

Part H -
Resolving
property
matters
in and out
of court

Chapter 23 – How are property matters resolved in practice?

Introduction

- 23.1 In this part of the Issues Paper we look at how property matters are resolved when relationships end, both in and out of court. We want to understand whether the PRA facilitates the resolution of property matters in accordance with people’s reasonable expectations, and as inexpensively, simply and speedily as is consistent with justice. We focus primarily on how separating partners resolve their property matters, although some of the issues identified in this part may also appear when one partner dies and disputes arise among the surviving partner, the personal representative of the deceased and third parties.¹
- 23.2 Separating partners can agree to divide their property in any manner they think fit. They are not required to apply the PRA’s rules of division, however, if they want their agreement to be enforceable by a court they must meet certain procedural requirements set out in the PRA.²
- 23.3 Partners resolve their property matters in a range of different ways, including by negotiation, with or without legal advice, or by mediation, arbitration or some other dispute resolution process. We use the term “out of court” to refer to this range of options, unless indicated otherwise. A smaller number of separating partners will have their property dispute determined by a court.
- 23.4 No information is routinely collected in New Zealand about how people resolve their property matters at the end of relationships. As a result, we lack the necessary information to fully analyse how the PRA is operating in practice. Your views on the practical issues people face when resolving property matters, and how those issues might be addressed, are therefore important to our review.

¹ The special rules that apply to relationships ending on death are discussed in Part M.

² For an agreement to be binding it must be in writing and signed by both partners. Each partner must receive independent legal advice before signing and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See: Property (Relationships) Act 1976, s 21F.

- 23.5 In this chapter we explore what is needed to achieve a just and efficient resolution of property matters under the PRA, and summarise what we know about what currently happens *in practice*. The rest of Part H is arranged as follows:
- (a) In Chapter 24 we look at how property matters are resolved out of court. We explore the range of information, support and dispute resolution services that are currently available, and ask whether there is a need for the State to do more to encourage out of court resolution in a way that achieves just and efficient results.
 - (b) In Chapter 25 we identify broader issues with the Family Court’s processes and powers, which can hinder the just and efficient resolution of property matters in court.
 - (c) In Chapter 26 we explore more complex and technical issues with the jurisdiction of the courts to decide property matters that arise at the end of relationships, focusing in particular on the roles of the Family Court and High Court.
- 23.6 Throughout this part of the Issues Paper we refer to the comprehensive review of the Family Court carried out by the Ministry of Justice in 2011, which led to important changes to the family justice system such as the introduction of the Family Dispute Resolution service for parenting disputes.³ We refer to this as the “Family Court Review.”

Achieving just and efficient resolution of property matters under the PRA

- 23.7 One of the principles of the PRA is that matters “should be resolved as inexpensively, simply, and speedily as is consistent with justice.”⁴ In other words, not only should the division of

³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011).

⁴ Property (Relationships) Act 1976, s 1N(d). However out of court resolution may not always be consistent with justice where, for example, there is a significant imbalance of power between the partners or information asymmetries. We discuss this issue further in this chapter.

property at the end of a relationship be *just*,⁵ the process for arriving at that decision should be *efficient*.

- 23.8 Inherent within this principle is that partners should be able to resolve property matters out of court wherever possible. Out of court resolution is generally quicker and less expensive than court-based resolution. It can also result in more enduring and satisfactory outcomes, in part because the partners are actively involved in the decision-making, and because it enables more workable and tailored outcomes.⁶ Out of court resolution is more likely to preserve the relationship between separating partners, and also achieves better outcomes for children, by reducing inter-parental conflict.⁷
- 23.9 There is a range of different dispute resolution services available for resolving property matters.⁸ We discuss these in Chapter 24. Dispute resolution services are generally more flexible than the court process, and can also be modified to better respond to the needs of Māori, Pacific and other cultures by being inclusive of the wider family.⁹ The more informal nature of dispute resolution services can also better enable children to express their views.¹⁰
- 23.10 We think that separating partners should be encouraged to resolve their property matters with minimum formality whenever appropriate. The extent to which the State should have a role in promoting out of court resolution is discussed in Chapter 24.
- 23.11 It will not, however, always be appropriate for separating partners to resolve their property matters without the powers and protections available in the court process. Situations will inevitably arise which could not have been contemplated when the PRA was enacted, and/or which require the application of one

⁵ A “just” division of property is one that follows the rules of division set out in the Property (Relationships) Act 1976 (PRA), or one which the former partners have agreed to, after receiving legal advice and complying with the other procedural requirements set out in pt 6 of the PRA. Part 6 gives partners the freedom to choose a different property arrangement, provided they do so fully aware of the effect and implications of that arrangement. For more discussion refer to Part A of this Issues Paper, where we explain that one of the principles of the PRA is that “partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards”

⁶ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

⁷ See for example Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 13; and Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 5.

⁸ In the past the terms “alternative dispute resolution” and “ADR” were commonly used to refer to out of court dispute resolution services. More recently there is a preference to simply refer to “dispute resolution.” See Chris Gallavin “The system formally known as ADR” (1 August 2014) New Zealand Law Society <www.lawsociety.org.nz>; Arbitrators and Mediators’ Institute of New Zealand Inc “What is Dispute Resolution?” <www.aminz.org.nz>.

⁹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40 and 42.

¹⁰ We discuss the participation of children in the resolution of property matters further in Part I.

or more exceptions to the general rule of equal sharing in order to achieve a just division of property. The lack of guidance in the PRA or existing case law in some situations may make it difficult to achieve a just result out of court.¹¹ Other situations may involve complex legal questions that require clarification from the courts.

23.12 A similar issue may arise where there is a significant power imbalance between the partners because of information asymmetries,¹² or because the partners have different levels of confidence, education, emotional control or financial support.¹³ A power imbalance can also arise where one partner has a history of being violent or intimidating towards the other partner, including financial or economic abuse.¹⁴ Significant power imbalances may result in unjust outcomes so it may be in the interests of justice for such matters to be managed and resolved in court.

23.13 The State has an important role in supporting people who cannot resolve disputes themselves, and in providing legal protection where issues have serious impacts on children and vulnerable people.¹⁵ In the context of post-separation property disputes, when out of court resolution is not appropriate or has been unsuccessful, the State fulfils this role primarily by providing access to the Family Court. Either one or both partners¹⁶ can apply to the Family Court for orders determining their respective shares in relationship property, dividing the relationship property between them and/or making declarations in relation to specific items of property.¹⁷ The Family Court's decision is binding on the parties, subject to a right of appeal to the High Court.¹⁸

¹¹ In this situation, arbitration may provide an appropriate alternative to a court determination.

¹² For example, when one partner possesses all the financial information about the partners' combined wealth, and there are concerns with the quality and extent of disclosure to the other partner.

¹³ Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at [180].

¹⁴ Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at [180]. In 2013 changes were made to the definition of domestic violence in the Domestic Violence Act 1995 following the Family Court Review. The definition was amended to expressly include: "financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education)". See Domestic Violence Act 1995, s 3(2)(c)(iva), inserted on 25 September 2013 by the Domestic Violence Amendment Act 2013. The reference to financial or economic abuse has been carried over into the definition of "family violence" (replacing domestic violence) in the Family and Whānau Violence Legislation Bill 2017 (247-2), cl 9.

¹⁵ As expressed as part of the Family Court Review. See Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [27].

¹⁶ When one partner has died, their personal representative may apply for orders under the Property (Relationships) Act 1976. However, leave of the Family Court is required if a personal representative seeks orders under s 25(1)(a), determining the respective shares of each partner in the relationship property: s 88(2).

¹⁷ Property (Relationships) Act 1976, ss 25(1)(a), 25(1)(b) and 25(3).

¹⁸ Property (Relationships) Act 1976, s 39. The Family Court can also transfer cases to the High Court if it thinks that it is the more appropriate venue for dealing with the proceedings: s 38A.

What is needed to achieve a just and efficient resolution of property matters?

23.14 We consider that there are four important elements in achieving a just and efficient resolution of property matters:

- (a) **Understanding of legal entitlements:** People need to understand their property entitlements and obligations under the PRA when resolving property matters. However this does not mean that people have to reach an agreement that is consistent with their legal entitlements. People will, and should be able to, do what is right for them in the context of their own lives. In many cases acting “legally rationally” may be seen as inappropriate or too difficult.¹⁹ But people need to know what their legal entitlements are so that they make informed decisions. One way the PRA recognises this is by requiring partners to receive independent legal advice prior to signing a contracting out agreement that will be legally binding and enforceable.²⁰ The need to ensure people understand their legal entitlements also emphasises the importance of clear and straightforward rules of classification and division in the PRA that people can apply to their property without the need to go to court. If a person’s legal position is uncertain, they may form an unreasonable expectation of what they should be entitled to, which can impede attempts to resolve matters in or out of court.
- (b) **Access to financial information:** Both partners must have sufficient information about their finances and those of their partner. This includes information about jointly and separately owned property, investments, bank accounts, income streams and any other property interests, including beneficial interests under a trust. Failing to disclose all relevant financial information is a serious impediment to achieving a just outcome and can also result in agreements being challenged.

¹⁹ Anne Barlow “Legal Rationality and Family Property – What has Love got to do with it?” in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, Oregon, 2009) 303 at 317–318.

²⁰ Property (Relationships) Act 1976 (PRA), s 21F. A contracting out agreement is an agreement made between the partners under either ss 21 or 21A of the PRA to deal with the status, ownership and division of their property instead of the provisions of the PRA. It can be made before, during or after a relationship ends.

- (c) **Appropriate support:** People need to be supported in the resolution process. The extent of support required will depend on the circumstances. People need to be supported by access to appropriate information about legal entitlements and about the different options for resolving property matters. In many cases support will be provided by lawyers. When a person cannot afford to engage a lawyer, legal aid may be available. Dispute resolution services can also support people to resolve property matters. In the minority of cases where out of court resolution is inappropriate or unsuccessful, people need to be supported through the Family Court process. People who represent themselves in court may need an additional level of support in navigating the court process.
- (d) **A timely resolution:** People need to be able to achieve a timely resolution of post-separation property matters. But timeliness does not always mean the fastest resolution possible. Sometimes time is necessary, for example, to ensure both partners are well informed, are ready to address the matters in dispute and have an opportunity to be heard. Some matters will raise complex issues. Unreasonable delay, however, can be harmful for children.²¹ It can also have significant financial and emotional implications for the former partners.²² The Ministry of Justice recognised the importance of timely resolution of PRA matters in the Family Court Review:²³

The high value of property involved, combined with the likelihood of other financial obligations, further highlights the benefit of earlier resolution for the parties. More timely outcomes may reduce the psychological impact of uncertainty by enabling the parties to make financial decisions that allow them to move on with their lives rather than having funds tied up.

²¹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 11.

²² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

²³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

Resolving PRA matters in accordance with tikanga

- 23.15 Māori have different values and different ways of resolving disputes according to tikanga. Māori place greater importance on the whānau than on individuals or nuclear families. Tikanga relies on a “collective sharing of decision making, tied to the community”, and differs from both the court process and the underlying assumption that separation is of concern only to the partners, their children and the State.²⁴
- 23.16 Non-Māori often do not recognise the part played in relationship breakdown by tensions inherent in Māori social organisation (such as conflicting whānau loyalties and differences in tikanga between iwi) or resulting from social change (such as the difficulties of parents who grew up in whānau raising children without whānau support).²⁵ When relationships are threatened with breakdown, relatives have valuable knowledge and skills to offer.²⁶

Those holding responsible jobs in whānau, hapū and iwi know the ancestors, historical group relationships and stresses involved within the marriage, and are often experienced mediators. Those in close contact with the couple, as members of an effective whānau, can supply information and insights inaccessible to strangers and can offer practical help, especially in terms of child care.

- 23.17 In a draft paper prepared for the Law Commission’s review of Māori customary law, Durie noted that resolution of disputes according to tikanga depends not upon finding for one or the other, or upon making one subordinate to the other, but upon recognising the status and contribution of each, and upon finding a structure that accommodates the various interests.²⁷ Ruru has observed that:²⁸

²⁴ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19; and Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

²⁵ Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

²⁶ Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

²⁷ ET Durie “Custom Law” (unpublished confidential draft paper for the Law Commission, January 1994) at [105] prepared for Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

²⁸ Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 Int J Law Policy Family 327 at 336.

Overall, the rules relating to marriage and property are haphazard and often contrary to tikanga Maori in that they deny the whānau and hapū the responsibility to mediate and determine rights and responsibilities to property. The rules are based on an ethic that endorses individual rights and ability to own property exclusively.

23.18 Therefore the whānau, not the State, is seen as the first line of defence in times of trouble.²⁹ If the whānau is not functioning effectively, the responsibility for supervision and intervention lies next with the hapū and then, if necessary, with the iwi.³⁰ Only after both options have collapsed should the responsibility fall to the State.³¹

23.19 These cultural practices mean that Māori may rarely use the courts to enforce their rights under the PRA, preferring instead to manage their own dispute resolution processes within their tribal communities.³² In the Family Court Review, the Ministry of Justice observed that Māori comprised just six per cent of applicants and respondents in PRA cases.³³ There may, however, be other reasons for this trend. Chadwick has observed that:³⁴

Matrimonial property is the only area of family law that I know of where whanaungatanga prevails regardless of the law. This is because Maori, as a rule, do not have the same emotional attachment to property that the law guarantees. Since 1976 the Family Court, in its matrimonial property jurisdiction, has by and large been the exclusive preserve of the white middle class.

23.20 When Māori do go to court, they may find it is not responsive to their values and beliefs.³⁵ The processes, language and culture of the adversarial court system can be mysterious and intimidating³⁶ and its focus on individuals can be alienating, not only for Māori

²⁹ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

³⁰ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

³¹ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

³² Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53 and 238.

³³ In contrast, New Zealand European/Pākehā are overrepresented in Property (Relationships) Act 1976 (PRA) cases, comprising 85 per cent of all applicants and respondents. Asian peoples comprise seven per cent, and Pacific peoples two per cent of applicants and respondents in PRA cases. The remaining one per cent is “other” ethnicity. The Ministry notes that these proportions represent only a partial count of ethnicities due to incomplete data: Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 83.

³⁴ John Chadwick “Whanaungatanga and the Family Court” (2002) 4 BFLJ 91.

³⁵ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

³⁶ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53.

but also Pasifika and other cultures who often want to resolve disputes by involving the wider family or whānau.³⁷ However in recent years the judiciary has made significant efforts to upskill in this area. Tikanga and te reo are important elements in the ongoing judicial education provided by the Institute of Judicial Studies.³⁸ The court can also use its powers to hear evidence of tikanga. This was demonstrated in the recent High Court case of *B v P*, where the High Court received evidence from two kuia on principles of tikanga relating to the guardianship of taonga.³⁹

23.21 The Family Court Review recognised that dispute resolution services, discussed in Chapter 24, are more flexible and can be modified to better respond to the needs of Māori, for example by being inclusive of the wider family.⁴⁰ In Chapter 26 we also discuss whether, when out of court resolution is unsuccessful, Māori should be able to resolve their property matters involving issues of tikanga in the Māori Land Court, which has a better understanding of tikanga, instead of the Family Court.

How do people resolve property matters in practice?

23.22 Information about when relationships end and how property matters are resolved is not routinely collected in New Zealand.⁴¹ This makes it difficult to fully analyse how partners resolve their property matters in practice. Below we look at court data, results from our preliminary consultation with family lawyers, and other information and research we have collected in an attempt to analyse how property matters are resolved.

³⁷ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

³⁸ Nick Butcher “The pathway to becoming a judge” Lawtalk 910 (Wellington, September 2017) at 43. This is against the backdrop of what might be a broader shift in public values and attitudes regarding te reo. In 2015 the New Zealand Attitudes and Values Study asked 15,821 adults to rate how strongly they opposed or supported teaching te reo Māori in primary schools and singing the national anthem in Māori. The study found that most New Zealanders were either on the fence or supportive. Only a very small number of people were opposed: see CM Matika “Support for Te Reo Māori in Aotearoa” (New Zealand Attitudes and Values Study Policy Brief 8, 2016) at 1–2.

³⁹ *B v P* [2017] NZHC 338. The issue in that case was whether taonga belonging to the deceased should pass to the surviving partner or the deceased’s parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased’s three sons). See also *S v S* [2012] NZFC 2685 and Chapter 11 for a discussion of these cases.

⁴⁰ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

⁴¹ The only information available is statistics on marriage and civil union dissolutions (divorces). However, the date the marriage or civil union was dissolved does not reflect when the partners separated, as it is a legal requirement that the spouses have been living apart for two years or more before an order dissolving the marriage or civil union can be made: Family Proceedings Act 1980, s 39. We also expect that many people who have separated have not yet chosen to formally dissolve their marriage or civil union. Information is not available about marriages and civil unions ending on death, or about de facto relationships ending on separation or death.

PRA matters resolved in court

- 23.23 Relatively few property matters are decided by a court. In recent years the number of PRA applications filed in the Family Court has been declining, as has the number of divorces. In 2016, 785 applications for orders under the PRA were filed in the Family Court.⁴² That same year the Family Court granted 8,169 orders dissolving a marriage or civil union.⁴³ In contrast, in 2006 the Family Court received 1,217 PRA applications and granted 10,065 dissolution orders.⁴⁴
- 23.24 Most applicants for orders under the PRA are women, comprising from 60–66 per cent of applicants each year since 2004.⁴⁵
- 23.25 Only about 20 per cent of PRA applications that are filed actually proceed to a hearing. The rest are settled or withdrawn prior to hearing (see Figure 1 below). Around half of those cases that settle involve orders being made by the Family Court.⁴⁶ A small number of applications are transferred to the High Court.⁴⁷
- 23.26 A 2011 review of a sample of PRA cases in the Family Court provides some insights. The review was undertaken by the Ministry of Justice as part of the Family Court Review.⁴⁸ The

⁴² Data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). In 2016 there were 989 applicants for orders under the Property (Relationships) Act 1976: Provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family data from the Ministry of Justice's Case Management System and provided by email to the Law Commission (26 September 2017). The number of applicants is higher than the number of applications for orders under s 25 of the Property (Relationships) Act 1976, as an application can have more than one applicant.

⁴³ Statistics New Zealand "Divorces (marriages and civil unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>. No information is kept on de facto relationship separations.

