors in those cases would have rights under the agreement.

31.69 Creditors may not have been creditors when the relevant agreement was made. Involuntary creditors, as in *Felton v Johnson*, must first obtain judgment against the partner or partners.[70] That may take months, if not years. The partners may also conceal their agreement. We expect that an agreement that is prejudicial to creditors would often come to light during debt recovery proceedings or after a partner's bankruptcy. Consequently, although the agreement has a prejudicial effect when made, the adverse consequences may not manifest until much later.[71] The two year limitation period is likely to restrict the effectiveness of section 47(2) and therefore limit the redress available for creditors.[72]

31.70 Section 47(2) is different to the position under general insolvency law. Sections 194 and 195 of the Insolvency Act 2006 provide that the Official Assignee may cancel transactions that prefer one creditor over others when a debtor is insolvent. The transaction must be made within two years immediately before the person who made the transaction was adjudicated bankrupt. Under these provisions, affected creditors benefit from the cancellation of the transaction without having to bring proceedings within a strict time limit as they do under section 47(2) of the PRA.[73] General insolvency law is arguably more favourable to creditors.

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69 This point was raised by Young J in his dissenting judgment in the Court of Appeal decision *Johnson v Felton* [2006] 3 NZLR 475 (CA) at [67] and [92].

70 See for example *Ministry of Education v M* [2017] NZHC 47 where the employer creditor applied to the court under s 47 of the Property (Relationships) Act 1976 to have the separation agreement declared void. The creditor only applied after the wife had been convicted of criminal wrongdoing having stolen $170,000 from her employer.

71 *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 322 per Richardson J.

72 The creditors' right of recovery under s 47(1) of the Property (Relationships) Act 1976 is not time-bound in the same way. However, we believe that it will be difficult in many cases for creditors to prove that the partners intended to defeat their rights when entering an agreement or transaction. Section 47(2) is therefore likely to be a much more useful remedy and this usefulness is severely restricted by the imposition of a two year limitation period.

73 Elizabeth Tobeck "Relationship Property and Creditors" [2006] NZLJ 413 at 416.

31.71 The policy basis for why section 47(2) grants creditors lesser rights than they enjoy under general insolvency law is unclear. The position taken in section 47(2) contradicts the position taken in section 20A of the PRA that creditors of either or both partners continue to enjoy rights as if the PRA had not been passed.

31.72 There may, however, be good reasons to limit creditors' rights when it comes to setting aside partners' agreements. Partners will want confidence that the agreements they reach with one another can be relied upon. A limitation period for setting aside an agreement ensures it cannot be challenged after the period has elapsed. Moreover, there may be situations where a partner's rights to relationship property are more deserving than those of unsecured creditors. For example, a partner may have devoted years of service to the relationship by caring for children, maintaining a home, and supporting the other partner in his or her career. That partner may have a stronger moral claim to items of relationship property than, say, an unpaid supplier in relation to the other partner's separate affairs.[74] The unpaid supplier could have contracted to take security regarding the debt but may have chosen not to. The partner may have contributed, in both a tangible and intangible way, greater value to the property he or she takes under the agreement than the supplier.

31.73 The second potential difficulty with section 47(2) concerns more practical issues. The Supreme Court in *Felton v Johnson* was uncertain how the limitation period would apply to the Official Assignee.[75] The Court held that a creditor could challenge an agreement within the two year limitation period by bringing proceedings under section 47(2) or by seeking to enforce a court judgment against the property which is the subject of the agreement.[76] The Supreme Court said the position of the Official Assignee was a "matter of considerable difficulty".[77] It was unclear whether section 47(2) simply required that the partner be adjudicated bankrupt within the two year period or whether the Official Assignee must take some other step to invoke section 47(2).[78]

74 Although we note that the partner will have the protected interest in the family home under s 20B of the Property (Relationships) Act 1976 which will take priority over the unsecured creditor.

75 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24].

76 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [21].

77 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24].

78 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24].

31.74 It is also uncertain whether and to what extent a claim by the Official Assignee displaces the claims of individual creditors.[79] The High Court partially addressed the issue in *Official Assignee of X (Bankrupt) v Y*.[80] There the Official Assignee sought to set aside an agreement between the partners. The High Court accepted that the partners' agreement had the effect of defeating creditors and held that section 47(2) applied. The Official Assignee had issued proceedings shortly before the expiry of the two year period so there was no issue as to what steps the Official Assignee needed to have taken to come within the two year limitation period. Nevertheless, there was an issue as to on whose behalf the Official Assignee could seek to hold the partners' agreement void. The Official Assignee sought to recover from the non-bankrupt partner an amount to meet the claims of several of the bankrupt's creditors, including its own costs. The High Court held that the agreement was only void against creditors with claims within the two year period. The creditors whose claims arose afterwards could not be said to have had their interests prejudiced or defeated by the partners' agreement.

31.75 The Supreme Court concluded its judgment in *Felton v Johnson* by recommending legislative attention to section 47.[81] While very few cases have come before the courts, meaning the adequacy of section 47(2) has not been tested outside *Felton v Johnson*, we agree that legislative attention is necessary. We consider options for reform below.

CONSULTATION QUESTION

K6 Should section 47(2) continue to operate as a limitation period so that creditors must challenge an agreement within a two year period after the agreement was made? Why/why not?

Options for reform of section 47(2)

31.76 There are several forms an amendment to section 47 could take.

79 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24].

80 *Official Assignee of X (Bankrupt) v Y* [2017] NZHC 1117, [2017] NZFLR 320.

81 *Felton v Johnson* [2006] NZSC 31, [2006] 3 NZLR 475 at [24].

Option 1: Remove section 47 from the PRA

31.77 A fairly extreme option is for section 47 to be omitted from the PRA. Instead, the ordinary rules under the general law of insolvency would apply.[82] Agreements or transactions made with intent to prejudice creditors could be dealt with under Subpart 6 of Part 6 of the Property Law Act 2007. Agreements or transactions with the effect of defeating creditors could be dealt with under sections 194 and 195 of the Insolvency Act 2006. By removing section 47 and relying on the general law of insolvency, the law would arguably be brought into line with the PRA's general position that creditors' rights continue as if the PRA had not been passed. The uncertainties and difficulties with sections 47(2) and 47(3) would also cease to exist.

31.78 The general law of insolvency, however, gives no additional protections to partners. There is no recognition of the particular interest a partner might have under the PRA in the property which is the subject of an agreement or transaction between the partners. For example, consideration would need to be given as to whether the provisions of the Property Law Act 2007 or the Insolvency Act 2006 should be subject to the PRA's protected interest provisions, and if so, how.

Option 2: Amend section 47(2)

31.79 Section 47 could be retained but several possible amendments to section 47(2) could be made.

31.80 First, section 47(2) could be amended so that:

(a) the meaning of the two year period is made explicit;

(b) the steps the Official Assignee must take to challenge an agreement are set out; and

(c) if the Official Assignee intervenes, the effect that would have on the position of other creditors is clarified.

31.81 Second, section 47(2) could clarify that the period is a limitation period, as determined by the Supreme Court in *Felton v Johnson*. Alternatively, section 47(2) could be harmonised with the Insolvency Act 2006 by providing that an agreement or

82 Elizabeth Tobeck "Relationship Property and Creditors" [2006] NZLJ 413 at 414–416.

transaction could be challenged if it is made within the two year period prior to a partner's bankruptcy.

CONSULTATION QUESTION

K7 What is the best option for the reform of section 47(2)? Are there other preferable options we have not identified?

The effect of section 47(3) is unclear

31.82 Section 47(3) provides that an agreement made for the purpose of settling the partners' rights under the PRA[83] is "deemed to have been made for valuable consideration" for the purposes of section 47(2). The term "consideration" means the exchange of a right or benefit in return for what the giver obtains under the contract.

31.83 Section 47(3) was introduced to the PRA during the 2001 amendments. It was based on a recommendation made by the New Zealand Law Society to the Parliamentary select committee.[84] The Law Society said that creditor's interests needed to be balanced against the partners' PRA rights. It explained that when partners have separated, their PRA rights will have accrued and, in those circumstances, their position against creditors should be strengthened. Creditors and the Official Assignee should still be able to challenge the validity of transactions between partners made for inadequate consideration. The select committee accepted amendment was required to presume that a settlement agreement entered when the partners had separated was made for consideration.[85] It added that the adequacy of the consideration would still be a matter for a court.[86]

31.84 The practical effect of section 47(3) is, however, unclear:

(a) First, section 21K already provides that all contracting out agreements are "taken to have been made for

83 It is unclear whether the agreements referred to in s 47(3) of the Property (Relationships) Act 1976 are settlement agreements under s 21A or include agreements under both s 21 and s 21A. The use of the word "settlement" suggests that the agreement has been entered under s 21A. Also, s 47(3)(a) provides that the agreement must have been entered when "a situation described in section 25(2) has arisen", namely the partners have ceased to live together. Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) says at [PRA 21A.01]:

> *In contrast to a contracting out agreement [under s 21] which is entered into prior to, or during a relationship, an agreement under s 21A is entered into between the partners after a relationship has ended … The purpose of a separation agreement [under s 21A] is to record and formalise the division of property at the end of a relationship.*

84 Matrimonial Property Amendment Bill 1999 (109-2) at xi–xii.

85 Matrimonial Property Amendment Bill 1999 (109-2) at xii.

86 Matrimonial Property Amendment Bill 1999 (109-2) at xii.

valuable consideration".[87] It is unclear whether section 47(3) means something different to section 21K. If it has the same meaning, section 47(3) may be redundant.[88]

(b) Second, regardless of section 47(3), creditors must always show that consideration is inadequate. Section 47(2) is concerned with agreements that deprive partners of property in a way that defeats unsecured creditors. An agreement for adequate consideration will not have that effect because it does not reduce the value of the partner's property.[89] If section 47(3) was intended to require creditors to prove the inadequacy of consideration it may be redundant because creditors already bear that onus under section 47(2).

(c) Third, it is unclear why deeming agreements to be for "valuable consideration" is relevant to section 47(2). Courts have said that the term "valuable consideration" can be less than the actual value of the property under consideration.[90] However, section 47(2) is only concerned with whether an agreement was for adequate consideration. Whether an agreement is made for valuable consideration or not is irrelevant.[91] An agreement can be deemed to be for valuable consideration but still defeat creditors.

Options for the reform of section 47(3)

31.85 Before we consider options for the reform of section 47(3), it is first necessary to ask whether the basis for the provision is sound. Section 47(3) seeks to strengthen the rights of partners who have separated and negotiated a settlement of their relationship

87 It is likely that the agreements referred to in s 47(3)(b) of the Property (Relationships) Act 1976 are settlement agreements within the meaning of s 21A. If an agreement purported to be a settlement agreement but did not comply with s 21A nor the requirements of s 21F, it would likely have no effect under s 21M.

88 Section 21K(2) does, however, have the additional purpose of stating that, even though an agreement is deemed to be for consideration, it does not affect whether a disposition of property is a gift for the purposes of the Estate and Gift Duties Act 1968.

89 That is because if under the agreement the partner has received the same value as consideration for the property he or she relinquished, the creditors will not be deprived of rights to that value: *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 323 per Richardson J.

90 *Welch v Official Assignee* [1998] 2 NZLR 8 (CA) at 12.

91 In *Official Assignee v Y* [2017] NZHC 1117, [2017] NZFLR 320 at [64] the High Court found that although the settlement agreement reached between the partners constituted a "mutually satisfying compromise which met their shared and individual interests", that was not the analysis called for by s 47(2).

property affairs in order to achieve an appropriate balance with creditor's interests (see paragraph 31.83). If the partners' PRA rights have crystallised because they have separated, to what extent should those rights rank above those of creditors?

31.86 We briefly set out some considerations for and against the basis for section 47(3). In this context we consider only the unsecured creditors of one partner. Secured creditors should not lose rights to secured property by section 46. Section 47(1) should also remain unaffected. We are only concerned with agreements made in good faith that affect creditors for the purposes of section 47(2).

31.87 If a partner's PRA rights are based on the contributions he or she makes to the relationship, it would seem arbitrary to provide partners who have separated with greater rights than those who have not. Contributions to the relationship exist in either scenario. Also, any priority given to the rights of partners who have separated would be a significant qualification to the rule in section 20A that creditors have the same rights as if the PRA had not been enacted.

31.88 An agreement may provide benefits to the partners and their creditors even if the agreement does not involve an exchange of property of equal value. Take these examples, where the partners may agree that:

(a) one partner retains assets which allow him or her to continue a business without interruption and the other partner takes additional property in compensation;

(b) the partner who cares for the children takes a greater share of property to recognise that he or she is not free to continue employment and earn income;

(c) the partner who moves out of the family home and relocates to a different neighbourhood takes a greater share of property to compensate for the inconvenience and upheaval of moving;

(d) the partner who gives up property to which he or she had significant sentimental attachment (such as a pet, painting or home) receives additional property as compensation;

(e) the partner who takes property that cannot be accurately valued because the value fluctuates (such as foreign currency or shares in a publicly listed company) receives additional property to compensate for the valuation risk.

31.89 In each scenario one partner is deprived of property which may affect the rights of his or her creditors. The bargain should, however, not be lightly overturned because:

(a) the partner may receive many advantages that indirectly benefit creditors, such as allowing a partner to retain business assets so his or her business and income stream can continue without interruption;

(b) creditors will often benefit from the stability and certainty a settlement agreement provides as opposed to the costs and uncertainty of a dispute; and

(c) a partner may accept significant burdens in order to receive a greater share of property, such as child care responsibilities. It is doubly hard on that partner (and the children) if they are left with the burdens under the agreement but the benefits are taken from them to satisfy creditors' claims.

CONSULTATION QUESTIONS

K8 Should a partner's rights under a settlement agreement take priority over the rights of unsecured creditors for the purposes of section 47(2)? If so, why?

K9 Are there any circumstances in which a partner's rights should or should not take priority?

Option 1: Remove section 47(3)

31.90 If a partner's rights under a section 21A settlement agreement should not take priority over the rights of the other partner's unsecured creditors, then the clear option is to remove section 47(3) from the PRA. Currently the provision seems to serve no useful purpose. If section 47(3) was removed, the amendment would be insignificant as it would simply remove a provision with no practical effect.

Option 2: Rely on general insolvency law

31.91 If a partner's rights should prevail against creditors, one option is to replace section 47(3) with the defences provided under insolvency law. Under the Insolvency Act 2006, a court must not order recovery from a person who receives property if the recipient:[92]

(a) received the property in good faith from the bankrupt;

(b) did not suspect the person who provided the property was insolvent; and

(c) gave value for the property or altered his or her position in the reasonably held belief that the transfer of the property was valid and would not be cancelled.

31.92 Such a provision could be brought into section 47 as a defence to section 47(2). That would mean a partner who provided value or altered his or her position could take advantage of the defence even if he or she did not provide adequate consideration.

31.93 Alternatively, we have considered whether sections 47(1) and 47(2) should be reformed by removing section 47 from the PRA entirely. Instead, the general irregular transaction provisions of insolvency law could apply. If general insolvency law applied then the defence would also apply.

Option 3: Amend section 47(2) so a court may treat a settlement agreement as void

31.94 Section 47(2) could be amended so a court may set aside a settlement agreement (in whole or in part) that has the effect of defeating creditors. The purpose of giving a court discretion would be to protect agreements if, for example:

(a) the agreement conferred benefits on creditors even if those benefits did not equate to the actual value of the property the debtor partner relinquished under the agreement; or

(b) the non-debtor partner (or the partners' children) would suffer hardship or injustice if the agreement was defeated.

92 Insolvency Act 2006, s 208.

31.95 Section 47(3) would then be removed because protection for partners would be exercised through the court's discretion under section 47(2).

Option 4: Increase the protected interest when the partners have separated

31.96 When determining whether an agreement has had the effect of defeating creditors for the purposes of section 47(2), section 20A is important. Section 20A provides that creditors' rights continue as if the PRA had not been enacted. If a partner transfers his or her property to the other partner under a settlement agreement, it is no defence to section 47(2) to say the other partner could have that property under the PRA.

31.97 The only exception is a partner's protected interest in the family home.[93] The rule in section 20A is subject to the protected interest. That means that an agreement will not have the effect of defeating unsecured creditors (and therefore cannot be void) if it transfers only the value of the other partner's protected interest in the family home.[94] Likewise, if a partner transfers more of his or her property to the other partner through an agreement, the agreement will only be void under section 47(2) in respect of any amount above the other partner's protected interest.[95]

31.98 One option for reform is to provide partners who have separated with a greater protected interest. This would require amendments to the PRA's provisions regarding the protected interest and amendments to the Property (Relationships) Specified Sum Order 2002.

CONSULTATION QUESTIONS

K10 Which option for reform do you prefer? Why?

K11 Are there viable options for reform that we have not considered?

93 Property (Relationships) Act 1976, s 20A.

94 See discussion in *Neill v Official Assignee* [1995] 2 NZLR 318 (CA) at 322–323 per Richardson J.

95 The protected interest will, however, only apply in respect of the partners' family home: Property (Relationships) Act 1976, s 20(B). If no home exists, the protected interest may attach to other relationship property: Property (Relationships) At 1976, ss 20B(1)(a)–20B(1)(c).

Part L – What should happen when people or property have a link to another country?

Chapter 32 – Cross-border issues and the PRA

Introduction

32.1 In an increasingly globalised world, property matters under the PRA are more likely to be complicated by a "cross-border" element. One partner may have a connection with another country or an item of disputed property may be located overseas. This is a growing phenomenon due to increased international mobility,[1] rising numbers of "international couples"[2] (where the partners come from different countries) and globalisation enabling the ownership of property in other countries.

32.2 Cross-border elements create additional issues that do not arise where the property dispute is confined to New Zealand. To properly resolve such issues, the partners, their lawyers and the courts involved must identify and understand private international law and the effect of sections 7 and 7A of the PRA.

32.3 This chapter summarises the current law that applies where cross-border elements are present in property matters under the PRA. We use two case studies to illustrate why sections 7 and 7A are problematic and should, in our preliminary view, be reformed. We identify three key questions that must be addressed to effectively deal with PRA matters involving a cross-border element:

(a) When should the PRA apply?

(b) When will a New Zealand court decide the matter?

(c) How and where can a remedy be enforced?

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1 In New Zealand there are statistics that show the rise in net migration into New Zealand. In the year to 31 March 2017 the net gain from immigration rose to 71,932 while the number of migrants arriving was 129,500. This was a new annual record: Statistics New Zealand "Migrant arrivals at new record of 129,500 a year" (press release, 26 April 2017).

2 Although we do not have statistics for New Zealand, a glance at figures from overseas indicates the strong trend in couples where the partners are from different countries. For example, in 2011 the European Commission identified 16 million married couples in the European Union (EU) alone that lived in a country other than their own or owned property in another country: European Commission "Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships" COM (2016) 108 def. In Eurostat's annual demography data collection it was found that marriages involving at least one foreigner accounted for 11 per cent of all marriages in the EU: Eurostat *People in the EU: Who We Are and How Do We Live?* (European Union, 2015) at 91.

32.4 Chapter 33 then looks at possible approaches to reform.

32.5 Cross-border issues under the PRA may arise on the death of partner as well as on separation. We discuss in Part M how the PRA applies on death. The discussion in this part focuses on the context of separation but we would welcome the identification of any particular cross-border issues that arise on the death of a partner.

What are cross-border issues in the PRA context?

32.6 Cross-border issues arise where either one or both partners, or their property, is located outside New Zealand or where the partners and property are in New Zealand but the partners have a strong connection to another country. The property may be movable (such as money or shares in a company) or immovable (like land).[3]

32.7 One example might be a New Zealand couple who returned to New Zealand after their "OE" (overseas experience) but kept their apartment in London as an investment. Another example would be a New Zealand couple owning a holiday apartment or time share in Australia or the Pacific Islands. Similarly an Australian couple may have purchased a holiday house in Queenstown, or a Dutch couple may have relocated to New Zealand for a few years for work and bought a house in New Zealand while keeping all their other property in the Netherlands. The overseas relocation of formerly New Zealand-based companies can mean that New Zealanders who have never even travelled abroad can find themselves owning assets abroad in shares in an overseas company.

32.8 As more people travel overseas for work and leisure, the chances of forming a relationship with someone from another country have increased. It is easier to live and work abroad for a short period while still maintaining the family home and chattels in New Zealand. New Zealand is also an attractive destination for families wanting to immigrate. Partners coming from other countries may have signed an agreement in their country of origin that sets out what should happen to their property if they

3 See discussion at paragraphs [32.35] to [32.38].

separate. The question of whether or not such an agreement is valid in New Zealand is one of the many potential cross-border issues that might arise.

The intersection of private international law and the PRA

32.9 Principles of private international law (PIL) are used to resolve cross-border issues that arise in PRA proceedings. PIL rules determine which country has jurisdiction to hear a dispute and which country's law applies. The outcome of the proceedings can be very different depending on the answer to these two questions, and might be very different to what one or both partners reasonably expected would happen if they separated. It may also mean that the outcome looks nothing like what would happen under the PRA in a purely domestic context.

32.10 The policy of the PRA is a just division of property.[4] A just division is generally achieved through an equal division of the pool of relationship property. Each partner is entitled to an equal share of the relationship property as a result of the equal contributions each makes to the relationship. Cross-border issues can complicate this approach.

32.11 An example helps illustrate this. Partner A and partner B are New Zealanders and live in New Zealand. They have separated and are fighting about an apartment in France in the name of partner A. Partner B claims the apartment is relationship property. If the apartment was in New Zealand it would probably be relationship property and partner B would be entitled to half. Under the rules of PIL, however, a New Zealand court cannot make an order relating to that apartment. This is because the apartment comes within the jurisdiction of France. Making an order about the apartment would be seen to encroach on the sovereign jurisdiction (the right to make its own laws) of France and its courts.[5] To ensure a just division of relationship property it might be anticipated that the New Zealand court could therefore give

4 See Chapter 3 of this Issues Paper for a discussion of the policy and principles of the Property (Relationships) Act 1976.

