

Part C – What
property
should the
PRA cover?

Chapter 8 – What property is covered?

Introduction

- 8.1 The PRA provides the rules for how partners divide their property when a relationship ends. A key part of this process is to first identify what property should be divided. In this Part we focus on the rules that determine what property should be shared and what property should be kept separate.
- 8.2 In this chapter we examine the PRA's definitions of "property" and "owner" and consider whether they capture the right types of property. The rest of Part C is arranged as follows:
- (a) In Chapter 9 we look at how the PRA classifies property as either relationship property (which is divided equally between the partners) or separate property (which is not). We also look at the classification of debts. We then examine the basis for classification and ask whether this remains appropriate for contemporary New Zealand.
 - (b) In Chapter 10 we look at situations when a partner's separate property may become relationship property.
 - (c) In Chapter 11 we concentrate on particular items of property and how the PRA classifies them. This includes ACC and insurance payments, super profits and income-earning capacity, heirlooms and taonga. We also look at student loan debts and inter-family gifting and lending.

The PRA's definitions of "property" and "owner"

- 8.3 The PRA is concerned with the division of property that is owned by one or both of the partners. Its application is therefore limited by how the PRA defines "property" and "owner".

8.4 The PRA does not define property in an exclusive manner. Instead it lists the types of things that the PRA will include as property. The definition has remained essentially unchanged since 1976¹ and it includes:²

- (a) real property;
- (b) personal property;
- (c) any estate or interest in any real property or personal property;
- (d) any debt or any thing in action; and
- (e) any other right or interest.

8.5 An owner in respect of any property means any person who is the *beneficial owner* of the property under any enactment or rule of common law or equity.³ A person will normally be a beneficial owner if he or she can enjoy the fruits of that property personally and can dispose of the property for his or her own benefit, either in the present or contingent on some future event.⁴ A person may be the beneficial owner of property even if the property is not held in his or her name.⁵

8.6 Property that is owned by a partner in his or her capacity as trustee is not captured by the PRA because that partner is not the beneficial owner of the trust property.⁶ In *S v S*, one partner was an artist who intended to give some of his paintings to his two children.⁷ The paintings hung in the artist's house until the children were ready to take possession. The Family Court was satisfied that the artist held those paintings on trust for the benefit of his children. As a result, the artist was not the "owner"

¹ The definition of "property" included in the Matrimonial Property Act 1976 also followed the definition in its predecessor legislation, the Matrimonial Property Act 1963.

² Property (Relationships) Act 1976, s 2.

³ Property (Relationships) Act 1976, s 2.

⁴ See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.6].

⁵ *Fuller v Fuller* (1978) 1 MPC 85 (SC) per Davison CJ, discussed in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.6].

⁶ Property (Relationships) Act 1976, s 4B. A person cannot, however, be a trustee and the sole beneficiary under a trust: *Re Cook, Beck v Grant* [1948] Ch 212 (Ch); *Re Herberley* (deceased) [1971] NZLR 325 (CA); Law Commission *The Duties, Office and Powers of a Trustee* (NZLC IP26, 2011) at [4.3]; and Richard Gray "Creation of Trusts" in Don Breden (ed) *Law of Trusts* (online looseleaf ed, LexisNexis) at [2.22], all as cited in *Clayton v Clayton* [2015] NZCA 30, [2015] NZLR 293 at [47].

⁷ *S v S* [2012] NZFC 2685.

of the paintings and those paintings were not captured by the PRA.⁸

- 8.7 The PRA only applies to property belonging to the partners. It does not apply to property owned by third parties. For example, if the partners live together in a home owned by one of the partner's parents, that property could not be divided at the end of the relationship because it is not "owned" by either partner. However difficulties arise where property that is legally owned by one or more third parties is held on trust (either explicitly or implicitly) for the benefit of one or both partners. In some cases a partner's beneficial interest in trust property may be captured by the PRA. Trust property is discussed in detail in Part G.

Is the PRA limited to conventional types of property?

- 8.8 Although the PRA's definition of property is broad and inclusive, in the past it has been interpreted by the courts as being a conventional definition which is essentially limited to real and personal property, and rights or interests in such property.⁹ The Court of Appeal in *Z v Z (No 2)* emphasised that the PRA uses the same property definition as a great number of other general property law statutes including the Property Law Act 1952,¹⁰ and considered that the consistent, cumulative use of that definition strongly indicated that the conventional understanding of property applied in the context of the PRA.¹¹ In that case the Court considered whether a partner's income earning capacity was covered by the PRA, but concluded that the conventional understanding of property was limited to rights in things, rather than rights in respect of the person, and it did not include "essentially personal characteristics which are part of an individual's overall makeup."¹²
- 8.9 In the more recent case of *Clayton v Clayton [Vaughan Road Property Trust]* the Supreme Court emphasised the need to

⁸ *S v S* [2012] NZFC 2685 at [46].

⁹ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 268.

¹⁰ The Property Law Act 1952 has since been repealed and replaced with the Property Law Act 2007.

¹¹ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279. See also Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17 *Trusts & Trustees* 866 at 878; and Nicola Peart "Protecting children's interests in relationship property proceedings" (2013) 13 *Otago L Rev* 27 at 30.

¹² *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

interpret the meaning of property in a manner that reflects the PRA's statutory context.¹³ The Court said that, because the PRA is social legislation, its definition of property is broader than traditional concepts of property, and included rights and interests even if they are not rights or interests in property.¹⁴

- 8.10 It remains to be seen whether the Supreme Court's decision in Clayton will have wider implications for what is considered property under the PRA. In that case, the trust deed gave Mr Clayton powers to appoint and remove beneficiaries, distribute any of the trust property to any one beneficiary including himself, and bring the trust to an end. The Supreme Court said that these powers were a right that was captured within the PRA's definition of property. However, as we discuss in Part G, that decision turned on the unusual and specific terms of that trust deed. Therefore the application of that decision may be limited.

Should the PRA apply to wider economic resources?

- 8.11 The PRA's focus (at least prior to Clayton) on conventional types of property means that wider "economic resources", from which the partners may derive financial advantages, are excluded from the PRA. Partners may have at their disposal resources which can confer on them real financial benefits even though that resource is not traditionally considered property. Probably the most significant example of an economic resource not captured by the PRA's definition of property is a person's capacity to earn an income (earning capacity). The current approach, following *Z v Z (No 2)*, is that the personal skills of an individual do not come within the PRA's concept of property.¹⁵ We discuss how the courts have approached earning capacity in greater detail in Chapter 11. Another example of an economic resource not captured by the PRA's definition of property is property held on trust. Trusts are discussed in detail in Part G.

¹³ *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

¹⁴ *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

¹⁵ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA), relied on in *Newman v Newman* [1999] NZFLR 839 (HC), in which the personal goodwill attaching to a surgeon's practice accounted for roughly 60 per cent of the practice's value. The High Court said that the personal goodwill was not property which could be divided between the partners.

8.12 Several overseas jurisdictions require courts to take into account the “financial resources” of the partners when making orders to divide their property.¹⁶ In these jurisdictions, a court’s power to make property division orders only applies to conventional property.¹⁷ Nevertheless, the availability of wider resources from which a partner can access financial benefits is highly relevant to the way in which the court can choose to divide the partners’ property.¹⁸ For example, in the Australian case *Hall v Hall* the wife’s father made provision under his will that a group of companies associated with the family should provide financial support to the wife.¹⁹ The executors of the father’s estate, who controlled the group of companies, gave evidence that there was no legal obligation on the companies to make such provision. Nevertheless, the High Court of Australia upheld a finding that if the wife had requested financial support, the executors were likely to have made a voluntary payment in accordance with her father’s testamentary wishes. The Court said that the wife’s interest was a financial resource.²⁰

8.13 Similarly, in the English case *Charman v Charman (No 4)*, the husband established a trust under which he was a discretionary beneficiary.²¹ There was a close connection between the husband and the trust, as indicated by the husband having previously told the trustee that he was to be considered the primary beneficiary. The Court of Appeal upheld the High Court’s finding that if the

¹⁶ See for example Matrimonial Causes Act 1973 (UK), ss 24 and 25(2)(a); Family Law Act 1975 (Cth), ss 75 and 79; and Family Law (Scotland) Act 1985, s 8(2)(b).

¹⁷ In England and Wales, s 24 of the Matrimonial Causes Act 1973 (UK) refers to “property to which the first-mentioned party is entitled, either in possession or reversion.” The Supreme Court of the United Kingdom has explained that its jurisdiction to make property adjustment orders under s 24 only applies to proprietary rights “with an established legal meaning and recognised legal incidents under the general law”: *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [37]. Likewise, in Australia the court is given powers under s 79 of the Family Law Act 1975 (Cth) to make orders “altering the interests of the parties to the marriage in the property.” In s 4 of the Family Law Act 1975 (Cth), property is defined in conventional terms as property to which the spouses are entitled in “possession or reversion.” The High Court of Australia has, however, said that the term property had to be interpreted to conform with the purposes of the Family Law Act rather than how the term is interpreted in a general property law context: *Kenyon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [64] per French CJ and at [89] per Hayne and Gummow JJ.

¹⁸ It should be noted that in these jurisdictions, particularly England, Wales and Australia, the legislation gives the court far more discretion when making property division orders. The New Zealand approach under the Property (Relationships) Act 1976 does not give the courts such leeway. Consequently, caution should be taken when assessing the relevance of the courts’ power to account for a partner’s financial resources under overseas property division schemes.

¹⁹ *Hall v Hall* [2016] HCA 23, (2016) 90 ALJR 695. The case concerned the wife’s claim for interim maintenance from her former husband, which required the court of first instance to assess the “financial resources” of the wife under s 75(2)(b) of the Family Law Act 1975 (Cth). When the court makes orders altering property interests, it also relies on the matters listed in s 75(2), therefore the decision in *Hall* is equally relevant to cases of property division.

²⁰ *Hall v Hall* [2016] HCA 23, (2016) 90 ALJR 695 at [45]–[48] and [56]. It should be noted that if *Hall* was decided by the New Zealand courts under the Property (Relationships) Act 1976, any property the wife obtained under her father’s will would probably not be classified as relationship property because inheritances from third parties are generally classified as separate property under s 10.

²¹ *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246. As we discuss in Part G, a discretionary interest in a trust has not traditionally been considered property.

husband made a request, the trustee would advance all the trust's assets to him.²² On that basis the Court attributed all the assets of the trust to the husband as his financial resources, and upheld an order that required the husband to pay a lump sum to the wife based in part on the assessment of his financial resources.²³

8.14 The primary argument for including wider economic resources in the PRA's definition of property is that it would best achieve the policy of a just division of property in cases where those wider economic resources constitute a significant proportion of the partners' combined wealth. Failing to account for those economic resources at the end of a relationship may fail to achieve equal division of the true value attributable to the relationship.

8.15 There are, however, several arguments against broadening the definition of property to include wider economic resources:

- (a) First, a novel definition of property under the PRA could create confusion, and there would be a period of uncertainty as lawyers and the courts grapple with the new and unfamiliar definition. For this reason, it might be preferable to maintain a consistent approach to the definition of property across different statutory contexts where possible.²⁴ The Supreme Court in *Clayton* may, however, have already signalled a departure from the conventional categories of property in the PRA context, as discussed at paragraph 8.9.
- (b) Second, the inclusion of earning capacity and trust property under the PRA will raise complex questions in each case. In particular, it might be difficult to identify the component of those resources that should be considered "relationship property" and shared between

²² *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57]. See also *Thomas v Thomas* [1995] 2 FLR 668 (CA) at 670; and *A v A* [2007] EWHC 99, [2007] 2 FLR 467.

²³ *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57]. It should be noted that the Court of Appeal did not order that the assets of the trust should be transferred, nor that the trust be varied. Instead, the Court's orders were in respect of the husband's property, taking into account the additional financial resources he had available by way of the trust.

²⁴ The Supreme Court of the United Kingdom has made similar observations in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415. At [37] per Lord Sumption the Court rejected the argument that a different definition of property should apply under relationship property law, concluding instead that core property law principles should remain constant across different legal contexts:

Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.

Lady Hale, who agreed with the leading judgment of Lord Sumption, said at [87]–[88] that s 24(1)(a) of the Matrimonial Causes Act 1973 (UK) referred only to rights recognised by the law of property and nothing in the wording of the statute nor its history suggested a wider interpretation.

the partners.²⁵ For example, if a partner's earning capacity is divisible to the extent it has been enhanced by the relationship, how is such enhancement to be ascertained? The valuation of those resources is also likely to be a difficult exercise. The inclusion of such resources may therefore increase the contestability of relationship property matters, undermining the principle that all questions under the PRA should be resolved as inexpensively, simply and speedily as is consistent with justice.²⁶ We look at these questions in greater detail in Chapter 11 when considering super profits and earning capacity.

- (c) Third, there are other ways to recognise and account for the benefits bestowed on one partner by wider economic resources. We discuss some options in respect of trust property in Part G. We also note that the approaches taken in Australia and England and Wales described above do not go as far as dividing a partner's economic resources. Rather, they are taken into account as one among many factors that influence how the courts divide the partners' conventional property.²⁷ It would be a radical step for the PRA to deem wider economic resources as property which is divisible between the partners.
- (d) Fourth, the main criticism regarding the narrowness of the PRA generally focuses on two specific economic resources that are currently not considered "property": earning capacity and property held on trust. We discuss the issues caused by the exclusion of these resources from the PRA in subsequent parts of the Issues Paper.²⁸ It may be unnecessary to amend the PRA's definition of property to include economic resources generally. Rather, it may be preferable to assess whether the

²⁵ In Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming), Henaghan proposes an approach that would include earning capacity as relationship property in its own right, which would then be divided equally alongside the parties' other relationship property. Henaghan proposes a formula to ascertain the amount of earning capacity to be counted as relationship property. This formula is discussed at n 278 below.

²⁶ Property (Relationships) Act 1976, s 1N(d). See Chapter 3 for a discussion of the principles of the PRA.

²⁷ As noted above at n 18, the courts in England, Wales and Australia have more discretion when making property division orders than the New Zealand courts have under the Property (Relationships) Act 1976.

²⁸ See discussion in Chapter 11 dealing with earning capacity and Part G dealing with trusts.

definition of property should be expanded to include specific resources on a case by case basis as we do in respect of earning capacity and trust property.

CONSULTATION QUESTION

C1 Should the PRA's definition of property include wider economic resources?

Is the definition of property future-proof?

8.16 We have considered whether the PRA can accommodate new and emerging types of property such as:²⁹

(a) **Cryptocurrencies (virtual currencies):**

Cryptocurrencies are digital representations of value that can be transferred, stored and traded electronically.³⁰ A person wishing to hold or trade cryptocurrency must use specific software to allow the currency to be transferred through a peer to peer online network.³¹ In the case of the cryptocurrency Bitcoin for example, a “virtual wallet” must be used. Cryptocurrencies are becoming increasingly common and so it is likely that partners in the future will hold some of their wealth in cryptocurrencies. Several hundred virtual currencies are in existence.³² Each has an exchange rate to conventional currencies. These exchange rates are prone to quite considerable fluctuation.³³

(b) **Digital libraries:** In previous years, when partners separated they might divide their CD and DVD collections. A modern equivalent might be that partners divide their digital libraries.³⁴ A digital library might

²⁹ Jade Lattimore, Bryce Menzies and Joe Box “You Sexy Thing: New Property in the 21st Century” (seminar at the National Family Law Conference, Melbourne, 19 October 2016).

³⁰ Judith Lee and others “Bitcoin Basics: A Primer on Virtual Currencies” (2015) 16 BLI 21 at 22.

³¹ Andrea Borroni “Bitcoins: Regulatory Patterns” (2016) 32 BFLR 47 at 50–51.

³² Judith Lee and others “Bitcoin Basics: A Primer on Virtual Currencies” (2015) 16 BLI 21 at 22–23.

³³ Judith Lee and others “Bitcoin Basics: A Primer on Virtual Currencies” (2015) 16 BLI 21 at 23. The authors give the example of Bitcoin which in November 2014 reached an exchange rate of US\$1,200 per Bitcoin, whereas at the time of the article's publication it had fallen to US\$400 per Bitcoin.

³⁴ There may be some uncertainty when considering digital libraries if the property in question is the digital files and apps themselves, or the licence granted to use the files or apps.

include media collections like movies or music. It might also include a collection of apps.³⁵

- (c) **Intellectual property rights:** As more people are involved with developing software, apps and other forms of digital design, it is likely that the intellectual property rights to these forms of work will become an issue which is more contested when partners separate.
- (d) **Other forms of intangible or digital property:** It is likely that new forms of intangible and digital property will continue to emerge. Customer loyalty scheme credits like frequent flyer points can have considerable value. Even credits earned within computer games, like a Pokémon collection in the game Pokémon Go, can sometimes be traded for large amounts of money.³⁶

8.17 We think that the PRA's definition of property, and in particular the catch all "any other right or interest" is wide enough to capture all sorts of intangible things.³⁷ For example, the Supreme Court has recently found that digital files, such as videos, constituted property under the Crimes Act 1961, which uses a very similar definition of property to the PRA.³⁸

8.18 The key question is whether the PRA's definition of property provides partners, lawyers and judges with sufficient guidance on whether new forms of property are indeed property for the

³⁵ Apps refer to computer applications which are used for a range of different activities, such as games, news, weather and social networks: BBC "What is an app?" (2 June 2014) BBC Webwise <www.bbc.co.uk>. Apps are used on devices like a tablet or smartphone.

³⁶ Pokémon Go is a game played through mobile devices. The aim is for players to capture Pokémon. The value of extensive Pokémon collections that some players had captured through the game rose with the widespread popularity of the game. Presenters at the Australian National Family Law Conference raised the example of Pokémon Go collections: Jade Lattimore, Bryce Menzies and Joe Box "You Sexy Thing: New Property in the 21st Century" (seminar at the National Family Law Conference, Melbourne, 19 October 2016).

³⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.3] lists the types of property that the courts have said to be property as "any thing in action, and any other right or interest." The courts have said property includes: assignable goodwill, a transmissible right of action for damages, debts, company shares, an option to purchase, a right to receive an Armed Services Terminal Benefit on future retirement, the right to superannuation benefits contingent upon future events, a life interest, rights pursuant to proprietary estoppel or constructive trust, rights pursuant to a building society secret ballot, fishing rights under the Fishing Act 1983, an interest in an asset in common with a third party, rights under the Accident Compensation Act, and goodwill in a professional practice.

³⁸ In *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 Mr Dixon posted CCTV footage on a video-sharing website. He was then charged under s 249(1)(a) of the Crimes Act 1961 with accessing a computer system and dishonestly obtaining "property." The issue before the Supreme Court was whether the video files Mr Dixon had obtained were property. The Crimes Act defines property in a similar way to the Property (Relationships) Act 1976. The Court concluded that the video files were property within the meaning of s 249 of the Crimes Act and upheld Mr Dixon's conviction. At [25] the Court explained that the files could be identified, they had a value and they were capable of being transferred to others. The Court also considered that the word "property" must be interpreted in the context of the legislation in which it is used. In this case, the Court said it was clear that s 249 was intended to apply to circumstances like Mr Dixon's use of the video files. The Court relied on the High Court of Australia decision in *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89] for this proposition. The Supreme Court's decision in *Dixon v R* suggests that the PRA's definition is broad enough to apply to new forms of property, particularly digital files.

purposes of the PRA. As discussed above, the PRA's definition of property simply lists what is included as property, which is very broad.

- 8.19 While court decisions (in New Zealand and overseas), academic literature and continuing legal professional development courses will all provide insights into what emerging forms of property come under the PRA, this may not avoid the need to go to court in order to establish whether a new form of property comes within the PRA.
- 8.20 The main problem with the PRA's definition of property is that it does not explain how or why something should be treated as property.³⁹ Lawyers may struggle to advise clients on whether emerging forms of property will be treated as property under the PRA. Consequently, valuable items may be omitted from the relationship property pool because they were overlooked. Alternatively, partners may suffer prolonged and costly disputes over whether an item should be treated as property.
- 8.21 There are also difficulties in valuing emerging forms of property. The future trend of emerging property can be unclear. New technology may become very popular, or it can quickly fade away. These matters are difficult to predict. The value of some emerging property is likely to fluctuate considerably. The value of cryptocurrencies, for example, can be very volatile. Best practices for valuing emerging forms of property may not have developed. How, for example, should the value of a Pokémon Go collection be determined?

Should the PRA include a more prescriptive definition of property?

- 8.22 While we think that the current definition of property is broad enough to capture emerging forms of property, there may still be merit in changing the definition to provide a way to determine whether an item constitutes property. Some statutes define property with greater prescription than the PRA, although these statutes operate in different policy areas. For example the

³⁹ In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [27] the Supreme Court noted the different definition of property under the Property Law Act 2007: "everything capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property." The Supreme Court said "[t]his is an attempt to define what the concept of 'property' means, unlike the definition in the PRA which is essentially an inclusive definition...."

Criminal Proceeds (Recovery) Act 2009 defines property in a conventional manner: property means real and personal property of any kind and any other right or interest.⁴⁰ The Act goes further, however, and defines “interest” as:⁴¹

- (a) a legal or equitable estate or interest in the property; or
- (b) a right, power, or privilege in connection with the property.

8.23 These definitions are supported by section 58 of the Act which provides that where people exercise “effective control” over property, they are to be treated as though they had an interest in the property. The “effective control” definition has been applied where a person controls a corporate structure⁴² and trusts.⁴³ The Act’s extended definition of interest exists to fulfil the purposes of that legislation. Principally, the definition is targeted at ensuring all “tainted property” or property to which a forfeiture order may apply comes under the Act. The extended definition also allows for the identification of appropriate parties who may wish to apply for relief from forfeiture.⁴⁴

8.24 The Property Law Act 2007, which deals with certain aspects of the law relating to real and personal property, has adopted a different definition of property to its predecessor legislation.⁴⁵ It now provides that property means “everything capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property.”⁴⁶

8.25 If the PRA’s definition of property was to be amended to provide greater guidance on what property the PRA is concerned with, the definition would need to be drafted to best achieve the PRA’s policy objective. Careful consideration would be needed. We are

⁴⁰ Criminal Proceeds (Recovery) Act 2009, s 5(1), definition of “property”.

⁴¹ Criminal Proceeds (Recovery) Act 2009, s 5(1), definition of “interest”.

⁴² *Commissioner of Police v Li* [2014] NZHC 479.

⁴³ *Commissioner of Police v Ranga* [2013] NZHC 745; *Commissioner of Police v Clifford* [2014] NZHC 181; and *Commissioner of Police v Read* [2015] NZHC 2055.

⁴⁴ Simon France (ed) *Adams on Criminal Law - Sentencing* (online looseleaf ed, Thomson Reuters) at [CP5.22.01].

⁴⁵ Property Law Act 2007, s 3. The aim of reformulating the definition of property reflected the Law Commission’s recommendation that the elements of the former inclusive definition of property under the Property Law Act 1952 be broken up and placed elsewhere in the Act: Law Commission *A New Property Law Act* (NZLC R29, 1994) at 258. The Property Law Act 2007 now has a very general definition of property under s 4, but the definition of what intangible property may include is found under subpart 5 of pt 2, s 48.

⁴⁶ Property Law Act 2007, s 4, definition of “property”. The Property Law Act 2007 does not, however, define what is meant by ownership, and its definition of “owner” is only in respect of certain conventional interests in land: Property Law Act 2007, s 4, definition of “owner”.

currently unaware of any other legislation that would provide a workable precedent for the PRA's statutory purpose.

- 8.26 A solution may be to retain the current definition but specify particular items that ought to be included. We consider in Chapter 11 whether a partner's earning capacity ought to be included and we consider in Part G whether trust property ought to be included.