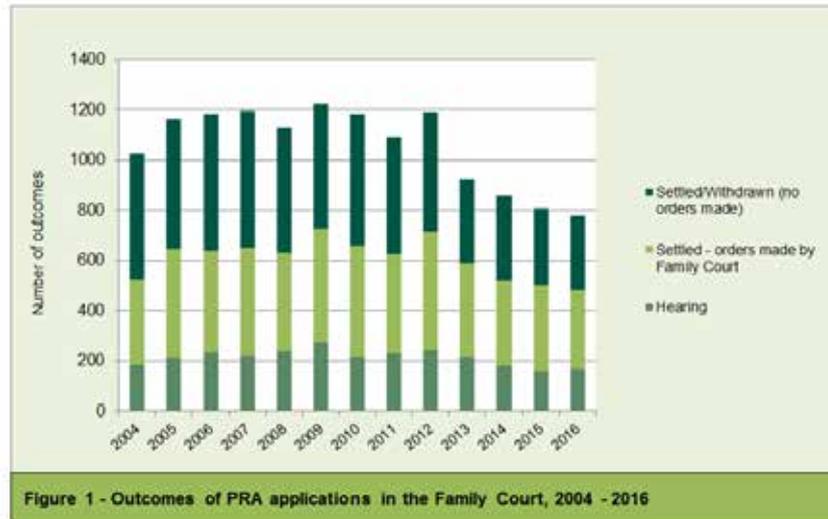
⁴⁴ Data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). In 2006 there were 1,459 applicants for orders under the Property (Relationships) Act 1976: Provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017). For statistics on dissolution orders see Statistics New Zealand "Divorces (marriages and civil unions) (Annual-Dec)" (May 2017) <www.stats.govt.nz>.

⁴⁵ These figures are from provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, provided by email to the Law Commission (26 September 2017).

⁴⁶ In 2016, 170 Property (Relationships) Act 1976 applications went to a hearing, 312 were settled and had orders made by the Family Court, and 298 cases were settled with no orders made: data provided by email from the Ministry of Justice to the Law Commission (5 May 2017).

⁴⁷ In 2016, 15 Property (Relationships) Act 1976 (PRA) applications were transferred to the High Court: data provided by email from the Ministry of Justice to the Law Commission (5 May 2017). The transfer of PRA applications to the High Court is discussed in detail in Chapter 26.

⁴⁸ The Ministry of Justice, in collaboration with the judiciary and court staff, reviewed a sample of 88 closed Property (Relationships) Act 1976 (PRA) files that had been opened in 2006 and 2007 across 10 different Family Court locations. The cases reviewed were not intended to be representative of all PRA cases, but were intended to provide insights into the nature of more complex cases. The findings of that case file review were published in Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011), and were also discussed in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22–23.



Ministry chose to review PRA cases because in 2009/10 they were taking on average 478 days to dispose.⁴⁹ Key findings of the case review included:

- (a) The most common type of property in dispute was residential property, which was in dispute in 74 per cent of cases. Disputes over chattels were evident in 44 per cent of cases and trust property in 14 per cent of cases.⁵⁰
- (b) The value of property in dispute was “substantial.”⁵¹ In 44 per cent of cases the property in issue was valued in excess of \$500,000. Less than 10 per cent of cases involved property valued under \$100,000.
- (c) Delay in proceedings, as indicated by the frequency of adjournments, was evident.⁵² The estimated average number of adjournments per case was 12.⁵³ Every case reviewed was adjourned at least once and 82 per cent of cases sampled were adjourned more than six times.⁵⁴ Adjournments most often occurred in order to obtain information, reports and await the outcome of settlement discussions.⁵⁵ Delay “caused by either a

⁴⁹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.
⁵⁰ The range of property in dispute also included investment property, shares, cash and superannuation proceeds: see Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.
⁵¹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.
⁵² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.
⁵³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.
⁵⁴ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.
⁵⁵ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

party or their lawyer” was also evident in 63 per cent of cases.⁵⁶

- (d) The main issues in dispute (identified from the decision) were categorised as follows:⁵⁷
 - (i) 55 per cent of cases involved “matters requiring consideration of legal issue/s”;
 - (ii) 23 per cent related to “tenancy/occupation”; and
 - (iii) 22 per cent required “determination of value/division/sale of property/assets” issues.
- (e) Only 27 per cent of applications stated the proposed property division, while 70 per cent required the Family Court to determine the division.⁵⁸ Where the proposed property division was stated in the application, 75 per cent of applicants sought up to 60 per cent of the property available for division. Eight per cent of applicants sought a share of between 60–75 per cent, and 17 per cent sought a share of over 75 per cent.⁵⁹

23.27 This data suggests that the Family Court is being used as a last resort and that most people are resolving their property matters out of court. When proceedings are filed, the vast majority of cases are resolved without the need for a hearing (around 80 per cent). The Ministry of Justice’s case review identified that most applications to the Family Court required consideration of legal issues. The court data does not, in our view, evidence a systemic problem of “too many” PRA matters unnecessarily going to court.

23.28 What the data does show is that the number of PRA matters going to court has declined significantly over the past 13 years. During the period 2004–2016 the number of applicants to the Family Court under the PRA decreased by 39 per cent.⁶⁰ The decrease was steeper following changes to the new Family Court fee structure

⁵⁶ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

⁵⁷ In addition, eight per cent of cases were categorised as “settled and/or consent memorandum filed” and in eight per cent of cases the main issue was not stated. Note that each file may have had multiple responses. See Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

⁵⁸ Two per cent of cases are recorded as “not stated”. See Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

⁵⁹ Ministry of Justice *Reviewing the Family Court: Case File Sample* (September 2011) at 2.

⁶⁰ This figure is from provisional analysis by the Ministry of Business, Innovation and Employment’s Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice’s Case Management System, provided by email to the Law Commission (26 September 2017).

introduced in 2012, and resulted in a noticeable reduction in the proportion of female applicants.⁶¹

PRA matters resolved out of court

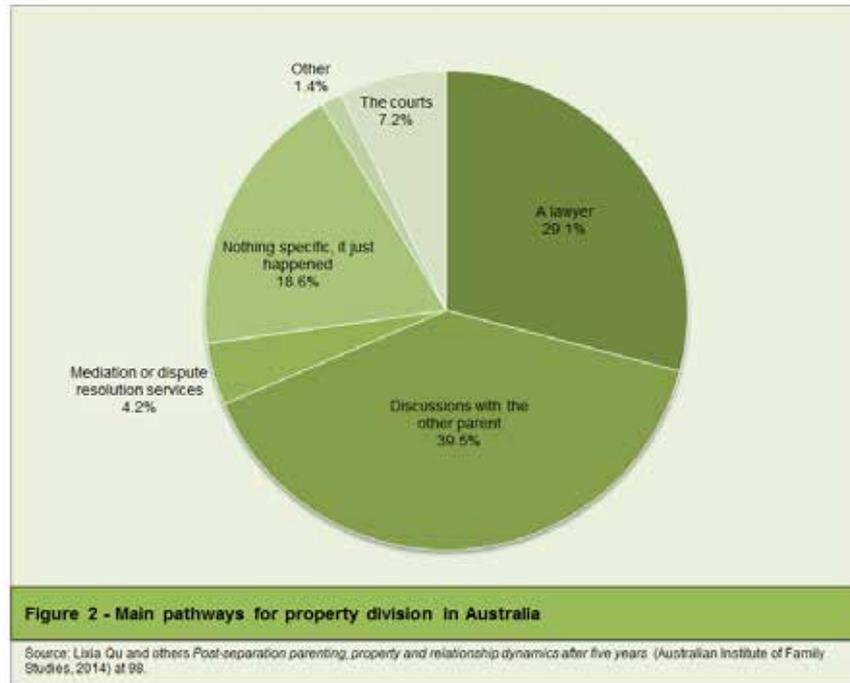
- 23.29 Most people will resolve PRA matters out of court by negotiating an agreement with their partner. Some will engage lawyers, some will not.
- 23.30 Preliminary consultation with family lawyers suggests that the vast majority of people who see a lawyer about PRA matters (around 80–90 per cent) will resolve the matter by agreement, negotiated with the assistance of their lawyer. This is often described as lawyer-led negotiation. Around 10–15 per cent of those who see a lawyer resolve their PRA matters by mediation, and a small minority, around 5–10 per cent, have their matters decided by a court.⁶²
- 23.31 We do not know how many people resolve property matters without the assistance of lawyers, but it is likely that this accounts for a significant proportion of separating partners. Research in England and Wales identified that 47 per cent of partners divorcing or separating between 1996 and 2011 did not seek legal advice.⁶³
- 23.32 In Australia, a study of 9,000 parents who had separated in 2006–2007 found that the main pathway for resolving property matters was “discussion with the other parent” (see Figure 2). While Australian data is helpful to look at, particularly given the general similarities in legal systems and the absence of New Zealand data, it is important to recognise that the property division regime in Australia is quite different to the PRA. In particular, the Family Law Act 1975 (Cth) currently provides for a discretionary approach, rather than a general rule of equal sharing. In the

⁶¹ The Ministry of Business, Innovation and Employment’s Government Centre for Dispute Resolution (GCDR) has undertaken provisional analysis of the Ministry of Justice Family Court Case Management System data. This found an 18 per cent drop in applicants to the Family Court under the PRA between 2012 and 2013 following the introduction of the new fee structure in mid-2012, and that the proportion of female applicants dropped from 65 per cent in 2012 to 60 per cent in 2016: provisional analysis by the Ministry of Business, Innovation and Employment’s Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice’s Case Management System, provided by email to the Law Commission (26 September 2017).

⁶² These figures are an estimate only, based on what we were told during preliminary consultation with a range of family lawyers. However, research in England and Wales identifies similar trends. A study of partners divorcing or separating between 1996 and 2011 identified that of those clients offered lawyer-led negotiation and mediation, 89 per cent took up lawyer-led negotiation while 38 per cent took up mediation: Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 6.

⁶³ Rosemary Hunter and others “Mapping Paths to Family Justice: matching parties, cases and processes” [2014] Fam Law 1404 at 1405.

context of dispute resolution, this makes it difficult for parties to know what their obligations or entitlements in a property division are, and may make it harder for people to resolve property matters without legal advice.⁶⁴



- 23.33 There might be several reasons why people do not seek legal advice. They may reach an informal agreement and not wish to incur the cost of legal fees. There may also be a concern that involving lawyers may change the dynamics of the separating partners' relationship. Some may prefer to seek support elsewhere, such as from family or whānau, or through culturally focused dispute resolution processes. Finally, separating partners may not address property matters at all, perhaps because they have no property to divide, or because they are unaware that they may have rights or entitlements under the PRA.
- 23.34 The Citizens Advice Bureau keeps records of the nature of inquiries it receives from the public. The number of relationship property inquiries has steadily increased since it started keeping records in 2011/12. In 2015/16, it received 1,801 relationship

⁶⁴ These concerns were raised in Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 873–875. The Productivity Commission recommended the property provisions in the Family Law Act 1975 (Cth) be reviewed with a view to clarifying how property will be divided on separation and that review should consider introducing presumptions about equal division as currently applies in New Zealand.

property inquiries, accounting for 13 per cent of all relationship inquiries.⁶⁵

- 23.35 The information from Citizens Advice Bureau suggests that the number of people who are resolving property matters may be increasing, even if the number of court applications has been declining. While divorce rates have been declining in recent decades, this does not accurately represent rates of separation, in particular because it excludes de facto relationships.⁶⁶ Rather, the decline in court applications is more likely to mean that more people are looking to resolve their property matters outside the court system. A key consideration for this review is whether the appropriate information and support is available to those people, to ensure that outcomes reached are just and efficient.

⁶⁵ In contrast, in 2010/11 the Citizens Advice Bureau received 1,396 relationship property inquiries. This rose to 1,425 in 2012/13, 1,551 in 2013/14, and 1,574 in 2014/15: Citizens Advice Bureau “CAB Enquiries relating to “relationships property” and “separation/relationship breakdown” provided by email from the Citizens Advice Bureau to the Law Commission (12 September 2016).

⁶⁶ For further information about changing patterns in relationship separation see our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

Chapter 24 – Resolving property matters out of court

24.1 Most separating partners will resolve their property matters themselves, with or without the assistance of lawyers. In this chapter we look at the range of information, support and dispute resolution services currently available for resolving property matters out of court, and ask whether there is a need for the State to do more to encourage out of court resolution in a way that achieves just and efficient outcomes.⁶⁷

Do people have access to appropriate information?

24.2 People need to have access to an appropriate range of information when resolving property matters at the end of a relationship. This includes information about:

- (a) legal entitlements and obligations under the PRA,⁶⁸
- (b) the range of options for resolving property matters out of court; and
- (c) the process for making applications to the Family Court, including likely costs and timeframes.

24.3 In the wider context of family law disputes it has also been suggested that people should be able to access information about the benefits of out of court resolution and the disadvantages of going to court, including the effects of prolonged conflict on children.⁶⁹

What information is publicly available?

24.4 There are several sources of publicly available information:

⁶⁷ We discuss what we mean by “just and efficient” outcomes in Chapter 23.

⁶⁸ See the discussion above at paragraph 23.14 (a).

⁶⁹ For example see the discussion in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 35.

- (a) The **Ministry of Justice** provides information on its website about issues arising on separation and divorce, including the division of property under the PRA.⁷⁰ That information covers applying to the Family Court, including the cost of making an application, the forms that need to be filed, and what happens once an application is filed. It also covers legal aid and includes links to Community Law and Citizens' Advice Bureau websites, and to some of the information provided on the Community Law website, discussed below.
- (b) **Community Law Centres** provide free legal help with all kinds of legal problems throughout the country.⁷¹ The Community Law Manual Online provides information about relationships and break-ups, including what happens to property on separation.⁷² The Community Law Manual explains the operation of the PRA, the fees for applying to the Family Court and the requirements for a binding contracting out agreement. However, while Community Law Centres can provide initial legal information about the PRA, they generally don't give individualised advice on property matters and many Community Law Centres cannot witness contracting out agreements.⁷³ They can however refer people to lawyers with the appropriate skills.
- (c) **Citizens Advice Bureau (CAB)** provides free advice on a broad range of issues.⁷⁴ CAB has offices throughout the country and users of their services can also ask questions on their website or over the phone. The CAB website provides information about the PRA and the rules of division. It also addresses a range of common issues, ranging from what happens when relationships are shorter than three years, what happens if one partner has left with debts owing, and who gets custody of any pets.

⁷⁰ See Ministry of Justice "Separation and Divorce: Divide relationship property" (11 January 2017) <www.justice.govt.nz>.

⁷¹ More information about Community Law Centres and the services they provide is available at <www.communitylaw.org.nz>.

⁷² The Community Law Manual Online is available at <www.communitylaw.org.nz>.

⁷³ As discussed in Chapter 23, an agreement under ss 21 or 21A of the Property (Relationships) Act 1976 must be witnessed by a lawyer for it to be valid and enforceable: s 21 F.

⁷⁴ More information about Citizens Advice Bureau and the information it provides is available at <www.cab.org.nz>.

- (d) The **New Zealand Law Society** (NZLS) produces several information pamphlets for the public, including guides to the PRA and what happens when partners separate.⁷⁵ These pamphlets are available on its website. NZLS also provides a searchable list of family lawyers on its website.⁷⁶
- (e) The **Commission for Financial Capability** also provides a guide to managing finances after separation on its money management website “**Sorted**.”⁷⁷ This includes some information about the PRA and directs people to the Ministry of Justice and CAB websites.

24.5 If there is a need to improve the information that is currently available, options include:

- (a) Improving online resources. International research has identified that, for the general population, the main source of information about out of court dispute resolution is the media/internet.⁷⁸ Recent research into parenting disputes in New Zealand observed that initiating parents’ natural instinct was to go to a legal/court information source to find out how to settle their parenting dispute.⁷⁹ In England and Wales, the Family Justice Review recommended that the process for initiating divorce should begin with a government-run online hub that provides information and support to separating partners, including about the different process options available for resolving disputes.⁸⁰ A similar approach is taken in Australia.⁸¹
- (b) Promoting public awareness of the PRA and its rules of property division through a public education campaign.

⁷⁵ New Zealand Law Society *Dividing Up Relationship Property: The Property (Relationships) Act* (March 2013); and New Zealand Law Society *What happens when your relationship breaks up?* (July 2014).

⁷⁶ For more information about the New Zealand Law Society see its website at <www.lawsociety.org.nz>.

⁷⁷ See <www.sorted.org.nz>.

⁷⁸ Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 4.

⁷⁹ Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 14. This research identified that participants typically learned about family dispute resolution (FDR) from their own lawyer, a Child, Youth and Family lawyer, a community law agency, court staff, other ministry staff or the ministry website. They also learned about this service through the Citizens Advice Bureau.

⁸⁰ Family Justice Review *Family Justice Review: Final Report* (November 2011) at [114]. See <helpwithchildarrangements.service.justice.gov.uk>.

⁸¹ See <www.familyrelationships.gov.au>.

- (c) Provision of printed leaflets in public spaces, such as in court buildings, libraries, CAB and Community Law Centres.
- (d) Providing more information on the PRA and options for resolving disputes through the government-run Parenting Through Separation programme.⁸²
- (e) Information about the PRA could be provided to people when they make contact with different government departments at different points in time, for example when applying for a marriage licence, registering a birth, buying or selling a house, or when migrating to New Zealand.

24.6 A further question is who should provide such information. In the Family Court Review there were mixed views as to whether it was the role of the Family Court to provide information and help for resolving disputes out of court. Some felt that information is best distributed in partnership with a range of government agencies such as the Ministry of Social Development, and community agencies such as Community Law Centres and iwi groups.⁸³

CONSULTATION QUESTIONS

- H1 Is the current range of publicly available information about the PRA and options for resolving property matters sufficient? If not, where are the current gaps?
- H2 If more information should be publicly available, who should be responsible for providing information, and in what form should this information be available (written/online/telephone)?

⁸² Parenting Through Separation is a free programme which provides information about the effects of a relationship breakdown. It is part of a wider strategy to support early and out-of-court resolution of parenting disputes. It is funded by the Ministry of Justice and is provided by different community groups across the country. Attendance at a Parenting Through Separation programme will normally be required before the Family Court will consider an application for a parenting order under the Care of Children Act 2004. Under the Care of Children Act 2004 every application for a parenting order, or for the variation of a parenting order, must include a statement by the applicant that he or she has undertaken a Parenting Through Separation course within the preceding two years, or that they are not required to undertake the course because they are unable to participate effectively, or because the application is being made without notice: s 47B(2). Evidence in support of that statement must be included in the application and a registrar may refuse to accept an application if the evidence provided does not adequately support the statement: ss 47B(3)–47B(4). A Family Court Judge may also direct attendance at a Parenting Through Separation course when an application for a parenting order is made: s 46O.