5 Chan notes that following the decision of *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628 English courts can make financial orders even after divorce and financial orders have been made in another jurisdiction. Chan suggests it may be possible for a financial order made under the Property (Relationships) Act 1976 to be supplemented by an order by the English courts to produce a "two jurisdiction" result: see Anita Chan "Section 21 and 21A Agreements – International Issues" (paper presented to the New Zealand Law Society Family Law Conference, November 2011) 347 at 355.

partner B more of the relationship property in New Zealand to compensate for the apartment in France. The Court of Appeal however has rejected the argument that compensation can be paid from the relationship property pool in recognition of a party's interest in foreign immovable property because of the concern that this is effectively an interference with France's sovereignty.[6] This illustrates how the rules of PIL can affect the PRA and, sometimes, take priority. Layering the rules of PIL over the PRA may lead to a result that is not consistent with the PRA's policy of a just division of relationship property.

32.12 There is nothing extraordinary in the fact that the PRA must interact with the rules of PIL. This happens in many areas of domestic law. The question in Part L is whether the right balance is struck to ensure the rules of PIL are respected while also giving effect to the policy of the PRA to the greatest extent possible. As with cross-border issues in all areas of law, there needs to be accommodation of both PIL and the relevant domestic law.

32.13 Our preliminary view is that the objectives of the legal framework where cross-border issues arise in the PRA context should be to:

(a) provide clear answers to the three questions set out at paragraph 32.3;

(b) ensure outcomes are consistent with core New Zealand public policy (usually unwritten principles that underlie New Zealand's laws such as the equality of men and women); and

(c) reach an outcome in line with partners' reasonable expectations (that the outcome is either in accordance with the law and policy of the country that has the closest connection to the relationship or in accordance with the partners' intentions as expressed in a valid written agreement).

32.14 This view is based on our preliminary consultation and research and is informed by, and consistent with, the policy and principles of the PRA as discussed in Chapter 3 of this Issues Paper. As they

6 In *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA) the Court of Appeal held that an order that gave the wife a greater share of relationship property in New Zealand if she signed a document forgoing any claim to property in Sri Lanka owned by the husband was in breach of s 7 as it effectively made orders relating to foreign immovable property. This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC). At the same time the High Court in *Shandil* distinguished *Walker v Walker* [1983] NZLR 560 (CA) where Richardson J in the minority took the view that while the Court cannot exercise jurisdiction over the foreign immovable property (the definition of movable and immovable property is discussed below), it could classify that property as relationship property and make a compensatory adjustment from the pool of New Zealand property.

stand, sections 7 and 7A of the PRA do not properly implement some of these principles.

What is private international law?

32.15 Before identifying the specific issues that arise when PIL applies to PRA matters, it is important to have an understanding of what PIL is.[7] PIL is the law that deals with problems that arise because the dispute, transaction or relationship has a connection with more than one country. PIL seeks answers to the three key questions that arise when there is a link with more than one country:

(a) Which country's law applies to resolve the particular dispute?

(b) Which court will apply the law and resolve the dispute?

(c) Can the judgment in one country be given effect in another country and, if so, how?

32.16 PIL comprises a mix of general PIL principles arising from case law (for example the principle that one country won't make an order about land in another country), specific laws set out in the domestic laws of each country (for example sections 7 and 7A of the PRA) and bilateral and multilateral treaties between countries. This means that "PIL" as a body of law is different in every country.

32.17 PIL helps us answer the three key questions that arise in New Zealand cross-border disputes dealing with relationship property.

Choice of law: Which country's law applies to resolve a particular dispute?

32.18 A New Zealand court may apply the law of another country. Likewise, a court in another country could in certain circumstances apply the PRA.

32.19 There is no body of PIL rules that every court in every country will apply. The laws or rules that help a New Zealand court determine which law it should apply are New Zealand's laws or rules.

7 This discussion is based on David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 1–14.

Where there are cross-border issues in disputes over relationship property, the New Zealand courts will look to sections 7 and 7A of the PRA to determine if it is the PRA or the law of another country that must be applied to resolve the dispute.

32.20 If a New Zealand court needs to apply the law of the other country evidentiary issues can lengthen proceedings and increase costs. For example, the courts may require experts to help them interpret what the law of the other country means.

Jurisdiction: Which court(s) decide a dispute?

32.21 The question of which law applies (choice of law) is separate to the question of which court decides a dispute (jurisdiction of the court). The set of PIL rules that determine whether a New Zealand court has jurisdiction are unique to New Zealand. Because each country has its own set of PIL rules there may be proceedings in the courts of two countries, hearing the same matter simultaneously.

32.22 Just because a New Zealand court is exercising jurisdiction, it does not mean the court is applying New Zealand law. As we discuss throughout Part L, sometimes a New Zealand court will apply the law of another country.

Enforcement of judgments and orders: in New Zealand and in other countries

32.23 Once a court has given a judgment or made an order, the question then arises of how and where that judgment or order will be enforced.[8] Judgments and orders made by foreign courts can be brought to New Zealand to be enforced against New Zealand residents and businesses and their New Zealand-based assets.[9] A New Zealand court will not impose sanctions for failing to comply with an order made by a foreign court.[10] Instead someone with a foreign judgment in their favour can bring an action in the New

8 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 57–69.

9 Under *Kemp v Kemp* [1996] 2 NZLR 454 (HC) a judgment of a foreign court is to be regarded as final and conclusive in New Zealand. Such a judgment is not examinable on its merits, whether regarding matters of fact or law. There are three exceptions to this outlined at 458 of *Kemp*: (1) where the judgment was obtained by fraud; (2) where enforcement of the judgment would be contrary to local public policy; and (3) where the proceedings in which the judgment was obtained were contrary to natural justice.

10 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 57.

Zealand courts based on the foreign judgment or by registering the judgment under the Reciprocal Enforcement of Judgments Act 1934.[11] We note that "a judgment given by a foreign court in circumstances in which the New Zealand court would itself exercise jurisdiction may not be enforced by the New Zealand court."[12]

32.24 The position relating to the enforceability of New Zealand judgments or orders overseas is different in every country. As a general rule, it is not possible to enforce a non-money order from a New Zealand court in another country (for example an order vesting property that is not money in another person), although the Trans-Tasman Proceedings Act 2010 makes enforcement easier in relation to Australia.[13] Non-money orders from a New Zealand court can be enforced in Commonwealth countries or in the United States but certain prerequisites must be met. New Zealand is not currently party to any multilateral treaties that relate to the reciprocal enforcement of judgments in other countries.

32.25 The question of how and where a judgment or order made in a New Zealand court would be enforced in a foreign country is therefore a real concern.

11 The Reciprocal Enforcement of Judgments Act 1934 streamlines the process for judgments from certain countries to be enforced (there is also the procedure in s 56 of the Judicature Act 1908 in certain circumstances). The Trans-Tasman Proceedings Act 2010 allows a range of Australian judgments to be enforced in New Zealand under the Reciprocal Enforcement of Judgments Act 1934. Where the dispute relates to a country other than New Zealand the process is set out in the common law.

12 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 58.

13 Under the Trans-Tasman Proceedings Act 2010 "most final judgments of Australian courts and tribunals will be able to be recognised and enforced in New Zealand": David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 84. While the Act applies to both money and non-money orders, under s 61(2) of the Trans-Tasman Proceedings Act 2010 a New Zealand court must set aside registration of a judgment under the Reciprocal Enforcement of Judgments Act 1934 if the judgment was given on a matter relating to immovable property or was about movable property that was not located in Australia at the time of the judgment.

How does New Zealand law deal with cross-border issues in relationship property matters?

Historical background

32.26 When recommending, in 1972, a "single, clear and comprehensive statute to regulate matrimonial property in New Zealand", a committee comprising members of the Ministry of Justice and the New Zealand Law Society (Special Committee) considered there was a place in such a statute to address matrimonial property issues with a cross-border element to them.[14] The Special Committee stated that: [15]

> *…there may be value in laying down what might be termed conflict of laws or jurisdictional rules, in the interests of convenience of reference, of avoiding the possibility of their being overlooked, and of removing certain obscurities and inconsistencies in the cases…What we have in mind is not a codification and revision of the rules of private international law on the subject, but the more modest aim of defining the applicability of the New Zealand legislation.*

32.27 Section 7 of the Matrimonial Property Act 1976 applied to immovable property in New Zealand and movable property in New Zealand or elsewhere if either spouse was domiciled in New Zealand. It enacted the long standing rule that: [16]

> *…where proceedings concern land the courts of the country where the land is situated have exclusive jurisdiction. The underlying rationale for this rule is the reality that a court in one country is not in a position to make an enforceable judgment in respect of land in another country.*

32.28 Whether section 7 should be amended to address immovable property located overseas was considered in the lead up to the 2001 amendments.[17] Submissions received by the Parliamentary

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14 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at [3].

15 Special Committee on Matrimonial Property *Matrimonial Property: Report of a Special Committee: Presented to the Minister of Justice in June 1972* (Department of Justice, June 1972) at [46].

16 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xv.

17 Movable and immovable property are not defined in the Property (Relationships) Act 1976.

select committee suggested that all overseas property should form part of the property pool capable of division under the PRA.[18]

32.29 The Family Law Section of the New Zealand Law Society submitted that not including foreign immovable property could:[19]

> *…cause hardship and injustice. Obviously it presents the New Zealand party with the prospect of being obliged to litigate over immovable property overseas….The result is that parties are faced with two sets of proceedings, or more likely, one set of proceedings and substantial concessions being given in relation to the property overseas. Basically it becomes uneconomic to pursue it. Clearly this can be extremely unfair.*

32.30 However, while sharing the concerns about problems presented to spouses when cross-border issues arise, the Family Law Section did not advocate fundamental change to the legislation at that time.[20]

32.31 The Principal Family Court Judge at the time, Judge Mahony, submitted that "the Court should be given greater or clearer jurisdiction to take into account real property owned by the parties out of the jurisdiction."[21] No doubt aware of the issues related to extending section 7 to immovable property, the Judge said that "[i]f the Court has no power to order a sale of that property there is no reason why the Court could not take the value of it into account."[22]

32.32 The Ministry of Justice was not, however, in favour of amending section 7 to include foreign immovable property, citing the risk of conflicting judgments in different countries over the same property; the potential to impact the undisclosed rights of third parties such as a mortgagee or potential constructive trust claimant; the difficulty of enforcement; and the disharmony between the rules relating to immovable property in different countries.[23] Finally the Ministry of Justice noted the ongoing work between New Zealand and Australian officials in relation to

18 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi.

19 "Comments on the Matrimonial Property Act 1976 from the Family Law Section of the New Zealand Law Society" (5 May 1999) at 2.

20 "Comments on the Matrimonial Property Act 1976 from the Family Law Section of the New Zealand Law Society" (5 May 1999) at 2; and Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi.

21 Principal Judge Mahony "Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998" at [7.7].

22 Principal Judge Mahony "Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998" at [7.7].

23 Ministry of Justice *Matrimonial Property Amendment Bill – Foreign Immovables and Māori Land* (29 April 1999).

harmonising choice of law PIL rules between Australia and New Zealand. The Ministry considered that changes to section 7 to include all immovable property risked prejudicing this work and creating future anomalies.[24] Also, partners were not precluded from signing an agreement in writing that New Zealand legislation would apply to foreign immovable property.[25]

32.33 The Parliamentary select committee did not recommend any amendment to the immovable rule in section 7.[26] In 2001, section 7 was replaced with a new section 7 and section 7A, but these made no substantive changes to the law. These sections set out the current law relating to relationship property disputes that have a cross-border element. As with the PRA more broadly, partners can opt out of these rules.[27]

Section 7

32.34 Section 7 provides:

> **7 Application to movable or immovable property**
>
> (1) This Act applies to immovable property that is situated in New Zealand.
>
> (2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand—
>
> (a) at the date of an application made under this Act; or
>
> (b) at the date of any agreement between the spouses or partners relating to the division of their property; or
>
> (c) at the date of his or her death.
>
> (3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor

24 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi; and Ministry of Justice Matrimonial Property Amendment Bill – Foreign Immovables and Māori Land (29 April 1999).

25 Letter from the Government Administration Committee to the Family Law Section of the New Zealand Law Society regarding comment sought on committee consideration of various sections of the Matrimonial Property Act 1976 (29 March 1999).

26 Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xvi. Note the Minority view of Labour members was that the New Zealand courts ought to be able to take judicial notice of the express intentions of the parties with respect to overseas-owned property in determining the division of matrimonial property: Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at xix.

27 Pursuant to ss 21 or 7A of the Property (Relationships) Act 1976.

> resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

32.35 Under section 7(1), the PRA applies to all immovable property situated in New Zealand regardless of where the partners are domiciled or resident.[28] The natural consequence of section 7(1) is that the PRA does *not* apply to immovable property situated outside New Zealand.[29] Immovable property outside New Zealand will be dealt with by the law of the country where the property is located.

32.36 Section 7(2) states that the PRA covers all movable property (if it is in New Zealand or if the movable property is located overseas but one partner is domiciled in New Zealand).

32.37 Section 7 refers to "domicile" which is a term used elsewhere in this part. Domicile relates to a person's permanent home country, which may not be where the person physically resides at a certain point. In section 9 of the Domicile Act 1976 domicile refers to an intention of making New Zealand the person's permanent home.[30] Therefore an individual may live in New Zealand for many years without it being her or his domicile.

32.38 Where neither partner is domiciled in New Zealand the PRA will only apply to the partner's movable property if the partners expressly agree in writing.[31] Under section 7(3), however, a court may decline to make an order in respect of any movable property

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28 Property (Relationships) Act 1976 (PRA), s 7(1) subject to s 7A(2). In *Howson v Howson* HC Hamilton M52/01, 22 August 2002 the parties had been resident in Australia throughout their relationship. Property proceedings were underway in the Family Court of Australia when the wife issued proceedings in New Zealand under the PRA, relating to the sale and disposition of the proceeds of sale of land owned in New Zealand by the couple as tenants in common in equal shares. The High Court held that it had jurisdiction to hear the question of whether the husband could be reimbursed to compensate for post-separation contributions made to the property by way of maintenance and paying the principal on the loan. The Court did not, however, consider that it could examine the status of a relationship debt (by way of a loan to the husband to buy the property), which the Court considered should be determined by the Australian courts along with other relationship property matters.

29 Unless the parties have agreed in writing under s 7A(1) that the Property (Relationships) Act 1976 is to apply. A New Zealand court may also be required to consider foreign immovable property in a claim made other than under the Property (Relationships) Act 1976, for example, if a constructive trust is claimed over property owned overseas.

30 The domicile that a person has after the commencement of the Act is determined with reference to the Domicile Act 1976, notably s 9 which sets out the rules about acquiring New Zealand domicile. It provides that:

> A person acquires a new domicile in a country at a particular time if, immediately before that time,—
>
> (a) he is not domiciled in that country; and
>
> (b) he is capable of having an independent domicile; and
>
> (c) he is in that country; and
>
> (d) he intends to live indefinitely in that country.

Section 5 of the Domicile Act 1976 also abolished the rule that a wife's domicile depended on that of her husband.

31 Property (Relationships) Act 1976, s 7A(1).

situated outside New Zealand.[32] This may happen, for example, if a court concludes that an order would not be capable of being enforced in an overseas jurisdiction.

The classification of property as movable or immovable varies in different countries

32.39 Movable and immovable property is classified differently in different countries.[33] For example, a New Zealand court would accept that a mortgagee's interest in land in the United Kingdom is immovable property,[34] although in New Zealand it would be movable property.[35] Under New Zealand law, whether or not something is movable or immovable is determined with reference to where the property is situated.[36]

32.40 Examples of how New Zealand law treats certain property include:[37]

(a) A debt is situated in the country where the debtor resides; while a judgment debt is situated in the country where the judgment is recorded.

(b) Negotiable instruments and transferable securities are situated where the paper representing the security is located.

(c) Shares in a company incorporated in New Zealand are situated in New Zealand unless registered on a branch register outside New Zealand.[38]

(d) A bank account is at the branch where the account is held.

(e) An interest in trust property is in the country where the trust property is located; but if the beneficiary has only

32 Property (Relationships) Act 1976, s 7.

33 Lawrence Collins (ed) *Dicey, Morris, & Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [22-004].

34 *Re Hoyles* [1911] 1 Ch 179 (CA).

35 *Re O'Neill* [1922] NZLR 468 (SC).

36 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society seminar, August 2012) at 154.

37 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society seminar, August 2012) at 154.

38 *Re Terry (deceased)* [1951] NZLR 30 (SC).

a right of action then the interest is situated where the action may be brought.

(f) Patents and trademarks are situated where they can be transferred according to the law relating to their creation.

32.41 Identifying where the property is situated is more difficult where the property has an intangible quality to it. For example, does a partner's interest in a business reside in the country where the firm is based or where the partner is domiciled?[39] In *Tyson v Tyson* the Family Court held that the husband's Australian pension (which was paid by the Commonwealth of Australia, could not be paid outside Australia, and which under Australian law was not a property right but simply a series of payments) was immovable under Australian law.[40] Because it was immovable property and was not situated in New Zealand, the Matrimonial Property Act 1976 (as it then was) did not apply. In *Fischbach v Bonnar* a German state pension based in Germany was considered a superannuation scheme entitlement under section 2 of the PRA, and the Family Court held that the portion accrued during the relationship was relationship property.[41] The Court considered that it had jurisdiction to make an order in relation to the scheme by virtue of section 7 of the PRA, but also noted that it could decline to do so if it wished under section 7(3).[42]

32.42 If there is no evidence on whether the country where the property is located would classify the property as movable or immovable then in New Zealand the position is assumed to be the same as New Zealand law.[43]

39 In *Haque v Haque (No 2)* (1965) 114 CLR 98 (Cth) the partner's business was held to reside where the firm was based. In *Sudeley (Lord) v Attorney-General* [1897] AC 11 (HL) it was held that a beneficiary's interest in an unadministered estate is located in the same country as the personal representatives of that estate.

40 *Tyson v Tyson* [2000] NZFLR 927 (DC).

41 *Fischbach v Bonnar* [2002] NZFLR 705 (FC).

42 *Fischbach v Bonnar* [2002] NZFLR 705 (FC) at [12]

43 In *M v B* FC North Shore FAM-2009-044-726, 30 April 2010 the dispute related to the right to use an Australian cell phone number. The Family Court concluded with no evidence of the relevant Australian law that Australian law was congruent with New Zealand law and therefore the right was a movable.

At what date should property be classified as movable or immovable property?

32.43 The Family Court has found that the date of hearing is the correct date for classification.[44] The date of classification can be important because property can change between being movable and immovable. Depending on when that change occurred there may be consequences for the division of relationship property. For example in *Shepherd v Shepherd* the property in question was the proceeds from the sale of a farm in Australia that was allegedly bought with relationship property. The farm was sold after an application for the division of relationship property was filed in the Family Court.[45] The proceeds from the sale (movable property) was transferred into the husband's bank account in New Zealand and were within the Court's jurisdiction under section 7(2).[46]

Foreign immovable property and the Moçambique Rule

32.44 As a general rule of PIL, a New Zealand court cannot make a judgment or order relating to foreign immovable property.[47] Disputes over foreign immovable property are to be dealt with under the law in the country in which the property is situated. This is described as the Moçambique Rule and it comes from a decision of the United Kingdom House of Lords in 1893.[48] In a recent decision the UK Supreme Court commented that:[49]

> *…much of the underpinning of the Moçambique rule…has been eroded. All that is left of the Moçambique rule…is that there is no jurisdiction in proceedings for infringement of rights in foreign land where the proceedings are "principally concerned with a question of the title, or the right to possession, of that property."*

32.45 The Moçambique Rule continues to apply in New Zealand, however, two exceptions have been established through case law.

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44 *Shepherd v Shepherd* [2009] NZFLR 226 (HC) at [61].

45 *Shepherd v Shepherd* [2009] NZFLR 226 (HC).

46 *Shepherd v Shepherd* [2009] NZFLR 226 (HC) at [61].

47 Captured in legislation in s 7(1) of the Property (Relationships) Act 1976.

48 *British South Africa Co v Compania de Moçambique* [1893] AC 602 (HL). In *Enright v Fox* (1989) 5 NZFLR 455 (HC) the High Court considered that s 7(1) of the Matrimonial Property Act 1976 by implication excludes foreign immovables from the jurisdiction of the New Zealand courts.

49 *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

The Rule now applies primarily to disputes relating to title or possession of immovable foreign property.[50] The first exception relates to the administration of a deceased estate.[51] The second exception arises where:[52]

> *there exists some personal obligation between the parties arising out of a fiduciary relationship, implied contract or other conduct which, in the view of the Court of equity in this country, would be unconscionable.*

32.46 This second exception emphasises the personal obligation of a party rather than the title to or right of possession of the property. The High Court in *Birch v Birch* said that a New Zealand court has jurisdiction in "cases where one party has inequitably dealt with a foreign immovable" and that "[i]n determining whether there is an equity, the Court considers the question against local and not foreign law".[53] In that case the High Court found that, where the wife had contributed to the equity in property in Australia, the second exception to the Moçambique Rule applied and the Court determined that the wife was entitled to half of the sale proceeds.[54]

32.47 It is unclear to what extent the Moçambique Rule affects relationship property disputes. Some of the historical reasons why overseas immovables are not covered by the PRA are no longer persuasive in our globalised world.[55] We note, however, that the policy behind the rule in PIL that one country will not exercise jurisdiction over immovable property in another country is linked to respect for State sovereignty and this remains an important concern.

50 *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [105].

51 In such cases a New Zealand court can make a judgment or order over the foreign immovable where the deceased was domiciled in New Zealand and his or her estate included New Zealand immovables or movables. In *re Fletcher Deceased* [1921] NZLR 46 (SC) the New Zealand Supreme Court held that it had jurisdiction to interpret a will where there was property in both Tonga and New Zealand. This was justified as an exception to the Moçambique Rule.

52 *Birch v Birch* [2001] NZFLR 653 (HC) at [9].

53 *Birch v Birch* [2001] NZFLR 653 (HC) at [9].

54 *Birch v Birch* [2001] NZFLR 653 (HC) at [51].

55 For example, how to value an overseas property may once have seemed difficult but there are equally difficult questions about how to value, say, shares in overseas businesses. Difficulty of valuation is not of itself a valid reason to exclude immovable property. There is an ongoing issue about enforcement of a judgment or order relating to foreign immovables.

Option for reform: Expressly state in section 7 which exceptions to the Moçambique Rule apply or do not apply in New Zealand

32.48 One option for dealing with the question of foreign immovable property and its exclusion from the pool of relationship property to be divided is to state in the PRA there are certain exceptions which mean that foreign immovable property can be dealt with in the PRA.