CONSULTATION QUESTIONS

- C2 Should the PRA's definition of property be retained so that questions of whether the PRA applies to emerging forms of property are left to the courts to decide on a case by case basis?
- C3 Should the PRA's definition of property be amended so that it defines property in greater detail? If so, is it preferable to amend the definition to expand the items that are included as property? Which items ought to be included?

Exclusion of Māori land from the PRA

- 8.27 Land is a taonga tuku iho of special significance to Māori people.⁴⁷ For that reason Te Ture Whenua Māori Act 1993 (TTWMA) promotes the retention of Māori land in the hands of its Māori owners, their whānau, their hapū, and their descendants.⁴⁸ TTWMA operates as a code, and Māori land can only be sold, gifted or otherwise disposed of in accordance with its rules.⁴⁹ Proposed alienations of Māori land must generally be approved by the Māori Land Court.⁵⁰
- 8.28 Only five per cent of New Zealand's land is Māori freehold land and very little Māori customary land remains.⁵¹ Māori land is typically owned in common with many other owners.⁵² It is

⁴⁷ Te Ture Whenua Māori Act 1993, preamble and s 2.

⁴⁸ Te Ture Whenua Māori Act 1993, preamble, s 2 and pt 6. Section 2 defines Māori land as Māori customary land (held in accordance with tikanga Māori) and Māori freehold land (Māori customary land to which the beneficial ownership has been determined according to tikanga Māori by order of the Māori Land Court).

⁴⁹ Te Ture Whenua Māori Act 1993, s 146. Information on Māori land is available on the Māori Land Court website <www.maorilandcourt.govt.nz>.

⁵⁰ Te Ture Whenua Māori Act 1993, pts 7 and 8.

⁵¹ Statistics New Zealand *He Arotahi Tatauranga: Supplementary Information* (August 2014) at 10.

⁵² Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 5. Te Ture Whenua Māori Act 1993 (TTWMA), part 12 provides for five types of Māori landowner trusts that may relate to Māori land, other land classified under the TTWMA and shares in a Māori incorporation that is incorporated under part 13 of TTWMA.

largely non-arable and some is landlocked.⁵³ The importance of Māori land however generally lies not in its monetary value, but in its ancestral, spiritual, cultural and historical value.⁵⁴

- 8.29 Section 6 of the PRA provides that “[n]othing in this Act shall apply in respect of any Māori land within the meaning of [TTWMA].” As noted by the Family Court in *Rawhiti v Marama*, Parliament’s intention seems to have been to exclude Māori land completely from the ambit of the PRA.⁵⁵ In doing so, section 6 protects the special status of Māori land and recognises the interests of other people in that land.⁵⁶

What happens when partners separate?

- 8.30 The exclusion of Māori land from the PRA means that if one or both of the partners owns Māori land, that land will not fall within the pool of relationship property available for sharing upon death or separation. This remains the case even if Māori land was used as the family home, and/or if the non-owning partner made or paid for improvements to the land, thereby increasing its value.⁵⁷ Similarly, a court cannot order one partner to transfer Māori land to the other partner for compensation purposes, such

⁵³ The Ministry of Agriculture and Forestry (now Ministry for Primary Industries) estimated that 80 per cent of land held in Māori title is of non-arable class and 30 per cent is landlocked: Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 2.

⁵⁴ Jacinta Ruru “Implications for Māori: Contemporary Legislation” in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 469. In *Yates v Nathan* the Deputy Chief Judge noted that “general land...lacks the same characteristics associated with land to which Māori people are associated in accordance with tikanga.” In that case the Deputy Chief Judge exercised jurisdiction under s 44 of Te Ture Whenua Māori Act 1993 (TTWMA) to amend orders of the Court constituting a whānau trust under s 214. The respondent had failed to disclose to the Court the applicant’s potential claim under the Property (Relationships) Act 1976 (PRA) in relation to the land which was classified as general land owned by Māori under s 129 of TTWMA. The orders constituting the trust were made conditional on there being no successful PRA claim by the applicant before the Family Court: *Yates v Nathan* (2016) Chief Judge’s MB 223 (2016 CJ 223).

⁵⁵ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127. Jacinta Ruru and Leo Watson describe this as “good law”, recognising “the importance of the blood connection that ties land and taonga to a collective rather than an individual responsibility”: Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁵⁶ As discussed in Part A, Māori land was not excluded from the predecessor regime (the Matrimonial Property Act 1963). It was only upon passing of the 1976 Act that Māori land was no longer covered. There was no discussion of the change in Parliament at the time of the 1976 Bill and it seems simply to reflect the evolving paradigm of the 1970s that special rules for Māori land were thought necessary, reflecting the importance of property passing in accordance with the principle of descent in te ao Māori. See Jacinta Ruru “Implications for Māori: Historical Overview” in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 464; and Justice Joseph Williams “The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 11.

⁵⁷ The provisions of the Property (Relationships) Act 1976 in ss 9A and 10(2) which enable separate property to become relationship property do not apply as Māori land is not separate property.

as where one partner used relationship property to pay off a personal debt.⁵⁸

- 8.31 The rights, if any, of a non-owning partner in respect of Māori land on separation are not covered in TTWMA, although it does provide for a right of occupation when one partner dies.⁵⁹ Nor does the Te Ture Whenua Māori Bill 2016, as currently drafted, appear to address the position on separation.⁶⁰ In 2008 Ruru referred to this as a legislative gap between TTWMA and the PRA that is unacknowledged by the judiciary and Parliament.⁶¹
- 8.32 Historically, owners of Māori land rarely built and resided on their land.⁶² However more recently owners are increasingly being encouraged and enabled to live and build on their land,⁶³ which means questions as to the rights of non-owning partners, particularly in respect of family homes built on Māori land, may arise more frequently in future.

The PRA applies if the family home is a chattel

- 8.33 As was observed in *Rawhiti v Marama*,⁶⁴ because Māori land is exempt from the PRA, a family home that is fixed to Māori land would also be exempt.⁶⁵ However buildings and other improvements that are not fixed to the land are regarded in law as chattels, and are therefore not excluded under section 6 of the PRA. This means that improvements that are not fixed to Māori land, such as movable houses, can be classified as relationship property and divided under the PRA.

⁵⁸ Property (Relationships) Act 1976, s 20E(1)(b).

⁵⁹ Te Ture Whenua Māori Act 1993, s 328. The right applies where a person has a beneficial interest in that land, such as a life interest devised by will: see s 108(4).

⁶⁰ Te Ture Whenua Māori Bill 2016 (126-2). At the time of writing, the Bill is currently in the Committee of the Whole House in Parliament.

⁶¹ Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” (2008) 41 UBC L Rev 315 at 327.

⁶² Ruru notes that land that stayed in Māori ownership following conversion and alienation through the Native Land Court was often remote and non-arable, and that Māori freehold land titles often have multiple owners and it is nearly impossible for one owner to obtain consent from all the others to build a family home on the land: Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” (2008) 41 UBC L Rev 315 at 334 and 337.

⁶³ See, for example, the proposals emerging from the most recent review of TTWMA: Te Ture Whenua Māori Act 1993 Review Panel *Report of the panel appointed to review Te Ture Whenua Māori Act 1993* (March 2014).

⁶⁴ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127.

⁶⁵ This reflects the general property law principle that what is fixed to the soil belongs with the soil: *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL). See further *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); and Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” 41 (2008) UBC L Rev 315 at 339.

8.34 The main indicators of whether a building is a fixture rather than a chattel are the degree of annexation and the purpose of annexation.⁶⁶ The Māori Land Court used this distinction to provide relief to a non-owner of Māori land in *Epiha William Hills – Kaiapoi MR873 Blk XI Sec 71B*.⁶⁷ In that case the sole owner of Māori land wished to build a house for his family, but could only do so if his wife contributed \$200,000 towards its construction. The wife would only do so if she could become joint owner of the land. The Māori Land Court said that it had no jurisdiction to transfer half ownership to her, and declined to exercise its jurisdiction to change the status of the land to general land. But if the house were built so that it could be easily transported away from the land, the Court could make an order declaring the house to be a chattel owned solely by the wife.⁶⁸

A claim in constructive trust

8.35 TTWMA does not prevent constructive trust claims being brought in respect of Māori land. The Māori Land Court has said that, although general principles of property law provide that the owners of the land also own any fixtures, section 18(1) (a) of TTWMA enables the Court to recognise that someone may separately own, by way of a beneficial interest under a constructive trust, an improvement on the land.⁶⁹ The Court has used these principles to recognise a non-owner's beneficial interest in buildings fixed to Māori land.⁷⁰

8.36 The leading case is *Stock v Morris – Wainui 2D2B*, decided by the Māori Land Court in 2012.⁷¹ In that case the parties lived together

⁶⁶ *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [41] referring to *Auckland City Council v Ports of Auckland* [2000] 3 NZLR 614 (CA) which adopted the approach of the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687(HL).

⁶⁷ *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85.

⁶⁸ *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85 at 89. Kāinga Whenua loans are available to build, purchase or relocate a house on multiple-owned Māori land subject to a tripartite deed between the borrower, owners and Housing New Zealand: see Kāinga Whenua information on the Housing New Zealand website <www.hnzc.co.nz>. The terms of the tripartite deed may stipulate design requirements, such as that the house be built on piles. In *Housing Corporation of New Zealand – Waimanoni 1B3B2A* (1996) 19 Kaitaia MB 227 (19 KT 227) the Court found that the parties to the deed had treated the house as a chattel. In *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206) and *Bennett – Estate of Ronald Clifford Bennett* (2017) 156 Waiariki MB 250 (156 WAR 250) the Court found the house to be a fixture that would only become a chattel if the lender's right to remove the house was triggered by a default by the borrower.

⁶⁹ See *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [35]; and *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [26].

⁷⁰ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [30] referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Tauranga MB 150 (73 T 150) and *Brokenshaw – Te Kaha B6X2* (2003) 81 Opotiki MB 18 (81 OPO 18).

⁷¹ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).

for eight years on Māori land. The applicant was an owner in the land, and the respondent a non-owner. During their relationship the respondent paid approximately \$60,000 for the construction of a cottage on the land. On separation, the applicant claimed ownership of the cottage, supported by her fellow owners. The respondent sought half the value of the cottage. The Court found that the cottage (which had been built on a concrete slab) was part and parcel of the land and could not be treated as a chattel.⁷² It could not be uplifted, and the applicant could not afford to purchase the respondent's claimed half-share in the cottage. The central issue for the Court was how it should do justice between the parties, within the parameters of the TTWMA.⁷³

- 8.37 The Court examined the scope of its powers under section 18(1) (a) of TTWMA to hear and determine a claim in equity. It said that the Court could make orders under that section in favour of a non-owner, and had done so in the past.⁷⁴ The Court went on to say that where a non-owner is entitled to equitable relief in relation to a fixture on Māori land, the Court should in the first place look to award monetary compensation. If monetary compensation is inappropriate, the Court may award ownership of the fixture if it can be removed from the land. The Court will also take into account the non-owner's free occupation of the land.⁷⁵ However an order vesting interests in the land, or a right of possession in favour of a non-owner would likely offend the kaupapa and provisions of TTWMA,⁷⁶ although it noted that the Court of Appeal had not completely ruled out this possibility.⁷⁷
- 8.38 The Court in *Stock v Morris* concluded that the applicant was the owner of the cottage but that the non-owner was entitled to compensation. The order declaring the applicant the owner was made conditional upon the respondent paying the non-owner compensation within two years. The Court also issued a charging

⁷² *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [22].

⁷³ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [1].

⁷⁴ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [64], referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Waikato Maniapoto 150 (73 T 150). See also *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

⁷⁵ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70].

⁷⁶ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70]. See also *Tipene v Tipene – Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2) at [63] and *Owen v Hauiti – Kiwinui A* (2016) 57 Tairarwhiti MB 70 (57 TRW 70) at [69].

⁷⁷ *Grace v Grace* [1995] 1 NZLR 1 (CA) at 5.

debt under section 82 of TTWMA, charging the owner's interest in the home with the sum owing.⁷⁸

Issues with the remedies for family homes on Māori land

- 8.39 While the Māori Land Court can make an order declaring a house to be a chattel, it can only do so if the house was built so that it could be easily relocatable. If the house is a fixture, the Court cannot say it is a chattel as it only has jurisdiction to declare existing ownership rights and cannot transfer or create new ownership rights.⁷⁹ The extent to which the Court can grant equitable relief in respect of houses and other buildings that are fixtures on Māori land remains unclear.⁸⁰
- 8.40 Ruru notes the reality of removable homes as a solution to the legislative gap is feasible and the concept of removable or relocatable homes is becoming more common.⁸¹ However, removable homes can be both logistically problematic and expensive, and the solution adds another constraint on the effective utilisation of Māori land.⁸² It may also be the case that some homes are regarded as a taonga, imbued with a sense of tapu. In this situation, removal or relocation would be contrary to tikanga Māori and therefore unacceptable.⁸³

⁷⁸ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [77]. The Court noted at [74] there was some prospect that the respondent may not receive compensation and that the Court had limited powers to enforce payment.

⁷⁹ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [25]. The Court discussed but did not prefer the line of authority which conceptualised the house as a chattel following the making of an order under s 18(1)(a) (the "fixture to chattel" theory): at [43] to [47].

⁸⁰ Despite the Māori Land Court's willingness to apply constructive trust principles over the family home, there is an argument that a constructive trust over Māori land is inconsistent with Te Ture Whenua Māori Act's prohibition on any form of disposition of any equitable interest in Māori land other than in accordance with that Act: see Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 10; and Te Ture Whenua Māori Act 1993 (TTWMA), s 4, definition of "alienation", para (a)(i), and s 146. The Court in *Stock v Morris* rationalised its ability to "do equity" in relation to Māori freehold land on the basis that the preamble and ss 2 and 17 set the kaupapa of TTWMA and promoted the interests of the owners, but the Court could not allow the actions of owners to cause injustice to non-owners: *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [65]. However, it remains unclear what rights a constructive trust over Māori freehold land could confer that would not be contrary to TTWMA.

⁸¹ Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁸² Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁸³ Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

- 8.41 For these reasons, there may be merit in clarifying the legal position of non-owning partners when the family home is on Māori land.

Options to provide for family homes on Māori land

- 8.42 The current legislative position reflects a policy decision that the retention of Māori land in the bloodline is preferred over an ability of the non-owning partner to claim an interest in the land. We are not considering removing the exclusion of Māori land from the PRA. This would have significant implications for TTWMA and Māori custom law. Further we are not aware of any issues with the exclusion of Māori land other than the issue of addressing improvements made by the non-owning partner, particularly in respect of family homes.
- 8.43 Enabling a non-owning partner to claim an interest in the family home but not the land on which it sits would represent an alternative policy balance that could be supported on the basis that it enables a just division of property that has a connection to the relationship, either because it is used as the family home or because it is attributable to the relationship.⁸⁴ Alternatively, the non-owning partner's actions or contributions to improving the land could be recognised by way of compensation. These options are discussed below.
- 8.44 In Part H we discuss which court, or courts, should hear claims that raise issues of importance to Māori, including family homes on Māori land.

Option 1: Treating the family home on Māori land as a family home under the PRA

- 8.45 One option is to enable a non-owning partner to claim an interest in Māori land by treating the family home (but not the land on which it sits) as a family home under the PRA.
- 8.46 The family home could be classified as relationship property either on the basis that it was for family use or that it was attributable to the relationship through the efforts of the partners. The family home could form part of the relationship property pool and a

⁸⁴ See Chapter 9 for a discussion of the “family use” and “fruits of the relationship” approaches to the classification of relationship property.

court could make orders with respect to the family home in accordance with the provisions of the PRA.

- 8.47 In practical terms this would mean that the value of the interest in the family home is brought into the relationship property pool and accounted for from other relationship property, but the land itself is not.
- 8.48 This would provide a more equal balance between the policies underpinning the TTWMA and PRA. However, a significant practical limitation is that there may be no other assets from which to satisfy the other partner's entitlement to a share in the relationship property.

Option 2: Providing compensation under the PRA

- 8.49 Another option is to amend the PRA to provide a mechanism to compensate a non-owning partner for his or her actions in increasing the value of Māori land. This would be consistent with the policy and provisions of the TTWMA and would overcome the difficulties identified with the current approach. It would, however, be inconsistent with the focus in the PRA on contributions to the relationship, rather than to specific items of property.⁸⁵
- 8.50 A new mechanism specifically for family homes on Māori land would recognise the unique policy considerations at play. Amending the PRA's existing compensation provisions will not achieve this and is unlikely to be the best conceptual and practical fit in light of the underlying ownership of the land.⁸⁶
- 8.51 Amending the PRA's provisions to provide compensation may acknowledge a non-owner's rights but, again, such opportunities can be limited in practice if the owning partner has insufficient

⁸⁵ See Chapter 2 for a discussion on why the Property (Relationships) Act 1976 replaced the earlier approach in the Matrimonial Property Act 1963 which focused on the contributions of the non-owning partner to specific items of property. The exception is s 9A(2)(b), which applies when an increase in the value of separate property is attributable to the actions of the non-owning partner. That section requires the court to determine the partners' respective shares in accordance with "the contribution of each spouse or partner to the increase in value." We discuss the problems with this approach in Chapter 10.

⁸⁶ For example, s 17 of the Property (Relationships) Act 1976 could be applied to order compensation to be paid where a partner's separate property has been sustained by the application of relationship property or the actions of the other partner. Alternatively, Ruru and Watson discuss an amendment to enable the Family Court to take Māori land interests into account when considering a compensatory order under s 11B of the PRA for the absence of an interest in the family home: Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Josie Te Rata suggests a provision similar to s 9A that would compensate a non-owning partner by adjusting the division of other relationship property to reflect the increase in value of the land attributable to the non-landowning partner's actions: Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9.

assets from which any compensation can be drawn. Nor would such amendments overcome the difficulties arising from land in multiple ownership as compensation can only be drawn from an owning partner's share in the land.

- 8.52 Te Rata notes, however, that in trying to strike a policy balance between retaining Māori land in the hands of its owners while compensating non-owning partners for their contributions, direction could be provided to the court on how to determine and give effect to a non-owning partner's rights.⁸⁷

Option 3: Remedies under Te Ture Whenua Māori Act 1993

- 8.53 TTWMA operates as a code for interests in Māori land. Although a non-owner's interest in a family home may be a product of a relationship, it is arguable that any attempt to fill the legislative gap in relation to contributions to Māori land should more appropriately sit in TTWMA.
- 8.54 There may be situations where it would be appropriate in the circumstances and in accordance with tikanga for the Māori Land Court to award an interest in land or otherwise provide compensation to a non-owner following a separation. TTWMA currently provides for rights for non-owners, including the provision of a life interest⁸⁸ or a financial interest⁸⁹ following the death of a partner, and the right of an owner of a beneficial interest to occupy land.⁹⁰ These provisions could be adapted, or new compensation provisions added, to recognise a non-owner's contribution to the family home.
- 8.55 While amendments to TTWMA are outside our terms of reference, we are interested in hearing whether this is an appropriate avenue for reform.

⁸⁷ Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9 in relation to a suggested amendment similar to s 9A of the Relationship (Property) Act 1976.

⁸⁸ Te Ture Whenua Māori Act 1993, ss 108(4) and 109(2).

⁸⁹ Te Ture Whenua Māori Act 1993, s 116. Parliament is alive to the issue of injustice: s 116(3) states

"In enacting this provision, Parliament has in mind particularly the possibility of injustice arising in individual cases from the prohibitions enacted by this Act against the alienation of beneficial interests in Māori freehold land to persons outside defined classes, and is therefore desirous of conferring on the court some flexible, if limited, powers to ameliorate any such injustice."

⁹⁰ Te Ture Whenua Māori Act 1993, s 328.

CONSULTATION QUESTIONS

- C4 Do you think that the law should provide rights or recognise interests in respect of a family home on Māori land, when one partner is not an owner of that land?
- C5 If so, what option do you prefer, and why?

Chapter 9 – Classifying relationship property and separate property

- 9.1 The PRA recognises that certain types of property should be shared between the partners at the end of the relationship, whereas other types of property should not. The PRA calls the types of property that should be divided *relationship property*. Property that is not shared remains each partner's *separate property*. The process of determining whether an item of property is relationship property or separate property is referred to as "classification."

Relationship property, separate property and debts

Relationship Property

- 9.2 Section 8(1) of the PRA provides that relationship property consists of:⁹¹
- (a) the family home whenever acquired; and
 - (b) the family chattels whenever acquired; and
 - (c) all property owned jointly or in common in equal shares by the married couple or by the partners; and
 - (d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—
 - (i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and

⁹¹ Many of the types of property listed in s 8 of the Property (Relationships) Act 1976 are defined further elsewhere in the Act, for example the family home, the family chattels, a life insurance policy, and a superannuation scheme.

- (ii) the property was intended for the common use or common benefit of both spouses or partners; and
- (e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and
- (ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—
 - (i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or
 - (ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and
- (f) [Repealed]
- (g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and
- (h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and
- (i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and
- (j) all other property that is relationship property under an agreement made under Part 6; and
- (k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and
- (l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

Separate Property

9.3 Separate property generally falls under one of three categories:

- (a) **Property of either partner that is not relationship property.** Section 9(1) defines separate property broadly as all property that does not fall within any of the categories of relationship property under section 8. Section 9 goes on to provide that separate property includes:
- (i) all property acquired out of separate property and the proceeds of any disposition of separate property;⁹²
 - (ii) any increase in the value of separate property, and any income or gains derived from separate property;⁹³
 - (iii) all property acquired by either partner while they are not living together, or by the surviving partner after the death of one of the partners, unless the court considers it just in the circumstances to treat the property as relationship property;⁹⁴ and
 - (iv) all property acquired by either partner after a court has made an order defining the partners' respective interests in the relationship property, or dividing that property.⁹⁵
- (b) **Property acquired by one partner from a third party.** Section 10 provides that separate property includes property a partner acquires from a third person:⁹⁶
- (i) by succession;
 - (ii) by survivorship;
 - (iii) by gift; or

⁹² Property (Relationships) Act 1976, s 9(2), which is subject to ss 8(1)(ee), 9A(3) and 10.

⁹³ Property (Relationships) Act 1976, s 9(3), which is subject to s 9A.

⁹⁴ Property (Relationships) Act 1976, s 9(4).

⁹⁵ Property (Relationships) Act 1976, s 9(5). This section does not apply in respect of orders made under s 25(3).

⁹⁶ Property (Relationships) Act 1976, ss 10(1) and 10(2). This includes the proceeds of a disposition of property, to which s 10(1)(a) applies, and property acquired out of property to which s 10(1)(a) applies: ss 10(1)(b) and 10(1)(c). If, however, the property listed in s 10(1) has been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property, it may be classified as relationship property.

- (iv) because the partner is the beneficiary under a trust settled by a third person.

These items of property will be classified as separate property even if they fit the description of relationship property under section 8. The family home and family chattels, however, will always be classified as relationship property.⁹⁷

- (c) **Special types of property recognised by the PRA:** These are other items of property that ordinarily would be relationship property, but for which the PRA makes specific provision. This includes property that one partner receives by gift from the other partner.⁹⁸ It also includes certain types of chattels that would otherwise be classified as relationship property, specifically:⁹⁹
 - (i) chattels used wholly or principally for business purposes;
 - (ii) money or securities for money;
 - (iii) heirlooms; and
 - (iv) taonga.

Debts

9.4 Partners' debts are classified under the PRA in a similar way to relationship and separate property. A relationship debt is a debt that has been incurred:¹⁰⁰

- (a) by the partners jointly;
- (b) in the course of a common enterprise carried on by the partners;
- (c) for the purpose of acquiring, improving, or maintaining relationship property;
- (d) for the benefit of both partners in the course of managing the affairs of the household; or

⁹⁷ Property (Relationships) Act 1976, s 9(4).

