

# Reviewing the Property (Relationships) Act

A simple and fair law for  
dividing property when  
relationships end



## Consultation Paper

16 October 2017




LAW COMMISSION  
TE AKA MATUA O TE TURE



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# Introducing our review of the Property (Relationships) Act 1976

- 1.1. The Property (Relationships) Act 1976 is a law about how people in relationships must divide their property when they separate, or if one of them dies.
- 1.2. The law aims to achieve a just division of property between partners on the basis that the relationship is a “joint venture”. Each partner is assumed to have contributed to the relationship, even if in different ways, and the general rule is that each partner is therefore entitled to an equal share of the property if they separate or one of them dies.
- 1.3. The law was made over 40 years ago. The way people in New Zealand enter and leave relationships has changed. We are looking at how the law works and whether it needs to change.
- 1.4. We want to know what you think.
- 1.5. These are some of the big questions we are looking at:
  - a. [What relationships should the law apply to \(paragraphs 2.1 - 2.37\)?](#)
  - b. [What property should be shared at the end of a relationship \(paragraphs 3.1 - 3.62\)?](#)
  - c. [What should happen when equal sharing does not fix inequalities between the partners \(paragraphs 6.1 - 6.18\)?](#)
  - d. [What should happen if trusts are involved \(paragraphs 7.1 - 7.33\)?](#)
  - e. [How should the law recognise children's interests \(paragraphs 9.1 - 9.33\)?](#)
  - f. [Does the law adequately allow for tikanga Māori \(paragraphs 11.1 - 11.49\)?](#)
  - g. [What should happen when one partner in a relationship dies \(paragraphs 14.1 - 14.48\)?](#)



- 1.6. If you would like to know about any of these questions in detail, you can [read our full Issues Paper on our website](#).

## A quick note about our language

- 1.7. Three relationship types are at the centre of the Property (Relationships) Act 1976: marriages, civil unions and de facto relationships.
- 1.8. The Property (Relationships) Act 1976 uses the words 'marriage', 'spouse', 'husband' and 'wife'; 'civil union' and 'civil union partner'; and 'de facto relationship' and 'de facto partner'.
- 1.9. We have tried to make things simpler. When we talk about the law we use the word 'relationship' to describe all three relationship types. We also use the word 'partner' to mean a spouse, civil union partner or de facto partner.
- 1.10. Sometimes in this document we abbreviate Property (Relationships) Act 1976 to PRA.

## What do you think?

- Q1. Should the law use the words 'relationship' and 'partner' where there is no need to distinguish between relationship types?





# The PRA's 7 steps to divide relationship property

## 1. What kind of **relationship** were the partners in?



The PRA applies to people who have been married, in a civil union or in a de facto relationship for three years or more. There are special rules for people whose relationship has ended sooner.

## 2. What **property** do the partners own?



The PRA only applies to property that the partners own either individually or jointly. It will not apply to property the partners use if someone else owns it.

## 3. Is it **relationship property** or **separate property**?

The PRA classifies the partners' property as either relationship property or separate property. The partners must share their relationship property but each partner keeps their separate property.



## 4. In **what shares** should the relationship property be divided?

The PRA has a general rule that each partner should get an equal share of the relationship property. In exceptional cases, courts can adjust the partners' shares, but it is uncommon.

## 5. Should **one partner** get more property?

Sometimes a partner should get more property. For example, maybe after the partners separate one partner keeps paying the mortgage over their home. Or one partner may struggle to find a good job after separation because during the relationship the partner was the homemaker and now has little work experience.

## 6. What is the **value** of the relationship property?

Before sharing the relationship property, the partners must work out the property's value. Then they can calculate the money or property each partner gets.

## 7. How should the partners **split the property** so each gets the right share?



Each partner might keep items of property up to their share. Or they might sell property and split the proceeds. Sometimes the court might order that the partners wait to split the property, or that one partner should get to use the property for a certain period. This can help when it is best for the children to keep living in the same house.

# How does the Property (Relationships) Act 1976 work?

- 1.11. The Property (Relationships) Act 1976 divides property between the partners to a relationship if they separate or if one partner dies.
- 1.12. When partners separate, the Act applies in seven steps as shown on the previous page.
- 1.13. When one partner in the relationship dies, the process is different. The surviving partner can choose whether to accept whatever property the deceased partner gave under his or her will. Or the surviving partner can divide the couple's relationship property by the same process as if both partners were alive but had separated.

## Do people need to know more about the Property (Relationships) Act 1976?

- 1.14. The Property (Relationships) Act 1976 applies when a couple separates or one partner dies. The Act will affect many New Zealanders either directly or indirectly at some point in their lives.
- 1.15. It is important that people know the general effect of the law and how it might apply to them.

## What do you think?

- Q2. Do you think there should be more public education about the Property (Relationships) Act 1976?
- Q3. If so, how do you think it should be done?

# How can I have my say?

- 1.16. You can answer the questions on [our consultation website prareview.lawcom.govt.nz](http://prareview.lawcom.govt.nz). You do not need to answer all the questions. You can answer just the ones you are interested in.
- 1.17. If you have experience of dividing property after a separation or the death of your partner, [you can tell us your story on the consultation website](http://prareview.lawcom.govt.nz).
- 1.18. You can come along to a **public meeting** and speak to one of our team. Details of the public meetings are at [www.lawcom.govt.nz](http://www.lawcom.govt.nz) and on page 7.
- 1.19. If you would like to write a submission to us, you can **email** your submission to: [pra@lawcom.govt.nz](mailto:pra@lawcom.govt.nz)
- 1.20. Or 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?

- 1.21. The Law Commission's processes are public, and it is subject to the Official Information Act 1982. So, if someone asks us for your submission we will normally provide it. We will consider any requests for withholding information on grounds of confidentiality or for any other reason according to 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 you provide us. You have the right to access and correct your personal information.
- 1.22. 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 we will anonymise submissions from private individuals. We keep all submissions as part of our official records.
- 1.23. If you do not want us to release all or part of your submission (including your name) or for us to refer to it in any Commission publication, please tell us which parts we should withhold and the reasons. We will consider your views.



# Details of public consultation meetings

Location	Date	Time	Venue
Hamilton	17 October 2017	12 noon – 1.15pm	Celebrating Age Centre, River Lounge, 30 Victoria Street
Tauranga	18 October 2017	12 noon – 1.15pm	Tauranga Historic Village – Balcony Room, 17th Avenue, Tauranga South
Rotorua	19 October 2017	12 noon – 1.15pm	Te Papaïouru Marae, Ohinemutu
Masterton	31 October 2017	1.00pm – 2.15pm	Wairarapa REAP, 340 Queen Street, Masterton
Paraparaumu	31 October 2017	12 noon – 1.15pm	Kapiti Community Centre-Kowhai Room, 15 Ngahina Street, Paraparaumu
Christchurch	1 November 2017	6.45pm – 8.00pm	Christchurch Cardboard Cathedral, 234 Hereford Street, Christchurch
Hokitika	2 November 2017	12 noon – 1.15pm	Westland RSA Building, 22 Sewell Street, Hokitika
New Plymouth	8 November 2017	12 noon – 1.15pm	Brian Bellringer Pavilion, Fillis Street, Pukekura Park, New Plymouth
Napier	9 November 2017	12 noon – 1.15pm	Meeanee Memorial Hall, cnr Meanee Road & Gavin Black Street, Napier
Palmerston North	10 November 2017	12 noon – 1.15pm	Palmerston North Community Leisure Centre, Eileen Phillip Room, 569 Fergusson Street, Palmerston North
Auckland, North Shore	16 November 2017	12 noon – 1.15pm	Takapuna War Memorial Hall, 7 The Strand, Takapuna
Auckland, Manukau	17 November 2017	12 noon – 1.15pm	Wiri Community Hall, 11 Inverell Avenue, Wiri
Wellington	21 November 2017	12 noon – 1.15pm	Loaves and Fishes Hall, corner of Molesworth and Hill St, Thorndon
Invercargill	4 December 2017	1.00pm – 2.15pm	Invercargill Library, 50 Dee Street
Dunedin	5 December 2017	12 noon – 1.15pm	Otago Branch New Zealand Law Society, John Wickliffe House, 4th Floor, 265 Princes Street, Dunedin
Kerikeri	6 December 2017	12 noon – 1.15pm	Kerikeri RSA, 37 Cobham Rd, Kerikeri
Whangarei	7 December 2017	12 noon – 1.15pm	Whangarei Community Law Centre, St John's Golden Church, 149 Kamo Rd, Kensington, Whangarei
Nelson	13 December 2017	12 noon – 1.15pm	Fairfield House, 48 Van Diemen Street, Nelson


# How has New Zealand changed?

- 1.24. It has been over 40 years since the Property (Relationships) Act 1976 became law. New Zealand has changed since then.
- 1.25. We look at some of these changes in our [Study Paper](#).
- 1.26. Some of the key changes are:
  - a. New Zealand is more culturally diverse. The proportion of New Zealanders identifying as European has dropped from 88% in 1976 to 74% in 2013. Māori, Pacific and Asian populations have more than doubled since 1976.
  - b. People in relationships are less likely to get married. The marriage rate has decreased. De facto relationships are more common. In 2013, 22% of couples said they were in a de facto relationship.
  - c. Families' living arrangements change frequently. One study found that, in one year, around 94,000 people move from living with a partner to living alone, with or without children.
  - d. Single parent families have almost doubled, from 5% of all households in 1976, to 9% in 2015. In 2013, 84% of single parents were women.
  - e. A recent study found that only 7% of children lived their whole childhood (from birth to age 15) in households containing only nuclear family members.

# More about our review of the Property (Relationships) Act 1976

- 1.27. In December 2015, the Minister responsible for the Law Commission, Hon Amy Adams, asked the Law Commission to review the Property (Relationships) Act 1976. [The Terms of Reference are on our main website](#). They require us to consider the rules which make up the law and how people resolve property matters in practice.
- 1.28. Since then we have researched the law's history and looked at cases, commentary and court data to understand how the Property (Relationships) Act 1976 works in practice. We have talked to lawyers, academics, community groups, government departments, and researchers. We have looked at international experiences to inform our understanding of possible reform options. We have also researched the social context and published our findings in the [Study Paper](#).
- 1.29. We established an Expert Advisory Group to assist us in this review, and sought guidance from the Law Commission's Māori Liaison Committee on those matters that may be of particular concern to Māori.
- 1.30. From this initial research and consultation we have identified a number of issues with the law.
- 1.31. Along with this consultation paper, we have prepared [an in-depth Issues Paper which you can read here](#).
- 1.32. From October 2017 to February 2018 we will consult. [Find out how you can have your say](#).
- 1.33. We will use the responses we receive to help draft our final report for the Minister Responsible for the Law Commission. The report is due in November 2018.
- 1.34. If you have other questions about the Law Commission's review of the Property (Relationships) Act 1976, please email us at [pra@lawcom.govt.nz](mailto:pra@lawcom.govt.nz)
- 1.35. Or you can write to us at:
- Property (Relationships) Act Review**  
**Law Commission**  
**PO Box 2590**  
**Wellington 6011**  
**DX SP 23534**





# What relationships should the Property (Relationships) Act 1976 cover?

- 2.1. The Property (Relationships) Act 1976 applies to three types of relationships: marriages, civil unions and de facto relationships.
- 2.2. The Act requires people who have left these relationships to divide their property in the same way, regardless of what type of relationship they were in. [If the relationships have not lasted three years, special rules apply \(see paragraphs 5.1 to 5.25\).](#)
- 2.3. The Property (Relationships) Act 1976 applies the same rules to all relationship types because it recognises that many long-term de facto relationships are very similar to marriages and civil unions. Do you think the Property (Relationships) Act 1976 should continue to treat similar relationships in the same way?
- 2.4. If the Act applies the same rules to all long-term relationships, it is important that the Act focuses on relationships that are similar and excludes relationships that are different. [We want to know if you think the de facto relationships that the Property \(Relationships\) Act 1976 focuses on are similar to marriages and civil unions.](#)
- 2.5. The definition of de facto relationship needs to be clear so people can tell whether the Property (Relationships) Act 1976 applies to them or not. At the same time it must be flexible because every relationship is different. [We want to know if the Act's definition achieves the right balance between certainty and flexibility \(See paragraphs 2.17 - 2.20\).](#)
- 2.6. [We also want to know if the definition of de facto relationships works for particular groups:](#)
  - a. people in Māori customary marriages;
  - b. relationships involving young people; and
  - c. relationships with and between members of the LGBTQI+ community.





- 2.7. The Property (Relationships) Act 1976 does not apply to relationships in which people care and support each other in a platonic, non-romantic way. [We want to know if the Act should apply to these relationships.](#)

## Should the Property (Relationships) Act 1976 treat all long-term relationships the same?

- 2.8. If the partners to a marriage, civil union or de facto relationship separate after being together for three years or more, the Property (Relationships) Act 1976 requires them to divide their property in the same way regardless of the relationship type.
- 2.9. The same treatment reflects New Zealand's human rights law, which prohibits discrimination based on the type of relationship people are in. The same treatment also recognises that different relationship types can involve similar levels of commitment and they can face the same property issues when the relationships end.
- 2.10. But there may be a problem if the Property (Relationships) Act 1976 treats relationships the same when they are actually different. The law should focus on relationships that are substantively the same.
- 2.11. Provided the Property (Relationships) Act 1976 focuses on long-term relationships that are the same, we think the Act should continue to apply the same rules to all relationships regardless of relationship type. But we want to know what you think.

## What do you think?

- Q4. Do you think the Property (Relationships) Act 1976 should continue to apply in the same way to all long-term relationships, regardless of relationship type?



# Does the Property (Relationships) Act 1976 focus on de facto relationships that are the same as marriages and civil unions?

- 2.12. When the partners to a long-term de facto relationship separate, the Property (Relationships) Act 1976 requires the partners to divide their property in the same way as the partners to a long-term marriage or civil union would.
- 2.13. But there can be problems if the Property (Relationships) Act 1976 treats some de facto relationships the same as marriages and civil unions when they are actually different. It is important that the Act focuses on the right relationships.
- 2.14. The Property (Relationships) Act 1976 defines a de facto relationship as two people who “live together as a couple”. The Act says courts should consider all the circumstances of the relationship, but it lists specific matters that indicate whether the two people were a couple. The matters include:
- a. the length of the relationship;
  - b. whether the partners shared the same house;
  - c. whether the partners had a sexual relationship;
  - d. how much the partners were financially dependent or interdependent;
  - e. how the partners owned, used and acquired property;
  - f. how much the partners were mutually committed to a shared life;
  - g. how the partners cared and supported their children;
  - h. how the partners performed household duties; and
  - i. the reputation and public aspects of the relationship.
- 2.15. The Act says that it is not critical that all or even any of the matters apply to the relationship. The court may attach whatever weight to each matter it thinks is appropriate. The court therefore has a lot of flexibility when deciding whether partners were a couple.
- 2.16. We want to know whether you think the definition enables the court to identify de facto relationships that are the same as marriages and civil unions.

## What do you think?

- Q5. Does the Property (Relationships) Act 1976's definition of "de facto relationships" let the court identify de facto relationships that are the same as marriages and civil unions? Why/why not?
- Q6. Should some matters that indicate a de facto relationship be more important than others?
- Q7. Do you think there are other matters that indicate whether people live together as a couple not listed in the definition? What are those matters and why are they important?

## Does the definition of de facto relationship achieve the right balance between certainty and flexibility?

- 2.17. The Property (Relationships) Act 1976's definition for when people are in a de facto relationship is very broad and very flexible.
- 2.18. Some people say that the meaning of the phrase "live together as a couple" is unclear. The Property (Relationships) Act 1976 affects how the partners must divide their property if they separate. People should be able to tell whether the Act applies to them or not.
- 2.19. Flexibility can be a good thing. Every relationship is different. The Property (Relationships) Act 1976 must apply to the right de facto relationships when those relationships may be very diverse. The way people enter and leave relationships has changed over time and it will probably keep changing.
- 2.20. It is important that the definition of de facto relationship provides people with as much guidance as possible but also keeps some flexibility.

## What do you think?

- Q8. Do you think the definition of de facto relationship in the Property (Relationships) Act 1976 strikes the right balance between being certain and flexible?

# De facto relationships among particular groups

- 2.21. De facto relationships can take many forms. We want to know if the Property (Relationships) Act 1976 applies properly to different forms of de facto relationships.
- 2.22. We discuss some de facto relationships in more detail in our [Issues Paper](#). And we also look at other relationships, like people who are in two or more relationships at the same time.

## Māori customary marriages

- 2.23. [We look at how the Property \(Relationships\) Act 1976 applies to Māori customary marriages at paragraphs 11.22 to 11.28.](#)

## Relationships involving young people

- 2.24. The Property (Relationships) Act 1976 applies only to de facto relationships where the partners are aged 18 or over.
- 2.25. That means if a de facto relationship ends before the youngest partner turns 21, the relationship will not have lasted for three years and consequently the main rules about property division in the Property (Relationships) Act 1976 will not apply. Instead, the [special rules that apply to short-term relationships \(see paragraphs 5.1 to 5.25\)](#) may apply. Even then, the court can only make a property division order if the youngest partner has turned 18 before the relationship ends, and if there would be serious injustice if the court made no order.
- 2.26. Some young people may be disadvantaged.





## Samara and Marcus

Samara (16) begins a relationship with Marcus (25) that would be a de facto relationship under the Property (Relationships) Act 1976 if Samara was 18. 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 Property (Relationships) Act 1976's general rule of equal sharing to automatically apply. However, due to the age limit, the 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. Either Samara or Marcus must therefore satisfy the court that failure to make an order under the Property (Relationships) Act 1976 for the division of relationship property would cause serious injustice. If they can establish serious injustice, the court will divide the relationship property according to each partner's contribution to the relationship.

- 2.27. The age restriction in the Property (Relationships) Act 1976 is different to the definition of de facto relationships in other legislation. It is also inconsistent with the legal age at which people can marry or enter a civil union (18 years, or 16 or 17 years with consent of specified individuals such as guardians).
- 2.28. However, some young people may drift into a de facto relationship without realising the legal consequences of their relationship. And young people are less likely to have lots of property to divide.

## What do you think?

- Q9. Do you think the main rules in the Property (Relationships) Act 1976 should continue to apply to de facto relationships where the partners are aged 18 or over?
- Q10. Should the age limit be lowered? If so why?

