

Part D – How
should the
PRA divide
property?

Chapter 12 – The general rule of equal sharing and exceptions

Introduction

- 12.1 The division of property is the PRA’s main purpose. It is characterised by the general rule that each partner is entitled to an equal share of the couple’s relationship property. The focus of this chapter is whether the general rule of equal sharing, and the exceptions to it, remain appropriate in contemporary New Zealand. The rest of Part D is arranged as follows:
- (a) In Chapter 13 we look at how property is valued under the PRA. We examine the various approaches to valuation and the issues that might arise in PRA proceedings.
 - (b) In Chapter 14 we focus on how the courts implement a division of property. We look at the range of orders a court can make and whether there are any restrictions which limit a court’s ability to implement a just division of property.

Equal sharing

- 12.2 Section 11 provides that on the division of relationship property under the PRA, each partner is entitled to share equally in:
- (a) the family home;
 - (b) the family chattels; and
 - (c) any other relationship property.¹
- 12.3 Section 11 is the centrepiece of the PRA’s framework. It characterises the PRA as an “equal sharing regime.” It is important

¹ Prior to the amendments to the Property (Relationships) Act 1976 in 2001, the Matrimonial Property Act 1976 had slightly different rules for the division of property. It provided that the family home and family chattels would be shared equally, but that the balance of relationship property (then referred to as matrimonial property) was subject only to a presumption of equal sharing. That property could be divided according to the contributions each spouse had made to the relationship, if one spouse’s contributions had clearly been greater than that of the other spouse: Matrimonial Property Act 1976, s 15.

to note, however, that the general rule of equal sharing is not absolute. Section 11 is subject to other provisions that govern the division of property which we discuss further in paragraph 12.7.

- 12.4 A partner's entitlement to share equally in relationship property will not necessarily result in the equal division of every specific item of relationship property. Rather, a court has a wide discretion to decide how the division of the partners' shares in relationship property should be implemented.² We examine the types of orders a court can make, and what issues may arise, in Chapter 14.
- 12.5 A court will usually determine the partners' shares in the relationship property as at the date their relationship ended.³ If the partners' relationship has not ended, the date will be the date of the application to the court.⁴ The property will usually be valued as at the date of the application to the court.⁵

Does the rule of equal sharing remain appropriate in contemporary New Zealand?

- 12.6 Our preliminary view is that the general rule of equal sharing remains appropriate in contemporary New Zealand, for three reasons:
- (a) First, we think equal sharing reflects the values we should attribute to relationships. As we explain in Part A, the PRA sees a qualifying relationship as a partnership or a joint venture.⁶ Key principles of the PRA include that men and women have equal status, and that all forms of contribution to the relationship are treated as equal.⁷ The PRA therefore treats non-monetary contributions as having equal worth to monetary contributions. When the relationship ends, the PRA grants each partner an entitlement to an equal share of relationship property based on the equal contributions each partner has made to the

² Principally, ss 25 and 33 of the Property (Relationships) Act 1976.

³ Property (Relationships) Act 1976, s 2F(1)(b).

⁴ Property (Relationships) Act 1976, s 2F(1)(a).

⁵ Property (Relationships) Act 1976, s 2G(1). The court of first instance or an appellate court does have the discretion to determine that a different date should apply: s 2F(2).

⁶ See Part A, paragraph [3.6] and [4.7]-[4.11].

⁷ The principles of the Property (Relationships) Act 1976 are discussed in Chapter 3.

relationship. Historically, women tended to make non-monetary contributions to relationships which, prior to the PRA, made it difficult to claim interests in property when relationships ended. The PRA overcomes this difficulty by recognising the true value each partner contributes to the relationship partnership. In doing so the PRA promotes gender equality. We think this view of relationships, and the values and norms it reflects, is now firmly established and accepted in New Zealand.

- (b) Second, through our research and preliminary consultation we have been struck by the extent to which the equal sharing rule is familiar to the public. We believe that many if not most people are generally aware that when a relationship ends the partners are required to divide their relationship property equally. Because the PRA is social legislation and affects so many people, there is a great deal of value in public awareness of the law.
- (c) Third, the equal sharing rule is easy to understand and simple to apply which in turn makes the law more predictable. It provides a “bright-line” test for determining each partner’s share of the relationship property. This helps partners to understand their rights and empowers them to resolve property matters out of court, which is central to the principle that disputes should be resolved inexpensively, simply and speedily as is consistent with justice.⁸

Exceptions to equal sharing

12.7 The general rule of equal sharing is not absolute. The PRA gives a court powers to depart from equal sharing in several different situations, including where:⁹

- (a) there are extraordinary circumstances that make the equal sharing of property repugnant to justice (section 13);

⁸ Property (Relationships) Act 1976, s 1N.

⁹ There are other provisions in the Property (Relationships) Act 1976 (PRA) which allow the court to make an adjustment to the general rule of equal sharing, including s 16 (two houses when the relationship began), ss 17–17A (where a partner has sustained or diminished the other’s separate property), s 20E (where a partner has paid a personal debt from relationship property) which we discuss further below, and ss 44 and 44C (where a partner has disposed of property to defeat the other partner’s claim or rights under the PRA).

- (b) the partners' relationship was shorter than three years (sections 14–14A);
 - (c) the income and living standards of one partner are likely to be significantly higher than the other partner because of the effects of the division of functions in the relationship (section 15);
 - (d) one partner made contributions to the relationship or dissipations of relationship property after the relationship ended (section 18B and section 18C); and
 - (e) there are successive and contemporaneous relationships (sections 52A and 52B).
- 12.8 Short-term relationships are considered in Part E, and section 15 adjustments for economic disparity are considered in Part F. In the rest of this chapter we explore issues identified with some of the other exceptions to equal sharing. We also discuss the limited effect of misconduct on the division of relationship property.

Extraordinary circumstances

- 12.9 If a court considers there are “extraordinary circumstances” that would make equal sharing “repugnant to justice”, section 13 provides that a court may order that each partner’s share of the relationship property be determined in accordance with their contributions to the relationship.¹⁰
- 12.10 Section 13 sets a high threshold for departing from equal sharing. The courts have repeatedly remarked on the strength and stringency of the words “extraordinary circumstances” and “repugnant to justice.”¹¹ This is premised on the view that in most cases relationship property should be shared equally.¹² It may be easier to establish an exception to equal sharing if the relationship has only marginally satisfied the technical criteria for equal sharing.¹³ For example, section 13 might apply if a relationship is only just longer than three years, or if property has only been

¹⁰ Section 18 of the Property (Relationships) Act 1976 lists the types of contributions the court will take into account.

¹¹ See for example *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111 per Richardson J; and *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 125: “It is difficult to envisage any stronger use of language than is reflected in ‘extraordinary circumstances’ and ‘repugnant to justice’ to emphasise the stringency of the test which has to be satisfied in order to justify departure from the equal sharing regime.”

¹² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.28].

¹³ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [12.29]–[12.30].

used as a family home or family chattel for a very short period of time.

- 12.11 Section 13 is largely unchanged from when it was first introduced in 1976.¹⁴ It might have been thought that the courts would be more willing to apply section 13 following the 2001 amendments, which brought more property within the general rule of equal sharing.¹⁵ The courts have, however, confirmed the test remains as rigorous as it did before 2001.¹⁶
- 12.12 The courts have found that there were extraordinary circumstances that would have made equal sharing repugnant to justice in situations where:
- (a) one partner contributed \$129,000 to the relationship that he had received as a beneficiary under a trust six months before the partners separated;¹⁷
 - (b) one partner contributed all the deposit for the family home, paid the mortgage from her salary and supported the other partner through his mental illness, which limited his contribution to the relationship;¹⁸
 - (c) the partners were married for just over three years, and the husband had contributed almost all of the property to the relationship (even the wife's income was derived from selling art work produced by the husband);¹⁹
 - (d) one partner concealed his own property and contributed very little property to the relationship;²⁰ and
 - (e) the relationship lasted for three years and two days, one partner contributed all capital assets to the relationship and the partners acquired no relationship property during the relationship.²¹

¹⁴ Section 13 of the Property (Relationships) Act 1976 was originally enacted as s 14 of the Matrimonial Property Act 1976.

¹⁵ See above n 1. The Property (Relationships) Amendment Act 2001 extended the general rule of equal sharing to all relationship property, when previously it applied only to the family home and family chattels.

¹⁶ *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [138].

¹⁷ *A v C* (1997) 16 FRNZ 29 (HC). See also the similar cases *B v B* (1986) 2 FRNZ 430 (HC); and *W v W* (1990) 6 FRNZ 683 (DC).

¹⁸ *P v P* [1980] 2 NZLR 278 (CA).

¹⁹ *S v S* [2012] NZFC 2685.

²⁰ *H v M* (2001) 21 FRNZ 369 (FC). In addition, the husband had promised to enter a contracting out agreement but then evaded signing. He also refused to leave the family home when the relationship broke down so he could avoid the rules relating to relationship of short duration in the Property (Relationships) Act 1976.

²¹ *B v B* [2016] NZHC 1201, [2017] NZFLR 56.

12.13 A court might also consider that there are extraordinary circumstances that make equal sharing repugnant to justice when children's interests are involved, however we have not identified any successful cases of this kind.²²

12.14 If a court is satisfied that section 13 applies, it will then look at the contributions each partner made to the relationship and divide the relationship property based on those contributions. Section 18(1) provides that contributions to the relationship are all or any of the following:

- (a) the care of—
 - (i) any child of the marriage, civil union, or de facto relationship:
 - (ii) any aged or infirm relative or dependant of either spouse or partner:
- (b) the management of the household and the performance of household duties:
- (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:
- (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
- (e) the payment of money to maintain or increase the value of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
- (f) the performance of work or services in respect of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
- (g) the forgoing of a higher standard of living than would otherwise have been available:

²² An unsuccessful application was made in *M v M* [2012] NZFC 5019 however the Family Court did not exclude the possibility that children's interests could constitute exceptional circumstances warranting an unequal division.

- (h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
 - (i) enables the other spouse or partner to acquire qualifications; or
 - (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

12.15 There is no presumption that financial contributions are of greater value than non-financial contributions.²³

The continued role of section 13 in the PRA framework

12.16 In our view, there remains a need for a provision that permits a court to depart from equal sharing in appropriate cases. The circumstances of each relationship differ so greatly that it is impossible to draft general rules of property division that will achieve a just division of property in every case. This is particularly so given that relationships in New Zealand are becoming more diverse.²⁴ We therefore consider if section 13, or an equivalent provision, should have a continuing role in the PRA.

12.17 We also think that there should be a high threshold for departing from the general rule of equal sharing, in order to preserve the principles of the PRA, discussed at paragraph (a) above and in more detail in Chapter 3.

12.18 It is difficult, however, to say precisely what the test ought to be for departing from the equal sharing rule. This is because section 13 operates as an exception that applies when the general rules in the PRA will not achieve a just division of property. In this Issues Paper we are considering reform of some of the PRA's general rules, such as the rules for the classification of property. Therefore it will not be clear what the precise role of section 13, or an equivalent provision, should be until there is greater clarity about how the PRA's general rules ought to operate.

²³ Property (Relationships) Act 1976, s 18(2).

²⁴ See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

Is the section 13 test uncertain?

- 12.19 Nonetheless, we have concerns about the test used in section 13. The phrase “extraordinary circumstances” requires a court to test the case at hand against a whole range of relationships to determine whether it can be characterised as extraordinary.²⁵ But as relationships continue to diversify, it is increasingly difficult to identify what are “ordinary” circumstances. We are therefore concerned that deciding what constitutes “extraordinary circumstances that make equal sharing repugnant to justice” will become more difficult in the years to come.
- 12.20 Options for reform might include prescribing in greater detail the matters a court should take into account when deciding whether section 13 should apply, setting out examples in the PRA of how the exception is intended to operate,²⁶ or replacing the test in section 13 with a new formula. As noted above, any options for reform will need to be considered in light of any reforms to the PRA’s general rules.

CONSULTATION QUESTIONS

- D1 Should the PRA continue to have an exception provision like section 13?
- D2 Is the current wording of section 13 satisfactory? If not, how might the test for departing from equal sharing be formulated?

Misconduct

- 12.21 The misconduct of one partner has very little influence on the division of property under the PRA. We noted in Chapter 3 that an implicit principle of the PRA is that misconduct during a relationship is generally irrelevant to the division of property. Section 18A makes this position clear.
- 12.22 Section 18A(1) provides that “a court may not take any misconduct of a spouse or partner into account in proceedings under this Act”, except as permitted in sections 18A(1) and 18A(2). This general rule influences how the PRA’s rules of division are to be interpreted. For example, the courts have said that

²⁵ *J v J* (1993) 10 FRNZ 302 (CA) at 307.

²⁶ See for example Copyright Act 1994, s 122A; Personal Property Securities Act 1999, s 41; and Accident Compensation Act 2001, s 114 as amended by the Interest on Money Claims Act 2016, s 29 which will come into effect on 1 January 2018. The Property (Relationships) Act 1976 itself contains some examples in ss 2B and 2BAA.

because of section 18A(1), misconduct is not an “extraordinary circumstance” that will allow a departure from the general rule of equal sharing under section 13.²⁷

12.23 Section 18A(2) provides that a court can only take into account a partner’s misconduct when deciding:

- (a) a partner’s contributions to the relationship under section 18;²⁸
- (b) whether to make an order under section 26 to settle relationship property for the benefit of children;
- (c) whether to make an order postponing division,²⁹ granting one partner the right to occupy the family home or a home rented by the family,³⁰ or granting one partner the temporary use of furniture or household items;³¹ or
- (d) whether to make an ancillary order under section 33.³²

12.24 Importantly, section 18A(3) provides that a court may only take misconduct into account that is “gross and palpable” and has “significantly affected the extent or value of relationship property”. Misconduct that has no effect on the relationship property will be irrelevant, regardless of how severe the misconduct may have been. For example, in *W v G* there was evidence that one partner had committed “gross and repeated” violence to his partner over a long period of time, including both physical and sexual abuse.³³ However because the District Court found no causative link between that conduct and the value of the relationship property, the partner’s misconduct had no impact on the division of property.³⁴

²⁷ *J v J* (2005) 25 FRNZ 1 (CA) at [11] per William Young J. See the discussion at Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR13.06]. The author exemplifies the extent of the exclusion by the case *E v W* [2006] NZFLR 1140 (FC) where one partner was convicted of sexually abusing the other partner’s children. The Family Court said this misconduct was not relevant to s 13 of the Property (Relationships) Act 1976.

²⁸ One partner’s support and tolerance of the other partner’s misconduct might also be seen as a positive contribution to the relationship under s 18 of the Property (Relationships) Act 1976: *J v J* (1993) 10 FRNZ 302 (CA) (wife coping with her husband’s alcoholism); and *W v W (No 2)* (1999) 19 FRNZ 24 (DC) (wife supporting husband through mental illness).

²⁹ Property (Relationships) Act 1976, s 26A.

³⁰ Property (Relationships) Act 1976, ss 27–28.

³¹ Property (Relationships) Act 1976, ss 28B–28C.

³² The court’s ancillary powers under s 33 of the Property (Relationships) Act 1976 are for the court to give effect to any substantive orders it makes dividing the partners’ relationship property under s 25.

³³ *W v G* DC Wellington FP 558/92, 16 August 1995.

³⁴ *W v G* DC Wellington FP 558/92, 16 August 1995 at 12–13.

- 12.25 The effect of section 18A is that misconduct will generally not affect a partner’s share of relationship property, even if that misconduct was gross and palpable and significantly affected the value of the relationship property. Misconduct will only have a bearing on a partner’s share of relationship property when there are other exceptional circumstances that make equal division repugnant to justice under section 13, or when the relationship is a short-term relationship.³⁵
- 12.26 There have, however, been cases when a court has taken misconduct into account as a question of fact when considering other provisions of the PRA. For example in *N v N* the Family Court accepted that if one partner’s violent conduct causes the other partner to take on more of the childcare responsibilities, or prevents them from taking on employment, then that violence may result in a division of functions for the purposes of section 15.³⁶
- 12.27 A court can also make orders where one partner has taken “deliberate action or inaction” that has “materially diminished” the other partner’s separate property (section 17A) or the relationship property after separation (section 18C).

Should misconduct have more weight in the division of relationship property?

- 12.28 There have been calls for a partner’s misconduct to have a greater bearing on the division of relationship property, particularly in cases of family violence.³⁷

³⁵ Section 18A(2)(a) of the Property (Relationships) Act 1976 permits misconduct to be taken into account when determining the contribution of a partner to the relationship under s 18. Section 18 is only relevant when s 13 (extraordinary circumstances) or ss 14–14A (short-term relationships) apply. These sections provide for the division of property in accordance with the contribution of each partner to the relationship.