⁸³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 35.

Is access to legal advice appropriate?

- 24.7 While the Ministry of Justice, Community Law Centres, CAB and NZLS are all valuable first contact points for separating partners, none are designed to provide tailored advice and ongoing support in the resolution of property matters. Many separating partners will need to consult a lawyer for advice tailored to their particular circumstances.⁸⁴
- 24.8 The PRA recognises the importance of legal advice in ensuring a just outcome in property matters.⁸⁵ It provides that a contracting out agreement will only be legally binding and enforceable in court if the partners both received independent legal advice about its effect and implications, prior to signing.⁸⁶

Is legal advice accessible?

- 24.9 Not everyone will be able to afford a lawyer to provide tailored advice. In some cases, only one partner may be able to do so. Inability to access legal advice is a concern as it may result in partners making agreements without knowing what their legal entitlements are. If only one partner is able to afford a lawyer, this may create an imbalance of power between the partners.
- 24.10 Legal aid is available for those who cannot afford a lawyer, but it is limited in respect of PRA matters.⁸⁷ Fees are fixed by activity type,⁸⁸ and include, for example, \$850 for pre-proceeding activities (including taking instructions, applying for legal aid, disclosure, valuations and negotiations between parties), \$650 for drafting PRA applications and affidavits and, if agreement is reached

⁸⁴ Research in England and Wales on people's awareness, usage, experience and outcomes with out of court family dispute resolution found that lawyers were the main source of information for people divorcing or separating. That research identified that people who went to see a lawyer often felt a strong steer from them about the options for dispute resolution, however as many as 47 per cent of people divorcing or separating sought no legal advice about their situation. See Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 4–6.

⁸⁵ A “just” outcome under the Property (Relationships) Act 1976 (PRA) includes where partners agree to a property arrangement that departs from the PRA's rules of division, provided they do so fully aware of the effect and implications of that arrangement. This reflects the principle that partners should be free to make their own agreement regarding the status, ownership and division of their property, subject to safeguards.

⁸⁶ Property (Relationships) Act 1976, s 21F.

⁸⁷ The Legal Services Regulations 2011 set out the maximum levels of income and disposable capital of applicants in order to be eligible for legal aid. For example, a single applicant with no dependent children cannot earn more than \$23,326, while a single applicant with two dependent children cannot earn more than \$53,119 (for applications made between 3 July 2017 and 1 July 2018). The maximum level of disposable capital is \$3,500 for a single applicant, with \$1,500 being added for each dependent child. See Legal Services Regulations 2011, regs 5–6.

⁸⁸ Subject to an ability to apply for additional funding in limited circumstances. See Ministry of Justice *Family Fixed Fee Schedules* (July 2016) at 33.

before proceedings are filed, \$320 for drafting and certifying a contracting out agreement.⁸⁹ Legal aid is considered a loan, and recipients may have to repay some or all of their grant, depending on how much they earn, and whether they receive any money or property when their property matter is resolved.⁹⁰

- 24.11 Some lawyers we have spoken with have raised the concern that the fees lawyers receive for legally aided PRA matters are not economically viable.⁹¹ We understand that many lawyers do not offer to act on PRA matters under legal aid for this reason. In a survey conducted by the Family Law Section of NZLS in 2014, 89.6 per cent of legal aid providers said that the fee for PRA orders was inadequate, and 93.5 per cent said that the fee for drafting contracting out agreements was inadequate.⁹² NZLS observed:⁹³

In relationship property cases, the law and people's financial structures were increasingly complicated and almost all cases would be fixed fee plus or require amendments to the original grant.

Providers indicated that [PRA matters] on legal aid was not economically viable. The work is high risk work from an insurance perspective and requires significant specialist skills. An appropriate level of remuneration is required to reflect this. Providers reported that [...] applications for amendments to grants to increase the fee were often required even in order to cover basic negotiations.

- 24.12 Concerns with the adequacy of legal aid funding are representative of a wider access to justice issue in family law matters, particularly in regional areas of New Zealand.⁹⁴ Between 2011 and 2016 there was a 25 per cent decrease in the number of lawyers providing family legal aid in New Zealand.⁹⁵

⁸⁹ Ministry of Justice *Family Fixed Fee Schedules* (July 2016) at 33.

⁹⁰ Legal Services Act 2011, ss 18 and 21.

⁹¹ See also the New Zealand Law Society's submission to the International Bar Association's Consultation Paper on Proposed Guidance/Reforming Legal Aid Systems (Civil, Family, Administrative) (13 September 2017) <www.lawsociety.org.nz>.

⁹² New Zealand Law Society Family Law Section *Family Legal Aid Fixed Fees* (2014) at 21.

⁹³ New Zealand Law Society Family Law Section *Family Legal Aid Fixed Fees* (2014) at 21.

⁹⁴ New Zealand Law Society "NZ Law Society welcomes temporary solution to family legal aid lawyer shortage" (30 March 2017) <www.lawsociety.org.nz>; and Radio New Zealand "Family Court lawyer shortage 'critical'" (19 September 2016) <www.radionz.co.nz>.

⁹⁵ New Zealand Law Society "Falls in family and criminal legal aid providers" (25 August 2016) <www.lawsociety.org.nz>. The Ministry of Justice has reportedly put the drop in providers down to regulation changes that required lawyers to reapply for approval and providers doing little or no legal aid work choosing not to reapply. See Tom Hunt "Legal aid bills skyrocket, but in some cases no lawyer can be found for kids in danger" (4 May 2017) Stuff <www.stuff.co.nz>.

- 24.13 This reduction means that access to legal advice may be more difficult. In England and Wales, significant reductions in legal aid for family matters resulted in a substantial increase in cases where the parties were self-represented in proceedings.⁹⁶ It will also likely mean more people will seek to negotiate an agreement entirely outside the family justice system. This has two consequences in property matters under the PRA. First, people may enter an informal agreement and act on that agreement without knowing what their rights are, and second, because informal agreements are void under the PRA, they may be overturned by a court later on.⁹⁷
- 24.14 One likely consequence of reduced legal aid, as experienced in England and Wales (see above), is an increase in the number of people who represent themselves in court. As the High Court observed in *Brown v Sinclair*, cases in the Family Court have an emotional component not present in other civil cases, and the inability of the parties to engage lawyers can make matters worse, as:⁹⁸

Counsel's detachment is the antidote for unpredictable or irrational behaviour from parties who are guided by emotional responses to an intense personal experience. In the absence of such assistance, it is difficult for Family Court Judges to perform their demanding functions, in resolving the domestic problems that they encounter.

- 24.15 The Court noted that self-represented litigants struggle to comply with the detailed rules of court, and that there will often be problems with the preparation and content of documents and evidence that he or she is required to file in accordance with those rules.⁹⁹ Self-represented litigants need additional support to navigate the court process, which can add to the workload of the Family Court. It can also create additional expense to the other partner and cause further delay.
- 24.16 While we recognise the significance of lawyers' concerns about the inadequacy of legal aid funding for PRA claims, our terms of reference do not extend to a review of the legal aid framework.

⁹⁶ See Law Commission of England and Wales *Enforcement of Family Financial Orders* (Consultation Paper No 219, 2015) at 4.

⁹⁷ Section 21F of the Property (Relationships) Act 1976 provides that an agreement entered into to settle property matters is void unless the requirements set out in ss (2) to (5) are complied with. These include the need for the agreement to be in writing, signed by both partners, and signatures to be witnessed by a lawyer, who certifies that he or she explained the effect and implications of the agreement to the partner.

⁹⁸ *Brown v Sinclair* [2016] NZHC 3196 at [3].

⁹⁹ *Brown v Sinclair* [2016] NZHC 3196 at [4].

In this chapter we explore other ways to promote access to justice, and in Part D of this Issues Paper we considered how the provisions for interim distributions from relationship property can be improved, including in order to free up funds to enable a partner to instruct a lawyer.

Access to dispute resolution services

24.17 In some cases, party-led or lawyer-led negotiation will not resolve property matters and additional help is required. There is a range of dispute resolution processes available to resolve property matters under the PRA.¹⁰⁰ The widespread use of dispute resolution services and the number of dispute resolution practitioners from various disciplines means there is incredible variation in the practice of dispute resolution.¹⁰¹ Some services are more suited than others to deal with post-separation property disputes.

24.18 In this section we briefly recount the history of dispute resolution in New Zealand’s family justice system and explore four different dispute resolution services that are currently available on a voluntary basis for property matters:

- (a) mediation;
- (b) collaborative law;
- (c) arbitration; and
- (d) online dispute resolution.

The history of dispute resolution in the family justice system

24.19 The New Zealand Family Court was established as a division of the District Court on 1 October 1981. An important feature of the Family Court was its therapeutic function, and the Family Courts Act provided for conciliation processes such as counselling and judge-led mediation.

¹⁰⁰ Dispute resolution falls into two broad categories: determinative processes like arbitration, and consensual or facilitative processes like negotiation and mediation: see Arbitrators’ and Mediators’ Institute of New Zealand “What is Dispute Resolution?” <www.aminz.org.nz>.

¹⁰¹ Lola Akin Ojelabi and Mary Anne Noone “ADR Processes: Connections Between Purpose, Values, Ethics and Justice” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 5 at 6.

- 24.20 Confidential counselling under section 9 of the Family Proceedings Act 1980 was the primary mechanism for people to get assistance with their relationship issues out of court.¹⁰² Counselling was free and was obtained by making a request to the Family Court, but parties did not need to file proceedings, or even intend to file, to be eligible. This recognised that personal and emotional issues rather than legal concerns underpin many family disputes, and provided parties with an opportunity to understand each other's perspective better and to be more open to resolution.¹⁰³
- 24.21 Parties to certain proceedings in the Family Court (but not PRA proceedings)¹⁰⁴ could also participate in a mediation conference chaired by a Family Court Judge. The Judge chairing the mediation could, with the consent of the parties, make any orders that could have been made by a Family Court, including orders relating to an application by either party for the possession or disposition of property under the PRA.¹⁰⁵ A District Court Judge could issue a summons to a person who had previously failed to comply with a request to attend mediation, requiring their attendance.¹⁰⁶
- 24.22 A review of the Family Court was undertaken in 1992 by a committee appointed by the Principal Family Court Judge. That review recommended the establishment of a separate Family Conciliation Service that would utilise mediation as the primary method of dispute resolution.¹⁰⁷ The Family Court would be used only when a decision on a family law issue was required. However those recommendations were not adopted.¹⁰⁸
- 24.23 A further review of the Family Court, undertaken by the Law Commission in 2003, recommended better resourcing of the family justice system to reduce delays, a new, expanded conciliation service offering mediation, enhancing information about the court within the community and making court services

¹⁰² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

¹⁰³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

¹⁰⁴ Judge-led mediation was available in respect of applications for a separation order, maintenance order, or parenting order: Family Proceedings Act 1980, s 13(1) (repealed).

¹⁰⁵ Family Proceedings Act 1980, s 15 (repealed).

¹⁰⁶ Family Proceedings Act 1980, s 17 (repealed).

¹⁰⁷ Megan Gollop, Nicola Taylor and Mark Henaghan Evaluation of the 2014 *Family Law Reforms: Phase One: Report to the New Zealand Law Foundation* (University of Otago, February 2015) at 1.

¹⁰⁸ Megan Gollop, Nicola Taylor and Mark Henaghan Evaluation of the 2014 *Family Law Reforms: Phase One: Report to the New Zealand Law Foundation* (University of Otago, February 2015) at 1.

more culturally responsive.¹⁰⁹ While legislation was introduced in response to these recommendations providing for mediation, the provisions never came into force.¹¹⁰ Under the proposed provisions a partner could ask the Family Court to arrange mediation. There did not need to be proceedings for mediation to be available, and the mediation could address any issues between the parties. It was intended that the State would bear the cost of mediation.¹¹¹

- 24.24 The Government did, however, trial an “Early Intervention Process”, in which the Family Court appointed lawyers to act as mediators in proceedings under the Care of Children Act 2004. However, the analysis of the project indicated that when lawyer-led mediation was used it was no more efficient than the pre-existing approach for deciding applications.¹¹² It was suggested that lawyers appointed by the Family Court to act as mediators may not be as skilled as private mediators, and that their training and background as lawyers made it more likely that they would take a positional rather than neutral approach to mediation, and would be less able to deal with the emotions of parties that may be obstructing resolution of the dispute.¹¹³

The Family Court Review

- 24.25 In 2011 the Ministry of Justice undertook a comprehensive review of the Family Court. That review found that the Family Court:¹¹⁴
- (a) was too often used for private matters that could be resolved without recourse to a judge;
 - (b) was adversarial, which could exacerbate conflict between parents and the risk of children being adversely affected by parental conflict;
 - (c) had complex processes and procedures and incentives that cause delay; and

¹⁰⁹ New Zealand Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003).

¹¹⁰ Non-judge led mediation was introduced by the Family Proceedings Amendment Act 2008, in response to recommendations made in the Law Commission’s 2003 report, *Dispute Resolution and the Family Court*, and its 2004 report, *Delivering Justice for All*. However, the provisions of that Amendment Act were never brought into force, and they were subsequently repealed following the Family Court Review by the Family Proceedings Amendment Act (No 2) 2013.

¹¹¹ Family Proceedings Amendment Act 2008, s 12 (proposed s 12J of the Family Proceedings Act) (repealed).

¹¹² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 52.

¹¹³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 53.

¹¹⁴ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [17].

(d) had experienced sizeable growth in costs despite the total number of all types of application remaining relatively stable.

24.26 The Family Court Review resulted in the most significant changes to New Zealand's family justice system since the establishment of the Family Court in 1981.¹¹⁵ The changes took effect on 31 March 2014 and were largely focused on parenting matters under the Care of Children Act 2004, as this represented the largest single category of applications to the Court (39 per cent of the Court's workload) and where costs had increased the most.¹¹⁶ Counselling and mediation were replaced with out of court processes including Family Dispute Resolution (FDR) and a parenting information programme, Parenting Through Separation.¹¹⁷

What is FDR?

24.27 Family Dispute Resolution, or FDR, is a mediation service that normally must be completed before a person can apply to the Family Court for a parenting order or for directions in a guardianship matter.¹¹⁸ FDR is fully funded for those who qualify for legal aid, and parties who do not qualify for full funding can access a government-subsidised service which is capped at \$390 plus GST per party.¹¹⁹ A similar requirement to attempt FDR for parenting disputes prior to going to court also exists in Australia.¹²⁰

24.28 An initial review of FDR in 2015 found that while parents and professionals generally supported the concept of out of court resolution of parenting disputes, 40 per cent of parents felt pressured to reach an agreement at mediation due to its long duration and/or the mediator's desire to get a signed agreement in

¹¹⁵ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [23].

¹¹⁶ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [26].

¹¹⁷ Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3.

¹¹⁸ Care of Children Act 2004, s 46E. Family Dispute Resolution (FDR) is not mandatory if a party or a child of one of the parties has been subject to domestic violence by one of the other parties, or is otherwise unable to participate effectively in FDR. FDR is also not required if the application is a cross-application, is without notice, is for a consent order, seeks enforcement of an existing order, or relates to a child who is already the subject of proceedings under the Children, Young Persons, and Their Families Act 1989.

¹¹⁹ Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 12.

¹²⁰ As introduced by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

place.¹²¹ Agreements reached when parents felt pressured tended to be broken shortly after mediation was completed.¹²²

24.29 Changes were subsequently made to the funding model so that FDR mediation is now a “process” rather than an “event.”¹²³ Fully funded FDR participants are given a 12 hour allocation of resources over a 12 month period, and those hours can be utilised in any combination agreed by the FDR provider, mediator and the parties.¹²⁴ Parties who are not eligible for full funding can only receive five hours of mediation within a 12 month period at the capped price of \$390 plus GST, and must pay for any mediation preparation themselves.¹²⁵ The Ministry is currently reviewing the effect of the 2014 reforms, and a three year evaluation project is also being undertaken by the University of Otago Faculty of Law and Children’s Issues Centre.¹²⁶

24.30 FDR is not designed for PRA matters, however, parents can use FDR to talk about property matters “but only if it helps you agree about how you’ll care for your children.”¹²⁷ We do not know how often it is utilised for property matters, but we have been told by family lawyers that this does occur.

24.31 As a result of the changes to the family justice system there is no longer any conciliation service (counselling, mediation or otherwise) available for PRA disputes out of court, except in the limited circumstances where parents can raise PRA matters in FDR.¹²⁸ We discuss FDR as an option for resolving property matters below.

¹²¹ Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 5 and 22.

¹²² Ministry of Justice *Evaluation of Family Dispute Resolution Service and Mandatory Self-representation: Qualitative Research Findings* (October 2015) at 5.

¹²³ Bryan King “FDR mediation – an event or a process” *The Family Advocate* 18(4) (Wellington, Spring 2017) at 27.

¹²⁴ Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 17.

¹²⁵ Ministry of Justice *Family Dispute Resolution: Operating Guidelines* (December 2016) at 19. Parties who access the government-subsidised Family Dispute Resolution service can access five hours of mediation twice in one 12 month period, but must pay \$390 plus GST per five hours of mediation.

¹²⁶ University of Otago Children’s Issues Centre “Research activities” <www.otago.ac.nz>; and Justice and Electoral Committee 2016/17 *Estimates for Vote Justice and Vote Courts* (1 July 2016) at 5.

¹²⁷ Ministry of Justice “Separation and Divorce: Divide relationship property” (11 January 2017) <www.justice.govt.nz>.

¹²⁸ However, where parties file proceedings in the Family Court, a judge can order the parties to attend a settlement conference, presided over by the judge, with the purpose of settling the disputes: Family Court Rules 2002, rr 52(2)(b) and 178. Settlement conferences are discussed in Chapter 25.

The different dispute resolution services available

Mediation

- 24.32 Our preliminary consultation with family lawyers suggests that around 10–15 per cent of clients with post-separation property disputes go to private mediation.
- 24.33 Mediation involves an independent and impartial person (a mediator) who helps the parties to resolve their disputes. It is a confidential and voluntary process. The mediator is not a decision-maker, although they may be legally trained.¹²⁹ Their role is to facilitate a supportive and supported negotiation environment, empowering the parties and building their capacity to negotiate mutually appropriate outcomes.¹³⁰
- 24.34 Mediation has many benefits, including its informality, flexibility and less confrontational nature; its ability to promote party self-determination; and its focus on the parties' mutual needs and interests, along with the best interests of the children.¹³¹
- 24.35 As discussed in Chapter 23, Māori are underrepresented as applicants and respondents in property matters in the Family Court, and it is recognised that the adversarial court system is not responsive to Māori culture and can be alienating.¹³² Dispute resolution services, in contrast, are more flexible than court processes. Dispute resolution can therefore be more accommodating of the needs of Māori and can focus on resolving matters in accordance with tikanga. Some mediators already offer services that are based on traditional Māori values and respect te reo, tikanga and kawa, and the role of the whānau.¹³³

¹²⁹ Mediation can differ substantially depending on whether the mediator is legally trained. In Australia for example, family dispute resolution is often multidisciplinary, rather than legally-focused. It may draw on affiliated services that support families in dispute, such as counselling, and specialist family violence and Parenting Order programs to assist high conflict separating families. This is contrasted by civil mediations in Australia, which tend to take place “in the deep shadow of the law”. See Judy Gutman and Jodie Grant “Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 106.