## Relationships with and between members of the LGBTQI+ Community

- 2.29. The Property (Relationships) Act 1976 defines a de facto relationship as two people that live together as a couple. The definition also lists [specific matters](#) that indicate whether the partners live together as a couple.
- 2.30. The definition of a de facto relationship applies to same-sex couples. The same definition and the same criteria apply whether the couple are in a heterosexual relationship or otherwise.
- 2.31. We want to know whether the Act's definition of de facto relationships reflects the way relationships work with and between





members of the LGBTQI+ community. Some relationships may differ from traditional forms and norms. The matters that indicate a relationship in the Act's definition may reflect heteronormative assumptions about relationships.

- 2.32. For example, one matter that indicates whether people are in a de facto relationship under the Property (Relationships) Act 1976 is whether the partners present as a couple in public. Some people in the LGBTQI+ community may be reluctant to disclose their sexuality to their friends and family.

## What do you think?

- Q11. Is the Property (Relationships) Act 1976's definition of de facto relationships working well for members of the LGBTQI+ community?
- Q12. Should the definition change to better recognise the forms and norms of LGBTQI+ relationships?

# Should the Property (Relationships) Act 1976 apply to domestic relationships?

- 2.33. The Property (Relationships) Act 1976 does not apply to people who provide care and support for each other in a platonic, non-romantic way. We call these relationships domestic relationships.
- 2.34. Domestic relationships may include relationships between family members or even relationships between people and their carers.

## Jane and Patricia

Jane and Patricia are sisters. They are in their early forties. They have lived together for 15 years. During that time, they have pooled their income into the same bank account, shared living expenses, and bought household items like whiteware. They have a shared social life. They go on holidays together and have the same friends. Because of their close relationship, Jane and Patricia provide affection and emotional support to each other.

- 2.35. Some people say that the Property (Relationships) Act 1976 should apply to domestic relationships. A domestic relationship





may function in a similar way to a marriage, civil union or de facto relationship. People in domestic relationships may live in the same house, they may provide support and care for each other, and the relationship may last a long time.




- 2.36. But domestic relationships are different to marriages, civil unions and de facto relationships. A sexual relationship is a common feature of the relationships that come under the Property (Relationships) Act 1976. Also, the people in domestic relationships may not expect to share property if the relationship ended.
- 2.37. If a domestic relationship ends, the people in the relationship can rely on other laws if they think they should be entitled to the property of the other person in the relationship. But these legal remedies are sometimes limited and hard to claim. It would be easier for people to claim rights in the property of another if their domestic relationship came under the Property (Relationships) Act 1976.

## What do you think?

Q13. Should the Property (Relationships) Act 1976 apply to domestic relationships?

Q14. If so, what characteristics must a domestic relationship have before the property division rules of the Act applied?





# What property should the Property (Relationships) Act 1976 cover?

- 3.1. One of the most important things the Property (Relationships) Act 1976 does is identify what property partners should share when a relationship ends.
- 3.2. The first step is for the partners to take stock of all the property they own, either individually or jointly. The law only applies to conventional forms of property rather than other resources which, although valuable, we would not normally think are property. It can sometimes be difficult to tell whether something counts as property. [We want you to tell us what property the law should focus on.](#)
- 3.3. The second step is to work out whether each item of property is **relationship property** or **separate property**. We call this process “classification”. This is important because the partners must share relationship property equally when the relationship ends, but each partner gets to keep his or her separate property.
- 3.4. Relationship property will usually include:
  - a. property used by the family, like the family home, furniture, cars; and
  - b. property either partner acquires during the relationship, like savings and superannuation (including KiwiSaver).
- 3.5. Separate property is all other property, but includes:
  - a. property a person owned before the relationship; and
  - b. any gift or inheritance a partner receives.
- 3.6. If the family uses a partner’s separate property, that property will normally become relationship property.
- 3.7. Some property that has particular significance in tikanga Māori will not be relationship property. The law excludes Māori land and some taonga from equal sharing.





- 3.8. We want to learn [whether the PRA classifies the right type of property as relationship property](#). In other words, which property should partners share equally at the end of a relationship?
- 3.9. The third step is to look at what debts the partners owe. Like property, a debt can be either a relationship debt or a personal debt.
- 3.10. The partners calculate the total value of relationship property they must share by deducting the value of relationship debts.
- 3.11. We want to hear your answers to several other questions:
- a. [Should the law treat a partner's ability to earn income as relationship property?](#)
  - b. [Should the law treat gifts and inheritances as a special form of separate property?](#)
  - c. [What should happen when the value of separate property increases?](#)
  - d. [What should happen when a partner receives ACC payments?](#)
  - e. [How should the law apply to heirlooms and other special property?](#)
  - f. [How should the law apply to student loans?](#)
  - g. [What should happen when a partner receives money from a parent?](#)



# What property should the law focus on?

- 3.12. The Property (Relationships) Act 1976 only applies to conventional forms of property that either or both partners own.
- 3.13. In a typical relationship the major property is things like a house, a car, furniture, appliances and computers, savings, and KiwiSaver.
- 3.14. Some partners might have access to other resources that provide financial benefits. But the law might not consider these are property. We are interested in two items in particular:
  - a. a partner's ability to earn income; and
  - b. a partner's interest under a trust.
- 3.15. We talk about these items further when we look at [whether a partner's ability to earn income should be relationship property \(at paragraphs 3.24-3.30\)](#), and when we look at [trusts \(at paragraphs 7.1-7.33\)](#).
- 3.16. It might be fairer if the law focused on all the financial benefits a partner receives, whether they are a conventional form of property or not. We could then classify all resources as either relationship property or separate property. The partners would share in the true wealth of the relationship.
- 3.17. But people will generally be familiar with conventional types of property. If the law changed, this might create uncertainty and confusion.

## What do you think?

- Q15. Do you think the law should have a wider focus than conventional types of property?
- Q16. Other than traditional forms of property, what things should the partners share?

- 3.18. Technology is developing rapidly. There are many emerging forms of property that people might not be familiar with.
- 3.19. Partners may own cryptocurrency like Bitcoin. They may have large digital libraries of apps, software or media. They may have other forms of intangible or digital property, like frequent flyer points. These types of property might be very valuable. But, because they are new and innovative, people might not take them into account when they divide property.



- 3.20. We want to know whether people feel confident to say when something is property. If people don't, we're interested to hear what will help.

## What do you think?

- Q17. Do you know how to identify when something is property that ought to be shared when a relationship ends?
- Q18. What might help you determine whether something is property that ought to be shared?

## What property should be relationship property?

- 3.21. Relationship property is the property the partners must share equally when a relationship ends. The partners calculate the total value of relationship property they must share by first deducting the value of relationship debts.
- 3.22. The Property (Relationships) Act 1976 lists what property is relationship property. Generally property is relationship property for one of two reasons:
- The family used the property (regardless of which partner owns the property or when they acquired it) – for example the family home, household furniture, household appliances and cars.
  - The partners acquired the property during the relationship – for example income from employment, superannuation.
- 3.23. Do you think that these approaches to classifying relationship property are fair? We have come up with some fictional examples to help you decide.





# Penny and Ken

Penny and Ken are both in their late 70s. Penny's former husband died eight years ago. Penny has four adult children. Ken has never been married and has no children.

Penny and Ken developed a close relationship shortly after Penny's husband died. Six years ago, Ken moved into Penny's house. Both admit they are in a de facto relationship. Ken has never owned a house but he has a large income from several investments. Penny owns the house and has no mortgage. She has less income than Ken. During the relationship Ken pays for nearly all the couple's living expenses.

Penny and Ken decide to separate. During the period they have been in a de facto relationship, the value of Penny's house has risen by \$100,000. Ken's investments are likely to be separate property.

## Q19. What is a fair way to classify Penny's house?

- The whole value of Penny's house should be relationship property
- The increase in the value of Penny's house over the course of the relationship should be relationship property
- The whole value of Penny's house should be Penny's separate property
- I prefer another way of classifying the house

Please explain the reasons for your answer.

# Hamish and Jun

Hamish is a widower. He has two teenage children. Jun is a single mother. She has two children under 10. Her former partner lives in Japan. She has no contact with him.

Four years ago Jun and Hamish decided to live together in Hamish's house with all their children. They became a step family. Hamish owned the house before the relationship began. During the relationship both Jun and Hamish use their income to pay off the mortgage over the house.

Jun and Hamish decide their relationship is not working out. Jun leaves the home with her children.

When Jun moved into Hamish's house, the home was valued at \$300,000 but there was an outstanding mortgage debt of \$200,000.

When the Jun and Hamish separate, the house is worth \$400,000 and the mortgage debt has gone down to \$150,000.



## Q20. What is a fair way to classify Hamish's house?

- The whole value of Hamish's house should be relationship property and the whole mortgage debt should be a relationship debt
- The growth in the equity in the house over the course of the relationship should be relationship property
- The whole value of Hamish's house should be Hamish's separate property and the mortgage a personal debt
- I prefer another way of classifying the house

Please explain the reasons for your answer.

# Talia and Ruth

Talia is an artist and Ruth is a teacher. They live together in a de facto relationship. Before the relationship began, Talia bought a painting from an artist friend. About five years ago, Talia moved the painting from her studio into the house. Ruth and Talia really like the painting and they display it above the mantelpiece in their lounge. About nine months ago, Talia removed the painting and placed it back in her studio away from the couple's home. Talia and Ruth separate. Over the course of the relationship the painting has become very valuable.

## Q21. What is a fair way to classify the painting?

- The whole value of the painting should be relationship property
- The increase in the value of the painting over the course of the relationship should be relationship property
- The whole value of the painting should be Talia's separate property
- I prefer another way of classifying the painting

Please explain the reasons for your answer.





# Should the law treat a partner's income earning capacity as relationship property?

- 3.24. In many relationships, the partners work hard to develop the career of one of the partners. A partner might provide most of the child care and housework so the other partner is free to work. Or the partners might use their finances to fund one partner's study. They are investing in human capital - one partner's career and ability to earn income.
- 3.25. The courts have said that a person's skills and talents, like an ability to earn income, are not items of property that can be divided if the partners separate.
- 3.26. This might be unfair in some cases. Take the following examples.

## Gary and Sue

Gary and Sue get together at the same time as Kevin and Josh.

Gary starts his own business as a car mechanic. He incorporates a company through which he runs the business, G Mechanics Ltd. He is the sole shareholder of G Mechanics Ltd. Over the next ten years, Gary works very hard. He builds up a successful business which employs two other staff and has many customers. He earns around \$75,000 each year through G Mechanics Ltd.

Kevin trains as a lawyer. He works very hard after graduating. He is later head-hunted by a multinational business, M Co Ltd, to be in-house counsel. After ten years of work, Kevin earns \$150,000 each year through his employment with M Co Ltd.

Gary and Sue separate. Kevin and Josh separate. Gary may have to divide the value of his shares in G Mechanics Ltd with Sue because company shares can be relationship property. Kevin will not have to share the value of his employment in M Co Ltd with Josh because his income earning capacity is not relationship property.

## Harriet and Rob

Harriet and Rob are in a de facto relationship. They are both finish undergraduate degrees at university with good grades. They decide that



Harriet will go on to study a post-graduate qualification that will enable her to work as an audiologist. But the couple decide that they need income to support their family. So Rob stops study and gets a job as an airport baggage handler.

Five years later Harriet and Rob separate. Harriet earns \$90,000 per year. Rob still works at the airport and earns \$45,000. Harriet has developed a career as an audiologist because of Rob's contribution to the relationship. But Harriet does not have to share the value of her ability to earn income because it is not relationship property.

- 3.27. In the examples, it might be fair if Kevin and Harriet's ability to earn income was considered property. That way, they would have to share the value of the future income they might earn in the same way that Gary has to share the value of his company shares with Sue. And Harriet would have to share the value of the career Rob has helped her develop.
- 3.28. But it can be very difficult to treat someone's ability to earn income as relationship property. Here are some of the problems:
- a. The value of someone's ability to earn income depends on the future income they are likely to earn. This requires people to speculate what will happen in the future, like what will be the person's future career path, when will the person retire, how likely is it they will get sick. These all require estimations which might be imprecise.
  - b. It can be difficult to work out how much of a person's ability to earn income should be shared. Usually, property people acquire before entering a relationship is their separate property and does not need to be shared. So if a person entered a relationship with qualifications and work experience, but then develops more skills and experience during the relationship, how much of the person's ability to earn income should be relationship property that should be shared?
  - c. A person might want to change careers or retire early. What is the value of someone's ability to earn income when they do not want to earn the income?
- 3.29. Our preliminary view is that it is not workable to treat a partner's ability to earn income as relationship property, but we want to know what you think.
- 3.30. But that does not mean a partner can keep all the income they earn in the future. [We consider other ways of sharing a partner's future income when equal sharing does not lead to financial equality \(see paragraphs 6.1-6.18\).](#)



# What do you think?

Q22. Do you agree with our preliminary view that it is not workable to treat a partner's ability to earn income as relationship property?

## Should gifts and inheritances be treated as a special form of separate property?

- 3.31. When a person receives property as a gift or as an inheritance, it will be that person's separate property. He or she does not need to share it when a relationship ends.
- 3.32. However, the law treats this form of property differently to other separate property.
- 3.33. Normally, separate property becomes relationship property if it is used to buy assets in the partners' joint names. But that does not apply if the separate property is a gift or inheritance. The following examples show the difference.

Bridget has saved some money before she met Jo. Bridget and Jo decide to buy some land in the country to start a vineyard together. Bridget uses her savings as a deposit. Bridget and Jo are the property's co-owners. The whole value of the land, including Bridget's deposit, is relationship property.

Alex inherits some money after her grandmother dies. Alex and Morgan are married. They decide to buy some land in the country to start an orchard. Alex uses her inheritance money as a deposit. Alex and Morgan are the property's co-owners. The value of land reflecting Alex's inheritance will remain Alex's separate property. The balance of the land's value will be relationship property.

- 3.34. The only way a gift or inheritance can become relationship property is if:
  - a. the property has been mixed with other property so it is impossible to tell which property is which; or
  - b. it is used by the family – for example, the family home or household furniture.
- 3.35. We are looking at whether the law should treat all separate property in the same way. We want to know whether property a partner receives as a gift or inheritance deserves special treatment.



## What do you think?

- Q23. Is the property a partner receives as a gift or inheritance a special form of property? Why?
- Q24. Should it be treated differently from other types of separate property, such as property a partner has acquired before the relationship?

## What should happen when the value of separate property increases?

- 3.36. Generally, when a person's separate property increases in value or produces income, the increase or income is also separate property.

### Gayle

Gayle put some money on a term deposit at her bank before she entered her relationship with Steve. Later, the term matures and she is repaid the money with interest into her personal bank account. The money and interest are likely to remain separate property.

- 3.37. The situation is different if the other partner to the relationship causes the increase or earns the income.

### Rod and Areta

Rod and Areta are married. Rod has a farm which is his separate property. He wants to convert it into a dairy farm. Areta helps. She uses her savings from the income she earned during the relationship to help pay for a new milking shed. She also quits her job so she can look after the couple's children and the household. That way Rod can work longer hours converting the farm.

The increase in the farm's value after the conversion is partly attributable to Areta. Consequently, part of the increase in value is likely to be relationship property.

- 3.38. These rules are not always easy to apply. It can be difficult to work out whether a partner's actions have enhanced the other partner's property. In our example, Areta has allowed Rob to improve his





farm because she has taken on additional family duties. Her actions have had a big impact, but it is difficult to measure because the actions have indirectly affected the property's value.

## What do you think?

Q25. How much of the increase in value in a partner's separate property should be shared? Tell us what you think:

- a. Partners should be able to keep all the increases in the value in their separate property
- b. Only the increase in value which is caused by the other partner's actions should be shared
- c. So long as the other partner has caused part of the increase in value, all the increase in value should be shared
- d. Whenever a partner's separate property increases in value during the relationship, the increase in value should be shared

## What should happen when a partner receives ACC payments?

- 3.39. Sometimes partners will receive ACC payments because of an injury they suffer.
- 3.40. The law does not focus on the payments themselves. Instead, the law looks at the legal right the partners have to receive the payments. If the legal right arose during the relationship, the value of the payments, whether as a lump sum or ongoing future payments, is likely to be relationship property.
- 3.41. We want to know whether you think this is fair.
- 3.42. Partners who receive the payments must still bear the consequences of the injury after the relationship ends. Should they still have to share the payments? It is also income on which they might depend.
- 3.43. On the other hand, the right to the payments may be one of the couple's biggest items of property. Should the other partner lose an interest in it? How is the property different from other rights to payment, like investments the partners have made?

## What do you think?

Q26. If a partner gets a right to ACC payments because of a personal injury suffered during the relationship, should all the payments (including future payments) be relationship property? Please tell us why.

## How should the law apply to heirlooms?

- 3.44. The items of property a family use in their home will usually be relationship property.
- 3.45. However, the law specifically excludes heirlooms and says they are not to be shared when a relationship ends.
- 3.46. Heirlooms are a special type of property. They are a family treasure and they cannot be replaced by another object. We think it is right that heirlooms are protected from division, but we want to hear what you think. We also want to know what you think makes something an heirloom.

## What do you think?

Q27. Should the heirlooms a partner owns be exempt from equal sharing?

Q28. What makes an item of property an heirloom?

- 3.47. As well as heirlooms, we want to know whether there are other special types of property that ought to be exempt from sharing.
- 3.48. One type of property might be property that has a special meaning to its owner. For example, someone might be awarded a valuable ornament for winning a competition or in recognition of outstanding services.
- 3.49. Another type of property might be property that has special cultural significance. There are important ways in which certain items of property are viewed in tikanga Māori. [In tikanga Māori and the Property \(Relationships\) Act 1976](#) we talk about [Māori land \(at paragraphs 11.7-11.13\)](#) and [taonga \(at paragraphs 11.14-11.21\)](#) and why these items should be exempt from sharing when a relationship ends.





- 3.50. We want to hear whether there are items of property that should be exempt from sharing because they have special cultural significance.

## What do you think?

Q29. Are there specific items of property that should be exempt from sharing under the Property (Relationships) Act 1976 because they have special significance? What property might this be and why?