³⁶ *N v N* [2004] NZFLR 942 (FC) at [98]. Section 15 of the Property (Relationships) Act 1976 is discussed in Part F.

³⁷ See for example Wendy Parker “Family Violence and Matrimonial Property” [1999] NZLJ 151; and Geraldine Callister “Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration” (LLB (Hons) Dissertation, University of Waikato, 2003). During the lead up to the 2001 amendments to the Property (Relationships) Act 1976 (PRA), several submitters said to the Justice and Electoral Select Committee that family violence needed to be taken into account under the Property (Relationships) Act 1976 regime: Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 14–15. Note we use the term “family violence” rather than “domestic violence” to reflect the current terminology in the Family and Whānau Violence Legislation Bill 2016 (247-2).

12.29 New Zealand has the highest reported rate of intimate partner violence³⁸ in the developed world.³⁹ The consequences of family violence can be devastating for the victims and their families. Discussing intimate partner violence, Cohen writes:⁴⁰

Terrible and tragic things happen within the contexts of battering relationships, even beyond the violence and resultant injury itself. These tragedies include the death of the battered victim; the physical and psychological abuse of others, especially children, within the household; the destruction of employment situations and opportunities; the withering away of basic trust, particularly trust in intimacy; and, often, the waste of what might, and should, have been rewarding and productive lives.

12.30 Several reasons have been given why family violence should have a greater bearing on the division of relationship property:

- (a) Family violence can be seen as a repudiation and a negation of the violent partner's commitment to the relationship.⁴¹ As we discussed in Chapter 3, the PRA is built on the theory that a qualifying relationship is an equal partnership or joint venture, to which partners contribute in different but equal ways. Misconduct of this severity has the effect of undermining that partnership and should have consequences.
- (b) Family violence can have significant ongoing economic consequences that may not be reflected in the reduced value of relationship property. For example, a partner who has suffered physical or psychological abuse may experience a deterioration of his or her performance at work or in study.⁴² That partner will therefore potentially suffer a drop in work productivity, inhibited career advancement, or even loss of employment and

³⁸ Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 187 describes "intimate partner violence" as "[a]ny behaviour within an intimate relationship (including current and/or past live-in relationships or dating relationships) that causes physical, psychological or sexual harm to those in the relationship"

³⁹ Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015) at 4–5.

⁴⁰ Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) citing Jane Maslow Cohen "Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?" (1995) 57 *U Pitt L Rev* 757 at 762.

⁴¹ *G v G* [1998] NZFLR 807 (FC) at 814.

⁴² Geraldine Callister "Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration" (LLB (Hons) Dissertation, University of Waikato, 2003) at 19.

loss of income. These consequences are not reflected in the PRA's division of property.⁴³

- (c) There is an increasing awareness of the damaging effects of family violence, the need for perpetrators to take responsibility for their actions and the need to discourage family violence.⁴⁴

12.31 To date Parliament has resisted calls to give misconduct greater weight in the division of property. In the lead up to the 2001 amendments the Select Committee responded to these calls by saying it was undesirable to introduce fault or misconduct as a basis for division.⁴⁵ The Committee explained it would represent a significant departure from the current scheme and it could lead to pressure for other fault-based conduct to be taken into account.⁴⁶ The Committee concluded that issues concerning the impact of family violence are most appropriately addressed in the context of the Domestic Violence Act 1995 and general criminal law.⁴⁷

12.32 Under the Domestic Violence Act 1995 a court can make orders that affect the partners' property. For example, a court can grant an applicant the right to personally occupy a house,⁴⁸ or to possess furniture, household appliances and household effects.⁴⁹

12.33 We recognise the important considerations on both sides of this issue. We are aware of the grave effects of family violence.⁵⁰ Family violence should be firmly discouraged and the perpetrators should face consequences.

⁴³ The Ministry of Justice note the significant economic cost of family violence to New Zealand, from the impact on the healthcare system through to the cost of low productivity: Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015) at 3. The estimated cost of intimate partner violence and child abuse to New Zealand's economy in 2014 is between \$4.1 billion to \$7 billion: Sherilee Kahui and Suzanne Snively *Measuring the Economic Costs of Child Abuse and Intimate Partner Violence to New Zealand* (The Glenn Inquiry, 2014).

⁴⁴ Wendy Parker "Family Violence and Matrimonial Property" [1999] NZLJ 151 at 153. The Family and Whānau Violence Legislation Bill 2016 (247-2) currently before Parliament is aimed at (a) recognising that family violence in all its forms is unacceptable, (b) stopping and preventing perpetrators from inflicting family violence, and (c) keeping victims safe from family violence (cl 1A).

⁴⁵ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

⁴⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

⁴⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 15.

⁴⁸ Domestic Violence Act 1995, s 53(1).

⁴⁹ Domestic Violence Act 1995, s 67(1).

⁵⁰ See for example Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016); and Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016).

- 12.34 We acknowledge, however, the merits of dividing partners' property without reference to the moral failings of each partner. It is undesirable to enable or encourage disputes that focus on fault and misconduct, particularly at separation, which is the most dangerous time for victims of family violence.⁵¹ This is also in keeping with the principle that questions under the PRA about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.
- 12.35 There might also be practical difficulties in proving misconduct and its economic impact on the relationship property. Questions about the interaction of the PRA and criminal proceedings, and what standard of proof would be required, would also need to be given careful thought.⁵²

Options for reform

- 12.36 If the PRA is to be reformed to give greater prominence to the effects of misconduct in a relationship, the question would be how to achieve this. We have explored two options for reform.

Option 1: Provide for misconduct to be considered an “extraordinary circumstance”

- 12.37 One option is to amend section 18(2) to provide that a court can take into account a partner's misconduct when deciding whether there are extraordinary circumstances which make equal sharing repugnant to justice under section 13. The result would be that misconduct could be taken into account in deciding how the relationship property should be divided, if the test in section 13 is met. Section 18A(3) would ensure that only misconduct that is “gross and palpable” and has “significantly affected the extent or value of relationship property” could be considered under section 13. The court would retain a discretion to decide whether the misconduct satisfies the test under section 13 in the particular circumstances of each case. This option relies on the courts to

⁵¹ The Law Commission noted evidence that women are most likely to be killed by an abusive partner in the context of an attempted separation: Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 31 citing Walter S DeKeseredy, McKenzie Rogness and Martin D Schwartz “Separation/divorce sexual assault: The current state of social scientific knowledge” (2004) 9 *Aggression and Violent Behavior* 675 at 677.

⁵² Zoë Lawton “One Court, One Judge: An Integrated Court System for New Zealand Families Affected by Violence” (discussion paper, 2017) available at <www.lawfoundation.org.nz> considers how an integrated domestic violence court might operate in New Zealand.

develop an approach to determining when misconduct satisfies the test under section 13.

Option 2: A specific exception for family violence

12.38 Parker explains that family violence may not be so uncommon as to constitute “extraordinary circumstances”, and argues there should be no requirement that the violence be extraordinary before the PRA responds.⁵³ Neither should the victim have to prove that the misconduct was gross and palpable and devalued property.⁵⁴ Rather, she says that the violence should be seen as an injustice in its own right which should, as a standalone exception, displace the general rule of equal sharing.⁵⁵ Therefore another option would be a new provision alongside section 13 that specifically deems family violence as a standalone exception to equal division.⁵⁶

CONSULTATION QUESTIONS

- D3 Should misconduct, and in particular family violence, have a greater bearing on how property is divided between the partners?
- D4 If it should, do you have a preferred option for reform? Are there viable options for reform we have not considered?

Dissipations of relationship property

12.39 If a partner’s “deliberate action or inaction” after separation has “materially diminished” the value of relationship property, section 18C permits a court to order that partner to compensate the other partner.⁵⁷ Compensation can be in the form of a payment of a sum of money or a transfer of relationship or separate property.

⁵³ Wendy Parker “Family Violence and Matrimonial Property” [1999] NZLJ 151 at 154. See also *S v S DC Whangarei FP 888/218/82*, 22 April 1991. A husband had been abusive in the past on four specific occasions. The District Court noted the time that had elapsed between each episode, the fact that assault is regrettably not so uncommon in relationships and that the husband had generally been a good father and provider. The Court said that no extraordinary circumstances existed.

⁵⁴ Wendy Parker “Family Violence and Matrimonial Property” [1999] NZLJ 151 at 154.

⁵⁵ Wendy Parker “Family Violence and Matrimonial Property” [1999] NZLJ 151 at 154.

⁵⁶ Wendy Parker “Family Violence and Matrimonial Property” [1999] NZLJ 151 at 154. Callister also supports this approach: see Geraldine Callister “Domestic Violence and the Division of Relationship Property under the Property (Relationships) Act 1976: The Case for Specific Consideration” (LLB (Hons) Dissertation, University of Waikato, 2003) at 39.

⁵⁷ Property (Relationships) Act 1976, s 18C.

- 12.40 Section 18C sets a high threshold. The partner must have deliberately acted or failed to act in order to reduce the value of the property.⁵⁸ This can be difficult for the other partner to prove.
- 12.41 Examples of the courts awarding compensation under section 18C include where:
- (a) one partner made significant drawings for personal expenditure on a company in which both partners were shareholders, which led to the value of the company decreasing,⁵⁹ and
 - (b) one partner sold an item of relationship property at undervalue.⁶⁰

Does the PRA deal adequately with the dissipation of property during a relationship?

- 12.42 The PRA may not deal adequately with the dissipation of property during a relationship, when that property would have been characterised as relationship property and would have otherwise been available for division on separation.
- 12.43 We have been told that it is common for one partner during the course of the relationship to use significant amounts of relationship property for personal use, such as gambling, or to incur personal debts, such as credit card debts, for which both partners are liable.⁶¹ We have also heard stories of one partner draining the partners' joint bank accounts before or immediately on separation.
- 12.44 Section 18C will not apply in these circumstances. It only applies when a partner has deliberately reduced the value of relationship property after the relationship has ended.
- 12.45 Rather, section 19 provides that, unless the PRA provides otherwise, nothing affects the power of either partner to deal

⁵⁸ *M v M* [2013] NZCA 660, [2014] NZFLR 418 at [37]. The Court of Appeal said that any diminution in value taken into account must have been deliberate. The Court rejected the argument that the word "deliberate" simply referred to the action or inaction. In declining leave to appeal, the Supreme Court said the Court of Appeal's comments about the use of the word deliberate were "clearly right": *M v M* [2014] NZSC 32, [2014] NZFLR 599 at [4]. See discussion in Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR18C.05].

⁵⁹ *S v S* [2012] NZFC 4050.

⁶⁰ *C v C* FC Auckland FAM-2002-004-2658, 8 September 2004.

⁶¹ See for example Susan Edmunds "Kiwis Warned of Sexually-Transmitted Debt Epidemic" (13 February 2017) Stuff <www.stuff.co.nz>.

with or dispose of property as if the PRA had not been enacted. So while the partners remain together, they may each deal with their property without any obligation to recognise the rights the other partner may have under the PRA if the relationship was to end. There are, however, a number of provisions in the PRA which can affect this general rule.

Section 44

- 12.46 The courts have sometimes relied on section 44. Section 44 provides that when a partner has disposed of property in order to defeat the other partner's claim or rights under the PRA, a court may order that the property be transferred back, or that the person who received the property pay compensation. In *N v R*, for example, one of the partners in a de facto relationship had died.⁶² In the years prior to the partner's death, he had suffered from Alzheimer's disease. During this period the other partner had transferred significant amounts of money from the partner to her own account. In the Family Court proceeding she would not explain what had happened to this money. The Family Court said that section 44 applied. The Court ordered that the partner repay the unaccounted sums to the deceased partner's estate.
- 12.47 Section 44 is not usually the appropriate tool to use in circumstances where a partner has dissipated property. Partners who have been disadvantaged by the disposition of property bear the burden of proving that the partner who made the disposition intended to defeat his or her claim or rights under the PRA.⁶³ In some cases this can be difficult.⁶⁴ The other major problem with section 44 is its remedies. It provides that the person who receives the property must return the property or pay compensation for it. In cases where one partner has repeatedly dissipated property on a number of occasions to a number of third parties, such as by gambling over an extended period of time, it is not possible for an affected partner to recover the property. The third party who receives the property will not be ordered to return the property or pay compensation if the property was received in

⁶² *N v R* [2014] NZFC 5380.

⁶³ The level of intention required has been substantively lowered in recent cases. In *R v U* [2010] 1 NZLR 434 (HC) the High Court accepted that a partner's knowledge of the effects of the disposition can be equated with an intention to bring about that effect.

⁶⁴ See our comments regarding s 44 of the Property (Relationships) Act 1976 in Part D.

good faith and for consideration.⁶⁵ For most third party suppliers or service providers, such as casinos, shops or bars, the third party will have a good defence to the recovery of the property.

Section 20E

12.48 The courts sometimes rely on section 20E to treat the expenditure as personal debts that have been paid from relationship property. In *W v W*, after the partners had separated the wife had spent approximately \$38,000 on what the Family Court described as “clothing, toys and trinketry.”⁶⁶ The Court said that, unlike things like groceries, the wife’s purchases could not be regarded as expenditure reasonably required for her maintenance. Rather, the Court said that the expenditure was used to meet her personal debts.⁶⁷ The Court ordered the wife to pay compensation to the husband for two-thirds of the amount of the expenditure. Although the expenditure in this case had occurred after the partners had separated, the Court noted that section 20E does not specify any time limits for when the partner paid his or her personal debt from relationship property. Consequently, section 20E could be applied.

12.49 In *B v B* a husband said that in the last 18 months of the partners’ marriage, his wife incurred considerable personal expenditure on personal items.⁶⁸ He argued that this expenditure should be considered the wife’s personal debts that she had paid from the partners’ relationship property. The Court said that section 20E did not apply in this instance. The wife’s expenditure was no more than normal everyday expenditure tacitly approved and expected in most relationships.⁶⁹

12.50 We consider that section 20E does not provide a suitable remedy in these types of cases. The transactions in these cases involved a contemporaneous exchange of cash for the item that was purchased. They cannot properly be described as a debt.⁷⁰

⁶⁵ Property (Relationships) Act 1976, ss 44(2) and 44(4).

⁶⁶ *W v W* FC New Plymouth FAM-2004-043-891, 18 April 2007 at [49].

⁶⁷ *W v W* FC New Plymouth FAM-2004-043-891, 18 April 2007 at [49].

⁶⁸ *B v B* FC Christchurch FAM-2004-009-3656, 13 July 2006.

⁶⁹ *B v B* FC Christchurch FAM-2004-009-3656, 13 July 2006 at [56]. The husband also complained that his wife had spent considerable sums of money gambling. The Court found that the husband had gambled alongside his wife on several occasions. The Court said at [63]–[64] that the partners’ joint gambling was a common enterprise which therefore characterised the debt as a relationship debt.

⁷⁰ *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [18] and [186].

Consequently, section 20E is arguably the wrong provision to use in cases of one partner's excessive expenditure of relationship property.

12.51 Furthermore, section 20E only applies to situations where the personal debts of one partner have been paid from relationship property. It does not apply to situations where one partner pays the other's personal debts from separate property.

12.52 In light of the shortcomings we have identified with these various provisions, the question arises whether the PRA should be better equipped to deal with one partner's excessive personal expenditure or other dissipation of relationship property during the relationship. Any change would need to clearly exclude normal expenditure that is reasonably incurred and discourage partners from scrutinising and disputing each other's spending during and after the relationship, except in truly inappropriate circumstances.

CONSULTATION QUESTIONS

D5 Does the excessive expenditure or dissipation of relationship property by one partner during or after the relationship often lead to an unjust division of property?

D6 Are the current provisions of the PRA adequate to deal with excessive personal expenditure or the dissipation of relationship property?

Successive and contemporaneous relationships

12.53 The PRA provides special rules of division in sections 52A and 52B for successive and contemporaneous relationships.⁷¹ These rules apply when competing claims are made in respect of the same relationship property but in relation to different relationships and there is insufficient property to satisfy the claims.⁷²

⁷¹ Sections 52A and 52B of the Property (Relationships) Act 1976 (PRA) were based on a provision recommended in the Law Commission Report *Succession Law: A Succession (Adjustment) Act* (NZLC R39 1997) at 141 and C200–C206: see Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 27. The provision recommended by the Law Commission was designed to manage competing claims in respect of contemporaneous relationships where there are insufficient assets in the deceased's estate to fully satisfy orders and awards. It was developed in a different context involving only two living partners, the common partner being deceased. It was not developed to address a scenario where all three partners are still alive, where the relationships were successive but not contemporaneous, or where one relationship ends and the other continues.

⁷² Sections 52A and 52B of the Property (Relationships) Act 1976 apply when two or more formal claims have been filed in court for orders under ss 25–31 or 33: s 52A(4); and *[LC] v D* (FC) Waitakere FAM-2008-090-000304, 20 September 2011 at [53].