⁹⁸ Property (Relationships) Act 1976, s 10(3), unless the gift is used for the benefit of both partners. Note that this does not apply to the family home and family chattels, which remain relationship property: s 10(4).

⁹⁹ Property (Relationships) Act 1976, ss 2, definition of "family chattels" and 8. See Chapter 11 for a discussion of heirlooms and taonga.

¹⁰⁰ Property (Relationships) Act 1976, s 20(1), definition of "relationship debt".

(e) for the purpose of bringing up any child of the relationship.

- 9.5 A personal debt is any debt that is not a relationship debt.¹⁰¹
- 9.6 The classification of debts can be equally as important as the classification of property. This is because the value of the pool of relationship property to be divided between the partners is calculated by first ascertaining the total value of the relationship property, and then deducting from that total any relationship debts owed by either or both partners.¹⁰² In this way, relationship debts are shared between the partners.¹⁰³
- 9.7 If one partner has paid a personal debt from relationship property, the court may order that the other partner’s share of relationship property be increased or that the partner who paid the debt pay compensation to the other partner.¹⁰⁴ There is no equivalent provision for relationship debts that are paid from separate property.

CASE STUDY: HOW CLASSIFICATION OF PROPERTY WORKS IN PRACTICE

To show how the PRA’s rules of classification work in practice, we use the hypothetical example of Rebecca and Wiremu.¹⁰⁵ Wiremu is a successful photographer. When Wiremu and Rebecca were married, Wiremu had already acquired a significant amount of property. He had amassed a significant collection of photographs, both works he created and works by other artists. He also owned a house, although he was still paying off the mortgage on it.

When the partners separate, Rebecca consults her lawyer. Her lawyer says that it is probable that the Family Court would classify the partners’ property in the following way:

Item	Classification	Relevant section of the PRA
House registered in Wiremu’s name	Relationship property	Section 8(1)(a) – the family home whenever acquired is relationship property

¹⁰¹ Property (Relationships) Act 1976, s 20(1), definition of “personal debt.”

¹⁰² Property (Relationships) Act 1976, s 20D.

¹⁰³ It is however only the value of the debt that is shared; the legal obligations each partner has to the creditors will remain unaltered: Property (Relationships) Act 1976, s 20A.

¹⁰⁴ Property (Relationships) Act 1976, s 20E.

¹⁰⁵ This example is loosely based on the Family Court’s decision in SvS [2012] NZFC 2685.

Rebecca's KiwiSaver Superannuation Policy acquired during the relationship	Relationship property	Section 8(1)(i) – the proportion of any superannuation attributable to the relationship is relationship property
Car registered in Wiremu's name but mostly driven by Rebecca	Relationship property	Section 8(1)(b) – the family chattels, which includes motor vehicles, are relationship property
Money in the partners' bank accounts saved during the relationship	Relationship property	Section 8(1)(e) - all property acquired after the relationship began is relationship property
Small boat used by the partners on holidays	Relationship property	Section 8(1)(b) – the family chattels, which includes boats, are relationship property
Colour printer used by Wiremu for his work as a photographer and bought prior to the relationship	Wiremu's separate property	Section 9(1) – all property which is not relationship property is separate property (or the printer may be considered a chattel used principally for business purposes and so is not a family chattel)
Framed photographs bought by Wiremu prior to the relationship and displayed in the partners' home	Relationship property	Section 8(1)(b) – the family chattels, which include household ornaments
Framed photographs bought by Wiremu prior to the relationship and displayed in his studio (which is separate to the family home)	Wiremu's separate property	Section 9(1) – all property which is not relationship property is separate property
The partners' pet dog, Monty, bought after the relationship began	Relationship property	Section 8(1)(b) – the family chattels, which includes pets, are relationship property
Gifts of jewellery from Wiremu to Rebecca	Rebecca's separate property	Section 10(3) – property gifted by one spouse to the other is separate property
Mortgage over Wiremu's house	Relationship debt	Section 20 – a debt incurred for the purpose of acquiring relationship property is a relationship debt.

Personal debt incurred by Wiremu to buy the colour printer	Personal debt	Section 20 – the debt was not incurred for a purpose that would classify it as a relationship debt, so it is a personal debt.
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The basis for classification

- 9.8 The classification of property is fundamental to the overall scheme of the PRA because it determines which property is to be divided between the partners.
- 9.9 In Part A we explained why we have the PRA, and the theories and principles on which its rules are based. To recap briefly, the PRA treats a qualifying relationship as a partnership or joint venture to which each partner contributes equally, although perhaps in different ways.¹⁰⁶ Each partner’s contributions to the relationship result in an entitlement to an equal share in the property of the relationship.
- 9.10 The concept of relationship property is intended to capture property that has a connection to the relationship, and which the partners can justifiably consider “theirs”, irrespective of strict legal title.¹⁰⁷
- 9.11 The PRA classifies two types of property as relationship property:¹⁰⁸
- (a) **Property which is central to family life.** This includes commonly owned and used property such as the family home and family chattels, whenever acquired. We call this the “**family use**” approach to classification.
 - (b) **Property attributable to the relationship.** This includes property that is directly or indirectly produced by the

¹⁰⁶ This is reflected in the explicit and implicit principles of the Property (Relationships) Act 1976, discussed in Chapter 3. See AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 1 and 10. See also AH Angelo and WR Atkin “A Conceptual and Structural Overview of the Matrimonial Property Act 1976” (1977) 7 NZULR 237 at 245 and 247; Bill Atkin “Classifying Relationship Property: A Radical Re-shaping” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁰⁷ AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 5–6. The original Matrimonial Property Act 1976 only gave a husband and wife an equal share in the matrimonial home and family chattels. Other items of matrimonial property were divided pursuant to the spouses’ respective contributions. The law was amended in 2001 so the Property (Relationships) Act 1976 divided all relationship property equally.

¹⁰⁸ See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.5]–[11.6].

joint or several efforts of the partners, such as property acquired during the relationship, the proportion of any life insurance policy or superannuation scheme attributable to the relationship and increases in the value of separate property due to the actions of the non-owner partner. We call this the “**fruits of the relationship**” approach to classification.¹⁰⁹

- 9.12 Separate property, on the other hand, is property that is unconnected to the relationship. It is excluded from division on the basis that a partner’s contributions to the relationship cannot be said to have had any bearing on the other partner’s separate property.
- 9.13 As discussed in Part A, there is no explicit principle in the PRA to explain this basis for classification. In Chapter 4 we recommended that, as a matter of good drafting practice, the implicit principles of the PRA should be expressly stated in a comprehensive principles section, including the principle that only property that has a connection to the relationship should be divided when the relationship ends.

Is the basis for classification appropriate for contemporary New Zealand?

- 9.14 An important issue in this review is whether the basis for the way the PRA classifies property remains appropriate in contemporary New Zealand.
- 9.15 As discussed above, there are two approaches reflected in the classification of relationship property. The fruits of the relationship approach, we think, remains appropriate because it reflects the values and norms of relationships in contemporary New Zealand. As explained above and in Part A, each partner is entitled to an equal share of the relationship property as a result of the equal contributions each makes to the relationship. The fruits of the relationship approach focuses on the product of the partners’ joint and several contributions. Conversely, it excludes

¹⁰⁹ The term “fruits of the relationship” is commonly used in the literature. See for example *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 569; and *Geddes v Geddes* [1987] 1 NZLR 303 (CA) at 307 per Somers J, “...such a construction reflects the general policy of the Matrimonial Property Act, that, save for express exceptions, matrimonial property is the fruit of the partnership.” See also Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). It is also referred to as a “gains” or “acquests” approach.

property which has not been produced or improved by the relationship.

- 9.16 The ongoing relevance of the family use approach needs to be considered in light of New Zealand’s changing social context and overseas trends, as we discuss below.

Does the family use approach still reflect most people’s sense of fairness?

- 9.17 Under the family use approach, property that one partner brings into the relationship or receives from a third party can sometimes be classified and divided as relationship property. The most common example is where the property contributed by one partner is used as the family home or as a family chattel.¹¹⁰ In such cases, the non-owning partner is entitled to an equal share in that property if the partners separate.
- 9.18 This might not fit with most people’s expectations of fairness in some situations, particularly where one partner brings significantly more property to the relationship than the other.¹¹¹ The family use approach might also lead to arbitrary results in some cases, as we discuss below.

The family use approach may lead to arbitrary results

- 9.19 If one partner brings a piece of furniture or appliance into the family home to be used for family purposes, it is likely to be considered a family chattel and eligible for division as relationship property. If the partner had taken the same item and placed it in his or her office away from the home, or even if it was kept in the home but it was not available for family use, it may retain its character as separate property. In *S v S*, Mr S had acquired an extensive art collection prior to his relationship with Mrs S.¹¹²

¹¹⁰ The family home and family chattels are relationship property because of their family use, regardless of when or how the property was acquired: Property (Relationships) Act 1976, s 8(1)(a) and 8(1)(b).

¹¹¹ See Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Fisher argues that the rules of classification and division of relationship property in the Property (Relationships) Act 1976 (PRA) should be based on causation. He says only property that is the “fruit of the relationship” should be divided equally. Fisher claims this approach is the generally accepted view in New Zealand. He criticises the classification of property that was acquired either before the relationship began or from some external source, such as from an inheritance, as relationship property. In particular he criticises the current classification of the family home regardless of how it was acquired as the greatest anomaly within the PRA. This is because of the possibility that a home would be divided even though it was acquired before the relationship began or from some external source.

¹¹² *S v S* [2012] NZFC 2685.

As the artworks were displayed on the walls throughout their home, the Family Court held that Mr S had used the works as a household ornament and so they had become family chattels and therefore relationship property.¹¹³ Mr S's lawyer pointed out that if Mr S had collected stamps and kept the collection in a hall cupboard, the collection would have remained separate property.¹¹⁴

- 9.20 In *Farrimond v Farrimond*, the partners had lived in a home bought by Mr Farrimond two years before the relationship began.¹¹⁵ The partners' relationship lasted for approximately 10 years. The home's value when the relationship began was \$280,000 but that had increased to \$830,500 by the date of hearing. Nine months prior to the partners' separation they moved into a property they rented by the beach. Mr Farrimond argued that their former home had ceased to be the family home for the purposes of the PRA, and as a result was his separate property. The Family Court accepted this argument.¹¹⁶ On appeal, the High Court overturned the decision and said that, notwithstanding the family's relocation, the former home remained the family home within the meaning of the PRA.¹¹⁷ The High Court reasoned that the family had not been living away from the home for a considerable period of time,¹¹⁸ nor had they clearly intended to move away from the home on a permanent basis.¹¹⁹ Had the partners spent longer away from the home, or had they clearly indicated an intention to permanently move away from the property, the house may have ceased to be the family home. As a result the pool of relationship property would have decreased by \$830,500.¹²⁰ It seems odd that such a significant difference can depend on such minor factors.

¹¹³ *S v S* [2012] NZFC 2685 at [89], although the Family Court ordered that there were extraordinary circumstances in this case under section 13 which justified a departure from equal sharing in Mr S's favour.

¹¹⁴ *S v S* [2012] NZFC 2685 at [80]. Mr S's lawyer relied on the case *S v S* (1978) MPC 178 (SC) in which the court said that as the husband had kept several trunks gifted to him by his parents in storage, the trunks remained separate property.

¹¹⁵ *Farrimond v Farrimond* [2017] NZHC 1450.

¹¹⁶ *Farrimond v Farrimond* [2016] NZFC 9599.

¹¹⁷ *Farrimond v Farrimond* [2017] NZHC 1450 at [35].

¹¹⁸ The High Court relied on s 2H of the Property (Relationships) Act 1976 which provides that the use to which property is put is to be determined by the use to which it was being put before the relationship ended. The Court also drew on the decision of *Evers v Evers* [1985] 2 NZLR 209 (CA) in which Richardson J for the Court of Appeal said at 211 that the Court must survey the pattern of use of the particular item up to the time the parties ceased to live together, and this may involve going back some distance in time in order to obtain a fair picture of the use of the property in the period before separation.

¹¹⁹ *Farrimond v Farrimond* [2017] NZHC 1450 at [35].

¹²⁰ It should be noted that if the house had not been considered relationship property, the wife would probably have been entitled to compensation under s 17 of the Property (Relationships) Act 1976 as had previously been ordered by the Family Court: *Farrimond v Farrimond* [2016] NZFC 9599.

- 9.21 It could be said that partners who willingly share their property for family use, rather than keep it separate, are disadvantaged by the family use approach to classification. For example, if one partner owns or inherits a house, and lives in that house with his or her partner, the house will likely become relationship property. But if that house was rented out, and the couple lived elsewhere, that house would remain separate property.

The family use approach and the changing social context

- 9.22 Changing patterns in partnering, family formation, separation and re-partnering mean that relationships in New Zealand have undergone significant change since the PRA's rules of classification were first drafted.¹²¹
- 9.23 In the 1970s the paradigm relationship was one in which children were raised and wealth was accumulated over time. Today people are generally marrying later in life,¹²² and are more likely to separate and re-partner.¹²³ In 1971, just 16 per cent of marriages were remarriages.¹²⁴ Since 1982 however, approximately one third of all marriages in New Zealand have been remarriages.¹²⁵ These statistics do not capture people who enter a de facto relationship after separation. This is likely to be a significant group. One New Zealand study identified that 80 per cent of women who had re-partnered within five years of separation had entered into a de facto relationship rather than remarrying.¹²⁶ That study also found that within two years of separation from a first marriage, 30 per

¹²¹ We discuss these changes in detail in our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017).

¹²² In 2016, the median age at first marriage was 30 for men and 29 for women, compared to 23 for men and 21 for women in 1971, when the marriage rate peaked: Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Statistics New Zealand *Information Release - Marriages, Civil Unions and Divorces: Year ended December 2016* (3 May 2017) at 5.

¹²³ The divorce rate has increased from 7.4 per 1,000 existing marriages in 1976, to 8.7 in 2016: Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Statistics New Zealand "Divorce rate (total population) (Annual-Dec)" (June 2017) <www.stats.govt.nz>.

¹²⁴ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

¹²⁵ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Statistics New Zealand "First Marriages, Remarriages, and Total Marriages (including Civil Unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

¹²⁶ Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 238-239.

cent of women had re-partnered, and that women who separated later in the study period (1950–1995) were increasingly more likely to re-partner.¹²⁷ While this study is now over 20 years old, it indicates that re-partnering has become increasingly common in New Zealand.

- 9.24 These social changes mean that more people are entering new relationships later in life, and are therefore more likely to have already accumulated some property. Situations where one partner brings significantly more property into a relationship (such as a house) might be more common. There may also be a question about the extent to which the fruits of a former relationship should be available for division at the end of a subsequent relationship. If the family use approach is considered unfair in these situations, then the issue is more significant than it was in the 1970s, and is likely to grow in the future (although we note that the rate of home ownership is decreasing).¹²⁸
- 9.25 The family use approach might also raise issues for specific groups of people, in particular stepfamilies and older people.

The impact of the family use approach on stepfamilies

- 9.26 As the rate of re-partnering increases, stepfamilies have become more common. One New Zealand study identified that, in 2011, approximately 9 per cent of children were living in a stepfamily.¹²⁹ Several longitudinal studies suggest that up to 18–20 per cent of all children spend some time in a stepfamily before age 16–17 years.¹³⁰
- 9.27 If one partner brings property into the relationship for the use of the stepfamily, it will normally be divided between the partners on separation. As we discuss in Part I, children’s interests do not

¹²⁷ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Ian Pool, Arunachalam Dharmalingam and Janet Sceats *The New Zealand Family from 1840: A Demographic History* (Auckland University Press, Auckland, 2007) at 238–239.

¹²⁸ In New Zealand the rate of home ownership has decreased from a record high 74 per cent in 1991 to 65 per cent in 2013: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, 2008) at 86 and 96. If this trend continues, fewer couples will have a family home to divide when they separate.

¹²⁹ Megan Gath *Identifying stepfamilies in longitudinal data* (Statistics New Zealand, Working Paper No 16-01, 2016) at 5.

¹³⁰ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017), citing Arunachalam Dharmalingam and others *Patterns of Family Formation and Change in New Zealand* (Ministry of Social Development, 2004) at 72–73; and JM Nicholson, DM Fergusson and LJ Horwood “Effects on later adjustment of living in a stepfamily during childhood and adolescence” (1999) 40 *Journal of Child Psychology and Psychiatry* 405 discussed in Megan Gath *Identifying stepfamilies in longitudinal data* (Statistics New Zealand, Working Paper No 16-01, 2016) at 7.

generally affect the division of property. However some people we have spoken to in our preliminary consultation think it would be fairer if the partner who contributed the property is able to retain it and use it exclusively for his or her own children. It is unfair, they said, that a partner should be deprived of his or her property in order to support the other partner and that partner's children.

Relationships involving older people

9.28 The family use approach might also raise particular issues for older people who re-partner later in life. Older people will generally enter relationships with a greater property base than younger partners, as it will have been built over a longer period of time before the relationship. When an older person re-partners after the death of a former partner, the property he or she holds may represent the fruits of the previous relationship. We have heard anecdotally that some older people unwittingly enter qualifying de facto relationships and later find they are obliged to divide half the equity in their home and other key items of property. This may create particular financial hardship for older people who are close to retirement or are no longer in paid employment and therefore have no sufficient income stream to acquire further property.

Trends in overseas jurisdictions

9.29 The current trend in overseas jurisdictions appears to be a move away from the family use approach and towards the fruits of the relationship approach.¹³¹ For example, British Columbia's Family Law Act 2011 departed entirely from the previous family use approach.¹³² The law now excludes from division all property acquired by a spouse before the relationship began, as well as inheritances and gifts acquired from third parties. Instead, all property acquired after the relationship began is eligible for division.¹³³ The Law Reform Commission of British Columbia had previously recommended the change, observing that there was "widespread agreement" that spouses who bring assets into a marriage should have a greater claim to them than the law

¹³¹ See Chapter 3 for a wider discussion of international approaches to property division.

¹³² The previous legislation defined a "family asset" (the property eligible for division) as property used by a spouse for a "family purpose": Family Relations Act 1996 (BC) (repealed), s 58(2).

¹³³ Family Law Act 2011 (BC), ss 84–85.

provided.¹³⁴ The Government White Paper accompanying the reforms echoed that sentiment.¹³⁵ The White Paper stated that the “most compelling reasons” for the fruits of the relationship approach over the family use approach were:¹³⁶

to make the law simpler, clear, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people’s expectations about what is fair. They “keep what is theirs,” (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship.

- 9.30 Similarly, the Netherlands is in the process of reforming its property division laws. Previously the Netherlands was heralded as one of the few examples of a jurisdiction that maintained a “full community of property”,¹³⁷ meaning that on marriage all property of either partner was subject to division. Draft legislation has recently been approved by both houses of the Dutch legislature that will introduce a limited community of property, under which assets owned before the marriage, or inheritances and gifts, will remain separate property.¹³⁸

The case for retaining the current approach

- 9.31 There are however several arguments for retaining the family use approach in connection with the family home and family chattels:
- (a) First, while the family use approach may be perceived as unfair in some situations, it might still reflect most people’s values and expectations in most cases. As discussed at paragraph 9.9, the PRA treats a relationship as an equal partnership or joint venture to which each partner contributes equally. Core assets that form an integral part of family life, like the family home, should arguably be seen as the property of the

¹³⁴ Law Reform Commission of British Columbia *Report on Property Rights on Marriage Breakdown* (LRC111, March 1990) at 17. The Commission based this assertion on the submissions it had received on its Working Paper, the laws of other Canadian provinces, and what appeared to be the “mainstream approach of the judges in the exercise of discretion with respect to the division of assets brought into marriage.”

¹³⁵ Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislative Office *White Paper on Family Relations Act Reform; Proposals for a new Family Law Act* (July 2010).

¹³⁶ Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislative Office *White Paper on Family Relations Act Reform; Proposals for a new Family Law Act* (July 2010) at 81.

¹³⁷ Jens M Scherpe “Marital Agreements and Private Autonomy in Comparative Perspective” in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* 443 (Hart, London, 2012) at 448.

¹³⁸ “Dutch married couples may no longer share ‘All my worldly goods’” (17 February 2017) DutchNews.nl <www.dutchnews.nl>; and “Community of property” (2017) De Boorder Schoots <www.deboorderschoots.nl/en>.

partnership. The contribution of pre-acquired property to the relationship partnership could be seen as simply one among many different but ultimately equal contributions the partners make to the relationship. It may be that in most cases the partners treat core family assets that are used for family purposes as their joint property in any event, in accordance with their commitment to a joint life together.¹³⁹ The family use approach may therefore be better at implementing the policy and principles of the PRA than a strict fruits of the relationship approach.

- (b) Second, division of the family home and family chattels has long been a hallmark of New Zealand's property division law.¹⁴⁰ The equal division of core family assets, regardless of how or when they were acquired, may therefore be established in the public mind. There is also a developed body of case law and understanding regarding the current rules of classification.
- (c) Third, the family use approach may be better at serving children's interests. There are several provisions under the PRA which allow the court to make orders which grant relationship property, or the use of relationship property, to meet the interests of children of the relationship. Section 26, for example, provides that the court can set aside relationship property for the benefit of the children. Section 27 allows the court to grant occupation of the family home, or other premises

¹³⁹ Bill Atkin goes further, arguing that more is needed for the Property (Relationships) Act 1976 (PRA) to reflect the nature of relationships as a partnership: Bill Atkin "Classifying Relationship Property: A Radical Re-shaping" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Atkin argues that if the principles underpinning the PRA are to be taken seriously, it should be reformed so that all the partners' property would be relationship property and each partner would be entitled to an equal share of the combined pool. Certain assets could be excluded if the relevant partner persuaded the court that the item had nothing to do with the life of the relationship or family. An advantage to this approach is that it may simplify the PRA's complex rules of classification and division. The disadvantage with this option is that it is a radical departure from the current rules. An "all assets" approach may not reflect the values and expectations of most New Zealanders.

¹⁴⁰ Fisher suggests that the special status attributable to the family home is historical, that is, it was the battleground on which women's property rights were first developed: see Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Fisher explains that the early reforms that gave women proprietary interests in their husband's property centred on the family home. The Matrimonial Proceedings Act 1963, for example, gave the court powers to make orders granting rights to a spouse to occupy the family home following divorce, regardless of which spouse held title to the property (s 57). That Act also gave the court power to make orders directing the sale of the home and dividing the proceeds between the spouses if each spouse had made a "substantial contribution" to the home, whether "in the form of money payments, or services, or prudent management, or otherwise" (s 58). Similarly, the Joint Family Homes Act 1964 initially allowed a spouse to settle a home in the joint names of both parties to the marriage. The drafters of the Matrimonial Property Bill 1975 described the family home as being "in a category of its own": AM Finlay "Matrimonial Property - Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 9.

that are relationship property, to a partner for a certain period. The family use approach focuses on key assets that are important to the children, such as the family home, pets, furniture and other household items.

In some cases, this might mean a larger relationship property pool available for division, which can also indirectly benefit children. The family use approach therefore ensures that the orders the court can make for children's interests are targeted at the appropriate property. While sections 26 and 27 could, under a fruits of the relationship approach, be extended to separate property in order to address these concerns, the courts may be less willing to make orders that have the effect of restricting one partner's enjoyment of his or her separate property for any considerable length of time.