## How should the law apply to student loans?

- 3.51. The Property (Relationships) Act 1976 treats student loans like any other type of debt.
- 3.52. The Act says there are two types of debts: personal debts and relationship debts. Relationship debts are debts that have been used to acquire relationship property, to contribute funds for family life, or were taken out as part of the partners' 'common enterprise'.
- 3.53. Generally, the law treats a student loan as each partner's personal debt. If, however, the partner used their student loan to contribute to the couple's living costs, or if the study was part of the partners' common enterprise, the loan (or part of it) might be a relationship debt.
- 3.54. The law says that the value of relationship property to be shared between the partners is calculated by taking the total value of relationship property and then deducting the value of relationship debts. So if a debt is a relationship debt, the partners share the value of the debt equally. If a debt is a personal debt, its value is not shared.
- 3.55. When a relationship ends, the main problem with student loans is that sometimes one partner will have paid back more of his or her student loan than the other partner. This situation could arise where one partner worked while the other stayed at home to care for children. To make things more complicated, if a partner has used his or her income to pay back a student loan, the other partner might be entitled to compensation. That is because income is usually relationship property and student loans are usually personal debts.
- 3.56. We want to know the fairest way of classifying student loans. One option is to keep the current law. That is to classify the loan as a personal debt or relationship debt depending on the particular



reasons a partner incurred the loan. The current law does a good job at treating loans fairly in the circumstances of each relationship. The law also entitles a partner to compensation where relationship property is used to pay back one partner's personal debt student loan.

- 3.57. But the law can be complicated and it is difficult to work out the right level of compensation. It might be simpler to say that student loans should always be relationship debts. In other words, the partners would always share the debt when they separate. That way, if both partners had student loans, it would not matter if one partner paid his or her loan off faster. And it would matter less if the partner used relationship property to pay the loan back.

## What do you think?

Q30. How should the Property (Relationships) Act 1976 treat student loans?

- a. Student loans should be treated like any other type of debt and classified according to the current rules. Or
- b. Student loans should be classified as relationship debt.

## What should happen when a partner receives money from a parent?

- 3.58. Sometimes parents will advance large amounts of money to their adult children. It may be more common as children rely on parental support for help to buy houses.
- 3.59. If a relationship ends, there may be problems if it is unclear whether the parent intended that money to be a gift or a loan. The distinction may make a big difference on the amount of relationship property the partners share, even if the advance was made to just one of the partners. That is because a loan might be classified as a relationship debt, whereas a gift might be classified as relationship property.
- 3.60. The law presumes that an advance from parents is a gift to their child. That means that a person who claims that the advance was a loan must prove it.
- 3.61. There have been cases where a person has argued that the law should not assume a parental advance is a gift because in the family's ethnic culture it is usual for parents to loan money to their children.



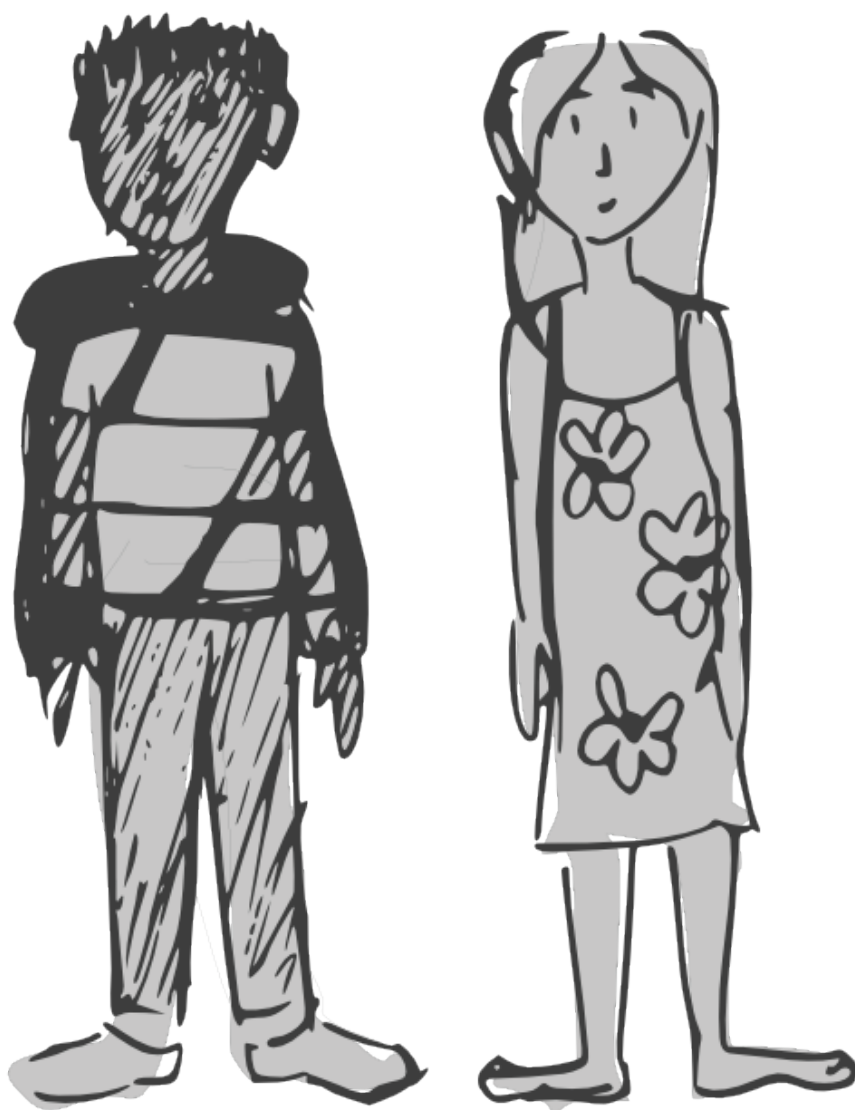




- 3.62. Because it may be more common for parents to advance money to children, and because New Zealand is becoming more culturally diverse, we want to know whether the current rules need to change.

## What do you think?

Q31. Should the law presume that the money a parent advances to a child is a gift unless proven otherwise?

Q32. If not, what is a more appropriate rule?





# How should the Property (Relationships) Act 1976 divide property?

- 4.1. The Property (Relationships) Act 1976's central purpose is to divide a couple's property when their relationship ends.
- 4.2. The law's most well-known feature is the rule of equal sharing. Each partner gets an equal share of the couple's relationship property. You might have heard this described as the '50-50 split' or a 'right to half the property'.
- 4.3. There are several exceptions to equal sharing. The main ones are where equal sharing does not fix inequalities between the partners and where extraordinary circumstances make equal sharing unjust. Special rules also apply if a relationship has not lasted three years, or if a partner has had two relationships at the same time or one after the other.
- 4.4. We want to hear [what you think about equal sharing](#) and [whether there should be wider exceptions](#).
- 4.5. Although a partner may share the couple's relationship property equally, it does not mean they get half of every asset. The value of relationship property is divided. This might mean each partner takes certain items of property with the same value. Or it might mean that the partners sell items of property and share the sale proceeds. Or it might mean that one partner keeps items of property but pays the other partner a sum of money in return.
- 4.6. Working out property's value is a very important when dividing property. We want to know [how difficult it is to value property and what might help](#).
- 4.7. If people go to court to resolve disputes, the court should have authority to divide property. We want to know [whether the court has the right powers](#).
- 4.8. Many types of property are difficult to divide because of the nature of the property itself. In particular, we want to hear [what you think should happen when a family owns pets](#).



- 4.9. Also, it can take a long time for the partners to finally resolve how they will divide their property. We want to know [whether it should be easier for partners to get access to some of the property before a final division.](#)
- 4.10. Or a partner might need to use property for a short time before the asset is divided. [When do you think a partner should be able to use or occupy property after a relationship ends?](#)

## Equal sharing of relationship property

- 4.11. The Property (Relationships) Act 1976 says that each partner may share equally in the couple's relationship property. We look at what relationship property means in [what property should be covered by the Property \(Relationships\) Act 1976 \(at paragraphs 3.1 to 3.62\).](#)
- 4.12. The general rule of equal sharing is very important. It gives each partner an automatic right. They need not prove that they contributed money or did things to justify their equal share.
- 4.13. There are many good things about the equal sharing rule.
- a. Equal sharing reflects how we think about relationships. Both partners contribute to a relationship in equal but often different ways. It does not matter, for instance, if one partner earns income while the other cares for their children. Each partner should get an equal share of relationship property because their contributions are of equal worth.
  - b. Lots of people already know about equal sharing. It is helpful when people know about the law and have accurate expectations about how it will divide property when a relationship ends.
  - c. The equal sharing rule is simple and easy to apply. This helps people sort out their own affairs without going to court.
  - d. The law protects weaker partners. Because the rule is well known and easy to apply, it is easier for people to assert their right to half the relationship property.
- 4.14. There are some exceptions to equal sharing. But they only apply in limited circumstances. We look at some of these exceptions here. The partners can also [agree to divide their property in a different way \(see paragraphs 10.1 to 10.44\)](#) provided they have followed the right process.

# What do you think?

Q33. Should the law continue to provide that each partner has a right to share equally in relationship property unless an exception applies?

Q34. Please tell us why.

## What are the exceptions to equal sharing?

- 4.15. The equal sharing rule will not apply to relationships that last less than three years. [We look at those relationships at paragraphs 5.1 to 5.25.](#)
- 4.16. A partner might get more property if equal sharing does not fix inequalities between the partners. There might be cases where someone has sacrificed a career to care for the family's children and home. When the relationship ends that person may have poor chances of earning income. [We look at how the law responds here.](#)
- 4.17. The law also says that the partners should not share relationship property equally where there are extraordinary circumstances that make equal sharing seriously unjust. Because this exception is only for extraordinary cases, it rarely applies.
- 4.18. A partner's misconduct has little influence on how the partners share their property. It can be unhelpful to make moral judgements on people's conduct when a relationship ends. The only time when misconduct may be relevant is if a person's actions after the relationship has ended have devalued property.
- 4.19. We want to know when you think the equal sharing rule should not apply.

## Family violence

- 4.20. Should equal sharing apply when one partner has been violent?
- 4.21. Family violence is one of the most serious forms of misconduct. It can have an horrific effect on family life.
- 4.22. Some people say that a partner who has been violent should lose entitlements to relationship property. They say that the rule of equal sharing is to recognise both partners' positive contributions to the relationship. If one partner has made negative contributions, like violence, there should be consequences.





- 4.23. Also, the victims of family violence will often suffer financial loss from the violence. Stress may interfere with work or study. Violence may break the family economic unit.
- 4.24. On the other hand, some people say the law should not base the division of property on the partners' conduct. They say that instead family violence should be dealt with by the criminal law and family violence legislation.
- 4.25. When the partners divide their property, it can also be unhelpful for them to focus on each other's conduct during the relationship. The current law helps partners sort out their property affairs rationally and dispassionately, and move on with their lives. This process could become more heated and less efficient if partners gain advantages by accusing each other of misconduct.

## What do you think?

Q35. Should family violence be an exception to the general rule of equal sharing?

Q36. Please tell us why.

## When a partner has squandered property

- 4.26. Sometimes partners in a relationship may spend lots of money on themselves. Partners may lose lots of money gambling. Or some people may spend lots on things like shopping, holidays or entertainment. It can sometimes be unfair because one partner consumes lots of relationship property without benefiting the other partner.
- 4.27. The law responds to this situation in two ways. First, a court can require a partner who devalues relationship property to pay compensation to the other partner. The main problem with this remedy is that the court's power only applies when a partner has squandered relationship property after the relationship has ended.
- 4.28. Second, the court can require partners to pay compensation to the other when they have paid personal debts with relationship property. The main problem with this remedy is that it is not accurate to describe spending money, gambling and shopping as debts.
- 4.29. Should the law provide a better remedy?

# What do you think?

Q37. Is it common for one partner in a relationship to squander lots of property on themselves during the relationship?

Q38. If so, should the law have better ways of helping the other partner?

## Valuing property

- 4.30. When a couple divide their property at the end of a relationship, they need to know the value of their relationship property.
- 4.31. The process of division usually requires the partners to first work out the total value of all their relationship property. They then deduct outstanding relationship debts. The partners share the net value of relationship property.
- 4.32. The actual division will usually mean that the partners each take assets of a certain value, or they sell the property and split the sale proceeds. One partner may then pay the other a sum of money if their shares are still unequal.
- 4.33. The law does not explain what 'value' means. But people commonly understand it as the fair price the property could sell for between a willing seller and a willing buyer in an open market.
- 4.34. It is easy to work out the value of some items of property, like cars and furniture. Other assets are more complex. It is harder to work out an asset's value when it depends on the likely future income earned from the property, like company shares or a partnership interest in a professional firm. The partners will probably need the help of an expert valuer, which can be expensive. And, given the uncertainty of predictions about the future, the partners may disagree on the value.
- 4.35. We wonder whether the costs, effort and potential arguments about the value of property are a big problem. If they are, we want to hear your ideas about what might help.

# What do you think?

Q39. Are the costs of valuing property and the potential for partners to disagree about the value of their property a big problem?

Q40. Do you have any ideas about what might help partners resolve disputes about the value of property?

# Does the court have the right powers to divide property?

- 4.36. Different people own very different types of property. Sometimes, the property might be things we are all familiar with, like houses, cars and savings. In other cases, the property might be more complex, like rights to ACC payments, company shares or a legal claim against someone else.
- 4.37. When a court comes to divide a couple's relationship property, there are two limits on its powers.
- 4.38. First, the court might be unable to determine whether a partner's right to property should be shared if the property right is disputed. The court is often reluctant to make a ruling about whether something is property because it can affect the rights of other people to that property. Also, the Family Court specialises in handling family matters. It sometimes lacks powers to make rulings about property or commercial law.

## Manu and Celia

Manu and Celia have separated. Celia says she has little property because, prior to the relationship, she transferred most of her valuable assets to her lawyer who is a trustee of a trust she created. The trust, Celia says, is for the benefit of any children she might have. Manu does not believe that Celia intended to create a trust. He thinks she and her lawyer treat the trust property like it belongs to Celia. Manu wants to argue that the trust is a sham. That way the lawyer must transfer the property back to Celia so it can be divided with Manu. Manu's lawyer says that it is not clear whether the Family Court can hear Manu's argument that the trust is a sham. The lawyer says Manu might need to start a separate court case in the High Court against both Celia and her lawyer.

- 4.39. Second, sometimes a court will decide that certain property, like superannuation entitlements or a partner's beneficial interest in a trust, is relationship property. Other people, like KiwiSaver providers or trustees, hold those types of relationship property.
- 4.40. It is not always clear whether the court can make an order that requires the third party to divide the property between the partners. The law generally applies only between the partners to a relationship. Sometimes the law gives the court power to order third parties to divide the property. But in other instances it is unclear whether the court has the power.



- 4.41. It might be best for the court to have all the powers it needs to determine people's property rights and then make orders dividing that property.
- 4.42. However, cases might be longer and more expensive. It might also be difficult for third parties if they must take part in the court case.

## What do you think?

- Q41. Should the court have general powers to resolve disputes between a partner and a third person when the third person has the property but does not agree that the partner has property rights?
- Q42. Should the court have general powers to require other people that hold the partners' property to divide that property between the partners?

## What should happen when a family owns pets?

- 4.43. The law says that household pets can be relationship property. That means partners have to share them when a relationship ends. The problem is that a pet cannot be physically divided.
- 4.44. A pet is also different to other types of property. A pet can offer a family love and friendship. But it also needs ongoing care.
- 4.45. There have been a few court cases when people could not agree what should happen to a pet when they separated. In those cases, the courts have said that the pet should live with the partner that can best provide for the pet's best interests.
- 4.46. For instance, in one case the partners separated but they both wanted to keep their dog. One partner lived on a big rural property whereas the other had moved into a townhouse. The court said it was better for the dog to stay with the partner at the rural property. But the court ordered that the partner who kept the dog had to pay half the dog's value to the other partner.
- 4.47. Do you think this is the right outcome?

## What do you think?

- Q43. What should happen to a family pet when a couple separate?



# Getting access to property before the final division

- 4.48. People who separate might take time to finally sort out the division of their property. If they go to court to resolve disputes, it can take several years.
- 4.49. In the meantime people need access to money to pay for day-to-day living costs. They might also have extra costs because of the separation, like setting up a new home or paying for legal advice. If most of the property is in the name of one of the partners, it can be difficult for the other partner to access the money he or she needs.
- 4.50. The law allows a person to ask the court to make an interim division of some property. But few people do this. Going to court can be time-consuming and expensive.
- 4.51. Sometimes the court might struggle to identify what property it can divide before making a final judgment. The court must be sure it is dividing relationship property. It also needs to be sure that the property the partner asks for does not exceed what they are entitled to.
- 4.52. When a relationship ends, a partner can also go to court to ask the other partner to make payments called maintenance. Maintenance payments are to support the post-separation needs of a partner. Sometimes it is easier to seek maintenance than an interim distribution of property.
- 4.53. We want to know if it should be easier to get an interim division of some property. The law could do this several ways. For instance, the court could order that one partner pays the other an initial lump sum payment. When one partner asks the court for an initial lump sum payment, the court would have to deal with the matter quickly.

## What do you think?

Q44. Should it be easier to get an interim distribution of property before the division of the partners' property is finally resolved?





# Using and occupying property after separation

- 4.54. Even though people who have separated will need to divide their property, one partner may need to use or occupy property for a certain period. The court can grant orders giving a partner the right to occupy the family's home.
- 4.55. The court can make occupation orders either because the partner needs the use of the house or because the partners' children do. [We look at when courts might use occupation orders when the interests of children are involved at paragraphs 9.1 to 9.54.](#)
- 4.56. It can be a problem when a person seeks an occupation order but neither of the partners to the relationship owns the home. The home might be held on a trust rather than in the partners' personal names. Sometimes a company owns the house and a partner is a shareholder in the company. In those circumstances, the court has no powers to grant an occupation order.
- 4.57. It might be better if the court could allow a partner to occupy the home for a definite period if, before the relationship ended, the family had permission from the trustees or company to live in the home and that permission has not been withdrawn.



## What do you think?

- Q45. Should the court be able to make orders that allow a partner to live in a house if the trustees or company owner has given a partner permission to do so?
- Q46. If so, in what circumstances should the court be able to make occupation orders?