¹³⁰ Rachael Field and Jonathan Crowe “Playing the Language Game of Family Mediation: Implications for Mediator Ethics” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84 at 85.

¹³¹ Rachael Field and Jonathan Crowe “Playing the Language Game of Family Mediation: Implications for Mediator Ethics” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84.

¹³² See discussion in Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

¹³³ For a discussion on the services offered by FairWay Family Dispute Resolution see Keri Morris “No two families are the same, so why should mediations be?” *The Family Advocate* 18(4) (Wellington, Spring 2017) at 29.

- 24.36 There are, however, challenges. The mediation process can ask a lot of parties – they are asked to make a genuine effort and demonstrate at least to some extent a level of rational, reasonable negotiation. This can be challenging in the post-separation period, which is often a stressful and emotional period.¹³⁴
- 24.37 There can also be ethical challenges for mediators in balancing traditional mediation values, such as the impartiality of the mediator and the flexibility of the mediation, with the need to promote an outcome that is procedurally and substantively “just.” There is longstanding debate over whether mediators should have any role at all in ensuring fair outcomes for the parties.¹³⁵ Mediators have an ethical obligation to act impartially, and can feel constrained in their ability to provide meaningful information to parties on their legal entitlements.¹³⁶ This issue can be heightened when the parties are not legally represented in the mediation, and when the dispute involves complex legal questions. It can result in unrepresented parties being left to make decisions in an “informational vacuum”, which often leads to decisions that are not in the parties’ long-term interests.¹³⁷
- 24.38 Another challenge for mediators arises in respect of the key values of self-determination and the promotion of settlement. On the one hand, a mediator is ethically committed to advance party choice. On the other hand, there is mediator knowledge of the law (and what presents a “just” division of property in terms of

¹³⁴ Rachael Field and Jonathan Crowe “Playing the Language Game of Family Mediation: Implications for Mediator Ethics” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 84 at 85–87. The authors also note that there are several assumptions about the mediation process – that the informal process provides a less challenging negotiation environment, and that the emphasis on party self-determination and collaborative negotiation evens out the negotiation playing field – that may not ring true for parties who are inexperienced with the mediation system. These assumptions can potentially create hidden barriers for parties who lack knowledge of the mediation process and the surrounding legal framework. As a result, it is argued that mediators need to play an active role in preparing and supporting the parties to operate effectively within the mediation.

¹³⁵ Some argue that mediators should be free to intervene to protect one party against a clearly unjust outcome, or to decline to “sanction” an agreement which the mediator has reason to believe would cause injustice to any party, including third parties. Others, however, take the view that it is not the role of the mediator to guarantee a fair agreement. See Bobette Wolski “An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 64 at 78–79. One international study found that most mediators believed they should not be concerned with the fairness of a mediated outcome, although the mediator has a role in ensuring procedural fairness. See Mary Anne Noone and Lola Akin Ojelabi “Ethical Challenges for Mediators around the Globe: An Australian Perspective” (2014) 45 *Washington University Journal of Law and Policy* 145.

¹³⁶ See for example Ellen Waldman “Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 24 at 29.

¹³⁷ There are different perspectives around the connection between justice and mediation processes. Purists might insist that impartiality means mediators are prevented from offering legal and other relevant information to the parties, while others prioritise the need to help the parties better understand their rights and obligations, so that they can make reasonably informed decisions. See Ellen Waldman “Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 24 at 29, 36 and 43.

the PRA). When mediation has a formal role in the justice system (like FDR does for parenting disputes) there may also be mediator responsibilities to ease the court workload and advance the administration of faster, cheaper and more efficient justice.¹³⁸

- 24.39 These factors suggest that mediation will be an appropriate dispute resolution process for some, but not all, property disputes under the PRA.

Collaborative law

24.40 Collaborative law emerged in the United States in 1995 and is a relative newcomer to dispute resolution in New Zealand, although it is well established elsewhere including in Australia, England and Wales, Scotland and Canada.¹³⁹ It developed as a response to lawyers' dissatisfaction with the win-lose culture of litigation particularly in family disputes, and represents a paradigm shift from "positional bargaining" to interest-based mutual problem solving and good faith bargaining.¹⁴⁰ Collaborative law is used primarily, although not exclusively, in the resolution of family law disputes.

24.41 Collaborative law is a negotiation-based approach practiced by lawyers as an alternative to conventional mediation and arbitration. Collaborative law, like mediation, provides a process for people who want to resolve their family disputes themselves. It is considered an "early consensual process" rather than a pre-litigation "intervention" by an expert with authority over the parties (unlike arbitration, discussed below).¹⁴¹ Unlike mediation, there is no neutral third party facilitator. Instead, each party is represented by a lawyer trained in collaborative practice. Collaborative lawyers advise and represent their clients in the role of advocate and remain bound by their ethical obligations to their

¹³⁸ Judy Gutman and Jodie Grant "Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities" in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 107.

¹³⁹ For further information about collaborative law see Collaborative Advocacy New Zealand's website at <www.collaborativelaw.org.nz> and the international body promoting collaborative law, the International Academy of Collaborative Professionals at <www.collaborativepractice.com>.

¹⁴⁰ Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 4.

¹⁴¹ Gaye Greenwood "The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?" (paper presented to AMINZ/IAMA "Challenges and Change" Conference, Christchurch, August 2010) at 3.

clients. They also play a more active role in the resolution process than a mediator.¹⁴²

- 24.42 At the core of the collaborative law model is a commitment by both parties to participate in good faith negotiation through face to face meetings, private settlement and transparent information sharing.¹⁴³ At the outset the parties and their lawyers enter into a “participation agreement” that disqualifies the lawyers from representing their client if either or both parties choose to litigate. The agreement creates procedural certainty and commits the parties to confidential, without prejudice and good faith negotiations, which creates a safe environment for interest-based negotiation.¹⁴⁴ The agreement outlines the behaviours expected of clients and professionals, and parties agree to share all relevant information.¹⁴⁵
- 24.43 Collaborative practice enables the parties to address overlapping issues such as parenting and property matters in the one process. It can involve professionals in other fields, including communication experts to facilitate effective dialogue, child and family experts, mental health professionals and financial professionals to help with future needs planning.¹⁴⁶
- 24.44 Lawyers require special training to practise collaborative law. To practise “collaboratively” it is suggested that lawyers must “unlearn traditional adversarial practices”, adopt a non-confrontational approach and incorporate knowledge of people’s psychological functioning and particularly how the grief at the ending of a relationship affects a person’s decision making after

¹⁴² Pauline H Tesler *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation* (American Bar Association, Chicago, 2001) at 1 discussed in Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 8.

¹⁴³ Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 4.

¹⁴⁴ Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 9.

¹⁴⁵ There is a lack of consensus among lawyers and academics about the ethics of an agreement with a “no litigation” clause in collaborative law agreements. Some question whether lawyers, in excluding litigation, are breaching their obligations to their clients. See Larry Spain “Collaborative law: A critical reflection on whether a collaborative orientation can be ethically incorporated in to the practice of law” (2004) 56 *Baylor Law Review* 141; and John Lande “Possibilities for collaborative law: ethics and practice of lawyer disqualification and process control in a new model of lawyering” (2003) 64 *Ohio State Law Journal* 1315. Both discussed in Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 11.

¹⁴⁶ Gaye Greenwood “The Challenge of Collaborative Law: Is Access to ADR through the Family Court an Oxymoron?” (paper presented to AMINZ/IAMA “Challenges and Change” Conference, Christchurch, August 2010) at 11-12.

a separation.¹⁴⁷ Collaborative Advocacy New Zealand (CANZ) oversees training in New Zealand and provides ongoing practice group support for collaborative professionals, including the publication of practice guidelines for collaborative lawyers.

- 24.45 International research into the effectiveness of collaborative law suggests high levels of client satisfaction and rates of settlement.¹⁴⁸ Research in England and Wales identified that people who went through a collaborative law process thought it was more supportive than mediation and quicker and less prone to inflame conflict than lawyer-led negotiation.¹⁴⁹
- 24.46 A key challenge to greater adoption of collaborative law, however, is cost. The choice to negotiate collaboratively is available for all New Zealanders who can afford it. Research in England and Wales identified that those talking about collaborative law tended to be better educated, more affluent, and generally have more sense of choice and agency about their options after separation.¹⁵⁰

Family arbitration

- 24.47 Arbitration is a formal, adversarial dispute resolution service that is more similar to a court process than a facilitative process like mediation or collaborative law. An independent arbitrator is appointed by the parties to make a decision that is binding and enforceable as if it were a court decision.¹⁵¹ The arbitration process is governed by the Arbitration Act 1996, and rights of appeal from the arbitrator's decision are very limited.
- 24.48 It appears that arbitration is rarely used in New Zealand for relationship property disputes, and the PRA does not seem to anticipate resolution of disputes by arbitration. However, as the PRA expressly provides for resolution of disputes by agreement, and because contracting out agreements, unlike parenting and maintenance agreements, do not usually require ongoing

¹⁴⁷ The Collaborative Law Association of New Zealand "Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012" at 3.

¹⁴⁸ J Lande "An empirical analysis of Collaborative Practice" (2011) 49 Family Court Review 257; and Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014).

¹⁴⁹ Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 13.

¹⁵⁰ Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 6.

¹⁵¹ Arbitration Act 1996, sch 1, cl 35.

monitoring, some argue that they are an obvious candidate for arbitration.¹⁵²

- 24.49 Arbitration is said to have many advantages over going to court. These include speed, procedural flexibility, confidentiality, choice and continuity of decision-maker, ease of access to the tribunal, finality (given the limited rights of appeal) and, where appropriate, the opportunity to combine arbitration with mediation.¹⁵³ The arbitrator's information-gathering powers are considered particularly helpful for PRA disputes. Arbitrators can actively assist in identifying the issues by calling the parties and their accountants to a conference, swearing everyone present as witnesses, and leading a round table discussion on disputed facts.¹⁵⁴ Once issues have been defined, they can seek missing information through directions for targeted discovery, inspection of computer systems, interrogatories, oral questioning or reports by arbitrator-appointed experts such as independent accountants, valuers or experts in information technology.¹⁵⁵
- 24.50 Arbitration can however be costly. Partners pay the arbitrator's costs, as well as their own lawyer's costs in preparing for and attending the arbitration. The arbitrator's costs can include an appointment fee, a fee for managing the process up to hearing, forum fees and expenses.¹⁵⁶ Arbitrations are therefore normally more expensive than court proceedings. Arbitration as an alternative to court proceedings will not always be appropriate, particularly if there are related claims under different areas of law, such as claims involving children, unascertained beneficiaries, inalienable family support rights after death or questions of family status.¹⁵⁷

Online dispute resolution

- 24.51 As technology develops at a rapid pace, there is a growing expectation that legal issues, like almost everything else, should be able to be sorted out online. Online dispute resolution can

¹⁵² Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15.

¹⁵³ Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 22–24.

¹⁵⁴ Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 23.

¹⁵⁵ Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 20.

¹⁵⁶ See for example Arbitrators' and Mediators' Institute of New Zealand "Schedule of Fees, Costs and Expenses" (Adopted by AMINZ Council, 27 May 2009).

¹⁵⁷ Robert Fisher "Relationship property arbitration" (2014) 8 NZFLJ 15 at 20–21.

improve access to justice and may provide a cheap, quick and easy option for some.¹⁵⁸ However, online dispute resolution will not always be appropriate, particularly where complicated legal issues are involved, or where the parties are not committed to taking an open and cooperative approach. In New Zealand, at least one online company provides template contracting out agreements,¹⁵⁹ and another offers online dispute resolution services for PRA disputes.¹⁶⁰ Similar services are also available in Australia.¹⁶¹

Is access to dispute resolution services for property matters appropriate?

24.52 Currently there is no State provision of dispute resolution services or a requirement on former partners to attempt to resolve property matters themselves before filing proceedings in the Family Court. This is despite a general trend in family justice systems, both in New Zealand and in other jurisdictions including Australia, towards out of court family dispute resolution. This trend is driven by several factors, including the recognised benefits of early intervention and out of court resolution, and the desirability of reducing costs to the State.¹⁶²

24.53 In Australia, obtaining affordable professional advice and dispute resolution services for property matters has been recognised as a particular problem for low value property disputes.¹⁶³ Results from a study of 9,000 parents who separated in 2006–2007 identified that those in the low (less than \$40,000) and low-medium (\$40,000–\$139,000) asset pool ranges were significantly less likely to use dispute resolution services, seek legal advice or go to court than those in the higher asset pool ranges, and were more likely to say that no specific pathway was used to resolve property

¹⁵⁸ New Zealand Law Society “Academic highlights ODR’s limitations” (22 March 2017) <www.lawsociety.org.nz>; and Robert J Condlin “Online Dispute Resolution: Stinky, Repugnant, or Drab” (Legal Studies Research Paper No 2016-40, University of Maryland, 2016).

¹⁵⁹ Legal Beagle <www.legalbeagle.co.nz>.

¹⁶⁰ Complete Online Dispute Resolution <www.codrco.nz> discussed in Nick Butcher “Online dispute resolution: Filling some of the access to justice void?” Lawtalk 905 (Wellington, 31 March 2017) at 56.

¹⁶¹ Divorce Partners <www.divorcepartners.com.au>.

¹⁶² Megan Gollop, Nicola Taylor and Mark Henaghan *Evaluation of the 2014 Family Law Reforms: Phase One* (University of Otago, February 2015) at 21.

¹⁶³ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 870–878.

issues.¹⁶⁴ The Australian Productivity Commission concluded that:¹⁶⁵

For some, avoiding the use of formal services for low value property disputes may be a proportionate and appropriate response. However, for others – particularly those who nominate no specific pathway – lack of access to affordable legal and financial advice and dispute resolution services may be a significant factor. This leads to questions about the appropriateness of agreements or outcomes arrived at in these cases.

24.54 No comparable research has been undertaken in New Zealand. However our initial conversations with family lawyers and community groups suggest the lack of access to low cost dispute resolution services for property matters may be a problem in New Zealand. We are therefore interested in receiving submissions on this question.

CONSULTATION QUESTION

H3 Do you think there is a problem with access to affordable dispute resolution services for property matters in New Zealand?

Options for promoting the use of dispute resolution for property matters

24.55 There are several different ways that use of dispute resolution services for resolution of property matters could be promoted. We consider several options below.

Should FDR be available for property matters?

24.56 Currently FDR is only funded for parenting disputes under the Care of Children Act 2004. Property matters may also be addressed at FDR, but only when they are related to an existing parenting dispute. The position is similar in Australia, and in 2014 the Australian Productivity Commission recommended that

¹⁶⁴ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 872 citing the results of research published in Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

¹⁶⁵ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 872.

the requirement to undertake FDR be extended to property and financial matters.¹⁶⁶

24.57 Property disputes under the PRA are different in nature to parenting disputes under the Care of Children Act. Quite often PRA disputes will involve complex legal and factual issues. A just outcome is dependent on full and frank disclosure, and will often require the parties to have received and carefully considered legal advice.

24.58 We are aware of concerns with the suitability of FDR to address property disputes. FDR mediators do not need to be legally trained, and lawyers for the parties do not usually attend FDR. Without proper preparation, legal advice and disclosure, discussing property matters in FDR risks partners making an agreement in the absence of all the facts or without knowledge of their legal entitlements. It might also damage relations between the partners if they make an “in principle” agreement during mediation only for one partner to be later advised against that agreement by the lawyer they approach to finalise a contracting out agreement.¹⁶⁷

24.59 While there is some attraction to extending the FDR service to property matters, we are concerned that the FDR process as it currently operates may not be appropriate.¹⁶⁸ Proper safeguards would need to be built into the process to ensure unjust outcomes do not arise.

Should some other dispute resolution service be designated for PRA matters?

24.60 An alternative to extending FDR is the development of a dispute resolution service specifically for PRA matters. This might enable the development of a service led by dispute resolution practitioners with specialist skills and knowledge of property matters. It might also provide for the involvement of participants’

¹⁶⁶ Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 875–877.

¹⁶⁷ For a contracting out agreement to be binding each partner must receive independent legal advice before signing and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See *Property (Relationships) Act 1976*, s 21F.

¹⁶⁸ The Australian Productivity Commission observed that issues of training and accreditation of Financial Dispute Resolution providers would need to be worked through prior to the introduction of a requirement to attend FDR for property matters. It considered that a new unit of competency in respect of property and spousal maintenance should be developed as part of the Vocational Graduate Diploma of Family Dispute Resolution: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 75 Vol 2, September 2014) at 875–877.

lawyers, recognising the complexity of the property matters in issue. However at this stage we are not convinced that there is a real need to establish a separate dispute resolution service for PRA disputes. This is for several reasons:

- (a) First, we lack evidence of any problems with how people are resolving their PRA disputes out of court, and the volume of cases going to court that could be redirected to dispute resolution do not suggest there is a case to be made for cost savings. PRA cases comprise a very small proportion of Family Court business, and the number of PRA applications is declining.¹⁶⁹
- (b) Second, because parenting issues and property matters often overlap, it would be inefficient to require parties to attend two different dispute resolution services when the issues could be properly resolved at one.
- (c) Third, it is not easy to identify what dispute resolution service is most appropriate for PRA matters. There is no “one size fits all” model. Each dispute resolution service has different strengths and weaknesses.¹⁷⁰ We think that the nature of the dispute and the characteristics of the parties will determine whether out of court resolution is appropriate in any given context and, if so, what dispute resolution service should be used.

24.61 If we were to recommend a dispute resolution service for property matters, careful consideration would need to be given to its design, including:

- (a) the extent to which legislation should set out the purpose, objectives and/or values to be followed by the dispute resolution service;
- (b) the screening process, if any, that should be used to decide whether the dispute resolution service is appropriate given the nature of the dispute, its urgency and the characteristics of the parties;
- (c) the role of the person leading the process (the dispute resolution practitioner), and in particular their role, if

¹⁶⁹ See Chapter 23, paragraphs [23.23]–[23.24]. In 2009/10 Property (Relationships) Act 1976 applications made up only three per cent of substantive applications to the Family Court. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 19.