- (d) Fourth, classification based solely on the fruits of the relationship approach presents a number of practical problems. It is more complex to assess what property the partners entered the relationship with. In the case of a lengthy relationship, it may be impractical to do so. It is unrealistic to expect partners to have kept clear records about the origins of their property. The assets may also have become so intermingled with other property it is impossible to discern what property is pre-relationship property and what property is the fruit of the relationship. In contrast, the default inclusion of the family home and family chattels is a bright-line rule.¹⁴¹ Because the rules are clear, it is easier for vulnerable partners to prove their relationship property entitlements.
- (e) Fifth, any reform to the PRA's rules of classification would inevitably introduce some uncertainty, at least for a short period. Other significant amendments would probably be needed to other parts of the PRA, including sections that deal with the classification of increases in the value of separate property (section 9A), the provisions concerning situations where no family home exists (sections 11A and 11B), the homestead provisions (sections 12 and 12A), and adjustments in

¹⁴¹ Although the question of whether a chattel is a "household" chattel may be open to interpretation in some circumstances.

the case of two family homes (section 16). The fruits of the relationship approach raises complex issues about the treatment of debts such as mortgages. For example it might not be appropriate to treat a pre-existing mortgage as a personal debt when that property is used as the family home. Careful thought would also be needed as to how a partner's protected interest in the family home under section 20B would apply.¹⁴²

- 9.32 In light of these arguments, we think that a credible case can be made for retaining the PRA's current definition of relationship property, which is based on both a family use approach and a fruits of the relationship approach. While our initial research has identified criticism of the family use approach, we do not know how widespread that criticism is.

Options for Reform

- 9.33 In light of the criticisms of the family use approach to the classification of relationship property, we consider two options for reform.

Option 1: Move to a pure fruits of the relationship approach

- 9.34 The PRA could be reformed so that relationship property is defined solely by the fruits of the relationship approach. That would mean, in general terms, the value of property a partner brings into the relationship, and the value of any property a party inherits or receives as a gift from a third party, will remain as separate property. This could apply even if the property is subsequently used as the family home and family chattels, or if the property has been placed in the joint ownership of the partners. Consequently, when the partners separate, they would divide whatever property had been acquired during the relationship.
- 9.35 Plainly, this approach would be a significant departure from the PRA's current provisions. A number of other amendments

¹⁴² The main purpose of the protected interest is to safeguard a partner's relationship property against the unsecured creditors of the other partner in respect to his or her personal debts: Property (Relationships) Act 1976, s 20B(2). The approach currently is to give a partner priority interest in the family home. We examine the protected interest provisions in Part K and discuss whether they ought to remain. Assuming they do remain, and if the family home ceases to be classified in all cases as relationship property, the protected interest will need to attach to other property.

to the PRA would be required, some of which we mentioned at paragraph 9.31 above. For example, when an asset that has been purchased from both separate property funds and relationship property funds, how is any increase in the value of that asset to be treated? We consider this question further below in our analysis of section 9A.

- 9.36 Another question is whether the PRA should impose an onus of proof on a partner who contends for a certain classification. For example, if a partner argues that an asset, or part of the value of an asset, is separate property, he or she must bear the responsibility for demonstrating that the property was acquired before the relationship or from an external source.¹⁴³

Option 2: Adopt different approaches depending on the length of the relationship

- 9.37 Another possible option for reform is to apply different definitions of relationship property to relationships of different lengths. The PRA could be reformed so that the relationship property of relationships that endured for a certain length of time could be determined on both a family use and fruits of the relationship approach. If the relationship has not endured for the requisite period, the partners' property could be classified solely on a fruits of the relationship approach. The special rules in the PRA that apply to relationships of short duration could also be reformed by incorporating them into this framework. We examine how this approach might apply to relationships of short duration in Part E.
- 9.38 The advantage of the family use approach is the certainty it provides through its bright-line rules. However the shorter the relationship, the simpler it will be to trace the separate property a partner brings to the relationship. It is also more likely that the fruits of the relationship approach is considered fairer in shorter relationships. Basing the applicable definition of relationship property on the length of the relationship could lead to a just division of property which is better tailored to the circumstances of the case.¹⁴⁴
- 9.39 There may however be disadvantages:

¹⁴³ A similar approach is taken in British Columbia, Family Law Act 2011 (BC), s 85(2).

¹⁴⁴ The Property (Relationships) Act 1976 already provides that in cases of relationships of short duration, it is more appropriate for partners to recover separate property contributions when those contributions have been unequal: see ss 14-14A.

- (a) First, it may be challenging to identify when the length of a relationship has crossed the relevant point in time, especially for de facto relationships or marriages and civil unions that were preceded by de facto relationships. This uncertainty may lead to more disputes. Nevertheless, this task is not impossible; the length of de facto relationships is routinely assessed in PRA matters.¹⁴⁵
- (b) Second, this option requires prescribing a relationship length, according to which different relationships would be subject to different rules. There will be a degree of arbitrariness to this. There is little research in New Zealand into relationships, particularly de facto relationships, which makes this task difficult. Careful thought would need to be given to what time frames would be most appropriate for the majority of couples.
- (c) Third, having multiple definitions of relationship property may create uncertainty and potentially confusion.

¹⁴⁵ The difficulties in establishing when a de facto relationship commences are discussed in Part E.

CONSULTATION QUESTIONS

- C6 Do you think the current classification of relationship property on the basis of family use is still appropriate?
- C7 Do you prefer any of the options for reform? If you prefer option 2, what length of relationship should justify different rules?

Chapter 10 – When separate property becomes relationship property

10.1 A partner's separate property may not always be kept truly separate from the relationship. The partners might use separate property for family purposes, like the family home. It might be combined with relationship property. For example, the partners may use savings acquired before the relationship to buy property together. One partner may make contributions, either directly or indirectly, to the other's separate property. The separate property may increase in value, or it may produce income which is then used for family purposes. These scenarios reflect just some of the many different ways partners can organise their property for their joint life together.

10.2 In this chapter we address the important issue of when a partner's separate property should no longer be considered separate. The PRA currently provides that separate property may become relationship property in a number of scenarios. In this section we focus on two particular provisions, section 9A and section 10(2), which apply in the following scenarios:¹⁴⁶

- (a) where relationship property has been applied to separate property, increasing the value of the separate property, or producing income or gains from the property (section 9A(1));
- (b) where the actions of the non-owning partner have directly or indirectly resulted in an increase in the value of separate property, or income or gains from the property (section 9A(2));
- (c) where the income or gains from separate property are used to improve or acquire relationship property (section 9A(3)); and

¹⁴⁶ Other sections of the Property (Relationships) Act 1976 provide that separate property becomes relationship property where the court considers it just to treat property acquired after a relationship ends as relationship property: s 9(4); and where the property a partner acquires as a gift or inheritance from a third party is used as the family home or as a family chattel: s 10(4).

- (d) where property received from a third party by way of succession, survivorship, as a beneficiary under a trust or by gift has been so intermingled with relationship property that it is unreasonable or impracticable to regard that property as separate property (section 10(2)).

Increasing the value of separate property

- 10.3 Sections 9A(1) and 9A(2) apply when one partner contributes to the other partner's separate property, and this results in an increase in the value of the separate property.¹⁴⁷ That increase in value is relationship property. It is treated as an independent item of property which is notionally severed from the underlying separate property.¹⁴⁸
- 10.4 Section 9A(1) applies where there has been an intermingling of relationship property and separate property. For example, in *Mead v Graham-Mead* the partners built a new milking shed on a farm which was Mr Mead's separate property.¹⁴⁹ The shed had been funded by money from the relationship bank account, and therefore section 9A(1) applied.¹⁵⁰ Under section 9A(1), if the increase in the separate property's value is due, wholly or in part, to the application of the relationship property, then the full increase in value is relationship property.
- 10.5 Section 9A(2) applies when the actions of the non-owning partner have directly or indirectly increased the value of the separate property. In the leading case of *Rose v Rose*, Mrs Rose had cared for the children and earned a significant portion of the household

¹⁴⁷ Section 9A of the Property (Relationships) Act 1976 also applies to any income or gains from separate property, and our discussion of section 9A in this chapter applies equally to income and gains.

¹⁴⁸ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [25]. Section 9A was inserted into the Property (Relationships) Act 1976 in 2001 and replaced what was s 9(3). The former s 9(3) had a similar purpose but did not allow for indirect contributions of the non-owning partner. The 2001 changes appear to have been aimed at that omission. However, s 9A includes changes beyond this, including the creation of separate tests for income or gains attributable to the actions of the other spouse, and income or gains attributable to the application of relationship property. The changes also removed a section which allowed for unequal division of non-domestic relationship property assets where one partner's contribution had been clearly greater than the other, which has influenced how the section has been applied subsequently: Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1.

¹⁴⁹ *Mead v Graham-Mead* [2015] NZHC 825.

¹⁵⁰ *Mead v Graham-Mead* [2015] NZHC 825 at [50]. The issue between the parties was the date from which the increase in value to the farm should be taken. The High Court preferred the earlier date on the basis that at that time the partners had borrowed funds which were then invested in the farming business: at [54].

income.¹⁵¹ She argued that these contributions freed up Mr Rose to work in his farming business, including developing a section of land that was his separate property. Mrs Rose's contributions also provided Mr Rose with income that, had it not been available, would probably have caused Mr Rose to sell his land to reduce his indebtedness. Mr Rose also funded the development of his separate property by increasing the relationship debt. On the basis of these indirect contributions, the Supreme Court granted Mrs Rose's claim under section 9A(2).¹⁵²

- 10.6 Like section 9A(1), when a partner's actions have increased the value of the other partner's separate property, section 9A(2) provides that the entire increase in value is treated as relationship property.¹⁵³ There is however a major difference in how the two provisions divide the increase in value. Under section 9A(1), the increase in value will be shared equally between the partners. Under section 9A(2), each partner's share will be determined in accordance with the contribution of each partner to the increase in value. This rule has typically led to uneven divisions that favour the owning spouse. In *Rose v Rose* the Supreme Court observed that, where a portion of the increase in value was caused by inflation or a general rise in the value of a certain kind of property, "the ownership of the separate property from which these increases in value sprang should be treated under s 9A(2)(b) as a contribution made by the owner spouse."¹⁵⁴ That contribution should then be evaluated, together with other contributions to the increase in value made by the owner spouse, and weighed against the contributions of the non-owner spouse.¹⁵⁵ In that case

¹⁵¹ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

¹⁵² *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]–[51]. We note however that Mrs Rose's indirect contributions to the increase in value of the separate property, both her financial and non-financial contributions to the relationship, might not of themselves have resulted in a significant share of the increased value. At [50] the Court noted that on these factors alone "the balance [of contributions] would appear to be substantially in favour of the husband." There was however an "unusual and very important feature", being that Mr Rose had funded the development of his separate property by increasing the partnership's indebtedness and, in doing so, increasing the relationship debt. The other "very significant finding" related to the fact that, had it not been for Mrs Rose's financial contribution, it is likely that the separate property would not have been retained. At [51] the Court said that "[w]hen these features are brought into account the wife's case for a share of the increase is greatly strengthened."

¹⁵³ Property (Relationships) Act 1976, s 9A(2)(a).

¹⁵⁴ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]. The Supreme Court noted another approach would be to set aside external factors that resulted in an increase in the value of separate property, determine the relativity of the other contributions of each spouse and then divide the total increase in value on that ratio. However in respect of that approach the Court said:

In many, perhaps most, instances that would not, however, give adequate recognition to the fact that the property was, and remains, separate property (only the increase being relationship property) and that, if it had not been brought into the marriage or acquired during the marriage as separate property, there would have been no asset to produce the inflationary or general gain.

¹⁵⁵ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]. The courts have not tended to separate out the portion of an increase in value that was due to market inflation, instead factoring it into the overall decision as to how to divide the

Mrs Rose’s indirect contributions were considered less than Mr Rose’s direct contributions.¹⁵⁶ Consequently, the increase in value was divided 60:40 between Mr Rose (who owned the separate property) and Mrs Rose.¹⁵⁷ In other cases there have been splits of 75:25¹⁵⁸ and 80:20¹⁵⁹ between the owner and non-owner partner.

- 10.7 Both sections 9A(1) and 9A(2) require a partner to show that his or her actions or the application of relationship property caused the separate property to increase in value. Frequently, claims under section 9A fail on the basis that any increase in the value of the property was caused by something else, such as inflation or market growth. In those cases, the non-owning partner would not share in the increase in value of the separate property, even if he or she worked extensively on the property or contributed relationship property towards it.
- 10.8 The differences in the section 9A(1) and 9A(2) tests are summarised in the table below:

The different tests in sections 9A(1) and 9A(2) of the PRA

Section 9A(1)	Section 9A(2)
Applies to increases in the value of separate property attributable to the application of relationship property .	Applies to increases in the value of separate property attributable to the actions of the non-owner partner .
Requires direct causation between the application of relationship property and the increase in the separate property’s value.	Requires either a direct or indirect causation between the non-owning partner’s actions and the increase in the separate property’s value.
Classifies the entire increase in value as relationship property and divides it equally between the partners .	Classifies the entire increase in value as relationship property but divides it accordance with each partner’s contribution to the increase in value .

increase. See also *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [112]–[114].

¹⁵⁶ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [47]–[51].

¹⁵⁷ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [51].

¹⁵⁸ *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534.

¹⁵⁹ *T v W* FC Papakura FAM-2009-055-432, 22 September 2011.

Overlap with section 17 and section 15A

10.9 There is some common ground between section 9A, section 17 and section 15A of the PRA. Section 17 compensates a partner where his or her actions or the application of relationship property has sustained the separate property of the other partner. Applications under section 9A and section 17 will therefore often be made together. There are, however, two important differences between the sections. First, under section 17 a partner needs to show that the separate property was sustained, not that it increased in value.¹⁶⁰ This means that in many cases where a section 9A claim fails, a section 17 claim may succeed. Second, section 9A treats the increase in value as a type of relationship property in its own right. In contrast, section 17 allows the court to either increase the non-owner partner's share of relationship property, or order the owner partner to pay money to the other partner as compensation. No new property arises.

10.10 Section 15A compensates a partner for the increase in value of the other partner's separate property, when:

- (a) after the relationship the owner partner's income and living standards are likely to be significantly higher than the other partner's, as a result of the division of functions within the relationship; and
- (b) the owner partner acted to increase the value of his or her separate property during the relationship.

10.11 When section 15A applies the court can order the owner partner to pay money or transfer property to the other party.¹⁶¹ This section deals with the situation where one partner was "freed up" to work during the relationship, and largely spent that time improving the value of his or her separate property, therefore creating an inequality at the end of the relationship.

¹⁶⁰ In *A v R* [2007] 2 NZLR 399 (HC) the High Court, citing *French v French* [1988] 1 NZLR 62 (CA) per Cooke P at 65, said at [119]: "Whereas s 9A(1) requires an *increase* in the value of the separate property to be established, s 17 only requires it to be established that the application of the relationship property has *preserved* the value of the separate property and allowed inflation to work" (emphasis in original).

¹⁶¹ This can come from relationship property or separate property: Property (Relationships) Act 1976, s 15A(3).

Does section 15A have a meaningful role?

- 10.12 Cases involving section 15A are rare. We have not identified any cases where an application under section 15A was successful.¹⁶² The courts have always rejected the claim, usually because the applicant has failed to show that the disparity in income and living standards between the partners was linked to the division of functions in the relationship,¹⁶³ or because the applicant failed to show any increase in the value of the other partner's separate property.¹⁶⁴
- 10.13 It seems to us that in most cases where section 15A would apply, section 9A(2) would also apply, as the partners' division of functions will have enabled one partner to devote himself or herself to labour or expenditure which increases the value of his or her separate property. This is precisely the scenario in *Rose v Rose*, discussed at paragraphs 10.5–10.6 above.¹⁶⁵
- 10.14 An application under section 9A is also likely to be simpler than an application under section 15A, as the applicant does not need to show a future disparity in income and living standards as required by section 15A(1)(a).
- 10.15 For these reasons, our preliminary view is that section 15A should be repealed.

CONSULTATION QUESTION

C8 Does section 15A perform a meaningful role? Should it be repealed?

Issues with sections 9A(1) and 9A(2)

- 10.16 The different tests in sections 9A(1) and 9A(2) raise several issues. These issues arise because of the inconsistent approach within section 9A, and between section 9A and the wider PRA framework.

¹⁶² Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR15A.04].

¹⁶³ *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC); *N v L* FC Gore FAM-2004-017-21, 18 August 2006; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011.

¹⁶⁴ *Beran v Beran* [2004] NZFLR 127 (FC); *A v F* FC Manukau FAM-2006-092-2394, 23 December 2009; and *J v D* FC North Shore FAM-2008-044-833, 13 May 2011.

¹⁶⁵ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

Are the different tests in sections 9A(1) and 9A(2) justified?

10.17 As noted above, there are significant differences between sections 9A(1) and 9A(2). Briggs and Peart argue that the distinction between monetary (section 9A(1)) and non-monetary (section 9A(2)) contributions contravenes the principle that all forms of contribution to the relationship are treated as equal.¹⁶⁶ They observe that section 18(2) gives explicit effect to that principle by stating that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. Yet section 9A makes exactly that distinction.¹⁶⁷ They say the distinction is without rationale and could produce bizarre results.¹⁶⁸ The High Court has also observed that including indirect contributions under section 9A(2) but not section 9A(1) is a “perplexing” distinction.¹⁶⁹

10.18 However Chief Justice Elias has suggested that the concern may be overstated. This is because sections 9A(1) and 9A(2) are aimed at different circumstances.¹⁷⁰ She explains that section 9A(1) treats the application of relationship property to separate property as a form of intermingling, similar to that provided for in section 10.¹⁷¹ Section 9A(2) on the other hand is a legislative tool designed to recognise indirect contributions to separate property; something the PRA failed to recognise before section 9A(2) was introduced.¹⁷²

10.19 If the different tests in sections 9A(1) and 9A(2) are not justified, the natural next step is to ask which test should be preferred, if

¹⁶⁶ Margaret Briggs and Nicola Peart “Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum” (2010) 24 NZULR 1 at 18. For a discussion of the principles of the PRA see Chapter 3 of this Issues Paper.

¹⁶⁷ Margaret Briggs and Nicola Peart “Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum” (2010) 24 NZULR 1 at 18.

¹⁶⁸ For example, a small amount of relationship property applied to separate property would entitle the non-owning partner to share equally in the consequential increase in value, whereas substantial actions by the non-owning partner are unlikely to result in equal sharing of the increase in value: Margaret Briggs and Nicola Peart “Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum” (2010) 24 NZULR 1 at 18.

¹⁶⁹ *Hyde v Hyde* [2011] NZFLR 35 (HC) at [33].

¹⁷⁰ Sian Elias “Separate Property – *Rose v Rose*” (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 7–8.

¹⁷¹ Sian Elias “Separate Property – *Rose v Rose*” (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 7–8.

¹⁷² Sian Elias “Separate Property – *Rose v Rose*” (paper presented to the Family Court Conference, Wellington, 5 August 2011) at 8. Elias does, however, recognise that the division of the increases pursuant to s 9A(2)(b) is a different concept to that applied to the Property (Relationships) Act 1976 as a whole: at 8.

either should. Both tests present their own issues, as we discuss below.

Is section 9A(1) inconsistent with the concept of separate property?

- 10.20 Under section 9A(1), where there has been an increase in value due to the application of relationship property, the whole of the increase in value is shared equally between the partners. It does not matter whether or not the application of relationship property was the *sole* cause of the increase in value. Briggs and Peart say this approach undermines the concept of separate property, because it allows the non-owning partner to share in any increase in value that is caused by inflation and the owner’s own actions.¹⁷³
- 10.21 There have been cases where the application of relationship property made only a small contribution to the increase in value of separate property, but because of section 9A(1) the non-owning partner could access an equal share in the much larger, overall increase in value. A typical example is where relationship property is used for improvements to land, such as landscaping or the introduction of an irrigation system, but the dominant reason for the increase in the land’s value is market growth.¹⁷⁴ The courts have in some cases avoided unjust results by excluding contributions that have had minimal impact on the increase in value.¹⁷⁵ The result is that the courts take an “all or nothing” approach.

Is section 9A(2) inconsistent with the wider framework of the PRA?

- 10.22 When separate property has increased in value due to the actions of the non-owning partner, the increase in value is shared in accordance with the contribution of each partner to that increase. This method of dividing property is not found anywhere else in the PRA. Rather, the PRA’s general rule is that each partner is entitled to an *equal* share of relationship property. The entitlement is based on the principle of the PRA that all

¹⁷³ Margaret Briggs and Nicola Peart “Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum” (2010) 24 NZULR 1 at 15–16.

¹⁷⁴ These were the facts in *J v K* [2013] NZFC 823.

¹⁷⁵ This was the reason given for not making an award in *V v V* [2007] NZFLR 350 (FC), where an increase in value attributable to the input of work and relationship property was estimated to be worth \$10,000 of a \$1.3 million increase.

forms of contribution to the relationship are treated as equal. The few exceptions to this general rule require the court to divide relationship property in accordance with the contribution of each partner *to the relationship* rather than to the property.¹⁷⁶

- 10.23 When Parliament introduced the PRA's general rule of equal sharing, it made a deliberate decision to move away from a contributions-based approach. The previous test under the Matrimonial Property Act 1963 required the court to divide partners' property pursuant to the specific contributions each had made to the property. As we discussed in Chapter 2, this approach was later regarded as fundamentally flawed. It required the applicant to prove specific contributions and have them quantified by the court, which was often impossible in practice and involved a considerable measure of uncertainty in every case.¹⁷⁷ Invariably, disproportionate weight was given to monetary contributions, usually made by the husband.¹⁷⁸ In criticising the courts' approach under the former legislation, Woodhouse J in *Reid v Reid*, called this the "hypnotic influence of money."¹⁷⁹
- 10.24 Arguably, the approach taken under the current section 9A(2)(b) resembles a similar downplaying of indirect and non-monetary contributions that the PRA was designed to avoid. As discussed at paragraph 10.6, the courts have tended to place a higher value on the direct work done by an owning partner than the indirect work done by the non-owning partner.¹⁸⁰
- 10.25 There are also practical issues in applying the test in section 9A(2)(b). The provision gives no guidance as to how contributions are to be weighted, and the courts have said that determining how the property is to be divided in accordance with contributions "may be little better than a matter of general impression."¹⁸¹

¹⁷⁶ The Property (Relationships) Act 1976, s 13 (exceptional circumstances), discussed in Part D; ss 14–14A (relationships of short duration), discussed in Part E; and s 85 (short term relationships ending on death), discussed in Part M. The only other occasion where a contributions-based method applies is where there are multiple claims regarding two different qualifying relationships under ss 52A–52B. That test is unique as it requires the court to allocate property amongst the two relationships in accordance with the contribution of each relationship (rather than each partner) to the acquisition of the property.

¹⁷⁷ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5.

¹⁷⁸ *Reid v Reid* [1979] 1 NZLR 572 (CA) at 581 per Woodhouse J.

¹⁷⁹ *Reid v Reid* [1979] 1 NZLR 572 (CA) at 581 per Woodhouse J.

¹⁸⁰ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [51].

¹⁸¹ *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [114].

Do the causal requirements in section 9A lead to unfair outcomes?