# How should the Property (Relationships) Act 1976 treat short-term relationships?

- 
- 
- 5.1. When a relationship ends, the Property (Relationships) Act 1976 normally requires the partners to divide their relationship property equally.
  - 5.2. But different rules apply if the relationship did not last for three years. In those cases, the way the partners must divide their property depends on whether they were married, in a civil union or in a de facto relationship.
  - 5.3. For marriages or civil unions of less than three years (including any time they spent in a de facto relationship beforehand), each partner will normally be entitled to half the relationship property. But they must divide the family home and household items (like furniture and appliances) differently if:
    - a. One partner owned them before the relationship started;
    - b. One partner acquired them by a gift or an inheritance from a third party; or
    - c. One partner has contributed much more to the relationship (by contributing money or property or non-financial contributions like childcare).
  - 5.4. In those situations, the partners must divide that property in proportions that reflect their contribution to the relationship.



## Rita and Penny

Rita and Penny are civil union partners. They live in a house that Penny owned before the relationship started. During the relationship, Rita starts a veterinary practice. She works long hours to make a success of the business. Penny helps by doing unpaid administration work. Penny also does most of the housework to allow Rita to work longer hours. Rita and Penny separate 18 months after entering their civil union. Rita's veterinary practice has no value because it has big debts.

Penny's lawyer says this is probably a case where equal sharing will not apply. Instead, Penny has provided the couple's most valuable asset, the home. She has also made what looks like greater contributions to the relationship than Rita, by supporting Rita at work and at home. Penny's lawyer says it is likely a court would order that Penny should take a greater share of the home.

- 5.5. If the partners to a de facto relationship have been together for less than three years the rules of division in the Property (Relationships) Act 1976 will not apply. The only exceptions are if the couple have a child or if one partner has made substantial contributions to the relationship. Even then, the Property (Relationships) Act 1976 will not apply unless the court thinks there would be a serious injustice.
- 5.6. If the court thinks that the Property (Relationships) Act 1976 should apply, the partners must divide their property in proportions that reflect their contribution to the relationship.

## Miles and Glenda

Miles and Glenda are in a de facto relationship. Glenda owns a house. The house is subject to a mortgage debt. Miles' only asset of any value is his car.

One year into their relationship, Miles and Glenda have a child together, Sally. Glenda provides full-time care for Sally.

Miles has a good job and earns all the family's income. He and Glenda use this income to pay for their living costs and the mortgage. He also accrues valuable superannuation benefits during the relationship.

Miles and Glenda separate after being together for two and a half years. Miles sees his lawyer to find out how he and Glenda must divide their property. Miles' lawyer says there is a good chance the Property (Relationships) Act 1976 will apply because Miles and Glenda have a child. They have both made contributions to the relationship and acquired property during the relationship. The lawyer says when the court looks at what proportions of the property each partner should get, it is relevant that Glenda has contributed the equity in family home and provided childcare. But it is also relevant that Miles has earned income and acquired superannuation benefits.





- 5.7. We want to know what you think about the rules that apply when a relationship lasts less than three years.
- [How long should a relationship last before the general rule of equal sharing applies?](#)
  - [When should the special property division rules for short-term relationships apply to de facto relationships?](#)
  - [What property division rules should apply to short-term relationships?](#)

## How long should a relationship last before the rule of general sharing applies?

- 5.8. If a marriage, civil union or de facto relationship ends after lasting for three years or more, the partners must divide their relationship property according to the Property (Relationships) Act 1976's general rule of equal sharing.
- 5.9. If the relationship has lasted for less than three years, the general rule of equal sharing will not apply.
- 5.10. Few marriages last for less than three years. According to Statistics New Zealand, 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. This suggests that few marriages are short-term marriages. There is little data about civil unions.
- 5.11. A more difficult question is whether three years is the right length of time for when equal sharing should apply to a de facto relationship. There has been little research on the duration of de facto relationships in New Zealand.
- 5.12. Here are reasons three years might be too short:
- People may drift into relationships without realising the legal consequences.
  - A relationship of three years might not have reached the stage where the general rule of equal sharing is appropriate. By three years, some people might not think their relationship involves the same commitment and permanence as a marriage or civil union. Other couples might see their relationship as a stepping-stone to marriage, which is when they really commit to the relationship.
  - Some people have more than one intimate relationship in their lifetime. That might mean that some people must divide property multiple times, which could erode their assets.



5.13. But there are reasons three years might be an appropriate length of time:

- The three-year rule has been the law for many years now. Many people know about it. If it changed, there might be confusion.
- Many people may invest in a relationship that lasts for less than three years. They might pool money together to buy assets, or support their partner with money and emotional commitment. If a couple have children together, the nature of the relationship will change.
- A relationship still must be a de facto relationship before the general rule of equal sharing applies. The Property (Relationships) Act 1976's definition of de facto relationship requires a level of commitment and therefore excludes casual relationships.

## What do you think?

Q47. How long do you think a de facto relationship should last for before the partners must share their relationship property equally if they separate?

Q48. If a couple had children together, would it make a difference to your answer?

- Yes – the equal sharing rule should apply if the relationship has lasted for a shorter period.
- No - the same period should apply
- Yes - the equal sharing rule should apply if the relationship has lasted for a longer period.

Q49. If the court could make the period shorter or longer in exceptional cases, would it make a difference?

- Yes – the equal sharing rule should apply after the relationship has lasted for a shorter period.
- No – the same period should apply.
- Yes - the equal sharing rule should apply after the relationship has lasted for a longer period.



# When should the rules for short-term relationships apply to de facto relationships?

- 5.14. The Property (Relationships) Act 1976 has special rules about how a couple should divide their relationship property if the relationship has lasted a short time. However, the rules only apply to de facto relationships if two extra conditions are met, otherwise the rules of division in the PRA do not apply at all.

**First condition:**

- a. there is a child of the de facto relationship; or
- b. a partner who wants the Act to apply has made substantial contributions to the relationship.

**Second condition:** if the partners' relationship property is not divided under the Property (Relationships) Act 1976 there would be serious injustice.

- 5.15. There are three main problems with these extra conditions.
- 5.16. First, the law treats people in de facto relationships differently to people in marriages and civil unions.
- 5.17. Normally the law does not treat people differently because of their relationship or family status. If people are treated differently, it can be unlawful discrimination and an infringement of their human rights. But that does not mean the law must treat people the same all the time. Sometimes, the law can make distinctions based on a person's relationship status if the different treatment is reasonable and can be justified.
- 5.18. The Property (Relationships) Act 1976 ought to apply the same rules to relationships that are substantively the same. But if a short de facto relationship is different to a short marriage or civil union, the extra conditions for de facto relationships might be reasonable and justified.
- 5.19. Second, the test is difficult to apply because it is unclear. The words "substantial contribution" and "serious injustice" are open to interpretation.
- 5.20. Third, the test sets a high bar for relationships with children because they must meet the additional condition of serious injustice before the division rules apply.



- 5.21. We want to know when you think the special rules of property division should apply to de facto relationships that only lasted a short time. What factors are relevant for determining whether a short de facto relationship should come under special division rules?

## What do you think?


- Q50. When should the special rules of property division apply to de facto relationships that have only lasted a short time?
- Q51. Should the same rules apply when people who have been in a relationship for less than three years separate regardless of whether the relationship was a marriage, civil union or de facto relationship?

## What property division rules should apply to short-term relationships?

- 5.22. If couples who are married or in a civil union separate before their relationship has lasted three years, the Property (Relationships) Act 1976 will sometimes require the partners to divide their relationship property equally. In other circumstances, they must divide their relationship property based on the contributions each partner has made to the relationship.
- 5.23. If the partners to a de facto relationship separate after less than three years, the Property (Relationships) Act 1976 will only apply to them in special circumstances. If the Act applies, they must divide their property based on the contributions each partner has made to the relationship.
- 5.24. There can be problems with these rules. We think the rules could be simpler. The same division rules should apply to all short-term relationships, regardless of whether the relationship is a marriage, civil union or a de facto relationship.
- 5.25. We discuss these problems further and some options for reform in our more detailed [Issues Paper](#).







# What should happen when equal sharing does not lead to equality?

- 6.1. The Property (Relationships) Act 1976 says that when people in a relationship separate, they should each get an equal share of the property connected with that relationship.
- 6.2. But equal sharing will not always mean that partners leave the relationship on an equal footing.
- 6.3. In some relationships, the partners take on different roles, which can leave one of them financially worse off. One partner may care for children and the home while the other continues in paid work. Or one partner might stop studying and work in a low-paying job to support the other partner's study or training.
- 6.4. When the relationship ends, one partner will continue to enjoy the benefits of a better career. The other partner will not have the same advantages because he or she has sacrificed work or study opportunities.

## Don and Nari

Don and Nari marry. They are 20 years old. Don is training to be a pilot. Nari works as a junior manager.

Two years later, Don and Nari have their first child. Nari leaves work to care for the child.

Over the next 15 years, Don and Nari have two more children. Don qualifies as a pilot and gets promoted to flying international routes. Nari is a full-time mum because Don is frequently away.

When Don and Nari's youngest child turns 16, they separate. Don continues to work as a pilot. He earns a large salary. He buys a new house straight away. He continues to enjoy a very good lifestyle.



Nari goes back to work at the bank, but she earns little because she does not have much work experience. Nari rents a house because she is not confident she can maintain mortgage payments. Don and Nari's children also come to live with Nari which adds extra financial pressure.

If Don and Nari divide their relationship property equally, they will not be on an equal footing.

- 6.5. The Property (Relationships) Act 1976 tries to address situations where the partners' income and living standards are very different because of the way they took on different roles during the relationship. The Act says a court can order the partner with the better income and living standards to pay compensation to the other partner.
- 6.6. There are several problems with a court's power to award compensation. Compensation is difficult to claim and the purpose of the compensation is unclear.
- 6.7. The law can be better. We have some suggestions. [We want to know what you think about them.](#)

## What is wrong with the law?

- 6.8. When a relationship ends, the Property (Relationships) Act 1976 says that one partner may need to pay the other partner compensation if there is a big difference between the partners' income and living standards. But it is hard for a partner to claim compensation.
- 6.9. The partner who claims compensation must show a court that the difference in income and living standards is because of the roles each partner took during the relationship. It is hard to show the link.
- 6.10. Even if the partner proves the link, the court decides how much compensation to award. Sometimes the court will make big discounts because it is not certain how much income the partners will actually earn over the coming years.
- 6.11. In around 40% of cases, the courts have awarded compensation. But the level of compensation has not been high. It is very rare for the court to award more than 10% of the total relationship property.
- 6.12. Because compensation claims are so difficult to prove, a partner can incur big legal costs trying to make the claim.
- 6.13. The law is unclear and does not provide sufficient guidance to the courts. Although the Property (Relationships) Act 1976 says that a court can award compensation, it is not clear what the compensation is for. It could be for one or more of several things:
  - a. The partner's lost opportunity to develop a career;
  - b. The partner's unpaid role in the relationship;





- c. The partner's loss of income and living standards he or she enjoyed during the relationship;
  - d. The partner's loss from investing in the other partner's career through the relationship and then losing the benefits of that investment.
- 6.14. The uncertainty makes it difficult for lawyers to advise people.
- 6.15. We discuss the problems with the law in greater detail in our [Issues Paper](#).

## How can the law be improved?

- 6.16. The law can be better. We have several ideas and we want to know what you think about them.
- 6.17. To explain our ideas, we want you to read Fergus and Victoria's story and tell us what a fair outcome would be.

### Victoria and Fergus

Victoria and Fergus are in a relationship. Victoria has just graduated from university and works at an accountancy firm. Fergus has been working for a few years.

Two years later Victoria leaves her job to look after their first child. Fergus continues his job and qualifies as a chartered accountant.

Victoria and Fergus have two more children. Victoria stays at home to take care of the children.

Ten years later Fergus becomes a partner in an accountancy firm.

Victoria and Fergus then separate.

They have a mortgage-free house and a few other assets. If Victoria and Fergus divide their relationship property equally, each partner will get property worth roughly \$150,000.

Victoria gets a junior job at an accountancy firm. She works part-time so she can care for the children. Victoria's mother provides childcare the rest of the time without compensation.

Victoria's salary is \$40,000. Victoria's standard of living drops. She moves to a smaller house in a different neighbourhood. She has less time to spend with her children because she must work.

Fergus earns \$350,000 a year. He continues to enjoy the same standard of living the couple had when they were living together. He takes care of the children on the weekends.



## What should happen?

### Option 1: Victoria should get compensation if she can show two things:

- 1 there is a big difference between her income and living standards and Fergus's income and living standards;
- 2 her role in the relationship meant she gave up career opportunities.

Victoria's compensation would be either a proportion of Fergus' future income, or a larger share of the relationship property.

### Option 2: Fergus's ability to earn income should be treated as an item of relationship property and divided.

This would require a court to work out two things: (a) the value of Fergus's income-earning capacity based on his likely future income and (b) the extent to which this income-earning capacity developed during the relationship.

A court would need to consider:

- What Fergus could earn when he started the relationship with Victoria and what he could earn when he left the relationship.
- How much Fergus is likely to earn in the future - This will depend on how much longer Fergus can work for and whether any risks affect Fergus's future ability to work.
- How it should recognise that Fergus must still work to earn the income.

These are complex questions. Victoria and Fergus will probably need the help of experts. When the court has worked out the value of Fergus's income-earning capacity attributable to the relationship, it would then divide that value equally between Victoria and Fergus. That would probably mean that Fergus must pay Victoria a sum of money reflecting the value, either from his separate property or from his share of the relationship property.

### Option 3: Victoria should get periodic payments from Fergus.

The payments should reflect what support Victoria needs and should compensate her for not being able to develop her career. The payments should also take into account what income both Fergus and Victoria earn and reflect the length of the relationship and the number and age of children that Victoria is caring for. Victoria should either get







payments from Fergus as long as she needs to become economically self-sufficient, or for a specified period of say 1, 2, 5 or 10 years.

Victoria need not prove that the roles she and Fergus took in the relationship caused the difference in their income and living standards. It is enough that Victoria and Fergus earn different amounts and that Victoria needs support.

## What do you think?

Q52. Which option do you think is the best? Why?





# What should happen to property held on trusts?

- 7.1. Many families in New Zealand use trusts to hold property. Around one out of every seven homes in New Zealand is held on trust. Many people have created a trust, or they are involved as a trustee or beneficiary.
- 7.2. [Trusts can cause problems when people in a relationship separate.](#)  
The Property (Relationships) Act 1976 says that normally the partners must divide all their relationship property equally. But often the Act will not apply to trusts. So people do not share any property held on a trust in the same way.
- 7.3. Because of the problems trusts can cause, the law provides remedies. Sometimes a court can order that a partner should get some of the trust property. But different laws give the court different powers. This makes the law inconsistent and difficult to apply.
- 7.4. We think that the law needs to change. [We want to know when you think is it appropriate for a partner to get a share of the trust property at the end of a relationship.](#)

# What are trusts and how can they cause problems at the end of relationships?

## What is a trust?

- 7.5. A trust is a way of holding property. Under a trust, the trustee owns and manages the property for the beneficiaries. The document used to create the trust will explain who the beneficiaries are and what property they are entitled to.
- 7.6. The trust document can give the beneficiaries different interests.
- 7.7. Sometimes, the document might say that the beneficiaries may have a fixed share of the trust property. The trustees then must give the property to the beneficiaries when the beneficiaries ask for it, or when a certain event happens, like the beneficiaries turn 21.
- 7.8. Sometimes, the trust document might say the beneficiaries may have the trust property only when the trustees decide. The beneficiaries cannot make the trustees give them the property.

## Why do people use trusts?

- 7.9. People use trusts for many reasons. Some people use trusts to keep assets safe from the risks related to their business or occupation. Some people use trusts to pass certain assets, like a family business or farm, to the next generation. Some people use trusts to give to charity, or to provide property for people who cannot manage it on their own like children or intellectually disabled people. Some people use trusts so they need not share property with their partner under the Property (Relationships) Act 1976.





# Esther

Esther wants to buy a house. Her lawyer suggests using a trust. Esther agrees and signs a document which sets up a trust.

Esther and the lawyer are trustees. When she buys the house, Esther and her lawyer are named as the property's owners because they are the trustees.

The trust document says that the beneficiaries are Esther and any children she may have. But the trust document says that the trustees can choose whether to distribute property to the beneficiaries.

## What happens to property held on trust when a relationship ends?

- 7.10. When a relationship ends, the Property (Relationships) Act 1976 sets out how the partners should divide their property. But the Act only applies to property that the partners own.
- 7.11. When a partner holds property as a trustee, the Property (Relationships) Act 1976 does not see it as their property.
- 7.12. If a partner is a beneficiary under the trust, their beneficial interest might be property. But the courts have said that if the trustees can decide whether or not to give property to the beneficiary, the beneficiary's interest is not property.
- 7.13. That often means property held on trust will not come under the Property (Relationships) Act 1976. It does not need to be divided. Instead the trustees will continue to hold the property according to the trust document.
- 7.14. Sometimes a person might have a remedy if the trust has defeated their legal rights. [We look at some remedies at paragraphs 7.17 to 7.23.](#)

# Esther and Greg

Two years after Esther buys the house using the trust, she gets married to Greg. Esther and Greg live in the house. The couple use Greg's income to pay the grocery and utility bills. They use Esther's income to pay the mortgage over the house.

Nine years later Esther and Greg separate. Greg moves out. Esther stays living in the house. Greg goes to see a lawyer to see how he and Esther should divide their property. The lawyer says that the Property (Relationships) Act 1976 does not require him and Esther to share the family home. That is because the home is held on the trust.



## What are some problems that trusts can cause?

- 7.15. Because the Property (Relationships) Act 1976 may not apply to property held on trust, there can be several problems when a relationship ends.
- a. Sometimes a trust may hold property that would normally be important and valuable items of relationship property. For example, the partners would usually divide the family home. If the home is held on a trust, the trust stops people from sharing the home equally regardless of what rights they would normally have under the Property (Relationships) Act 1976.
  - b. Sometimes people create a trust assuming that their family will remain together. For example, both partners may be trustees. Or the trust property may be central to family life, like the family home, a bach or the assets of a family business. If the partners separate, the Property (Relationships) Act 1976 provides no way for the partners to sort out these trusts.
  - c. Sometimes a partner will control a trust. A partner may be a trustee. Or the trustees might follow that partner's instructions. If the partner can control the trust, the partner may get to use and enjoy the trust property. Or in the future the trustees may give the partner the trust property. But, regardless of the practical benefits a partner might get from a trust, the Property (Relationships) Act 1976 will not usually divide the property. This may mean one partner leaves the relationship with little property whereas the other gets access to large amounts of property.
- 7.16. The law is inconsistent. Normally if people do not want the Property (Relationships) Act 1976 to apply they must enter an agreement following the process set out in the Act. The process requires each partner to have independent legal advice so they know exactly how the agreement affects their rights to the property. A trust can have the same effect as a contracting out agreement because it can stop the partners from sharing the property when they separate or if one partner dies. But a partner can move their property so it is held on trust without the informed consent of the other partner.