32.49 Some have argued that proceedings to enforce an agreement regarding immovable relationship property would come within the exception of actions based on contract or equity between the parties.[56] Proceedings alleging a constructive trust over foreign immovable property are likewise arguably based in equity and therefore within the exception.[57] By analogy a claim to determine an entitlement to relationship property may come within the exception relating to a claim in contract.

32.50 Clearer statutory guidance could help the courts identify whether any exceptions to the Moçambique Rule could apply to what would otherwise be relationship property to be dealt with under the PRA.

CONSULTATION QUESTION

L1 Should there be express statutory reference to exceptions to excluding foreign immovable property from the PRA in keeping with the exceptions to the Moçambique Rule?

Compensating for overseas immovable property

32.51 The majority of the Court of Appeal has rejected the argument that compensation can be paid from the relationship property pool in recognition of one partner's interest in foreign immovable property under the PRA. In *Samarawickrema v Samarawickrema* the Court of Appeal held that an order that gave the wife a greater share of relationship property in New Zealand if she signed a document forgoing any claim to property in Sri Lanka owned by the husband was in breach of section 7 as it effectively made

56 David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 393.

57 David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 393.

orders relating to foreign immovable property.[58] However, where relationship property in New Zealand is used post-separation to acquire the foreign immovable, a compensatory order may be made. For example, partner A uses funds from the partners' joint bank account in New Zealand to buy an apartment in New York after separation but before partner B applies to the court for a division of relationship property under the PRA. Section 18C of the PRA allows a court to compensate partner B from the pool of relationship property. This is because the partner's rights to the New Zealand property existed at separation. These rights are unaffected by the property being transformed into a foreign immovable.

Option for reform: Make provision for a court to compensate one partner for foreign immovable property

32.52 It is all too easy for one partner to avoid accounting for what would be relationship property under the PRA because the property is a foreign immovable. The likely increasing number of partners with an international connection suggests such a scenario is likely to arise more often in the future. An option for reform is to retain the statement in section 7 that the PRA does not apply to foreign immovables but expressly allow a court to compensate a partner for foreign immovable property in relation to which the court cannot make an order.[59] Unless the partner in control of the overseas property provides a personal undertaking to follow a court's directions relating to the property (for which they could then be held accountable for any breach), compensation could be ordered from the pool of relationship property.

32.53 There is an issue whether such a power would be viewed as interfering with the jurisdiction of another court to make a determination in relation to the property. Such a power could also impact on the potential interests of third parties, and might be of minimal value if there is little or no relationship property in New Zealand from which compensation may be ordered.

58 *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA). This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC). At the same time the High Court distinguished *Walker v Walker* [1983] NZLR 560 (HC) where Richardson J in the minority took the view that while the Court cannot exercise jurisdiction over the foreign immovables, it could classify that property as relationship property and make a compensatory adjustment from the pool of New Zealand property.

59 This is similar to the approach taken in British Columbia, where a court can order compensation or the substitution of domestically-based property instead of the foreign-based property: Family Law Act SBC 2011 c 25, s 109(2)(a).

32.54 There are strong policy reasons for allowing a court to compensate one party for foreign immovable property that, had the property been in New Zealand, would be relationship property under the PRA. Compensation is already a feature of the PRA and an important tool to ensure the outcome under the PRA is a just division of property.

32.55 This option would mean that section 7 would not require reform and would remain in line with general principles of PIL (if that was desirable). However, as it stands, excluding foreign immovables in section 7 undermines the purpose of the PRA to provide a just division of relationship property.

CONSULTATION QUESTION

L2 Should provision be made in the PRA to allow a court to order compensation to take into account foreign immovable property?

Section 7A

32.56 Section 7A applies where the parties have made an agreement on what law should be applied to their property. It states that:

> **7A Application where spouses or partners agree**
>
> (1) This Act applies in any case where the spouses or partners agree in writing that it is to apply.
>
> (2) Subject to subsections (1) and (3), this Act does not apply to any relationship property if—
>
> (a) the spouses or partners have agreed, before or at the time their marriage, civil union, or de facto relationship began, that the property law of a country other than New Zealand is to apply to that property; and
>
> (b) the agreement is in writing or is otherwise valid according to the law of that country.
>
> (3) Subsection (2) does not apply if the court determines that the application of the law of the other country under an agreement to which that subsection applies would be contrary to justice or public policy.

32.57 Partners can expressly agree that the PRA will apply, even if neither partner is domiciled in New Zealand. If such an election is made this would cover all immovable and movable property

over which the PRA has jurisdiction. Partners may also expressly agree that the law of another country should be applied. Provided that agreement is valid (see section 7A(2)), the law to be applied by the courts will be that of the stated country. This may require a New Zealand court to apply the law of another country. Under section 7A(3) a New Zealand court can decide not to apply the law of another country if that would be contrary to justice or public policy.[60]

32.58 Where partners agree that the law of a country other than New Zealand may apply, it is important to note that:

(a) Section 7A only relates to agreements made before or at the time their marriage, civil union or de facto relationship began.[61] Atkin points out that this "rule reflects the position in a number of European or European former colonies, whereby on marriage parties may opt for an alternative property regime."[62] However, this is out of step with the increased number of de facto relationships prior to marriage and the entry into property sharing agreements at that stage of the relationship.

(b) The agreement must specify which law is to apply and not simply that New Zealand law is *not* to apply.[63]

(c) The agreement must refer to the "property law" of another country under section 7A(2)(a) yet it is possible that the relevant law of another country is not "property law" but something else, such as family law.

60 For example, it might be contrary to public policy in New Zealand that taonga were dealt with under the law of another country if that law did not result in an outcome consistent with New Zealand law or resulted in taonga being taken overseas or kept overseas. For discussion more generally on the repatriation of taonga see Arapata Hakiwai "He Mana Taonga, He Mana Tangata: Māori Taonga and the Politics of Māori Tribal Identity and Development" (MHS PhD Thesis, Victoria University of Wellington, 2014). In his thesis Hakiwai considered "the role Māori taonga play within contemporary Māori communities as part of tribal self-determination and the advancement of Māori development and identity". The question was researched in the context of taonga held in museums and other institutions in New Zealand and overseas.

61 Property (Relationships) Act 1976, s 7A(1). In *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 the parties entered into an agreement in South Africa after they started living in a de facto relationship but before their marriage. The court stated at [29] that the agreement was therefore outside the scope of s 7A of the Property (Relationships) Act 1976.

62 Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

63 In *Bergner v Nelis* HC Auckland CIV 2004-404-149, 19 December 2005 the husband was Dutch and the wife German and when they married in the Netherlands, the couple signed a prenuptial agreement stating no community of property would be acquired during the marriage (or in other words that property was to be kept separate). The couple separated while living in New Zealand and at that time signed an agreement under s 21 of the Property (Relationships) Act 1976 confirming their Dutch agreement and the application of Dutch law. It was held that the Dutch agreement should not be given effect given that it did not expressly stipulate the applicable law in the agreement.

(d) The agreement need not be valid according to the law of the country where it was made but it needs to be in writing.

(e) An unwritten agreement will be valid if it is also valid according to the law of the country where it was made.

(f) It is unclear whether there can be an implied agreement. This may arise where, for example, a couple gets married and enters into an agreement in a certain country, implying that it is the law of that country that applies to the relationship without an express agreement to the contrary.

(g) The partners may agree to depart from the agreement so that the PRA becomes applicable under section 7A(1).

(h) It is unclear how the court should determine whether the application of the law of another country would be "contrary to justice or public policy." Arguably the older the agreement the more willing the court may be to set it aside if it risks substantially depriving a party of rights to property which would otherwise be available under the PRA.

(i) A court will not take notice of the effect of foreign law, but will seek expert evidence on the point.[64]

(j) An overseas agreement that satisfies Part 6 of the PRA may be upheld under Part 6. An agreement that otherwise falls short may still be upheld under section 21H if the partners have not been materially prejudiced.[65]

What happens when an agreement does not comply with section 7A(2)?

32.59 An agreement made after a relationship is entered into or that does not state which country's law is to apply will not comply with section 7A. This means that if one or both partners acquire immovable property in New Zealand then the PRA will apply to that property (although this does not preclude another country

64 *Koops v Den Blanken* [1998] NZFLR 891 (HC) upheld by the Court of Appeal in *Koops v Den Blanken* (1999) 18 FRNZ 343 (CA).

65 *Stark v Stark* [1996] NZFLR 36 (DC). See also Chapter 30 of this Issues Paper.

finding it also has jurisdiction). If the parties are domiciled in New Zealand then the PRA will also apply to any movable property.[66] If the parties are not domiciled in New Zealand then the PRA will not apply to any movable property in or outside of New Zealand nor immovable property outside New Zealand.

32.60 The concern about agreements that do not comply with section 7A is that partners have organised their affairs in reliance on the agreement made between them. While an agreement may still be upheld under section 21H of the PRA, if this is not possible, then the parties may find themselves bound by the rules of the PRA contrary to their intentions.

32.61 Section 7A(3) allows a New Zealand court to determine that applying the law of another country would be contrary to public policy or justice. In such cases section 7A(2) would not apply and the court would disregard the agreement. There is no statutory guidance on the threshold for establishing that the application of the law of another country would be "contrary to public policy or justice."

32.62 Very few cases provide an indication of how section 7A(3) will be interpreted.[67] We have found one case where section 7A(3) was applied and in that case the threshold of finding the outcome would be contrary to public policy or justice was high.[68] In *P v P* the Family Court refused to recognise a South African pre-nuptial agreement because the agreement amounted to unjust enrichment under New Zealand common law.[69] In that case the parties entered a pre-nuptial agreement in South Africa that identified the value of assets each party brought into the marriage and provided for subsequent division of matrimonial property. Prior to arriving in New Zealand, the parties established a "frozen fund" from which each party might seek repatriation of funds to New Zealand. All investments, bank accounts and other funds were put into a single fund in the name of the husband. This left the wife with no property. The Court held that the South African

66 For a discussion as to "domicile" see paragraph [32.36].

67 In *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005 the High Court said in obiter that it left "open also the extent of the 'public policy' or 'contrary to justice' exceptions set out in s 7A(3) of the [Property (Relationships) Act 1976]" at [25].

68 *P v P* [2000] NZFLR 72 (FC).

69 *P v P* [2000] NZFLR 72 (FC).

agreement was bad for public policy, contrary to justice, unfair and unreasonable, and the Court would not uphold it.[70]

What happens when the current law is applied?

32.63 In this section we discuss what the current law in sections 7 and 7A of the PRA can look like in practice. Below are two case studies which highlight that applying the PRA can result in outcomes that:

(a) are inconsistent with the policy of the PRA;

(b) would likely see the partners incur significant legal costs; and

(c) would mean resolution of the dispute would likely take a long time.

32.64 The outcomes are also unlikely to reflect what the partners would have reasonably expected to happen.

Case study: Gil and Evelyn

Gil and Evelyn are a New Zealand couple in their 60s who have been married for over 30 years. Things have not been going well between them since they both retired. Recently Gil and Evelyn sold their holiday apartment in Queenstown and bought a holiday apartment on the Gold Coast in Australia. Soon after they purchased the apartment on the Gold Coast they ended their marriage. Gil and Evelyn disagree over who should keep the Gold Coast apartment and who should keep their holiday bach in New Zealand. The two properties are of equal value.

Likely outcome

32.65 A New Zealand court cannot make an order over the Gold Coast apartment as it is immovable property and within the jurisdiction of the Australian courts. Gil and Evelyn would have to apply to an Australian court for an order relating to the property. This may mean there could be proceedings in both New Zealand and Australia, which would result in both Gil and Evelyn incurring additional legal expenses. In neither proceeding could the court

70 *P v P* [2000] NZFLR 72 (FC) at [77].

make an order considering the immovable property in the other country.

Alternative facts and outcome

32.66 Imagine now that Gil and Evelyn had sold the apartment in Queenstown, transferred the money to a bank account in Australia in anticipation of buying an apartment but separated before they purchased any property in Australia. A New Zealand court could apply the PRA to the money in the bank account in Australia as it is movable property. A money judgment of the New Zealand court will be recognised and enforced by the Australian courts.

Are these the outcomes Gil and Evelyn would reasonably have expected?

32.67 Two aspects of these alternative outcomes are remarkable. First, an Australian court would have jurisdiction to apply Australian law to the apartment on the Gold Coast even though the parties are New Zealanders and the country with which the relationship has its closest connection is New Zealand. Second, whether the property was held as money in an Australian bank account (movable) or was the apartment (immovable) changes which country's court can hear the case and what law applies to that property.

Case study: Tania and Henri

Tania and Henri are South African. After living together for five years Tania and Henri married in Johannesburg. Just prior to the marriage they entered a written relationship property agreement (the pre-nuptial agreement). Under South African law couples must enter into an agreement unless they want to have a community of property (meaning they share all property), which is the default regime in South Africa. Tania and Henri did not want a community of property regime so entered the pre-nuptial agreement. It did not expressly state what law was to apply. The couple lived in a house that Tania had bought prior to their relationship. Henri owned an apartment he rented out and from which he used the income to help pay the mortgage on the house.

Ten years later Tania and Henri immigrated to New Zealand. Tania sold the house and Henri sold his apartment. On arriving in New Zealand they followed the

same arrangement. Tania bought a house which the couple lived in together. Henri bought an investment apartment and used the rent to help pay off the mortgage. Two years after they arrived in New Zealand Tania and Henri separated.

Likely outcome

32.68 Despite having a pre-nuptial agreement, it is likely that the PRA would apply to the house and that the house (as the family home) would be divided equally between Tania and Henri. Under the PRA Henri's apartment would be his separate property and not available for division. All the family chattels would be divided equally between them.

32.69 This is because although the parties had an agreement between them it is probably not valid under section 7A(2). First, it was signed after the de facto relationship had started (even though it was prior to the marriage). The agreement must have been entered into "before or at the time their marriage, civil union, or de facto relationship began." Second, there was no express provision on what law should apply. On that basis the PRA becomes the default law to be applied.

Alternative facts and outcome

32.70 Imagine now that having lived in New Zealand for two years, Henri was offered a job back in Johannesburg. Annelotte (Tania and Henri's daughter) has two years left at high school so Tania and Henri decide that Tania would stay on in New Zealand with Annelotte. Tania and Henri both sell their respective properties. Tania rents an apartment for herself and Annelotte. Tania and Henri both pay the deposit on a house in Johannesburg. However, because only Henri is living in Johannesburg the partners agreed it would be easier to keep the house in Henri's name and to keep the rest of their funds in a South African bank account in Henri's name. Henri pays the mortgage on the house while Tania pays the rent on the apartment in New Zealand.

32.71 Trying to maintain a long-distance relationship was hard. Tania did not want to return to South Africa but Henri loved his job and reconnecting with friends and family back in Johannesburg. After one year apart Tania and Henri agree to separate.

32.72 It would be difficult to advise Tania and Henri which country's law would apply to the division of their property. Both partners

appear to have a different domicile – Tania in New Zealand and Henri in South Africa. Because Tania is probably domiciled in New Zealand, the PRA may apply to all movable property including the bank account in South Africa.[71] The PRA would not apply to the apartment in Johannesburg (as it is immovable property and excluded under section 7(1)). Because Henri is probably domiciled in South Africa there could be proceedings in South Africa. As the partners had signed the pre-nuptial agreement electing not to have a community of property then both the house and bank account in Johannesburg would appear on the face of it to be the separate property of Henri under South African law. Expert advice would be needed to determine what the implications would be under both New Zealand and South African law and proceedings might be issued in both countries.

Is the outcome what Tania and Henri would have reasonably expected?

32.73 Tania and Henri may have reasonably expected that the pre-nuptial agreement they entered into would be upheld. It does not appear rational that the agreement was not valid because it was entered into after the start of the de facto relationship (but before the marriage). Although South African law was not expressly nominated as the relevant law in the pre-nuptial agreement it is arguably implied, given that the agreement was entered into in South Africa, complying with South African law. The possibility of proceedings in two countries and the costs entailed does not promote an efficient and just resolution of the dispute. In addition, if the New Zealand and South African courts both made orders in relation to the bank account and those orders conflicted, this could be a very difficult situation to resolve. Finally, even if the PRA was found to apply to all movable property (based on Tania's domicile), Tania may be prevented from receiving a just division of relationship property given that the PRA would not apply to the house in South Africa, the partners' key asset.

71 Because the pre-nuptial agreement between Tania and Henri was entered into after the parties lived together (and therefore probably after the start of the de facto relationship) it would probably not be valid under s 7A(2) of the Property (Relationships) Act 1976.

Summary of problems when the current law is applied

32.74 These two case studies illustrate the issues with sections 7 and 7A. In summary, the issues are:

(a) The PRA may not help partners (and lawyers) determine what court will hear a dispute.

(b) The PRA may not help partners (and lawyers) determine what law will be applied.

(c) It may be difficult to enforce a judgment or order of a New Zealand court in a foreign country, frustrating a partner's entitlement under the PRA.

(d) The outcome is not always consistent with the partners' reasonable expectations.

(e) The express intentions of partners captured in a written agreement may not be given effect to due to non-compliance with section 7A, but the justification for these compliance requirements is unclear.

(f) Applying sections 7 and 7A may lead to outcomes inconsistent with the PRA's policy of a just division of relationship property.

32.75 If sections 7 and 7A frustrate either a just division of relationship property under the PRA or the right of partners to opt out of the PRA and be confident in their own arrangements, we consider that reform is needed. The implications of not having an accurate understanding of the law can have serious consequences in the cross-border context. This is because it is not just the application of the PRA at issue. The law of another country may apply and the outcome of applying the law of another country may be very different. This emphasises the need for clarity and, as far as possible, simplicity in the law.

32.76 Cross-border issues can be complex. Lawyers may take a long time to identify and understand the issues, as in *Calkin v Roland*, where the protest to jurisdiction was not lodged until just prior to the substantive hearing.[72] Legal advice at the outset of a case

72 The Family Court in *Calkin v Roland* [2013] NZFC 3768, [2014] NZFLR 833 at [2]–[3] noted that "although this issue should have been obvious to counsel from the beginning, they appear to have overlooked it for 14 months… It was

may need to be revisited as the cross-border issues are discovered. These factors contribute to our preliminary view that the law in the PRA relating to cross-border issues needs reform.

CONSULTATION QUESTION

L3 Do you agree that reform of the law is needed?

only when the dispute was set down for a settlement conference that counsel for the respondent began to think about jurisdictional issues."

Chapter 33 – Approaches to reform

33.1 In the New Zealand context, the three key questions that must be addressed to effectively deal with PRA matters involving a cross-border element are:

(a) When should the PRA apply?

(b) When will a New Zealand court decide the matter?

(c) How and where can a remedy be enforced?

33.2 This chapter addresses each of these questions, highlighting the issues arising and suggesting options to ensure that outcomes are consistent with the rules of PIL and the policy of the PRA as well as meeting the reasonable expectations of partners who find themselves in a relationship property dispute with cross-border issues.

When should the PRA apply?

33.3 Just because a New Zealand court has jurisdiction to hear a dispute between partners over relationship property does not mean that the court will apply the PRA. In this section we identify scenarios where the PRA is not automatically the law the court will apply.

Agreements that expressly provide for New Zealand law to apply

Case Study: Anaïs and Louis

Anaïs and Louis are French and have been living together for several years. Anaïs falls pregnant and the couple decide they want to immigrate to New Zealand. Louis has explained to Anaïs that in New Zealand de facto couples are treated like married couples, a situation very different to France. Before their child is born Anaïs and Louis sign a written agreement saying they wish New Zealand law to apply to their property, should they separate. After the baby is born Anaïs, Louis and the baby move to New Zealand to have a trial run of their new home. Just in case things don't go well they have left

their savings in a French bank account as security. The move to New Zealand does not go well and shortly after arriving, Anaïs and Louis separate.

What is the likely outcome under the PRA?

33.4 As a general rule, where there is a written agreement stating that the PRA is to apply, then the PRA will apply. There are no further express requirements set out in section 7A. This is different to the provisions in Part 6 of the PRA allowing partners to contract out of the PRA. Given that partners are making a conscious choice to contract into the PRA (rather than out of the PRA) there would seem to be no logical reason the same safeguards would apply. The safeguards are implicit in the rules of the PRA itself because they represent policy choices as to how the State considers relationship property should be distributed in New Zealand. In contrast when partners contract out of the PRA, the safeguards in Part 6 ensure that they understand the potential implications of not having the security of the default rules in the PRA apply.

33.5 Applying the PRA would mean that Anaïs and Louis would share equally all relationship property. Any order made for division could include any movable property back in France, such as the bank account. The PRA would not, however, apply to any immovable property in France.

Two matters for clarification

33.6 Section 7(1) refers to "this Act" (being the PRA) applying when the partners agree in writing it is to apply. It is just as likely that an agreement could refer to "New Zealand law" rather than specifically identifying the PRA. We suggest that this difference should not upset the validity of an agreement. Reference to New Zealand law is broader and would encompass any unforeseen circumstances where a broader application of New Zealand law might be required to ensure justice.

33.7 Section 7A(2) refers to the agreement being entered into "before or at the time" the partners' relationship began. There is no such requirement in section 7A(1). Our preliminary view is that this requirement should be removed from section 7A(2) as there seems to be no reason to exclude agreements made at any other time during or even after the relationship.

33.8 A clear indication of the choice of law the parties have made is likely to help resolve a dispute quickly and in accordance with the wishes of the partners.

CONSULTATION QUESTIONS

L4 Do you agree that section 7A should refer to an agreement to apply "New Zealand law" rather than the PRA?

L5 Do you agree there should be no timing requirement for agreements entered into under section 7A(1)?

Agreements that implicitly provide for New Zealand law to apply

Case Study: Omar and Fatima

Omar and Fatima have immigrated to New Zealand from Turkey. They married shortly before they left Turkey. Just prior to their marriage (knowing they were coming to New Zealand) they signed a written agreement that stated Turkish law was not to apply if they divorced. Despite immigrating to New Zealand, the couple retained close ties with Turkey including Fatima running an online business based in Turkey. Five years after arriving in New Zealand, the couple separate.

What is the likely outcome under the PRA?

33.9 Without an express agreement about choice of law it is open for one partner to argue in relation to any movable property that New Zealand law should not be applied (for example claiming that the parties remained domiciled in Turkey). However, without either partner putting evidence to the contrary before the court, the court would likely apply New Zealand law as the default rules.

What should happen?

33.10 This scenario raises the question of whether an implicit choice of law can be recognised. In this scenario the express rejection of Turkish law and the fact the parties were resident in New Zealand strongly favours New Zealand law being the applicable law. The reasonable expectation of the partners would be to give effect to the agreement by applying New Zealand law.