- 12.54 Successive relationships are those that occur one after the other, with no period of overlap. For example, after partner A's marriage to partner B ends, he or she enters into a de facto relationship with partner C. Section 52A applies if partner A and partner B do not resolve their property matters before partner A's new de facto relationship with partner C ends, and partner C seeks a division of property under the PRA. If partner A and partner B had been in a de facto relationship rather than married, then section 52B would apply.
- 12.55 Contemporaneous relationships arise when one person is in two or more relationships at the same time. For example, partner A is married to partner B and at the same time is also in a de facto relationship with partner C. Contemporaneous relationships were discussed in Part B.
- 12.56 If the relationships are successive, the relationship property is divided in accordance with the chronological order of the relationships.⁷³ This recognises that the first relationship will generally stop accumulating relationship property when it ends. The common partner will only take property into his or her second relationship that is not claimable by the first partner.⁷⁴ This means that the first partner's claim is determined first, in order to ascertain the balance of property available to satisfy the second partner's claim. The rules for successive relationships are not a true exception to the general rule of equal sharing as they simply set out a mechanism for determining the priority of claims. The general rule of equal sharing still applies to the division of property between the partners to each relationship.
- 12.57 If the relationships were contemporaneous, then there is a two stage process:
- (a) to the extent possible, the claims must be satisfied from the property attributable to each relationship (stage one); and
 - (b) to the extent that it is not possible to attribute property to either relationship, the property is to be divided in accordance with the contribution of each relationship to the acquisition of the property (stage two).

⁷³ Property (Relationships) Act 1976, ss 52A and 52B.

⁷⁴ See Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39 1997) at [C204].

12.58 The rules for contemporaneous relationships are an exception to the general rule of equal sharing. They are also an exception to the general approach of examining contributions to the relationship, which is the approach that applies when there are exceptional circumstances under section 13 and when the relationship is a short-term relationship.⁷⁵ The approach in sections 52A and 52B is attractive in this context as it avoids comparing the worth of the two contemporaneous relationships.⁷⁶ Such value judgements would be difficult to make and inconsistent with the principles on which the PRA is based.⁷⁷

12.59 There is limited case law on sections 52A and 52B. This may be because it is relatively rare for competing claims from different relationships to be made. It may also be due to the difficulty of establishing a contemporaneous relationship (discussed in Part B). Nonetheless we have identified several potential issues with how sections 52A and 52B operate in practice.

Issues with sections 52A and 52B

12.60 The issues we have identified are with the way sections 52A and 52B work both generally and for contemporaneous relationships. We have not identified any material issues that are unique to the way sections 52A and 52B work for successive relationships.

12.61 The issues are:

- (a) **The rules are unclear.** Reid says that the main problem with sections 52A and 52B is their lack of clarity.⁷⁸ For example, it is unclear at what stage of proceedings sections 52A and 52B apply⁷⁹ and how a court will

⁷⁵ Property (Relationships) Act 1976, ss 14-14A.

⁷⁶ However the situation is different where there is only one relationship. See Chapter 10 for a discussion of the problems with dividing relationship property on the basis of contributions to property, rather than to the relationship, in the context of s 9A(2) of the Property (Relationships) Act 1976.

⁷⁷ See Chapter 3 for a discussion of the principles of the Property (Relationships) Act 1976. These include the principle that men and women have equal status and their equality should be maintained and enhanced, and the principle that all forms of contribution to the relationship are treated as equal.

⁷⁸ Adrienne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 57. This Dissertation also identifies other technical and procedural issues with ss 52A and 52B of the Property (Relationships) Act 1976.

⁷⁹ Adrienne Reid "Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976" (LLB (Hons) Dissertation, University of Otago, 2007) at 25-29. Reid says at 26 that "[t]he question that arises when considering sections 52A and 52B is whether they dictate what relationship property is available to be divided between the parties to each relationship, or whether property orders are made under the usual division of relationship property sections of the [PRA], and sections 52A and 52B only apply to rank the property orders made if there is insufficient property to satisfy them."

determine which property is “attributable” to which relationship.⁸⁰

- (b) **The rules favour the common partner.** This is because, however property is divided between contemporaneous relationships, if the general rule of equal sharing applies within each relationship, the common partner will receive half of the relationship property divided under section 52A or 52B, which amounts to half of the total.⁸¹ Reid says that:⁸²

...sections 52A and 52B inevitably bring a result that is incongruous with the rest of the [PRA], with the common partner retaining half of the property while the other partners share the remainder in a way that it is hard to predict. It seems that the common partner is allowed to have their cake and eat it too, while the others must fight over the crumbs.

- (c) **The rules may be used strategically to defeat or reduce one partner’s claim.** For example, if only one of the relationships has ended, it is in the interests of the partner to the continuing relationship to bring a claim under section 52A or 52B to preserve as much property as possible for the continuing relationship.
- (d) **The rules are difficult to reconcile with the PRA’s rules around misconduct.** In the lead up to the 2001 reforms the Principal Family Court Judge highlighted the difficulty for the courts in reconciling section 18A with sections 52A and 52B.⁸³ Section 18A allows “gross and palpable” misconduct that has “significantly affected the extent or value of relationship property” to be taken into account in determining a partner’s contribution to the relationship. Such conduct can

⁸⁰ The term “attributable” is not defined in the Property (Relationships) Act 1976 (PRA), although it is used in other sections of the PRA in different ways, for example, ss 8(1)(g), 8(1)(i) and 9A(2). The way an attribution analysis works in these other contexts could inform the interpretation of ss 52A and 52B. Adrienne Reid “Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976” (LLB (Hons) Dissertation, University of Otago, 2007) at 7 makes the point that stage one of the test is redundant because “all property that is relationship property of a relationship is attributable to that relationship.”

⁸¹ See Adrienne Reid “Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976” (LLB (Hons) Dissertation, University of Otago, 2007) at 36.

⁸² Adrienne Reid “Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976” (LLB (Hons) Dissertation, University of Otago, 2007) at 60.

⁸³ Principal Judge Mahoney “Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000” at 6.

also be taken into account in determining what order to make under particular provisions of the PRA.⁸⁴ The Judge gave the example of a husband who throughout the marriage supports a clandestine relationship with considerable financial contributions sourced from relationship property, for example earnings.⁸⁵ Henaghan says that there is an argument that a clandestine contemporaneous relationship may in fact satisfy the misconduct test in certain circumstances.⁸⁶

- (e) **The existing rules do not clearly cater for situations involving more than two contemporaneous relationships.** For example, partner A is married to partner B and is also in de facto relationships with partner C and partner D at the same time. However this scenario may be unusual in practice.

CONSULTATION QUESTIONS

- D7 Are there any issues with the way sections 52A and 52B work for successive relationships?
- D8 Do the rules for contemporaneous relationships have the potential to lead to an unjust result? If so, in what circumstances?

Options for reform

12.62 Our preliminary view is that there is a need for provisions setting out the priority of claims when there are successive or contemporaneous relationships. The rules already provide mechanical clarity for successive relationships, but not for contemporaneous relationships. As relationships in New Zealand are becoming more diverse, there may be an increasing need to better provide for contemporaneous relationships.

12.63 We consider several options for reform below. However we also note that some of the issues with sections 52A and 52B may be less acute if the PRA's rules of classification are changed. As we have discussed in Chapter 9, one option is to move to a pure "fruits of the relationship" approach to the classification

⁸⁴ Property (Relationships) Act 1976, s 18A(2)(b). However see [12.25] above.

⁸⁵ Principal Judge Mahoney "Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000" at 6.

⁸⁶ Mark Henaghan "The three of us" (paper presented to the New Zealand Law Society Family Law Conference, October 2001) at 9-10.

of property, which would likely reduce the pool of relationship property that is divided between the partners in many cases. This may reduce the risk that sections 52A and 52B lead to an unjust result when applied to contemporaneous relationships.

Option 1: Amend sections 52A and 52B to address their lack of clarity

12.64 This option would accept that the policy underpinning sections 52A and 52B is basically sound. It would retain attractive aspects of the current rules, for example the nuanced approach and the focus on contributions to the property as opposed to contributions to the relationship. Careful consideration would be needed as to what directions the provisions could give to determine when property is attributable to a relationship.

Option 2: Divide all relationship property equally between all partners entitled to share it

12.65 Option 2 is to replace sections 52A and 52B with a new provision that says property that is relationship property of more than one relationship contemporaneously be divided equally between all the partners entitled to share in it.⁸⁷

12.66 There is some precedent for this approach in the Administration Act 1969, which contains rules that apply when the deceased is survived by multiple partners who are entitled to succeed on intestacy.⁸⁸ Those rules provide that the partners share equally what one of them would have received if only one partner had survived the deceased.⁸⁹ This approach would have the advantage of clarity, but may in some circumstances deliver “rough justice” as opposed to a just result. An option to address this would be to include an element of judicial discretion, for example giving a court flexibility to depart from the rule to avoid serious injustice.⁹⁰

⁸⁷ Adrienne Reid “Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976” (LLB (Hons) Dissertation, University of Otago, 2007) at 58.

⁸⁸ Administration Act 1969, s 77C.

⁸⁹ Administration Act 1969, s 77C.

⁹⁰ A “serious injustice” test is already used in other provisions of the Property (Relationships) Act 1976, for example ss 14A and 21J. See also Adrienne Reid “Have your cake and eat it too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976” (LLB (Hons) Dissertation, University of Otago, 2007) at 57–58.

Option 3: Amend the PRA to better reconcile the rules around misconduct with the rules for contemporaneous relationships

- 12.67 Another option is to amend sections 13, 18A and/or 52A and 52B to expressly recognise clandestine or unsanctioned contemporaneous relationship(s) that significantly affect the extent or value of the relationship property attributable to each relationship as a form of misconduct that renders equal sharing repugnant to justice. This option has some similarities with option 1 under misconduct, discussed at paragraph 12.37 above.
- 12.68 Under this option the common partner's share of relationship property could be reduced and the share of the other partner(s) increased. This could mean that the common partner bears greater responsibility for the property consequences of maintaining contemporaneous relationships.

CONSULTATION QUESTIONS

D9 Do the rules for contemporaneous relationships require reform? If so, which of the options we have identified (if any) do you prefer and why?

D10 How should sections 52A and 52B relate to the rules on misconduct in section 18A?

Chapter 13 - Valuation

Valuation of property in the PRA's overall scheme

- 13.1 Usually relationship property is divided as a global division. This means a court will first determine the value of individual items of relationship property to assess the total relationship property value. The valuation of property is integral to ensuring that each partner obtains an equal share of the global relationship property pool.⁹¹ As the Court of Appeal explained in *Reid v Reid*:⁹²

[T]he overall purpose of having various assets valued is to produce in a global sense a fair estimation of the worth of the matrimonial property so that its subsequent division will be achieved in a way which will be just as between the husband and wife.

- 13.2 The valuation of relationship debts is similarly important because those debts are deducted from the total value of the partners' relationship property. It is only the remaining net value of the relationship property that is divided between the partners.⁹³
- 13.3 Once a court has calculated the net value of relationship property it will then decide which assets go to each partner, with monetary adjustments to ensure equal sharing of all relationship property.⁹⁴

Valuation and compensation

- 13.4 In certain cases a court must also value contributions and items of separate property in order to calculate compensation payments or adjustments to the global division of relationship property. The PRA has several provisions that allow a court to order one partner to pay compensation to the other.⁹⁵ In each case, a court

⁹¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9]. The author explains that valuation is essential to global division process as value is "used as the medium for determining the respective entitlements in the overall division."

⁹² *Reid v Reid* [1980] 2 NZLR 270 (CA) at 272, judgment of Woodhouse and Richardson JJ delivered by Woodhouse J.

⁹³ Property (Relationships) Act 1976, s 20D.

⁹⁴ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9].

⁹⁵ For example a court may order one partner to pay compensation to the other if, owing to the division of functions during the relationship, that partner is likely to enjoy significantly higher income and living standards than the other partner after separation: s 15; a court may require one partner, whose separate property has been sustained by the other

would have to assess the value of certain things. Under section 15 for example, a court must determine the likely economic disparity between the partners to quantify the appropriate level of compensation. Under sections 17 and 18B, a court must consider the value of a partner's contributions. If a partner has taken care of the partners' children after separation and a court determines that compensation under section 18B is appropriate, it could receive valuation evidence of the costs of providing a nanny in lieu of the care the partner provided.⁹⁶

Determining value

What is value?

- 13.5 The PRA is silent on what the term "value" means. Instead, its interpretation has been left to the courts to decide.⁹⁷ We note four points regarding the courts' approach to valuation.
- 13.6 First, valuation of property is a separate exercise to the initial exercise of taking stock of the partners' property. The PRA will only apply to items that fall within the definitions of "property" and "owner" under section 2.⁹⁸ A valuer might be able to ascribe a value to a particular item, but that item would not be property for the purposes of the PRA. For example, a person's earning capacity is not property although the present value of a partner's future income can be determined.⁹⁹
- 13.7 Second, a court must determine the appropriate standard of value. The PRA frequently refers to the word "value." It can, however, have several meanings because, as a matter of valuation practice, different standards of value are applied in different instances. In

partner, to pay compensation: s 17; a court may recognise a partner's contributions to the relationship after separation by requiring that a partner compensate the partner who made the contributions: s 18B; and if one partner has materially diminished the value of relationship property after separation, the court can order that partner to pay compensation to the other: s 18C.

⁹⁶ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁹⁷ In the years following the enactment of the Matrimonial Property Act 1976 the Court of Appeal addressed the question of valuation in a number of cases: see principally *Haldane v Haldane* [1981] 1 NZLR 554 (CA); and *Holt v Holt* [1987] 1 NZLR 85 (CA). The Court of Appeal's approach was later upheld on appeal: *Holt v Holt* [1990] 3 NZLR 401 (PC).

⁹⁸ See Chapter 8 for a discussion of these terms.

⁹⁹ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) the Court of Appeal said that although the person may obtain considerable financial benefits from his or her qualifications, skills and experience, those aspects are purely personal characteristics which do not come within the Property (Relationships) Act 1976's definition of property.

Haldane v Haldane, the Court of Appeal explained that “value” could refer to the market value of the property, its intrinsic value to the owner, or its replacement cost.¹⁰⁰ The Court concluded that ordinarily a just division of property under the PRA will require a court to use the “fair market value” of the property.¹⁰¹ This is determined by assuming a hypothetical sale between a willing but not anxious seller and a willing but not anxious buyer.¹⁰² It should be noted, however, that a court may not always adopt a fair market value standard. In some cases the courts have considered whether to use an alternative standard of value.¹⁰³

- 13.8 Third, the PRA gives no guidance on the methodology to determine value. The courts have said no specific methodology should be elevated into a test for what value means, rather that valuation methodologies are aids.¹⁰⁴ Some assets are simple to value. For example, a fair market value of a family car can be appraised by a second-hand car dealer.¹⁰⁵ The task is more complex when a court must determine the present value of an asset that will produce future income. The most common example of such assets in relationship property cases are company shares and superannuation scheme entitlements. The courts will usually accept a valuation based on a discounted cash flow analysis.¹⁰⁶ This involves working out a present value by assessing future

¹⁰⁰ *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562 per Richardson J.

¹⁰¹ *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562 per Richardson J. This is the standard of value usually applied in relationship property cases: see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.9]; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2G.06]. Similarly, the courts will usually value relationship debts on a fair market value standard: *Walker v Walker* [2007] 2 NZLR 261 (CA) at [37-40] (in other words, what a willing but not anxious purchaser would pay for the debt). The fair market value of the debt may differ from the book value of the debt depending on several factors, such as the debtor’s ability to repay the debt.

¹⁰² This test was adopted by the courts when determining value under estates and gift duty legislation and applied to the Matrimonial Property Act 1976 context: see *H v Commission of Inland Revenue* [1963] NZLR 641 at 661 (CA); *Clark v Clark* [1987] 2 NZLR 385 (CA) at 388; *Z v Z* [1989] 3 NZLR 413 (CA) at 415; *Holt v Holt* [1990] 3 NZLR 401 (PC) at 402-403; *Sojourner v Robb* [2007] NZCA 493, [2008] 1 NZLR 751 at [38]; *Boat Park Ltd v Hutchison* [1999] 2 NZLR 74 (CA) at 83-85; *Sayes v Tamatekapua* [2012] NZCA 524 at [21]; *Sturgess v Dunphy* [2014] NZCA 266 at [148]; *Morganstern v Jeffreys* [2014] NZCA 449 at [61]; and *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [242].