## What do you think?

Q53. Do you agree that trusts can cause problems when a relationship ends?

Q54. Please tell us why.

# What can the courts do when trusts cause problems?

- 7.17. If a partner has moved property to a trust, it may mean that the other partner's rights to that property under the Property (Relationships) Act 1976 will disappear. In those cases, the Act gives the court powers to get property back from the trustees.
- 7.18. If the court finds that a partner moved the property to the trust deliberately intending to defeat the other partner's rights, the court can order that the trustees give the property back. The court may require the partners to share that property equally if they separate or if one partner dies.
- 7.19. If the court finds that the partner did not intend to defeat the rights of the other partner, but by moving the property the transaction has had that effect, the court can order the partner to pay compensation to the other. But the court does not have power to order that the trustees give the property back.
- 7.20. There are also remedies under other laws. Under the divorce legislation, the court has power to vary trusts connected to a marriage. The courts have said that it is appropriate to vary trusts when what the spouses could reasonably expect from the trust changes because of the separation. This power to vary trusts is much wider than the remedies in the Property (Relationships) Act 1976.
- 7.21. Sometimes the courts have said that a partner should have a property interest in a trust even if they are not a beneficiary. The court will sometimes do this because of the work the partner did on the trust property, and because the partner thought he or she would get an interest.
- 7.22. The main problem with all these remedies is that they are under different laws. That means if a trust causes problems when a relationship ends, a partner might have to make several claims to the court. The procedure can be complex and expensive.
- 7.23. The different remedies also clash with one another. Some give the court wide powers, whereas some do not.

# Should a partner to get a share of the trust property at the end of a relationship?

- 7.24. The Property (Relationships) Act 1976 might not apply when property connected to a relationship is held on a trust. This can cause problems.
- 7.25. The law provides remedies through which a partner can sometimes get a share of the trust property at the end of a relationship. But there are lots of remedies. They sometimes overlap and clash. They can be confusing.
- 7.26. We think the law needs to change. One option is to have a new remedy in the Property (Relationships) Act 1976 to deal with trusts that prevent people from sharing property fairly.
- 7.27. But sometimes it will not be appropriate to interfere with the trust just because the partners' relationship has ended.
- 7.28. Some people create trusts for good reasons. They might genuinely intend to give the property to the beneficiaries. It might be unfair to the beneficiaries if the law allowed the partners to take back the property so they could divide it.
- 7.29. Sometimes a third party like a partner's parent or grandparent may have created the trust so assets like farms stay in the family. The family might not want the property to go to a family member's former partner.
- 7.30. Any new remedy must distinguish between trusts from which it is appropriate to share the property and trusts where sharing would be inappropriate.
- 7.31. We suggest options for new remedies in the [Issues Paper](#).
- 7.32. We want you to tell us when the remedies should apply. What do you think should happen in these examples?

## Hugh and Phil

Hugh and Phil have been in a de facto relationship for seven years. Earlier in their relationship, they bought a rental property in Hugh's name. They used their joint savings to fund the deposit and they paid the mortgage with money from the rent and their salaries.

Hugh decides he wants to start his own business. His lawyer says that he should set up a trust to protect his property if the business fails. Hugh



creates the H Trust. Hugh gifts the rental property to the trust. Hugh and his lawyer are the trustees. The beneficiaries are Hugh, Phil, their siblings and any children they may have. The trust document says that the trustees can decide how much property they give to the beneficiaries.

**Q55.** Hugh and Phil separate. What should Phil get?

- a. Phil should not get a share in the rental property because it is held on the H Trust.
- b. Phil should not get a share in the rental property but Hugh should pay Phil compensation.
- c. The H Trust should not apply and Hugh and Phil should divide the rental property equally.
- d. Phil should get something else. Please specify.

Why did you choose this option?

## Ana and Brendon

Ana and Brendon are married. They live on Brendon's family farm. The farm is held on the Smith Family Trust. Brendon's parents created the Smith Family Trust before Ana and Brendon started their relationship. Brendon's parents are the trustees. Brendon and his parents and siblings are beneficiaries but only Brendon and Ana live on the farm.

During the relationship, Ana works on the farm with Brendon. The couple try their best to improve the farm. Ana does things like fencing, helping install water tanks, and planting trees. When the couple has children Ana also does most of the child care so Brendon can work longer hours on the farm. During their relationship, the value of the farm increases because of the improvements they have made to it.

**Q56.** After 18 years of marriage, Ana and Brendon separate. What should Ana get?

- a. Ana should not get any share of the farm because it is held on the Smith Family Trust.
- b. Ana should not get any share of the farm, but because Brendon is one of several beneficiaries, she should get a half of Brendon's interest in the farm.



- c. Ana should get half of the increase in the farm's value because of the improvements she and Brendon made during their relationship.
- d. Ana should get something else. Please specify.

Why did you choose this option?

## Talia and Sione

Talia and Sione have been in a relationship for five years. Talia and Sione have twins, Jodi and Harper. Shortly after the twins are born Sione gets a large bonus at work. Talia and Sione put the bonus to one side so Jodi and Harper can have the money when they are older. Talia and Sione's lawyer says that one option is to create a trust for Jodi and Harper. But the lawyer explains that if Talia and Sione create a trust over the bonus money, the money will no longer be theirs to use as they like.



Talia and Sione create the J & H Trust. Talia and Sione are the trustees. Jodi and Harper are the beneficiaries, but they may only have the trust money when they turn 18. They transfer Sione's bonus into a bank account in the name of the trust.

A year later, Talia and Sione separate. Talia has primary care of Jodi and Harper. Talia finds it hard to make ends meet. She wants to unwind the J & H Trust and get half the money right now.

### Q57. What should Talia get?

- a. Talia should not get the property held on the J & H Trust.
- b. The court should be able to vary the trust to provide Talia with some or all of the trust property.
- c. The J & H Trust should not apply and Talia and Sione should divide the property held on the J & H Trust equally.
- d. Talia should get something else. Please specify.

Why did you choose this option?



# How should people resolve property matters in and out of court?

- 8.1. When people separate, the law should help them work out how to divide their property. The process should be as inexpensive, simple and speedy as possible, but still be fair.
- 8.2. Many people who separate will divide their property without going to court. Some people will not even get legal advice.
- 8.3. Because no one collects information about how people divide their property, there is a lot we do not know. [We want to hear from you so we can learn more.](#)
- 8.4. If possible, people should work out their property matters out of court. But the resolution should be fair and efficient. [We want to know whether people have all the support they need to resolve their disputes without going to court – such as access to information and help from a lawyer.](#)
- 8.5. We also want to know more about [out of court dispute resolution services](#). Do they work well, or is there a better way?
- 8.6. We also want to know [how disputes can be resolved in accordance with tikanga Māori](#).
- 8.7. Sometimes, the partners cannot resolve their disputes. In those cases, they need to go to court. We want to know [if the court process works well?](#)
- 8.8. We also want to know [if more cases should go to the High Court](#).



# How do people resolve property matters in practice?

- 8.9. From the information available, most people who separate reach their own agreement without going to court.
- 8.10. We also think that most people who reach their own agreement do so without the help of lawyers. People might not seek legal advice because of the cost, or because they are concerned it might damage relations with their former partner. They might get help from somewhere else. Or they might not be aware they have legal rights.
- 8.11. From the lawyers we have spoken to, we estimate that where people see a lawyer about property matters, the vast majority (around 80–90 per cent) will negotiate an agreement with their lawyer's assistance. Some (around 10–15 per cent) will use mediation. Only a small number (around 5–10 per cent) have their matters decided by a court.
- 8.12. The number of people applying to court has declined over the last 10 years. When a dispute goes to court, the most common property in dispute is residential property, household items (such as the family car and furniture) and trust property.

## What do you think?

Q58. If you have been through a relationship break-up, how did you resolve your property matters?

- Reached own agreement without a lawyer's advice or assistance.
- Reached own agreement with a lawyer's advice or assistance.
- Used mediation or other dispute resolution services.
- Obtained a judgment from the court about how to divide the property.
- Other [please specify].

Q59. Was this an effective way of resolving your property matters?

Q60. Why or why not?

Q61. If you could change something about the process, what would you change?

# Resolving property matters out of court

- 8.13. Resolving matters out of court is generally quicker and less expensive than going to court. The separating partners are more likely to follow the agreement and so it might be better for them and their children. This is because they have negotiated an agreement to fit their particular situation.
- 8.14. We think that separating partners should be encouraged to work out their property matters out of court whenever possible.
- 8.15. But to make sure the process is fair and happens efficiently people need four things.

## 1. People need information about their legal entitlements

- 8.16. People should have access to the following information so they can reach a fair agreement:
  - a. their legal entitlements and obligations under the law;
  - b. different options for resolving property matters out of court; and
  - c. the process for applying to the court, including likely costs and timeframes.
- 8.17. General information is publicly available from different sources including:
  - a. the Ministry of Justice [website](#);
  - b. local Community Law Centres and on their [website](#);
  - c. local Citizens Advice Bureau and on their [website](#);
  - d. New Zealand Law Society branches and [website](#); and
  - e. [the sorted.org.nz website](http://the.sorted.org.nz).



## What do you think?

Q62. Is the publicly-available information about the law and options for resolving property matters sufficient?

Q63. If the information could be improved, how could this be done?

- Improved online resources
- Printed material available in courts and other key locations
- Public education campaign
- Providing more information through the Parenting Through Separation programme
- Other [please specify].

## 2. People need information about the other partner's finances

- 8.18. Partners must know what property they each own jointly and individually so they do not miss out on property they might be entitled to.
- 8.19. When people separate, their disputes can be very personal and bitter. So sometimes one or both partners do not provide all the information they should. Unless the partners go to court, there is no way to require the other partner to disclose information.
- 8.20. The problem is sometimes worse where one partner managed the couple's finances during the relationship. This imbalance in knowledge can disadvantage the other partner.

## What do you think?

Q64. Have you been involved in a dispute about property at the end of the relationship and failed to get all the information you needed from your former partner? Tell us about it.

Q65. Should there should be clear rules about disclosure of financial information when a relationship ends, even if the partners do not go to court?

Q66. What should happen if one partner does not provide all the relevant information?

### 3. People need support

- 8.21. Disputes can be difficult to resolve without help.
- 8.22. The most common form of support people have is from a lawyer. Lawyers provide advice and support that is tailored to a person's particular situation. It is important that people can access legal advice if they need it.
- 8.23. If the partners make an agreement about their property without seeing a lawyer, their agreement could be invalid, because the Property (Relationships) Act 1976 requires each partner to get independent legal advice when making an agreement about their property. [We look at the requirements for making a valid agreement at paragraphs 10.1 - 10.44.](#) If the partners do not get legal advice, they could make an agreement without knowing their legal entitlements and the agreement could be unfair.
- 8.24. Some people may not be able to afford a lawyer. Legal aid is available for those on a low income but they may need to pay it back to the Government. Also, it can be difficult in some areas of New Zealand to find a legal aid lawyer.

## What do you think?

Q67. Is legal advice accessible for those who need it?

### 4. People need to resolve property disputes in a reasonable time frame

- 8.25. When property disputes take a long time to resolve, people suffer stress and uncertainty when they want to move on with their lives. The longer a dispute drags on, the longer some people may have no access to, or access to only some of, their share of the property, which can cause hardship.
- 8.26. But sometimes people need to take time to understand their entitlements and avoid rushing into unfair agreements.

## What do you think?

Q68. When people are resolving their property matters, are unreasonable delays a problem?

# Ways of resolving disputes out of court

## Mediation

We think that about 10-15% of people who see a lawyer will take their disputes to a private mediation. An independent mediator, helps the partners to negotiate a settlement. Mediation is informal and flexible. The mediator facilitates the discussion and helps the partners, often with their lawyers, to negotiate.

### PROS & CONS

*Sometimes mediation is not appropriate. People must be ready to deal with their issues. They must have rational and reasonable discussions and be willing to agree on an outcome. This can be challenging because relationship break ups are often stressful and emotional.*

*Another difficulty is that the mediators must act impartially. They do not advise or advocate for either partner. Their primary aim is to help the partners reach a settlement. If a partner has no lawyer, or does not have enough information, a settlement reached at mediation might be unfair.*

## Family dispute resolution

Family dispute resolution (FDR) is a mediation service for people who have separated and need to work out how they will share the care of children.

People must go through a FDR mediation before they can take their case to court. The Government subsidises the process and fees are capped.

FDR is not for disputes about property, but people can talk about property matters if it will help them decide how they will care for their children.

## Online dispute resolution

More people are trying to resolve disputes through online dispute resolution services, which can sometimes offer quick and cheap solutions.

### PROS & CONS

*Online dispute resolution services might not be appropriate where complicated legal issues are involved. Or they might not work if the partners are not committed to an open and cooperative approach.*

## Collaborative Law

Collaborative law is a way that lawyers help their clients to resolve disputes.

The process requires the people in the dispute to commit to have face-to-face meetings and to share information. They must have reasonable discussions and want to reach an outcome which is good for both partners. Lawyers play an active role. Their job is not to help their client win. Instead, they help their client problem-solve with the other partner. Sometimes other experts can help, like child experts, financial professionals and communication experts.

### PROS & CONS

*Collaborative law can be effective. Research suggests that people who go through the process reach settlements they are happy with.*

*The main barrier with collaborative law is that it can be expensive. It can require lots of work from the lawyers and other experts.*

## Family Arbitration

Arbitration is a formal process where the partners appoint an independent arbitrator to decide what should happen. The decision is binding and enforceable as if it was a court judgment.

### PROS & CONS

*Arbitration is usually quicker than going to court. It is also confidential. An arbitrator can help the partners identify the main issues in their disputes and tell them what information they must disclose.*

*Arbitration can be expensive. An arbitrator will charge a fee which will be on top of each partner's legal fees.*

## Negotiation

Partners will often try to settle their property matters directly through negotiation discussions. Although no independent person facilitates the discussions, the partners will usually require lawyers if they are to enter enforceable settlement agreements.

### PROS & CONS

*Negotiations can be a direct and quick way to solve matters, which may make the process cheap. But an independent facilitator can be useful, and sometimes more efficient.*

# Ways of resolving disputes out of court

- 8.27. Many people who have separated will divide their property without going to court.
- 8.28. There are several ways people can reach their own agreement. Sometimes the partners will be able to reach an agreement on their own or with the help of their lawyers.
- 8.29. But sometimes the partners will not be able to agree. In those instances, there are several dispute resolution processes to help the partners resolve their differences.

## Is there a better process?

- 8.30. There might be better processes to help people resolve disputes themselves.
- 8.31. One option is for the existing FDR mediation process to apply to property disputes. If the Government subsidised FDR for property matters, it could be a cheap and efficient way for people to resolve disputes.
- 8.32. But FDR mediations about property would need good processes for people to disclose all relevant information, know their legal rights and reach fair and binding agreements. The FDR mediators would also need legal expertise in property matters.
- 8.33. Alternatively, there could be a dispute resolution process specifically for people who cannot agree how to divide their property. It could have specially designed procedures and be led by people with mediation skills and legal expertise in property matters.

## What do you think?

Q69. Should there be dispute resolution processes specifically to help people resolve property matters at the end of a relationship?

Q70. If so, what is the best dispute resolution process?

- a. FDR mediations for property matters
- b. A specific dispute resolution process
- c. There should be an alternative process. Please specify.

# How should the law recognise tikanga Māori in resolving disputes?

- 8.34. [We consider how the law should recognise tikanga Māori in resolving disputes when we look at tikanga Māori and the Property \(Relationships\) Act 1976 at paragraphs 11.39 - 11.49.](#)

## Is the court process working well?

- 8.35. When people go to court to resolve disputes about property at the end of a relationship, the court process can take a long time.
- 8.36. Of the property cases in the Family Court resolved in 2015, half had taken over two years to resolve.
- 8.37. There are many reasons the cases took this long. Sometimes the legal and factual issues in the case might be complex. For example, the partners might disagree over the value of a business and they might need to consider expert evidence.
- 8.38. Sometimes one partner might intentionally try to delay the case. For example, they might not provide full information straight away.
- 8.39. Some people say that the Family Court process is inadequate. For example, people say that the legal documents a partner must file to bring a case to the Family Court, or to defend a case, do not require the partners to describe the legal issues properly. Or the Court might not set a date for a hearing soon enough so the partners have no deadlines to work towards.
- 8.40. We look at some potential reforms to the Family Court's procedure in greater detail in our [Issues Paper](#).


## What do you think?

- Q71. Have you been involved in a court dispute about property at the end of the relationship and thought it took too long or there were other problems? Tell us about it.



# Should more cases be heard in the High Court?

- 8.41. The Property (Relationships) Act 1976 says that the Family Court should deal with disputes about how partners divide their property at the end of a relationship.
- 8.42. The Family Court is a specialist court that deals with family issues, like the care of children, domestic violence and divorces.
- 8.43. Sometimes a property dispute can involve an issue beyond the Family Court's jurisdiction, like claims relating to a trust or when a partner has a claim against a third party.
- 8.44. In these cases, the Family Court might not be able to resolve all the issues.
- 8.45. Some people say that the High Court, which has a wider jurisdiction and is used to dealing with complex legal issues, might be a better court to deal with complex property disputes. Alternatively, the Family Court could have more powers to deal with all aspects of a property case.
- 8.46. In the [Issues Paper](#), we look at the limits of the Family Court's jurisdiction and the advantages and disadvantages of moving more cases to the High Court.