CONSULTATION QUESTIONS

L6 Should the PRA always apply if partners do not say in their agreement which country's law should apply?

L7 Should there be recognition of an implicit choice that New Zealand law is to apply?

Agreements that expressly provide for the law of another country to apply

Case study: Brian and Taggie

Brian and Taggie are British citizens. Two months before the couple are due to marry they decide to immigrate to New Zealand. Taggie asks Brian to sign a pre-nuptial agreement that says if they separate, English law is to govern how they organise their affairs. They sign the agreement before they get married. The couple move to New Zealand. Taggie buys a house for the couple to live in. Brian receives a very generous inheritance from a great-aunt just before the couple move to New Zealand. He uses this to pay the couple's bills and day-to-day expenses. Taggie runs a successful property development business. While she runs the business side of things, Brian does most of the physical labour involved in renovating the properties before they are on-sold. The business and the bank accounts are in Taggie's name. Six years later the couple separate. Brian still has a large part of his inheritance and can continue to live with the same standard of living as the couple had during the marriage.

What is the likely outcome under the PRA?

33.11 Provided the parties were not already in a de facto relationship when the agreement was signed then the agreement would likely be upheld. If the parties were in a de facto relationship when the agreement was entered into then it would not be valid under section 7A. Assuming the agreement was valid, it would be open to one or both of the parties to rely on and prove in court the relevant English law. If this is done then a New Zealand court would probably apply English law and make orders accordingly. Because under English law a financial order would only be made for financial need, which on these facts does not exist, Brian might not be entitled to any business profit or a share of the house.[73]

33.12 Provided the agreement was otherwise valid, a New Zealand court could, however, elect not to give effect to the agreement

73 As per the Matrimonial Causes Act 1973 (UK). This Act and the approach taken in England is discussed in Part A.

if it determined that applying English law would be contrary to justice or public policy. Brian might argue that given his payment of day to day expenses and his work in Taggie's business it would be unjust for him not to share in a division of the house and the business.

What should happen?

The requirement that a section 7A(2) agreement be entered into before the relationship began

33.13 We see no persuasive reason for the validity of an agreement to depend on the time it was entered into. Section 7A(2) has been interpreted by the High Court as meaning that an agreement made by a couple already in a de facto relationship in contemplation of marriage would not be upheld.[74] This interpretation does not fit with the reality today that many married couples first live together in a de facto relationship. For many couples a de facto relationship will lead to marriage and at the point of marriage formal arrangements might be put in place, including an agreement under section 7A(2). There may be other reasons an agreement is entered into after the start of a relationship, such as the birth of a child or the decision to move overseas. There appears to be no sound basis for excluding agreements just because they are made after the relationship began.

33.14 There also seems to be no good reason partners cannot enter into a section 7A(2) agreement at the end of a relationship. There may be valid reasons why partners living in New Zealand or with property in New Zealand wish the law of another country to apply to their property, as highlighted throughout the case studies in this part.

33.15 Ideally, people should be enabled to make their own arrangements to best meet their own needs. At different points of a relationship, partners may identify that their needs require them to enter into an agreement that identifies the law of a certain country will apply if the relationship ends. It seems unhelpful to prevent partners from relying on an agreement based on when in the relationship the agreement is entered into. Our preliminary view is that this requirement should be removed from section 7A(2).

74 *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 at [27]–[29].

CONSULTATION QUESTIONS

L8 Do you think that a couple should be able to agree at any point during their relationship, or even after separation, that a different law should govern how they divide their property?

L9 Do you agree that the timing requirement should be removed from section 7A(2)?

L10 Should there be recognition of an implicit choice that the law of another country should apply?

Is the reference to "the property law of another country" overly restrictive?

33.16 Section 7A(2) refers to the "property law of another country". We consider this phrase is unnecessarily restrictive. In other countries "property law" may not be the relevant law for dealing with the economic consequences when a relationship ends. This is the case, for example, in England and Wales, where the Matrimonial Causes Act 1973 (UK) is not directly concerned with distributing relationship property. Replacing "property law of another country" with "law of another country" would limit the risk of excluding agreements where the relevant law falls outside of the strict wording of section 7A(2), potentially rendering the agreement void.

CONSULTATION QUESTION

L11 Would it be sufficient to refer to the law of another country without stating which body of law should apply (for example property or family law)?

When should an agreement not be upheld?

33.17 An implicit principle of the PRA is that partners should be free to make their own agreement regarding the status, ownership and division of their property subject to safeguards.[75] Part 6 of the PRA provides a regime whereby partners can contract out of the PRA's rules of property classification and division. However, an agreement under section 7A(2) does not have the same safeguards that exist in relation to contracting out agreements under Part 6 of the PRA (notably the requirement for legal advice on the implications of the agreement). On what grounds should a court

75 See Chapter 3 of this Issues Paper for a discussion of the principles of the Property (Relationships) Act 1976.

be permitted to set aside an otherwise valid agreement under section 7A(2)?

33.18 As discussed above, section 7A(3) provides that an agreement will be set aside if a "court determines that *the application of the law of the other country* under an agreement to which that subsection applies *would be contrary to justice or public policy*" (emphasis added). There is little judicial guidance to indicate how section 7(3) will be interpreted in the context of cross-border issues and when an outcome will be said to be contrary to justice and public policy. Given the vast range of potential factual scenarios, a clear test would give a court greater scope to prevent injustice and to ensure a just division of relationship property.

33.19 Potential options for a test for setting aside an otherwise valid agreement under section 7A(2) include:

(a) **Option 1: Adopt a test similar to the test used in section 21J of the PRA allowing a court to set aside a contracting out agreement.** This test is whether giving effect to the contracting out agreement would cause "serious injustice." This is a high threshold but is justified as the partners have deliberately ordered their own affairs and as long as it meets the procedural requirements, the contracting out agreement and, by extension, the partners' wishes, should not be easily overturned. As discussed in Chapter 30 the fact the contracting out agreement would lead to an unequal result for the partners is, of itself, not enough to set aside an agreement under section 21J. Currently a section 7A agreement does not have the same list of procedural criteria for the agreement to be valid. There is therefore no guarantee, for example, that both partners were informed of and understood the implications of the agreement. As the agreement must be valid according to the law of the nominated country and every country will have different tests for validity, it may be that the test for setting aside a section 7A agreement should not be as high as for contracting out agreements.

(b) **Option 2: add to section 7A(3) a list of factors that a court must consider before upholding an agreement.** These could include:

(i) Whether or not the agreement was a device when it was entered into furthering a goal contrary to the policy of the PRA. For example, where the agreement sought to escape the obligations of one partner.

(ii) Whether there has been significant change of life circumstances of one or both of the partners that could reasonably require that the partners revisit the agreement. This is different to the point of the relationship when the agreement was entered into, which would not as a general rule relate to the justice of the agreement.

(iii) Where there has not been a significant change of life circumstances, however a significant period of time had passed since the agreement was entered into.

(c) **Option 3: continue with the current approach under section 7A(3) but provide a clear statutory test.** This option would retain the current power to set aside an agreement as contrary to justice or public policy. It might apply, for example, if the outcome would not be balanced between the partners. The statutory test could list the relevant factors that would establish that an agreement is contrary to justice or public policy. These factors could include those listed above at Option 2. Alternatively the test could be changed to be whether the agreement could cause serious injustice. The factors listed in section 21J of the PRA might then likewise be used in this context in assessing serious injustice.

CONSULTATION QUESTIONS

L12 Do you agree that a clear test for when a court can set aside an agreement under section 7A would be useful?

L13 Which of the options do you prefer and why? Are there any other "relevant factors" you would include? Are there any other options you would like to suggest?

Agreements that implicitly provide for the law of another country to apply

Case study: Maxima and Robert

Maxima and Robert are Dutch. Before marrying they agree in writing that they opt out of a community of property regime but do not specify what law is to apply to the agreement. Robert is a school teacher and Maxima is a fashion designer. Several years after they are married, Maxima is offered a role at a top fashion house in Auckland on a two year contract. Although they leave their house and chattels in Amsterdam, Maxima buys an apartment in Auckland and the couple move to New Zealand. Robert does not feel confident speaking English so he stays at home and writes a novel rather than looking for paid work. After a year Robert wants to return to the Netherlands and start work again. Maxima loves her work and wants to complete her contract in New Zealand. The couple separate.

What is the likely outcome under the PRA?

33.20 As the agreement entered into at the time of their marriage does not nominate the law of another country to apply, it is likely that the PRA will apply. On this basis Robert will probably be entitled to half of the apartment in Auckland and any family chattels in New Zealand. A New Zealand court will not make an order about the house in Amsterdam but it may make an order relating to the partners' chattels in Amsterdam if it found that either partner was domiciled in New Zealand. There is therefore the potential for two sets of proceedings to resolve all property matters – one in New Zealand under the PRA and one in the Netherlands under the relevant Dutch law.

What should happen?

33.21 There will be scenarios when it is understandable that an otherwise compliant section 7A(2) agreement is entered into but there is no designation of which country's law is to apply. This may be because the partners move every few years and they do not know at the outset of their relationship which country's law will be most relevant on separation. Requiring partners at the start of the relationship to elect the property regime they wish to apply to their property if they are to separate is inflexible and, we consider, unnecessary.

33.22 In *Herbst v Herbst* the parties entered into an agreement while living in South Africa and several years before immigrating to New Zealand.[76] This agreement was entered into under South African law that requires that when two people marry they must choose whether they will have community of property or not. The agreement stated there was to be no community of property between the partners but did not state expressly that the property law of South Africa was to apply. The High Court of New Zealand found that the agreement did not comply with section 7A(2) as it "was one which contracts out of the relevant South African matrimonial property legislation but does not explicitly state which country's property laws are to apply to any relationship property acquired in other jurisdictions."[77] While there was no agreement in writing that the law of South Africa would apply, we consider that it could be reasonably implied that the relevant law was that of South Africa.

33.23 One option is to allow an implied agreement or at least implied terms of an agreement in cases such as *Herbst v Herbst*. The benefit of allowing an implied term or terms to be read into an agreement is that the reasonable expectations of the partners would not be upset by, for example, applying the PRA when the parties did not want this to happen. There would need to be a mechanism to allow a court to identify which country's law should be applied. At paragraphs 32.30 to 32.37 we will discuss shifting the focus from the relevant law being determined with reference to the location and nature of the property, to the relevant law being determined with reference to the country that has the closest connection to the relationship.

33.24 A similar approach could deal with agreements that choose which country's laws are to apply but then only refer to certain items of property. Having a test that applied the law of the country to which the relationship had its closest connection could permit an implied term that this law applied to property not dealt with under an otherwise valid agreement. The disadvantage to this approach is that a situation could arise where a New Zealand court had to apply the law of country A to designated property under the agreement and the law of country B (because the relationship had its closest connection to country B) to the rest of the property. The alternative approach would be to make New Zealand

76 *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460.

77 *Herbst v Herbst* [2013] NZHC 3535, [2014] NZFLR 460 at [26].

law the default law to be applied to property not covered in an otherwise valid agreement (that applies the law of country A to designated property). This is rational because the dispute is being dealt with in New Zealand.

CONSULTATION QUESTIONS

L14 Do you think a court should be able to read an implied term into an agreement on which country's law should be applied?

L15 Do you agree that if an agreement deals with only certain items of property, New Zealand law should apply to all other property of the partners?

Where foreign law is not relied on or proven

Case Study: Mi Na and Tony

Mi Na and Tony immigrated to New Zealand from Korea. They married in Korea and entered into an agreement just before their marriage stating that Korean law was to be used to resolve any property dispute that arose if they separated. After living in New Zealand for four years, Mi Na and Tony separate. They cannot decide what should happen to the house in New Zealand which is held in Mi Na's name but for which Tony pays the mortgage, and ask the Family Court to decide for them.

What is the likely outcome under the PRA?

33.25 If neither Mi Na nor Tony seek to prove and rely on Korean law to determine the dispute then New Zealand law will apply. This is the case even if they still have a very strong connection to Korea, including owning property in Korea. A New Zealand court can apply the PRA.[78]

33.26 The result would be the same even if there was no agreement between the partners but the relationship had its strongest connection with another country.[79] Without one partner seeking to prove and rely on evidence that the law of another country should apply, a New Zealand court will apply New Zealand law.

33.27 We have not identified any issues with this outcome. Failing to prove and rely on the law of another country amounts to an

78 See obiter comments in *Birch v Birch* [2001] 3 NZLR 413 (HC) at [49].

79 On the basis of the rules set out in ss 7 and 7A of the Property (Relationships) Act 1976 (PRA), which state when the PRA applies to property.

implied agreement that New Zealand law should apply, which seems appropriate.

Where the relationship has its closest and most substantial connection with New Zealand

Case study: Manu and Theo

Manu is Portugese and Theo is Chinese. They have been in a long term de facto relationship. They met in New Zealand while travelling and settled in Tauranga. Manu works as a gardener and Theo is a consultant chef who travels extensively to work for short periods in restaurants throughout the Asia-Pacific region. They both have jobs in New Zealand and are permanent residents. They live in Tauranga in a house owned by Manu and they pay the mortgage with income from renting out Theo's apartment in Beijing. The couple own as tenants in common a small holiday house in Fiji where they spend five months each year during winter. They keep a bank account open in Fiji to use when they are there. Every year Manu spends a month in Lisbon visiting family. After ten years together the couple separate. Manu and Theo have entered no form of property sharing agreement.

What is likely to happen under the PRA?

33.28 On the face of it Manu and Theo's relationship (and property) has connections with several countries – Fiji, China, Portugal and New Zealand. This could lead to very complicated, long and costly proceedings in New Zealand and the other countries. The PRA would apply to immovable property in New Zealand and depending on a finding as to domicile of the partners it would apply to movable property in New Zealand and overseas. The PRA would not apply to any immovable property overseas. It is unclear whether the partners are domiciled in New Zealand given how often they travel and live abroad and the interests they retain in the other countries. This can have implications as to whether the PRA would apply to movable property in other countries.

33.29 The likely outcomes risk being far removed from what Manu and Theo could have reasonably expected to happen. The reasonable expectations of the partners will probably not be met if they must rely on the courts in more than one country to resolve the matter. Nor would they be met if property in New Zealand is subject to equal sharing under the PRA but the property in other countries is not covered under the PRA and would therefore be distributed according to the law of that country.

What should happen?

33.30 Much of the complexity that arises in this scenario is because the law applied depends on the nature and location of the property. A different approach would be to focus on the country with which the relationship has its closest connection. If this was the focus Manu and Theo probably have their closest connection with New Zealand. They live the majority of time in New Zealand; they formed, conducted and ended their relationship in New Zealand; while each partner has a connection to another country the partners have a mutual connection to New Zealand and both partners work in New Zealand (at least sometimes). If this approach were taken then arguably the PRA applies to all their relationship property and the New Zealand court could decide the case on that basis (provided it has jurisdiction as discussed below).

33.31 Focusing on the country to which the relationship has the closest connection reflects a move away from the test of habitual residence used in other areas of the law with cross-border implications such as inter-country child abduction[80] or tax residency in a country.[81]

33.32 Different countries have different rules to deal with which law to apply in relationship property disputes.[82] For example, in Ontario, Canada:[83]

> *the property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.*

80 The test of habitual residence is used in the Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).

81 See the recent New Zealand case of *G v Chief Executive of the Ministry of Social Development* [2015] NZSC 139, [2016] 1 NZLR 261. In that case the Court of Appeal had earlier taken a "common sense approach to making the legislation work in accordance with Parliament's purpose": Douglas White "A Personal Perspective on Legislation: Northern Milk Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699 at 705. The Court of Appeal was looking for a "close and clear connection" between the applicant and New Zealand in order to establish the applicant's entitlement to New Zealand superannuation, despite the applicant having lived overseas for 20 years: *Chief Executive of the Ministry of Social Development v G* [2014] NZCA 611, [2015] 3 NZLR 117 at [32]. The Court took a large number of factors into account in making its findings. This included factors unrelated to residence. This decision was overturned on appeal to the Supreme Court which found that the appellant was not ordinarily resident in New Zealand. The Supreme Court said at [32] that the meaning of the words "ordinarily resident" turned on the particular statutory context in which they were used. In this case the relevant statute was the Social Security Act 1964 and the term "ordinarily resident" "denote[s] a place in which someone resides": at [36].

82 In the European Union, the Brussels II regulation states that the court in which proceedings were first started has exclusive jurisdiction: Regulation 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of personal responsibility [2003] OJ 338/1.

83 Family Law Act RSO 1990 c F.3, s 15.

33.33 In New Zealand, the general approach has been to resolve the conflict by referring to where the partners are domiciled (habitually reside). The situation immediately becomes more complex, however, if one partner is ordinarily resident in another country or where the partners are domiciled or resident in New Zealand but want the law of another country to apply to their dispute.

33.34 Focusing on domicile and habitual residence may fail to capture the true centre of gravity for the relationship. For example, residence at the time of marriage fails to recognise that partners may change residence, and residence at the time of separation is arbitrary and does not necessarily have any link to the relationship. Domicile is still used in section 7 of the PRA but fails to capture the increasing reality that two partners can be domiciled in different countries.[84]

33.35 Focusing on the country to which the relationship has its closest connection can also be used in reverse to deal with couples whose relationship has its closest connection with another country but who also have a minor connection with New Zealand. This could be done by extending the provision in section 7(3).

33.36 Take as an example Cynthia and Michael, who are a de facto couple living and working in Singapore. They are Singaporean citizens but spend every holiday in Wanaka where Cynthia owns a holiday home. From the perspective of the time, cost and complexity involved, it is not logical that any dispute over the Wanaka property is dealt with by a New Zealand court. The outcome under New Zealand law, which generally treats de facto couples like married couples, could be different to that under Singaporean law. Such an outcome could be different to that reasonably expected by Cynthia and Michael. Focusing on the country to which the relationship has the closest connection would address these issues.

33.37 The habitual residence of each partner may be an important factor in determining the country to which the relationship has its closest connection, but it would only be one factor. Other factors could include the time the partners spend apart and together in a certain location, joint and separate property ownership, social connections, whether the partners had a permanent home

84 The history of the domicile test is linked to historical conceptions of the wife as the property of the husband as her domicile would be linked to where the husband resided.

somewhere, where the relationship ended, where the income earning activities of the relationship are based, evidence of any property sharing agreements and where any children of the relationship live.

CONSULTATION QUESTIONS

L16 Do you agree that where a relationship has its closest connection with New Zealand the PRA should be the law applied to any relationship property dispute?

L17 What factors will be relevant in determining the place a relationship has its closest connection with?

When will a New Zealand court decide the matter?

33.38 Jurisdiction can be a complicated matter in cross-border proceedings and is often mixed up with questions of choice of law (what law should apply). To bring a matter before a court, both subject matter jurisdiction and personal jurisdiction must be established.

Subject matter jurisdiction

33.39 Section 22 of the PRA states that "every application under this Act must be heard and determined in the Family Court."[85] The New Zealand Family Court therefore has jurisdiction to hear every matter to which the PRA applies, which includes matters relating to all property that comes within section 7. This is called subject matter jurisdiction.[86] If a court has subject matter jurisdiction to deal with a relationship property dispute then the law applied is the PRA.[87] A court can make orders in relation to any property covered by the PRA (the question of enforceability of that order will be considered below).

33.40 If the partners have agreed in writing that the law of another country applies under section 7A(2), then the Family Court does

85 This is unless a Family Court transfers the matter to the High Court: Property (relationships) Act 1976 s 38A.

86 See David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at [2.2].

87 Bill Atkin "Distribution of Property on Divorce" in J Heaton and B Stark (eds) *Routledge Handbook of International Family Law* (2017, Routledge, Abingdon, UK) (forthcoming), Ch 6.

not have subject matter jurisdiction. This becomes a matter for the District Court or High Court as discussed below.

Personal jurisdiction

33.41 Personal jurisdiction must also be established. Personal jurisdiction generally requires that there is valid service of proceedings on the person against whom the claim is made (the defendant). The PRA only addresses subject jurisdiction and does not deal with personal jurisdiction. This means that in PRA cases personal jurisdiction follows the general rule that there must be valid service of proceedings on the defendant.

33.42 Proceedings must be served on the defendant under the rules of the Family Court, the District Court and where relevant the High Court. A defendant can be served at any time he or she is in New Zealand. Service can be difficult where the defendant is overseas.[88] The rules for service differ depending on a range of factors including whether there is an agreement between the partners, whether the defendant has submitted to the jurisdiction of the New Zealand court, whether the claim is under the PRA, the law of contract, constructive trust law or the law of another country and whether the defendant is ordinarily domiciled in New Zealand or elsewhere.

33.43 In certain circumstances leave of the court will be required for proceedings to be served.[89] When a defendant is served overseas additional documents need to be provided. Notice must be given to the defendant informing the defendant of, amongst other things, the scope of jurisdiction of the court, the arguments of the plaintiff and the defendant's right to object to the jurisdiction.[90]

When jurisdiction is not exercised by a court

33.44 Under section 7(3) of the PRA a court can decline to exercise jurisdiction over foreign movable property, where the defendant is neither domiciled nor resident in New Zealand.[91]

88 Rule 130 of the Family Court Rules 2002 states that rr 6.23–6.27 of the District Court Rules 2014 apply to service abroad of proceedings under the Property (Relationships) Act 1976.

89 District Court Rules 2014, r 6.24; and High Court Rules 2016, r 6.31.

90 District Court Rules 2014, r 6.27; and High Court Rules 2016, r 6.31.

91 The approach in New Zealand will be different to the approach in other countries. See for example the Australian approach taken in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

33.45 In addition a defendant served overseas can object to the court exercising jurisdiction. An objection can be made on three separate grounds:

(a) There was no arguable case that the grounds for serving proceedings abroad without leave were satisfied.[92] The burden is then on the applicant to prove there was a good arguable case and there are serious issues to be tried.

(b) There are no serious issues to be tried.

(c) That New Zealand is *forum non conveniens* (New Zealand is not the most appropriate forum for the matter to be heard and decided and that another forum would be more appropriate). We discuss this below.

33.46 If the defendant succeeds in establishing one of the above grounds, the applicant must then establish that the New Zealand court should exercise jurisdiction, including showing that New Zealand is *forum conveniens* (New Zealand is the most appropriate forum). A partner seeking to establish that New Zealand is the most appropriate forum will have a more persuasive case if there has been consideration of how to minimise costs and obstacles such as giving evidence by video link or meeting the costs of the other party or by conceding certain pieces of overseas evidence.