- 10.26 The final issue with sections 9A(1) and 9A(2) is that both require a causal link between the work done or investment made and the increase in value of the separate property. This may lead to unfair outcomes. A classic example is the case of a farm. One partner may have inherited the farm or purchased it before the relationship began, therefore making it separate property. The other partner could do significant farming work over many years during the relationship, performing materially similar work as the owning partner. This might result in no material changes to the farm, but nevertheless the farm may significantly increase in value due to other factors. At the end of the relationship, due to a lack of any causal connection, the non-owning partner may receive nothing under section 9A(2) for the work he or she has done while the owning partner receives the full benefit of the increased value.¹⁸²
- 10.27 The causal requirement might also lead to unfair outcomes when relationship property is used to pay off debt in separate property, such as a mortgage. Section 9A(1) will not normally apply to the payment of debts, because it has not caused the property to increase in value – it only reduces or discharges the indebtedness secured over the property.¹⁸³ This means very different results under section 9A(1), depending on how the relationship property is used. For example, if one partner separately owned a rental property, and relationship property (such as either of the partners' incomes)¹⁸⁴ was used to make improvements to the rental property, the increased value would be shared under section 9A(1). If however relationship property was instead used to meet the mortgage repayments on the rental, section 9A would not apply.

¹⁸² This scenario is in essence what occurred in *V v V* [2007] NZFLR 350 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *B v A* (2005) 25 FRNZ 778 (FC); and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

¹⁸³ *M v G* [2012] NZHC 1798 at [64]. However s 9A(1) may apply if the debt was incurred in order to improve the separate property (rather than to purchase the property), and that debt was paid off with relationship property: *L v L* [2012] NZFC 2545. In that case one partner borrowed money to pay for developments to a farm that was his separate property. Those developments increased the farm's value. The partners used relationship property to meet the loan repayments, and that was an application of relationship property that brought about the increase in value of separate property [69]. Therefore the court said that the increased value of the separate property was relationship property under s 9A(1) of the Property (Relationships) Act 1976.

¹⁸⁴ Income earned by either partner is generally classified as relationship property under s 8(1)(e).

10.28 Section 17, discussed at paragraph 10.9 above, might provide a partial answer to these issues. Where the partner's actions cannot be attributed to the increase in the property's value, the courts have sometimes found that the partner has "sustained" the property and therefore can receive compensation.¹⁸⁵ Section 20E might also apply when relationship property has been used to pay debt in separate property.¹⁸⁶ However compensation under section 17 or section 20E may not result in an award of the same size as if the increase in value was classified as relationship property under section 9A(2). This is because these sections focus on compensating the non-owning partner only for the amount of relationship property spent on the separate property or personal debts. However in some cases, awards of up to 25 per cent of the increase in value of the separate property have been made under section 17 as compensation.¹⁸⁷

Options for reform

10.29 We have considered three possible options for reforming sections 9A(1) and 9A(2). These options address the issues discussed above by removing some of the inconsistencies between the different components of section 9A and between section 9A and the wider PRA.

Option 1: Adopt a single contributions-based test

10.30 Option 1 is to replace sections 9A(1) and 9A(2) with a single test, under which increases in the value of separate property are shared between the partners on the basis of the contributions each partner made to the relationship. Briggs and Peart propose the following wording for consideration:¹⁸⁸

(1) *If any increase in the value of separate property, or any income or gains derived from separate property, were*

¹⁸⁵ Section 17 awards were made in these circumstances in *V v V* [2007] NZFLR 350 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *B v A* (2005) 25 FRNZ 778 (FC); and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

¹⁸⁶ Under s 20E the court may make an order increasing proportionately the share to which the non-owning partner would otherwise be entitled in the relationship property, an order that some of the owning partner's separate property is relationship property for the purposes of division, or an order that the owning partner pays money as compensation to the non-owning partner: Property (Relationships) Act 1976, s 20E(1).

¹⁸⁷ *Hodgkinson v Hodgkinson* [2003] NZFLR 780 (FC); *O v O* FC Hamilton FAM-2001-019-1355, 4 May 2006; and *W v W* FC Wellington FAM-2008-032-461, 6 July 2009.

¹⁸⁸ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

attributable wholly or in part, directly or indirectly, to the application of relationship property or the contributions of the non-owning spouse or partner, then the increase in value or (as the case requires) the income or gains are relationship property.

- (2) *In every case to which subsection (1) applies, sections 11(1), 11A, 11B and 12 do not apply and the share of each spouse or partner in the increase in value that has become relationship property is to be determined in accordance with the contribution of each spouse or partner to the relationship.*

10.31 Under this test, the application of relationship property and a non-owning partner's actions are treated alike, reflecting the principle of the PRA that all forms of contributions should be treated as equal.¹⁸⁹ Increases in value caused by external factors such as inflation may be captured, but the second part of the test ensures that the property is divided in accordance with the partners' contributions.¹⁹⁰ The test is also more consistent with the wider PRA framework as it focuses on contributions to the *relationship* and not contributions to the *property*.¹⁹¹

10.32 However, this test does not resolve the inconsistency with the principle that all contributions to the relationship are to be treated as equal. This inconsistency is inherent in a contributions-based assessment, and is put in even starker relief if the court has to assess contributions to the relationship rather than to the specific item of separate property.¹⁹² While a similar approach is used elsewhere in the PRA, this is only where there are exceptional circumstances which make equal sharing repugnant to justice (section 13), or where the partners were in a relationship that does not qualify for the PRA's general rule of equal sharing because it was shorter than three years (sections 14–14A). We have doubts as to whether increases in value of separate property that are the result of the application of relationship property or the contributions of the non-owning partner should be treated in the same way.

¹⁸⁹ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

¹⁹⁰ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 19.

¹⁹¹ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

¹⁹² The contributions-based approach is already used in s 13 (exceptional circumstances), discussed in Part D, and ss 14, 14AA and 14A (relationships of short duration), discussed in Part E.

10.33 Neither does this test address the practical issues that arise when the court is required to divide property in accordance with contributions, discussed at paragraph 10.25 above.

Option 2: Adopt a single causation-based test

10.34 The other option Briggs and Peart present is to adopt a narrow causative approach:¹⁹³

- (1) *If any increase in the value of separate property, or any income or gains derived from separate property, were attributable directly or indirectly to the application of relationship property or the contributions of the non-owning spouse or partner, then that part of the increase in value or (as the case requires) the income or gains are relationship property.*

10.35 Alternatively, this test could be broadened so that it also captures the contributions of the *owning* partner to the increase in value, effectively treating all increases other than those caused by external factors such as inflation as relationship property. This alternative is favoured by Fisher, who suggests that gains on separate property during the course of the relationship that are attributable to the joint and several efforts of the partners should be considered relationship property.¹⁹⁴

10.36 Like option 1, this test removes distinctions between the current sections 9A(1) and 9A(2). Because it provides for equal sharing, it is arguably more consistent with the PRA's principle that all forms of contribution to the relationship are treated as equal. By only allowing increases in value to be shared equally if the increase is *attributable* to the application of relationship property or the contributions of the one or both of the partners, it excludes external causative factors like inflation.¹⁹⁵ The main disadvantage is that the task of apportioning the correct value to the respective separate property and relationship property components of the increase in value will be complex and is also likely to be imprecise. To achieve accuracy, the partners will probably require

¹⁹³ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

¹⁹⁴ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁹⁵ Margaret Briggs and Nicola Peart "Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: A Conceptual Conundrum" (2010) 24 NZULR 1 at 20.

considerable expert assistance, which will increase the costs and length of resolving relationship property matters.

Option 3: Treat all increases in value of separate property as relationship property

- 10.37 This option proposes more significant reform, by expanding the extent to which a non-owning partner can access the increase in value or income or gains from separate property.
- 10.38 Under this option the PRA would classify all increases in the value of separate property, or income or gains derived from separate property during the relationship as relationship property. No causative element would be needed. This option would probably mean repealing sections 9A(1) and 9A(2) and introducing a new category of relationship property under section 8.
- 10.39 The basis for doing so is that it is simply an extension of the rule under section 8(1)(e) that all property acquired after the relationship began is relationship property. There would be no distinction as to whether the property acquired during the relationship was derived from separate property or any other source. The Supreme Court accepted in *Rose v Rose* that, except in the case of a purely passive investment, it is likely that conduct of the non-owning partner will have had some direct or indirect influence on the value of separate property.¹⁹⁶ The Court explained that invariably, one partner's actions will have allowed the owning-partner to devote labour or expenditure to the separate property. Alternatively, the non-owning partner may have provided financial support by paying for household expenditure and thereby enabling the owner of the separate property to pay for work which increases the value of the separate property.¹⁹⁷ If that is the case, it may be sensible to reverse the position of section 9A and deem that all increases in, or gains from, separate property are relationship property. An exception could be retained for cases where the increases in the value of separate property truly have no connection with the relationship.
- 10.40 This option would also be simpler than options 1 or 2. There would be no need to undertake the complex process of apportioning the increased value of the property to the different

¹⁹⁶ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

¹⁹⁷ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [44].

contributions of the partners or the application of relationship property.

- 10.41 The main criticism of this option is likely to be that it undermines the concept of separate property as it would give no credit to a partner who contributed the separate property in the first place. It might also increase valuation costs and the risk of valuation disputes, as the partners would need to determine the extent to which any separate property increased in value during the relationship.

CONSULTATION QUESTION

C9 Is section 9A in need of reform? If so, what is the preferable option for reform? Are there any other potential options we have not considered?

Applying separate property to relationship property

- 10.42 Section 9A(3) applies where the partners have used separate property for the acquisition or improvement of relationship property. It provides that any separate property¹⁹⁸ is relationship property if it is used:
- (a) with the express or implied consent of the owning partner; and
 - (b) for the acquisition or improvement of relationship property, or to increase the value of relationship property or the amount of any partner's interest in any relationship property.

Does section 9A(3) have a meaningful role?

- 10.43 Section 9A(3) is of narrow application and is not widely used. This is because other provisions of the PRA will usually classify the property as relationship property without relying on section 9A(3). When separate property is used to acquire or improve relationship property it will generally be converted into that

¹⁹⁸ Including any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property: Property (Relationships) Act 1976, s 9A(3).

relationship property.¹⁹⁹ For example, if an item of separate property is sold and the money is used to make improvements on the family home, that money will simply become part of the family home, which is relationship property. Also, section 9A(3) is subject to section 10, which means the specific rules applying to property acquired by gift, succession or under a trust will apply to that type of property.

- 10.44 Since section 9A(3) was amended in 2001, there have been several cases where the courts have said that section 9A(3) applied. However those courts also found the property to be relationship property for other reasons.²⁰⁰
- 10.45 Some commentators suggest that section 9A(3) resolves conflicts between some of the definitions of relationship property and some of the definitions of separate property.²⁰¹ For example, section 9A(3) ensures that when the family home is purchased from the proceeds of separate property, the family home is still treated as relationship property despite section 9A(2) stating that all property acquired out of separate property is separate property. There may be a simpler way to approach this, for example by amending sections 8 and 9 to clarify where the provisions defining relationship property take precedence over provisions defining separate property, and vice versa.

CONSULTATION QUESTION

C10 Do you think that section 9A(3) has a meaningful role? Should it be repealed?

Does the policy of section 9A(3) lead to unfair outcomes?

- 10.46 Section 9A(3) is based on the presumption that when one partner uses their separate property to acquire or improve relationship property, it is fair to treat the separate property as relationship property from that point on. That might not seem fair in some scenarios, because it gives no credit to the partner providing the separate property. For example, if one partner used his or her

¹⁹⁹ In *Hyde v Hyde* [2011] NZFLR 35 (HC) at [39] Ellis J observed that “where separate property is applied to enhance relationship property, the operation of some other provision of the Act will usually transmogrify the separate, into relationship, property in any event.”

²⁰⁰ The cases are *Hyde v Hyde* [2011] NZFLR 35 (HC) and *Thackwray v Thackwray* [2014] NZFC 8702. In one other case the court did not attempt to apply s 9A(3) at all due to findings in favour of the partner seeking division of the property on other grounds: see *Herbst v Herbst* [2013] NZFC 4862.

²⁰¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.55].

substantial savings to pay the deposit on the family home that deposit simply becomes part of the relationship property pool.

- 10.47 If the policy of section 9A(3) no longer reflects what most people think is fair, then this may support the option of amending the definition of relationship property to reflect a pure “fruits of the relationship” approach, which we discussed in Chapter 9. Under this approach the value of any contributions of separate property to the relationship could be preserved. We discuss how this would work below.

Intermingling of gifts and inheritances with relationship property

- 10.48 Section 10 recognises the special nature of property received from a third party by way of succession, survivorship, as a beneficiary under a trust or by gift. This property will normally be separate property, as will any proceeds from the sale of that property, and property acquired out that property.²⁰² In this section we refer to these types of property as “gifts and inheritances.”
- 10.49 Section 10(2) provides an exception. The gifted or inherited property will be considered relationship property if it has, with the express or implied consent of the partner who received it, “been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.”²⁰³
- 10.50 In *N v N*, for example, the husband received a gift of 247 cattle 20 years before the relationship ended.²⁰⁴ The cattle had been farmed with other stock that was relationship property. The Court of Appeal upheld the High Court’s finding that, because over the 20 year period the original stock had either died, been sold or replaced, they could not be traced. The Court of Appeal therefore said that the cattle were so intermingled with relationship property that it was impractical and unreasonable to treat them as separate property.²⁰⁵

²⁰² Property (Relationships) Act 1976, ss 10(1)(b) and 10(1)(c).

²⁰³ Property (Relationships) Act 1976, s 10(2). Section 10(3) also provides that a gift from the other partner will be regarded as relationship property if has been “used for the benefit of both spouses or partners.”

²⁰⁴ *N v N* [2005] 3 NZLR 46 (CA).

²⁰⁵ *N v N* [2005] 3 NZLR 46 (CA) at [115].

10.51 The courts have noted that there is a distinction between the terms “impractical” and “unreasonable.”²⁰⁶ In *S v W* one partner had purchased a herd of animals from his separate property funds to start a farming business.²⁰⁷ The business was operated through a partnership between the partners which was also used to operate an art business. The farming business and art business were fully integrated. Revenues and expenses were dealt with through the same account. The High Court observed that the surviving animals were physically identifiable at the time of separation and it was arguably practical to regard the surviving animals in the original herd as the partner’s separate property. However, the partners ran the farming business through a jointly operated partnership which intermingled the separate property with relationship property. The partners saw advantages in structuring the operation in this way. The High Court therefore said that it was unreasonable to regard the animals as separate property.²⁰⁸

The relationship between sections 8, 9, 9A and 10 is unclear

10.52 The PRA appears to treat gifts and inheritances received from a third party as a special form of separate property. Rather than include gifts and inheritances among the general types of separate property under section 9, section 10 deals with it in isolation. Section 10 also provides specific exceptions in subsections 10(2) and 10(3). It is not clear from the PRA how section 10 relates to the general definitions of relationship property and separate property. This is evident in a number of instances.

Gifts and inheritances acquired in the partners’ joint names

10.53 There is some uncertainty about how to classify property that has been acquired in the partners’ joint names but was funded by property acquired by gift or inheritance. Section 8(1)(c) provides that property owned jointly or in common in equal shares by

²⁰⁶ *S v W* [2006] 2 NZLR 669 (HC) at [58].

²⁰⁷ *S v W* [2006] 2 NZLR 669 (HC).

²⁰⁸ *S v W* [2006] 2 NZLR 669 (HC) at [73]. A similar decision was reached in *Greenslade v Greenslade* (1978) 2 MPC 69 (SC). In that case Mr and Mrs Greenslade carried on business together through a partnership. Mr Greenslade paid an inheritance he had received into the partners’ joint account. The partners pooled all their joint cash resources into the account, regardless of whether the income and expenditure from the account was used for private, domestic or business purposes. The court said at 70 that pooling of the partners’ resources in this way reflected their “joint domestic interest” and also the significant help rendered by Mrs Greenslade to the business. Accordingly, the court said that property purchased from the account should be classified as matrimonial property.

the partners is relationship property. However, section 10(1)(c) provides that all property acquired from a gift or inheritance is not relationship property. To confuse matters further, some items of relationship property under section 8(1) are expressly stated to be subject to section 10, but section 8(1)(c) is not so qualified. Yet, section 10(4) provides that regardless of sections 10(2) and 10(3), the family home and family chattels (under sections 8(1)(a) and 8(1)(b)) will always be classified as relationship property. It makes no mention of section 8(1)(c).

10.54 The courts have considered the relationship between section 8(1)(c) and section 10(2) on a number of occasions, but have reached different conclusions.²⁰⁹ The courts are now tending to follow the High Court's decision in *S v W*.²¹⁰ In that case, the High Court observed that the wording of the PRA was not capable of conclusively resolving the issue one way or the other.²¹¹ Nevertheless, the Court said that the underlying intention behind the PRA seemed to be that section 10 alone should govern property acquired by succession, survivorship, as a beneficiary under a trust or by gift. That was because the property had not been produced by the efforts of the partners.²¹² On that basis, the High Court saw section 10 as "an exclusive code."²¹³ While joint ownership of property might reflect an intention to share the property equally, the Court said that this could be displaced where section 10 applied.²¹⁴

Is section 10 subject to section 9A?

10.55 There is also some uncertainty about whether any increases in the value of property obtained by gift or inheritance from a third party can be classified as relationship property. In other words, is section 10 subject to section 9A? The wordings of the provisions

²⁰⁹ The conflicting authorities were helpfully considered by the High Court in *S v W* [2006] 2 NZLR 669 (HC). Cases that decided s 8(1)(c) prevailed over s 10: *Skerten v Skerten* (1978) 1 MPC 193 (SC); *Lewis v Lewis* [1993] 1 NZLR 569 (HC); and *Waller v Hider* [1997] NZFLR 936 (HC) (leave to Court of Appeal refused: *Waller v Hider* [1998] 1 NZLR 412 (CA)). Cases that decided s 10 prevails over s 8(1)(c): *Z v Z* (1988) 5 NZFLR 111 (HC); *Millington v Millington* [1999] NZFLR 829 (HC); *Coley v Coley* FC Manukau FP055/253/02, 24 December 2003; *Macleod v Macleod* FC North Shore FAM-2003-044-1824, 29 June 2004; *P v P* (2002) 22 FRNZ 380 (FC); *S v W* [2006] 2 NZLR 669 (HC); *McDowell v McDowell* (2009) 28 FRNZ 379 (FC); *B v B* FC Christchurch FAM-2005-009-3163, 29 June 2009; *Phair v Galland* FC Oamaru FAM-2008-045-113, 8 February 2010.

²¹⁰ *S v W* [2006] 2 NZLR 669 (HC).

²¹¹ *S v W* [2006] 2 NZLR 669 (HC) at [51].

²¹² *S v W* [2006] 2 NZLR 669 (HC) at [52].

²¹³ *S v W* [2006] 2 NZLR 669 (HC) at [52].

²¹⁴ *S v W* [2006] 2 NZLR 669 (HC) at [52].

give no indication of their respective priorities. The ordering of the sections suggests that section 9A is intended as a qualification to section 9. If section 9A was meant to qualify section 10 as well, it may have been logical for section 9A to follow section 10. Section 10(2) also provides its own grounds for when the property listed in section 10(1) may become relationship property. Section 9A is not mentioned. If section 10 is intended to be an exclusive code, as the High Court concluded in *S v W*, section 9A should not apply.

- 10.56 Nevertheless, the Supreme Court has inferred that section 10 is subject to section 9A. In *Rose v Rose*, one partner inherited land from his father and so it would have been separate property under section 10.²¹⁵ The partner developed the land into a vineyard using relationship property. The land increased in value. The Supreme Court said that the increased value could be considered relationship property under section 9A. The Court, however, did not discuss the relationship between section 9A and section 10. It appears simply to have been assumed that section 9A would apply to separate property under section 10.
- 10.57 Accordingly, while the courts have decided how section 10 should be interpreted in relation to section 8(1) and section 9A, these interpretations are not supported by the clear wording of the PRA. In addition, the extent to which section 10 is a self-contained code is unclear in light of the Supreme Court's decision in *Rose v Rose*.

Is reform required?

- 10.58 In considering whether reform is required, the primary question is what priority should be given to property that a partner acquires as a gift or inheritance from a third party. Does that property deserve special treatment, or can it be treated as separate property generally and therefore subject to sections 8 and 9A? More specifically, should gifts or inheritances become relationship property when the partners have placed that property into their joint ownership? And should increases in the value of a gift or inheritance that are attributable to the relationship be treated as relationship property?

²¹⁵ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [28].

- 10.59 There is little discussion in the legislative material about why the property described in section 10(1) should be treated differently from separate property generally under section 9. The rationale alluded to in the case law is that property acquired from a third party has not been produced by the efforts of the partners and so should not be considered relationship property.²¹⁶ But the same can equally be said of other types of separate property that would fall under the definition in section 9, such as property acquired before a relationship.
- 10.60 One possible explanation is that property acquired by gift or inheritance is unique because of the intentions of the third party who gave the property. It could be argued that the PRA should not defeat or restrict a third party's ability to gift property to a recipient of his or her choosing. For example, parents may wish that their children inherit certain family assets by way of succession. As we explain in Part G it has been common in New Zealand for families to establish trusts in order to pass family farms to the next generation. It might be suggested that the PRA should not disrupt such estate planning. Rather, the PRA should distinguish between gifted and inherited property and separate property generally in order that gifted and inherited property is given extra protections against division.
- 10.61 The question of whether gifted or inherited property should be treated differently by the PRA is fundamentally a value judgment.

CONSULTATION QUESTIONS

- C11 Should the PRA give special treatment to property acquired by one partner from a third party by succession, survivorship, gift or because the partner is beneficiary under a trust?
- C12 If so, should such property lose its separate property status if it has been used to acquire property in the partners' joint names?
- C13 Likewise, should such property be subject to section 9A?

Should the courts take a more robust approach to intermingling?

- 10.62 Some commentators criticise the intermingling exception under section 10(2). Fisher argues that separate property such as third party gifts do not lose their character just because they have been

²¹⁶ *S v W* [2006] 2 NZLR 669 (HC) at [52].

intermingled.²¹⁷ Nor does intermingling prevent an estimation of the respective proportions of relationship property and separate property, even if broad and robust estimates are required.²¹⁸ Fisher argues that it is far better to undertake rough apportionments in the case of intermingling because it is more consistent with the concept underlying the PRA, that relationship property is divided but separate property remains separate.²¹⁹

- 10.63 Fisher makes a valid point. It might not seem fair that the recipient of the gifted or inherited property receives no credit for its initial contribution, just because it has been intermingled with relationship property. It is however important to recognise that the courts will only refuse to account for the initial separate property input when the intermingling has made it *impractical* or *unreasonable* to regard the property as separate property. This is a high threshold. The case law shows that intermingling on its own will not deprive a partner of the separate property.
- 10.64 In *Brensell v Brensell* for example, the partners carried on a farming business together as a partnership.²²⁰ The partners initially contributed funds to begin the partnership. The wife injected a sum of money she had inherited as a bequest. The partnership soon began to generate revenue. All funds were credited to and debited from the same account. The wife used a sum of money from the partnership account to purchase shares in a company. She claimed that the money she had withdrawn was the money she had inherited. The question before the High Court was the classification of the shares. This in turn required the Court to consider whether the purchase of the shares could be traced to the funds the wife had inherited as a bequest, or whether the funds in the partnership account were so intermingled it was impractical and unreasonable to consider the purchase funds as the wife's separate property. The High Court observed that at the time of the share purchase, the partnership had acquired insufficient revenue from which to fund the share

²¹⁷ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²¹⁸ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²¹⁹ Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [11.63].