# How should the law recognise children's interests?

- 9.1. Many children's parents separate. Almost half of all divorces in 2015 involved children and over 6,000 children under 17 were affected.
- 9.2. When parents split up, the way they divide their property affects their children. It can affect their accommodation, their standard of living, where they go to school and their ability to maintain relationships with family, whānau, friends and community.
- 9.3. The Property (Relationships) Act 1976 recognises that children's interests are relevant when parents separate or one partner dies. When dividing a couple's property, the court can make orders that can benefit children. For example, the court can put some of the parents' property to one side specifically for the children. Sometimes, the court can postpone the time at which the parents divide the relationship property.
- 9.4. But the court rarely makes these orders. Parents rarely ask the court to make them. The court can be reluctant to take property away from parents or to prevent parents from getting their share of property straight away.
- 9.5. We do not think children's interests are adequately recognised. The law should focus more on children.
- 9.6. But we are interested to hear what you think about:
  - a. [Who counts as a child? And what counts as a family?](#)
  - b. [Should the law focus more on children's interests?](#)
  - c. What would it mean if the law focused more on children's interests? In particular:
    - i. [Should children's interests affect the general rule that partners share property equally at the end of a relationship?](#)
    - ii. [How important are children's interests in other instances?](#)
    - iii. [When should the court put property to one side specifically for the benefit of children?](#)

# Who counts as a child? And what counts as a family?

- 9.7. When the Property (Relationships) Act 1976 refers to children, it means the children of both partners, such as their biological children.
- 9.8. It can also mean other children who are 'members of the family'. They might be children of either or neither partner. For example, they might be stepchildren, foster children and children who are also members of another household.
- 9.9. In one case, the court said that to be a member of the family means the child must have a presence in or belonging to the partners' household. Sometimes the court has said non-biological children are not members of the family.
- 9.10. We want to know whether the law's focus is appropriate.
- 9.11. Modern New Zealand families are diverse. Some children, particularly stepchildren, may live in the partners' household or a different household depending on how care is shared. Some children may be informally adopted or whāngai. Other children may be financially supported by a parent, but will not live in their household, such as children that live with the other parent.

## Moira and Henri

Moira and Henri live together in Hamilton. Henri has children from a previous relationship. The children live mainly with their mother in Nelson. Moira and Henri have care of the children for about four weeks a year when they come to stay for holidays. During that time both Moira and Henri provide full parental care for the children. Moira and Henri travel to Nelson for two weeks each year to spend more time with the children. Henri pays child support. Moira and Henri will frequently pay for other things for the children, like sports lessons, new clothes, computers and orthodontic work.

If Moira and Henri separated, should the children be considered members of Moira and Henri's family?



- 9.12. Some people may have a different understanding about what family is. For instance the Māori concept of whānau extends beyond the immediate family. Many Pākehā also have a wider view of who is a member of their family.
- 9.13. Do you think the law needs a new definition of 'member of the family' to include more children who are not children of both partners? That would require the court to have regard to the interests of more children. It could also mean changes in other areas. For example, having a child may mean that more short-term de facto relationships would fall under the Property (Relationships) Act. Sometimes a partner's contributions to a relationship can be relevant. Care of children is a contribution, so including more children would mean childcare is relevant in more cases.

## What do you think?

Q72. How do you define child and family?

Q73. Which members of a family should the law focus on?

## Should the law focus more on children's interests?

- 9.14. The Property (Relationships) Act 1976 is mainly about how partners in a relationship divide property when their relationship ends.
- 9.15. Children have an interest in how their parents divide their property, but the law gives that interest a low priority. The Property (Relationships) Act 1976 says the court must "have regard" to the interests of minor or dependent children.
- 9.16. The court can also make orders that can directly or indirectly benefit children, such as:
- a. putting some of the partners' property to one side for the children;
  - b. granting occupation of the family home so the children can stay in a familiar environment and do not have to shift schools; and
  - c. postponing the time at which the partners must divide their property to avoid undue hardship for the primary carer.



- 9.17. The courts rarely make these orders. There are many reasons, but the main reasons are that:
- The law does not direct the court to give priority to the interests of children. Instead the courts usually focus on the partners' property rights.
  - There are tensions between the interests of the partners and the interests of their children. Partners may wish to end their relationship with a clean break. They may want access to their share of the property straight away, to start a new life.
  - It is not common for parents to apply for these orders.
  - Court proceedings are usually between the partners. Children rarely participate and it is unusual for the children to get a lawyer.
- 9.18. We want to know if the law should focus more on children's interests.
- 9.19. Some people say that New Zealand's law should take a more child-centred approach. They say children are people entitled to protection and care, and to be treated with dignity and respect. New Zealand has also signed up to the United Nations Convention on the Rights of the Child, which sets out children's basic rights.
- 9.20. Children have an important interest in the division of their parents' property. It can affect their accommodation, standard of living, where they go to school and their ability to maintain relationships with family, whānau, friends and community. Decisions about property can harm children. For example, if the family home is sold straight away, it can mean big changes for the children while they are dealing with their parents' separation. If children are not provided for by their parents, the State might need to support them, for example through benefits.
- 9.21. Some people may think that the Property (Relationships) Act 1976 adequately protects children's interests and does not need to change. When a relationship ends, the partners are still required to support their children. If children suffer because of the way their parents' property is divided, then perhaps parents' duties to their children could be strengthened elsewhere.
- 9.22. It might indirectly benefit the primary carer if the law gave greater priority to children's interests, for example by allowing him or her to stay in the family home for a time. That may distort care arrangements as parents vie for the role of primary carer, or it may encourage other strategic behaviour that is not in the children's best interests.



# What do you think?

Q74. Should children's interests be more important in the Property (Relationships) Act 1976?

- 9.23. If the law should focus more on children's interests, there are several options for how the law might change. We want to know how you think the law should change.
- [Should children's interests affect the general rule that each partner is entitled to an equal share of relationship property \(see paragraphs 9.24 to 9.25\)?](#)
  - [How important should children's interests be in other instances \(see paragraphs 9.26 to 9.28\)?](#)
  - [When should the court put property to one side specifically for the benefit of children \(see paragraphs 9.29 to 9.31\)?](#)

## Should children's interests affect the general rule that the partners share relationship property equally?

- 9.24. Under the Property (Relationships) Act 1976, each partner usually gets an equal share of relationship property when the relationship ends. That means if the partners go to court, the court's primary task is to divide the couple's relationship property equally between the partners.
- 9.25. At this stage we do not see a need to amend the general rule of equal sharing, although we do think the Property (Relationships) Act 1976 could take a more child-centred approach. We think that it is unnecessary because there are other mechanisms to provide for children's interests, like child support or allowing a partner to occupy the family home for the children's benefit. The general rule of equal sharing is working well. It reflects the way we think of relationships as partnerships, and it is familiar, predictable and easy to understand.

# What do you think?

Q75. Do you agree that, while the law should take a more child-centred approach, that should not extend to changing the general rule of equal sharing?

## How important are children's interests in other instances?

- 9.26. Although a major role of the Property (Relationships) Act 1976 is to divide relationship property equally between the partners, it has many other functions. If children's interests should not affect equal sharing between the partners, how important should children's interests be in other instances under the the Property (Relationships) Act 1976?
- 9.27. For example, how important should children's interests be in these scenarios:
- a. A court must decide whether to delay the division of the partners' property to avoid undue hardship for the primary carer. Immediate division would require selling the family home straight away. It would be good for the children to stay in the family home until the end of the school year. How important is it to postpone selling the house?
  - b. A court must decide what items of property go to each partner so they both get a half share. It would be good for the children to stay in the family home so they need not change schools. How important is it for the primary carer to get the family home and the other partner to get other property instead?
  - c. A court must decide whether the partners' property agreement should apply or be set aside. How important are the agreement's consequences for the partners' children?
  - d. A court must decide how to award compensation to a partner for contributing to the relationship after separation because the partner provided all the childcare. How should the court consider the interests of children when deciding on compensation?
- 9.28. What priority should the law should give to children's interests in these scenarios?



# What do you think?

Q76. We want to know how important you think children's interests should be in the Property (Relationships) Act 1976. Should the law say that:

- children's interests should be considered;
- children's interests should be an important factor alongside other important factors such as the partners' interests; or
- children's interests should be the most important factor, more important than the partners' interests

## When should the court put property to one side specifically for the benefit of children?

- 9.29. The Property (Relationships) Act 1976 gives the court the power to put part of a couple's relationship property to one side for the benefit of their children.
- 9.30. The courts generally only make orders putting aside property for children in extreme cases. In some cases, a partner had committed serious crimes. In another case, a partner went to a psychiatric hospital with no prospect of recovery.
- 9.31. It is rare for partners to apply for these orders to benefit their children. Although partners might agree that they should provide for their children, they might be reluctant to give up part of their property.
- 9.32. We want to know when you think the court should use its power to put property aside for children's specific needs. For example, should the court put property aside to pay for high medical costs or dental costs, costs arising due to special needs, or education?
- 9.33. Some people think that setting aside property in these scenarios is inconsistent with the law's focus on dividing property between the partners. The law meets children's needs in other ways, for example through child support. Others may say that these orders could help some children, for example where one parent is paying the minimum child support but the child has expensive needs that cannot be met in another way. Some parents may favour these orders as a way to ring-fence property to benefit their children rather than giving extra property to the partner with primary care.






# What do you think?

Q77. Should the court make orders putting property aside for children in more cases?

Q78. If so, in what circumstances should the court make an order distributing relationship property for the benefit of children?





# Can partners make their own agreement about property?

- 10.1. When a relationship ends, people do not need to divide property according to the Property (Relationship) Act 1976. Instead, the law allows partners to make their own agreement about how they divide their property.
- 10.2. There are two types of agreement. First, partners thinking of entering a relationship, or who are already in a relationship, can enter an agreement that applies if they separate or if one of them dies. You may know these types of agreements as prenuptial agreements. Second, partners who have separated can enter an agreement to divide their property rather than go to court. These types of agreements are settlement agreements.

## Jill and Pita

Jill and Pita have been in a relationship for a year. They buy an apartment and move in together. Jill has money that she inherited from her grandmother. Pita has savings, but less than Jill. Pita and Jill decide that if they separate it is fair they split the value of their apartment 60:40 rather than 50:50.

Pita works as a freelance software developer. He and Jill agree that if they separate Jill should have no rights to Pita's software.

Jill and Pita see a lawyer to make sure that their agreement will apply if they separate instead of the Property (Relationships) Act 1976.

- 10.3. We know little about how many couples use agreements. We know little about why the people who use them prefer their own agreement rather than the law. [We want to learn who uses agreements and why.](#)
- 10.4. The law recognises that people in relationships might make agreements that could be unfair. Some partners might agree to things they would not normally agree to because they are in love and they cannot imagine that the relationship could ever end. They



might think the relationship will end if they do not agree. Or they might not know of their legal rights to the property.

- 10.5. To protect the partners' rights, they must follow a specified procedure when entering an agreement:
  - a. The agreement must be in writing.
  - b. Each partner must receive advice from a lawyer before signing.
  - c. The lawyer must witness the partner sign the agreement.
  - d. The lawyer must certify that he or she explained the effect and implications of the agreement to the partner.
- 10.6. If the partners do not follow the procedure, the agreement has no effect.
- 10.7. [We want to know if this procedure protects people's rights while still being accessible for most people.](#)
- 10.8. If a couple come to an agreement, but fail to follow the correct procedure, [should the agreement be binding anyway?](#)
- 10.9. Even if the agreement is effective, the court can set an agreement aside. However, the court can only exercise this power if the agreement would cause a 'serious injustice', so it is rarely used. [Should the court be able to rewrite people's agreements to make them fairer?](#)
- 10.10. Lastly, we want to know [what property people should be able to divide through an agreement?](#) Should people be able to divide their KiwiSaver through an agreement? Should people be able to divide property held on a trust?



# Who makes agreements and why?

- 10.11. The law allows a couple to make their own agreement to divide their property in the way they want if they separate or if one partner dies.
- 10.12. A couple can enter an agreement before or during the relationship. Or they can enter an agreement when they separate to settle their affairs.
- 10.13. If the couple enter an agreement by following the proper procedure, the agreement is a contract.
- 10.14. We know little about couples who enter agreements before or during their relationship. We do not know how common it is for couples in New Zealand to enter agreements. We do not know the main reasons they enter agreements.
- 10.15. Some reasons might be:
  - a. The couple want to be certain about what will happen if they separate.
  - b. The couple have children from previous relationships and want to make sure they can keep certain property for their children.
  - c. The couple have assets that produce income, like an interest in a business or a rental property, and they want to make sure dividing their property will not affect the asset's income.
- 10.16. Likewise, we know little about why some couples do not enter agreements before or during their relationship. Some reasons might be:
  - a. It is too expensive to get legal advice.
  - b. It is too awkward and difficult to talk about what should happen if the couple separate.
  - c. The couple never imagine their relationship would end.
- 10.17. We want you to tell us about how New Zealanders use and think about agreements to divide their property.



# What do you think?

Q79. How likely do you think it is for couples in New Zealand to enter an agreement before or during their relationship to determine how they divide their property if they separate?

- a. very likely
- b. likely
- c. unlikely
- d. very unlikely

Q80. Why do couples enter agreements?

Q81. Why do couples not enter agreements?

## Can the procedure to enter an agreement be easier?

- 10.18. If a couple want to enter an agreement about how they will divide their property, the law requires them to follow a special procedure:
  - a. The agreement must be in writing.
  - b. Each partner must receive advice from a lawyer before signing.
  - c. The lawyer must witness the partner sign the agreement.
  - d. The lawyer must certify that he or she explained the effect and implications of the agreement to the partner.
- 10.19. The law requires people to follow this procedure so they know exactly what their rights are under the law and how the agreement might affect their rights.
- 10.20. There is a risk that people who enter agreements might unfairly give up their rights. They might not know what their legal rights are. Or they might fear that the relationship will end if they do not agree. Or, because they are in love, they might agree to things to please their partner.
- 10.21. But there needs to be a balance. The procedure may be too difficult for some people. Legal advice is expensive. Some people may struggle to afford to make agreements in the proper way.





## What do you think?

Q82. Does the procedure a couple must go through to enter a binding agreement strike the right balance between (a) protecting people from unfairly giving up their rights and (b) being accessible and workable for most people?

## What should happen if people make an agreement without following the correct procedure?

- 10.22. A couple may reach an understanding about what will happen to their property if they separate. They may have relied on this understanding during a long relationship and structured their affairs in particular ways.
- 10.23. If, however, they have not made the agreement by following the correct procedure, the agreement will have no legal effect.

### Ben and Grace

Ben and Grace live together. After talking, they decide that they will share all their major assets. Grace will sell her house and with the money the couple will buy a bigger house in both their names. In return Ben says he will add Grace's name to all his savings accounts and term deposits at the bank.

The couple implement the agreement. They buy a new house with the sale money from Grace's house. And Ben adds Grace's name to the accounts and term deposits.

The couple later separate. Grace discovers that Ben has a lot of money held in bank accounts overseas which he never told Grace about. Grace thinks this breaches their agreement because they were to share all their major assets. She wants to enforce the agreement against Ben and take a share of Ben's money.

Grace's lawyer says that they did not make their agreement in the proper way. They did not write it down. Nor did they take legal advice when they made it. Grace's lawyer says it is unlikely the agreement will be binding.



- 10.24. Sometimes a partner can ask the court to order that the agreement is to apply even if it was not made in the correct way. But to make these orders, the court must be sure it will not affect the other partner unfairly. The court rarely uses this power.

## What do you think?

Q83. When should the court make an order that an agreement should apply even if the couple did not make it through the proper procedure?

# Should the court have power to rewrite a couple's agreement to make it fairer?

- 10.25. If a couple make a valid agreement, the court can still set it aside if it would cause a serious injustice.
- 10.26. If the court finds the agreement would cause a serious injustice, it has two options: set it aside entirely or leave it in place. There is no way a court can keep the parts of the agreement that are fair, but remove the parts that would cause the injustice.
- 10.27. It is rare for the court to find that an agreement would cause a serious injustice. The court will often recognise that the partners wanted to be certain about how to divide their property and allow their agreement to stand.
- 10.28. Would it be better if the court could vary the partners' agreement? If it could, the court could salvage the things the partners agreed on, but remove the problematic parts of the agreement.
- 10.29. People will often make agreements because they think the whole bargain is fair. If the court changes parts of the agreement, it could skew the bargain. People will probably want confidence that the entirety of their agreement will always apply.

## What do you think?

Q84. Should a court be able to vary a couple's agreement rather than set it aside or allow it to stand?



# What property should a couple be able to divide through an agreement?

- 10.30. The law says that a couple can make an agreement about their property.
- 10.31. There can sometimes be difficulties if the partners have an interest in property but someone else holds the property. When property is held on a trust or a KiwiSaver scheme there can be problems.

## Making agreements when property is held on a trust

- 10.32. It is common for families in New Zealand to use trusts to hold and use property. As many as one in five homes are held on a trust in New Zealand.
- 10.33. [We look in greater detail how the Property \(Relationships\) Act 1976 deals with property held on trust at paragraphs 7.1 to 7.33.](#)
- 10.34. Under a trust, a person called the trustee owns the property. But the trustee is not the ultimate owner. Instead, the trustee must use and manage the property for the benefit of the beneficiaries.
- 10.35. The law is unclear whether the partners can make agreements about property held on trust. They are not the owners of the trust property. Even if the partners are beneficiaries they might need to make a separate agreement with the trustees.
- 10.36. The law also gives partners the right to go to court if a trust has affected their rights to the property. Sometimes it may be better if the trustees settle the partners' claims so everyone avoids lengthy and costly court cases.
- 10.37. The partners might need to make a separate agreement with the trustees to settle claims. The law is unclear whether partners can agree with the trustees to settle a claim against a trust in the same agreement about the partners' other property.
- 10.38. We want to know whether you think the law should be more flexible in dealing with property held on trust.

## What do you think?

Q85. Should the Property (Relationships) Act 1976 give partners and trustees the ability to make agreements together about the partners' property and trusts?