¹⁰³ See for example *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011. The Family Court addressed the question of how shares in a family company that operated a farming business should be valued. The Court considered at [29]-[33] whether it would be appropriate to value the shares on a “fair value” basis rather than on a “fair market value” basis. Although the Court did not reach a clear conclusion on the applicable standard, it said that it was not appropriate to give a discount on the shares that would normally be expected if valuing a minority shareholding interests pursuant to a fair market value standard.

¹⁰⁴ *H v Commissioner of Inland Revenue* [1963] NZLR 641 (CA) at 661; *Jamieson v Cox* [1990] NZFLR 165 (CA) at 167; *Pountney v Pountney* CA45/91, 20 September 1991 at 20; and *Carter v Carter* [2001] NZFLR 180 (HC) at 189-190.

¹⁰⁵ Simon Jefferson and Paul Moriarty “Valuation of Relationship Property: An Evaluation of Practice and Procedure” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁰⁶ Brendan Lyne and Robyn von Keisenberg “Valuation and Expert Financial Evidence in PRA Cases” (paper presented to the New Zealand Law Society Seminar, June 2016) at 27 and 36; and Shelley Griffiths “Valuing ‘bundles of rights’ for the Property (Relationships) Act 1976; when neither art nor science is enough” (2011) 7 NZFLJ 98 at 100.

income streams from the property and discounting for risks and contingencies.¹⁰⁷ Valuations based on complex methodologies will often require high level expert input. Sometimes expert valuers undertake extensive analysis and present that evidence in court. Issues around the value of property or debt can therefore increase the costs and time to resolve a dispute.¹⁰⁸ Valuers will also need access to information about the property which can be difficult to obtain.

- 13.9 Fourth, if a court takes a fair market value approach, it will not usually consider the personal intentions or sentiments of the partners regarding the property. Instead, a court will make certain assumptions regarding the hypothetical market that may not accord with the facts of the case.¹⁰⁹ In *Holt v Holt*, the partners could not agree on how the husband's shares in a company should be valued.¹¹⁰ The company was used to carry on the business of a family farm. The husband said he intended to bequeath his shareholding to his children so that the farm would stay in the family. The husband argued this intention should diminish the value of the shares. The Court of Appeal said that in hypothetical negotiations between the willing buyer and seller, purely sentimental matters and questions of personal financial need or wealth had to be put aside.¹¹¹ As the husband was under no obligation to bequeath his shares, the Court said it had to ignore the husband's assertion. Instead, the Court said that the notional vendor and purchaser are arriving at a commercial bargain uninfluenced by generosity or the prospect of generosity.¹¹²

¹⁰⁷ Brendan Lyne and Robyn von Keisenberg "Valuation and Expert Financial Evidence in PRA Cases" (paper presented to the New Zealand Law Society Seminar, June 2016) at 27 and 36; and Shelley Griffiths "Valuing 'bundles of rights' for the Property (Relationships) Act 1976; when neither art nor science is enough" (2011) 7 NZFLJ 98 at 100.

¹⁰⁸ In some cases, if there is significant uncertainty as to the value of an asset, the courts will sometimes order that the property be sold and the proceeds divided equally between the partners. See *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 at [25]. In February 2017 the Supreme Court heard an appeal from the Court of Appeal's decision. The Supreme Court has not yet issued its judgment.

¹⁰⁹ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). In RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.11] the author says that valuation is usually abstracted from the "personal whims" of the partners.

¹¹⁰ *Holt v Holt* [1987] 1 NZLR 85 (CA). The Court of Appeal's decision was later upheld on appeal: *Holt v Holt* [1990] 3 NZLR 401 (PC).

¹¹¹ *Holt v Holt* [1987] 1 NZLR 85 (CA) at 90.

¹¹² In *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 the Supreme Court said that Mr Clayton's powers under the trust deed gave him the unfettered ability to appoint all the trust property to himself. The Court said that these powers were property in their own right for the purposes of the Property (Relationships) Act 1976. As Mr Clayton had the ability to distribute all trust property to himself, the Court said at [104] that the value of the powers would equate to the value of the underlying trust property. Mr Clayton argued that valuing the trust property in this way would preclude the possibility that he might exercise his powers to appoint the property to other beneficiaries. The Court said at [102] this consideration was irrelevant. See also *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [113]-[114].

At which date should property be valued?

13.10 The date at which the property's value should be assessed is often a contentious issue in relationship property disputes. That is because the value of property can fluctuate. The date at which the property's value is assessed will therefore determine the extent to which the partners' share in any increases or decreases in the property's value.

13.11 Section 2G(1) lays down a general rule that the value of any property to which an application under the PRA relates is determined at the date of the hearing by the court of first instance.¹¹³ Section 2G(2), however, provides that a court may decide that the value of the property be determined as at another date.

13.12 The basis of the general rule in section 2G(1) is that a contemporary valuation of the property will usually provide a just division of that property.¹¹⁴ If the property has increased in value since the partners separated because of the market inflation, it is usually considered fair that the partners share equally in the increase. In *De Malmanche v De Malmanche*, the family home had a value of \$500,000 at the date the partners separated.¹¹⁵ By the hearing date, the property had increased in value to \$640,000. The evidence before the Court showed that the increase in the property's value was attributable to market forces rather than the efforts of either partner. The High Court said that the property should be valued as at the hearing date. The Court said it would be unjust to deny each partner an equal share of the advantages of the post-separation increase in value.¹¹⁶

13.13 If the post-separation increase or decrease in value is attributable to the actions of one partner, it may not be just to share those increases or decreases equally. Prior to the 2001 amendments, a court was limited in its ability to take the post-separation actions of one partner into account. Its primary tool was to adjust the

¹¹³ The court of first instance is the court that hears the party's application for the first time. This will usually be the Family Court although some cases are heard for the first time by the High Court. The appellate courts (the Court of Appeal and the Supreme Court) will not be the courts of first instance.

¹¹⁴ *Jorna v Jorna* [1982] 1 NZLR 507 (CA) at 511: "[i]n a general way and in the absence of particular circumstances a contemporary valuation will produce equity."

¹¹⁵ *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC).

¹¹⁶ *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [148].

date of valuation so as to exclude the increases or decreases attributable to one partner alone.¹¹⁷

- 13.14 Following the 2001 amendments, a court's discretion to adopt a different valuation date under section 2G(2) is of less significance. That is because a court may now award compensation to a partner under section 18B for contributions the partner has made to the relationship after separation. Likewise, a court can award compensation under section 18C against a partner who has materially diminished the value of the partners' relationship property through deliberate action or inaction. The courts have said that the valuation date should not be changed under section 2G(2) if section 18B or section 18C applies.¹¹⁸
- 13.15 If one partner has retained use and enjoyment of the property after separation, but the property has depreciated, section 2G(2) may be relevant.¹¹⁹

Evidence of value

- 13.16 A court will usually determine the value of property by relying on the evidence each partner presents to the court. The most common way partners give evidence of value is to rely on an expert valuer.
- 13.17 How expert valuers give evidence in court proceedings is governed by the rules of evidence, which are found under the Evidence Act 2006 and the relevant court rules.¹²⁰ We will not examine these rules but simply mention a few important aspects.
- 13.18 First, experts are under an overriding duty to assist the court.¹²¹ This reflects the position that expert evidence assists the fact-

¹¹⁷ For example, if one partner had made improvements to property after separation but prior to the hearing and those improvements increased the value of the property, the court may have ordered that the value of the property be ascertained at the date before the improvements were made. See for example *Meikle v Meikle* [1979] 1 NZLR 137 (CA).

¹¹⁸ *Fowler v Wills* (2003) 23 FRNZ 703 (CA); and more recently *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772. See also *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129 at [25].

¹¹⁹ Nichola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2G.03] relying on *G v G* (2002) 22 FRNZ 990 (FC); and *Loader v Loader* [2003] NZFLR 553 (FC).

¹²⁰ Although s 12A of the Family Courts Act 1980 provides that in Property (Relationship) Act 1976 proceedings, the court may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

¹²¹ High Court Rules 2016, r 9.43 and sch 4 (Code of conduct for expert witnesses), cl 1. The Code of conduct is incorporated into the District Court Rules 2014: r 9.34. All expert witnesses in the Family Court are expected to comply with the Code of conduct in preparing any witness statement or in giving any evidence in court: Nichola Peart (ed) *Brookers Family Law – Family Procedure* (online looseleaf ed, Thomson Reuters) at [EF4.1.03].

finder in a court case.¹²² In the PRA context, the role of expert valuers is to assist the court in finding the correct value of the property. A court will weigh the opinions presented by the expert. This will normally require a court to scrutinise the qualifications and credibility of the expert, and the reasons for each opinion and the facts and other matters relied on by the expert.¹²³

13.19 Second, a court can manage how expert evidence is given. A court can direct a conference of experts in order for them to try to reach agreement on certain matters, and prepare joint statements on the matters on which they agree and do not agree.¹²⁴ A court can also direct that experts give evidence at the same time and in each other's presence.¹²⁵ This process has become known as "hot tubbing."¹²⁶ A judge can ask the same questions to both experts at the same time. A judge effectively facilitates debate between the two experts. This process may be more efficient than if each party called their own expert and the other party cross-examined that expert.

13.20 Third, a court can appoint its own expert. This ability is found in both the court rules¹²⁷ and the PRA itself.¹²⁸ Under section 38 of the PRA a court may appoint a person to inquire into the matters of fact in issue between the parties. The provision has occasionally been used by a court to determine the value of property.¹²⁹ Section 38 inquiries are discussed further in Chapter 25.

¹²² Evidence Act 2006, s 25; and *A v R* [2010] NZCA 57, (2010) 25 CRNZ 138. The court explained at [19] that the admission of expert evidence of opinion is an exception to the ordinary rules that a witness's task is to speak facts rather than to offer opinions. See generally Simon France (ed) *Adams on Criminal Law - Evidence* (online looseleaf ed, Thomson Reuters) at [EA25.01]; and Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA25.1]-[EVA25.2].

¹²³ *Crichton v Crichton* [1991] NZFLR 529 (HC) at 534-535. See generally Simon France (ed) *Adams on Criminal Law - Evidence* (online looseleaf ed, Thomson Reuters) at [EA25.01]; and Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA25.1]-[EVA25.2].

¹²⁴ High Court Rules 2016, r 9.44; and District Court Rules 2014, r 9.35. See discussion in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹²⁵ The procedure is available under High Court Rules 2016, r 9.46.

¹²⁶ See discussion in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹²⁷ High Court Rules 2016, r 9.36; and District Court Rules 2014, r 9.27.

¹²⁸ Property (Relationships) Act 1976, s 38.

¹²⁹ See for example *J v J* [2005] NZFLR 301 (HC); and *Cleland v Dixon* HC Hamilton CIV-2006-419-571, 21 July 2006 cited in Nichola Peart (ed) *Brookers Family Law - Family Property* (online looseleaf ed, Thomson Reuters) at [PR38.02(1)].

Issues and options for reform

Valuation disputes contribute costs and delay to the resolution of property matters

- 13.21 When all relationship property is to be sold and the proceeds shared, valuation disputes rarely arise. But sometimes one partner may want to retain a particular item of relationship property, such as the family home or company shares. In other cases the property cannot actually be sold, such as a partnership interest in a professional firm or company shares that are subject to sale restrictions. Partners will often disagree on the value of these items of property. That is because the value ascribed to these items will determine how much property the other partner should receive, either from the remaining pool of relationship property or by way of a monetary payment from the partner who keeps the property.
- 13.22 We have no way of determining what proportion of property disputes involve issues over the valuation of property because many disputes are resolved out of court. From our research and our preliminary consultation with lawyers we have heard that disputes over the value of property are common, especially when the valuation exercise is complex. The partners may seek extensive expert evidence to support their preferred valuation. This can cause delay to the resolution of disputes and the partners may incur considerable cost. Prolonged disputes may contradict the principle in section 1N(d) that questions arising under the PRA should be resolved as inexpensively, simply, and speedily as is consistent with justice.
- 13.23 The complexities and contest over valuation evidence is often seen in the courts' decisions. A recent example is *T v T*, where the Family Court had to ascertain the value of shares in a tourist business negatively affected by the Canterbury earthquakes.¹³⁰ The partners presented valuations of the shares which were approximately \$680,000 apart. The experts could not agree on the correct valuation methodology, including what underlying

¹³⁰ *T v T* [2014] NZFC 5335, [2015] NZFLR 185. See also commentary on this case in Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

assumptions to make about the future outlook of the business. The hearing took four days and numerous valuation reports and updates to those reports were presented to the Family Court.

- 13.24 If disputed valuations are adding costs and delay to the resolution of property matters, the question that arises is whether any improvements to the PRA's rules can be made. The PRA does not prescribe the standard and methodologies that should be used when assessing the value of property. Instead, the courts are left to adopt a value that reflects a just division of that property. In our preliminary view, much can be said for providing a court with this flexibility. Some property will be inherently difficult to value. The value will depend on many factors that are specific to the case. In *T v T*, the value of the company in question had been affected by the unprecedented effects of the Canterbury earthquakes on the tourism industry.¹³¹ The present value of the shares was based on the future income streams to the company which depended on the recovery of Christchurch from the earthquakes. The Family Court acknowledged that the valuation of the shares was a "speculative exercise."¹³² Valuers can legitimately hold different opinions on these matters.¹³³ As the Court of Appeal explained in *Holt v Holt*:¹³⁴

The valuation of shares in a family company is notoriously difficult. If the valuation of the appellant's shares had been submitted to five valuers, it would not be unlikely that five different answers would have resulted.

- 13.25 It is not apparent to us whether any measures could be taken to help partners agree the value of their property out of court. We anticipate that in most cases, the majority of the partners' property will be fairly easy to value, such as vehicles, furniture, savings and residential property. For these types of property, we are unsure whether reform is required to assist the partners and advisers. Rather, disputes over valuation that end up in court tend to arise where the value of the asset in question depends on estimated future income flow, such as shares or partnership interests in professional firms. Such valuations are often difficult and depend on many factors.

¹³¹ *T v T* [2014] NZFC 5335, [2015] NZFLR 185.

¹³² *T v T* [2014] NZFC 5335, [2015] NZFLR 185 at [185].

¹³³ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹³⁴ *Holt v Holt* [1987] 1 NZLR 85 (CA) at 95 per McMullin J.

- 13.26 The main option for reform we can see is to introduce rules into the PRA that prescribe in greater detail how property should be valued. We are unsure, however, whether this would reduce valuation disputes. The rules must still be applied to the circumstances of each case. There would probably still be scope for argument. In *M v B (Economic Disparity)*, the husband and wife each engaged expert valuers to value the husband's interest in a law firm.¹³⁵ Both valuers were given the same set of instructions on how the interest should be valued. The valuer engaged by the wife arrived at a value of \$1.341 million whereas for the husband the valuer gave a value of \$182,000.¹³⁶
- 13.27 If the rules were too prescriptive and inflexible, they could jeopardise a court's ability to arrive at a value that is fair in the circumstances of each case.
- 13.28 Instead of amendments to the PRA, an alternative approach could be to reform the procedure around expert valuation evidence. Jefferson and Moriarty suggest that the courts could make greater use of expert conferences.¹³⁷ These conferences could be like mediations between the experts. They could assist a court by assisting the experts to identify on which matters they agree or do not agree. Also, the courts could better use the powers under section 38 of the PRA to appoint a single expert to undertake a valuation.¹³⁸
- 13.29 Again, we are unsure whether reforms of this nature would be effective at minimising the length and costs of disputes around valuation. Jefferson and Moriarty suggest that if a court appoints a single expert, the partners may well retain their own "shadow experts" to challenge any report from the single expert.¹³⁹ Similarly, if each partner's expert must attend a conference of experts, the time and cost to each partner could be significant.

¹³⁵ *M v B (Economic Disparity)* [2006] 3 NZLR 660 (CA).

¹³⁶ *M v B (Economic Disparity)* [2006] 3 NZLR 660 (CA) at [59]–[60].

¹³⁷ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹³⁸ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹³⁹ Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

- 13.30 Finally, some people we spoke with in our preliminary consultation suggested there may be greater scope to offer partners tools that calculate an approximate value of their property. For example, online calculators could be developed to provide approximate valuations for things like superannuation scheme entitlements and company share valuations. Such tools would give partners a rough idea of the value of their property without engaging expensive expert assistance. The valuations given would have no binding effect; the calculation tools would be for estimation only.¹⁴⁰ If the partners have available a means of determining the approximate value of their property, they may be better equipped to resolve property matters themselves.
- 13.31 We have doubts about the efficacy of such tools. As we have noted, disputes over value mostly arise where the asset's value is likely to be high but reasonable experts may differ on applying an appropriate methodology. We are unsure whether measures such as online calculators would assist with complex share valuations, or dissuade the partners from retaining their own experts and contesting the issue.

CONSULTATION QUESTIONS

D11 How often will a dispute between the partners involve a contest over the value of property?