¹⁷⁰ As identified in UK research. See Anne Barlow and others *Mapping Paths to Family Justice: Briefing Paper & Report on Key Findings* (University of Exeter, June 2014) at 16.

any, in providing information to the parties on their legal entitlements under the PRA;

- (d) the support that should be available to the parties, including issues of legal representation at the dispute resolution event and preparation (legal and/or non-legal) for the event;
- (e) the necessary qualifications of the dispute resolution practitioner, and the details of an approval or accreditation process if necessary;
- (f) ensuring parties can resolve disputes in a manner consistent with their culture and personal values;
- (g) when the dispute resolution event should occur (eg before or after proceedings are filed in the Family Court);
- (h) how the dispute resolution service should be funded; and
- (i) whether the dispute resolution service should be mandatory before an application can be filed in the Family Court (we discuss this issue below).

CONSULTATION QUESTION

H4 Do you think that FDR (Option 1) or another designated dispute resolution service (Option 2) should be available for resolving PRA matters?

Should parties be required to attempt out of court resolution of PRA matters before going to court?

24.62 Currently there is no obligation on former partners to try and resolve property matters themselves or use a dispute resolution service before filing proceedings in the Family Court. This is in contrast to care of children matters, which must normally go to FDR first.¹⁷¹

24.63 Introducing mandatory dispute resolution might result in fewer people going to court. But because the proportion of separating partners who are currently going to court is very small, such a requirement is unlikely to make a significant difference to how most people resolve their property matters. Requiring parties

¹⁷¹ Care of Children Act 2004, s 46E.

to participate in facilitative dispute resolution processes like mediation also raises ethical issues, as it conflicts with core dispute resolution principles such as voluntary participation by the parties, their empowerment in and ownership of their dispute and their self-determination in its resolution.¹⁷² Mandatory participation in dispute resolution may have other unintended consequences for the family justice system. For example, the introduction of mandatory FDR under the Care of Children Act coincided with a sharp increase in urgent (without notice) applications to the Family Court.¹⁷³ It has been suggested that this increase is due to people not wanting to complete FDR before going to the Family Court, and/or wanting to be represented by a lawyer.¹⁷⁴

- 24.64 Rather than require parties to attend dispute resolution, the parties could instead be required to make a genuine effort and/or use their best endeavours to resolve matters out of court. A good example is the “pre-action procedures” that apply in post-separation property disputes in Australia. These procedures must be complied with before a party can go to court, unless there are good reasons for not doing so.¹⁷⁵ Pre-action procedures include making a genuine effort to resolve the dispute by:¹⁷⁶
- (a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling;
 - (b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and
 - (c) complying, as far as practicable, with the duty of disclosure.
- 24.65 There may be serious penalties imposed by a court for non-compliance with pre-action procedures, including costs

¹⁷² Judy Gutman and Jodie Grant “Ethical Conundrums Facing Mediators: Comparing Processes, Identifying Challenges and Opportunities” in Lola Akin Ojelabi and Mary Anne Noone (eds) *Ethics in Alternative Dispute Resolution* (The Federation Press, New South Wales, 2017) 101 at 111.

¹⁷³ In 2016, 75 per cent of the 7,253 parenting applications and 64 per cent of the 1,443 guardianship applications made in the Family Court were without notice applications. See Catherine Hutton “Urgent Family Court cases rise after mediation change” (31 July 2017) Radio New Zealand <www.radionz.co.nz>. Similar trends have also been observed in respect of without notice applications for warrants in relation to breaches of parenting orders. See Shane Cowlshaw “Minister wants answers over rise in without-notice applications” (15 August 2017) Newsroom <www.newsroom.co.nz>.

¹⁷⁴ Catherine Hutton “Urgent Family Court cases rise after mediation change” (31 July 2017) Radio New Zealand <www.radionz.co.nz>; and John Adams “Former Family Court Judge: ‘Compliance isn’t optional!’” (8 August 2017) Newsroom <www.newsroom.co.nz>.

¹⁷⁵ Family Law Rules 2004 (Cth), sch 1.

¹⁷⁶ Family Law Rules 2004 (Cth), sch 1, cl 1(1).

penalties.¹⁷⁷ The pre-action procedure also imposes obligations on lawyers acting for clients with post-separation property disputes, including to:¹⁷⁸

- (a) advise clients on ways of resolving the dispute without starting legal action;
- (b) advise clients about their duty to make full and frank disclosure, and possible consequences of breaching that duty;
- (c) endeavour to reach a solution by settlement, if that is in the best interests of the client and any child, and tell their client that it is in their best interests to accept a settlement if, in the lawyer's opinion, the settlement is reasonable;
- (d) advise clients of estimated costs of legal action, and the factors that may affect the court in considering costs orders;
- (e) provide clients with information prepared by the court about legal aid services and dispute resolution services available, and about the legal and social effects and possible consequences for children of proposed litigation; and
- (f) actively discourage clients from making extravagant claims or seeking orders that are not reasonably achievable.

24.66 Currently, lawyers acting for parties and proposed parties in the Family Court in New Zealand have a statutory duty to, so far as possible, promote conciliation.¹⁷⁹ It is not clear what is meant by “conciliation”, but this appears to encompass facilitative methods of dispute resolution, where parties try to reach agreement, with or without third party intervention or assistance.¹⁸⁰ The Care of

¹⁷⁷ Family Law Rules 2004 (Cth), sch 1, pt 1, cl 1(3).

¹⁷⁸ Family Law Rules 2004 (Cth), sch 1, pt 1, cl 6.

¹⁷⁹ Family Court Act 1980, s 9A.

¹⁸⁰ There is no statutory definition of the meaning of conciliation. The Dictionary of Arbitration Law and Practice describes conciliation simply as “a method of resolving disputes by negotiation either between the parties or through the intervention of an independent third body”: Eric Lee Dictionary of Arbitration Law and Practice (Mansfield Law Publishers, London, 1986) at 53. The Law Commission's report *Dispute Resolution in the Family Court* (NZLC R82, 2003) at 3 uses the term “conciliation” to encompass services including information, counselling and mediation. Conciliation services, the Commission noted, focus on healing, rather than determination of disputes. The Commission explained at 10 that conciliation encourages each party to understand the other's point of view and to cooperate in finding a resolution that accommodates both parties. This is in contrast to the court process, and arbitration, both of which involve an independent third party adjudicating the dispute and making a determination binding on the parties.

Children Act 2004 also imposes a duty on lawyers, when giving advice about arrangements for the guardianship or care of a child, to ensure the person is aware of:¹⁸¹

- (a) the mechanisms for assisting resolution of family disputes;
- (b) the steps for commencing and pursuing proceedings through the court; and
- (c) the types of directions and orders the court may make.

24.67 There is no equivalent duty on lawyers in respect of property matters under the PRA.

24.68 We are interested in your views on whether former partners should be required to attempt to resolve property matters before they go to court. We are also interested in what this requirement might involve. Should it specify the particular steps that should be taken, for example, lawyer-led negotiation or using a particular dispute resolution service? We also want to know whether you think there should be a duty on lawyers advising clients on post-separation property matters to provide them with information about the different options for resolving disputes out of court, similar to what is currently required under the Care of Children Act, or what is required in the Australian pre-action procedures.

CONSULTATION QUESTIONS

- H5 Should people with a property dispute under the PRA be required to attempt to resolve the dispute before going to court? If so, what steps should they be required to undertake?
- H6 Should there be a duty on lawyers to provide their clients with information about the range of options for resolving property matters under the PRA out of court and the benefits of out of court resolution?

Is there a need for clear disclosure obligations?

24.69 As we explain in Chapter 25, the PRA imposes no express duty of disclosure on partners. The Family Court Rules 2002 provide for the parties to make disclosure when PRA proceedings are filed in

¹⁸¹ Care of Children Act 2004, s 7B. This duty was introduced following the Family Court Review. It was inserted into the Family Court Proceedings Reform Bill by the Justice and Electoral Committee, which considered that the overarching requirement to promote conciliation in care of children proceedings should be reflected in the Bill. See Family Court Proceedings Reform Bill 2013 (90-2) (select committee report) at 5.

the Family Court, or beforehand in very limited circumstances.¹⁸² There are no rules requiring disclosure at the earlier stages of out of court dispute resolution.¹⁸³

24.70 Following the Family Court Review, Cabinet agreed to changes to improve the information available to parties before they bring PRA proceedings in the Family Court.¹⁸⁴ While some changes were made to the Family Court Rules in response, they were limited to improving the quality of information disclosed for the purpose of proceedings, rather than out of court resolution. Because the Family Court Rules are limited to regulating the practice and procedure of the Family Court, separate rules may be needed to regulate dispute resolution practices that take place out of court.¹⁸⁵

24.71 In Australia, the pre-action procedures for post-separation property disputes sets out the parties' disclosure obligations and a process for exchanging correspondence that applies before either party goes to court.¹⁸⁶ The protocol explains that parties have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely matter.¹⁸⁷ It provides that, when attempting to resolve their dispute, parties should, as soon as practicable, exchange:¹⁸⁸

- (a) a schedule of assets, income and liabilities;
- (b) a list of relevant documents in the party's possession or control; and
- (c) a copy of any document required by the other party, identified by reference to the list of relevant documents.

24.72 Parties are encouraged to refer to the rules for disclosure of financial information that apply to court proceedings as a guide, and the pre-action procedure sets out a specific list of documents

¹⁸² Family Court Rules 2002, r 140 allows the court to make an order for discovery before proceedings are commenced, but only where it is "impossible or impractical" for the intending applicant to formulate their application to the court without reference to a document or class of documents.

¹⁸³ See paragraphs 25.6–25.12 for a discussion of the current disclosure requirements under the Family Court Rules 2002.

¹⁸⁴ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [99].

¹⁸⁵ The Family Court Rules 2004 are made pursuant to s 16A of the Family Court Act 1980, which permits the Governor-General, by Order in Council, to make rules "regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine" (sub-r 16A(1)).

¹⁸⁶ Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4.

¹⁸⁷ Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4(1).

¹⁸⁸ Family Law Rules 2004 (Cth), sch 1, pt 1, cl 4(2).

that the court would consider appropriate to include in the list of documents and exchange with the other party.¹⁸⁹

- 24.73 Our preliminary view is that out of court resolution of property matters should be supported by clear rules about what information separating partners need to share with each other. A prescribed process, like the pre-action procedure in Australia, appears to be a good model for New Zealand. The type of information that should be disclosed could mirror the initial disclosure requirements that apply when parties go to court. These are discussed in detail in Chapter 25.

CONSULTATION QUESTION

H7 Do you think that there should be clear rules of disclosure for parties to follow when resolving property disputes out of court?

Should collaborative law be promoted for property disputes?

- 24.74 Collaborative law, as a relatively new dispute resolution service, could be more formally recognised and provided for in the family justice system.
- 24.75 In some jurisdictions, court processes have been streamlined or legislation passed to support collaborative practice.¹⁹⁰ In the United States in 2009 the Uniform Law Commission¹⁹¹ drafted a “Collaborative Law Act” to regulate and standardise the use of collaborative law as a form of dispute resolution across states. Versions of the Act have been enacted in seven states, and recently introduced in two.¹⁹²
- 24.76 In the United Kingdom, collaborative law is promoted by the State as a way to reach agreement on child arrangements.¹⁹³ In Australia, collaborative law is supported at an executive administrative level, with endorsement from the former Federal

¹⁸⁹ Family Law Rules 2004 (Cth), sch 1, pt 1, cls 4(3)–4(5).

¹⁹⁰ The Collaborative Law Association of New Zealand “Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012” at 11.

¹⁹¹ Also known as the National Conference of Commissioners on Uniform State Laws. The Commission was established in 1892 and provides states with non-partisan legislation to bring uniformity to state law.

¹⁹² Alabama, Arizona, District of Columbia, Michigan, New Mexico, Ohio and Texas have enacted versions of the Collaborative Law Act. In 2017 legislation was introduced and is pending enactment in Illinois and Massachusetts. See Uniform Law Commission “Collaborative Law Act” <www.uniformlaws.org>. In California the San Francisco Superior Court has established a Collaborative Law Department of the Court to encourage and support collaborative law, allowing collaborative lawyers to file routine documents with the department and providing access where necessary to judges well informed about collaborative practice.

¹⁹³ See <helpwithchildarrangements.service.justice.gov.uk>.

Attorney-General, a committee of the Law Council of Australia and the Chief Judge of the Family Court of Australia.¹⁹⁴

24.77 Following the review of Family Court, the Collaborative Advocacy New Zealand (CANZ)¹⁹⁵ submitted that collaborative law should be adopted and supported in the family justice system.¹⁹⁶ It submitted that parties should be able to undertake collaborative law as an alternative to FDR, and that legal aid should be available for collaborative law in PRA matters.¹⁹⁷ It argued that the current legal aid framework is focused on proceedings rather than out of court resolution, which has the consequence of promoting litigation in order to access legal aid for alternative dispute resolution.¹⁹⁸

24.78 The Ministry of Justice, advising the Parliamentary select committee on the Family Court reforms, commented that the reforms did not exclude the possibility of collaborative lawyers becoming FDR providers. It also observed that if the parties had just completed a collaborative law process an FDR provider could excuse the parties from undertaking FDR before applying to the Court, on the basis that FDR is inappropriate for the parties to the dispute.¹⁹⁹

24.79 However, CANZ have told us their concerns about how collaborative law would work within an FDR-type model.²⁰⁰ Imposing the current time and cost limitations in FDR on a collaborative law process would not provide optimal outcomes for families. The structure of the FDR model, in which the provision of legal advice to a client sits outside the FDR process and the lawyer does not normally attend FDR, is also incompatible with collaborative law practices, which focus on legal advice and advocacy throughout the dispute resolution process. However CANZ maintains that with careful design of the process,

¹⁹⁴ The Collaborative Law Association of New Zealand “Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012” at 14.

¹⁹⁵ Formerly known as the Collaborative Law Association of New Zealand.

¹⁹⁶ The Collaborative Law Association of New Zealand “Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012” at 18–19.

¹⁹⁷ The Collaborative Law Association of New Zealand “Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012” at 20–22.

¹⁹⁸ The Collaborative Law Association of New Zealand “Submission to the Justice and Electoral Committee on the Family Court Proceedings Reform Bill 2012” at 22.

¹⁹⁹ Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at 76.

²⁰⁰ Information provided by email from The Collaborative Law Association of New Zealand to the Law Commission (10 October 2016).

collaborative law can be incorporated into a funded dispute resolution model.

- 24.80 We are interested to hear whether there is a need to specifically provide for collaborative law in the context of property disputes, including by way of legal aid eligibility.

CONSULTATION QUESTION

H8 Is legal reform needed to better enable parties to use collaborative law to resolve property disputes?

Does the law need to be clarified to provide for arbitration?

- 24.81 The Arbitration Act 1996 provides a general structure for arbitration and confirms that an arbitrator's decision is enforceable as a court decision. But the PRA does not make any express provision for arbitration. Instead, the provisions relating to contracting out in Part 6 of the PRA can be used by the parties to agree to resolve any disputes by arbitration.²⁰¹ In contrast, in some jurisdictions arbitration is authorised and regulated for property disputes arising on separation,²⁰² while in others professional arbitration organisations and family law organisations have adopted special rules for family arbitration.²⁰³
- 24.82 We are interested in submissions on whether there is a need for the PRA to make special provision for the resolution of property matters by arbitration. This could be by way of reference to arbitrations under the Arbitration Act, or by establishing a specific arbitral regime within the PRA. An example is the regime for construction contracts established under the Construction Contracts Act 2002.
- 24.83 One possible matter for consideration is whether the grounds of appeal for arbitral awards should be broader in the PRA

²⁰¹ An agreement entered into under s 21 of the Property (Relationships) Act 1976 (in contemplation of, or during, a relationship) could include an agreement to decide any disputes that arise in future by arbitration. Alternatively, when a dispute has arisen, the parties can enter into an agreement under s 21A to refer the dispute to arbitration for determination. The agreement to arbitrate, under either s 21 or 21A, would need to satisfy the normal procedural requirements for contracting out agreements, and could be set aside if it would cause serious injustice, under s 21J. However, the jurisdiction to intervene under s 21J does not extend to the arbitral award itself – the only grounds of appeal are those set out in the Arbitration Act 1996. For discussion see Robert Fisher “Relationship property arbitration” (2014) 8 NZFLJ 15.

²⁰² In Australia the Family Law Act 1975 (Cth) authorises and regulates arbitration for property settlement, maintenance and financial agreements. Similar legislation supports family law arbitration in some Canadian states.

²⁰³ In England and Wales the Institute of Family Law Arbitrators (IFLA) was established to administer a set of rules (the IFLA Scheme) for family law disputes including property disputes. A similar scheme was also set up in Scotland. See Robert Fisher “Relationship property arbitration” (2014) 8 NZFLJ 15.

context. The grounds for setting aside an arbitral award under the Arbitration Act are very limited.²⁰⁴ There is no general right to appeal the merits of the decision, or to challenge the decision on the basis that it would cause serious injustice. This is in contrast with the general right of appeal from decisions of the Family Court.²⁰⁵ It is also more difficult to challenge an arbitral award than it is to challenge the terms of an ordinary contracting out agreement, which may be set aside if it would cause serious injustice.²⁰⁶

CONSULTATION QUESTION

H9 Is legal reform needed to promote the use of family law arbitration as an alternative to court in property disputes?

²⁰⁴ See Arbitration Act 1996, sch 1, arts 34–36; and sch 2, art 5.

²⁰⁵ Property (Relationships) Act 1976, s 39.

²⁰⁶ Contracting out agreements can be set aside if the court “is satisfied that giving effect to the agreement would cause serious injustice.” See Property (Relationships) Act 1976, s 21J. The jurisdiction conferred by s 21J does not extend to the arbitral award itself: “The PRA governs challenges to an ‘agreement’; the Arbitration Act governs challenges to an ‘award’”: Robert Fisher “Relationship property arbitration” (2014) 8 NZFLJ 15 at 19.