## Making agreements when a partner has KiwiSaver savings

- 10.39. The law says that a partner may have to share KiwiSaver savings with the other partner if the savings accrued during the relationship. Sometimes partners can leave their savings in the KiwiSaver scheme but pay the other partner an equivalent sum of money.
- 10.40. If partners cannot afford to pay the money, they might have to divide the actual KiwiSaver savings.
- 10.41. KiwiSaver schemes have said that partners cannot split or withdraw their KiwiSaver savings through an agreement. KiwiSaver members can only withdraw their savings when purchasing their first home or when they turn 65. KiwiSaver scheme providers say that the partners must first obtain a court order if they want to divide their KiwiSaver savings.
- 10.42. We want to hear whether you think people should be able to deal with their KiwiSaver savings through an agreement without going to court.
- 10.43. KiwiSaver savings are important assets. They are to provide people with savings for significant life events like buying a first home or retirement. The longer KiwiSaver members keep their funds in the scheme, the better the return on the funds will be. If people withdraw savings too early from KiwiSaver, they can lose money. Perhaps the law should make sure people do not withdraw their KiwiSaver savings too easily. It might be better that partners need a court order to divide their KiwiSaver.
- 10.44. On the other hand, if partners can divide KiwiSaver savings without going to court, it could save people time and money. Also, when people enter an agreement they need to have it recorded in writing and they need to receive independent legal advice. These might be enough safeguards.

## What do you think?

Q86. Should people be able to divide KiwiSaver savings through an agreement or should they need to get a court order?



# Tikanga Māori and the Property (Relationships) Act 1976

- 11.1. The Property (Relationships) Act 1976 directs how a couple are to divide their property if they separate or one of them dies. It is important social legislation that will affect virtually all New Zealanders either directly or indirectly.
- 11.2. It is important that the law recognises tikanga Māori relating to the family. We want to know if you think [the Property \(Relationships\) Act 1976 allows tikanga Māori](#) to operate properly.
- 11.3. We want to know what you think about these questions.
- [How should the law treat family homes on Māori land?](#)
  - [How should the law treat taonga?](#)
  - [How should the law recognise Māori customary marriage?](#)
  - [How should the law recognise whāngai children?](#)
  - [How should the law accommodate tikanga Māori in agreements that determine how a couple divide their property?](#)
  - [How should the law recognise tikanga Māori in the resolution of disputes?](#)

## How should the Property (Relationships) Act 1976 interact with tikanga Māori?

- 11.4. The norms and values of tikanga Māori provides a framework for how relationships and families function, including how people deal with property.



- 11.5. Two values are particularly important in Māori customary family law.
- a. **Whanaungatanga** reflects that relationships are everything. Whakapapa, which identifies the nature of relationships between all things, is the glue that holds the Māori world together. The basic social unit of Māori society is the whānau. The whānau is broader than the nuclear family. It includes grandparents, aunts and uncles. Whānau consider children to be taonga. The child is not the child of the birth parents, but of the whole family. Whanaungatanga recognises that an individual's relationship with others defines their identity. Tikanga Māori emphasises the responsibility each individual owes to the collective.
  - b. **Manaakitanga** involves nurturing relationships, looking after people, and being careful about how we treat others. Manaakitanga is always important. When members of the whānau face difficult times, there should be manaakitanga without cause or blame.
- 11.6. The Property (Relationships) Act 1976 focuses on the relationship property entitlements of the two adult partners. It does not reflect whanaungatanga. Do you think that if the Property (Relationships) Act 1976 allows room for tikanga Māori in important issues, like Māori land or whāngai, the law can remain as it is? Or do you think there should be other law based on tikanga Māori for those who want to be governed by tikanga Māori?

## What do you think?

- Q87. Can we continue to base the Property (Relationships) Act 1976 on the entitlements of two adult partners while also allowing tikanga to operate in important areas such as Māori land and whāngai?
- Q88. Should there be other law based on whanaungatanga for people who want to divide their property under tikanga Māori?
- Q89. Please tell us why you think this and how such a law might work.



# How should the Property (Relationships) Act 1976 treat family homes on Māori land?

- 11.7. Generally, when a couple separate, they must divide their family home.
- 11.8. But the Property (Relationships) Act 1976 does not apply to Māori land.
- 11.9. If the couple's family home is on Māori land, it will not be divided under the Property (Relationships) Act 1976 if the partners separate or if one of them dies.
- 11.10. Māori land is exempt from division because of its special significance to Māori. It is a taonga tuku iho – land to hand down through generations within the whānau or hapū. It is different to general land.
- 11.11. Māori land also has its own comprehensive legislation (Te Ture Whenua Maori Land Act 1993). The division rules of the Property (Relationships) Act 1976, if they applied, might cut across this legislation.
- 11.12. But sometimes, a couple may live on Māori land for years. A partner with no interest in the land may pay to build a home on the land or spend money or do work enhancing the home. In those situations, if the partners separate, perhaps the value of their home should be shared even if it is on Māori land.
- 11.13. We want to know how you think the law should respond when a family's home sits on Māori land.

## What do you think?

- Q90. Should a partner be able to share in the value of a family home on Māori land? If so, in what circumstances?
- Q91. Should a partner who owns the interest in Māori land pay compensation to the other partner for a share of the value of the family home?

# How should the Property (Relationships) Act 1976 treat taonga?

- 11.14. Generally, when a couple separate they must divide their household items equally. These might be things like furniture, paintings, and appliances.
- 11.15. But if a household item is a taonga, it is exempt from being divided.
- 11.16. The law does not define taonga. How would you define taonga?
- 11.17. Sometimes, non-Māori people have claimed that property which is special to them should be a taonga. But some people think that taonga are Māori-specific.
- 11.18. The courts have said that non-Māori people can claim special property is a taonga but that we should understand taonga from a tikanga Māori perspective. This may mean that the item has elements of whakapapa, or particular significance or mana, within tikanga Māori. The taonga may also need to be presented in a marae-like setting and accompanied with korero.
- 11.19. What matters then is that the person who possesses the taonga exercises kaitiakitanga over it according to the wider whānau expectations.

## What do you think?

Q92. What do you think makes something a taonga?

Q93. Should an item only become a taonga if it is a taonga under tikanga Māori?

- 11.20. If the couple have a taonga in their possession that is not a household item, then the law does not prevent it from being divided if the partners separate.
- 11.21. Some people think that taonga should be excluded from division altogether regardless of whether it was a household item or not.

## What do you think?

Q94. Should we only exempt a taonga from division if it is a household item? Or should we exclude it even if it is not a household item?

# How should the law recognise Māori customary marriage?

- 11.22. A Māori customary marriage involves partners who marry under tikanga Māori. Whānau approval means a couple are married rather than living together or a formal ceremony.
- 11.23. We do not know how many people in New Zealand are partners in a Māori customary marriage. There is evidence that Māori customary marriages happen but they are not very common.
- 11.24. A Māori customary marriage would probably come under the Property (Relationships) Act 1976 because the law would see the partners as in a de facto relationship.
- 11.25. That would mean the property division rules of the Property (Relationships) Act 1976 would apply if the couple separated, rather than tikanga Māori values.
- 11.26. Māori customary marriage does not carry with it any rights to property the other partner holds (although manaakitanga may require the whānau to care for a partner and any children).
- 11.27. Whanaungatanga also emphasises that property passes on through descent lines rather than to a partner.
- 11.28. Some people say that, because the Property (Relationships) Act 1976 applies, partners to Māori customary marriages might claim a half-share in the couple's relationship property. There could be conflict with whānau if, under tikanga Māori, the property more properly belongs to the whānau.

## What do you think?

Q95. How should the Property (Relationships) Act 1976 recognise Māori customary marriage?

Q96. Should different rules apply to Māori customary marriages and, if so, what should those rules be?

# How should the law recognise whāngai children?

- 11.29. Whāngai is a Māori customary practice where a child goes into the care of relatives, such as a grandparent, aunt or other member of the same hapū or iwi. The arrangement can be flexible because the child can return to the care of the birth parents or another relative.
- 11.30. Whāngai placements may occur for many reasons, like giving a child to people who cannot have children, consolidating land rights, or passing down traditions and knowledge.
- 11.31. The Property (Relationships) Act 1976 recognises children in several places. [We look at children's interests in more detail at paragraphs 9.1 - 9.33.](#) If there are children of a relationship, it can often affect the court's decisions about:
- whether a relationship should come under the Property (Relationships) Act 1976;
  - how the partners might divide their property to meet children's interests; and
  - whether it should put property to one side for the children.
- 11.32. Tikanga Māori does not determine the status of whāngai under the Property (Relationships) Act 1976. Instead, a whāngai might be a child of the relationship according to the Act's rules. That means that a whāngai may be a child of the relationship when decisions are made under the Property (Relationships) Act 1976 even if there is no relationship of descent as determined by the tikanga of the respective whānau or hapū.
- 11.33. We want to know if a whāngai should be treated generally as a child of the relationship under the Property (Relationships) Act 1976? Or should special rules determine how whāngai should be treated according to tikanga Māori?

## What do you think?

Q97. Should a whāngai be treated generally as a child of the relationship under the Property (Relationships) Act 1976? Or should special rules determine how whāngai should be treated according to tikanga Māori?

# How should the law accommodate tikanga Māori in agreements that determine how a couple divide their property?

- 11.34. When a relationship ends, people need not divide property according to the Property (Relationship) Act 1976. Instead, the law allows partners to make their own agreement about how they divide their property.
- 11.35. [We look at these agreements in greater detail at paragraphs 10.1 to 10.44.](#)
- 11.36. For the agreement to be valid, the Property (Relationships) Act 1976 requires the partners to follow a certain procedure. Each partner must get legal advice. The agreement must be in writing and signed by each partner. When each partner signs, the lawyer who gave advice must witness and certify the agreement.
- 11.37. Some Māori may wish to use an agreement to arrange their property matters according to tikanga Māori. We do not know how many Māori make such agreements.
- 11.38. If Māori make agreements about arranging their property according to tikanga Māori, what process should they follow? It might make more sense if a couple entered the agreement through a tikanga Māori process rather than the process set out in the Property (Relationships) Act 1976.

## What do you think?

- Q98. Do many partners make agreements about holding their property according to tikanga Māori?
- Q99. If they do, what process do they follow to enter the agreements?
- Q100. Would it be better if people could make agreements through tikanga Māori rather than the Property (Relationships) Act 1976?



# How should the law recognise tikanga Māori in resolving disputes?

- 11.39. Resolving disputes according to tikanga Māori is different to the way people resolve disputes through the formal court process in New Zealand.
- 11.40. Māori place importance on the whānau. If there is a dispute about property at the end of a relationship, it might concern the whānau and not just the individual partners or their children. The support of whānau members is important as individuals resolve their differences.
- 11.41. There may also be other tensions within Māori social organisation, like conflicting whānau loyalties and differences in tikanga between iwi. People with responsibility within the whānau, hapū and iwi understand these tensions. They are often experienced mediators.
- 11.42. The outcome of a dispute may also be very different in tikanga Māori. In tikanga Māori, it may be more important to recognise the status and contribution of each partner and then find a way of accommodating the interests.
- 11.43. These cultural differences may mean that some Māori rarely use the courts to enforce their rights. Instead they may prefer to manage their own disputes within the whānau, hapū or iwi according to their own processes.
- 11.44. We want to know what could help Māori resolve disputes according to tikanga Māori. For example, should there be greater support for mediations based on traditional Māori values that respect te reo, tikanga, kawa, and the role of the whānau.

## What do you think?

Q101. What more could the law do to help Māori resolve disputes according to tikanga Māori?

- 11.45. When Māori take their property disputes to the courts, sometimes the partners argue about what tikanga Māori means. In those cases, the courts must be able to decide how to apply tikanga Māori.
- 11.46. Sometimes, the Family Court receives evidence from kaumātua, kuia or academics. But are there other ways?
- 11.47. The Family Court could appoint its own experts, pūkenga and kaumātua as cultural advisers to assist. Or those pūkenga and kaumātua could be full members of the court in some cases and decide the case jointly with the judge.



- 11.48. It may be better if the Family Court did not hear the case. Instead, the Māori Land Court or the Māori Appellate Court could hear the case. These courts have specialist knowledge in Māori land and tikanga Māori. They also have flexible procedures that are less formal, apply marae kawa and encourage te reo Māori.
- 11.49. But the Māori Land Court and Māori Appellate Court do not have experience with family law issues. A solution might be for a Māori Land Court or Māori Appellate Court judge to sit in the Family Court with the Family Court judge when a case involves issues of tikanga Māori.

## What do you think?

Q102. When a court case involves issues about tikanga Māori, how should the court bring in knowledge and expertise about tikanga Māori?

# Should the Property (Relationships) Act 1976 affect the rights of creditors?

- 12.1. Partners in a relationship may have debts, such as a television bought on hire purchase or a car paid for by instalments. The debt might belong to one partner individually or to both partners jointly. A mortgage over the family home is a common debt partners have at the end of a relationship.
- 12.2. The law gives creditors rights to recover money they are owed. [The general rule is that creditors' rights are not affected](#) by the Property (Relationships) Act 1976 but there are some limited exceptions. [We want to hear whether you think the general rule is appropriate.](#)
- 12.3. The main exception to the general rule is that the Property (Relationships) Act 1976 gives a partner an interest in the family home and this has priority over the rights of some creditors. [We want to hear what people think about the protected interest in the family home.](#)
- 12.4. Other exceptions to the general rule include:
  - a. when a partner registers a notice on the title of land to protect a claim to that land; and
  - b. court powers that apply when a person is about to sell or transfer ownership of property, or has already done so, to defeat a partner's rights to that property.
- 12.5. [We want to know whether people think these measures are adequate.](#)
- 12.6. The law also intervenes when partners make an agreement which stops creditors from getting their money back.

# The general rule – the Property (Relationships) Act 1976 does not affect the rights of creditors

- 12.7. The general rule is that the Property (Relationships) Act 1976 does not affect creditors' rights to get money they are owed. There are limited exceptions to this rule.
- 12.8. A creditor's rights against a partner, or partners if the debt is in both names, will depend on the terms of the credit agreement. This says how a creditor can recover the debt if a partner stops repayments. A creditor usually has the right to repossess property bought on credit, or sell property that has been given as security for debt, as in the case of a mortgage on a family home.
- 12.9. There are good reasons why the Property (Relationships) Act 1976 should not affect creditors' rights. Creditors will usually provide goods or services to one or both partners. Partners get the benefit of having those goods or services on credit, or are able to buy a house they could not otherwise pay for.
- 12.10. It could be unfair if creditors' rights were affected when couples separate. If the law changed so creditors had fewer rights, it is also likely that they would change the way they gave credit. It could be more difficult to get credit or people might end up paying more for credit.
- 12.11. However in some circumstances, it may be unfair that creditors' rights take priority over a partner's rights. In one case, a bank's right to sell a mortgaged house to recover a debt took priority over a partner's right to live in the house even though she had been given that right by the Family Court.

## What do you think?

Q103. Is the general rule that a creditor's rights are not affected by the Property (Relationships) Act 1976 fair?

Q104. If not, how should the law change so a partner has better rights?

# The protected interest in the family home

- 12.12. The general rule is that the Property (Relationships) Act 1976 does not affect creditors' rights. The main exception is a partner's 'protected interest' in the family home. For each partner, the law protects either half the equity in the family home or \$103,000, whichever is the lower amount (although the Government has power to raise the value of the protected interest). A partner's unsecured creditors cannot recover debt from the other partner's protected interest.

## Cordelia and Duwayne

Cordelia and Duwayne separated. Duwayne stayed in the family home with the couple's children Erin and Freddie. Cordelia is a Bob Marley fan. Before they separated, Cordelia took out five personal loans so she could buy some rare Bob Marley memorabilia at a special internet auction. The loans had high interest rates because the creditors did not ask for any security when they gave Cordelia the loans. After they separated, Cordelia lost her job and could not repay the loans. Cordelia took the memorabilia and started a new life in Jamaica. Because Cordelia's creditors are unsecured, they are not able to recover the debt from Duwayne's protected interest in the family home.

- 12.13. The law provides this exception because the family home is important, particularly to children. One partner should not lose their share of the home because the other partner has personal debts.
- 12.14. We think that the law should continue to protect a partner's interest. But it may no longer be appropriate for a protected interest to apply just to the family home.
- 12.15. The rate of home ownership in New Zealand is decreasing, so the reason to protect this asset over any other asset may no longer be as relevant.
- 12.16. Also, house values have increased significantly and the amount of \$103,000 may not go far towards the cost of buying another house, particularly in some areas of New Zealand.
- 12.17. The protected interest is often of little use because the family home is mortgaged. A lender who has a mortgage against the family home as a security interest will have priority over the partner's protected interest in the home.

## What do you think?

Q105. Should the law continue to provide a partner with a protected interest that takes priority against the other partner's unsecured creditors?

Q106. If so, should the protected interest apply to the family home or to relationship property generally?

Q107. How much money should the protected interest be?

## Notices of claim

12.18. The law allows a partner with a claim or interest in land to register a notice against the land title to prevent anyone else buying or selling the land.

12.19. This can affect rights to the land that creditors claim, particularly if their interest is unregistered or if they register their interest after the notice of claim is lodged.

12.20. We think notices of claim work well. We discuss this further in our more detailed [Issues Paper](#).

## Where a person disposes of property

12.21. The law gives the court powers to prevent a person from selling or transferring ownership in property where the purpose is to remove the property from one partner's reach. Sometimes, if the property has already been sold or transferred the court can order the property to be returned or compensation to be paid.

12.22. In most cases these powers will not affect creditors. A creditor's primary motive is rarely to take away a partner's legal rights – they are just trying to get their money back.


## What do you think?

Q108. Is a partner's interest in a couple's property adequately protected by these measures?

# Agreements that defeat creditors

- 12.23. Partners may sometimes make an agreement between themselves about property, or sell or transfer ownership of property, so that a partner's creditors cannot use that property to get their money back. They may do this on purpose, or it may just be the effect of their agreement or property transaction.
- 12.24. The Property (Relationships) Act 1976 says that agreements or transactions that are made with the intent to defeat creditors in this way are void. Agreements or transactions that are not intended to, but have the effect of defeating creditors, are void for a period of two years after they are made.
- 12.25. There are some technical problems with the way this works in practice which we discuss in our more detailed [Issues Paper](#).