D12 Are there any ways the PRA and/or dispute resolution processes could be improved to avoid disputes regarding valuation?

Is the fair market value standard relied on too often?

- 13.32 As we have noted, the PRA does not define what value means. There are however many standards against which property can be valued. Usually valuers will be instructed to determine the fair market value of property. As we explained above, this requires an analysis of what price a willing but not anxious buyer would pay for the property and at what price a willing but not anxious seller would sell.
- 13.33 Through our preliminary consultation we have heard that in the vast majority of cases lawyers will instruct valuers to value

¹⁴⁰ The Inland Revenue's online Child Support - Liability/Entitlement Calculator serves a similar function. See Inland Revenue "Child Support Liability/Entitlement Calculator" <www.ird.govt.nz>.

property on a fair market basis without considering whether an alternative standard may be appropriate. Sometimes a fair market value standard may not be the best approach because the fictitious willing buyer and willing seller analysis ignores the reality of the partners' circumstances.¹⁴¹

- 13.34 A good example is the way the courts sometimes value shares in a company. Where a small company is run as a partnership between two shareholders, and the shareholders fall out, one shareholder may buy the other shareholder's shares. In these circumstances a fair value of the shares may not be captured by assuming a hypothetical arm's length transaction. For instance, on a market value approach, there would usually be a discount for the shareholder's minority interest in the company, whereas in reality the remaining shareholder would obtain a majority interest in the company. The outgoing shareholder will also give up a great deal losing his or her interest in the quasi-partnership. Again, this loss may not be accurately reflected in a willing but not anxious seller analogy.
- 13.35 In these circumstances the courts sometimes adopt a fair value standard rather than a fair market value standard. Under a fair value approach, the value the court endeavours to ascertain is a value that is fair as between the vendor and purchaser.¹⁴² A court does this by recognising what the seller gives up in value and what the buyer acquires through the transaction.¹⁴³ The fair value approach realises that the market value of the property is not actually the real or intrinsic value of the property.¹⁴⁴
- 13.36 We are interested in responses to whether the courts should be more willing to value property against a different standard than the market value of the property. We can identify several items of property that may have greater intrinsic value to the partners over the property's market value. The partners may have great affection and attachment to a family pet or a work of art. As part of the division of the partners' relationship property, a court could order that the pet or artwork vest in one partner. That partner must

¹⁴¹ Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

¹⁴² *Fong v Wong* [2010] NZSC 152 at [7-8]; *Re James Davern Ltd* (1996) 9 PRNZ 456 (CA) at 459; and Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

¹⁴³ *Re James Davern Ltd* (1996) 9 PRNZ 456 (CA) at 459.

¹⁴⁴ Allan McRae and Jai Basrur "Valuations of Unlisted Shares – is there a difference between Fair Market Value and Fair Value?" *NZ Lawyer* (online ed, Auckland, 15 November 2011).

then account for half the property's value to the other partner.¹⁴⁵ The price a third party would be likely to pay for the pet or artwork in a hypothetical arm's length transaction may not reflect the sentimental value the partner accords to the property but is forced to give up. Division of the property's fair market value may not be a just division.

- 13.37 To take another example, the partners may have carried on business together through a company in which both partners hold shares. As part of the division of the partners' relationship property, one partner may allow the other to acquire his or her shares. Based on our discussion above, this may be a case where the remaining shareholder would have to account for the fair value of the outgoing partner's shares rather than the fair market value. The issue was considered by the Family Court in *Foley v Foley*.¹⁴⁶ There the expert valuers had disagreed on whether the shares in the company through which the partners conducted a farming business should be valued at a fair value or fair market value. The Family Court noted that the concepts had never been fully analysed in any prior decision.¹⁴⁷ Ultimately, the Court did not express a preference on the standard of value. The Court did, however, value the shares based on what the husband would obtain by acquiring the wife's shares in the actual circumstances of the case rather than on a hypothetical market price.¹⁴⁸
- 13.38 However we also see the advantages of valuing property by fair market value. A fair market value can be determined objectively, and the courts do not have to consider a partner's subjective intentions and sentiments regarding the property. This means that one partner cannot unfairly skew the valuation by what may sometimes be spurious or subjective claims about the property.

CONSULTATION QUESTIONS

D13 Should the courts be more willing to value property against a different standard than the market value of the property?

D14 In what circumstances should property be valued under an alternative standard of value?

¹⁴⁵ See discussion on pets below in Chapter 14.

¹⁴⁶ *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011.

¹⁴⁷ *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011 at [29].

¹⁴⁸ *Foley v Foley* FC Christchurch FAM-2009-009-2141, 25 August 2011 at [44].

Chapter 14 – How a court implements a division of property

- 14.1 In Chapter 12 we looked at each partner's right to an equal share in relationship property. That does not mean that every asset is literally halved. As explained in Chapter 13, the partners share in the value of the global pool of relationship property, after the value of relationship debts has been deducted. Once the net value of each partner's half share is ascertained, the court will make orders allocating certain items of relationship property (or a portion of their sale proceeds) to each partner.
- 14.2 In this chapter we focus on this process. We consider the orders a court can make to implement or facilitate the division of relationship property (division orders), and the court's powers to grant interim distributions of property.
- 14.3 We also look at other orders a court can make that grant a partner certain temporary rights to property, but do not divide that property. We call these orders non-division orders. They include:
- (a) occupation orders (section 27);
 - (b) tenancy orders (section 28); and
 - (c) orders for furniture required to equip another household (section 28C).
- 14.4 Finally, we consider the PRA provisions that protect a partner's rights before the relationship property is divided.

Division orders

- 14.5 Although the PRA has very clear rules about each partner's right to an equal share of relationship property, the PRA is less prescriptive about how a court implements or facilitates a division of the property.
- 14.6 Section 25 is the key provision that enables a court to make any order it considers just, deciding the respective shares of each partner in the relationship property or dividing relationship property between the partners.

- 14.7 A court can make a range of orders to implement a decision it makes about property division under section 25. These are “ancillary” orders because they must only give effect to a court’s decision under section 25.¹⁴⁹
- 14.8 The court’s primary source of power to make ancillary orders is set out in section 33. Section 33(1) gives a court a general power to:
- ... make all such orders and give such directions as may be necessary or expedient to give effect, or better effect, to any order made under any of the provisions of sections 25 to 32.*
- 14.9 The ancillary powers under section 33 can also be exercised in relation to orders under other provisions of the PRA, such as sections 44 and 44C.¹⁵⁰ Section 33(3) sets out a non-exhaustive list of examples of powers a court could employ to carry out this task.
- 14.10 A court may exercise its powers under section 33 more than once in the same court proceeding. For example, section 33 can be used where there has been or will be an attempt to give effect to the court’s substantive order, but that has not or may not achieve the intended result.¹⁵¹ However a court cannot reopen its substantive findings and decisions on property shares and their division in a later application under section 33.¹⁵² The powers in section 33 can also implement a contracting out agreement and consent orders, but cannot be used to alter their terms.¹⁵³
- 14.11 The PRA also gives a court specific powers to divide particular types of property:
- (a) hire purchase agreements (section 29);
 - (b) insurance policies (section 30); and
 - (c) superannuation rights (section 31).
- 14.12 Finally, a court has powers to make certain orders to provide for children:

¹⁴⁹ *C v C* [1993] 2 NZLR 397 (CA), at 408.

¹⁵⁰ Section 44 of the Property (Relationships) Act 1976 (PRA) gives a court the power to set a disposition of property aside in certain circumstances and s 44C provides for compensation where relationship property has been disposed of to a trust. The ancillary powers in s 33 also apply to orders under other provisions of the PRA, such as ss 44 and 44C, by virtue of s 25(1)(b), which empowers a court to “make any other order that it is empowered to make by any provision of this Act”.

¹⁵¹ *Lee v Lee* (1987) 3 FRNZ 310 (HC) at 315.

¹⁵² *Weir v Weir* (1987) 3 FRNZ 289 (HC) at 293.

¹⁵³ See for example *Belt v Belt* (1989) 5 FRNZ 258 (FC); and *C v C* FC Waitakere FAM-2006-090-1281, 18 June 2008 at [57].

- (a) settling relationship property for the benefit of children (section 26);
- (b) postponing vesting any share in relationship property (section 26A); and
- (c) making or varying any order regarding maintenance and child support (section 32).

14.13 We discuss orders under sections 26 and 26A in Part I of this Issues Paper.

Can a court make orders about property owned by a third party?

14.14 Section 25(3) provides that a court: “may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just.” This suggests that a court can make orders or declarations regarding any property, regardless of ownership. However the courts have said that section 25(3) is supplementary to section 25(1), which limits a court to orders regarding relationship property and other orders it is empowered to make under the PRA.¹⁵⁴ Section 25(3) is simply intended to better empower a court to make appropriate orders within the general scheme and framework of the PRA.¹⁵⁵

14.15 It is unclear whether, within the general scheme of the PRA, a court has the power to make orders regarding third party property. Sometimes the partners will have an interest in property that appears to be owned by a third party. A common example is a trust.¹⁵⁶ In *Yeoman v Public Trust* the High Court explained that if a third party disputes a partner’s property interest claim, a court has no jurisdiction under the PRA to determine the issue.¹⁵⁷ Instead, the claim would need to be determined in separate proceedings. As we explain in Part H, this issue often comes up when a partner claims that a trust connected with the relationship is invalid.¹⁵⁸

¹⁵⁴ *ANZ Banking Group (NZ) Ltd v Wrightson* (1992) 9 FRNZ 1 (HC) at 8, referring to *Hall v Hall* (1989) 5 FRNZ 309 (FC) at 313.

¹⁵⁵ *ANZ Banking Group (NZ) Ltd v Wrightson* (1992) 9 FRNZ 1 (HC) at 8, referring to *Hall v Hall* (1989) 5 FRNZ 309 (FC) at 313.

¹⁵⁶ Another example is family homes built on Māori land. Māori land typically has multiple owners or is held on trust for the descendants of a common tipuna. Māori land is excluded from the Property (Relationships) Act 1976, but the position in respect of family homes that sit on the land is unclear. See the discussion in Chapter 8.

¹⁵⁷ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39]. In *Jew v Jew* [2003] 1 NZLR 708 (HC), the High Court went further. It held that it was inconceivable that the Family Court had jurisdiction under s 25(3) of the Property (Relationships) Act 1976 to make declarations as to ownership in respect of property owned by third parties.

¹⁵⁸ See Part H.

- 14.16 It is also unclear whether any decision under the PRA about a partner's interest in property which appears to be owned by a third party binds that third party. Again, in *Yeoman v Public Trust* the High Court explained that a decision under the PRA cannot bind third parties.¹⁵⁹
- 14.17 These issues tie into the overall jurisdiction of the Family Court to consider claims that determine the rights of third parties. There is no settled view among the cases.¹⁶⁰ We discuss these problems in relation to trusts in Part G and in relation to the jurisdiction of the Family Court in Part H.

Can the court vary trusts?

- 14.18 There is also uncertainty about a court's ancillary powers regarding trusts. Section 33(3)(m) provides that a court can make "an order varying the terms of any trust or settlement, other than a trust under a will or other testamentary disposition." This appears to give a court broad powers to vary a trust deed, including to add or remove trustees or beneficiaries, vary the final distribution date or give one partner an interest in income of the trust.
- 14.19 However, there are several limitations on a court's use of section 33(3)(m):
- (a) First, as discussed at paragraphs 14.7–14.9 above, section 33 does not provide originating jurisdiction regarding trusts. The power to vary a trust can only be exercised if it is necessary or expedient to give effect or better effect to orders made under another provision of the PRA.¹⁶¹
 - (b) Second, if trust property is not beneficially owned by one or both of the partners, it will be outside the jurisdiction of the PRA unless the PRA provides the court with specific powers to make orders in respect

¹⁵⁹ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39] and [44]. In some instances however the Property (Relationships) Act 1976 gives the Family Court specific powers over property held by third parties (see s 31 in relation to superannuation scheme entitlements; and ss 44–44C in respect of trusts).

¹⁶⁰ See for example *F v W* (2009) 2 NZTR 19-024 (HC) where the High Court held the Family Court did not have jurisdiction to declare that a trust was a sham in proceedings under the Property (Relationships) Act 1976. In contrast, in *B v X* [2011] 2 NZLR 405 (HC) the High Court held that the Family Court did have jurisdiction to declare that a trust was a sham, as did the High Court in *F v F* [2015] NZHC 2693.

¹⁶¹ *G v R FC Porirua* FAM-2007-091-892, 4 September 2008; *B v M* [2005] NZFLR 730 (HC) at [223]; *P v P (No 4)* (2005) 25 FRNZ 320 (FC); and *C v C HC Auckland CIV-2005-404-7124*, 27 November 2006.

of the trust property.¹⁶² This appears to limit section 33(3)(m) to cases where sections 44 and 44C apply.¹⁶³ However section 33(3)(m) does not expressly refer to those provisions. Section 33(3)(m) might also be used where the purported transfer of property to a trust is invalid or ineffective, but this is unclear given the uncertainty around the extent of a court's jurisdiction under the PRA, discussed above.¹⁶⁴

- (c) Third, as we discussed above it does not appear that a court can make orders under the PRA binding on third parties, including trustees.¹⁶⁵ While trustees may be joined as third parties in PRA proceedings under section 37,¹⁶⁶ the courts have observed this does not entitle a court to make an order affecting that party's property entitlements.¹⁶⁷

14.20 For these reasons we think that the application of section 33(3)(m) would benefit from clarification.

14.21 A further issue with section 33(3)(m) is that there is no requirement to consider the interests of the other beneficiaries. While a court would likely do so, it is desirable that this be clarified in the PRA.

CONSULTATION QUESTION

D15 Have we identified all of the issues with the operation of section 33(3)(m) to vary trusts?

¹⁶² See discussion in Part G. However it seems that section 33(3)(m) would be able to be used to vary trusts where one party has a vested or contingent interest in trust property, on the basis that such an interest is considered "property" for the purposes of the Property (Relationships) Act 1976, and can therefore be classified as relationship property. However note the problems identified at [14.15]–[14.16] above. See also Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR33.13]; and *C v C (No 2)* [2006] NZFLR 908 (FC).

¹⁶³ As discussed at [14.9], s 33 of the Property (Relationships) Act 1976 applies to ss 44 and 44C by virtue of s 25(1)(b). See *S v M* FC Tauranga FAM-2004-070-823, 16 November 2006 at [54]. The Family Court relied on the High Court's decision in *McGill v Crozier* (2001) 21 FRNZ 157 (HC) whereby section 33(3)(m) was used to vary the terms of the trust in relation to a yacht. However, the High Court in *McGill v Crozier* determined at [41] that the powers given by s 33(3)(m) had been invoked by the Family Court after it had acted under s 25 to determine that the wife's half share remained relationship property. The Family Court in *S v M* instead used the s 33(3)(m) powers, via s 25(1)(b), to directly order the trustees to sell a home if the husband was unable to otherwise pay compensation due under s 44C.

¹⁶⁴ See *McGill v Crozier* (2001) 21 FRNZ 157 (HC). In that case there were no third party trustees so the purported transfer "must have been ineffective to convey title in those circumstances": at [41].

¹⁶⁵ See discussion in Part H; *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39] to [45]; and *F v F* [2015] NZHC 2693 at [102]–[103].

¹⁶⁶ Section 37 of the Property (Relationships) Act 1976 requires the court to notify any third party who has an interest in property that is affected by an order and to give the third party an opportunity to be heard as a party to the proceedings.

¹⁶⁷ *Chesham v Chesham* [1991] NZFLR (HC) 546 at 554. See also *Johanson v Johanson* (1993) 10 FRNZ 578 (CA) at 581. The Family Court in *Naidu v Naidu* FC Auckland FAM-2005-004-2700, 10 September 2009, at [55]–[58] invited the wife to join the family trust as a party if she intended to pursue an order requiring the trustees to vary the trust to transfer the former family home into her name. The wife was relying on the court's decision in *S v M* FC Tauranga FAM-2004-070-823, 16 November 2006, discussed above, to make the order.

Is there a need for clear guidance on when a court can vary trusts under that provision?

D16 Are there any other issues with the operation of section 25 or section 33 we have not identified?