²²⁰ *Brensell v Brensell* [1995] 3 NZLR 320 (HC).

purchase. Accordingly, the purchase funds must have been the from the wife's bequest, at least in substantial part. In those circumstances, the Court said, it was logical to regard the purchase money as the withdrawal of the wife's separate property.²²¹ While there had been an intermingling of the bequest by depositing it in the partnership account, it was not unreasonable or impracticable to regard the money as the wife's separate property.²²²

- 10.65 Even if it is practical to apportion the value of intermingled property between the separate property and relationship property inputs, there may be good reasons for treating intermingled property as relationship property where it is *unreasonable* to do otherwise. In the case *S v W* discussed above, one partner had acquired animals from his separate property funds. The High Court recognised, however, that the partner derived advantages through structuring the farming business as a partnership with the other partner and by intermingling property. In that case, the High Court said it would be unreasonable to treat the animals as separate property, even though it was practical to treat them as such.²²³
- 10.66 In our preliminary view, the intermingling exception under section 10(2) ought to be retained in its current form. Although it could be argued that the courts should take a robust approach and be more willing to apportion the value of intermingled property, section 10(2) is intended to operate in the truly exceptional case. We also see advantages in allowing the court to treat intermingled property as relationship property where it is reasonable.

CONSULTATION QUESTIONS

C14 Should the intermingling exception under section 10(2) of the PRA be retained in its current form?

C15 If not, what is a better approach for when gifts and inheritances have been intermingled with relationship property?

²²¹ *Brensell v Brensell* [1995] 3 NZLR 320 (HC) at 330.

²²² *Brensell v Brensell* [1995] 3 NZLR 320 (HC) at 330.

²²³ *S v W* [2006] 2 NZLR 669 (HC) at [73].

Implications of moving to a “fruits of the relationship” approach

- 10.67 In Chapter 9 we considered the option of moving to a pure fruits of the relationship approach. Under that approach, the PRA would define relationship property as property which is attributable (directly or indirectly) to the relationship. Relationship property would no longer be defined based on the use to which property is put.
- 10.68 If the PRA is reformed by adopting a fruits of the relationship approach, there are implications for section 9A and section 10.

How would separate property be treated under a fruits of the relationship approach?

- 10.69 The fruits of the relationship approach will require the partners to identify all property they brought into the relationship or acquired during the relationship from a gift or inheritance. This will generally remain separate property even if it is used as the family home (subject to intermingling under section 10(2)). The questions that then arise are:
- (a) First, how should increases in value, or any incomes or gains on separate property, be treated?
 - (b) Second, where new property has been purchased using relationship property funds and separate property funds, how should the new property, and any increases in its value, be shared?

Option 1: Share increases in value and new property purchases between the separate property and relationship property sources

- 10.70 One option is to share any increases in the value of separate property, or new property purchased using separate property funds, according to the extent they were attributable to the relationship. Fisher, who favours this approach, suggests that increases in value of separate property during the course of the relationship that are attributable to the joint and several

efforts of the partners should be considered relationship property.²²⁴ However, “spontaneous increases in value”, such as those attributable to inflation or rises in the value of property, should remain separate.²²⁵ This is similar to the second option for reforming sections 9A(1) and 9A(2), discussed at paragraphs 10.34–10.36 above.

- 10.71 For new property that is purchased from both relationship property funds and separate property funds, it would be necessary to share the value of the new property according to the relationship property and separate property contributions, including a proportionate share of any increase in value of the new property.²²⁶
- 10.72 The advantage of this approach is that each partner is credited for the property they contribute to the relationship, including any additional value gained on that separate property. Likewise, the approach apportions the gains in value that are attributable to the relationship. The main disadvantage is that the task of apportioning the correct value to the respective separate property and relationship property components of an asset will be complex. The task of apportioning value between the various factors, such as the relationship, the input of separate property and inflationary gains, is also likely to be imprecise. To achieve accuracy, the partners will probably require considerable expert assistance, which will increase the costs and length of resolving relationship property matters.

Option 2: Classify increases in the value of any property as relationship property

- 10.73 A second and alternative approach is to consider any increase in value on any property, whether relationship property or separate property, as relationship property. This is essentially the third option for reforming sections 9A(1) and 9A(2), discussed at paragraphs 10.37–10.41 above.

²²⁴ Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²²⁵ Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²²⁶ Robert Fisher “Should a Property Sharing Regime be Mandatory or Optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

- 10.74 When new property is purchased using a combination of separate property funds and relationship property funds, the partners would keep an entitlement to their separate property contributions, but any subsequent increase in the new property's value would be treated as relationship property.
- 10.75 The advantage of this approach is that it would be simpler. There would be no need to undertake the complex process of apportioning the increased value of the property to the respective separate property and relationship property inputs. Instead, all gains would be relationship property. The main disadvantage is that it would give no credit to a partner who contributes a significant amount of separate property to the purchase of an asset.
- 10.76 These options are illustrated in the case study below.

CASE STUDY: How should increases in value be shared?

To explore how a fruits of the relationship approach might work, we use the hypothetical example of Brenda and Martin.

Brenda and Martin decide to move in together. They purchase a house. Brenda uses her savings of \$50,000 (which is her separate property) to fund the deposit. The purchase price of the house is \$300,000. Brenda and Martin fund the balance of the purchase price by a mortgage of \$250,000.

Brenda and Martin meet the mortgage repayments and other expenditure of the house from their incomes.

Three years later Martin receives a \$50,000 inheritance from his grandmother's estate (which is his separate property). Martin uses this money to build a double garage and an extra bedroom on the house.

Brenda and Martin separate a year later. Brenda and Martin have repaid \$50,000 off the mortgage. An amount of \$200,000 remains outstanding.

A valuer tells Brenda and Martin that the market value of the house is \$450,000. However, if the house did not have the double garage

and the extra bedroom, it would only be worth \$375,000.

How should Brenda and Martin divide the value of the house?²²⁷

DIVISION UNDER THE CURRENT RULES

The contributions of separate property by both Brenda and Martin are treated as having been converted into the house, which is relationship property. The market value of the house, less the mortgage, is shared equally:

Status quo	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	-	\$125,000	\$125,000
Martin	-	\$125,000	\$125,000

DIVISION UNDER OPTION 1

Under option 1, Brenda and Martin would need to share the value of the house between their respective separate property and relationship property contributions.

First, Martin's use of separate property to build the garage and bedroom has increased the house's value by \$75,000. That would mean Martin is entitled to his initial separate property contribution (\$50,000) and gain (\$25,000), totalling \$75,000.

Second, the market value of the house after discounting Martin's separate property contribution appears to be \$375,000. The house has therefore increased in value by \$75,000. Brenda's separate property contribution of \$50,000 accounts for one sixth of the initial purchase price. She may therefore be entitled to recover one sixth of the property's increased value (\$12,500) as a gain on her separate property contribution. That would mean Brenda is entitled to \$62,500 representing her separate property contribution and gain.

Third, the remainder of the house's market value (\$312,500) would be relationship property. From this amount, the outstanding \$200,000 mortgage debt must be deducted because it is a relationship debt. The relationship property eligible for equal division between Brenda and Martin is \$112,500.

Option 1	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	\$62,500	\$56,250	\$118,750
Martin	\$75,000	\$56,250	\$131,250

²²⁷ For the purposes of this scenario Brenda and Martin's house is the only item of property. In every scenario, the outstanding mortgage would be a relationship debt. Ordinarily a relationship debt would be deducted from the gross value of the global pool of relationship property. In this example we have only deducted the mortgage debt from the gross value of the house.

DIVISION UNDER OPTION 2

Under option 2, increases in value of all property during the relationship would be relationship property. Accordingly, Brenda and Martin would each be entitled to their \$50,000 separate property contributions. All increases in the house's value would be relationship property, against which the outstanding mortgage debt would be deducted. Brenda and Martin's respective shares would be as follows:

Option 2	Separate property and gains	Relationship property and gains (half share)	Total
Brenda	\$50,000	\$75,000	\$125,000
Martin	\$50,000	\$75,000	\$125,000

CONSULTATION QUESTION

C16 If the PRA's definition of relationship property was based solely on a fruits of the relationship approach, how should increases in value be treated? Do you prefer option 1 or option 2? Why?

How would gifts and inheritances be treated under a fruits of the relationship approach?

- 10.77 Section 10(4) provides that if gifted or inherited property is used as the family home or a family chattel, that property will be classified as relationship property. The PRA therefore gives primacy to the family use approach to classification over the special treatment given to gifted or inherited property.
- 10.78 Under a fruits of the relationship approach, the family home and family chattels would not automatically be designated as relationship property. Section 10(4) would need to be removed. Consequently, the special status of gifted and inherited property would be enhanced because there would be fewer exceptions under section 10 for when such property could be treated as relationship property. If, however, gifted and inherited property was treated like other types of property and was subject to the same rules and exceptions under sections 8 and 9A, a move to a fruits of the relationship approach would not enhance the special status of inherited and gifted property to the same extent.
- 10.79 The responses we receive to the question of whether gifted and inherited property should receive special treatment will also be relevant if a fruits of the relationship approach to classification is considered.

Chapter 11 – Issues with particular types of property and debts

- 11.1 This chapter considers issues with the classification of the following types of property and debts:
- (a) ACC and insurance payments;
 - (b) super profits and earning capacity;
 - (c) taonga;
 - (d) heirlooms;
 - (e) student loan debts; and
 - (f) inter-family gifting and lending.

ACC and insurance payments

- 11.2 A partner may have a right to payments in respect of injury or illness under the Accident Compensation Act 2001 or under a private insurance policy. The courts have said that the right to payment constitutes a property right which, if accrued during the relationship, will be classified as relationship property. For ease of reference, we will refer to payments under the Accident Compensation Act 2001 and its predecessors as “ACC payments.” We will refer to payments under an insurance policy for personal injury or illness as “insurance payments.”
- 11.3 ACC payments can take several forms.²²⁸ The main ones are:
- (a) rehabilitation payments, which are intended as money and support to facilitate the injured person’s rehabilitation;²²⁹

²²⁸ For an overview, see Simon Connell and Nicola Peart “Accident Compensation Entitlements Under the Property (Relationships) Act 1976” (2017) 14(3) Otago Law Review (forthcoming). Not listed here are the entitlements available when a partner dies: see Accident Compensation Act 2001, sch 1, pt 4.

²²⁹ Accident Compensation Act 2001, sch 1, pt 1. Simon Connell and Nicola Peart “Accident Compensation Entitlements Under the Property (Relationships) Act 1976” (2017) 14(3) Otago Law Review (forthcoming) suggest that rehabilitation payments reflect the statutory purpose in s 3(c) of that Act that “where injuries occur, the Corporation’s primary focus should be on rehabilitation with the goal of achieving quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant’s health, independence, and participation.”

- (b) lump sum compensation payments for permanent impairment,²³⁰ and
- (c) weekly compensation payments, which are to compensate people incapacitated through injury for their lost earnings.²³¹
- 11.4 In *S v S*²³² and *B v B*²³³ a partner had received lump sum ACC payments. In both cases, the courts determined that the payments represented the recipient partner's right to compensation under accident compensation legislation. As the rights had accrued during the relationship, they were relationship property pursuant to section 8(1)(e) of the PRA.
- 11.5 In *C v C* the husband suffered an illness during the course of the relationship which left him disabled.²³⁴ His policy of insurance provided that in the event he suffered a disability that prevented him from working he would be paid a monthly income, both during his notional working life and in his retirement. The High Court said the husband's right to payments was a contractual right under the insurance policy that had crystallised during the relationship.²³⁵ All future payments the husband would receive were attributable to this underlying property right and were likewise relationship property.²³⁶
- 11.6 In contrast, if the partner's right to ACC or insurance payments, either as a lump sum or as periodical payments, accrues before the relationship, it will be regarded as the partner's separate property.²³⁷

²³⁰ These payments are designed to compensate the injured person for impairment to their person regardless of whether that causes economic loss: Injury Prevention and Rehabilitation Bill 2000 (90-1) (explanatory note) at 3; and Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, 1967) at [291] cited in Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976 (2017) 14(3) Otago Law Review (forthcoming).

²³¹ Accident Compensation Act 2001, s 100(1) and sch 1, pt 2.

²³² *S v S* (1984) 3 NZFLR 88 (DC).

²³³ *B v B* [2016] NZHC 1201, [2017] NZFLR 56. In this case there was an issue as to when the right to payments accrued. The High Court said that, based on s 38 of the Accident Compensation Act 2001, the statutory right to payment accrues when the claimant first receives treatment for the injury, even if the injury itself was suffered and manifested some time earlier.

²³⁴ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

²³⁵ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [32].

²³⁶ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [39].

²³⁷ *G v G* [1995] NZFLR 550 (HC); and *T v A* FC Auckland FP 88/00, 20 November 2003.

Should a partner's right to ACC or insurance payments accrued during the relationship be divided as relationship property?

- 11.7 The classification of a partner's right to ACC or insurance payments as relationship property may be perceived as unfair for several reasons.
- 11.8 First, ACC payments are usually made either to facilitate a person's rehabilitation from injury or as compensation for impairment or lost earnings. Likewise, insurance payments are received in respect of insured loss to a person's health, often as a means of ensuring income protection. The partner who receives the payments may continue to suffer the injury and loss after the partners' relationship has ended. Nevertheless, the courts have said that the full value of a lump sum payment, or all future periodic payments, is relationship property if the right to the payments accrued during the relationship. It could be argued that, if the payments are to compensate for the loss suffered after the relationship ends, this means the recipient partner is obliged to account for property received in respect of post-separation losses which are unconnected with the relationship.²³⁸
- 11.9 Although technically all payments stem from the underlying property right,²³⁹ it could be said that this analysis is not in keeping with classification under the PRA. The general approach is to classify property connected to the relationship as relationship property and all property unconnected with the relationship as separate property.²⁴⁰ In any event, many people may not agree

²³⁸ In some cases, the courts have recognised the difficulties in requiring a partner to share the value of ACC payments that are intended as compensation for loss suffered after the relationship: *P v P* HC Nelson M8-83, 20 July 1983 at 9 per Hardie Boys J; the lump sum compensation was "entirely personal" and intended to compensate the injured husband for losses he would suffer "for the remainder of his days"; and *S v S* (1984) 3 NZFLR 88 (DC) at 92-93. In these cases, the courts applied the exception that extraordinary circumstances rendered equal sharing of the payments repugnant to justice. These cases were, however, decided prior to the 2001 amendments, and there was greater scope under the legislation to depart from equal sharing in respect of property other than the family home and family chattels: see Simon Connell and Nicola Peart "Accident Compensation Entitlements under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming).

²³⁹ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [33]-[34].

²⁴⁰ In its 1988 report, the Ministerial Working Group observed that ACC payments are distinct from other types of property a partner may receive during the relationship. Unlike property such as lottery winnings and redundancy payments, the injury for which the partner receives compensation may be permanent: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 24. Ultimately, the Working Group did not make any firm recommendations in respect of ACC payments but expressed the view that earnings-related compensation for the period during marriage should be matrimonial property and earnings-related compensation for a period outside marriage should remain separate (at 25). We also note that s 8(1)(g) of the Property (Relationships) Act 1976 provides that the value of any life insurance policy, or of the proceeds of such a policy, is relationship property to the extent the value is attributable to the relationship. There are, however, key differences between life insurance policies, and ACC payments and other insurance policies (such as income protection policies). Life insurance policies often can be surrendered in

with the distinction made between post-separation income, which is not relationship property, and post-separation ACC payments or insurance payments, which are.

- 11.10 The law has long recognised that compensation received in respect of bodily injury deserves special treatment.²⁴¹ Throughout the history of the accident compensation legislation, a person's entitlements under the legislation have always been inalienable and have never vested in the Official Assignee if the recipient became bankrupt.²⁴²
- 11.11 Second, if a partner has received or is continuing to receive ACC or insurance payments, it may mean that his or her ability to work is affected. In some cases the payments may be income on which the partner depends if he or she cannot work. In other cases, the payments will be necessary for the partner's rehabilitation. There will be tensions and practical difficulties if the partner is required to account for half the payments to a former partner after separation.
- 11.12 The extent to which the current approach to ACC and insurance payments may operate unfairly is best illustrated by the scenario where, at the end of a relationship, one partner is working full time and the other is unable to work due to an injury sustained during the relationship. In this scenario, the partner working full time is not required to share his or her future earnings, while the partner receiving ACC or insurance payments must share any future payments equally with his or her former partner.

Options for reform

- 11.13 The PRA could be amended in order to respond to these potential issues. Section 8 could classify ACC payments as relationship property only to the extent that they relate to loss a partner has suffered during the relationship. If the payments relate to the loss a partner suffered either before or after the relationship, those payments could be classified as separate property. The task of apportioning payments may be straightforward if the payments

return for a certain payment. Life insurance policies also insure the life of a partner rather than compensate for ongoing loss a person may suffer during the course of his or her life.

²⁴¹ In *B v N* [2007] NZFLR 1146 (FC) at [23] the Family Court observed that s 123 of the Accident Compensation Act 2001 provided that entitlements under that Act are "not assignable or alienable." The Court said that this provision "very much carries through the philosophy that derives from common law in which actions for damage to the person are sacrosanct."

²⁴² Accident Compensation Act 2001, s 123; Accident Insurance Act 1998, s 124; Accident Rehabilitation and Compensation Insurance Act 1992, s 86; Accident Compensation Act 1982, s 89; and Accident Compensation Act 1972, s 135. See also *B v N* [2007] NZFLR 1146 (FC) at [23] for discussion on the effect of s 123 of the Accident Compensation Act 2001.

are made to the partner periodically. If, on the other hand, the payments are made as a lump sum payment, the partners would have to apportion the lump sum across the respective periods. This could be difficult, particularly when there is no indication of how the lump sum compensatory payment has been calculated.

- 11.14 The advantages of this approach are that the classification better reflects the nature of relationship property and separate property. We also believe that most New Zealanders would consider this approach to classification to be fairer. The main disadvantage is that it will require partners to undertake the potentially difficult task of apportioning lump sum ACC payments to the pre-relationship period, relationship period and post-relationship period.
- 11.15 A similar reform could be made for insurance payments made in respect of personal injury or illness. However there may be less basis for doing so, as insurance payments are likely received as a result of the deliberate choice by a couple to purchase an insurance policy and meet the premiums using relationship property. They may be distinguishable therefore from the compulsory social insurance accident compensation scheme, although partners will still have usually contributed to the scheme through levies on their incomes, which will usually be relationship property.²⁴³

CONSULTATION QUESTIONS

C17 If a right to ACC or insurance payments arises during the relationship (because of a personal injury or illness sustained during the relationship), should all those payments (including future payments) be classified as relationship property?

C18 Should the PRA be reformed? If so, do you agree with our suggested amendment? Should it apply to ACC and insurance payments?

Super profits and earning capacity

- 11.16 As discussed in Chapter 8, the courts have said that a partner's capacity to earn an income (earning capacity) does not come under the PRA's definition of property. The leading case is the decision of the full Court of Appeal in *Z v Z (No 2)*.²⁴⁴ In that case

²⁴³ Simon Connell and Nicola Peart "Accident Compensation Entitlements Under the Property (Relationships) Act 1976" (2017) 14(3) Otago Law Review (forthcoming).

²⁴⁴ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

Mrs Z had left the labour force when she married Mr Z in order to care for their children and look after the home. Mr Z had developed a successful career in accountancy. At the time the partners separated, Mr Z had become a partner in a successful accountancy firm. Mrs Z suffered from an illness and was unlikely to return to work. Mrs Z argued that her contributions to the marriage had enhanced Mr Z's earning capacity, and that his enhanced earning capacity should be relationship property. Through her care for the children and the home she had supported Mr Z through his study and the development of his career. Mrs Z said that she should be entitled to half the value of Mr Z's earning capacity.

- 11.17 The Court of Appeal recognised the force of Mrs Z's arguments.²⁴⁵ However, the Court said that Mr Z's earning capacity could not be considered property under the PRA. The Court noted that the PRA's definition of property was adopted from conventional property law statutes and this strongly indicated the PRA only applied to conventional notions of property.²⁴⁶ The Court also said that personal characteristics, which are part of an individual's overall make up, cannot constitute property under the PRA.²⁴⁷
- 11.18 Although the Court of Appeal did not accept Mrs Z's argument, that was not the end of the matter. The Court said that Mr Z had a "bundle of rights" that made up his interest as a partner in the accountancy firm. This interest, the Court said, did constitute property under the PRA which should be divided between Mr and Mrs Z.²⁴⁸ The Court suggested that the best approach to valuing Mr Z's partnership interest was first to ascertain whether the profits he received from the partnership included an element derived from his membership of the firm as distinct from his own earning capacity.²⁴⁹ The Court referred to these excess earnings as "super profits"
- 11.19 This approach to valuing a partner's interest in a firm has been followed in subsequent cases. The Court of Appeal case *M v B* is a leading example.²⁵⁰ The husband was a partner in a large law firm. The Court said that his interest in the partnership was relationship property, but only to the extent that the profits he

²⁴⁵ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 281.

²⁴⁶ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

²⁴⁷ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

²⁴⁸ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 286.

²⁴⁹ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 292.

²⁵⁰ *M v B* [2006] 3 NZLR 660 (CA).

derived from partnership were in excess of what his own direct industry would command. His future maintainable earnings in the partnership were estimated at \$500,000 per annum.²⁵¹ In contrast, the evidence suggested he could earn at least \$250,000 as a self-employed barrister.²⁵² The Court of Appeal said that the annual differential between the husband's actual earnings and the potential earnings from his own industry was \$250,000.²⁵³ In terms of *Z v Z (No 2)*, this was the level of "super profit" which was available to the husband on an ongoing basis.²⁵⁴ The Court of Appeal described the super profits as an income stream from an item of relationship property (the husband's partnership interest) which the husband could continue to access.²⁵⁵

11.20 In order to arrive at an accurate valuation of the husband's relationship property interest in the partnership, the Court adopted a multiplier against which to multiply the annual amount of super profits. The multiplier took into account the following factors, which affected the ongoing value of the income stream:²⁵⁶

- (a) the husband was about 50 years old;
- (b) when he ceased to be a partner in the firm, there was no residual value in the partnership to be paid out to him by the remaining partners;
- (c) the firm relied heavily on one client, which generated fees at a lower level of remuneration than existed in many firms; and
- (d) there was a degree of capture by the firm of its partners because of the relatively restricted nature of the work undertaken.

11.21 The Court decided that a multiplier of three was appropriate. In other words, the value of the husband's relationship property interest in the partnership (the "super profit") was three times his future maintainable earnings, less what was attributable to his personal industry and commitment.²⁵⁷ Having calculated the value of the super profit at \$750,000, the Court of Appeal made a

²⁵¹ *M v B* [2006] 3 NZLR 660 (CA) at [88].

²⁵² *M v B* [2006] 3 NZLR 660 (CA) at [77].

²⁵³ *M v B* [2006] 3 NZLR 660 (CA) at [89].

²⁵⁴ *M v B* [2006] 3 NZLR 660 (CA) at [89].

²⁵⁵ *M v B* [2006] 3 NZLR 660 (CA) at [89].

²⁵⁶ *M v B* [2006] 3 NZLR 660 (CA) at [93].

²⁵⁷ *M v B* [2006] 3 NZLR 660 (CA) at [94].

discount for the tax payable on that income.²⁵⁸ The net value was \$450,000 and that was the sum at which the Court valued the relationship property interest in the partnership.²⁵⁹ The wife was accordingly entitled to \$225,000, being an equal share of that item of relationship property.

- 11.22 The courts' approach to analysing the relationship property component of a partnership interest in a firm has become a significant topic of debate. This is largely because the issue has been dealt with in a number of appellate cases, such as *Z v Z (No 2)* and *M v B*. A number of issues are raised in the discussions around these cases which are worth highlighting.