Chapter 25 – Going to court

- 25.1 When separating partners cannot resolve their property matters themselves, they can apply to the Family Court for orders dividing their property. The Family Court hears all applications under the PRA, although it can transfer cases to the High Court when appropriate.²⁰⁷ We discuss the jurisdiction of the Family Court and the High Court in Chapter 26.
- 25.2 In this chapter we look at how property matters are dealt with in the Family Court, and identify some practical issues that can hinder the just and efficient resolution of disputes.²⁰⁸

PRA proceedings in the Family Court

- 25.3 The Family Court process is governed by the Family Court Rules 2002 (Rules). The purpose of the Rules is to:²⁰⁹
- ... make it possible for proceedings in Family Courts to be dealt with—
 - (a) as fairly, inexpensively, simply, and speedily as is consistent with justice; and
 - (b) in such a way as to avoid unnecessary formality; and
 - (c) in harmony with the purpose and spirit of the family law Acts under which the proceedings arise.
- 25.4 Proceedings commence when one party files an application in the Court for orders under the PRA.²¹⁰ The Rules set out the requirements for making an application and the documentation that needs to be filed alongside an application, including a

²⁰⁷ Property (Relationships) Act 1976, ss 22 and 38A.

²⁰⁸ In Chapter 23 we discussed the importance of achieving resolutions that are just and efficient, and what is needed in order to achieve that objective.

²⁰⁹ Family Court Rules 2002, r 3(1).

²¹⁰ Family Court Rules 2002, r 19. The applicant must complete the general application form G 5 which is set out in the Family Court Rules 2002, sch 1 and is available on the Ministry of Justice's website. See <www.justice.govt.nz>.

supporting affidavit²¹¹ and affidavit of assets and liabilities.²¹² Applicants will usually need to pay a \$700 filing fee.²¹³

- 25.5 Applications under the PRA are normally made “on notice” to the other party, which means that the applicant’s former partner (the respondent) receives a copy of the application and affidavits filed and has an opportunity to respond to them before the matter is heard by the Court.²¹⁴ The respondent must file and serve on the applicant an affidavit “sufficient to inform the court of the facts relied on by the respondent” as well as their own affidavit of assets and liabilities within 20 working days of receiving the application.²¹⁵

What information must parties disclose?

- 25.6 There is no express duty of disclosure on partners in the PRA.²¹⁶ However in *M v B* the Court of Appeal confirmed that the law required “total disclosure and cooperation” between parties in PRA proceedings.²¹⁷ In *Clayton v Clayton* the Court of Appeal endorsed an approach that recognises that parties “are under an obligation to make full and frank disclosure of all relevant information”, in order to ensure that the court is in a position to make appropriate orders under the PRA.²¹⁸ This duty of disclosure is enforced through the Rules.
- 25.7 The Rules provide for initial disclosure by way of the affidavit of assets and liabilities, which must be filed by each party in the prescribed form set out in the Rules.²¹⁹ This requires the parties to set out full details of all of their assets (including all legal

²¹¹ Also known as an “affidavit in support.” See Family Court Rules 2002, r 392, pursuant to rr 20(1)(c) and 21(i). The affidavit in support is intended to include all relevant information, including proposed arrangements for the division of property and matters in issue between the parties: Family Court Rules 2002, sub-r 392(1). The affidavit may have annexed to it a copy of any document relied on by the applicant in support of the application: Family Court Rules 2002, sub-r 392(2).

²¹² Family Court Rules 2002, r 398. The affidavit of assets and liabilities is form P(R) 1, set out in the Family Court Rules 2002, sch 8 and is available on the Ministry of Justice’s website. See <www.justice.govt.nz>.

²¹³ An applicant can ask for the court to waive the fee if they are experiencing financial hardship (including if the applicant receives legal aid).

²¹⁴ Unless rr 24(1) or 24(2) of the Family Court Rules 2002 apply.

²¹⁵ Unless directed otherwise by a judge or registrar: Family Court Rules 2002, sub-rr 392(3) and 398(2).

²¹⁶ The Government Administration Committee considered whether there should be an express power to require disclosure in the Property (Relationships) Act 1976 when it reviewed the Matrimonial Property Amendment Bill. However, it concluded that this was unnecessary as the relevant rules already required the filing of an affidavit disclosing a person’s property. See Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at vi.

²¹⁷ *M v B* [2006] 3 NZLR 660 (CA) at [49].

²¹⁸ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

²¹⁹ Family Court Rules 2002, r 398 and sch 8, form P(R) 1.

and beneficial interests) and liabilities, as well as details of any income, capital payments, and dealings in assets since the parties separated. The prescribed form provides for supporting documents such as valuations, proof of deposits and financial statements to be attached to the affidavit.

- 25.8 If the applicant fails to file an affidavit of assets and liabilities with their application, the proceedings can be dismissed or stayed until the affidavit is filed and served.²²⁰
- 25.9 When there has been inadequate disclosure of assets and liabilities, there are several orders a court can make to require additional disclosure of relevant financial information from a party. It can order:²²¹
- (a) the discovery of documents (discussed below);²²²
 - (b) the administration of interrogatories, which are written questions to a party about matters in issue;²²³
 - (c) the examination of the non-disclosing party, which requires that party to attend court and be examined on any matter that should have been disclosed in the affidavit of assets and liabilities;²²⁴ or
 - (d) an inquiry under section 38 of PRA.
- 25.10 It is for the court to decide the best means by which any information deficit can be remedied, but it must adopt a sense of proportionality.²²⁵ The more serious the default, the more intrusive the remedy is likely to be.²²⁶

What is the process for discovery?

- 25.11 Discovery is the process through which each party identifies the documents which are relevant to the proceeding and discloses

²²⁰ Family Court Rules 2002, r 399.

²²¹ *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [41]. See also Family Court Rules 2002, r 47. The Family Court Rules also provide ways for a party to obtain admissions or further particulars from the other party, by issuing a notice to admit facts (r 138); a notice to admit documents (r 154); a notice requiring them to file and serve further particulars (r 139); or a notice requiring them to produce specified documents (r 153).

²²² Family Court Rules 2002, rr 140–152.

²²³ Family Court Rules 2002, rr 47 and 137.

²²⁴ Family Court Rules 2002, r 400.

²²⁵ *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [46] and [53].

²²⁶ *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [53].

those documents to the other party.²²⁷ A party must apply to the court for an order for discovery, and that application must be accompanied by an affidavit specifying the extent of the discovery required and the reasons for the discovery.²²⁸ The court then orders the other party to produce an affidavit listing the relevant documents they have in their possession, and any other relevant documents they know to exist.²²⁹ Once that affidavit is filed, the party who made the application for discovery can request the production of any of the documents listed.²³⁰ In 2015 the High Court in *D v K* established some “essential principles” for discovery in PRA proceedings:²³¹

- (a) *A robust approach should be taken to discovery consistent with the purposes and principles of the Act: the need for just division, but also inexpensive and efficient access to justice.*
- (b) *Such discovery must not be unduly onerous.*
- (c) *Such discovery must be reasonably necessary at the time sought.*
- (d) *The scope of discovery should therefore be tailored to the need of the Court to dispose, justly and efficiently, of relationship property issues under the Act.*
- (e) *More substantial discovery may well be ordered by the Court where it has reason to believe that a party has concealed information or otherwise sought to mislead either the other party or the Court as to the scope of relationship property. But even here, the scope of discovery should be no more than is required for the Court to fairly and justly determine relationship property rights. It is just that in such a situation, more is likely to be required to meet that requirement.*

²²⁷ Applications for discovery are normally made after proceedings have been filed and a notice of defence or a notice to appear has been filed: Family Court Rules 2002, r 141. The Rules also provide that applications for discovery can be made before proceedings are commenced, but only if it is impossible or impracticable for the intending applicant to formulate their application without reference to a document or class of documents in the intended respondent's possession: Family Court Rules 2002, r 140. Discovery can also be ordered against a non-party: Family Court Rules 2002, r 143.

²²⁸ Family Court Rules 2002, rr 141(1) and 141(2).

²²⁹ Family Court Rules 2002, rr 141(2A) and 142.

²³⁰ Family Court Rules 2002, r 146.

²³¹ *Dixon v Kingsley* [2015] NZFLR 1012 (HC) at [20]. See also *C v C FC Rotorua* FAM-2007-063-652, 20 June 2011 at [31]; and *J v P* [2013] NZHC 557 at [22].

What are the consequences of non-disclosure?

25.12 There are several possible consequences for failing to comply with disclosure obligations:

- (a) The court can impose procedural consequences, including a stay or dismissal of proceedings (in part or in full),²³² restrictions on further participation in the proceedings until disclosure obligations are met,²³³ and ultimately contempt of court.²³⁴
- (b) When hearing the issues in dispute, the court can draw inferences that are adverse to the non-disclosing party's position.²³⁵

[T]here is a principle of long standing that a party peculiarly placed to provide evidence as to value must expect assumptions to be made against the party's interests if he or she remains silent.

- (c) Non-disclosure can be taken into account in an award of costs under section 40 of the PRA.²³⁶ Courts have readily awarded costs where a party's conduct has escalated costs to the other party, and have said there is a strong public policy interest in establishing for future litigants that serious conduct, such as lying, obstructing and delaying, will be heavily penalised in costs.²³⁷

²³² Family Court Rules 2002, rr 17 (failure to comply with the rules), 176 (non-compliance with orders or directions made at a judicial conference) and 399 (failure by applicant to file an affidavit of assets and liabilities).

²³³ Family Court Rules 2002, r 176. If the applicant fails to comply with an order or direction given at a judicial conference, the court may prevent the applicant from taking further steps until they comply with that order or direction. If the respondent fails to comply with an order or direction, the court may order that the respondent be allowed to appear at the hearing and defend the application only on terms that the court directs. See also r 401 (failure to attend for examination or to comply with directions).

²³⁴ Family Court Rules 2002, rr 157 and 401. A person is liable to proceedings for contempt if they refuse to make an affidavit or files an incomplete affidavit of assets and liabilities and then disobeys an order for examination or production of a document (r 157). A person is also liable to proceedings for contempt if, when attending an examination on assets and liabilities, they wilfully and without lawful excuse disobey a direction from the judge (r 401). The District and Family Courts also have the power to punish a person for contempt for disobeying court orders under the District Court Act 2016, s 212 and by necessary implication to enable the court to discharge its statutory jurisdiction effectively. For further discussion on contempt of court see Law Commission *Reforming the Law of Contempt of Court: A Modern Statute - Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017).

²³⁵ *J v J* [2005] NZFLR 301 (HC) at [42]. See also *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186]. In extreme cases, non-disclosure may amount to fraud, justifying the setting aside of a contracting out agreement or a decision of the court. See for example: *Sharland v Sharland* [2015] UKSC 60, 2016 AC 871 per Lady Hale. In that case the husband failed to disclose vital information about the value of his company shareholding. That was a fraud that "unravelling all" and enabled the court to set aside the agreement.

²³⁶ Family Court Rules 2002, r 400(5). In particular, failure to file an affidavit of assets and liabilities or the filing of an inadequate affidavit of assets and liabilities must be taken into account in exercising the court's power under s 40 of the Property (Relationships) Act 1976.

²³⁷ *S v S* HC Whangarei AP 37/92, 22 June 1993. See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.42] on the grounds to award costs, including examples where courts have

How are PRA cases managed through the court?

- 25.13 While parties must comply with the Rules, there are no prescribed standard steps that all PRA cases must follow. The Family Court Caseflow Management Practice Note (Practice Note) outlines best practice for managing cases through the court system.²³⁸ Judges are, however, ultimately responsible for the way in which they run their cases and there can be considerable variation in the style and practice of judges in the courtroom.²³⁹
- 25.14 The Practice Note provides for cases to be managed through the “Registrar’s List” to ensure that applications have been served and that steps are taken to further the proceedings.²⁴⁰ According to the Practice Note, when an application is filed, the Registrar will assign a Registrar’s List date for six weeks’ time.²⁴¹ Parties and their lawyers do not usually need to attend the Registrar’s List, but they must tell the Registrar in advance what steps have been achieved and what further directions (if any) are sought.²⁴² The Registrar’s List deals with standard interlocutory matters and ensures that all evidence (including affidavits) is being assembled within the necessary timeframes.²⁴³ At the Registrar’s List the Registrar will set the case down for a judicial conference, to be held within 42 days.²⁴⁴ Alternatively the case might be adjourned. This might be to give the parties more time to assemble their evidence, or to try to resolve the matter by agreement.²⁴⁵ However, a judicial conference will normally be allocated after two adjournments, or when the Registrar otherwise considers that the delay warrants judicial intervention.²⁴⁶

taken into account an unwillingness to provide full and frank disclosure and an increase in court costs due to providing inadequate or false information concerning assets and liabilities.

²³⁸ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011).

²³⁹ The Principal Family Court Judge, who issues practice notes, would be unlikely to intervene in the way in which a judge chooses to run his or her courtroom barring “clear misconduct or hopeless incompetence.” See: Law Commission *Family Court Dispute Resolution: A discussion paper* (NZLC PP47, 2002) at [64] and [68].

²⁴⁰ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.5].

²⁴¹ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.5].

²⁴² Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.7].

²⁴³ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.8].

²⁴⁴ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.5].

²⁴⁵ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [1.6].

²⁴⁶ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.9].

25.15 Judicial conferences are presided over by a judge. Parties are expected to attend with their lawyers,²⁴⁷ and should have filed and served their affidavits of assets and liabilities beforehand.²⁴⁸ At the judicial conference the court can make orders or give directions on matters including:²⁴⁹

- (a) the clarification and/or agreement on the extent of their assets and liabilities;
- (b) settling the issues to be determined at the hearing;
- (c) setting tasks to clarify the issues and procure further information when necessary;
- (d) requiring the parties to attend a settlement conference; and
- (e) setting the case down for hearing.

25.16 At a settlement conference the parties try to settle the issues in dispute between them.²⁵⁰ It is presided over by a judge, and the parties and their lawyers can be required to attend.²⁵¹ Settlement conferences are confidential, and any information, statement or admission disclosed at a settlement conference cannot be referred to at any subsequent court hearing.²⁵² If the judge presiding over the settlement conference is satisfied that the parties cannot resolve the issues, he or she may treat the conference as a judicial conference and may make any of the orders or directions referred to above, including setting down the case for a hearing.²⁵³

How does the court make its decision?

25.17 In most civil proceedings in New Zealand, the court operates an adversarial process in which the party initiating the proceedings has the burden of proving their claim on the balance of probabilities. In PRA proceedings, however, the court's role is

²⁴⁷ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.7].

²⁴⁸ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.6].

²⁴⁹ Family Court Rules 2002, r 175D; and Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.8].

²⁵⁰ Family Court Rules 2002, sub-r 178(1).

²⁵¹ Family Court Rules 2002, sub-r 178(2).

²⁵² Family Court Rules 2002, sub-r 178(4).

²⁵³ Family Court Rules 2002, r 179A. The judge who presided over the settlement conference must not preside over the hearing unless the parties consent or the only matter for resolution at the hearing is a question of law: Family Court Rules 2002, r 180.

different. It is required to make orders dividing property in a way that achieves justice between the parties, and therefore takes a semi-inquisitorial approach.²⁵⁴ This was confirmed by the Court of Appeal in *M v B*:²⁵⁵

The [PRA] is about property rights and entitlements. The [PRA], and the regulations which have been promulgated pursuant to it, make it clear that, although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.

25.18 In other words, the court needs to be satisfied that a state of affairs existed, but the applicant does not have the burden of proving that to the court.²⁵⁶ This is an important point, because often the applicant in PRA proceedings will not be the legal owner of the property in dispute, and so the evidence relevant to the applicant's claims is more likely to be in the possession of the responding partner.²⁵⁷

25.19 That said, the court can only proceed on the basis of the evidence that is before it. The party making a claim therefore needs to ensure that there is sufficient evidence before the court for it to be satisfied of a particular state of affairs, or that the different elements of a test have been met.²⁵⁸

Who pays the costs of going to court?

25.20 The Family Court has the power to make orders as to costs for any proceeding, step in a proceeding or any matter incidental to a proceeding as it thinks fit.²⁵⁹

²⁵⁴ As reflected in the statutory purpose of the Property (Relationships) Act 1976, s 1M. See discussion in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.23].

²⁵⁵ *M v B* [2006] 3 NZLR 660 (CA) at [39]. In *T v R* [2010] NZFLR 712 (FC) at [28] the Family Court also acknowledged the different approach required in proceedings under the Property (Relationships) Act 1976 compared to other civil causes of action.

²⁵⁶ *M v B* [2006] 3 NZLR 660 (CA) at [49]–[50]. This has also been accepted by the High Court in the context of maintenance proceedings: *Clayton v Clayton (Maintenance)* [2015] NZHC 765, [2015] NZFLR 501 at [86].

²⁵⁷ *M v B* [2006] 3 NZLR 660 (CA) at [38].

²⁵⁸ For example, where a party claims that an increase in the value of separate property should be considered relationship property under s 9A of the Property (Relationships) Act 1976, the applicant needs to provide an evidential basis for the court to determine that there has, in fact, been an increase in value, and to assess how much the increase in value has been: *N v N* [2005] 3 NZLR 46 (CA) at [80]. See also *X v X* [2009] NZFLR 985 (CA) at [96] discussing the evidential requirements for a claim under s 15. See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.27] for a list of circumstances where positive evidence should be adduced.

²⁵⁹ Property (Relationships) Act 1976, s 40. Costs are awarded at the court's discretion and it may apply the provisions of the District Court Rules 2014: Family Court Rules 2002, r 207.

- 25.21 Traditionally the court took the view that PRA proceedings were a “mutual approach to the court for assistance in dividing property”, and therefore each party should bear their own costs.²⁶⁰ Following the passing of the Matrimonial Property Rules 1988 (the predecessor to the Family Court Rules), it became widespread practice to consider and award costs for improper compliance with procedural directions and rules.²⁶¹
- 25.22 More recently, the growing trend is to treat costs awards in the Family Court in a similar fashion to how costs are dealt with in other civil proceedings.²⁶² That is, while costs decisions are discretionary, the court should apply the civil costs regime in the District Court Rules 2014 to PRA proceedings, and any departure “must be a considered and particularised exercise of the discretion.”²⁶³ The guiding principle for determining costs in a civil costs regime is that the party who fails should pay costs to the party who succeeds (that is, costs should follow the event).²⁶⁴
- 25.23 The civil costs regime may not, however, be appropriate for PRA proceedings. As we explained above, PRA proceedings are different in nature to other civil proceedings, and this may justify a different approach, for example, if the threat of costs operates as a barrier to accessing justice. Some argue that more flexibility than the approach to costs in civil proceedings is appropriate in PRA proceedings.²⁶⁵

CONSULTATION QUESTION

H10 Should costs be available in PRA proceedings on the same basis as in other civil proceedings?