Problems dividing particular types of property

Superannuation scheme entitlements

- 14.22 Under section 8(1)(i) of the PRA “the proportion of the value of any superannuation scheme entitlements ... that is attributable to the relationship” is relationship property. A “superannuation scheme entitlement” is defined in section 2 and only includes superannuation schemes where the benefit derives from contributions made by the person or an employer. It does not apply to State pension benefits.¹⁶⁸
- 14.23 Applying the PRA to superannuation is complex when it comes to valuing and dividing the benefits from a scheme. Usually the benefit will not accrue until some point in the future. The Court of Appeal has suggested that to achieve a clean break, the best option may be for one partner to pay a lump sum to the other from other property to account for the value of the superannuation scheme entitlement.¹⁶⁹ The courts have, however, acknowledged that there will be cases where a lump sum payment is not suitable, particularly when the contributing partner does not have enough assets available to make the payment.¹⁷⁰ In this situation there are two options under the PRA. One is to provide for a deferred payment. The other option is to make an order under section 31.
- 14.24 Section 31 enables a court to make an order requiring the superannuation scheme manager to pay the non-contributing partner out of that scheme. The court’s order is conditional on the partners entering a deed or arrangement which binds the manager of the scheme.

¹⁶⁸ GJ van Bohemen “Superannuation schemes and the Matrimonial Property Act 1976” (1979) 10 VUWLR 63 at 65. This is unlikely to be an issue in many cases; State pension benefits are universal so both partners will be equally eligible for benefits.

¹⁶⁹ *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 557.

¹⁷⁰ *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 556.

- 14.25 Atkin says that section 31 does not seem necessary.¹⁷¹ This is because section 33(3)(l) and section 33(6) provide a court with the required powers to make orders to distribute payments from superannuation schemes.¹⁷² It is difficult to reconcile the broader, general powers in these sections with the more limited, specific power in section 31. We think this should be clarified.
- 14.26 Problems also arise under section 31 where there are other possible beneficiaries of the partner's superannuation scheme entitlement. For example, when the contributing partner enters a new relationship the new partner may have rights to the fund on the death of the contributing partner. This scenario arose in *Sidon v Sidon*.¹⁷³ There the High Court made no section 31 order because it considered it would be inappropriate to alter the rights that the former partner and the new partner had under the scheme. Instead, the Court ordered that the value of the contributing partner's future scheme entitlements should be quantified as at the date of separation, but payment of half that value to the former partner could be deferred. The rights the new partner had on the death of the contributing partner were left unaffected.
- 14.27 It is not clear whether a section 31 order impacts on the way a superannuation entitlement is valued. In theory, when a section 31 order is made there should be no deduction for contingencies or the present value of money. That is because the non-contributing partner will only receive the money from the scheme at the later date and will take on the risk of the contingencies and the cost of not having the money until retirement. Cases in which a section 31 order is made have not included reductions for contingencies in valuing the superannuation scheme.¹⁷⁴ Sometimes an award has been made to the value of the scheme at separation date (including contingencies) plus interest.¹⁷⁵
- 14.28 There are also issues with the process contemplated under section 31. The benefit in requiring the parties to enter an arrangement or deed is unclear. Evidence about the superannuation scheme and contributions to the scheme would need to be provided to

¹⁷¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

¹⁷² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

¹⁷³ *Sidon v Sidon* (1991) 7 FRNZ 351 (HC).

¹⁷⁴ In *Turner v Turner* (1987) 3 FRNZ 419 (HC) the High Court saw avoiding having to consider contingencies as a factor in favour of making a s 31 order under the Property (Relationships) Act 1976. Contingencies were not applied in *Callaghan v Callaghan* [1987] 2 NZLR 374 (CA). However, very few cases have addressed valuation in the context of s 31 orders.

¹⁷⁵ *Brown v Brown* (1994) 12 FRNZ 633 (DC).

a court to identify the proportion of superannuation funds that constitute relationship property under section 2 and section 8(1)(i), and their value. In addition, evidence may need to be provided to the court to ensure consistency between the terms of a superannuation scheme and any agreement regarding contributions, including where there are other beneficiaries to the scheme.¹⁷⁶ It would therefore seem more efficient to include the terms of the agreement about superannuation rights within the order itself and not require parties to enter any subsequent arrangement or deed.

- 14.29 The chief significance of a deed as contemplated by section 31 is that it appears to provide an additional mechanism for the partner concerned to enforce their rights against the superannuation fund manager.¹⁷⁷ However, it is not clear if the extra protection a deed would provide, over a court order containing the terms of the arrangement, warrants the extra resource required.
- 14.30 A court order detailing the agreement would also minimise any risk that a later arrangement or deed made under section 31(1) contradicts directions in the order. There is a requirement to serve the arrangement or deed on the superannuation scheme provider under section 31(2) but not the order made under section 31(1). This should also be addressed.

CONSULTATION QUESTIONS

D17 Is it preferable for a court to have a specific power to deal with superannuation scheme entitlements rather than use its generic powers under section 33?

D18 Is the requirement under section 31 for a deed or arrangement useful or would a court order on its own be enough for the division of superannuation rights under the PRA?

KiwiSaver

- 14.31 KiwiSaver is similar to private superannuation schemes because both comprise a combination of employer and employee contributions and are often only accessible on turning the age of 65. However in some cases it may be incorrect to describe a KiwiSaver account as a superannuation scheme. This is because people can withdraw money from their KiwiSaver scheme before

¹⁷⁶ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR31.03] recommends that counsel should make submissions as to the necessary paragraphs in any order and that trustees of the fund be called to confirm that the proposed terms come within the terms of the superannuation deed.

¹⁷⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39].

the age of 65 in certain circumstances, for example, to fund the purchase of their first home or when they are experiencing significant financial hardship.

14.32 The Court of Appeal has said that the definition of a superannuation scheme entitlement in section 2 is wide enough to include an interest in a KiwiSaver scheme, although that case was not about dividing a KiwiSaver account under the PRA.¹⁷⁸ Section 127 of the KiwiSaver Act 2006 recognises that a court can make orders under section 31 of the PRA in relation to KiwiSaver schemes, which indicates an intention that KiwiSaver schemes would fall under the superannuation provisions of the PRA.

14.33 In other cases under the PRA the courts have treated KiwiSaver entitlements as the equivalent of money in a bank account which can be split evenly.¹⁷⁹ This approach ignores the contingent nature of KiwiSaver entitlements. It may be unfair on the contributing partner as he or she must account for half the value of the KiwiSaver scheme when the actual funds cannot usually be accessed for many years. The time value of money is not considered in making half of the account payable on separation. These issues have not yet been raised in any cases. This might be because KiwiSaver is a relatively new scheme and as a result the sums of money in KiwiSaver accounts are usually small when compared to the size of the overall relationship property pool. However as KiwiSaver accounts become larger over time, the fact that the funds cannot be accessed immediately may see the courts move to treating KiwiSaver accounts as if they are superannuation schemes. This might also create issues, due to the unique aspects of the KiwiSaver scheme described at paragraph 14.31 above.

CONSULTATION QUESTION

D19 Should KiwiSaver schemes be treated in the same way as superannuation schemes on the division of relationship property? Or should there be a different approach? What would that approach look like?

ACC payments

14.34 In Chapter 11 we explained how an entitlement to payments under the Accident Compensation Act 2001 and its predecessors

¹⁷⁸ *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 at [53].

¹⁷⁹ Examples of this include *S v S* [2012] NZFC 2685; *B v C* [2015] NZFC 8940; and *R v L FC Gisborne* FAM-2011-016-147, 6 October 2011.

(ACC payments) will be classified as relationship property if the entitlement arose during the relationship. It is not clear how ACC payments should be divided.

- 14.35 Section 123 of the Accident Compensation Act provides that all entitlements under the legislation are “absolutely inalienable.” Section 124 provides that the Accident Compensation Corporation must provide the entitlements only to the claimant. There are limited exceptions to these rules, such as deductions for child support, but division of relationship property under the PRA is not included.
- 14.36 The KiwiSaver Act 2006 has similar restrictions. Section 127(1) provides that a member’s interest or any future benefits in a KiwiSaver scheme cannot be assigned or passed to another person. Section 127(2), however, provides that interests can be passed to another person if required by any enactment, or by court order, “including an order made under section 31 of the [PRA]”. The Court of Appeal has said that this express reference to section 31 indicates that any derogation from the clear language of section 127(1) of the KiwiSaver Act should be clearly and expressly provided for in some other enactment.¹⁸⁰
- 14.37 There is no equivalent of section 31 to enable a court to make orders regarding a person’s ACC entitlements under the PRA. Nor does section 123 of the Accident Compensation Act refer to the PRA. It is therefore unclear whether the PRA gives a court power to make orders dividing a partner’s ACC entitlements. The contrary view, however, is that notwithstanding the prohibition on alienation under sections 123 and 124 of the Accident Compensation Act, the PRA will prevail. That is because section 4A of the PRA provides that every other enactment must be read subject to the PRA. Regardless, we think it is desirable that this be clarified in the PRA.

CONSULTATION QUESTION

D20 If ACC entitlements can be classified as relationship property, should section 123 of the Accident Compensation Act 2001 be amended to expressly allow division under the PRA?

¹⁸⁰ *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 at [53].

Pets

- 14.38 The PRA's definition of "family chattels" under section 2 includes "household pets." Pets are therefore theoretically treated like any other item of property when partners' property is classified and divided. Pets are, however, different from other types of family chattels. They are living creatures, and their ongoing care must be factored into the division of relationship property. A partner's attachment to and affection for a pet is also likely to be of a different quality than their attitude to other types of property.
- 14.39 The PRA gives little direction on how these special considerations are to be taken into account when dealing with pets. The courts have, however, established some fairly clear principles:
- (a) First, the courts have followed the PRA's provisions and included pets when dividing the partners' relationship property equally. In the case *S v S* for example, the Family Court ordered that the partners' dog Milo was to stay with Mr S at Mr S's rural property.¹⁸¹ The Court accepted however that Milo was relationship property and that Milo's value had to be shared equally. The Court ordered that Mr S pay Mrs S half Milo's value, which was assessed at half the price Milo had been bought for.¹⁸²
 - (b) Second, even though the value of the pets will be shared, the courts will determine which partner the pet should live with based on the best interests of the pet. For example, in the case *Pence v Pence*, the Court had to decide which partner the couple's two chihuahuas should live with.¹⁸³ One partner argued that each partner should be awarded one dog. The Court did not agree. The Court said that it was in the best interests of the chihuahuas that they live together. The Court noted that four reasonably large dogs frequently visited one of the partner's homes, and considered that the larger dogs would not be appropriate company for the smaller chihuahuas. The Court therefore awarded ownership of the chihuahuas to the other partner.¹⁸⁴

¹⁸¹ *S v S* [2012] NZFC 2685.

¹⁸² *S v S* [2012] NZFC 2685 at [30].

¹⁸³ *Pence v Pence* (1978) 2 MPC 146 (SC).

¹⁸⁴ See also *O'Brien v Tuer* DC Waitakere FP090/327/03, 9 September 2003; *S v S* [2012] NZFC 2685; and *Casey v Lyttle* [2013] NZFC 9109.

- 14.40 Although these principles appear fairly well settled, there are potential issues. The main concern is whether the PRA should contain more direction to the courts on how it should make orders regarding pets. Some overseas commentators suggest that the principles governing the post-separation placement of family pets should be dealt with expressly through legislation.¹⁸⁵ The Swiss Civil Code, for example, provides that ownership of a pet may only be awarded to the partner who offers the better conditions of animal welfare in which to keep the animal.¹⁸⁶
- 14.41 There is also uncertainty regarding pets that cannot be properly described by the term “household pets” used in section 2. A family may have an equally strong attachment to a pet horse or sheep, even though these animals are not technically “household pets.” There is also some uncertainty regarding the classification and valuation of pets used partly for business, like showing or breeding.¹⁸⁷
- 14.42 Although these concerns are legitimate issues, we are unsure whether in practice they are creating problems to an extent that requires reform of the PRA.

CONSULTATION QUESTION

D21 Do the PRA’s provisions regarding pets give sufficient direction to a court? Are the provisions inadequate in relation to non-household pets?

Interim property orders

- 14.43 Separation or the death of one partner can have immediate financial consequences for the partners involved.¹⁸⁸ When property matters under the PRA are disputed this can tie up a

¹⁸⁵ See Tony Bogdanoski “Towards an Animal-Friendly Family Law – Recognising the Welfare of Family Law’s Forgotten Family Member” (2010) 19 Griffith L. Rev. 197; and Paula Hallam “Dogs and Divorce: Chattels or Children? – Or Somewhere In-between?” (2015) 17 S. Cross U. L. Rev. 97.

¹⁸⁶ Discussed in Paula Hallam “Dogs and Divorce: Chattels or Children? – Or Somewhere In-between?” (2015) 17 S Cross L Rev. 97; and Swiss Civil Code 1907, art 651a. In contrast, some Canadian courts have resisted calls to determine the living arrangements for pets in a similar way to the guardianship of children. See *Ireland v Ireland* 2010 SKQB 454, 367 Sask R 130 at [12] “[A] dog is a dog. Any application of principles that the court might normally apply to the determination of custody of children are completely inapplicable to the disposition of a pet as family property” cited with approval in *Henderson v Henderson* 2016 SKQB 282.

¹⁸⁷ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PRA 2.12.02].

¹⁸⁸ See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8 referring to the findings of the Auckland University of Technology study regarding the economic cost of separation in Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017).

large proportion of a partner's wealth until those matters are resolved. This can take a long time, often years, especially if the partners go to court.¹⁸⁹

- 14.44 Sometimes a partner will need interim access to relationship property in order to pay for day-to-day living expenses or cover the additional costs of moving out of the family home, setting up a new home and/or getting legal advice. When relationship property is in the other partner's name, and the partners cannot agree on how interim costs are to be met, an application for an interim property distribution may be necessary.

Interim distributions under section 25(3)

- 14.45 Section 25(3) provides that “the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property it considers just.” Section 25(4) then states that:

To avoid any doubt, but without limiting subsection (3), if proceedings under this Act are pending, the court, if it considers it appropriate in the circumstances, may make an interim order under that subsection for the sale of any relationship property, and may give any directions it thinks fit with respect to the proceeds.

- 14.46 A court can therefore order an interim distribution of property under section 25(3), and it can give effect to that order by making ancillary orders under section 33.¹⁹⁰
- 14.47 The PRA does not provide any guidance on when an interim distribution should be made. However the courts have recognised a range of relevant factors, including:¹⁹¹

- (a) the purpose and principles of the PRA;
- (b) the needs and circumstances of the applicant;

¹⁸⁹ Of the PRA cases that proceeded to a hearing and were disposed in 2015, 93 per cent had taken more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016). In 2016, the average time the Family Court took to resolve an application (either through the Court granting or dismissing an application, or through the application being discontinued, withdrawn or struck-out) from the time it was filed was approximately 74 weeks: this figure is from provisional analysis made by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution, having analysed data from the Ministry of Justice's Case Management System and provided by email to the Law Commission (26 September 2017). See Chapter 25 for further discussion on court processes.

¹⁹⁰ *Murray v Murray* (1989) 5 FRNZ 177 (CA); and *Harrison v Harrison* [2009] NZCA 68, [2009] NZFLR 687. We discuss child support in Part I.

¹⁹¹ *H v P FC Tauranga* FAM-2009-070-817, 11 January 2011 at [26]; and *M v B* [2013] NZHC 1056 at [30].

- (c) the purpose for which interim distribution is sought;
- (d) the applicant's likely share of relationship property;
- (e) the respondent's ability to give effect to an order;
- (f) the length of time until the hearing of the substantive issues;
- (g) delays to date, and who had caused them;
- (h) any uncertainty as to the applicant's entitlements under the PRA;
- (i) the effect of an order on the parties' willingness and determination to finalise their claims;
- (j) whether or not the respondent has dissipated relationship property;
- (k) any possible prejudice that might arise from making a proposed order; and
- (l) whether an interim distribution will cause further delays in finally determining the relationship property claim.

Limitations of section 25(3)

14.48 Because section 25(3) has not been designed solely for interim distributions,¹⁹² there are a number of limitations that undermine its effectiveness.

14.49 First, orders can only be made in relation to specific items of property. Section 25(3) cannot be used to make an interim distribution of a sum of money that represents part of the value of the global pool of relationship property.¹⁹³ A court would instead need to order specific property to be vested in one partner or to be sold, with orders as to how the proceeds should be distributed between the partners.¹⁹⁴

¹⁹² Section 25(3) of the Property (Relationships) Act 1976 is also useful, for example, where partners are seeking a declaration on the status of a single item of property to assist the parties to resolve their property matters out of court, or where proceedings have been filed and the parties seek an order for sale so that they can take advantage of a favourable market.

¹⁹³ *Munro v Munro* [1997] NZFLR 620 (FC); and *Burton v Burton* [2002] NZFLR 172 (HC). Although the Court of Appeal has observed that there is nothing to prevent the court from achieving a general division of relationship property by making a series of orders in relation to each specific asset owned by each of the parties: *Public Trust v W* [2005] 2 NZLR 696 (CA) at [21].