Issue 1: The distinction between earning capacity and super profits may be difficult to understand

- 11.23 The exclusion of earning capacity and the focus instead on super profits from the partnership interest may be difficult to understand. The courts' approach can be understood by following the Court of Appeal's reasoning in *Z v Z (No 2)*. However most people will not be aware of the Court's decision. Instead, most people are unlikely to distinguish between the income attributable to a partner's personal efforts and skills as against the excess income from a partnership interest. Also, as the Court of Appeal accepted in *Z v Z (No 2)*,²⁶⁰ there is logic in the view that a partner's earning capacity is "human capital" into which both parties in a relationship have invested. Arguably it is sensible that all income derived from that human capital be shared. Consequently, the exclusion of income attributable to the partner's individual skills and industry may appear arbitrary.
- 11.24 The analysis may also lead to differing and seemingly anomalous results between similar cases. For example, there could be instances where two individuals have the same interest in a partnership under the firm's partnership deed. If assessed under the PRA, their respective interests might be valued at different levels depending on the level of income a court says should be attributed to the partners' personal industry and skill.²⁶¹ To take another example, a court may find that if an individual

²⁵⁸ *M v B* [2006] 3 NZLR 660 (CA) at [94].

²⁵⁹ *M v B* [2006] 3 NZLR 660 (CA) at [94].

²⁶⁰ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280-281.

²⁶¹ This observation was made by William Young P in *M v B* [2006] 3 NZLR 660 (CA) at [167].

was self-employed he or she could command an income at a similar or greater level to that which he or she in fact receives from the interest in the partnership. In that scenario, the court will probably say that there are no super profits arising from the partnership interest, even if the partner does receive income derived from his or her partnership interest.²⁶²

Issue 2: Valuation of super profits is complex

11.25 The valuation of a partnership interest based on the super profits approach can be complex. The assessment requires a sophisticated analysis of what income should be attributed to a partner's personal skills and industry. The court must then decide on an appropriate multiplier which reflects the peculiarities of, among other things, the nature of the firm's business, the specific terms of the partnership deed, and contingencies relating to the individual partner in question, such as proximity to retirement or other factors affecting work output. In cases where the partnership interest is relatively modest, there are concerns as to whether the costs and depth of analysis can be justified. The case *T v T* provides an interesting example.²⁶³ That case involved what the court described as a "modest trucking business."²⁶⁴ The central issue was how the trucking business partnership should be valued and divided. The Family Court expressed dissatisfaction that the resolution of this issue had turned into "an astonishingly convoluted legal process."²⁶⁵ The wife, in attempting to claim a relationship property interest in the partnership, had relied on evidence of the husband's earnings from the business following separation. She presented accounting evidence that, after a fair remuneration from these earnings was deducted, there was a super profit for each financial year.²⁶⁶ The Court considered that this argument lacked the proper analysis. Rather, the Court focused on the operations of the trucking business. The success of the business was due to the husband's personal relationship with the business's major contractor and the husband's proven reliability. The Court therefore said that the profits generated by the business were almost certainly due to the husband's "singular

²⁶² This observation was made by William Young P in *M v B* [2006] 3 NZLR 660 (CA) at [167].

²⁶³ *T v T* [2007] NZFLR 754 (FC).

²⁶⁴ *T v T* [2007] NZFLR 754 (FC) at [1].

²⁶⁵ *T v T* [2007] NZFLR 754 (FC) at [6].

²⁶⁶ *T v T* [2007] NZFLR 754 (FC) at [51].

commitment and energy.”²⁶⁷ This case suggests that sophisticated legal and valuation analysis is needed to effectively present a claim for a relationship property interest in a partnership interest, even if the interest in question is relatively modest.

Issue 3: The super profits analysis may blur the line between income and capital

11.26 Atkin says that the super profits analysis unhelpfully blurs the distinction between income and capital.²⁶⁸ As a general rule, the income a partner earns following separation will not be relationship property.²⁶⁹ The super profits analysis, however, focuses on the future income a partner will receive after separation. As explained above, the analysis is based on a partnership interest being relationship property. The income generated from it is likewise relationship property. It is analogous to dividends received on company shares when the shares themselves are classified as relationship property.²⁷⁰

11.27 It not always easy to determine when post-relationship income is generated from an item of relationship property. An example is *C v C*, discussed at paragraph 11.5 above. In that case the husband suffered an illness during the course of the marriage which left him disabled.²⁷¹ His insurance policy provided that in the event of disability that prevented him from working he would be paid a monthly income, both during his notional working life and in his retirement. The wife claimed that the insurance payments the husband received after separation should be classified as relationship property. In response the husband argued, among other things, that the insurance payments related to his earning capacity and, in accordance with *Z v Z (No 2)*, were not property. The High Court said that the property interest at issue was the husband’s contractual right to payments under the insurance policy.²⁷² As the right had crystallised during the course of the relationship when the husband became disabled, that right was relationship property. All future payments the husband would

²⁶⁷ *T v T* [2007] NZFLR 754 (FC) at [60].

²⁶⁸ Bill Atkin “What Kind of Property is ‘Relationship Property?’” (2016) 47 VUWLR 345 at 355.

²⁶⁹ Property (Relationships) Act 1976, s 9(4).

²⁷⁰ *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 at [50].

²⁷¹ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004.

²⁷² *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [32].

receive were attributable to this underlying property right and were likewise relationship property.²⁷³

- 11.28 The decision in *C v C* demonstrates the sophisticated legal analysis needed when analysing property rights and income. Many people may struggle to understand the distinction between income received from someone's personal efforts or employment and income received pursuant to some other contractual entitlement, such as a partnership interest or a right under an insurance policy. Atkin's observation about the blurred distinction holds some weight.

Issue 4: The super profits approach singles out people in partnerships and their partners

- 11.29 A further issue is that the super profits approach will only apply in the small number of cases where a partner has a partnership interest, for example in an accounting or law firm.²⁷⁴ Not dividing a partner's earning capacity, but dividing super profits, creates a different set of rules that unfairly favours people whose partners have had the opportunity to obtain a partnership interest and disadvantages the partners who have a partnership interest.
- 11.30 Take an example of two different relationships: Couple A and Couple B. In both relationships one partner stops working to take on the role of supporting the career of the other partner, through such things as child care and housework. In Couple A the working partner develops a successful career in management, and at the time of separation is the chief executive of a large company. In Couple B the working partner trains as a lawyer, and at the time of separation is a partner in a large law firm. The supporting partner in Couple A would have no relationship property interest in the human capital of the working partner. In contrast, the supporting partner in Couple B would have a relationship property interest in the partnership interest, at least to the extent of the super profits. In both relationships the supporting partners made the same level of contributions and support to the relationships, and the working partners may even be earning the same income. Yet

²⁷³ *C v C* HC Auckland CIV-2003-404-6892, 10 September 2004 at [39].

²⁷⁴ Bill Atkin "What Kind of Property is "Relationship Property"?" (2017) 47 VUWLR 345 at 355. Atkin notes that "although the Court of Appeal [in *Z v Z (No 2)*] toyed with [the] idea of its reasoning being applied to employment contracts, it is hard to see how super profits or something similar can apply to the regular wage and salary earner."

the supporting partners' entitlements under the PRA are very different as are the effects on the working partners.

Should a partner's enhanced earning capacity be considered relationship property?

- 11.31 The question of how earning capacity and super profits should be dealt with is a complex one. There are no simple solutions. A possible, though perhaps equally problematic, solution is to move away from super profits and instead deem a partner's earning capacity as an item of property. The extent to which that earning capacity has been enhanced by the relationship could then be classified as relationship property.
- 11.32 We have already considered in Chapter 8 whether earning capacity should be captured within the definition of property for the purposes of the PRA as a wider "economic resource." We now consider the advantages and disadvantages of including a partner's enhanced earning capacity within the PRA's concept of relationship property.

Advantages of including enhanced earning capacity within the PRA's definition of relationship property

- 11.33 First, treating a partner's earning capacity as relationship property to the extent it has been enhanced by the relationship is consistent with the principles of the PRA. It would recognise that one partner may make a significant contribution to the other partner's earning capacity and this constitutes a contribution to the relationship. This contribution may result in one partner sacrificing his or her own career, expecting that the investment in the other partner's career will provide financial returns. As the Court of Appeal noted in *Z v Z (No 2)*:²⁷⁵

it is difficult to refute the contention that excluding a wife whose contribution to the matrimonial partnership has been the management of the home and the care of the children from sharing in the husband's increased earning power, which they had jointly worked for, perpetuates the injustice the Act was aimed at remedying.

²⁷⁵ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

- 11.34 Second, treating enhanced earning capacity as relationship property removes the distinction the current law makes between people who have partnership interests and those who do not. Every partner's income-earning potential would be assessed, whether it was attributable to the partner's personal skills and experience or a super-profit derived from a partnership.

Disadvantages of including enhanced earning capacity within the PRA's definition of relationship property

- 11.35 First, if a partner's earning capacity is treated as property under the PRA, and that capacity is to be relationship property to the extent it has been enhanced by the relationship, it will encourage partners to focus their disputes on their personal characteristics. Separation is generally a time of emotional upheaval, and recently separated partners are often on bad terms. There are therefore good reasons why relationship property issues should be depersonalised as much as possible.
- 11.36 Second, treating earning capacity as property likely presents more problems than it solves. Concern is often expressed at the difficulty of valuing earning capacity. It is generally acknowledged that the value of an earning capacity is the net present value of the partner's future income stream.²⁷⁶ A valuation therefore requires estimations of the partner's projected future earnings. These estimations can be imprecise as they rely on speculations about things like the partner's projected career path, the duration of the partner's working life, inflation rates, taxation and other contingencies.²⁷⁷ Valuation evidence could become more critical

²⁷⁶ The approach of valuing earning capacity as the net present value of the partner's future income stream was taken in the leading case (prior to the law change) of *O'Brien v O'Brien*, 489 N.E.2d 712, 713-714, 716 (N.Y. 1985). The American Law Institute criticised the approach as it observes that "earning capacity" has no meaning or existence independent of the method used to measure it. It concludes that a rule characterising earning capacity as marital property is really a rule that treats future earnings as marital property. American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, Newark 2002) at 694. Calculating this value can be challenging as it requires speculation on the likely income the partner will obtain and possible contingencies.

²⁷⁷ The uncertainty and arbitrariness of valuing earning capacity was one of the principal reasons the Working Group in 1988 recommended against including earning capacity as a potentially divisible item of property under the Matrimonial Property Act 1976: Department of Justice Report of the Working Group on Matrimonial Property and Family Protection (October 1988) at 9.

In New York, until recently the courts treated a partner's professional qualifications as property. Reviewing the law, the New York City Bar Association expressed concerns on valuing enhanced earning capacity: New York City Bar Association "Report to the New York State Law Revision Commission by the Domestic Violence Committee, Family Court and Family Law Committee, Matrimonial Law Committee and Sex and Law Committee" (November, 2011) at 6-7:

As history has shown, this is...a difficult, imprecise and costly endeavor. It requires assumptions on assumptions: first, project the earnings (especially hard with newly acquired skills, degrees or licenses when hypothetical figures must be used); second, project work-life expectancies, real earnings growth, inflation rates, and taxes; and, third, determine the appropriate interest rates to be used to reduce the figure to present value. As we have seen in recent years of economic upheaval, these assumptions often do not pan out. The result of this analysis is that the payor is held to the resulting number (often paid at the time of the divorce judgment) even if the actual income is not reached or the employment life is reduced (this is

and, probably as a result, more contestable. This is likely to increase the costs and delay in resolving relationship property matters.²⁷⁸

11.37 Third, it may be a complex task to identify the relationship property component of a partner's earning capacity. As explained in Chapter 9, relationship property is property that is either used for family purposes, like the family home and family chattels, or property that has been acquired through the partners' joint and several efforts during the relationship (the "fruit" of the relationship). For example, the partners' income acquired during the relationship is usually relationship property,²⁷⁹ and the proportion or value of a partner's superannuation scheme entitlements "attributable to the relationship" is relationship property.²⁸⁰ It follows that a partner's income earning capacity would likewise fall under this "fruit of the relationship" category. A partner's income earning capacity should therefore only be relationship property to the extent the earning capacity *has been enhanced by the relationship*. Therefore:

- (a) the partner's income earning capacity must be identified at the point when the relationship began;
- (b) it may then be necessary to identify and discount the value of future income likely to be derived from

true even if the results were not due to the actions of the titled spouse). Thus, the payor may be forced to stay in work or employment positions even if it is not a good decision (or sometimes even if it is an unhealthy decision) just in order to pay off the award or the results of the award which cannot be modified.

²⁷⁸ Overseas jurisdictions have developed sophisticated tools, such as tables or online calculators, to help with valuations of a person's future projected earnings. For instance, in the United Kingdom litigants will refer to the Ogden tables to calculate lump sum damages for future losses in personal injury and fatal accident cases: see Government Actuary's Department, *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationary Office, London, 2017) at 8. In *M v B* [2006] 3 NZLR 660 (CA) at [169] to [171] the Court of Appeal commented on the desirability of providing a methodology such as the Ogden Tables that could be applied by "reasonably numerate lawyers and judges" when calculating super profits.

Henaghan suggests several "simple and cost-effective" calculations that could be used to ascertain the "amount of earning capacity to be counted as relationship property". His principal suggestion is for an "income equalisation payment". The partners' respective future incomes for the 12 month period after their relationship ends are calculated and then added together to arrive at the total combined annual income. This is then divided equally, similar to the division of relationship property. In practical terms, it would mean the partner with the larger income earning capacity would need to pay the other partner in order to equalise their incomes. The amount the partner would need to pay the other based on an annual figure would then be multiplied by half the number of years the partners had been together, up to a maximum of 10 years: see Mark Henaghan "Sharing Family Finances at the end of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

However, neither of these approaches isolate the relationship property component of a partner's earning capacity, namely the extent to which it has been enhanced by the relationship. Henaghan for example proposes instead to treat both partners' entire income earning capacity as relationship property.

²⁷⁹ Property (Relationships) Act 1976, s 8(1)(e).

²⁸⁰ Property (Relationships) Act 1976, s 8(1)(i).

enhancements that occurred after the relationship ended, such as any subsequent training or experience;²⁸¹

- (c) there may be suggestions that income attributable to the partner's innate talent should be excluded; and
- (d) it may also be appropriate to recognise that the partner must undertake the work; earning capacity alone is not enough.

11.38 The task of identifying the relationship property component of a partner's earning capacity can therefore be challenging. It could be so cumbersome and uncertain that the advantages of designating income earning capacity as property are lost.

11.39 Fourth, designating enhanced earning capacity as relationship property may unfairly affect the autonomy of a partner by forcing him or her to continue to work to produce that income stream. One response to this is that property must be valued on the basis that the property will be put to its highest and best use. Otherwise one partner could devalue the partners' relationship property by his or her personal preferences. If that view was followed then partners who do not wish to put their enhanced earning powers to best use should have to pay for that choice.

11.40 Finally, it is rare that overseas jurisdictions treat enhanced earning capacity as property. In earlier years, courts in the State of New York pioneered the treatment of professional qualifications and educational degrees as divisible items of property.²⁸² However, in 2015 the New York State Assembly amended the law to bar the courts from considering as marital property "the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement."²⁸³ In making its recommendations for reform, the New York State Law Revision Commission recommended "based on widespread consensus" that "one party's "increased earning capacity" no longer be considered as a marital asset in equitable distribution." The Commission noted that:²⁸⁴

²⁸¹ New York State in the United States formerly divided the value of a spouse's qualifications by determining the present value of the spouse's entire future earning stream: see *O'Brien v O'Brien* 489 N.E.2d 712, 713-714, 716 (N.Y. 1985). Frantz and Dagan criticise this approach as going too far because the court in *O'Brien* included value that was "partly attributable to future professional experience, skill development, and seniority": Carolyn Frantz and Hanoch Dagan "Properties of Marriage" (2004) 104 Colum L Rev 75 at 107.

²⁸² *O'Brien v O'Brien* 489 N.E.2d 712, 713-714, 716 (N.Y. 1985).

²⁸³ Domestic Relations Law (New York), § 236, as amended by Bill A7645, effective from 23 January 2016.

²⁸⁴ New York State Law Revision Commission "Final Report on Maintenance Awards in Divorce Proceedings" (May, 2013). The New York State Law Revision Commission was created by Chapter 597 of the Laws of 1934 which enacted Article 4-A of the Legislative Law. It consists of the chairpersons of the Committees on the Judiciary and Codes of the Senate

The concept of an “increased earning capacity” has much dissatisfaction and litigation because of the asset’s intangible nature, the speculative nature of its “value” as well as the costs associated with valuations, and problems of double counting increased earnings in awards of post-divorce income and child support.

- 11.41 On balance, our preliminary view is that deeming a partner’s enhanced earning capacity as relationship property is not a feasible option. We look at the point again in Part F when considering options to address situations where the economic advantages and disadvantages flowing from the roles each partner took in the relationship are not fairly shared after the relationship ends.

CONSULTATION QUESTION

C19 Is the law regarding earning capacity and super profits problematic?

C20 Do you agree with our preliminary view that it is not feasible to deem a partner’s income earning capacity as enhanced by the relationship as relationship property?

Taonga

- 11.42 In 2001 taonga were excluded from the PRA’s definition of family chattels. While there was no discussion of Parliament’s intention in making this special rule for taonga, it followed the recommendation in 1988 of a Working Group established to review the Matrimonial Property Act 1976.²⁸⁵ The Working Group recommended the exclusion of taonga and heirlooms (discussed below) for the following reasons:²⁸⁶

- (1) *Heirlooms and taonga are of a special nature as much of their value lies in their individuality; as a family treasure they cannot be replaced by another, although in other ways identical, object. Where an object’s value lies partly in the fact that it has been passed down from earlier generations its special character is lost if it passes to someone outside the family or tribal group.*

and Assembly and five members appointed by the Governor. Its role is to examine the common law and statutes of New York State and current judicial decisions for the purpose of recommending law reform: see website at <lawrevision.state.ny.us>.

²⁸⁵ The Working Group was convened by Geoffrey Palmer, then Minister of Justice: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988). The Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i states that the amendments in the Bill (including the exclusion of taonga) were largely drawn from the recommendations of the Working Group.

²⁸⁶ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

- (2) *Other property acquired by succession or survivorship, or under a trust, which does not fall within the category of family chattels, is separate property by virtue of s10. The group is of the opinion that the special nature of heirlooms and taonga outweighs the special nature of family chattels in relation to other types of property.*
- (3) *Taonga have a special cultural and ancestral significance for Maori tribes as well as for individual Maori to whom the property may pass. Maori argue that individuals are not seen as owning such property and therefore able to dispose of it as they wish. Instead, a person in possession of taonga is more of a guardian of taonga for the rest of the tribe and for future generations. Maori thus argue that the matrimonial property regime should not apply to such property in order that the property may pass according to custom.*

11.43 The special significance of taonga was also recognised in a 1996 working paper prepared by Hohepa and Williams for the Law Commission’s review of the law of succession.²⁸⁷ In that paper Williams discussed whether tikanga Māori should govern the succession of items defined by general law as personal property, “on the basis that the items are *not* the personal property of the deceased but are taonga of the [hapū] for which the new kaitiaki may well be a person outside the immediate family of the deceased.”²⁸⁸

Taonga are subject to the PRA

11.44 Unlike Māori land, discussed in Chapter 8, taonga are still subject to the PRA, even if they are excluded from the definition of family chattels. This means that taonga that are chattels will generally be treated as one partner’s separate property.²⁸⁹ As separate property, taonga are subject to the PRA’s ordinary rules about when separate property becomes relationship property, including through intermingling,²⁹⁰ or where the value of the taonga has increased or

²⁸⁷ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46.

²⁸⁸ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46 (emphasis in original).

²⁸⁹ This is because s 9(1) of the Property (Relationships) Act 1976 provides that all property of either partner that is not relationship property is separate property.

²⁹⁰ Where property acquired by succession, survivorship, or gift becomes so intermingled with relationship property that it is unreasonable or impracticable to regard it as separate property: Property (Relationships) Act 1976, s 10(2).

income or gains have been made as a result of the application of relationship property.²⁹¹

- 11.45 Taonga that are *not* chattels are not excluded from the definition of relationship property. Rather, they are treated like any other item of property that needs to be classified as either relationship property or separate property according to the PRA's rules of classification. For example, land with general title status that nonetheless has ancestral significance is not excluded from the pool of relationship property on the basis that it is taonga, although it may still be separate property under section 9 or section 10. On this point, Ruru suggests that:²⁹²

If whanaungatanga is operative, it should be for the whānau (not necessarily the nuclear family) to appoint the successive kaitiaki (guardian) of the property, here, ancestral land. However, the placement of taonga in the family chattels definition does not permit such a practice to be given effect.

- 11.46 Taonga that are in the possession of one partner might, in some circumstances, be regarded by the court as being held on trust, in which case the taonga would be excluded from the PRA entirely.²⁹³

CONSULTATION QUESTIONS

C21 Should the PRA exclude taonga which fall outside of the definition of family chattels (e.g. land of ancestral significance which is not Māori land)?

C22 Should the PRA provide that taonga which is initially separate property cannot become relationship property in any circumstances?

The courts' interpretation of taonga

- 11.47 Taonga is not defined in the PRA, but its interpretation in the context of the PRA has been explored in a series of cases.²⁹⁴

²⁹¹ Property (Relationships) Act 1976, s 9A.

²⁹² Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 482 (footnotes omitted).

²⁹³ This is pursuant to s 4B of the Property (Relationships) Act 1976 (PRA), which provides that nothing in the Act applies where either partner is acting as a trustee. In *B v P* [2017] NZHC 338 the High Court was required to determine whether the ownership of three items of taonga (two taiaha and a tewhatewha) had passed to the applicant as administrator of the deceased's estate. The applicant argued the taonga were the deceased's personal property, while the respondents (the deceased's parents) argued that it was for them, as guardians of the taonga, to decide what should happen to the taonga. The Court held that, in the particular circumstances of the case, the taonga did not fall into the deceased's estate after his death. That was because the deceased had, six years prior to his death, entrusted the taonga to his parents to care for, and in doing so entrusted his parents to make a decision as to how they should be ultimately dealt with after his death: at [151] and [161].

²⁹⁴ The courts' interpretation of the concept of taonga in the context of the Property (Relationships) Act 1976 has been the subject of commentary by Ruru: see Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 and Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

11.48 Initially the courts took a broad approach to the concept of taonga. In *Page v Page* the High Court considered taonga in the context of the PRA for the first time.²⁹⁵ That case concerned the status of a piece of artwork painted by one partner's mother. Neither partner was Māori. The case was decided in 2001, shortly before taonga was excluded from the definition of family chattels. With that legislative change on the horizon the High Court observed that the "ordinary and everyday use [of the term taonga] would encompass without difficulty the artworks of the mother in this case."²⁹⁶

11.49 In *Perry v West* the District Court and High Court had to determine whether a Colin McCahon painting was taonga.²⁹⁷ Both Courts agreed that the concept of taonga could be applied to describe the relationship between an item of property and a person of any ethnic or cultural background.²⁹⁸ The High Court set out two ways in which an item could attain the status of taonga:²⁹⁹

The first is where the object is acquired by an individual because it has a special significance to that individual. The second is where the object assumes the special status of taonga because others also ascribe to it or bestow upon it a special significance.

11.50 Both Courts found that the husband had failed to establish that the painting was a taonga but for different reasons. The District Court said it could not be a taonga to the husband if he was willing to sell it to realise cash for other routine purposes,³⁰⁰ while the High Court said it could not be a taonga to the husband because he had failed to consistently maintain his personal attachment to it, having only made a claim to the painting nearly a decade after the divorce.³⁰¹

11.51 In a 2004 article Ruru expressed concern at an emerging precedent by which an item could be classified as taonga although it is not owned or held by a Māori person, was not made by a Māori person and has no Māori association or content.³⁰² In

²⁹⁵ *Page v Page* (2001) 21 FRNZ 275 (HC).

²⁹⁶ *Page v Page* (2001) 21 FRNZ 275 (HC) at [46].