33.47 Where proceedings were served on a defendant in New Zealand, the defendant cannot object to jurisdiction because it has already been established. A defendant can, however, request that the court stay the proceedings if he or she can establish that New Zealand is *forum non conveniens*.[93] A key factor in determining whether another country is the appropriate forum is the question of enforceability.

92 District Court Rules 2014, r 6.23.

93 District Court Rules 2014, r 15.1; and High Court Rules 2016, r 15.1. See *Ghose v Ghose* (1997) 16 FRNZ 455 (HC).

The forum conveniens test and the forum non conveniens test

33.48 The principles of forum conveniens or forum non conveniens are used by the courts in New Zealand when a party objects to the New Zealand courts exercising jurisdiction.[94]

33.49 A range of factors are considered by a court in identifying the most appropriate forum. These include:[95]

(a) cost and convenience of proceedings in each of the potential jurisdictions;

(b) the location and availability of witnesses;

(c) how litigation has proceeded in these jurisdictions (in other proceedings);

(d) whether all the parties are subject to New Zealand jurisdiction so all issues may be resolved in a single hearing;

(e) whether the relevant law is New Zealand law or foreign law (because it is preferable to apply the law of a country in that country);

(f) the existence of any agreement that refers to the appropriateness of either country to hear the dispute;

(g) the strength of the plaintiff's case;

(h) whether the judgment must be enforced;

(i) whether the application is being made to gain a tactical advantage or whether it is because the defendant truly wants the hearing to be in another forum;

(j) any procedural advantage in the particular jurisdiction; and

(k) whether the other jurisdiction has held it is the most appropriate forum.

33.50 The fact that the PRA is the applicable law is only one factor to take into account.

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94 These principles were reviewed by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) and confirmed in New Zealand in *Wing Hung Printing Co v Saito Offshore Pty Ltd* [2011] 1 NZLR 754 (CA) at [43].

95 David Goddard and Campbell McLachlan "Private International Law – litigating in the trans-Tasman context and beyond" (paper presented to the New Zealand Law Society Seminar, August 2012) at 49–50.

33.51 In relationship property cases, the New Zealand courts have been influenced by where the property in dispute is located and the law that will be applied to determine the rights of the partners.[96]

How have the courts applied these factors?

33.52 In *L v L* there was disputed property in both New Zealand and the United States.[97] The wife was domiciled in New Zealand when she made her application, and the husband was resident in the United States. The husband did not formally object to the New Zealand courts having jurisdiction, did not commence proceedings in the United States and even expressed the view that the courts in New Zealand should decide the matter. Having assumed that the property in the United States was movable property (given there was no evidence to the contrary), the New Zealand Family Court did not exercise the power under section 7(3) to *not* make an order. Instead it held that the movables in the United States were relationship property and therefore subject to division.

33.53 In *W v Y* the Family Court held that Taiwan was the appropriate forum.[98] The partners married and had their children in Taiwan. The husband helped settle the wife and some of their children in New Zealand but he remained resident and domiciled in Taiwan. The parties entered into a matrimonial property agreement in Taiwan. The wife claimed that she was forced into the agreement and did not understand her rights when she signed it. The Family Court noted the following points in finding that New Zealand was not *forum conveniens* and that the appropriate court to hear the dispute was in Taiwan:

(a) the part of the relationship when the partners lived together as a couple was in Taiwan;

(b) the income earning activities of the relationship were in Taiwan;

(c) the partners were likely to be more aware of Taiwanese than New Zealand relationship property law;

(d) neither partner was fluent in English;

96 *Gilmore v Gilmore* [1993] NZFLR 561 (HC).

97 *L v L* FC Levin FAM 2003-031-336, 8 December 2005.

98 *W v Y* FC Manukau FAM 2004-092-1762, 30 March 2007.

(e) the New Zealand courts had no jurisdiction over land in Taiwan;

(f) the relevant investments were controlled by the husband in Taiwan; and

(g) evidence relating to matters surrounding the matrimonial property agreement was more available in Taiwan.

33.54 In *S v S* the property was mostly movable property located outside New Zealand.[99] The wife was a New Zealand resident and the husband an American citizen residing in Guam. The wife commenced PRA proceedings in New Zealand and the husband commenced proceedings in Guam seeking a divorce and a division of community property. The factors against the New Zealand court dealing with the matter were that additional fees would be incurred by the partners and there was an increased evidential burden as information would have to be sought from overseas and explained to New Zealand counsel and the court. Factors in favour of the dispute being heard in New Zealand were that the wife might not be able to afford the cost of a lawyer in Guam nor afford the cost of representing herself in proceedings in Guam. The Family Court did not decline to exercise jurisdiction but granted leave to the husband to reapply if funds were provided to the wife to meet her legal costs in Guam.

What are the issues with the rules relating to jurisdiction?

33.55 There do not seem to be any major issues in relation to the jurisdiction rules but we consider there is an issue relating to which New Zealand court should hear cases where another country's law is to be applied. This is due to the complexity inherent in applying the law of another country.

33.56 Goddard has noted that "because [section] 7 goes to the jurisdiction of the Family Court to hear the proceedings, the Family Court cannot hear a claim in respect of property to which [section] 7 does not apply."[100] This may include matters where the relevant law is not the PRA, and the dispute must be determined

99 *S v S* FC Christchurch FAM-2006-009-2233, 27 April 2007.

100 David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) 383 at 397.

by reference to common law or equity. This may also include where the law to be applied to the matter is the law of another country. In such cases, the matter must go to the District Court or the High Court.[101]

33.57 Applying the relationship property law of another country is likely to be complicated and require the advice of experts. In addition, the Family Court will not have subject matter jurisdiction if the PRA does not apply, for example, if the partners had a valid written agreement that the law of another country applies. Proceedings involving the application of foreign law would need to be transferred to the District Court or the High Court, depending on the amount and nature of the claim.[102] Transfer of proceedings can be costly in both the money involved and the time it takes.

33.58 Two options discussed in Chapter 26 are relevant here. First is the option to have concurrent jurisdiction of the High Court and Family Court. Second is the option to allow the High Court to transfer proceedings from the Family Court. If the matter is complex,[103] or it involves the application of foreign law and requires transfer to a higher court, then the process could be improved.

CONSULTATION QUESTIONS

L18 Do you agree that any dispute involving the potential application of foreign law should be able to be transferred to the High Court? If not, why not?

L19 Is there capacity for the Family Court to exercise originating jurisdiction, for example, if there is a dispute whether a section 7A(2) agreement is valid? If this was resolved and a finding that the law of another country was to be applied, should this then be transferred to the High Court?

101 David Goddard "Relationship Property Disputes – the International Dimension" (paper presented to the New Zealand Law Society Family Law Conference, October 2003) at 397.

102 In contrast the Employment Court has exclusive jurisdiction regardless of whether the relevant law is New Zealand law or the law of another country: *Bowport Ltd v Alloy Yachts International Ltd* HC Auckland CP 159/SD01, 14 January 2002.

103 As per the threshold in s 38A of the Property (Relationships) Act 1976.

How and where can a judgment or order be enforced?

33.59 In Chapter 14 we examined the range of orders a court may make under the PRA. These include vesting, ancillary, postponement and financial orders.[104] These orders provide flexibility under the PRA so a court can find a workable solution for the partners in their particular circumstances. When the proceeding has a cross-border element, the flexibility reduces. This is due to difficulties in enforcing the remedy overseas.

33.60 Although each country has different rules and approaches, the key point is that another country is unlikely to enforce a judgment from a foreign court over immovable property inside that country.[105] This means, in practical terms, that where the property in question is a foreign immovable, a New Zealand court should order relief of a different nature rather than an order purporting to vest overseas property in the applicant partner. For example, a court in New Zealand could impose a personal obligation on one partner to deal with overseas land as directed. Failure to uphold that obligation can lead to personal remedies against that partner, such as a finding that the individual is in contempt of court.[106]

What should happen?

Increased range of remedies to be used by a court

33.61 Any reform should focus on ensuring that a range of remedies is available under the PRA. Courts should be encouraged to consider all the facts relating to the partners, their circumstances and the dispute when deciding relief. For example, a financial order against a partner may be more appropriate and be more likely

104 Section 33(1) of the Property (Relationships) Act 1976 gives a court a general power to:

> make all such orders and give such directions as may be necessary or expedient to give effect, or better effect, to any order made under any of the provisions of sections 25 to 32.

105 The Court of Appeal in *Samarawickrema v Samarawickrema* [1994] NZFLR 913 (CA) has rejected the argument that compensation can be paid from the relationship property pool in recognition of a party's interest in immovable property located overseas. This avoids the accusation that the court is indirectly making a determination about property in the jurisdiction of another country's courts. This was followed in *Shandil v Shandil* [2011] NZFLR 554 (HC).

106 For further discussion on contempt of court see Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at Chapter 5. At [5.5] the Law Commission states that a "person will be in contempt of court if he or she fails or refuses to comply with a lawfully made court order…an order requiring the payment of money cannot be enforced by contempt proceedings."

to be enforced (and failure to comply can lead to appropriate consequences that can likewise be enforced against the recalcitrant partner).

33.62 In Part G we discuss the power of a court to make orders concerning property held on trust that would otherwise be relationship property. Similarly, one option for reform in the cross-border context would be to give the courts greater express powers to consider relationship property overseas in order to effect a just division of the pool of relationship property.

33.63 In Chapter 26 we discuss a court's inventory function as explored by the High Court in *Yeoman v Public Trust Ltd*.[107] The Court noted that division of relationship property under the PRA includes inventory-taking, ascertaining relationship debts, applying division provisions under Part 4 of the PRA and making orders under Part 7.[108] It would seem a natural step for all overseas property (both movable and immovable) to be identified and accounted for as part of an inventory exercise. It would also be in accordance with the policy that a just division of property under the PRA requires that all relationship property be identified and accounted for. Failure of a partner to fully disclose overseas property could be subject to penalties, as discussed in Chapter 25. After a full inventory was taken of both overseas and domestic property, a court could call on the full range of remedies available under the PRA such as vesting, ancillary, postponement and financial orders and choose and adapt a remedy to best address the circumstances of the partners.

33.64 There are limitations with this approach, for example, if all the relationship property comprises overseas immovable property. However, a key benefit is that such an approach is more likely to be in keeping with the reasonable expectations of the parties. All relationship property is dealt with together by one court rather than the potential for different proceedings, under different laws, in different countries. If the law applied was the law of the country with which the relationship has its closest connection, then it would also be more likely that a majority of this property would be in that country. It would be rare for a relationship to have its closest connection with New Zealand but for all the relationship property to be overseas.

107 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

108 *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

CONSULTATION QUESTIONS

L20 Do you agree that a court should have to take into account all overseas property when making an inventory of all relationship property?

L21 Do you have suggestions for expanding the range of remedial measures?

Part M – What should happen when one partner dies?

Chapter 34 – Dividing relationship property when one partner dies

Introduction

34.1 Many relationships will end with the death of one partner.[1] The PRA makes provision for relationships that end on death, as well as relationships ending on separation. The provisions that apply when one partner dies are set out in Part 8 of the PRA, and were introduced in 2001.

34.2 In this part we explore how the PRA applies when one partner dies. We discuss the tensions between the PRA's provisions that apply on death and succession law, which provides the rules for what happens to a person's property when they die. The fundamental question in this part is whether the PRA can reconcile the competing interests of all those potentially affected by the death of a partner, given the PRA's focus on the just division of property between partners.[2] We express our preliminary view that a separate statute dealing with relationship property rights on death, together with the types of claims currently contemplated by the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, is desirable because it would allow a comprehensive approach to the question of how to balance competing interests in a deceased's estate.

34.3 One important issue which we do not explore in this part is how the PRA's provisions that apply on death affect succession in tikanga Māori. The Law Commission undertook some preliminary

1 In the 2013 census, 171,315 people reported they were widowed or a surviving civil union partner. This does not, however, include surviving de facto partners: Statistics New Zealand "Legally registered relationship status by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006, and 2013 Censuses (RC, TA, AU)" <nzdotstats.stats.govt.nz>.

2 There has been relatively little academic commentary on the application of the Property (Relationships) Act 1976 (PRA) on the death of one partner, compared with other aspects of the PRA, particularly in comparison to commentary on other reforms made by the 2001 amendments, such as the economic disparity provisions (ss 15–15A), and other aspects of succession law such as the Family Protection Act 1955. A small number of authors have critically examined the operation of the PRA on death: see Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004); Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356; and Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

work in this area as part of its review of the law of succession in the 1990s.[3] Careful consideration needs to be given to how relationship property rights should interact with succession in a Māori context.[4]

34.4 In this chapter we briefly explain succession law and set out the history of the PRA's provisions that apply on death. We then describe what may happen to property when a person dies and is survived by a partner. The rest of Part M is arranged as follows:

(a) In Chapter 35 we consider the issues that have emerged since the PRA was extended to apply to relationships ending on death in 2001 and options to address these issues by reform of Part 8.

(b) In Chapter 36 we consider the option of having a separate statute which deals with relationship property division on death as well as claims against the estate currently contemplated by the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

34.5 Throughout Part M we use the terms "deceased partner" (the spouse, civil union or de facto partner who has died) and "surviving partner" (the spouse, civil union or de facto partner who has survived his or her partner). We also refer to the "personal representative" of the deceased, being the person who is responsible for administering the deceased's estate.

Overview of succession law

34.6 Succession law determines what happens to people's property when they die. Given that approximately 30,000 deaths are registered in New Zealand each year, many people will be affected by succession law.[5] It is important that the law in this area is clear

3 As part of the Law Commission's review of succession law, Joan Metge prepared a paper on succession law and tikanga: "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in relation to the Law Commission seminar on succession, 1994). Pat Hohepa and David Williams also prepared a working paper: *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, February 1996). The Commission also addressed succession issues in its Study Paper: *Māori Custom and Values in New Zealand Law* (NZLC SP9, March 2001).

4 In Part C of this Issues Paper we explore the exclusion of Māori land and taonga from the Property (Relationships) Act 1976. These exclusions apply when relationships end on death as well as on separation. For a discussion of possible issues that arise for Māori on the death of one partner see Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 487–490.

5 The number of deaths registered in New Zealand totalled 31,179 in 2016; 31,608 in 2015; and 31,062 in 2014: see Statistics New Zealand "Deaths by age and sex (Annual-Dec)" (May 2017) <www.stats.govt.nz>. In 2016, the High Court

and accessible so that people understand both their rights and duties as a will maker and their rights in respect of a deceased's estate.

34.7 Succession law in New Zealand is found in both statute law and common law.[6] The main statutes dealing with succession law are the Wills Act 2007, the Administration Act 1969, the PRA, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 (TPA). For our discussion in Part M, the PRA, the Family Protection Act 1955 and the TPA are the most relevant.

34.8 Leaving aside the PRA for the moment, a deceased's estate may be dealt with in three ways:

(a) in accordance with the deceased's will, where he or she sets out what should happen to his or her property on death in a valid will;[7]

(b) under the rules of intestacy, which apply when there is no valid will, set out in section 77 of the Administration Act 1969; or

(c) under the rules of survivorship, where the deceased co-owned property with others as joint tenants, which means that the surviving joint tenant or tenants automatically receive the deceased's share of the property.[8]

34.9 The distribution of property under a will or the intestacy rules is sometimes affected by third party claims. There are two statutory avenues for a third party to seek an adjustment to the distribution of property.[9]

34.10 First, the Family Protection Act allows a claim where the deceased has failed to discharge an obligation to provide "proper maintenance and support" for family members in his or her will or under the rules of intestacy.[10] Family members entitled to make

granted probate (i.e. where there is a will) 14,832 times and letters of administration (i.e. where there is no will) 1,058 times: data provided by email from the Ministry of Justice to the Law Commission (13 June 2017).

6 Testamentary capacity and voluntariness are covered by common law but we do not need to address these points further in Part M.

7 The requirements for a valid will are set out in the Wills Act 2007.

8 Under the rules of survivorship, any property owned as joint tenants does not form part of the deceased's estate and is not available to be distributed under the deceased's will or the rules of intestacy.

9 A dissatisfied individual can also make a claim for a constructive trust over the deceased's estate but these claims are less common. See *C v C* [2016] NZHC 583 for an example of such a claim. It is not necessary for us to discuss such claims further to highlight the general point that third party interests may result in the adjustment of the division of property. The use of constructive trust claims may occur because the Family Protection Act 1955 is not considered adequate and this question falls outside our Terms of Reference.

10 Family Protection Act 1955, s 4(1).

a claim include any partner,[11] child, grandchild, stepchild who was being maintained at the time of death, or parent of the deceased.[12] Proper maintenance and support goes beyond simply providing for a person's needs and requires "recognition of belonging to the family and of having been an important part of the overall life of the deceased."[13]

34.11 Second, the TPA allows a claim where the deceased promised to provide for a person, including a surviving partner, in a will in return for services that the person provided to the deceased during the deceased's lifetime. A surviving partner or third party may have an interest in the deceased's estate that the deceased failed to recognise and account for in his or her will.[14]

34.12 A surviving partner can make a claim under the TPA where:[15]

(a) the deceased promised to provide for the surviving partner from his or her estate;

(b) the surviving partner provided services to the deceased during the deceased's lifetime that went beyond "the normal incidents of the relationship";

(c) the provision promised was a reward for the services provided by the surviving partner; and

(d) the deceased failed to keep that promise.

34.13 Given the difficulty of establishing these elements, surviving partners rarely make claims under the TPA and are more likely to make a claim under the Family Protection Act.[16]

34.14 The Family Protection Act and the TPA seek to address different rights or needs. The Family Protection Act relates to claims for maintenance and support of family members out of the deceased's estate. The TPA is about enforcing promises made by the deceased in return for services by the party making the claim and is not

11 A spouse or civil union partner can make a claim under the Family Protection Act 1955 even if separated, whereas a de facto partner can do so only if he or she was living with the deceased in a qualifying relationship when the deceased died: Family Protection Act 1955, s 3(1)(aa).

12 Family Protection Act 1955, s 3. A parent can only make a claim if a parent was being maintained wholly or partly, or was legally entitled to be maintained wholly or partly, by the deceased immediately before his or her death or there was no surviving partner or child of the deceased, at s 3(1A).

13 *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

14 A court retains discretion to make an order under the Law Reform (Testamentary Promises) Act 1949 (TPA) and the factors relevant to quantum are very wide. This may mean that if competing claims against the estate are strong enough, an applicant under the TPA may not in fact receive any award.

15 Set out in Nicola Peart "Other Claims Against the Estate" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 419 at 428.

16 Nicola Peart "Other Claims Against the Estate" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 419 at 428.

limited to family members. Unless there is a very large estate it may be difficult to satisfy claims under these Acts.

34.15 Under the PRA, however, the surviving partner can elect to make an application for the division of the partners' relationship property instead of relying on succession law.[17] The personal representative of the deceased may also, in some circumstances, be able to apply for a division of relationship property under the PRA.[18] What happens when an application for the division of relationship property is made following the death of one partner is discussed below.

History of Part 8 of the PRA

34.16 Before the enactment of Part 8 of the PRA in 2001, a surviving spouse could make an application under the Matrimonial Property Act 1963 for an order against the deceased spouse's estate for an award based on contributions made by the surviving spouse to the property of the deceased spouse.[19] That Act gave the personal representative of the deceased an equivalent right to apply for orders in relation to the division of property, and this was commonly used to recover assets for beneficiaries of the estate or to enable the estate to meet claims under the Family Protection Act.[20] The Matrimonial Property Act 1963 did not address the relationship between matrimonial property orders and rights to provision from the deceased's estate, and this resulted in confusion as to how the Act was to operate on death.[21] In *Re Mora*, the Court of Appeal clarified that while an order under the Act could take into account any provision made for the spouse under succession law, it was possible for the surviving spouse to retain the entitlement under succession law as well as the matrimonial property award.[22]

17 Property (Relationships) Act 1976, s 61.

18 Property (Relationships) Act 1976, s 88.

19 Matrimonial Property Act 1963, ss 5 and 6. For an overview of the earlier background to division of property on the death of a partner see Margaret Briggs "Historical Analysis" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 1 at 1.

20 See s 5 of the Matrimonial Property Act 1963; and the discussion in Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

21 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

22 *Re Mora* (1988) 4 NZFLR 609 (CA) at 614.

34.17 The Matrimonial Property Act 1976 did not apply on the death of a spouse.[23] In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice said, however, that "the rights of a widow (or widower) should not be inferior in any way to those of a divorced or separated spouse".[24] Consideration of how this was to be achieved was deferred.[25] This meant that the Matrimonial Property Act 1963 continued to apply on the death of a spouse. There was no presumption of equal sharing and the surviving spouse had to prove contributions to the property to justify receiving property, besides any inheritance he or she may have received.

34.18 The position was considered again by the Working Group established in 1988 to review the Matrimonial Property Act 1976,[26] and by the Law Commission in its review of succession law in the 1990s.[27] Both identified as an anomaly the failure of the Matrimonial Property Act 1976 to apply when one spouse died.[28] As the law stood, the situation could arise where a spouse was given less property on the death of one spouse under the Matrimonial Property Act 1963 than he or she would have been entitled to had the spouses separated and the equal sharing regime applied.

34.19 The Working Group recommended that when a marriage ended on death the surviving spouse should have a choice between dividing the spouses' matrimonial property under the Matrimonial Property Act 1976 or taking whatever entitlement was provided under the deceased's will.[29] The Law Commission made a similar proposal.[30] Both emphasised the principle that the surviving

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23 AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13–14.

24 AM Finlay "Matrimonial Property – Comparable Sharing: an Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 13.

25 JK McLay MP "The Matrimonial Property Act 1976" (papers presented to the Legal Research Foundation Seminar, Auckland, 2 February 1977) at 18:

> *[a] number of submissions [to the Statutes Revision committee] advocated that the principles in the [1975] Bill should be extended to operate after the death of one spouse. There was general agreement with that proposition – however the Bill itself could not be so extended. . . . In the meantime the 1963 Act must continue in force for the limited purpose of enabling matrimonial property proceedings to be instituted after the death of one party; this is an interim situation which all would regard as unsatisfactory but unavoidable.*

26 The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to identify the broad policy issues with the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

27 Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996); and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

28 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40; and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [4] and [15].

29 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 44.