¹⁹⁴ Property (Relationships) Act 1976, subs 25(3) and (4). In *K v B* FC Waitakere FAM-2001-090-1013, 5 March 2009, the Family Court ordered chattels to vest in the applicant, which could then be sold, unless the respondent paid a specified

14.50 Second, it is unclear whether a court can make an order under section 25(3) in respect of general funds. While orders have been made in relation to funds held in lawyers' trust accounts,¹⁹⁵ the High Court in *Owen v Thomas* noted there were "serious difficulties" in obtaining an order under section 25(3) for the payment of a sum of money, because it does not readily fit within the description of "specific property."¹⁹⁶ The Court distinguished money frozen in an account by agreement or court order, from funds that can move in and out of a bank account and which can be replaced by funds of a different or mixed character in terms of being either relationship or separate property.¹⁹⁷

14.51 Third, there is uncertainty as to whether section 25(3) can be used to make orders in relation to separate property. The High Court has observed on several occasions that section 25(3) appears to extend to separate property,¹⁹⁸ and in *R v G* the Family Court made orders under section 25(3) vesting in the respondent certain property which the partners had agreed was the applicant's separate property.¹⁹⁹ However in the more recent case of *Owen v Thomas* the High Court, while not deciding on the matter, observed that it would need to be satisfied that the circumstances of the parties justified the separate property of one party being drawn into the pool of relationship property.²⁰⁰ Otherwise, the Court said, section 25(3) would enable a court to order an interim distribution of property that could not be distributed by way of a final order.²⁰¹

14.52 Finally, an interim distribution converts the property into one partner's separate property, so the effect of the order is final and cannot be revisited or recalled.²⁰² A court must therefore be

sum on a specified date.

¹⁹⁵ *Murray v Murray* (1989) 5 FRNZ 177 (CA); and *M v M* [2007] NZFLR 933 (FC). In *Burton v Burton* [2002] NZFLR 172 (HC) the High Court held at [21] that it is not possible at law to take possession of money without vesting the ownership of it.

¹⁹⁶ *Owen v Thomas* [2014] NZHC 2200 at [28].

¹⁹⁷ *Owen v Thomas* [2014] NZHC 2200 at [29].

¹⁹⁸ *Cossey v Bach* [1992] 3 NZLR 612 (HC) at 639; and *M v B* [2013] NZHC 1056 at [31]. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.59].

¹⁹⁹ *R v G* FC North Shore FAM-2009-044-920, 31 March 2010.

²⁰⁰ *Owen v Thomas* [2014] NZHC 2200 at [25].

²⁰¹ See *Burton v Burton* [2002] NZFLR 172 (HC).

²⁰² *B v B* [2012] NZHC 1951 at [12]; and *Burton v Burton* [2002] NZFLR 172 (HC). Note that orders for possession under s 25(3) of the Property (Relationships) Act 1976 are not final in effect: *Brown v Cheung* [2016] NZHC 2408, [2016] NZFLR 860.

certain that an interim distribution will not exceed the applicant's entitlement. As the Family Court observed in *A v R (No 2)*:²⁰³

The challenge, therefore is to determine the amount which can be safely released to the applicant at this stage without putting the Family Court in any difficulty when it comes to make [its] final determination under the Act.

- 14.53 This requires a court to have sufficient information regarding the value of both the specific item of property that is the focus of the section 25(3) application and the global pool of relationship property. This can be challenging when there are unresolved disputes about the relationship property.²⁰⁴ In Chapter 13 we discussed how disputes over the value contribute to costs and delay to the resolution of property matters. This is also an issue for interim distributions.

Relationship between section 25(3) and the other pillars of financial support

- 14.54 In Chapter 2 we identified the different pillars of financial support available to families when relationships end. These are maintenance (including interim maintenance), child support and State benefits.²⁰⁵ Each addresses a different issue and together with the PRA they establish a framework of financial support.
- 14.55 Often these pillars of financial support will be better at meeting one partner's interim living costs than an interim distribution of property under the PRA. While our review does not extend to these other pillars of financial support, it is important to understand how they operate to ensure there are no gaps or overlaps in terms of what each pillar is designed to achieve. We discuss interim maintenance below, as this is directly relevant to the role of interim distributions under the PRA. Maintenance is discussed further in Part F and child support is discussed in Part I.

Interim maintenance under the Family Proceedings Act 1980

- 14.56 One partner may be entitled to maintenance from the other partner to the extent that it is necessary to meet their

²⁰³ *A v R (No 2)* FC Christchurch FP/009/1430/99, 18 August 2004.

²⁰⁴ See for example *B v B* [2012] NZHC 1951 at [13].

²⁰⁵ Other pillars of financial support may be available when a relationship ends on death, as discussed in Chapter 2.

reasonable needs if they cannot meet those needs themselves.²⁰⁶ Maintenance may be available for married and civil union partners both during the relationship and after the relationship has been dissolved, and for de facto partners after the parties cease to live together.²⁰⁷ A partner seeking maintenance must apply to the Family Court or District Court under the Family Proceedings Act 1980.

- 14.57 Interim maintenance can be ordered when an application for maintenance has been filed but not yet finally determined.²⁰⁸ A court can make an interim maintenance order for the payment of “such periodical sum as the [court] thinks reasonable.”²⁰⁹ A court will consider the reasonable needs of the applicant, with reference to the partners’ previous standard of living, the applicant’s ability to meet those needs and the other partner’s ability to pay.²¹⁰ Interim maintenance orders can only be made for a six month period,²¹¹ and are a stop-gap measure designed for quick and easy access to the courts.²¹² Interim maintenance is often sought immediately following separation when the final outcome of the partners’ relationship, parenting and property matters is unknown.²¹³
- 14.58 During preliminary consultation we heard from lawyers that applications for interim maintenance are relatively common and often a vital source of aid for many applicants. However, there can be delays in applications being heard and subsequent applications are often required once the six month time limit expires because the parties are still sorting out their affairs. We also heard that partners will often make private arrangements for the payment of

²⁰⁶ Family Proceedings Act 1980, s 64. Section 2 defines maintenance as the provision of money, property and services and includes, in respect of a child, provision for the child’s education and training to the extent of the child’s ability and talents, and in respect of a deceased person, the cost of the deceased person’s funeral.

²⁰⁷ Family Proceedings Act 1980, ss 63 and 64. Under s 70A maintenance cannot be ordered if a partner has entered into another marriage, civil union or de facto relationship. Note that costs for children cannot be included in adult maintenance claims: child support may be claimed for children under the Child Support Act 1991 and maintenance orders under s 79 of the Family Proceedings Act 1980 may be ordered against a natural parent.

²⁰⁸ Family Proceedings Act 1980, s 82.

²⁰⁹ Family Proceedings Act 1980, s 82(1). The court is not bound by the factors relevant to determining substantive applications, but is not prevented from considering those factors: Family Proceedings Act, s 61; *Ropiha v Rohipa* [1979] 2 NZLR 245 (CA); and *Langridge v Langridge* [1987] 2 NZLR 554 (HC).

²¹⁰ *Ropiha v Rohipa* [1979] 2 NZLR 245 (CA).

²¹¹ Family Proceedings Act 1980, s 82(4). New applications can be made if Property (Relationships) Act 1976 proceedings have not been resolved or the substantive maintenance proceedings have not been heard: *Zola v Abel* [2015] NZFC 9058, [2016] NZFLR 81; and *Cooper v Pinney* [2016] NZHC 1633.

²¹² *Beck v Beck* [1975] 2 NZLR 123 (SC) at 125; and *G v [LC]* FC Auckland FAM-2011-004-2021, 16 December 2011 at [9].

²¹³ *H v H* [2014] NZHC 211, (2014) 29 FRNZ 727 at [36].

maintenance in the short-term following separation, often for six months, reflecting the time limit in the Family Proceedings Act.

- 14.59 A court can make a final order for maintenance where a partner cannot meet their reasonable needs due to specified circumstances, such as the partner's ability to become self-supporting due to the effects of the division of functions in the relationship, or ongoing childcare responsibilities.²¹⁴ A court must take into account a number of factors in assessing quantum, including the reasonable needs, means, and responsibilities of each partner.²¹⁵ There is no time limit for final maintenance orders but partners must assume responsibility for their own needs within a reasonable time after the relationship ends.²¹⁶

When should maintenance be ordered pending the determination of property matters?

- 14.60 Maintenance clearly has a role to play following a relationship breakdown. This is recognised in the PRA. Section 32 requires a court to have regard to any prior maintenance orders, and permits a court to make, vary or discharge an order for maintenance when dealing with property matters under the PRA.²¹⁷
- 14.61 Maintenance will not, however, always be sufficient in meeting the needs of one partner pending the determination of property matters under the PRA. For example, when the partners only possess capital assets and have limited income streams there may be an inability to pay a reasonable amount of maintenance. There are also restrictions within the maintenance regime. For example, lump sum payments cannot be awarded for interim maintenance,²¹⁸ and legal and accounting costs cannot be claimed in applications for final maintenance.²¹⁹
- 14.62 For these reasons we think there remains a need to provide for interim property distributions under the PRA. We discuss below

²¹⁴ Family Proceedings Act 1980, s 64.

²¹⁵ Family Proceedings Act 1980, s 65.

²¹⁶ Family Proceedings Act 1980, s 64A. Liability for maintenance may continue if the conditions in ss 64A(2) and 64A(3) are satisfied. This will ultimately depend on the circumstances of each case.

²¹⁷ Similar provisions also exist in s 65(2)(a)(i) of the Family Proceedings Act 1980.

²¹⁸ Family Proceedings Act 1980, s 82.

²¹⁹ *C v G* [2010] NZCA 128, [2010] NZFLR 497: such costs are not likely to be an ongoing expense. We discuss further issues with maintenance in Part F.

some options for reform that are designed to address the current limitations of section 25(3).

Options for reform

Option 1: Provide for interim lump sum distributions

- 14.63 One option is to retain section 25(3) but give the court a new power to order an interim distribution in the form of a lump sum payment. This would provide an alternative to seeking an interim distribution in relation to a specific item of property. A lump sum distribution could be made where a court was satisfied that funds were available to meet the order. Those funds might not need to be classified as relationship property, but a court would still need to be satisfied that the interim payment will not exceed the value of the recipient partner's share in the global relationship property pool.
- 14.64 We think that an initial lump sum payment order could address a number of the issues we have outlined. It could also improve accessibility to the law and provide a visible framework to incentivise partners to negotiate their own agreements for interim payments out of court.
- 14.65 The option of an interim lump sum payment in lieu of maintenance is discussed further in Part F.

Option 2: Provide specific valuation guidance for interim distributions

- 14.66 In Chapter 13 we discussed some options to address valuation issues, although we are unsure if these reforms would be effective in reducing the prevalence of valuation disputes. One option to address valuation disputes that arise in the context of interim distributions might be to provide guidance on how a court should assign values to property for the purposes of interim distributions. For example, the PRA could provide that, when two different valuations are submitted, a court can accept the lowest reasonable valuation for the sole purpose of making an interim distribution order. The court's decision would be a pragmatic one and would have no bearing on the value to be assigned to the property at the final hearing.

CONSULTATION QUESTIONS

D22 Should a court have the power to order an initial payment not associated with specific items of property? If so on what basis?

D23 Are there any other options to improve the PRA's provisions for interim distributions?

Non-division orders

Occupation and tenancy orders

14.67 Section 27 provides that a court may grant one partner the right to occupy the family home or any other premises forming part of the relationship property, to the exclusion of the other partner.²²⁰

In the PRA the “family home” is not defined by ownership; it simply means the home that is used as the principal family residence.²²¹ Section 28 provides that a court may make an order vesting the tenancy of any dwellinghouse in either partner.²²²

14.68 Occupation orders can also be obtained under the Domestic Violence Act 1995 when there is an urgent need to respond to family violence.²²³ While there is overlap between the PRA and the Domestic Violence Act, we think it is coherent and does not create confusion or gaps in provision.²²⁴

14.69 In Part I we discuss whether the occupation and tenancy order provisions in the PRA are effective in addressing the interests of children. Another issue is whether an occupation order is available for the family home when it is held on trust or in a company, either on separation or when the partner who was the trust beneficiary dies. We discuss this issue below.

²²⁰ Despite some ambiguity in the drafting of s 27(1) of the Property (Relationships) Act 1976, it is accepted that s 27 applies only to relationship property including but not limited to the family home. The Family Court in *R v R* [2010] NZFLR 555 (FC) said that one or both of the partners had to be the beneficial owner of the property and the property interest in question had to be relationship property.

²²¹ Property (Relationships) Act 1976, s 2 definition of “family home”.

²²² Property (Relationships) Act 1976, s 2 definition of “dwellinghouse”.

²²³ Domestic Violence Act 1995, ss 52–61.

²²⁴ See also the Family and Whānau Violence Legislation Bill 2017 (247-2) which is currently before Parliament and proposes to amend the provisions of the Domestic Violence Act 1995 in relation to occupation orders.

Are occupation orders available for trust and company property?

14.70 Property held on trust cannot normally be divided under the PRA if one or both of the partners has only a discretionary interest in the trust. That is because a discretionary interest in trust property is not considered “property” for the purposes of the PRA. Sometimes, the courts have also said there is no jurisdiction to make an occupation order where the family home is held on trust, unless one or both of the partners has a vested or contingent interest in the trust assets and that interest is relationship property.²²⁵ In *R v R*, however, the Family Court held that while one or both partners must have an “interest” in the family home, it was not possible to generalise what constitutes a property interest in a trust.²²⁶ There is, the Court said, a continuum of interests in different trusts and each case must be considered to see where it falls on this continuum.²²⁷

14.71 The Family Court also has held that it has no jurisdiction to make an occupation order if a company holds the home, unless the company is a sham.²²⁸

14.72 Peart argues that precluding jurisdiction under section 27 because the family home is held on trust or owned by a company misunderstands the requirements of section 27.²²⁹ Rather than focusing on whether there is a property interest sufficient to give ownership of the home, the proper question for section 27, Peart argues, is whether there is a “use and occupation” interest sufficient to give a right to possess the home.²³⁰ Close scrutiny is required of the terms of the trust or the shareholder’s interest, and the decisions by the trustees or arrangements made by the company that allowed one or both of the partners to occupy the

²²⁵ *Gao v Elledge* [2003] NZFLR 378 (DC); and *Keats v Keats* [2006] NZFLR 470 (FC). *Keats* was followed in *C v H* FC Hamilton FAM-2008-019-992, 11 March 2009.

²²⁶ *R v R* [2010] NZFLR 555 (FC).

²²⁷ *R v R* [2010] NZFLR 555 (FC) at [60]. In that case the family home was owned by a partnership of two mirror trusts established by the partners during marriage. The Family Court held that it had jurisdiction to make an order under s 27 of the Property (Relationships) Act 1976, applying the “bundle of rights” doctrine referred to by the Court of Appeal in *M v B* [2006] 3 NZLR 660 (CA) at [112]–[119]. Under that doctrine, a partner’s powers to control a trust are a “bundle of rights” that has value as property. See *M v B* [2006] 3 NZLR 660 (HC) at [112]–[119]; and *Walker v Walker* [2007] NZFLR 772 (CA) at [48]–[49]. However, despite these references, the bundle of rights argument has not been widely adopted. See the discussion in Part G.

²²⁸ *S v S* [2008] NZFLR 711 (FC).

²²⁹ Nicola Peart “Occupation orders under the PRA” [2011] NZLJ 356 at 357.

²³⁰ Nicola Peart “Occupation orders under the PRA” [2011] NZLJ 356 at 357.

home during and after the relationship.²³¹ If there is an express or implied authority to occupy the home, and that has not come to an irreversible end, then Peart argues that property interest is sufficient for the purposes of an occupation order²³²

14.73 However, where the partner with a discretionary interest in the trust dies, this interpretation of section 27 is unlikely to assist the surviving partner. A partner's beneficial interest in a trust is personal to them and ceases on their death.²³³ Therefore even if a right to exclusive occupation could amount to a property interest under section 27, the right to occupy may end on the death of a partner depending on the terms of the trust deed.²³⁴ There is no jurisdiction for a court to grant an occupation order under section 27 to the surviving partner based on the deceased's interest prior to death.

14.74 For example in *C v H*, Mrs C was 74 years old when her 83 year old de facto partner of eight years died.²³⁵ The family home was held on trust but Mrs C was not a beneficiary. Mrs C was denied an occupation order pending the disposition of the PRA proceedings because the right granted by the trust to her de facto partner to reside in the family home had been terminated by his death.

14.75 We think it is desirable that the application of section 27 to property held on trust or by a company be clarified in the PRA. If occupation orders should be available in respect of trust and company property, then section 27 could be amended to clarify that a court may make an occupation order when, during the relationship, the partners jointly had a right, either expressly granted or inferred from arrangements, to exclusive possession of the property. Special provision may be required to ensure that an occupation order may be granted to a surviving partner, if the deceased was the trust beneficiary.