²⁹⁷ *Perry v West* DC Waitakere FP 239/01, 25 March 2003; *Perry v West* [2004] NZFLR 515 (HC).

²⁹⁸ *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [89]; *Perry v West* [2004] NZFLR 515 (HC) at [37].

²⁹⁹ *Perry v West* [2004] NZFLR 515 (HC) at [37].

³⁰⁰ *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [95].

³⁰¹ *Perry v West* [2004] NZFLR 515 (HC) at [37(b)].

³⁰² Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297.

reference to the judicial approaches in *Perry v West Ruru* noted that:³⁰³

- (a) Neither Court had attempted a particularly comprehensive definition of taonga.
- (b) Each Court relied on broad concepts of taonga as employed by the Waitangi Tribunal, but failed to acknowledge that the Tribunal’s approach to taonga, while broad, is necessarily still Māori-specific.
- (c) Jurisprudence on taonga in other contexts recognises it as a Māori-specific term (as does jurisprudence on Māori concepts in other statutes, for instance, “kaitiaki” under the Resource Management Act 1990).
- (d) Each Court noted the importance of the existence of a relationship with the object in question, but placed importance on a personal attachment. Under tikanga, personal attachment to the taonga is largely irrelevant; more important is the kaitiakitanga exercised over the taonga for the purposes of wider family expectations.
- (e) The Courts did not discuss Parliament’s likely intention in making the special rule for taonga, and did not refer to the 1988 Working Group’s reasons for recommending the exclusion of taonga, which referred specifically to the Māori cultural significance of taonga.
- (f) The Courts did not consider the effect of the broad interpretation of taonga on the meaning of “heirloom.” If taonga is so broadly interpreted, arguably the separate category for heirlooms becomes superfluous.

11.52 In subsequent cases the courts have restricted the interpretation of taonga.³⁰⁴ In *Kininmonth v Kininmonth* the husband argued that his interest in a family bach was taonga and was therefore excluded from the pool of relationship property.³⁰⁵ The Family Court, referring to Ruru’s article, did not accept that the concept of taonga could be relied upon in respect of a non-Māori asset such as an interest in a bach.³⁰⁶

³⁰³ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 298–299.

³⁰⁴ Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³⁰⁵ *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008.

³⁰⁶ *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008 at [26].

11.53 In *S v S*, the husband, an artist, claimed that his art collection was a taonga, and thus was excluded from the definition of family chattels in the PRA.³⁰⁷ The Family Court observed that case law to date provided no definitive definition of taonga.³⁰⁸ It concluded that the term should be defined within a tikanga Māori construct, noting the reference of the 1988 Working Group to taonga as a Māori concept and the need to avoid interpreting the term through a Pākehā lens. However, it found that the concept of taonga, as defined within a tikanga Māori construct, could be applied “pan-culturally”:³⁰⁹

[P]rovided the central elements of Tikanga Māori can be shown to exist on the evidence before the Court, there can be no sound basis as to why a particular item of property could not be classified as taonga, notwithstanding that the parties to the proceedings are non-Māori.

11.54 To help identify what made a chattel a “taonga”, the Court relied on writings of Professor Paul Tapsell (who also gave evidence in the proceedings) and concluded that:³¹⁰

... for an item to become taonga it must be accompanied, through a marae or marae like setting, with elements of whakapapa, mana, tapu and korero. For an item to become taonga it must therefore be presented, either by a group or an individual (but only on behalf of a kin group/tribal group) to another, in a marae like setting. It must additionally have accompanying it a history or whakapapa, some particular significance or mana, and be presented in the context of an oration or korero. Professor Tapsell accepted that application of taonga using this definition could involve non-Māori.

11.55 Applying that definition, the husband’s art collection were not taonga as there was no evidence that he had acquired the paintings in a marae like setting, no evidence of any particular speech or history associated with the paintings and no evidence that the paintings were received on behalf of others who were representatives of a wider group.³¹¹

³⁰⁷ *S v S* [2012] NZFC 2685.

³⁰⁸ *S v S* [2012] NZFC 2685 at [48].

³⁰⁹ *S v S* [2012] NZFC 2685 at [54(b)].

³¹⁰ *S v S* [2012] NZFC 2685 at [57].

³¹¹ *S v S* [2012] NZFC 2685 at [59].

11.56 Ruru has observed that the Court’s decision in *S v S* has provided “a more Māori aligned precedent for understanding taonga.”³¹²

Should taonga be defined in the PRA?

11.57 Ruru has previously suggested that it would be prudent for Parliament to engage with Māori about a possible definition of taonga for the PRA.³¹³ This was echoed by the Family Court in *S v S*.³¹⁴ The decision in that case however may have “reduced any urgency for the legislature to clarify its intent to confine taonga to Māori generational treasures.”³¹⁵

11.58 If Parliament opts not to define taonga, Ruru stresses that there must be ways for evidence from experts on tikanga to be obtained and applied by a court that has a working knowledge of tikanga.³¹⁶

11.59 The use of expert evidence on tikanga was evident in *S v S*, discussed above, and was also demonstrated in the recent High Court case of *B v P*.³¹⁷ While this case did not involve a claim under the PRA, the High Court had to decide whether taonga belonging to the deceased should go to his surviving partner or to his parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased’s three sons). The Court heard evidence from two kuia. The evidence confirmed that, according to tikanga, taonga had a guardian instead of an owner. If the taonga were entrusted into the care of someone, those people were responsible for protecting and caring for them and for making decisions about what would happen to them. The Court concluded that in the circumstances, the taonga were held on trust by the deceased’s parents. At least in this instance, the Court had little trouble resolving the issue with the assistance of the expert evidence from the kuia.³¹⁸

³¹² Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³¹³ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 299.

³¹⁴ *S v S* [2012] NZFC 2685 at [48].

³¹⁵ Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³¹⁶ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 300.

³¹⁷ *B v P* [2017] NZHC 338. The facts of this case are summarised above at n 293.

³¹⁸ Note also the discussion in John Chadwick “Whanautanga and the Family Court” (2002) 4 *Butterworths Family Law Journal* 91 at 94 where the author noted that whanautanga prevails over the law in relation to matrimonial property because Māori, as a rule, do not have the same emotional attachment to property like family chattels.

CONSULTATION QUESTION

C23 Should the concept of taonga be defined in the PRA? Or should it be left to be considered on a case by case basis with evidence called as necessary in each case?

Heirlooms

- 11.60 The definition of “family chattels” under section 2 of the PRA excludes heirlooms. That means an heirloom that is a family chattel will not be considered relationship property and it will be excluded from division under the PRA. An heirloom that is not a family chattel is likely to be classified as separate property under section 10.
- 11.61 The PRA does not define what an heirloom is. The Family Court has said that in order to be an heirloom, an item of property must:³¹⁹
- (a) be passed down from one generation to another in accordance with some special family custom;
 - (b) have unique characteristics or be of particular importance; and
 - (c) have been in the partner’s family for generations.
- 11.62 The PRA was amended to exclude heirlooms in 2001. This was in response to an earlier recommendation of the Working Group established to review the Matrimonial Property Act 1976. In 1988 the Working Group recommended that heirlooms (and taonga, discussed above) be excluded from the definition of family chattels in recognition of the special nature of heirlooms, which outweighed the special nature of family chattels.³²⁰ The Working Group’s reasons for recommending the exclusion of heirlooms are set out in full at paragraph 11.42 above.
- 11.63 In our view, these reasons remain valid and justify the exclusion of heirlooms from the definition of family chattels. In our research and preliminary consultation we have not come across any significant concerns about excluding heirlooms from the PRA’s equal sharing regime.

³¹⁹ *Humphrey v Humphrey* FC Christchurch FAM-2003-009-3044, 25 May 2005 at [112]. See also *H v F* FC Auckland FAM 2005-004-1312, 27 January 2006 at [48] and *Stuart v Stuart* FC Christchurch FAM 2003-00-5175, 16 March 2005 at [19].

³²⁰ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

Should the PRA exclude other property with special significance?

11.64 There may be items of property that do not fall within the definition of heirloom but should be exempt from the PRA regime because of the special significance the property holds.

11.65 Ruru suggests that the interpretation of heirloom as being something which is handed down the generations may explain attempts to categorise non-Māori items of property, such as an art collection, as taonga.³²¹ It is significant that all the cases arising to date where one partner has sought to rely on the exclusion for taonga have not involved separating Māori couples or traditionally treasured Māori items.³²² This may suggest a legislative gap for items of special significance other than heirlooms or taonga.³²³

11.66 It may, however, be challenging to describe with precision what types of property ought to escape division under the PRA. Partners will no doubt attribute value and significance to a diverse range of property. The unique characteristics and importance that makes an item of property significant are likely to be intangible and subjective.

11.67 We suggest two categories of property that, like heirlooms, might deserve to be expressly excluded from the definition of family chattels:³²⁴

- (a) First, property that has special meaning for a partner and is irreplaceable. Such property might include:
 - (i) a gift from a close friend or family member who has died; or
 - (ii) a trophy or ornament awarded for a particular achievement, like winning a sporting event or a long-service award from a workplace.

³²¹ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 299.

³²² Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³²³ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 299.

³²⁴ If the Property (Relationships) Act 1976 (PRA) is amended to abolish the family use approach to the classification of relationship property, discussed in Chapter 9, property would not become relationship property solely because they were used as family chattels. We note therefore that although the PRA could exclude other forms of property from the definition of family chattels in addition to heirlooms and taonga, moving away from a family use approach could achieve a similar outcome.

- (b) Second, property which is in the nominal ownership of one of the partners but, owing to its wider cultural significance, should not form part of the partners' relationship property pool. The traditional construct of property rights, which undoubtedly the PRA's definition of property embodies, may appear alien to or be unsuited for different cultural groups within New Zealand. It may be appropriate for the PRA to make exceptions for other property of cultural significance.

CONSULTATION QUESTION

C24 Should the PRA expressly exclude property with special significance from the definition of family chattels in addition to heirlooms? If so, what types of property ought to be exempt?

Student loans

- 11.68 The PRA treats student loans like any other debt. That means the classification of a student loan as either a personal debt or a relationship debt under section 20 will depend on the purpose for which the debt has been incurred.³²⁵ The cases show that a student loan incurred before the relationship began will generally be classified as a personal debt.³²⁶ That is because the debt cannot have been incurred for relationship purposes, such as a common enterprise between the partners, or for the purposes of acquiring, improving or maintaining relationship property.³²⁷
- 11.69 If, however, a partner incurred a student loan during the course of the relationship, the position may be different. A student loan may comprise a debt that was partly used to pay the partner's course fees and partly used to pay for the family's living costs. In some cases, the courts have classified the component of the debt

³²⁵ Property (Relationships) Act 1976, s 20. The treatment of student loan debts was raised by several submitters during the Parliamentary select committee's consideration of the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report). In particular, several submitters argued that it was unfair if both partners had a student loan, but one partner pays off his or her loan while working while the other stays at home (for example to look after children) and does not: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16. The National Council of Women submitted that a student loan should be a relationship debt unless this would be repugnant to justice: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16. The select committee concluded, however, that a student loan debt was no different from any other type of debt and should be classified in accordance with the normal rules.

³²⁶ *O'Connor v O'Connor* FC Christchurch FP 1720/94, 16 December 1996; and *Kauwhata v Kauwhata* [2000] NZFLR 755 (HC). See also Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR20.01].

³²⁷ *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [51].

that relates to course fees as the partner's personal debt. But the courts have classified the component of the debt that relates to the family's living costs as a relationship debt.³²⁸ Similarly, if a partner has undertaken the study as part of a common enterprise of the partners, or for the benefit of both partners, the courts have classified the entire student loan as a relationship debt.³²⁹ For example, in *Jayachandran v Daswani* the partners were married in India but came to New Zealand to live, study and work.³³⁰ The husband incurred a student loan to enable him to study in New Zealand. The Family Court accepted that the entire debt should be classified as a relationship debt.³³¹ It said that the husband's study and accompanying loan had been incurred as part of the partners' common enterprise to relocate to New Zealand. It had also provided both partners with benefits as, among other things, the husband's study allowed the wife to obtain a work visa.

- 11.70 If a student loan is classified as a relationship debt, the net value of the partners' relationship property will be calculated by deducting the student loan debt.³³² That will mean both partners share the debt equally. On the other hand, if a partner's student loan is classified as a personal debt the amount of that debt will not be shared equally between both partners. If the partner has paid back some of the loan with relationship property, such as with his or her salary, section 20E will apply. Section 20E provides that a partner who has paid his or her personal debt from relationship property is obliged to compensate the other partner. The recent case *Shaws v Reed* provides a good example.³³³ Ms Reed had completed her degree shortly before her relationship with Mr Shaws began. She had incurred a student loan of \$49,643.04. Her qualification allowed her to secure specialist employment during the course of the relationship from which she received considerable remuneration. Her income was pooled with Mr Shaws' income. From that income, Ms Reed repaid her student loan. Mr Shaws sought compensation under section 20E on the grounds Ms Reed had paid her personal debt with relationship property. The Family Court agreed and awarded Mr

³²⁸ See for example *C v B* FC Hamilton FAM-2005-019-991, 7 June 2006. The Family Court said that the part of the loan that was used for managing the affairs of the household and bringing up a child of the marriage came within the meaning of a "relationship debt" under s 20(1)(d).

³²⁹ *S v S* [2012] NZFC 4050.

³³⁰ *Jayachandran v Daswani* [2015] NZFC 5238.

³³¹ *Jayachandran v Daswani* [2015] NZFC 5238 at [44]-[45].

³³² Property (Relationships) Act 1976, s 20D.

³³³ *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243.

Shaws compensation.³³⁴ The Court recognised, however, that Mr Shaws had received the benefit of Ms Reed’s income during the relationship and that should be recognised in the compensation to which he was entitled.³³⁵ The Court therefore awarded Mr Shaws a “broad brush” sum of \$10,000.

- 11.71 Student loans are likely to be an increasingly common debt, particularly for younger partners. As at 30 June 2016, there were 731,754 borrowers in the Student Loan Scheme.³³⁶ The average student loan amount for all borrowers in 2016 was \$20,983, which has increased from \$19,731 in 2011.³³⁷ Of the total borrowers, 30 per cent are inactive, mostly because their income is below the repayment threshold which means they do not have any repayment obligations.³³⁸ The median repayment time for all borrowers who left study in 2014 is projected to be 8.4 years.³³⁹ This is longer than the median repayment time of 7 years for borrowers who left study in 2011.³⁴⁰ Females make up a greater proportion of borrowers than males and are projected to take slightly longer to fully repay their loans.³⁴¹
- 11.72 Given the prevalence of student loans, we are interested in views on whether the PRA should provide any special rules for dealing with them.³⁴² In particular, we are interested in whether there could be better provision for two likely scenarios.
- 11.73 The first is where a partner has repaid a student loan that is classified as a personal debt from relationship property. This is likely to be the most common scenario, as a student loan borrower must make repayments when the borrower’s income reaches a

³³⁴ *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [52].

³³⁵ *Shaws v Reed* [2016] NZFC 7925, [2017] NZFLR 243 at [56].

³³⁶ The Ministry of Education “Student Loan Scheme Annual Report 2015/2016” (December 2016) at 32. Of the 731,754 borrowers, 621,015 were New Zealand-based borrowers. The number of borrowers in 2014 and 2015 were 721,437 and 728,354 respectively.

³³⁷ The Ministry of Education “Student Loan Scheme Annual Report 2015/16” (December 2016) at 34.

³³⁸ Twenty two per cent of borrowers are New Zealand-based borrowers who are inactive, and eight per cent are overseas-based borrowers who are inactive: The Ministry of Education “Student Loan Scheme Annual Report 2015/16” (December 2016) at 35.

³³⁹ The Ministry of Education “Student Loan Scheme Annual Report 2015/16” (December 2016) at 37.

³⁴⁰ The Ministry of Education “Student Loan Scheme Annual Report 2015/16” (December 2016) at 37. The Ministry notes at 36 that many factors may affect times for repayment, such as the government policy towards student loans and the strength of the labour market.

³⁴¹ The Ministry of Education “Student Loan Scheme Annual Report 2015/16” (December 2016) at 37. For borrowers who completed study in 2014, the projected median time for a male to repay his loan is 7.9 years whereas a female’s projected repayment time is 8.8 years.

³⁴² We again note that the issue was considered by the Parliamentary select committee during the 2001 amendments: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

certain level,³⁴³ and a borrower's repayments will be automatically deducted from employment income.³⁴⁴ Consequently, in most cases a partner will pay back a student loan, at least in part, through his or her earnings, which will generally be classified as relationship property under section 8(e). Section 20E will apply, and the partner will need to pay compensation to account for the relationship property he or she has applied to a personal debt. The matter may become more complicated if the court is required to calculate a discount to reflect the benefit the other partner has received from the partner's qualification and enhanced earning capacity. We are also conscious that the rules relating to the classification and allocation of debts may be overly complex.

- 11.74 The second scenario relates to the division of functions in a relationship. One partner may have maintained steady employment and made significant repayments to his or her student loan. The other partner may have performed other contributions to the relationship that limited his or her capacity for paid employment. For example, the other partner may have cared for children at home. In contrast to the employed partner, it may be unlikely that this partner can make meaningful repayments to his or her student loan. The result may be that, if the relationship ends, one partner has discharged his or her student loan whereas the other partner's student loan remains unpaid. Even if the employed partner is obliged to pay compensation for applying relationship property to his or her student loan, it can be argued that the non-employed partner is still at a disadvantage.

Option for reform

- 11.75 A possible reform option could be to classify a student loan that either partner brings into the relationship as a relationship debt. The classification could be subject to limited exceptions, such as if the classification of the student loan as a relationship debt is repugnant to justice.³⁴⁵ The advantage of this approach is that it avoids difficult assessments of whether a student loan

³⁴³ The income threshold is currently set at \$19,084 a year: The New Zealand Government "Paying back your student loan" (8 May 2017) <www.govt.nz>.

³⁴⁴ Inland Revenue "Employer Responsibilities – Deducting Student Loan Repayments" (23 October 2013) <www.ird.govt.nz>.

³⁴⁵ This was the approach suggested by the National Council of Women to the Parliamentary select committee when the Property (Relationships) Act 1976 was amended in 2001: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

is a personal debt or a relationship debt. It also avoids complex accounting exercises to determine the level of compensation that should be payable under section 20E. In addition, it obliges both partners to share the burden of their respective student loans if one partner has been unable to repay his or her loan owing to the division of functions within the relationship.

- 11.76 On the other hand, the current rules arguably provide for a more nuanced approach. Student loans will be incurred in different circumstances and for different reasons. It may be unfair to classify all student loans as relationship debts, particularly if one partner's loan is sizeable and provides little benefit for the partners. Moreover, if the PRA treats student loans differently from other debts, student loans may be seen as an anomaly. It is unclear whether the potential issues we have identified above justify special treatment.

CONSULTATION QUESTION

C25 Are the current rules regarding the treatment of student loans adequate? Could the rules be improved? For example, should all student loans whenever acquired be treated as a relationship debt?

Family gifting and lending

- 11.77 We have learned through our research and preliminary consultation that transfers of property between family members may be increasingly common. This is partly attributable to the fact that New Zealand may be becoming more culturally diverse and intergenerational wealth transfers may be more prominent among different cultures.³⁴⁶ It may also reflect the increasing financial assistance partners require in order to buy their first home.³⁴⁷
- 11.78 While intergenerational transfers of wealth themselves do not appear to create significant legal problems, disputes can arise when it is unclear whether the transfer was intended as a gift or a loan. The distinction is important when determining property interests at the end of a relationship. If, for example, the parents of one partner gift property to that partner to help him or her purchase a first home, the gift would constitute relationship

³⁴⁶ See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017).

³⁴⁷ See Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāiane* (NZLC SP22, 2017).

property if that home is used as the family home.³⁴⁸ If, on the other hand, the transfer is a loan to help purchase a home, the loan is likely to be a relationship debt which is then deducted from the partners' relationship property.

- 11.79 Some legal rules attempt to simplify the process of determining whether a transfer is a gift or loan. The law presumes that when parents transfer property to their children they intend to do so as a gift.³⁴⁹ This rule is sometimes called the “presumption of advancement.” Consequently, if a partner argues that the advance was a loan, he or she must prove that the advance was indeed intended as a loan.
- 11.80 In *S v C* the husband, who was from Hong Kong, and the wife, who was a New Zealander of European descent, separated.³⁵⁰ The husband's family members had advanced the partners money which was used to buy a house. The issue before the Family Court was whether the advance was a gift or a loan. The husband argued that in Chinese culture there was a very clear expectation that these types of advances were loans. The Family Court accepted that the transactions should not be evaluated in terms of the expectations of a New Zealand lawyer.³⁵¹ Rather, the formalities of the transactions reflected the cultural context in which they occurred.³⁵² The Court said that on the evidence there was no doubt that there was an obligation and the husband was expected to repay the advances made.
- 11.81 Similarly, in *Zhou v Yu* the husband argued that the fact that the advance took place in a Chinese family was enough for the court to be satisfied the advance was not intended to be a gift.³⁵³ In that case the husband's parents had made an advance to him. The husband produced evidence that in Chinese culture there was an expectation that an advance is treated as a loan.³⁵⁴ The Family

³⁴⁸ Assuming that no contracting out agreement under pt 6 of the Property (Relationships) Act 1976 classifies the advance.

³⁴⁹ In *Narayan v Narayan* [2010] NZFLR 161 (HC) at [46] the High Court applied the presumption in a case where a husband contended that an advance from his parents was a loan whereas the wife argued it was a gift. The husband's parents had executed a document described as an “irrevocable document” in which they recorded that they had loaned the partners the money. The High Court said at [48] that the document was direct evidence that the advance was intended as a loan. Although the presumption that the advancement was a gift applied, the Court said that in these circumstances the document rebutted that presumption. The presumption of advancement does not, however, apply to gifts between a partner and a son in law or daughter in law: *Knight v Biss* [1954] NZLR 55 (SC); and *Terry Schwass Company Ltd v Marsh* [2017] NZHC 1382 at [20].

³⁵⁰ *S v C* [2003] NZFLR 385 (FC). The Family Court's judgment regarding the advances and their classification as relationship debts was accepted on appeal to the High Court: *C v S* [2005] NZFLR 400 (HC) at [53].

³⁵¹ *S v C* [2003] NZFLR 385 (FC) at [8].

³⁵² *S v C* [2003] NZFLR 385 (FC) at [8].

³⁵³ *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [400].

³⁵⁴ *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [407].

Court did not directly decide whether or not the presumption of advancement should be rebutted when the advance occurred within a Chinese family. The Court said however that in this particular case there was a lack of surrounding evidence supporting the husband's assertion that the advance was a loan.³⁵⁵

- 11.82 As we think it probable that family gifting and lending will increase in New Zealand, it is appropriate to consider whether any reform to the PRA is needed to respond to these types of transactions. In particular, we are interested in views on whether the PRA should provide that the presumption of advancement does not apply.³⁵⁶ Removing the presumption could better reflect current (and potentially future) practices in New Zealand, particularly among some sections of society. On the other hand, it could make situations where the nature of an advance is unclear more contestable. That would potentially stimulate disputes between partners and wider family members. It could also be contrary to the principle that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.

CONSULTATION QUESTION

C26 Is reform to the PRA needed to respond to the rise in family gifting and lending? Should the presumption of advancement be expressly excluded by the PRA?

³⁵⁵ *Zhou v Yu* [2015] NZFC 7668, [2016] NZFLR 338 at [428].

³⁵⁶ Section 4(3) of the Property (Relationships) Act 1976 already provides that many presumptions that existed under the former law no longer apply. For example s 4(3)(a) provides that the presumption of advancement does not apply between a husband and wife.