30 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at C36.

spouse should be no worse off than one whose marriage had broken down during the joint lives of the spouses.[31] The Working Group was careful to distinguish between matrimonial property law and inheritance law, observing that:[32]

> *The function of matrimonial property law is to ensure that a marriage partner whose marriage has come to an end receives what is rightfully his or her own property. It should go no further than that. If a deceased has failed to make proper provision for the survivor out of the deceased's share of matrimonial property or separate property, the survivor should apply for an appropriate award under inheritance law.*

34.20 The Working Group did not, however, consider that the estate should have a right to bring proceedings against the surviving spouse.[33] Noting that the broad object was to ensure that the surviving spouse was no worse off than one whose marriage had broken down, the Working Group felt that:[34]

> *It does not follow that the estate should be able to sue the survivor to ensure that the survivor is left with no more than his or her share of matrimonial property. Where one spouse has died the contest is no longer between two partners who take their share and then go their different ways. It is between the survivor of a marriage and the beneficiaries under a will or on an intestacy, or potential family protection claimants. There is also the obvious point that the deceased may have wished the survivor to take the deceased's share of matrimonial property.*

34.21 The Law Commission came to a different conclusion. In its Preliminary Paper on succession law it took the position that "a property division may be initiated either by the surviving spouse or else by the will-maker's administrator".[35] In theory, the Commission said, "if property is held unequally between husband and wife, either should be able to reclaim their own property. It does not matter who dies first."[36] This was in accordance the

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31 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40; and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [4] and [15]. Also discussed in Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

32 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40 (emphasis in original).

33 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46.

34 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46. The Working Group noted at 46–47 that the Ontario Law Reform Commission reached the same conclusion, and this conclusion was reflected in the resulting legislation. Among reasons given by the Ontario Law Reform Commission were that (a) to permit such claims would in many cases result in property returning in due course to the survivor, and (b) a survivor with children should not have his or her assets diminished by such claims.

35 Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [106].

36 Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [107].

Commission's view that property division on death should "be governed by the principles of the law of matrimonial property, as they apply to spouses whose marriage ends by divorce."[37] These views were reflected in the Commission's Final Report.[38] The Commission noted, however, that the survivor should be able to advance a "support claim" if the administrator of the deceased spouse's estate initiates the recovery of the estate's share of the matrimonial property.[39] A support claim would permit the surviving spouse to maintain a reasonable, independent standard of living but only until he or she could reasonably be expected to become self-supporting, having regard to the financial consequences of the partnership.[40] The Commission said:[41]

> *In practice, it may not be worthwhile for the administrator to bring property division proceedings during the survivor's lifetime. The claim is likely to be met by the survivor's claim for support. But on the survivor's death, the equalisation of estates may well be desirable, for example, to secure provision for the children from the previous marriage of the partner who dies first.*

34.22 Both the Working Group and the Law Commission also made recommendations in relation to the Family Protection Act and the TPA. The Working Group proposed that the provisions covering division of matrimonial property on death should be included in the Matrimonial Property Act 1976, while the Family Protection Act and TPA provisions should be combined in a new statute.[42] The Law Commission recommended that rules relating to the division of matrimonial property on the death of a spouse, support claims and contribution claims all come under a new statute, to be called the Succession (Adjustment) Act, and that the Family Protection Act and the TPA be repealed.[43] The purpose of the proposed Succession (Adjustment) Act was to align claims against estates with claims that could be made against the deceased during his or her lifetime.[44] Neither of the new statutes

37 Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [99].

38 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C31] and [C35].

39 Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [107].

40 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [52]–[55] and [C3]–[C5]. This was consistent with "spousal support rules for when a marriage ends on dissolution of marriage during spouses' joint lifetime" in s 64 of the Family Proceedings Act 1955 (Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 80).

41 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C35].

42 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40 and 63. Having noted that not allowing the estate to make a claim could give rise to issues where children from a previous relationship are not provided for, the Working Group commented that a new Inheritance Act could be created allowing step-children to sue step-parents (at 47).

43 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at vii.

44 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C4]

proposed by the Working Group or the Law Commission has been implemented.

34.23 Instead, the 2001 amendments introduced Part 8 into the PRA, extending the equal sharing regime to relationships ending on death.[45] The amendments were intended to address the "major anomaly" that the Matrimonial Property Act 1963 applied on a spouse's death rather than the equal sharing regime.[46]

What happens to a partner's property when they die?

34.24 We set out below how succession law and the PRA can apply when a person dies, leaving behind a partner and other potential beneficiaries.

The surviving partner's choice under the PRA

34.25 When one partner dies, there is a risk that his or her will does not make adequate provision for the surviving partner's relationship property entitlement under the PRA. For example, if most of the partners' property was in the deceased's sole name, and the deceased leaves his or her property to the partners' children, the surviving partner is worse off than if the partners had separated before death.[47]

34.26 To protect against this risk, and the risk that the rules of intestacy might apply, section 61 of the PRA gives a surviving partner the choice to:

(a) apply for a division of relationship property under the PRA (option A); or

(b) receive an entitlement provided under the deceased's will, or if the deceased dies without a will, under the intestacy rules (option B).

45 Property (Relationships) Amendment Act 2001, pt 8.

46 Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i.

47 Section 19 of the Property (Relationships) Act 1976 provides that while property is undivided either partner can dispose of property in any way whatsoever.

34.27 If the surviving partner does not make a choice of option A or option B in the required manner and within the required timeframe, he or she is treated as having chosen option B.[48]

34.28 Once the surviving partner chooses option A or option B, he or she cannot withdraw that choice.[49] A court can set aside the choice, however, but only if it is satisfied that either:[50]

(a) the decision was not freely made;

(b) the surviving partner did not fully understand the effect of the choice;

(c) the surviving partner has received relevant information since the choice was made; or

(d) someone other than the surviving partner has made an application under the Family Protection Act or the TPA in relation to the deceased partner's estate; and

(e) in all the circumstances it would be unjust to enforce the choice.

The personal representative's choice under the PRA

34.29 The surviving partner is not the only person who can apply for a division of relationship property under the PRA.[51] Sometimes the personal representative of the deceased will want a court to determine the deceased's interest under the PRA. This situation will usually arise because the personal representative wants to ensure that some of the deceased's estate is available for other beneficiaries under the will or for potential claimants under the Family Protection Act or the TPA.

34.30 A personal representative may only apply for a division of relationship property if a court grants leave to do so.[52] A court can only grant leave if it is satisfied that failing to do so would cause "serious injustice".[53] In *Public Trust v W*, for example, leave was granted because the court was satisfied that the deceased had

48 Section 68 of the Property (Relationships) Act 1976. The choice must be made within six months of death or the grant of administration of the estate of the deceased spouse as set out in s 62. The choice must be made in the manner required by s 65.

49 Property (Relationships) Act 1976, s 67.

50 Property (Relationships) Act 1976, s 69.

51 Property (Relationships) Act 1976, s 88.

52 Property (Relationships) Act 1976, s 88(2).

53 Property (Relationships) Act 1976, s 88(2).

structured his affairs in order to avoid fulfilling his moral duty to provide for the minor children of a former relationship.[54]

Option A – dividing the relationship property under the PRA

34.31 If option A is chosen the surviving partner's relationship property entitlement under the PRA has priority over claims under the Family Protection Act or the TPA, as well as priority over any beneficial interest under a will or the rules of intestacy.[55]

34.32 If a surviving partner chooses option A, or a court grants the deceased's personal representative leave to apply for a division of relationship property, the PRA's general rules of classification and division of relationship property (discussed in Part C and Part D of this Issues Paper) apply, with some modifications.[56]

34.33 There are several important modifications to the PRA's rules of classification and division that apply only on death:

(a) First, section 81 presumes that all of the deceased's property is relationship property.[57] Any person who asserts otherwise must prove the disputed property is not relationship property.[58] This is subject to the provisions of the PRA relating to contracting out agreements, discussed below.[59]

(b) Second, section 83 provides that property that would have otherwise passed to the surviving partner by the rule of survivorship (that is, any property owned as joint tenants) is not automatically the separate property of the surviving partner. The status of that property as relationship property or separate property is determined according to the status it would have had if the deceased partner had not died, unless a court decides otherwise.[60] The High Court has clarified that section 83

54 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [50]–[51].

55 Property (Relationships) Act 1976, s 78.

56 Property (Relationships) Act 1976, s 75(b).

57 Other than any property the deceased received under from a third person by way of gift, inheritance or as a beneficiary under a trust, to which s 10(2) of the Property (Relationships) Act 1976 applies: s 81(4).

58 Property (Relationships) Act 1976, s 81(2). Note that the Property (Relationships) Act 1976 also contains a presumption that property acquired by the deceased's estate is relationship property: s 82.

59 Property (Relationships) Act 1976, s 81(3).

60 Property (Relationships) Act 1976 (the PRA), s 83(1)(b). In *B v A* (2005) 25 FRNZ 778 (FC) the Family Court considered at [57] that although the surviving spouse had chosen option A, and thus would only receive a half interest in a holiday home jointly owned by the partners, the phrase "decides otherwise" authorised the Court to exercise its discretion

only applies where the surviving partner chooses option A.[61] It cannot be relied on when the deceased's personal representative applies for a division of relationship property.[62]

(c) Third, the rules of division for short-term relationships that end on death are different to the rules for short-term relationships that end on separation.[63] If a short-term marriage or civil union ends on death, the PRA treats the relationship as if it was not of short duration, unless the result would be "unjust."[64] If, however, a short-term de facto relationship ends on death, the same rules apply as for short-term relationships ending on separation, and a court cannot make an order for a division of relationship property unless either:[65]

(i) there was a child of the relationship; or

(ii) the surviving partner made a substantial contribution to the relationship;[66] and

(iii) not making the order would cause serious injustice.

34.34 In practice, when option A is chosen, the surviving partner and the personal representative of the deceased will usually agree on the classification and division of the partners' property, in the same way separating partners negotiate a property division under the PRA. Any agreement reached should be formalised in accordance with section 21B of the PRA. If agreement is not reached, the surviving partner can apply to a court for division of relationship property.

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where it was just to do so. The Court found that the survivorship rule should apply and the widow was allowed to retain the holiday home. The Court relied on the purposes and principles of the PRA as stated in ss 1M and 1N. The Court also considered factors at [61]–[62] such as the sentimental value of the holiday home to the surviving spouse and the deceased's intention that the surviving partner would acquire the asset by survivorship. Other factors that were not expressly mentioned in the judgment were that the bulk of the deceased's estate was separate property that was left to a friend, and that there were no competing claims as the deceased had no children: Nicola Peart (ed) *Brookers Family Law – Family Property* at [PR83.04]. This decision was criticised in *Brookers Family Law – Family Property* at [PR83.03] because the Court should have classified the assets as the widow's separate property rather than holding that the survivorship rule should apply. Classification would have achieved the same result in the case.

61 *Thompson v Public Trust* [2014] NZHC 1374, [2014] NZFLR 902 at [88].

62 *Thompson v Public Trust* [2014] NZHC 1374, [2014] NZFLR 902 at [88].

63 Property (Relationships) Act 1976, s 85.

64 Property (Relationships) Act 1976, s 85(1). If a court considers it would be unjust to apply the general rule of equal sharing to a short-term marriage or civil union, the rules for short-term marriages and civil unions that end on separation will apply: s 85(2).

65 Property (Relationships) Act 1976, s 85(3). If this test is satisfied, the share of the surviving partner and of the deceased partner's estate in the relationship property is to be determined in accordance with the contribution of each partner to the relationship: s 85(4).

66 What constitutes a "substantial contribution" was considered in the case of *H v H* [2013] NZHC 443, [2013] NZFLR 387. The High Court settled on stating that it was a contribution "over and above" what would usually be expected in the normal course of a relationship at [53]–[56].

34.35 When a partner chooses option A, he or she foregoes any gifts under the will, unless the will-maker has expressed a contrary intention in the will.[67] The will is then interpreted as if the surviving partner has died before the deceased.[68]

34.36 A court may make an order under section 77 that the surviving partner should receive a gift under the will if it is necessary to avoid injustice.[69] In addition, section 57 of the PRA preserves the right of a surviving partner to make a claim under the Family Protection Act or the TPA. An example of the courts exercising discretion under section 77 is in *B v A*, where the surviving partner would have been left little of the deceased's estate, which was principally a large farm that was the deceased's separate property, regardless of whether option A or option B was chosen.[70] The court ordered that the surviving partner was to receive gifts provided for under the will of the deceased.[71]

Option B – relying on succession law

34.37 If the surviving partner chooses option B and the deceased partner left a will, the estate will be administered according to the terms of that will, subject to any claims brought under the Family Protection Act or the TPA, as discussed below.[72]

34.38 If the surviving partner chooses option B and the deceased partner died intestate, the surviving partner receives all of the deceased's personal chattels, a prescribed amount of money which is set by regulation,[73] and a certain portion of the remainder of the estate depending on whether there were other surviving family members.[74] If the deceased left behind children, the surviving partner receives one-third of the residue of the estate and the children receive two-thirds.[75] If the deceased left behind no children but one or both parents are still alive, the surviving partner receives two-thirds and the parent or parents receive one

67 Property (Relationships) Act 1976, s 76.

68 Property (Relationships) Act 1976, s 76(3).

69 Property (Relationships) Act 1976, s 77.

70 *B v A* (2005) 25 FRNZ 778 (FC).

71 *B v A* (2005) 25 FRNZ 778 (FC).

72 Or under common law or equity.

73 Administration Act 1969, s 82A. The prescribed amount is currently $155,000: Administration (Prescribed Amounts) Regulations 2009, reg 5.

74 Administration Act 1969, s 77.

75 Administration Act 1969, s 77.

third of the estate. If there are no children and no parents, the surviving partner receives the entire estate.

Case study: Robin's estate

Robin and Ataahua have been married since their early 20s. They have two children. They own two properties; their family home and a holiday house. All significant property they own was acquired during their relationship. Any money they have been gifted or inherited, or owned before they married, has been intermingled with property obtained during the relationship. Both the family home and the holiday house are held in Robin's name. Robin dies (aged 70), leaving Ataahua (aged 67) and the two children (both in their mid 30s). Robin leaves a will in which he leaves the family home and all family chattels to Ataahua. He leaves the holiday home and everything else that is left over after the express gifts (known as the residue) to his children jointly.

Ataahua has two options. She can choose option A, and apply for a division of relationship property. This would give her a half share in all the property, including both the property left to her in the will (the family home and chattels) and the property left to the children in the will (the holiday home and any residue). Alternatively, she can elect option B and take what she has been left under the will. If she elects option A, she will lose any gifts under the will that are not her share of relationship property because there was no contrary intention expressed. These gifts are Robin's half of the home and the family chattels. They would become part of the residue of the estate and go to the children in half shares.

Third party claims

34.39 The rights available to the surviving partner can affect the interests of third parties. As discussed at paragraph 34.31, if a surviving partner chooses option A, his or her relationship property entitlement under the PRA takes priority over the will or the intestacy rules, any duties and fees payable by the estate, and any orders made under the Family Protection Act or TPA.[76]

34.40 In addition to electing option A or option B, a surviving partner is also able to bring a claim under the Family Protection Act or TPA.[77] This might occur where a large portion of the deceased's estate is separate property left to a third party under the will, so little property is available to the surviving partner under either option A or option B. For example in *B v A*, discussed at paragraph 34.36, the court made an award under the Family Protection Act

[76] Property (Relationships) Act 1976 (PRA), s 78. This might mean that a claim to a specific item of property under the Law Reform (Testamentary Promises) Act 1949 could not be met because it was relationship property and therefore subject to division under the PRA.

[77] Property (Relationships) Act 1976, s 57. See also Family Protection Act 1955, s 4; and Law Reform (Testamentary Promises) Act 1949, s 3.

in circumstances where the surviving partner would have been left little of the deceased's estate (principally a large farm that was his separate property) regardless of whether option A or option B was chosen.[78]

34.41 Claims brought by third parties as beneficiaries under the will or the rules of intestacy, or under the Family Protection Act and TPA, can affect the rights of the surviving partner. If option B is chosen,[79] the surviving partner's share of the estate may be reduced. The personal representative of the deceased may also seek leave to apply for a division of property under the PRA, as discussed at paragraphs 34.29 and 34.30.

34.42 The PRA prioritises applications for the division of relationship property over other claims on the deceased's estate.[80] As we discuss in Chapter 36, the PRA, with its focus on the partners' interests, is arguably not well-equipped to address the tension between the interests of surviving partners and third parties, nor the appropriate role of the personal representative.

34.43 The rights of creditors under the Insolvency Act 2006 and Administration Act 1969 are, however, preserved as if the PRA did not exist.[81] This means that the rights of the deceased's creditors against the estate are unaffected by a surviving partner's rights under the PRA. This is very similar in effect to section 20A of the PRA which provides that the rights of creditors continue as if the PRA had not been enacted.

Contracting out agreements and death

34.44 An implicit principle of the PRA is that, subject to safeguards, partners should have the freedom to organise their property affairs in a manner of their choosing.[82] This includes deciding how property should be divided on the death of one partner.

34.45 Section 21 of the PRA provides that partners can make an agreement before or during a relationship, relating to the "status, ownership and division of their property (including future

78 *B v A* (2005) 25 FRNZ 778 (FC).

79 Or if option A is chosen and the surviving partner also receives property under the will: see discussion at paragraph 34.35.

80 Property (Relationships) Act 1976, s 78.

81 Property (Relationships) Act 1976, s 58. See discussion in Part K.

82 This implicit principle is discussed in Chapter 3. In Chapter 30 we discuss contracting out agreements in more detail.

property)", when one partner dies.[83] This means that if the partners had a contracting out agreement under section 21 which provided for how property was to be classified or divided on the death of a partner, that agreement would apply instead of the rules of the PRA.[84] In order to rely on a section 21 agreement, the surviving partner must elect option A.

34.46 Section 21B provides that when one partner has died, the deceased's personal representative and the surviving partner may make an agreement to settle any claim with respect to the partners' property. If the surviving partner is also the personal representative of the deceased then section 21B(3) requires the agreement to be approved by a court under section 21C.

34.47 Contracting out agreements under section 21 and section 21B must comply with the procedural requirements in section 21F. If these requirements are not satisfied then the agreement is void, subject to section 21H.[85]

34.48 Even if a valid contracting out agreement is made, the court retains a power to set aside the agreement if it would cause a serious injustice.[86] Section 87 provides for a surviving partner to challenge a section 21 agreement before or after option A is chosen.[87]

83 In *C v C* [2016] NZHC 583, for example, the partners made an agreement that provided that all property held by the partners was relationship property and that it would be evenly divided on separation but that the surviving partner would receive more than half of the property if one partner died. The terms of a variation to the wills indicated that the partners expected the surviving partner to choose option B (which gave the surviving partner in this case all the relationship property subject to obligations to others recorded under the variation). Any property that passed by surviviorship was not part of the estate. Even if option A were chosen, the division of property would be determined pursuant to the terms of the relationship property agreement and the variation (unless the arrangements were set aside under s21J). Concern has been expressed to us that in practice, some contracting out agreements are drafted ambiguously which can give rise to uncertainty about their operation on the death of a partner.

84 Property (Relationships) Act 1976, s 81(3).

85 Section 21H of the Property (Relationships) Act 1976 provides that even though an agreement is void for non-compliance with a requirement of s 21F, the court may declare that the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

86 Property (Relationships) Act 1976, s 21J.

87 Property (Relationships) Act 1976, s 87(2)(b). When determining if an agreement would cause serious injustice the court must also have regard to whether the estate of the deceased has been partly or wholly distributed: s 87(3).

Chapter 35 – Specific issues with Part 8

Issue 1: Public understanding of the application of the PRA on death

35.1 From our research and preliminary consultation we understand that many will-makers and surviving partners are not aware of the choice a surviving partner can make between option A and option B, or the implications of making a choice.[88] This may be due in part to a lack of debate and public promotion of the 2001 amendments extending the PRA to relationships ending on death when they were introduced.[89] It may also reflect an assumption by the public that, because a relationship ending on death is different to a relationship ending on separation, different rules apply.

35.2 Lawyers and other professional advisers may tell a will-maker about option A and option B but what these options mean for the will-maker can be difficult to explain in simple terms. Complex legal advice on the likely outcome of a future division of relationship property under the PRA might be necessary, requiring an assessment of the will-maker's assets and the circumstances that could lead to those assets being classified as relationship property or separate property. Any legal advice would likely be qualified to acknowledge possible changes in circumstances between the time of drafting of the will and the will-maker's death. Such changes could affect classification of property, the division of relationship property or the will-maker's vulnerability to a claim under either the Family Protection Act or the TPA.[90]

35.3 Exploring the potential PRA implications of making a will may be time-consuming and costly. It may increase costs so much that

88 Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356 at 372.

89 Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Common Law World Review 356 at 368.

90 People may also be unaware of the way that wills are affected by changes in relationship status. Under s 18 of the Wills Act 2007, wills are revoked when people get married or enter into civil unions. There is no equivalent rule for de facto relationships. This rule was called into question by the Law Commission in their review of succession law in the 1990s: Law Commission *Succession Law Wills Reforms* (NZLC MP2, 1996) at [128]. It is possible that enough people now make wills in favour of their partners before marriages or civil unions that the rule is no longer useful.

the will-maker cannot or will not seek professional advice. The set fee option lawyers may offer for preparing a will is unlikely to allow for the additional time required to fully address the PRA implications.

35.4 The lack of public awareness of the PRA's application to relationships ending on the death of one partner has several consequences:

(a) First, people make wills without realising that their will may not apply if the surviving partner elects option A. If will-makers knew this, they might make different estate plans.

(b) Second, by not knowing they can elect option A, surviving partners may be missing out on property rights under the PRA that would be financially beneficial to them.[91]

(c) Third, surviving partners who do choose option A may do so without full knowledge of its consequences. We have heard anecdotal evidence of surviving partners choosing option A without knowing the extent of the estate and being unaware that property owned in their name (that they assumed was their own separate property) is also subject to division.

(d) Fourth, there is insufficient consideration of contracting out of the PRA.

35.5 Greater awareness among both professional advisers and the general public of the implications of the PRA for relationships ending on death seems desirable. We are interested in suggestions as to how this could be achieved.

CONSULTATION QUESTION

M1 Are the options available to the surviving partner under the PRA, and the implications of those options, well known and understood by will-makers, surviving partners and professional advisers? If not, what could be done to better inform people?