# What should happen when people or property have a link to another country?

- 13.1. Many relationships in New Zealand have a link to another country. Sometimes the partners have property overseas. Or sometimes the partners have come from another country, or the partners might spend some of their time living overseas. These situations can give rise to what we call cross-border issues.
- 13.2. When a couple separate and there is a cross-border issue, should the courts in New Zealand apply the Property (Relationships) Act 1976?
- 13.3. The Property (Relationships) Act 1976 has rules that determine when it will apply. They focus on whether the couple's property is immovable (such as a house or land) or other property (known as movable property). The rules say that Property (Relationships) Act 1976 will apply to:
  - a. any immovable property in New Zealand;
  - b. any movable property in New Zealand;
  - c. any movable property overseas if one partner is usually resident in New Zealand.
- 13.4. Importantly, the Property (Relationships) Act 1976 will not apply to any immovable property located overseas.
- 13.5. [These rules can be difficult to apply.](#) Sometimes the rules may mean that the New Zealand courts cannot deal with all the partners' property under New Zealand law.
- 13.6. The Property (Relationships) Act 1976 also allows couples to agree which country's law will govern their property division if they separate. They can agree that the Property (Relationships) Act 1976 will apply. Or they can agree that the law of a different country will apply, but only if the agreement complies with certain rules.
- 13.7. Again, these rules can be difficult to apply and [cause problems for some people.](#)



# When will the Property (Relationships) Act 1976 apply?

- 13.8. The Property (Relationships) Act 1976 applies to:
- a. any immovable property in New Zealand;
  - b. any movable property in New Zealand;
  - c. any movable property overseas if one partner is usually resident in New Zealand.
- 13.9. If the partners own movable property overseas, like money saved in a foreign bank or a car kept overseas, the Property (Relationships) Act 1976 might apply.
- 13.10. But if either or both partners own immovable property overseas, like land and buildings, the New Zealand courts cannot require the partners to divide those items of property under the Property (Relationships) Act 1976.
- 13.11. The reason foreign immovable property does not come under the Property (Relationships) Act 1976 is that the law respects each state's sovereignty to deal with land in their territory.

## Gil and Evelyn

Gil and Evelyn are New Zealanders living in Timaru and have been married for 30 years. They have a holiday apartment on the Gold Coast in Australia. Gil and Evelyn separate. They disagree on what should happen to the apartment.

A New Zealand court cannot decide what should happen to the apartment because it is within the jurisdiction of the Australian courts and the Property (Relationships) Act 1976 will not apply.



# Anika and Tai

Anika and Tai have been in a relationship for 12 years. For some of that time they lived and worked in Canada. As part of Tai's employment package he earned the right to a small pension from his employer.

Anika and Tai move back to New Zealand. They then separate.

A New Zealand court would likely say that Tai's pension is relationship property under the Property (Relationships) Act 1976.

## What are the problems with the law?

- 13.12. Because the Property (Relationships) Act 1976 does not apply to immovable property overseas, it may mean that a couple must go to the courts in that country to decide what happens to that property. They must also go to court in New Zealand to decide what happens to the rest of their property. Multiple court cases can be long and expensive.
- 13.13. In some cases, one partner has argued that the other partner should pay compensation because they can keep their overseas immovable property without having to divide it under the Property (Relationships) Act 1976. But the New Zealand courts have not awarded compensation out of respect for other states' sovereignty to deal with land in their territory.
- 13.14. That means that the New Zealand courts do not take into account everything the partners own worldwide when the court decides what orders are fair under the Property (Relationships) Act 1976.
- 13.15. Some people might think that is strange that the courts can divide movable property under the Property (Relationships) Act 1976 but not immovable property.
- 13.16. We want to know if you think the rules could be improved.
- 13.17. An option is to make two changes to the Property (Relationships) Act 1976:
  - a. First, rather than focus on whether the property is movable or immovable, the rules could focus on whether the partners' relationship had a close connection with New Zealand. For example, if a couple spent most of their time or had most of their property in New Zealand, the Property (Relationships) Act 1976 would apply.
  - b. Second, if the relationship had a close connection with New Zealand, the Property (Relationships) Act 1976 could say that the New Zealand court must take into account all the partners' property regardless of which country it is in.
- 13.18. But the court would not have power to make orders requiring a partner to sell or transfer any immovable property he or she owns



overseas. Instead, the court could divide the total value of the couples' property by ordering that the partner with the overseas immovable property must pay money or transfer other property to the other partner.

- 13.19. That way, the New Zealand court would not be interfering with land in another country, but the court could still fairly divide the value of all the couple's property.

## What do you think?

Q109. Should the Property (Relationships) Act 1976 let courts can take into account all the property the partners own worldwide, provided the partners' relationship had a close connection with New Zealand?

## Agreements about what law applies

- 13.20. A couple can agree that the Property (Relationship) Act 1976 will apply when they separate, regardless of whether either partner is usually resident in New Zealand.
- 13.21. The partners can also agree that the law of a different country will apply. So if the partners had a dispute, a court in New Zealand would have to apply the law specified in the partners' agreement.
- 13.22. But rules apply when the partners want to choose the law of another country.
- First, the couple must enter the agreement at the start of the relationship. If they enter the agreement later, it will not be valid.
  - Second, the agreement must clearly state what country's law will apply. It is not enough simply to say that New Zealand law will not apply.
  - Third, the agreement must also be in writing and be valid according to the law of the country the partners have chosen.
  - Last, the foreign law cannot be contrary to justice or public policy in the view of the New Zealand courts (for example, an agreement that left one partner with no property at all).





# Tania and Henri

Tania and Henri live together in South Africa. After five years, they get married. They enter an agreement that says that if they separate each partner is to keep the property registered in their name.

Two years later Tania and Henri move to New Zealand. They buy a house registered in Tania's name.

Tania and Henri separate a year later.

It is likely that the Property (Relationships) Act 1976 will require Tania and Henri to divide the house equally. Tania and Henri did not enter their agreement in South Africa at the start of their relationship. The agreement also failed to state which law would apply, which means the Property (Relationships) Act 1976 becomes the default law.

## What are the problems with the law?

- 13.23. Sometimes a couple might think they have agreed that a different law will apply. But if the agreement does not comply with the rules it will be invalid. The partners may then have to divide their property in a way that neither partner intended.
- 13.24. That may mean the rules should be less strict.
- 13.25. For example, a couple should be able to make an agreement at any point in their relationship, not just at the start.
- 13.26. If the partners did not state which law was to apply to their agreement, it might be better to try work out which country's law the partners expected would apply to their agreement rather than apply New Zealand law.

## What do you think?

Q110. Should a couple 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?

Q111. Should the Property (Relationships) Act 1976 always apply if people do not say in their agreement which country's law should apply? Or would it be better to work out which country's law the partners expected would apply?



# What should happen when one partner dies?

- 14.1. The Property (Relationships) Act 1976 applies when a couple separates. It also applies when a person in a relationship dies.
- 14.2. Some people may leave little property for their partners under their wills. In fact, sometimes a surviving partner may have been better off if the couple had separated.
- 14.3. The law tries to avoid that situation. If a person in a relationship dies, the law gives the surviving partner a choice:
  - a. The partner can elect whether to take whatever he or she is given under the deceased partner's will (or the rules of intestacy if there is no will). Or,
  - b. The surviving partner can choose instead to divide the couple's property under the Property (Relationships) Act 1976 as if they were both still alive but had separated.
- 14.4. If the surviving partner chooses the second option they get half the couple's relationship property. The other half will go to the deceased's estate. That property will be distributed according to the deceased's will. But because the surviving partner has already received half the relationship property, the law says the surviving partner cannot take any gifts made under the will.
- 14.5. When a person in a relationship dies, [we want to know what property you think the surviving partner should get.](#)
- 14.6. We also want to know if it [is a good idea for the surviving partner to choose between the will and a property division.](#)
- 14.7. We suspect that many people do not know the law gives people this choice. Some people might find the rules too confusing. [We want to know whether you think people understand the law.](#)
- 14.8. There are, of course, many differences between where a couple separate and where one partner dies. It is very difficult to make the same rules apply to each situation. We want to know what you think about two particular scenarios:
  - a. [What should happen when the partners have only been together for a short time before one of them dies?](#)
  - b. [What should happen when the deceased partner has not left much property for other family members?](#)

# When someone dies what property should a surviving partner get?

- 14.9. The Property (Relationships) Act 1976 says that when a relationship ends, each partner gets to share equally in the couple's relationship property.
- 14.10. The reason for equal sharing is that the law treats each partner's contributions to a relationship as being of equal value. As a result, each partner gets an equal share of the property connected with the relationship.
- 14.11. When people die, their property is distributed according to their will or the rules of intestacy (which apply when there is no will). But a problem can arise where the deceased leaves their surviving partner less than their equal share in the property. In that case, the surviving partner would be worse off than if the couple had separated while they were both still alive.
- 14.12. To avoid a situation where the surviving partner could be worse off, the law allows a surviving partner to choose whether:
  - a. to take whatever the surviving partner receives under the deceased partner's will; or
  - b. to divide the couple's relationship property equally under the Property (Relationships) Act 1976.

## Todd and Myra

Todd and Myra are in their 70s. They have been married for ten years. Todd has an adult son, Daniel, from a previous marriage. Myra has no children. They live in a house owned by Todd. The couple live on the income each receives from their superannuation. A year ago Todd was diagnosed with cancer. Myra supports Todd through his illness. She does most of the housework. She provides love and comfort to Todd. In the last weeks of Todd's life she nurses him.

Shortly after Todd dies, Todd's lawyer writes to Myra. She tells her that under Todd's will Myra will inherit \$10,000. Todd also gave \$20,000 to Daniel. Todd left the rest of his property to support cancer research. Myra is surprised. She always assumed that Todd would leave the majority of his property to Myra because they were married.

Myra goes to see a lawyer. The lawyer explains to Myra that if she and Todd had separated before he died, she would have received half their relationship property, including half the value of their home. The lawyer says Myra should think about dividing her and Todd's property under the Property (Relationships) Act 1976 rather than accepting the gift of \$10,000 under Todd's will.



- 14.13. The idea is that surviving partners should get at least half of their share of relationship property under the Property (Relationships) Act 1976.
- 14.14. We want to know what you think a surviving partner should be entitled to.

## What do you think?

Q112. When a person in a relationship dies, what property should the surviving partner get?

- a. Whatever the surviving partner receives under the deceased partner's will
- b. Half the couple's relationship property
- c. The surviving partner should get a different share of property: – what share?

Q113. Please tell us why.

- 14.15. Sometimes a deceased's family members believe they should get more property under the deceased's will. Sometimes the law allows these people to take a greater share of the deceased's estate if the will has not recognised them properly. The law also allows people to make claims against the deceased's estate when the deceased promised to give property to a person in their will but then reneged on the promise.
- 14.16. If a surviving partner chooses to take half the couple's relationship property rather than their share from the will, their half share will take priority over other claims. Any other claim for a share of the deceased's property will not affect the surviving partner's entitlement to half the couple's relationship property.





## Todd and Myra

Myra follows her lawyer's advice and chooses to divide the couple's property under the Property (Relationships) Act 1976.

Todd's son Daniel also feels that he has been unfairly left out of Todd's will. Daniel goes to see a lawyer. The lawyer tells Daniel that he can make a claim for a greater share of Todd's estate. But because Myra has chosen to divide her and Todd's relationship property equally, Daniel can only claim a greater share of Todd's half share.

- 14.17. We want to know whether you think a surviving partner's entitlement deserves priority.

## What do you think?

Q114. Should a surviving partner's entitlement take priority over the claims of other family members?

## Do most people know and understand the law?

- 14.18. We suspect that most New Zealanders are unaware of the law that applies when a partner dies.
- 14.19. Many people might think that the deceased's property will be distributed according to the will and there is no other option.
- 14.20. When people write wills they might not know that their partner can decide whether to follow the will or instead divide their property under the Property (Relationships) Act 1976.
- 14.21. Even if people know about the law, they might not understand it because it is complex. For people making wills, it can be difficult to work out what will happen to the property if the surviving partner chooses to divide it under the Act rather than through a will. It can be unclear what it would mean for the deceased's will and for other family members.
- 14.22. For surviving partners, it can be hard to work out what property they will get if they choose to divide the couple's property or if they choose the will.





## What do you think?

- Q115. Were you aware that the law gives surviving partners a choice to elect either to follow the deceased's will or to divide the couple's property under the Property (Relationships) Act 1976?
- Q116. Do you think most other New Zealanders know about the options a person has when his or her partner dies?
- Q117. If you have made a will since 2001, were you advised about the choice your partner has to divide your property rather than follow the will?
- Q118. Do you think people who are aware of the choice open to a surviving partner understand the law?

## Should a surviving partner have a choice whether to follow the will or elect a property division?

- 14.23. When someone's partner dies, the law gives him or her a choice:
- They can accept whatever property the deceased gives to them under the will.
  - Or they can divide the couple's property under the Property (Relationships) Act 1976.
- 14.24. If a surviving partner does not make a choice, the law says they have chosen to follow the deceased's will.
- 14.25. The law gives people the choice because it might be unfair if someone were worse off when their partner died than they would have been if they had separated.
- 14.26. The flexibility the law gives can be a good thing. Surviving partners are not forced to accept the will, nor are they forced to divide their property. It is up to them.
- 14.27. But until the partner makes the choice, no one can be sure whether the will is going to apply. Because of this uncertainty, it can be difficult for people making wills to make plans for their property after they die.
- 14.28. A family member, friend or charity might be a beneficiary under the will. They too may struggle to know what to expect before the surviving partner makes a choice.





- 14.29. Sometimes will-makers can say in their wills what should happen if their surviving partner chooses to divide the property through the Property (Relationships) Act 1976. But we think that is rare. They might say, for example, that if the surviving partner chooses to divide the property through the Property (Relationships) Act 1976 the survivor can still receive certain gifts from the deceased partner's share of the property.
- 14.30. It is also hard for surviving partners. To make an informed choice, they will need to take legal advice. This can be expensive and stressful, at what is already likely to be a difficult time.

## What do you think?

Q119. Should a surviving partner get to choose whether to take property under the will or divide property under the Property (Relationships) Act 1976?

Q120. Please tell us why.

# What should happen when the partners have only been together for a short time before one of them dies?

- 14.31. When a couple separates while both partners are alive, the normal rules of property division do not apply if the relationship has only lasted a short time. Instead, special rules apply when a marriage, civil union or de facto relationship has lasted less than three years. [We look at those rules at paragraphs 5.1 to 5.25.](#)
- 14.32. When one partner dies, those special rules change in several ways if the surviving partner chooses to divide the couple's property under the Property (Relationships) Act 1976.
- 14.33. The special rules do not apply if a marriage or civil union has lasted less than three years before the partner died. Instead, the couple will divide their relationship property as if the relationship had lasted a long time.
- 14.34. In contrast, if the couple were in a de facto relationship of less than three years, the Property (Relationships) Act 1976 will not apply at all when one partner dies (unless there would be a serious injustice).
- 14.35. The law treats marriages and civil unions of less than three years differently to de facto relationships of less than three years when one partner dies.





- 14.36. When one partner dies, the partners to the marriage or civil union have not decided to separate. The law says it is reasonable to assume that, had the partner not died, the relationship would continue.
- 14.37. The law does not make the same assumption about de facto relationships. Possibly the law assumes partners to a de facto relationship of less than three years are less committed to the relationship than partners in a marriage or civil union of the same length.
- 14.38. We want to know what you think about these rules and the assumptions behind them.

## What do you think?

Q121. In situations where one partner dies, should the law treat all relationships of less than three years the same regardless of whether they are marriages, civil unions and de facto relationships?

# What should happen when a person leaves little property for other family members?

- 14.39. People who make wills usually leave their property to family and friends.
- 14.40. The Family Protection Act 1955 allows family members to claim a greater share of the deceased's property if the will does not recognise them properly.
- 14.41. Sometimes there can be tensions between family members who feel left out under the will and the surviving partner. These tensions commonly arise where the family members are children from the deceased's previous relationship. They might feel that it is unfair if the deceased leaves lots of property to a partner from a later relationship.
- 14.42. Particular problems arise if the deceased legally co-owned property with his or her partner. In those situations, the property goes to the surviving partner. Other family members cannot claim against that property under the Family Protection Act 1955.
- 14.43. The Property (Relationships) Act 1976 allows the people who administer the deceased's estate to ask the court to divide the couple's property so family members or children get a fairer share.





The court will only grant permission to do that if otherwise there would be a serious injustice.

- 14.44. The only times when the court has granted permission have been where the deceased left very little property to her or his children and the deceased's partner took all the valuable assets.

## Shaun and Emily

Shaun has two children from a former relationship, Emily (aged 13) and Titus (aged 9). For the past six years, Shaun has been in a relationship with Nancy. Shaun and Nancy have acquired several rental properties together which they hold as co-owners. The net value of their property is around \$900,000.

Tragically Shaun dies. All the co-owner rental properties pass to Nancy. Shaun's estate comprises a few personal items and some savings which together total around \$15,000. Emily and Titus will get little of Shaun's property under his will.

The lawyer administering Shaun's estate wishes Emily and Titus could receive more property. The lawyer applies to the court to divide Shaun and Nancy's rental properties equally under the Property (Relationships) Act 1976.

- 14.45. In these situations, the court is trying to ensure other family members do not miss out. But it might seem strange to use the Property (Relationships) Act 1976 to achieve that. If a person did not provide enough property in a will for other family members, why should a court divide the couple's property equally as if both partners were still alive and had separated?
- 14.46. A court has to weigh up and balance the needs and interests of all family members and the surviving partner. The law ought to state the fair way of distributing property between everyone. But the Property (Relationships) Act 1976 does not. Its main purpose is sharing property between two living people who have separated.
- 14.47. It might be better if there was a separate law which explained how the court should divide a deceased person's property among the entire family. What do you think?



# What do you think?

Q122. If a person has not left property to other family members in his or her will, should the people administering the person's estate be able to divide the couple's relationship property under the Property (Relationships) Act 1976?

Q123. Should there be a separate law for these types of situations?





# How can I have my say?

You can answer the questions on [our consultation website prareview.lawcom.govt.nz](http://prareview.lawcom.govt.nz). You do not need to answer all the questions. You can answer just the ones you are interested in.

If you have experience of dividing property after a separation or the death of your partner, [you can tell us your story on the consultation website](http://prareview.lawcom.govt.nz).

You can come along to a **public meeting** and speak to one of our team. Details of the public meetings are at [www.lawcom.govt.nz](http://www.lawcom.govt.nz) and on page 7.

If you would like to write a submission to us, you can **email** your submission to: [pra@lawcom.govt.nz](mailto:pra@lawcom.govt.nz)

Or you can post your written submission to:

**Property (Relationships) Act Review**

**Law Commission**

**PO Box 2590**

**Wellington 6011**

**DX SP 23534**