14.76 In Part G we also identify an option for reform that would expand the definition of property in the PRA to include broader rights and reflect a partner's true interest in a trust. This may also go some way to recognising the true nature of a right to occupy the home

²³¹ Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357-359.

²³² Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 359.

²³³ *S v N FC North Shore FAM-2010-044-1254*, 30 June 2011 at [39].

²³⁴ See Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 357 and discussion above about the potential proprietary nature of interests that give rights to exclusive possession for the purposes of occupation orders made under the Property (Relationships) Act 1976.

²³⁵ *C v H FC Hamilton FAM-2008-019-992*, 11 March 2009.

under a trust arrangement as a property interest for the purpose of occupation orders.

CONSULTATION QUESTIONS

D24 Should occupation orders be available where the property in question is held on trust or by a company? If so, in what circumstances?

D25 If occupation orders should be available regarding trust and company property, would clarifying that an occupation order could be made where either partner could have exclusive possession of the property achieve this purpose? Are there any other options?

Is there appropriate guidance on interest awards and occupation rent?

- 14.77 When one partner occupies the family home after separation, the other partner might be compensated for their loss of enjoyment of that property. Interest awards can be made by a court to compensate one partner for denied or delayed access to the capital he or she is entitled to under the PRA. This applies to the period up until the date of judgment.²³⁶ Interest awards are usually made under section 33(4). Alternatively, a court may require one partner to pay compensation to the other when their entitlement was delayed under section 18B of the PRA. An interest award under either section 33(4) or section 18B may be based on a calculation of interest on the partner's share of the property that the other partner had the use of.²³⁷
- 14.78 Occupation rent can also be awarded under section 18B.²³⁸ Section 33 does not specifically address occupation rent, but section 33(3) (i) empowers a court to make an order for the payment of a sum of money by one partner to the other.
- 14.79 It is not clear whether there is a difference between awards of interest and occupation rent. Some cases suggest that occupation rent is equal to an interest order.²³⁹ If they serve the same function, then an allowance of interest on occupation rent has

²³⁶ Interest awarded becomes a fixed sum post-judgment and thereafter attracts interest at the prescribed rate under the Judicature Act 1908.

²³⁷ *Griffiths v Griffiths* [2012] NZFLR 327 (HC).

²³⁸ Occupation rent can also be ordered under s 343(f) of the Property Law Act 2007, requiring the payment by any person of a fair occupation rent for all or any part of the property which is split between co-owners via a court order under s 339 of that Act.

²³⁹ *E v G* HC Auckland CIV-2005-485-1895, 18 May 2006 at [24].

aspects of double counting.²⁴⁰ However in *T v G* the High Court observed that an award of interest should not be confused with orders for compensation for lack of use of a family home, or occupation rent which might be made under section 18B.²⁴¹

14.80 There appears to be no settled approach on whether an award of occupation rent or an award of interest is appropriate to compensate a partner for their loss of enjoyment of the family home. The High Court has also observed that there appears to be “no clear or coherent principles to guide a Court in the exercise of its discretion in awarding interest” in PRA cases.²⁴² The interest rates stipulated in section 87 of the Judicature Act 1908²⁴³ which apply in most commercial disputes may “not always be appropriate in a family law context.”²⁴⁴

14.81 Another issue on which guidance would be desirable is that of grace periods in awards of occupation rent or interest. Currently there is no consistent approach on whether there should be a period immediately following separation when occupation rent or interest is not applicable.²⁴⁵ It has also been suggested that the occupying party should not be liable for occupation rent until they receive notice from the non-occupying party that an adjustment for occupation is being sought.²⁴⁶ The occupying party should have the opportunity to vacate the property and seek alternative accommodation before occupation rent or interest starts accruing.

Occupation rent when the home is held on trust

14.82 If occupation orders are available in respect of trust and company property, then specific provision may be needed to provide for

²⁴⁰ *Wicksteed v Wicksteed* [2002] NZFLR 28 (HC) at [60].

²⁴¹ *T v G* [2013] NZHC 2976 at [81].

²⁴² *Wicksteed v Wicksteed* [2002] NZFLR 28 (HC) at [59].

²⁴³ Section 87 of the Judicature Act 1908 will no longer apply to proceedings commenced after 1 January 2018 when the Interest on Money Claims Act 2016 comes into force: Senior Courts Act 2016, ss 2(2)(b) and 182(4); Interest on Money Claims Act 2016, s 2. The Interest on Money Claims Act 2016 provides a regime for the award of interest as compensation for a delay in the payment of debts, damages, and other money claims in respect of which civil proceedings are commenced: s 3.

²⁴⁴ *Johnston v Johnston* HC Auckland CIV-2008-404-817, 23 April 2008 at [45]. This confirms earlier dicta from *Cook v Cook* (1981) 4 MPC 43 (HC) at 45 where the Court said “that commercial rates are inappropriate in matrimonial property proceedings.” In *J v J* [2016] NZHC 1606 the Court and counsel accepted at [25] that the application of the New Zealand average annual bank term deposit rates as set out in a website <www.interest.co.nz> was a fair indication of New Zealand interest rates.

²⁴⁵ *K v M* FC Auckland FAM-2004-004-3382, 17 May 2007 at [21]; compare with *Griffiths v Griffiths* [2012] NZFLR 327 (HC) at [39]. See also *Jacobson v Guo* (2008) 9 NZCPR 850 (HC) and *M v M* [2012] NZFC 680.

²⁴⁶ See *S v S* FC Blenheim FAM-2009-006-245, 13 May 2010 at [67] citing *C v C* FC Nelson FAM-2006-042-184, 5 August 2008.

occupation rent or interest. Currently section 18B only provides for compensation in respect of relationship property. Where the occupying party is making use of a home held on trust, there is no jurisdiction to make an order for compensation under section 18B.²⁴⁷ However in *T v G* the High Court held that it was not prohibited from awarding an interest payment simply because the asset (the family home in this case) was held in a family trust.²⁴⁸

CONSULTATION QUESTIONS

D26 Should occupation rent or interest be available?

D27 Should more guidance be given?

Protection of rights under the PRA

14.83 The PRA has several provisions that protect a partner's rights before a court determines the division of the partners' property.

Section 42 notices of claim

14.84 Section 42 is an important provision. It allows a partner with a claim or interest in land under the PRA to register a notice on the title of the land. Section 42(5) provides that a notice can be registered even though no PRA proceedings are pending or in contemplation.

14.85 A notice of claim has been described as a "stop sign" because when registered on the title to land it prevents dealings with the land.²⁴⁹ It prevents the registered owner from selling or otherwise disposing of the land to a third party. A notice of claim can protect a potential interest regarding:

- (a) land claimed as relationship property (such as the family home) where it is in the name of one partner;
- (b) land that is one partner's separate property if there is a potential claim against that land, such as a challenge

²⁴⁷ *X v Y* [2015] NZHC 1166, [2015] NZFLR 664 at [25].

²⁴⁸ *T v G* [2013] NZHC 2976 at [79].

²⁴⁹ *Moriarty v Roman Catholic Bishop of Auckland* (1982) 1 NZFLR 144 (HC) at 146. Section 42(1) of the Property (Relationships) Act 1976 deems the alleged claim or interest to be a registerable interest under the Land Transfer Act 1952. Section 42(3) of the Property (Relationships) Act 1976 provides that a notice once lodged has effect as if it were a caveat.

against a section 21 agreement,²⁵⁰ or a claim under section 9A,²⁵¹ and

- (c) land purchased after separation where a partner has a potential claim under section 44 or section 44C, or where it is argued that the land is held on trust and that the trust is a “sham.”²⁵²

14.86 A notice of claim protects the claimant from the date of lodging the notice, but it does not affect any claims arising before that date. If the land has already been disposed of, then an application under section 44 may be necessary.²⁵³

14.87 Notice of claims, once lodged, can only be removed by order of the Family Court, District Court or High Court.²⁵⁴ A notice of claim will be removed if a court is satisfied that the claimed interest is unsustainable or suspicious or the notice has done its work.²⁵⁵

14.88 The notice of claim procedure appears to be widely used. In the last ten years, the number of notices registered against land under section 42 each year has ranged from a low of 794 registrations in one year, to a high of 1,255 registrations in another year.²⁵⁶ These statistics show that many partners are using their rights under section 42 which suggests that many people consider that the notice of claim procedure is a useful mechanism.

14.89 Despite the significance of section 42, we have encountered little criticism with the notice of claim procedure. There may, however, be issues with how the notice of claim procedure works in practice. For example, the authors of Family Property say:²⁵⁷

The form prescribed for s 42 notices is poorly worded. The use of the present tense to describe the claimant’s relationship to the

²⁵⁰ *C v C* (1989) 5 NZFLR 398 (HC); and *Doyle v Doyle* [2004] NZFLR 43 (CA).

²⁵¹ *M v W* FC Kaikohe FAM-2009-027-327, 30 November 2009.

²⁵² See *H v D* FC North Shore FAM-2003-044-33, 19 June 2008; *W v L* FC Waitakere FAM-2005-090-1441, 19 November 2008; and *C v C* FC Rotorua FAM-2007-063-652, 20 June 2011, where the notices of claim protected the applicants’ claims under ss 44 and 44C of the Property (Relationships) Act 1976.

²⁵³ Section 44 of the Property (Relationships) Act 1976 is discussed in Part G.

²⁵⁴ Property (Relationships) Act 1976, s 42(3).

²⁵⁵ See *Gregan v Gregan* [1983] NZLR 555 (CA); *Laing v Laing* (1988) 4 NZFLR 629 (HC); *Doyle v Doyle (No 2)* [2004] NZFLR 43 (CA); *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *C v C* FC Auckland FAM-2009-004-1390, 8 September 2009.

²⁵⁶ The number of registrations each year have been as follows: 2007: 1,255 registrations; 2008: 1,170 registrations; 2009: 993 registrations; 2010: 942 registrations; 2011: 862 registrations; 2012: 855 registrations; 2013: 841 registrations; 2014: 752 registrations; 2015: 794 registrations; 2016: 881 registrations: email from Land Information New Zealand to the Law Commission regarding data on notice of claim registrations (28 April 2017).

²⁵⁷ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR42.05].

owner of the land presupposes that the parties are still married or in a civil union or de facto relationship. It does not provide for the possibility that the parties may have separated or that one of them has died. Yet, claims under the Act are obviously possible in those circumstances... Section 42 notices must therefore be available to protect interests in land that could be the subject of those claims.

Are notices of claim available for trust property?

- 14.90 It is uncertain how the notice of claim procedure applies to certain types of property.²⁵⁸ In particular it is difficult to sustain a notice of claim in respect of property legally owned by a third party, such as a company or trustee.²⁵⁹
- 14.91 A section 42 notice cannot be used where a partner only has a discretionary interest in the trust property,²⁶⁰ or to protect some interest outside the PRA, such as an interest claimed under a constructive trust.²⁶¹ Ownership of company shares does not create a beneficial interest in company property, and therefore a section 42 notice cannot be sustained in respect of company property,²⁶² unless there is a claim under section 44 or 44C.
- 14.92 We think that the availability of notices of claim in respect of trust and company property should be clarified. We are interested in views on what types of property interests the procedure should be able to protect. We expect that if the remedies in the PRA regarding trust assets are improved, as discussed in Part G, applying section 42 will expand to include trust property subject to such potential claims.
- 14.93 A notice of claim can also affect the rights creditors claim to the land, particularly if the creditor's interest in the land is unregistered or if it has been registered after the notice of claim

²⁵⁸ *H v J DVC* [2015] NZCA 213.

²⁵⁹ A notice of claim against trust property can only be maintained where there is a claim under ss 44 or 44C of the Property (Relationships) Act 1976: see *W v L FC Waitakere* FAM-2005-090-1441, 19 November 2008 and *C v C FC Rotorua* FAM-2007-063-652, 20 June 2011); where a partner has a vested or contingent interest in the trust property; where a partner has a beneficial interest in trust property on the basis of the Supreme Court's interpretation of "property" in *Clayton v Clayton*: see *B v B* [2016] NZFC 2668, [2016] NZFLR 944 citing *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; or where it is alleged that the trust is a sham: see *H v D FC North Shore* FAM-2003-044-33, 19 June 2008; *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236; *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551; and *B v B* [2016] NZFC 2668, [2016] NZFLR 944.

²⁶⁰ *Mulholland v Tonar* HC Auckland CIV-2005-404-6870, 30 March 2006; and *Thompson v Parlour* [2012] NZHC 3096.

²⁶¹ *B v B* [2017] NZHC 131.

²⁶² *Straight Views Ltd v Hannaway* (2005) 6 NZCPR 725 (HC); and *C v C* (1989) 5 FRNZ 694 (HC).

is lodged. We discuss how section 42 can affect the rights of creditors in Part K.

CONSULTATION QUESTIONS

D28 Should the notice of claim procedure under section 42 be able to protect interests in trust property, where a partner only has a discretionary interest or a constructive trust claim?

D29 Are there any other issues with the way the notice of claim procedure is working in practice?

Section 43 orders restraining the disposition of property

14.94 Section 43 applies when a disposition of property is about to be made to defeat a partner’s claim or rights under the PRA. A court has the power to restrain the impending disposition, or order that any proceeds from the disposition be paid into court, where it is satisfied that a disposition is about to be made to defeat the claim or rights of a person under the PRA.²⁶³ While “disposition” is not defined in the PRA, the High Court has held that it covers all forms of alienation, whether for value or not.²⁶⁴ Orders can be made in relation to both relationship property and separate property.

Is the threshold for section 43 too high?

14.95 Section 43 requires a predictive assessment of both the likelihood of the disposition being made, and the intention of the party claimed to be making the disposition.²⁶⁵

14.96 The test for establishing intention is the same as that under section 44, which applies where a disposition has been made and an application is made asking a court to set aside that disposition. The applicant must establish that the person making the disposition is doing so “in order to defeat the claim or rights” of any person under the PRA.²⁶⁶ The courts have taken the approach that, when a person must have known that disposing of property

²⁶³ Property (Relationships) Act 1976, s 43(1).

²⁶⁴ *Re Polkinghorne Trust* (1988) 4 NZFLR 756 (HC).

²⁶⁵ *P v D* [2012] NZHC 2757 at [39].

²⁶⁶ Property (Relationships) Act 1976, ss 43(1); and 44(1).

would expose their partner to a significantly enhanced risk of not receiving their entitlement under the PRA, they must be taken to have intended that consequence, even if it was not actually their wish to cause the partner loss.²⁶⁷ The Court of Appeal recently confirmed this approach in *P v H*, stating:²⁶⁸

... the inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights, from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence.

14.97 While the approach of the courts, confirmed in *Potter v Horsfall*, may make it easier to meet the threshold for section 43, we are interested in views on whether the threshold is appropriate. Section 43 is a precautionary measure that functions as a statutory form of interim injunction,²⁶⁹ and cannot be used to recover property already disposed of, unlike section 44.²⁷⁰ Setting aside a disposition under section 44, it seems, carries greater consequences than preventing a disposition until proceedings are dealt with under the PRA. It may, therefore, be appropriate to have a lower threshold, such as an effects-based test.²⁷¹ Section 44C, for example, enables a court to make an order of compensation where relationship property has been disposed of to a trust and the disposition has the effect of defeating the claim or rights of one of the partners. However lowering the threshold may be unnecessary if, as an alternative, a section 42 notice of claim can be lodged on the title of the property.

CONSULTATION QUESTION

D30 Is the threshold test in section 43 too high? If so, would an effects-based test be appropriate?

²⁶⁷ *R v U* [2010] 1 NZLR 434 (HC) at [33] applying *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J. *R v U* was cited with approval in *W v C* [2013] NZHC 396, [2014] NZFLR 71 at [69]. However note the decisions in *K v V* [2012] NZHC 1129; and *P v D* [2012] NZHC 2757.

²⁶⁸ *P v H* [2016] NZCA 514, [2016] NZFLR 974 at [41] in relation to s 44 of the Property (Relationships) Act 1976. Leave to appeal to the Supreme Court has been granted: *H v P* [2017] NZSC 21.

²⁶⁹ *S v S* [2008] NZFLR 227 (HC) at [26].

²⁷⁰ Under s 44(2)(a) of the Property (Relationships) Act 1976 property can be recovered if it has been received otherwise than in good faith and for valuable consideration.

²⁷¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Lexis Nexis) at [9.42] fn 13 notes the Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 30 - 31 recommended expanding ss 43 and 44 and the Family Court in *Taylor v Taylor* DC Christchurch FP 009/752/96, 18 June 1996 added that "it should be enough if the effect of the disposition is to defeat the claim or rights of any other person rather than importing notions of motive."