²⁶⁰ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.41] citing *Fitzherbert v Fitzherbert* FC Auckland 1322-D97, 27 November 2001. See also *Martin v Marsh* [2015] NZHC 416 at [7].

²⁶¹ *Hardisty v Hardisty* (1990) 7 FRNZ 5 (FC) per Judge Boshier.

²⁶² *Van Selm v Van Selm* [2015] NZHC 641 at [34]–[44], adopting the approach in *B v C* HC Auckland CIV-2011-404-1005, 4 October 2011; *T v L* [2012] NZHC 1388; *Thompson v Public Trust* [2014] NZHC 2434; and *Martin v Marsh* [2015] NZHC 416. The change in approach came about following the introduction of r 207 of the Family Court Rules 2002, which provides that in exercising discretion to determine costs, “the court may apply any or all of the following [District Court Rules]”: Family Court Rules 2002, sub-r 207(2).

²⁶³ *Van Selm v Van Selm* [2015] NZHC 641 at [44]. See also *Gibbs v Gibbs* [2015] NZHC 3043 at [53].

²⁶⁴ District Court Rules 2014, r 14.2(a), incorporated by Family Court Rules 2002, r 207. See also *Anderson v Anderson* HC New Plymouth CIV 2004-443-25, 16 June 2004 at [33].

²⁶⁵ See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 260.

Is the court process operating effectively?

PRA proceedings take a long time to resolve

25.24 Best practice is that standard PRA cases should be disposed of within 26 weeks of filing in the Family Court, and complex PRA cases within 39 weeks of filing.²⁶⁶ But in reality the vast majority of PRA cases take much longer to resolve. Of the PRA cases disposed in 2015, 93 per cent had taken longer than 39 weeks, and half had taken over two years.²⁶⁷ In 2016, the average time the Family Court took to resolve an application under the PRA (either through the court granting or dismissing an application, or through the application being discontinued, withdrawn or struck-out) from the time it was filed was approximately 74 weeks.²⁶⁸ While PRA applications make up a small proportion of the Family Court's workload, they take the longest time to resolve.²⁶⁹

25.25 The length of time it takes to resolve property disputes can have significant financial and emotional implications for the parties.²⁷⁰ For many people, the costs and delays associated with going to court “remain at least as daunting as the bewildering complexity of the law itself.”²⁷¹ Until the proceedings are resolved the parties live in a state of uncertainty that can prevent them from making financial decisions which could allow them to move on with their lives.²⁷² When one party has access to the disputed property pending determination of the case, delays can have a disproportionate impact on the other party and potentially any children in their primary care.

²⁶⁶ Principal Judge Peter Boshier *Family Court Caseflow Management Practice Note* (24 March 2011) at [13.1]–[13.2].

²⁶⁷ This refers to cases that proceeded to a hearing. In 2015, 93 per cent of cases took more than 40 weeks from filing to disposal, and 50 per cent took more than 105 weeks from filing to disposal: data provided by email from the Ministry of Justice to the Law Commission (16 September 2016). This is not a new phenomenon. In 2011, the Ministry of Justice's review of the Family Court identified that Property (Relationships) Act 1976 cases took on average 478 days to dispose. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 22.

²⁶⁸ This figure is from provisional analysis by the Ministry of Business, Innovation and Employment's Government Centre for Dispute Resolution (GCDR), which analysed Family Court data from the Ministry of Justice's Case Management System, and provided by email to the Law Commission (26 September 2017). The Government Centre for Dispute Resolution (GCDR) noted that the national average is affected by the Family Courts in the Auckland Metro region, which had a far longer resolution timeframe (approximately 96 weeks).

²⁶⁹ Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [97].

²⁷⁰ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

²⁷¹ Simon Jefferson “Upgrading the Tractor to a Maserati” (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 152.

²⁷² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

25.26 Just because a case takes a long time to resolve does not, however, necessarily mean there has been unreasonable delay. PRA cases often involve complex legal and personal problems and disputes require time to be managed and resolved.²⁷³ Sometimes, “fast” justice is not possible and simply speeding up processes will not produce fair or lasting outcomes.²⁷⁴ The *International Framework for Court Excellence* describes timeliness as a balance between the time required to properly obtain, present and weigh the evidence, law and arguments, and unreasonable delay due to inefficient processes and insufficient resources.²⁷⁵

25.27 In this review we are concerned with unreasonable delay caused by inefficient processes or insufficient resources specific to PRA proceedings. We do not address broader issues with Family Court operations as this is outside the scope of this review.²⁷⁶

Do PRA proceedings experience unreasonable delay?

25.28 A close examination of a sample of 88 PRA cases by the Ministry of Justice revealed that:²⁷⁷

Delay in [PRA] proceedings, as indicated by the frequency of adjournments, was evident. While some adjournments are necessary, the estimated average number of adjournments per case was 12, which appears high. Every case was adjourned at least once, with 82 percent being adjourned more than six times. At the extreme end, 13 of the 88 cases sampled had in excess of 20 adjournments with two cases having in excess of 30 adjournments. Adjournments most often occurred in order to obtain information, reports and await the outcome of settlement discussions. Delay caused by either a party or their lawyer was also evident in 55 of the 88 cases.

²⁷³ Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 1.

²⁷⁴ Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 2.

²⁷⁵ International Consortium for Court Excellence *International Framework for Court Excellence* (National Center for State Courts, United States, 2008) discussed in Australian Centre for Justice Innovation *Innovation Paper: Improving Timeliness in the Justice System* (Monash University, 2015) at 8.

²⁷⁶ The general operation of the Family Court was the subject of a comprehensive review by the Ministry of Justice in 2011, which resulted in significant changes to the court process. However the majority of those changes were limited to applications under the Care of Children Act 2004, which made up the majority of the Family Court’s workload.

²⁷⁷ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

25.29 This, considered alongside the raw disposal data for PRA proceedings discussed above, as well as examples of “relatively uncomplicated” claims becoming “mired in a procedural morass”,²⁷⁸ suggests that PRA cases may be more susceptible to unreasonable delay than other types of cases before the Family Court.

PRA cases have unique characteristics which are likely to contribute to delays

25.30 PRA cases are different from most other Family Court cases because they “are not so much about personal relationships as they are about property.”²⁷⁹ They will often involve complex legal and factual issues, such as valuation issues, disputes over the classification of property and issues to do with trust property. Therefore information disclosure is extremely important in PRA cases.

25.31 But PRA proceedings also come after partners have separated, and often at a time of high interpersonal conflict. As the High Court observed in *Brown v Sinclair*:²⁸⁰

Primarily, disputes requiring resolution of the Family Court, whether involving children or property, have an emotional component that is not present in other civil cases. Two people are hurting from the breakup of a relationship, and all too often one is intent on causing financial or psychological harm to the other.

25.32 Information disclosure between the parties can be more challenging than in other types of property disputes. This problem can be compounded if one partner managed the partners’ finances during the relationship, and as a result has greater knowledge of their financial affairs than the other partner. On separation, this

²⁷⁸ *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [2]. In that case a claim involving property of “average value” was filed in the Family Court in 2011. The parties had signed a settlement agreement at a judicial settlement conference in 2013. The Judge presiding over the settlement agreement did not, however, issue a consent order to settle the issues in accordance with that agreement. The wife wished to have the agreement upheld; the husband did not. The matter went to another Judge of the Family Court in 2015, who opted to treat the settlement agreement as a contracting out agreement under ss 21A and 21H of the Property (Relationships) Act 1976. The husband appealed to the High Court, who heard the appeal in 2015. The High Court upheld the appeal but could not finally determine the issue, and instead had to send it back to the Family Court for final decision. See also *Brown v Sinclair* [2016] NZHC 3196 at [1]:

Two people have been married for less than three years. They separate. One files an application in the Family Court to determine their respective shares in relationship property. The other files an application for a protection order. Within six months the person against whom the relationship property application was brought is debarred from participating in that proceeding. Cross applications for protection orders are made. Almost six years later, the parties remain embroiled in litigation in the Family Court and in this Court.

²⁷⁹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

²⁸⁰ *Brown v Sinclair* [2016] NZHC 3196 at [3].

imbalance of knowledge can put the one partner at a distinct disadvantage.²⁸¹

- 25.33 These characteristics mean that PRA proceedings are “notorious for efforts by a wealthier or better informed spouse to confine access to information by the poorer or more poorly informed spouse.”²⁸²
- 25.34 In a similar vein, tactics aimed at delaying the court process and forcing the other party to incur added expense are also evident in some PRA proceedings.²⁸³ In the Family Court Review the Ministry of Justice observed that the court process placed the onus on the applicant to take action when the other party (the respondent) has failed to comply with the Rules, or will not engage in pre-hearing settlement negotiations. This means that often the applicant is in a vulnerable position, as they may not be in control of the property in dispute yet are forced to undertake expensive and lengthy litigation.²⁸⁴

Reform may be needed to address delays in the Family Court

- 25.35 The unique characteristics of PRA cases point to the need for an efficient case management process, clear disclosure obligations and effective penalties for non-compliance with disclosure and with other procedural requirements.
- 25.36 We are interested in views on whether the current process for PRA cases in the Family Court is causing unreasonable delay, and if so, what you think are the particular sources of delay. Our initial research and conversations with lawyers working in the Family Court have identified several possible sources of delay in the current court process, including:
- (a) the reliance on affidavit evidence to identify the issues in dispute is inefficient;²⁸⁵

²⁸¹ See Lynda Kearns “Laying Your Cards on the Table: Disclosure Roulette” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

²⁸² *D v K* [2015] NZFLR 1012 (HC) at [15].

²⁸³ See discussion in Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

²⁸⁴ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 23.

²⁸⁵ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

- (b) the disclosure obligations are regularly ignored or only partially met.²⁸⁶ While a party has several options for seeking further disclosure, each of these options require that party to take further steps and incur additional cost and delay.²⁸⁷ For these reasons lawyers may be reluctant to utilise these options except as a last resort;²⁸⁸
- (c) the lack of a structured case management process with prescribed timeframes means that it is too easy for one party to slow the process down, for example, by filing incomplete information, making multiple interlocutory applications or seeking multiple adjournments; and
- (d) current practice is not to allocate a hearing date early in the process, which means that parties are not incentivised to enter into settlement negotiations early on or to arrange their case in an efficient manner.

CONSULTATION QUESTION

H11 In your experience, do you think there is unreasonable delay in the current court process for PRA proceedings? If so, have we identified all of the particular sources of delay?

Options to improve the court process

Option 1: Introduce pleadings for PRA cases

25.37 Pleadings (such as a statement of claim²⁸⁹ and statement of defence) are regularly used in other courts to define the matters

²⁸⁶ Lynda Kearns “Laying Your Cards on the Table: Disclosure Roulette” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

²⁸⁷ Lynda Kearns “Laying Your Cards on the Table: Disclosure Roulette” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8. For example, the Rules require the party applying for discovery to prove that the documents sought are relevant to the issues in the case. The respondent can oppose discovery and argue that other documents are available and sufficient to enable the applicant to prove their case, that valuation is available from other means, or that the claim to the property is remote or uncertain. The use of tactics to avoid a discovery order can lead to delays that can go on for months and even years. See: Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6.

²⁸⁸ Simon Jefferson “Upgrading the Tractor to a Maserati” (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 156.

²⁸⁹ A statement of claim is a formal document which sets out, or “pleads”, all elements of the applicant’s claim and the relief the applicant seeks from the court. If the respondent wishes to defend the claim, the respondent files a statement of defence addressing each of the applicant’s claims or allegations. The High Court Rules 2016 require that a statement of claim (r 5.26):

- (a) must show the general nature of the plaintiff’s claim to the relief sought; and

in issue between the parties. Currently there is no requirement to file a statement of claim when making an application under the PRA in the Family Court. Instead, an applicant must fill in a general application form (not specific to the PRA) which requires the applicant to state the nature of the orders sought. However, many applications are made in non-specific terms, simply for “such orders under the [PRA] as the Court deems just.”²⁹⁰

25.38 In theory, the supporting affidavit filed with an application under the PRA should include details of the proposed arrangements for the division of property and the matters in issue between the parties.²⁹¹ There are, however, several potential problems with relying on affidavit evidence to identify the matters in issue:

- (a) affidavits filed are often incomplete or inadequate in identifying the matters in issue;
- (b) “almost anything can be raised in an affidavit and be regarded as a live issue”, which can cause problems when seeking to define the issues or where affidavits stray into inappropriate areas;²⁹²
- (c) the absence of pleadings means a respondent is not obliged (and may not be able) to disclose any defences they rely on, and there is no clear process for applying to strike out an untenable claim or defence before the hearing, or for proceeding by way of default judgment or formal proof;²⁹³ and
- (d) the absence of pleadings can make it difficult to identify whether cases have been fully disposed of.²⁹⁴

(b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff’s cause of action; and

(c) must state specifically the basis of any claim for interest and the rate at which interest is claimed; and

(d) in a proceeding against the Crown that is instituted against the Attorney-General, must give particulars of the government department or officer or employee of the Crown concerned.

²⁹⁰ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR 25.01]; and *Bergner v Nelis* HC Auckland CIV-2004-404-149, 19 December 2005 at [53].

²⁹¹ Family Court Rules 2002, r 392.

²⁹² *Bergner v Nelis* HC Auckland CIV-2004-404-149 19, December 2005 at [52] discussed in Simon Jefferson “Upgrading the Tractor to a Maserati” (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 154. See also *Roulston v Roulston* HC Auckland CIV-2004-404-7120, 9 August 2005 at [72(c)]; and *Walker v Walker* [2006] NZFLR 768 (HC) at [11]–[13].

²⁹³ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8–9.

²⁹⁴ In *R v P* [2015] NZHC 603 the Family Court had delivered a judgment deciding relationship issues, and the parties subsequently settled a dispute about the implementation of that decision. However because that settlement was not expressed to be “full and final”, and because the litigation had not addressed a s 15 claim, it was still open to

- 25.39 These problems can lead to ongoing interlocutory applications for further evidence, sometimes as a litigation tactic to add cost and delay to the court process.²⁹⁵ One family lawyer observes that often it is not until expert reports are received (sometimes just prior to a hearing) that it becomes apparent that a particular claim or defence is being argued, which risks issues not being properly investigated or responded to at the hearing.²⁹⁶
- 25.40 However, requiring formal pleadings in the context of the PRA may not be the best response to these issues. In *T v R* the Family Court explained that there is “clearly a distinct difference in approach in the civil jurisdiction of the District Court to that adopted in the Family Court,” and as a result the statement of claim and statement of defence procedure “does not sit appropriately in the PRA jurisdiction of the Family Court.”²⁹⁷ Also, it might be very difficult for the parties to identify all of the issues, potential claims and defences without the benefit of disclosure. One party should not miss out on an entitlement simply because it was not pleaded at the outset. Opportunities to refine the issues after disclosure would be necessary, which again raises the risk of litigation tactics (through multiple applications for further particulars and/or amended pleadings). We would be reluctant to make any recommendations that could deter parties from applying to the court when they lack adequate information about their former partner’s financial affairs.
- 25.41 Another option is to require parties to identify issues in advance of the first judicial conference. Currently, parties can be required to file memoranda of issues, and these can be considered at judicial conferences, but this does not happen automatically.²⁹⁸

the applicant to file a new application for orders under s 15 provided that the time limitations under the Property (Relationships) Act 1976 had not been breached: at [40]. The High Court at [32] observed that this issue would not have arisen “if there had been a more rigorous approach to pleading Ms R’s case.” See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR25.01].

²⁹⁵ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 7.

²⁹⁶ See discussion in Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8–9.

²⁹⁷ *T v R* [2010] NZFLR 712 (FC) at [28]. In that case the respondent had applied for an order requiring the applicant to file a statement of claim. The Court observed that central to the underpinning of a statement of claim in the civil jurisdiction is the concept of a cause of action, and the onus of proof is clearly on the party asserting the cause of action. In contrast, a Property (Relationships) Act 1976 (PRA) claim is formulated pursuant to a section of the Act, and also unlike civil cases, where there might be one or two causes of action, under the PRA there are frequently multiple issues the Court is required to determine. The Court noted that it is not appropriate for the practice of the Family Court to be changed by a judgment. This was a question of practice, and if a change is sought it should be by way of change to the Family Court Rules, so there can be wide consultation about such a proposal, and the full merits assessed.

²⁹⁸ For example in *T v R* [2010] NZFLR 712 (FC) at [29] the court declined to require the applicant to file a statement of claim, but did require both parties to file a memorandum of issues setting out what was claimed, what section of the

Parties could be required to file a joint memorandum of issues, or, if that is not possible, file separate memoranda ahead of the judicial conference, with an opportunity to respond to the other party's memoranda in the case of disagreement.²⁹⁹ The judge could then confirm the issues in dispute by issuing a minute after the conference. This might be a better option as it means parties do not have to commit to issues until after disclosure has been made. We discuss options for imposing stricter consequences for non-disclosure below. The potential for delay could be minimised if the case management process includes a clear timeframe for holding the judicial conference, which we discuss below.

CONSULTATION QUESTIONS

H12 Do you think that there is a problem with identifying issues in dispute in PRA proceedings?

H13 If so, do you support a change to the Family Court procedure to either require parties to PRA proceedings to file pleadings (a statement of claim and statement of defence), or to identify the matters in issue in a memorandum of issues filed before the first judicial conference, or some other change in procedure?

Option 2: Introduce a more structured case management process

25.42 While parties must comply with the Rules, there is no prescribed process that PRA cases must follow within specified timeframes. In an earlier report on the New Zealand court system, the Law Commission observed:³⁰⁰

In our court system, the parties have traditionally controlled the pace of litigation, and the court's role has been passive, waiting for one or the other party to seek intervention.

25.43 As the Ministry of Justice observed in the Family Court Review, while less prescriptive processes may have the benefit of flexibility, they are also uncertain, less efficient and a cause of delay.³⁰¹ It concluded that “the lack of clear processes has

Property (Relationships) Act 1976 was relied on, and any other authority relied on, so that each partner knew the particulars of what was being sought by the other.

²⁹⁹ See for example the process set out in the High Court Rules 2016, r 7.3.