[91] In 2016, probate or letters of administration were granted to nearly 16,000 estates, but option A was elected only 14 times: data provided by email from the Ministry of Justice to the Law Commission (13 June 2017).

Issue 2: The different treatment of short-term relationships on death

35.6 Two issues arise with the rules for short-term relationships that end on death.

Should short-term marriages and civil unions be treated the same as qualifying relationships?

35.7 The minimum duration requirements that apply when partners separate do not normally apply to marriages and civil unions ended by death.[92] Section 85 provides that the general rule of equal sharing will apply to short-term marriages and civil unions that end on the death of one partner unless a court, having regard to all the circumstances, considers that would be unjust.[93] If the court does consider that would be unjust, the rules of property division set out in section 14 for short-term marriages and civil unions ending on separation will apply.

35.8 The PRA does not define "unjust" and its meaning in this context has not often been considered by the courts. In *S v S*, the Family Court found that the threshold of "unjust" was not met, despite stating that "the marriage could well be described as one of convenience for both parties".[94] In that case the Court found that equal sharing was not unjust because both parties benefited from the marriage.[95] Had the deceased partner remained alive, there was no reason to think the marriage would not have passed the three-year threshold.[96]

35.9 The approach set out in section 85 reflects the recommendations of the Working Group in 1988.[97] The Working Group said that the surviving partner could suffer hardship if the same rules that applied to short-term relationships that ended on separation applied to those that ended on the death of one partner, in essence because the relationship had not ended by

92 Property (Relationships) Act 1976, ss 2E and 85(1).

93 Property (Relationships) Act 1976, s 85(2).

94 *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [31].

95 *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [34]–[35].

96 *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [38].

97 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

choice.[98] Short-term relationships ended by death may share some characteristics with short-term relationships ended by separation.[99] Such relationships may be transient or not have developed the commitment that often comes with time. The difference, however, is that when the partners have separated there is clear evidence that a relationship is, for example, transient or lacking commitment. Our preliminary view is that, without evidence to the contrary, it is appropriate for the PRA to assume that, but for the death of one partner, the relationship would have continued.

Should short-term de facto relationships ending on death be treated differently?

35.10 The PRA does not generally apply to short-term de facto relationships that end on the death of one partner. The court can only order the division of property if the short-term de facto relationship passes the two-stage test that applies to short-term de facto relationships that end on separation (see paragraph 34.33(c)).[100] If that test is met, a court may order division of the relationship property in accordance with the contributions of each partner.[101] If that test is not met, the surviving partner has no rights under the PRA.

35.11 The different treatment of short-term de facto relationships on separation under section 14A is discussed in Part E of this Issues Paper, and is probably the basis for the different treatment of short-term de facto relationships on death. However, if the reason for treating short-term marriages and civil unions ending on death differently from those ending on separation is that death is not a voluntary ending to the marriage or civil union, it is unclear why the same reasoning does not apply to short-term de facto relationships ended by death. The perception that people are more likely to "drift" into de facto relationships and that de facto relationships involve a lesser commitment than marriages and civil unions may be part of the justification.[102]

98 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 43.

99 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 43.

100 Property (Relationships) Act 1976, s 85(3).

101 Property (Relationships) Act 1976, s 85(4).

102 These views are discussed further in Part E of this Issues Paper.

35.12 The current approach ensures that a de facto partner in a short-term relationship is not worse off if their partner dies, compared to if they separate. A surviving de facto partner can still make a claim under both the Family Protection Act and the TPA, independent of any claim under the PRA. If the law was to be changed to allow all surviving de facto partners (regardless of the length of the relationship) to make a claim under the PRA, careful consideration would be needed as to how to guard against undesirable results. For example, if short-term de facto relationships that ended on death were treated as a qualifying relationship, some surviving de facto partners would be better off than if the relationship ended by separation (because they would be entitled to an equal share of relationship property regardless of their contribution to the relationship or the existence of a child of the relationship). A provision similar to section 85(2), which permits the court to apply the rules for short-term marriages and civil unions that end on separation if it would be unjust to apply the general rule of equal sharing, could address this risk. [103]

35.13 In Part E we propose options for reforming the rules that apply when short-term relationships end on separation. One option is to adopt the same rules of division for all short-term marriages, civil unions and de facto relationships that end on separation. Any proposal to reform the rules that apply to short-term relationships ending on death must be considered alongside those options.

CONSULTATION QUESTIONS

M2 On the death of a partner, should short-term marriages and civil unions continue to be treated the same way as qualifying relationships?

M3 On the death of a de facto partner, should short term de facto relationships continue to be treated differently to short-term marriages and civil unions?

Issue 3: Problems with option A and option B

35.14 Various problems arise with the way option A and option B operate in practice.

[103] See the discussion in Chapter 3 as to potential human rights implications that arise in the scope of this review.

35.15 First, until a surviving partner chooses option A or option B, no one can be sure whether the deceased's will is going to apply or not. The surviving partner has six months from the grant of administration of the estate to make his or her choice.[104] This uncertainty affects the will-maker while he or she is alive, the beneficiaries of the deceased's estate and even the surviving partner. It may also affect professional advisers and the deceased's personal representative. While a surviving partner is deliberating which option to elect, an estate is unlikely to be distributed in accordance with the deceased's will.

35.16 Second, in most cases the surviving partner must choose to either wholly accept (option B) or wholly forfeit (option A) the benefits he or she has under the will. If, in contrast, the partners had separated and there was a relationship property division before one partner died, the surviving spouse does not lose the right to take gifts under the deceased partner's will.[105] The separated partner could therefore be better off than a partner whose relationship ended on death.

35.17 Peart suggests that this approach confuses the boundary between a partner's entitlements under the PRA and under succession law.[106] When partners elect a division of the partners' relationship property under the PRA, they are rightfully claiming their own property. When partners receive an inheritance, they are receiving the deceased's property as a gift. It is arguably unfair that surviving partners must forfeit the gifts the other partner chooses to give them if they are to claim what is in any event their property.

35.18 Although a will-maker can expressly provide in the will that any gifts to a surviving partner are to have effect even if the partner elects option A, we understand that wills seldom contain such a provision.[107] This may be due to a lack of understanding of the need to make such express provision, rather than a deliberate step to deprive a surviving partner of gifts under the will or a

104 Property (Relationships) Act 1976, s 62, with the possibility of an extension granted by the court.

105 This may occur where separated partners have not updated their wills to reflect the end of their relationship. A will remains valid even if a person's marriage or civil union comes to an end unless they have a separation order or if their relationship is formally ended by a dissolution order: see s 19 of the Wills Act 2007. Ending a de facto relationship has no effect on a will. We acknowledge that in most cases, it would only be by oversight that a separated partner continued to leave property to their former partner under a will.

106 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Section 76 of the Property (Relationships) Act 1976 provides that if a partner elects option A under s 61, every gift to that surviving partner is treated as having been revoked.

107 Property (Relationships) Act 1976, s 76(1).

public consensus that the "all or nothing" approach in the PRA is the right one. Partners who anticipate that the surviving partner would receive a half share of relationship property together with gifts under the will may be disappointed.

35.19 Third, the requirement that a surviving partner must choose option A or option B may impose costs and delay on both the surviving partner and the deceased's personal representative. A surviving partner must give written notice of his or her choice of option A or option B in the prescribed form.[108] The surviving partner's lawyer must certify that he or she has explained the effect and implications of the notice.[109] Both exercises take time for which the lawyer will be entitled to charge.

35.20 Fourth, we understand that there can be uncertainty about how a contracting out agreement entered into under section 21 affects the surviving partner's choice of option A or option B, because of the way in which some agreements are drafted.

35.21 If the surviving partner makes no election, he or she will be treated as having chosen option B.[110] We understand that usually option B is automatically engaged and that a formal election under section 61 is uncommon.[111]

Option for reform: Should the PRA presume election of option A (division of relationship property under the PRA)?

35.22 If the potential problems we have identified above are material issues, a possible option for reform is to remove the requirement that a surviving partner must choose option A or option B. Instead, the PRA could provide that:

(a) A surviving partner has a minimum entitlement to an equal share of the partners' relationship property regardless of the provisions of the deceased partner's will. That is, all cases would proceed as if the surviving partner had elected option A.

108 Property (Relationships) Forms Regulations 2001, sch 2.

109 Property (Relationships) Act 1976, s 65(2)(b).

110 Property (Relationships) Act 1976, s 68(1).

111 See fn 91 above.

(b) The surviving partner is also entitled to any gifts under the deceased's will, assuming that gift is not already accounted for in the division of the partners' relationship property. There would be no need for the will-maker to make his or her intentions clear in accordance the current requirement in section 76.

35.23 This approach would give the will-maker more certainty about what will happen to his or her property on death. There would no longer be a need for the deceased's personal representative to apply for a division of relationship property under the PRA, as that would become the default position. Administration of an estate would not have to wait until the surviving partner makes an election. Any Family Protection Act and TPA claims would be dealt with after the pool of relationship property is identified and divided. Such claims would be limited to the deceased's share of relationship property, and any other separate property that makes up the deceased's estate.

35.24 This approach would also avoid problems that arise from people being uninformed about the application of the PRA on the death of one partner. Surviving partners would not be disadvantaged by being unsure of their rights, and will-makers would, with proper advice, know that they could not deal with relationship property as if it was entirely their own. This should assist professional advisers and will-makers in estate planning.

35.25 Reform of the intestacy rules under the Administration Act 1969 would be required under this option to reflect the surviving partner's minimum entitlement. One way to deal with this would be to give the surviving partner their portion of relationship property, and any additional property from the deceased's estate up to the surviving partner's entitlement on intestacy.[112]

112 Under s 77 of the Administration Act 1969 the surviving partner's entitlement is the family chattels, a statutory sum of (currently) $155,000, and a portion of the remainder of the estate that changes in size depending on whether there are surviving children or parents of the deceased. When the Law Commission reviewed New Zealand's succession laws in the 1990s, a review of the Administration Act was initially part of the reference. In its report on wills, the Law Commission noted it was conducting research on "the conceptual basis of the system of intestate succession" and that the current intestacy rules failed to give effect to either the duties or the assumed wishes of the deceased: Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R41, 1997) at v. Although there were no further publications on this matter, law reform bodies in other jurisdictions have conducted reviews of the division of property on intestacy, for example, New South Wales , where the rules were changed to provide the surviving partner with all the property in the estate unless there were children of a previous relationship: Succession Act 2006 (NSW), ss 110–113; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (NSWLRC R116, 2007) at xiii–xiv. This reform reflected the view, as stated by the Commission, that these rules better reflected the presumed intentions of the deceased person and the rules which provided otherwise did not "reflect the current demographic makeup of early 21st century Australia, community expectations … and other factors": New South Wales Law Reform Commission *Uniform succession laws: intestacy* (NSWLRC R116, 2007) at 8 and 35.

35.26 This option would also need to be considered in light of the rule of survivorship (that any property owned as joint tenants automatically passes to the surviving tenants on death). Section 83 provides that the survivorship rule does not apply under option A. Instead, any jointly owned property must be assessed as relationship property or separate property in accordance with the PRA's classification rules. This option for reform would therefore mean that the partners' intentions, demonstrated by their joint ownership of property, have little effect on how that property is divided under the PRA. This might, however, be seen as desirable, as the deceased's share of the jointly held property would remain part of his or her estate and would be available for distribution under the will or intestacy rules, subject to any Family Protection Act or TPA claims.

35.27 Finally, careful consideration is needed as to how to balance the competing interests of all those potentially affected by the death of a partner, including:

(a) the deceased's freedom to deal with property under a will as he or she chooses and the deceased's rights under the PRA;

(b) the surviving partner's rights under succession law and the PRA;

(c) the rights of the deceased and the surviving partner to hold property in joint ownership or to enter a contracting out agreement under section 21 of the PRA; and

(d) the rights of third parties who may benefit under succession law.

35.28 Often competing claims to the deceased's estate will arise. Consideration is needed as to which claims ought to be given priority. This policy question goes to the heart of what is a fair distribution of a deceased's estate on death. It must therefore be considered in the broader context of succession law, rather than the PRA, which is primarily about the property rights of partners. We address this policy question further in Chapter 36.

35.29 This option may be perceived as a big change. Many New Zealanders make wills assuming they have complete testamentary freedom to deal with property to which they hold legal title. Consequently, many people may see a legal requirement to

provide a partner half the relationship property as an unwelcome change in New Zealand's succession law. Given that testamentary freedom is in fact constrained in a number of ways, this perception may simply be misplaced.

CONSULTATION QUESTIONS

M4 Should the application of the PRA on death continue to be based on an election by the surviving partner?

M5 If not, should the PRA presume an election of option A? If not, what would you change?

Issue 4: The deceased's personal representative does not have the same rights as the surviving partner

35.30 The Matrimonial Property Amendment Bill 1998 as introduced to Parliament adopted the Working Group's recommendation that only the surviving partner should have the right to elect a division of the partners' relationship property under the PRA.[113] The Parliamentary select committee, however, amended the Bill by providing for the personal representative of the deceased to apply for a division of relationship property with leave of the court.[114] No explanation was given in the select committee report for the amendment although it was likely related to a desire to give some protection to other beneficiaries to the deceased's estate.[115]

113 See discussion in Nicola Peart "Part 8: The Election" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 59 at 60–61. The Working Group on Matrimonial Property and Family Protection felt that an estate was not required to ensure that the surviving partner received no more than his or her share of the relationship property, and that the contest is between the surviving partner and any beneficiary under the will, not the two surviving partners who go their separate ways. The Working Group also noted that the deceased may have wished that the surviving partner take the deceased's share of relationship property: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46. When the Law Commission considered the question in 1997, it took a different view to the Working Group. The Law Commission recommended that the personal representatives of the deceased's estate have a right to initiate a division of the partners' relationship property. The Law Commission's reasons were that the estate had a right under the Matrimonial Property Act 1963 to apply for a division. The Commission also noted that the estate may wish to seek a division in order to secure provision for the children of a former marriage, although the Commission accepted that it may be desirable that the division be sought after the death of the surviving partner. See Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 58–59.

114 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report).

115 Nicola Peart states "[i]t is safe to assume, though, that s 88(2) was inserted in response to submissions identifying the risk of dependent family members being rendered destitute if the estate could not seek a division": Nicola Peart "Relationship Property on Death" [2004] NZLJ 269 at 270. Some indication on the purpose of allowing the personal representatives to apply for division can be gleaned from the Ministry of Justice Departmental Report on the Bill to the Select Committee: Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999). At 50 the Ministry advised:

> *[I]t is acknowledged that there may be cases where preventing the estate applying for a division could cause injustice. For example, where the surviving spouse owns a substantial amount of the matrimonial property, the inability of the estate to*

35.31 This late-stage change to the Bill has likely contributed to the range of issues that arise when a personal representative seeks to apply for a division of relationship property under the PRA.

Section 88 of the PRA

35.32 Section 88(1) of the PRA gives a surviving partner the right to apply to a court for a division of relationship property. Section 88(2) provides that the personal representative of the deceased may only apply for an order dividing relationship property with the leave of a court. A court may grant leave only if it is satisfied that refusing leave would cause "serious injustice."[116] We discuss the "serious injustice" test below.

35.33 The leave of a court is not, however, required for the personal representative to apply for any other order under the PRA, including a declaration or order in relation to a specific item of property under section 25(3). The reason for this distinction is unclear. It might have odd outcomes. For example, a personal representative could rely on section 25(3) to seek a declaration as to ownership of individual items of property rather than seeking the leave of the court under section 25(1)(a). This could effectively undermine the leave requirement in relation to section 25(1)(a). However, in this scenario the court might be inclined to exercise its discretion against making such an order, on the basis that it undermines the intent of section 88(2).

Should a personal representative need leave of the court to apply for a division under the PRA?

35.34 If the choice to elect option A or option B remains in the PRA, another option for reform is to grant the same rights to apply for a division of relationship property under the PRA to the deceased's personal representative. Peart has argued that the deceased's personal representative should be able to apply for a division of relationship property under the PRA as of right, in the same way a surviving partner can, because the deceased partner should have an equal right to distribute his or her share of relationship

have its share divested from the survivor may be unfair to the other beneficiaries under the deceased's will. It is therefore proposed that the Court have a discretion to allow the estate to make an application for a division where the inability to do so would cause serious injustice. This would provide a mechanism for deserving cases to be addressed, while not opening up the regime to significant increases in litigation.

116 Property Relationships Act 1976, s 88(2).

property on death.[117] She argues that providing both the surviving partner and the deceased's estate with an unqualified right to their respective share of the relationship property would be a more consistent approach that does not favour either party. The division would be governed by the PRA. Succession law would only be relevant after division of the relationship property.[118] This is potentially undermined if the surviving partner takes most of the relationship property by survivorship, or has legal title to most of the relationship property, and elects option B. In those situations, the deceased partner's share of relationship property would not be part of his or her estate, unless the deceased's personal representative obtained a division of relationship property under the PRA.

35.35 A review of the cases decided under section 88(2) identifies that a personal representative will generally apply for leave to divide the partners' relationship property under the PRA when:

(a) the deceased partner's property has passed to the surviving partner by the rules of survivorship rather than coming within the estate; and

(b) a third party wishes to claim against the estate under the Family Protection Act or the TPA.[119]

35.36 Cases where the personal representative seeks leave to apply for a division of relationship property under the PRA tend to involve a will that does not provide adequately for the children of the deceased, who therefore wish to bring a claim under the Family Protection Act.[120] In some cases it might be unfair to allow a deceased partner to ignore the obligations he or she owes to others.[121] In *Public Trust v W*, the deceased structured his affairs so all property passed to the surviving partner by survivorship.[122]

117 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

118 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

119 We are unsure whether the personal representatives of an estate would be entitled to seek leave under s 88(2) of the Property (Relationships) Act 1976 (PRA) in order to restore funds to the estate to meet creditors' claims. Section 20A provides that, unless the PRA provides otherwise, creditors have the same rights against a partner as if the PRA had not been passed. It would be odd if a creditor's position could be improved beyond that provided for in s 20A by a claim by the personal representatives for division.

120 The major exception we have found to this is a case where the surviving partner murdered the deceased: *H v T* HC Christchurch CIV-2006-409-2615, 5 June 2007. Section 12 of the Succession (Homicide) Act 2007 now provides that a refusal of leave will cause a serious injustice if it would allow a killer to retain a more certain or valuable interest in the property of the estate.

121 Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

122 *Public Trust v W* [2005] 2 NZLR 696 (CA).

The deceased's two minor children were left with no provision. In those circumstances, the Court of Appeal appointed the Public Trust as the deceased's personal representative and observed that it would have very reasonable prospects of obtaining leave under section 88(2) to commence proceedings under the PRA.[123] This raises a broader question of policy. That is, which claims against a deceased's estate ought to be given priority? As discussed at paragraph 35.28 above, this policy question goes to the heart of what is a fair distribution of a deceased's estate on death. It must therefore be considered in the broader context of succession law, rather than the PRA, which is primarily about the property rights of partners. We address this policy question further in Chapter 36.

35.37 In seeking a division of relationship property under the PRA a personal representative is effectively acting for the benefit of third parties.[124] Consequently, the justification for why a personal representative should be granted leave will reflect the merits of the third party claim. This is not an inquiry with which the PRA is primarily concerned, and uses the PRA as a mechanism to enhance rights under the Family Protection Act and the TPA. A third party making such a claim has no ability to access property that has passed by survivorship to anyone other than the surviving partner.

35.38 It might be argued, however, that the differences between a relationship ending on separation and a relationship ending on death justify a difference in rights between the surviving partner and the personal representative (who is typically acting in the interests of third parties). If there is a will, it might be said that this reflects the deceased's wishes and those wishes should be respected.

35.39 This issue demonstrates the tension that arises between the provisions of the PRA that apply on death and succession law. As we discuss in Chapter 36, our preliminary view is that a separate statute would better allow the development of a coherent approach to claims made against a deceased's estate.

123 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [51].

124 Although we note that the position in Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 cases is that the personal representative remains neutral and third parties argue their own case: Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [FP4.05] citing Re McCarthy [1919] NZLR 807 (SC); *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA); and Re Schroeder's Will Trusts [2004] 1 NZLR 695 (HC).

Is the "serious injustice" threshold in section 88(2) appropriate?

35.40 If the personal representative should continue to be required to obtain leave from the court to apply for a division of relationship property under PRA, it is necessary to consider whether the test in section 88(2) (refusing leave would cause "serious in justice") is appropriate.

35.41 The PRA does not explain what is meant by "serious injustice" for the purposes of section 88(2) but a series of cases have considered its meaning.[125]

35.42 The Courts initially took a strict approach to the meaning of "serious injustice". In *K v W*, the High Court stated that the injustice had to be "intolerable".[126] There, the partners held almost all their property as joint tenants. When one partner died, property valued at $820,000 passed to the surviving partner by survivorship. Only $8,000 was left in the deceased's estate, and the will gifted the $8,000 to the surviving partner. An adult child from the deceased's first marriage was left with no provision. An application was brought by the personal representative of the deceased under section 88(2). If successful, this would have meant that the deceased's share of any relationship property would form part of the deceased's estate, rather than going to the surviving partner by survivorship, and would be available to satisfy any successful claim brought by the adult child under the Family Protection Act. In that case, however, the High Court said that the circumstances did not amount to a serious injustice as required under section 88(2).

35.43 In *Public Trust v W* the Court of Appeal disagreed with this approach, stating that no gloss should be placed on the words of section 88(2) and indicating that it would have granted leave in the circumstances of *K v W*.[127] In *Public Trust v W*, the deceased died without a will. Three properties which the deceased held as a joint tenant passed to the surviving partner by survivorship. The deceased's minor children from a previous relationship stood to inherit nothing from the estate. The surviving partner and the Public Trust applied for administration of the estate under

125 *K v W* [2004] 2 NZLR 132 (HC) at [48]; *Public Trust v W* [2005] 2 NZLR 696 (CA); *Tod v Tod* [2015] NZHC 528, [2015] 3 NZLR 397; *C v C* [2016] NZHC 583; and *Kennedy v Kennedy* [2017] NZHC 168, [2017] NZFLR 149.

126 *K v W* [2004] 2 NZLR 132 (HC).

127 *Public Trust v W* [2005] 2 NZLR 696 (CA).

intestacy rules. Public Trust did so on the basis that it would seek the court's leave under section 88(2) to apply for a division of relationship property in order to restore funds to the estate to meet the Family Protection Act claims of the deceased's children. The Court of Appeal observed that the primary reason for allowing applications for a division of relationship property by a personal representative was, presumably, to address situations of the type presented by that case and *K v W* and granted Public Trust's application to be appointed administrator.[128] The Court added that it thought Public Trust would have reasonable prospects of satisfying the test under section 88(2) in the Family Court.[129]

CONSULTATION QUESTIONS

M6 If the choice to elect option A or option B remains in the PRA, should the personal representative have an automatic right to apply for a division of relationship property, or should the requirement to seek leave of the court remain?

M7 If the requirement to seek the leave of the court remains, is the threshold in section 88(2) the right one and if not what should it be?

Other issues in relation to Part 8

35.44 Additional points arise from the personal representative's power to apply for a division of relationship property under section 88(2). First, sections 75 to 78 (discussed in Chapter 34) set out consequences if the surviving partner elects option A. It is not clear, however, if these provisions apply when the personal representative seeks a division of relationship property.

35.45 Second, section 87 is silent on the rights, if any, of the personal representative to challenge a section 21 agreement. Peart argues there is no "plausible justification for preventing the personal representative from mounting such a challenge."[130] The case law is conflicting on this issue.[131] In *C v C,* the most recent decision, the High Court said that if a personal representative can apply for a division of relationship property due to serious injustice (the test

128 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [48].

129 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [51]. A later case stated that "[w]hat is or is not a 'serious injustice' is likely to depend very much on impression": *Public Trust v Relph* [2009] 2 NZLR 819 (HC) at [39].

130 Nicola Peart "Contracting Out of the Act" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 309 at 322.

131 *S v P* [2010] NZFLR 230 (FC); *Tod v Tod* [2015] NZHC 528, [2015] 3 NZLR 397; and *C v C* [2016] NZHC 583.

under section 88(2)), he or she should also be able to apply to set aside a section 21 agreement.[132] It said that section 88(2):[133]

> *provided an avenue for a personal representative to override the surviving spouse's election not to seek a divison under s 25(1) where serious injustice would otherwise arise. It is consistent with that decision to also permit the Court to set aside a s[ection] 21 agreement which likewise may give rise to serious injustice.*

35.46 Third, if a surviving partner elects option B, section 95 provides that the estate must be administered in accordance with the deceased's will. Section 95 is silent on the right of the personal representative to seek leave to apply for a division of relationship property under section 88(2) if the surviving partner has already elected option B. The Court of Appeal considered section 95 in *Public Trust v W*.[134] It observed that the language of section 95 was awkward and presented difficulties when an estate wished to apply for division.[135] The Court said, however, that it must have been Parliament's intention that a surviving partner's election of option B should not preclude the personal representative's ability to seek leave under section 88(2), otherwise there would be no point to the provision.[136]

35.47 Fourth, an issue may also arise as to the effect of section 95 where there is a section 21 agreement. The provisions of the PRA that deal with contracting out agreements are not included in the list of provisions specified in section 95 as still applying if option B is chosen. This leaves uncertain the enforceability of any section 21 agreement and the impact of non-compliance with section 21F when option B is chosen.

35.48 Fifth, orders to postpone the vesting of property under section 26A can only be made for the benefit of the surviving partner. Section 26A allows for postponement if immediate vesting of property: [137]

> *…would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children….*

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132 *C v C* [2016] NZHC 583 at [72]–[86]. The court considered that the provisions in s 87 and s 88 are complementary: at [79].

133 *C v C* [2016] NZHC 583 at [85].

134 *Public Trust v W* [2005] 2 NZLR 696 (CA).

135 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [38] and [41].

136 *Public Trust v W* [2005] 2 NZLR 696 (CA) at [38] to [41].

137 Property (Relationships) Act 1976, s 26A.

35.49 The postponement of sharing might also be appropriate where the surviving partner is not the primary caregiver. For example, if a third party or parties, such as the deceased's parents, care for the children after the death of a partner, immediate vesting might require the home where the children are living to be sold, against their interests and the interests of their primary caregivers. The PRA does not provide for this scenario. Providing for situations where someone other than the surviving partner is the primary caregiver may be complex, for example, where the interests of the surviving partner conflict with those of the children of the relationship or where there are other children involved, such as children of the deceased's previous relationship. This complexity does not, however, seem to justify excluding the possibility of orders for the benefit of caregivers other than the surviving partner on death.

35.50 Sixth, third parties have no right to apply directly for a division of relationship property under the PRA. In the case of a personal representative who is unwilling to make an application under section 88(2), the third party must first apply to the court to replace the personal representative.[138]

35.51 If the choice to elect option A or option B remains in the PRA, another option could be to allow third parties to apply for leave to seek a division of relationship property. The advantages of this approach are that:

(a) the personal representative could remain neutral as is generally required in proceedings under the Family Protection Act;[139]

(b) if a personal representative refused to seek leave, the third party would not need to take the additional step of applying to the High Court to replace the personal representative; and

(c) often the court may want to consider the leave application contemporaneously with the substantive Family Protection Act application and the third party claimant will already be before the court.

138 This was recently the case in *C v C* [2016] NZHC 583; and *Kennedy v Kennedy* [2017] NZHC 186, [2017] NZFLR 149.

139 See fn 124 above.

Option for reform: clarifications and amendments to existing provisions in Part 8

35.52 Our preliminary view, set out in Chapter 36, is that a separate statute would better allow the development of a coherent approach to claims made against a deceased's estate. Earlier in this chapter we set out an alternative option whereby option A becomes the default position and the surviving spouse has a minimum entitlement of a half share in the partners' relationship property. That would avoid the need for a personal representative of the deceased (or a third party) to apply for a division of relationship property under the PRA.

35.53 If neither of those options are preferred, a third alternative option is to retain Part 8 of the PRA with the following clarifications and amendments:

(a) First, a personal representative's ability to seek the court's leave should be transferred from section 88(2) to a specific provision early on in Part 8 so it stands alongside section 61. This would send a clear signal that the right of the personal representative to apply for division is not related to the circumstances in section 88.[140]

(b) Second, the "serious injustice" test could be clarified. Section 88(2) could be amended so the court must have regard to listed matters when assessing serious injustice. These matters could include whether the deceased had failed to make adequate provision for people able to claim under the Family Protection Act or the TPA.[141]

(c) Third, various provisions in Part 8 could be reworked so to clarify the consequences that follow when a personal representative seeks a division of property under the PRA. We suggest these provisions require attention:

140 There is currently an issue that s 88 of the Property (Relationships) Act 1976 (PRA) itself appears to address the circumstances when a surviving partner elects option A. For example, under s 88(1)(b) a person on whom conflicting claims are made may apply for an order under s 25(1)(a) or 25(1)(b) to determine and divide the partners' relationship property. It would be odd that, if the surviving partner and the estate were content to proceed under the will (i.e. the surviving partner elects option B), a person on whom conflicting claims are made had the right to apply to divide the partners' property under the PRA. Consequently, s 88 seems aimed at circumstances where the surviving partner or the estate has opted to divide the property under the PRA. Giving the personal representatives the right to seek leave in s 88(2) confuses s 88. We therefore favour removing the personal representatives' right to seek leave from s 88.

141 It is outside our terms of reference to consider the adequacy or otherwise of the Family Protection Act 1955 or Law Reform (Testamentary Promises) Act 1949.

(i) section 75 – an equivalent provision for applications brought by the personal representative;

(ii) section 76 – the effect on the will when a personal representative seeks division under the PRA;

(iii) section 87 – whether a personal representative can challenge a section 21 agreement under Part 6 of the PRA;

(iv) section 95 – whether a surviving partner's election of option B precludes a personal representative's right to seek leave to apply for a division of property under the PRA.

35.54 Third parties with claims against the estate could have a direct right to seek leave to divide the relationship property of the surviving partner and the deceased partner.

CONSULTATION QUESTION

M8 Do you have any further suggestions for reform of the rights of the personal representative or third parties to apply for a division of property under the PRA on death of a partner?

Chapter 36 – Resolving the tensions between the PRA and succession law: the case for a separate statute

36.1 In this chapter we discuss the tensions that arise when the rules of the PRA, which were originally devised solely for relationships ending on separation, are applied on death. We express our preliminary view that these tensions would be best managed by having a separate statute to deal with division of relationship property on the death of a partner, along with the claims presently allowed for under the Family Protection Act and the TPA.

The different contexts of relationships ending on death and on separation

36.2 The context for dividing property on the death of a partner is different to the context for dividing property when a relationship ends by separation. Key differences include:

(a) A relationship that ends on death is not one ended by choice. Without contrary evidence it can reasonably be assumed that, if the partner did not die, the relationship would have continued.

(b) There is no conflict between the partners to be resolved. Any dispute, if one arises, will not be between the partners to the relationship but between the surviving partner and the personal representative of the estate and/or third parties who claim an interest in the estate. These disputes are of a different nature.

(c) The deceased partner has no future need for his or her property but may have expressed wishes about what should happen to it on death (through a will or a contracting out agreement).

(d) There is an expectation that a deceased partner will provide for the surviving partner to enable him or her to continue to enjoy the same lifestyle shared by the partners during the relationship.[142] The expectations that arise on separation are different, and are canvassed throughout this Issues Paper.

(e) The rights of and obligations owed to third parties become relevant on death in a way that does not occur when a relationship ends on separation, and is not provided for in the PRA. Third parties may feel that they have a legitimate interest in the deceased's estate.

36.3 There may be tension between the competing interests of all those potentially affected by the death of a partner, including:

(a) the deceased's freedom to deal with property under a will as he or she chooses and the deceased's rights under the PRA;

(b) the rights of a surviving partner under the deceased's will, the rules of intestacy, the PRA, the Family Protection Act and/or the TPA;

(c) the rights of the deceased and the surviving partner to hold property in joint ownership or to have entered a contracting out agreement under section 21 of the PRA;

(d) the rights of third parties who may benefit under the will or the rules of intestacy, or who may have a claim under the Family Protection Act or the TPA.

36.4 Key policy questions that arise in respect of the division of property on the death of a partner are the priority to be given to a surviving partner relative to the rights of third parties, and in relation to what property. The competing interests of the surviving partner and third parties are particularly evident where the deceased had a previous relationship and children from that relationship.[143] Data suggests that the numbers of people re-partnering after separation is increasing.[144] In those cases, there may be tensions between the deceased wishing to give most of

142 *Re Z* [1979] 2 NZLR 495 (CA); *Re Hilton* [1997] 2 NZLR 734 (HC); and *M v L* [2005] NZFLR 281. The deceased's duty to support the surviving spouse is well established in common law jurisdictions and is associated with the marriage commitment, although this is now extended to include de facto relationships.

143 See Donna Chisholm "Sense of Entitlement" *New Zealand Listener* (Auckland, 23 September 2017) at 14–21 for a discussion of cases involving claims by adult children in the context of blended families..

144 Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4.

their property to the children of a prior relationship while the PRA gives the surviving partner half the partners' relationship property. Or the deceased may have made a will, arranged for all property to be held jointly or entered into a contracting out agreement with the result that the surviving partner receives all or the vast majority of property on the deceased partner's death. There may be a particular sense of injustice on the part of children where the partners' relationship property was largely acquired before the relationship began, especially if this includes the family home and family chattels.[145]

36.5 In *M v L*, the Family Court summarised these tensions in this way:[146]

> [28] *Where there is a second marriage it is difficult for adult children from a first marriage to appreciate the commitment their parent has made to a new partner. Adult children tend to regard themselves as prior claimants as they have known their parent for all their lives and were already adults when he re-partnered. They have a sentimental attachment to belongings that were part of their life together and to which their father had an attachment. In most cases, if their parents had remained married and their father had died first, they would not have expected to inherit personal items until after their mother had died. Where there is a second marriage they can no longer assume that the new partner will leave property to them in her will or whether she will consider she has more compelling obligations to others such as her own children.*
>
> [29] *On the other hand, the surviving widow feels that her primary relationship was with her husband and his with her. They are likely to have spent a great deal more time together than he has spent with his adult children. His history as well as the period of time they were together has personal significance for her. She expected that they would share their resources for their lifetimes.*

145 From our review of the cases we have noticed in some cases the deceased provided in his or her will that the surviving partner was to have a life interest in the family home but, upon the surviving partner's death, the property was to fall into the residuary of the estate for the beneficiaries. This is clearly a lesser entitlement than an equal share in the family home under the Property (Relationships) Act 1976. See *Love v Scannell* [2016] NZFC 8114, [2017] NZFLR 226; *Thurston v Thurston* [2014] NZHC 2267; *Thrasher v Allard* [2013] NZFC 5260; *Gera v Moir* [2016] NZHC 613, [2016] NZFLR 875; *N v N* [2013] NZFC 2695; *Re Estate of H* [2012] NZFC 2869; *H v H* [2012] NZFC 1303; *S v G* FC Auckland FAM-2007-004-3009, 26 February 2010; *Mulder v Mulder* [2009] NZFLR 727 (FC); *Slatter v Estate of Sydney Ernest Slatter* FC Christchurch FAM-2003-009-4322, 10 August 2005; and *M v L* [2005] NZFLR 281 (FC). Note though that in *Re W Deceased* HC Tauranga M75/88, 23 October 1990 the High Court said that life interests were now unusual in a will and "redolent of the patronising parsimony of former generations" cited in *M v L* [2005] NZFLR 281 (FC) at [40].

146 *M v L* [2005] NZFLR 281 (FC) at [28]–[30].

> [30] *These issues fall to be sorted out at a time when everyone in the family is grieving. Any dispute about the distribution of the property is an extra assault on the sensibilities of the individual family members.*

36.6 These competing interests emphasise the need to clarify the policy basis of the law. By way of an example, we understand from our preliminary consultation that a practice is developing of lodging a notice of claim under section 42 of the PRA on behalf of children of a person who has a claim to an interest, typically children of a deceased partner where the surviving partner is from a subsequent relationship. The claim is made on the basis that the child or children is entitled to lodge a section 42 notice because of special circumstances supporting a derivative claim (in equity) on behalf of the estate for division of property under the PRA.[147] The division of property is typically sought in order to make assets available to the estate to meet a Family Protection Act claim.[148]

36.7 The policy of the PRA is the just division of property. Its main focus, as a result of original design and legislative intention, is on dividing property between partners who separate. In our view, the problems discussed above have arisen primarily because relationships that end on death are fundamentally different to relationships that end on separation. The framework of the PRA cannot easily accommodate both. It was designed to provide a just division of property on separation, and is inadequate to inform the division of property on death.[149] The competing interests that arise on the death of one partner discussed above need to be considered and resolved as matters of policy.

36.8 Our preliminary view is that a separate statute is required. For relationship property claims, that statute could have the same broad policy as the PRA, that is, a just division of property. This means a surviving partner would be able to seek an equal division of relationship property as an alternative to taking an entitlement under a will (unless the option for reform discussed in Chapter 35 is preferred, in which case the PRA will presume an election of

147 This practice relies on *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973. In this case, the executor was the surviving spouse, who had taken most of the deceased's property through survivorship with a small amount being left to her in the deceased's will. A son from the deceased's first marriage wished to pursue a claim under the Family Protection Act 1955.

148 A consequence of adult children being able to make successful claims under the Family Protection Act 1955 is arguably a greater incentive for the use of trusts and "other will substitutes" to protect a partner's assets from such potential claims: Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

149 See the discussion in Part A. Peart describes the conceptual confusion in Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

option A). The property rights that the PRA bestows on partners in qualifying relationships should not be lost when one partner dies. Nor should those rights be defeated by the unilateral decision of one partner as reflected in his or her will or the use of provisions of the Family Protection Act or the TPA by third parties.

36.9 We agree with Peart's point that:[150]

> *There is currently a real tension in succession law between testamentary freedom and family obligations, which makes it difficult for property owners to make reliable arrangements for the disposal of their property after death. Little wonder that property owners have sought refuge in the law of trusts. Through trusts they are able to control the destiny of their property and know that by and large their arrangements are safe from challenge, certainly from claims under the Family Protection Act.*

36.10 The questions as to how to balance the various interests go to the heart of what is a fair distribution of a deceased's estate on death. They must be considered in the broader context of succession law.

Preferred approach: a separate statute for succession law

36.11 The Law Commission has previously recommended that a single, separate statute (the proposed Succession (Adjustment) Act) was needed to deal comprehensively with relationship property claims, testamentary promises claims and family protection claims on death.[151]

36.12 We are attracted in principle to this proposal, although any such legislation would fall outside the scope of the PRA review.[152]

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150 Nicola Peart "Property Rights on Death: Policies in Conflict" (Ethel Benjamin Address 2017, 11 September 2017) at 18. Peart cites the case of *Penson v Forbes* [2014] NZHC 2160.

151 Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

152 Peart recently reached a similar conclusion in giving the Ethel Benjamin address: Nicola Peart "Property Rights on Death: Policies in Conflict" (Ethel Benjamin Address 2017, 11 September 2017). Peart stated:

> *Reform is needed to provide certainty and predictability. In my view that is best achieved by accepting that death is different from separation. Property rights on death are best regulated through succession law, covering both the property entitlements of spouses and partners, based on the principle of equality, and the deceased's support obligations to family members based either on need or contribution to the deceased.*
>
> *As a first step, I hope that the Law Commission recommends that the Property (Relationships) Act be left to deal with the property rights on separation, while relationship property rights on death are dealt with in a separate statute to which at a later stage support obligations could be added. In my view that would provide a more coherent approach to property rights on death, and remove at least some of the current conflict in policies governing relationship property and succession law.*

36.13 We suggest that such a separate statute would make the law more accessible and efficient.[153] It would also allow proper consideration of the interests of surviving partners, deceased partners, beneficiaries under a will or the rules of intestacy and potential claimants against the estate. It would likely also assist those advising on estate planning and those administering estates.

36.14 The mere proposal of a separate statute would raise public awareness about what may happen to property on death. Debating and enacting a separate statute would raise public awareness even further.

CONSULTATION QUESTION

M9 Do you agree there should be a separate statute? If not, why not?

[153] See *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973. At [9] and [10] the court commented on the "stamina" required to deal with the multiple proceedings required in different courts at different times.

Appendix A – Terms of Reference

The Property (Relationships) Act 1976 ("the Act") created a code which governs the division of property held by married couples, civil union couples and couples who have lived in a de facto relationship when they separate or one of them dies.

The Act was amended in 2001 and 2005 to extend its application to civil unions and de facto partnerships but has not been comprehensively reviewed since its inception. Over time the Act affects almost every New Zealander, both adults and children, and as such it should be reviewed to ensure that it is operating appropriately and effectively.

The Law Commission's review of the Act will include (but not be limited to) the following matters:

1. The definitions of property, relationship property, and separate property;
2. How a de facto relationship is defined for the purposes of the Act;
3. Differences in the rules governing de facto relationships and marriages/civil unions;
4. Whether the Act gives rise to matters of particular concern to Māori and how these should be addressed;
5. How the interests of children are recognised and protected under the Act and in how it is applied;
6. How the Act functions in relation to sequential relationships and blended families;
7. The ability to make adjustments to take account of economic disparity between spouses and partners, and other departures from equal sharing as contemplated by the Act;
8. The operation of Part 5 of the Act concerning relationship property and creditors;
9. How the Act deals with property held by a company or trust and the powers of the courts in this area;
10. The relationship between and application of the Act and section 182 of the Family Proceedings Act 1980;

11. The provisions relating to contracting out and settlement agreements;
12. The provisions relating to division of property on death;
13. The requirements for disclosure of information in relationship property matters and the consequences for failing to disclose;
14. The jurisdiction of the courts over relationship property matters and the range of orders the courts can make;
15. Whether the Act adequately deals with cross-border issues;
16. Whether the Act facilitates the resolution of relationship property matters in accordance with the reasonable expectations of the parties.

The Law Commission will consult with experts, stakeholders, and the general public over 2016 and 2017. The Commission will report to the Minister with its recommendations by November 2018.

Appendix B – Consultation

The Law Commission consulted with the following people and organisations during the preparation of this Paper:

Asian Leaders Network
Professor Bill Atkin
Associate Professor Nicola Atwool
Professor Anne Barlow
Judge Andrew Becroft
David Boyle
Professor Margaret Briggs
Richard Broad
Dr Andrew Butler
Charlotte Butruille-Cardew
Natalia Cabaj
Professor Paul Callister
Lady Deborah Chambers QC
Anita Chan QC
Eva Chen
Nelly Choy
Spencer Clarke
Thomas Cleary
Lloyd Collins
Peter Cordtz
Jenny Corry
Vivienne Crawshaw
Robert Didham
Shamubeel Eaqub
Andrew Easterbrook
Associate Professor Vivienne Elizabeth
Chris Ellis
Penelope England
Denise Evans
Nick Fagerland
Robert Fisher QC
Michael Fletcher
Jane Forrest
Dr Megan Gollop
David Goddard QC
Dr Gaye Greenwood
Bharat Guha
Frances Gush
Dr David Hall
John Hancock
The Honourable Rodney Hansen CNZM QC
Deborah Hart
Eva Hartshorn-Sanders
Anna Heenan
Professor Mark Henghan
Andrew Hubbard
Simon Jefferson QC
Jeremy Johnson
Mark Jones
Lynda Kearns
Greg Kelly
Vasantha Krishnan
Professor Tahu Kukutai
Daria Kwon
Jade Lattimore
Karinia Lee
Carolyn Luey
Kai Luey
Jan McCartney
Anna McDowell
Wendy McGowan
Sir Jim McLay KNZM QSO
Jan McLean
Judith McMillan
Leona McWilliam
Lisa Mellville
Joanna Miles
Associate Professor Susan Morton
Kent Newman
Julie Nind
Dr Kathryn O'Sullivan
Gill Palmer
Associate Professor Jessica Palmer
Professor Patrick Parkinson
Professor Nicola Peart
Hazel Phillips
John Porter
Richard Power
Hon John Priestley
Dr Jan Pryor
Nazmeen Rasheed
Professor Charles Rickett
Dr Jeremy Robertson
Professor Carol Rogerson
Professor Jacinta Ruru
Judge Laurence Ryan
Caroline Sawyer
Dr Jens Scherpe
Cushla Schofield
Fern Seto
Renika Siciliano
Hayley Sinclair
Praveen Singh
Judge Anna Skellern
Rachel Smith
Sija Spaak
Associate Professor Susan St John
John Stephenson
Kirsty Swadling
Kiriana Tan
Associate Professor Nicola Taylor
Jessica Temm
Professor Rollie Thompson
Stephen Van Bohemen
Holly Walker
Professor Margaret Wilson DCNZM