³⁰⁰ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

³⁰¹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 52.

compromised the Court's efficiency and cost effectiveness and has contributed to delay."³⁰²

- 25.44 Some argue that a more structured case management procedure, similar to that used in the High Court, may lead to more efficient resolution of PRA proceedings.³⁰³ As it stands, High Court case management is seen by some as a compelling reason for seeking a transfer of PRA proceedings from the Family Court.³⁰⁴
- 25.45 We think that case management is an essential part of an effective and efficient court system.³⁰⁵ Given that PRA proceedings often involve complex issues and acrimonious relationships between the parties, we think there is value in exploring a more structured case management process than is currently available.
- 25.46 In an earlier report the Law Commission identified that a case management system should have the straightforward aims of ensuring that:³⁰⁶
- (a) cases are dealt with consistently, but there should be flexibility for cases that do not fit the usual mould;
 - (b) the issues are identified as early as possible;
 - (c) opportunities for settlement are fully explored; and
 - (d) a hearing date is allocated as early as possible.
- 25.47 One possible model is the case management procedure used in the District Court.³⁰⁷ That procedure involves:
- (a) the allocation of the first case management conference on the first available date not less than 25 working days

³⁰² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 54. See also Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [17] and [76]. As a result of the Family Court Review a new standard case management process was introduced, but that was limited to applications under the Care of Children Act 2004, as these were the largest single category of applications before the Family Court, and where costs were increasing the most: Minister of Justice *Family Court Review: proposals for reform* (July 2012) at [26].

³⁰³ See recommendation in Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 10.

³⁰⁴ Simon Jefferson "Upgrading the Tractor to a Maserati" (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 157.

³⁰⁵ In doing so we affirm the views in the Law Commission's earlier publication *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

³⁰⁶ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 199.

³⁰⁷ District Court Rules 2014, r 7.2. Similar rules also applied, until 1 September 2017, in the High Court. The High Court Rules 2016 now provide that parties are first subject to a case management review and at that review the judge can allocate a case management conference if satisfied that the filed memoranda meet the necessary requirements: High Court Rules 2016, r 7.3.

after the statement of defence is filed (or not less than 50 working days after the filing of the proceeding);³⁰⁸

- (b) an expectation that, prior to the first case management conference, parties will have provided initial disclosure, carefully considered the pleadings and the principal documents disclosed within, discussed and endeavoured to agree on appropriate discovery;³⁰⁹
- (c) a requirement that the parties file and serve joint memorandum or separate memoranda addressing a range of issues to be discussed at the conference;³¹⁰
- (d) a set agenda for the first case management conference, including the making of a discovery order, the hearing and, if practicable, the disposal of any interlocutory applications, the fixing of a close of pleadings date, a hearing date and a date for any further case management, issues or pre-trial conferences;³¹¹ and
- (e) subsequent case management, issues or pre-trial conferences, as directed by the judge.

25.48 A similar process might be appropriate for property matters in the Family Court. However, we are mindful that, given the unique characteristics of PRA proceedings identified above, it would be wrong to treat PRA proceedings as being on all fours with civil proceedings in the District Court. Incorporating the same rules and timeframes from the District Court Rules into the PRA might not be practical. Alternatively, more robust procedures could be included as best practice, for example in the Family Court Caseflow Management Practice Note.

CONSULTATION QUESTIONS

H14 Do you think the current case management process for PRA proceedings is problematic?

H15 If so, should a process similar to the District Court case management process be adopted? If not, what?

³⁰⁸ District Court Rules 2014, sub-r 7.2(2).

³⁰⁹ District Court Rules 2014, sch 3.

³¹⁰ District Court Rules 2014, sub-r 7.2(2).

³¹¹ District Court Rules 2014, sub-r 7.2(3).

Should there be specific provision for single issue hearings?

- 25.49 A related issue is whether the case management process should provide for single issue hearings, where appropriate. Both the District and High Court rules provide for a question or issue in any proceeding to be decided separately, in advance of the substantive hearing.³¹² A single issue hearing is usually ordered when it would expedite proceedings, by limiting or defining the scope of the substantive hearing or by eliminating the need for a trial altogether.³¹³
- 25.50 In PRA proceedings, the High Court has recognised the value in single issue hearings where an applicant must successfully argue that a contracting out agreement should be set aside, before the Court considers an application to divide relationship property.³¹⁴

I consider that the statutory scheme will ordinarily require that, before a relationship property claim can be brought in the face of a s 21A or s 21P agreement, the party seeking to bring that claim must first meet the hurdle of having the agreement set aside. I consider that this will conform with the principle in s 1N(d) of the Act. The inexpensive, simple and speedy resolution of issues is likely to be assisted by determining first whether the agreement should be set aside, rather than by requiring parties to engage in a relationship property dispute which they have settled. The setting aside of the agreement can properly be dealt with as a preliminary question by the Family Court. That should, except possibly in cases which may raise some particular consideration, mean that the two aspects must be dealt with separately, and sequentially. I do not consider that considerations of case management will routinely justify the substantive relationship property claim being heard before the right to bring it has been determined.

- 25.51 The Family Court Rules do not expressly provide for single issue hearings. When the Rules are silent, the judge must deal with any matters “under provisions of these rules dealing with similar matters” if possible, or “in a way decided by the Judge, in the light of the purpose of these rules.”³¹⁵ The purpose of the Rules is set

³¹² See District Court Rules 2014, rr 10.20–10.24 and High Court Rules 2016, rr 10.14–10.21 discussed in Simon Jefferson “Upgrading the Tractor to a Maserati” (paper presented to New Zealand Law Society PRA Intensive, September 2016) 151 at 158–160.

³¹³ *Innes v Ewing* (1986) 4 PRNZ 10 (HC).

³¹⁴ *Donsford v Shanly* [2012] NZHC 257 at [26]. See also *F v F* [2015] NZHC 2693. Another example where a single issue hearing might be appropriate is where the partners dispute the existence of a qualifying relationship under the Property (Relationships) Act 1976.

³¹⁵ Family Court Rules 2002, r 15.

out at paragraph 25.36 above. It is similar to section 1N(d) of the PRA, which the High Court has observed can be met by having a single issue hearing. Therefore we think the Family Court can already order single issue hearings, however, there may be merit in including specific provision for single issue hearings in PRA proceedings, similar to those in the District Court and High Court Rules, along with guidance for the Family Court in the exercise of its discretion.³¹⁶

CONSULTATION QUESTION

H16 Should single issue hearings be available for PRA proceedings in the Family Court?

Option 3: Confirm the duty of disclosure in the PRA or Family Court Rules

25.52 The Court of Appeal has confirmed that parties have a duty of full and frank disclosure in PRA proceedings.³¹⁷ One option for reform is to simply codify that duty. A new provision in the PRA or the Family Court Rules could provide that parties have a duty to the court and to each other to give full and frank disclosure of all information relevant to the proceedings in a timely manner. A similar provision exists in Australia.³¹⁸ Such a provision may encourage greater voluntary disclosure without the need to make an application to the court for discovery orders.

25.53 One family lawyer argues that, instead of a duty to disclose relevant information, the PRA should recognise that each party has an “absolute entitlement” to documents associated with any property that is the subject of a claim, and that those documents must be provided on request.³¹⁹ There should be no onus on the applicant to prove the information is relevant, as the relevance test “serves only to invite the respondent to oppose the provision of documents.”³²⁰

³¹⁶ *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR10.15.06] details the main criteria that have been taken into account in deciding whether to exercise discretion to order a split trial.

³¹⁷ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [186].

³¹⁸ Family Court Rules 2004 (Cth), r 13.01.

³¹⁹ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6–7.

³²⁰ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 6–7.

Option 4: Amend the Family Court Rules to improve the quality of initial disclosure³²¹

25.54 Improved initial disclosure could simplify the court process, reduce the need to take further steps to obtain full disclosure and reduce the number of court events (judicial conferences). It could also assist parties to settle their disputes early on in the court process. There are different ways initial disclosure could be improved:

- (a) One option is to require general discovery of all relevant documents (guided by the essential principles of discovery set out at paragraph 25.11 above) in every case at the outset of the proceedings and without the need for a court order. Guidance could be provided on the extent of the obligation, including the type of information and documents that will usually be relevant.³²² However such a broad requirement may add significant cost and delay to the process. General discovery may not always be appropriate, and applications seeking directions from the court clarifying the extent of discovery may be inevitable.
- (b) A second option is for a more tailored requirement for initial disclosure similar to the provisions in the High Court Rules 2016. Those rules require a party to serve, at the same time they serve their pleading, a bundle consisting of all the documents referred to in the pleading, and any additional principal documents in the party's control, and that they used when preparing the pleading and on which they intend to rely at the hearing.³²³ The initial disclosure requirement is considered to have helped progress cases in the High Court by assisting in the identification of issues and the settling of pleadings, although some lawyers think initial disclosure is inefficient and has increased their

³²¹ This discussion is based on options identified in Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 8.

³²² For example r 13.04 of the Australian Family Law Rules 2004 (Cth) requires parties to make full and frank disclosure of the party's direct and indirect financial circumstances, and includes a list of specified matters such as sources of earnings, interest income, property and other financial resources.

³²³ High Court Rules 2016, r 8.4(1).

workload.³²⁴ Because disclosure is tailored to the issues identified by parties in pleadings, this option might go hand in hand with the option of requiring pleadings, discussed above.

- (c) The third option is to provide for a two-stage process of disclosure, like that in Australia and England and Wales. Parties could be required to file a comprehensive financial statement when filing an application or responding to an application.³²⁵ Further financial documents, including recent taxation returns, superannuation documents and valuations of property, must then be exchanged by way of disclosure before the first court date and before any settlement conference.³²⁶
- (d) The final option is the simplest, clarifying in the Rules that a party must attach all supporting documents to their affidavit of assets and liabilities when it is filed and served on the other party. The Rules could specify what documents must be included (if they exist), and these could include valuations, tax returns, trust deeds, financial accounts for any entities in which the party is a shareholder, all superannuation and insurance policies and statements of account, and bank account statements.

25.55 In addition, the parties could be required to confirm to the court that they have complied with their duty of disclosure. The current affidavit of assets and liabilities form already includes a statement to the effect that a party making a false statement could result in an order of the court being set aside and a criminal proceedings being brought, however there is concern that this is generally overlooked.³²⁷ It might be more effective to require the party to file a separate certificate confirming they have made full

³²⁴ This is according to a survey of lawyers and judges carried out in 2015 to assess the effectiveness of the reforms to discovery and case management in the High Court. See Justice Winkelmann and Justice Asher “Effectiveness of the 2011–2012 reforms – report to the profession” (February 2015) Courts of New Zealand <www.courtsofnz.govt.nz>.

³²⁵ Family Law Rules 2004 (Cth), r 13.05.

³²⁶ Family Law Rules 2004 (Cth), pt 13.2. In England and Wales parties are required to exchange a financial statement not less than 35 days before the first court appointment, and must then serve further documents, including a statement of issues between the parties and a questionnaire setting out a request for further information and documents by reference to the statement of issues. The court determines at the first appointment the outstanding questions to be answered and documents to be produced. See Family Procedure Rules 2010 (UK), rr 9.14–9.15.

³²⁷ Lynda Kearns “Laying Your Cards on the Table: Disclosure Roulette” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 9.

disclosure, or making such a statement directly to the judge at the conference.³²⁸

Option 5: Impose stricter consequences for party non-disclosure

25.56 There are several ways in which the court's powers to penalise a non-disclosing party could be enhanced.

- (a) First, the PRA or Rules could include better guidance about when the court should order costs to be paid for non-compliance with disclosure requirements.
- (b) Second, financial penalties for non-compliance with disclosure requirements could be introduced. This would effectively treat non-disclosure as a form of contempt of court. Non-compliance could be classified as a criminal offence, attracting an infringement penalty or fine. Alternatively, non-compliance could attract a civil pecuniary penalty. A scale of financial penalties could apply depending on the stage of proceedings and the seriousness of the non-disclosure.³²⁹ There are a number of examples of offences used to enforce compliance with court orders.³³⁰ However we are not aware of any criminal or civil pecuniary penalties in New Zealand that apply to breaches of rules or court orders regarding disclosure.³³¹
- (c) Third, a more extreme option is to enable the court to penalise non-compliance directly from the pool of relationship property. This could be achieved by either empowering the court to make an order compensating one partner for the non-disclosure of the other partner, thereby avoiding the need for an order as to costs,

³²⁸ Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 9.

³²⁹ Care would need to be taken in drafting any penalty provision to ensure that the nature of either option and level of penalty was proportionate and subject to procedural safeguards. Guidance on the creation of new criminal and infringement offences and pecuniary penalties is available in the Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014).

³³⁰ Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at Appendix 1. An example where breach of a Family Court order is an offence can be found in the Care of Children Act 2004, s 78 for intentionally contravening a parenting or guardianship order without reasonable excuse.

³³¹ Following the Family Court Review, Cabinet gave approval to enable the Family Court to impose a financial penalty on parties for serious breaches of court procedures: Minister of Justice *Family Court Review: proposals for reform* (July 2012). Subsequent changes to the Rules did not impose penalties for breaches of disclosure obligations.

or by introducing a rebuttable presumption that the non-disclosing party's share of relationship property is reduced by an amount or proportion that the court considers is reasonable in the circumstances. A version of such a presumption has been adopted by the Supreme Court of British Columbia for cases where there is evidence that one party may be hiding assets.³³²

25.57 It is unclear to us whether these stricter consequences for non-disclosure would be any more effective in incentivising full disclosure than the current range of tools that the Court's disposal. Imposing financial penalties for non-disclosure, particularly from relationship property, would be a significant and novel step in New Zealand. We are interested in hearing views about this and other potential ways to encourage a party to comply with disclosure requirements.

Option 6: Introduce sanctions for lawyers in connection with client non-disclosure

25.58 Currently the Family Court does not appear to have jurisdiction to make a costs order against a lawyer representing a party in PRA proceedings, although it has done so on occasion.³³³ Following the Family Court Review, Cabinet gave approval to enable the Family Court to impose a financial penalty on lawyers for a serious breach of court procedures.³³⁴ However, no changes resulted. In contrast, in criminal proceedings the District Court can make a costs order against a defendant's lawyer or prosecutor for a procedural failure,

³³² *Cunha v Cunha* (1994), 99 BCLR (2d) 93 (SC). See also *Eng v Eng* [1998] BCJ No 2574 (SC); and *Wu v Sun* 2011 BCCA 239, [2011] BCJ No 914. Referring to the non-disclosure of assets at [9] as "the cancer of matrimonial property litigation", the court in *Cunha v Cunha* held at [13] that if non-disclosure is established at any stage, there is an onus on the non-disclosing party to satisfy the court that full disclosure has been made. If the court is satisfied of this, costs might be the appropriate penalty. Where a non-disclosing party has not satisfied the court that full disclosure of assets has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. The court may then vest all disclosed assets in the other party on the basis of equal division between the parties: *Laxton v Coglon* 2008 BCSC 42, [2008] BCJ No 45. An adverse inference attributing income to a non-disclosing party has since been incorporated in legislation: Family Law Act SBC 2011, c 25, s 213. The court in *Nearing v Sauer* 2015 BCSC 58, [2015] BCJ No 67 said at [134] that while the remedy in s 213 may be interpreted as allowing the court to impute property as well as income to a person, the court could continue to follow *Cunha* and the subsequent authorities as the legislation was not intended to replace the common law.

³³³ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.41]; and *N v S* [2013] NZFC 1061 relying on *Hughes v Ratcliffe* (2000) 14 PRNZ 690 (HC). In contrast, the High Court can award costs against a lawyer: *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1; and High Court Rules 2016, r 14.1. It also has inherent jurisdiction to discipline and strike lawyers off the roll: Senior Courts Act 2016, s 12.

³³⁴ Minister of Justice *Family Court Review: proposals for reform* (July 2012).

but only where the failure was significant and there was no reasonable excuse for that failure.³³⁵

25.59 Lawyers have professional responsibilities to the court and their client in relation to disclosure. A lawyer must advise their client of the scope of their disclosure obligations and ensure to the best of their ability that their client understands and fulfils those obligations.³³⁶ A lawyer's primary duty is to the court and the lawyer must not continue to act for their client if, to their knowledge, there has been a breach of discovery obligations by a client and the client refuses to remedy that breach.³³⁷ Lawyers must also act in a timely manner and not in a way that undermines the processes of the court, so should not engage in unethical discovery practices for the purpose of delay.³³⁸ Lawyers who breach these requirements can face disciplinary action. Sanctions include censure, fines, requiring the refund of legal fees, payment of compensation, suspension or being struck off the roll.³³⁹ Lawyers can also be found in contempt of court for failing to comply with an order or direction of the court.³⁴⁰

25.60 There are examples in other jurisdictions of courts having the power to order costs against lawyers for non-disclosure. In Victoria, Australia, the Civil Procedure Act 2010 enables the court to order costs, including indemnity costs, against a lawyer who is responsible for aiding and abetting:³⁴¹

- (a) a failure to comply with discovery obligations;
- (b) a failure to comply with any order or direction of the court in relation to discovery; or
- (c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

³³⁵ Criminal Procedure Act 2011, s 364. In *R v Walker* [2016] NZDC 15474 the District Court ordered a lawyer to pay \$250 to the Ministry of Justice and \$250 to the Crown solicitor's office for failing to advise the court that the lawyer was not proceeding with a half day pre-trial fixture.

³³⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1 cl 13.9.

³³⁷ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1, cl 13 and sch 1, cl 13.9.

³³⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, sch 1, cl 3 and sch 1, cl 13.2.

³³⁹ Lawyers and Conveyancers Act 2006, ss 156, 211 and 242.

³⁴⁰ The High Court in *Chen v Wang* [2015] NZFC 3330, [2015] NZFLR 1025 found a lawyer in contempt of court for failing to comply with a direction to appear in court to explain non-compliance with a court order to transfer funds held in trust for interim distribution under the Property (Relationships) Act 1976. The Court referred the complaint to the New Zealand Law Society Disciplinary Tribunal for consideration.

³⁴¹ Civil Procedure Act 2010 (Vic), s 56. Other examples include legislation that enables a court to order a lawyer to meet "wasted" or "thrown away" costs. These are costs that result, for example, from a lawyer's improper, unreasonable or negligent act or omission, or non-compliance with court rules or orders. See for example the Family Law Rules 2004 (Cth), r 19.10; Federal Court Rules 2011 (Cth), r 40.07; and Senior Courts Act 1981 (UK), s 51(6).

25.61 We are not aware of concerns about widespread lawyer non-compliance with professional standards relating to disclosure. Enabling the Family Court to award costs or imposing a financial penalty on lawyers would be a significant step. While costs can be awarded in other courts in criminal cases, arguably there is a greater need to protect against procedural failures and delays in criminal proceedings as these could impact on a person's right to liberty and to be tried without undue delay.³⁴² There is a risk that imposing sanctions on lawyers in the context of a single type of civil proceeding is disproportionate, risks confusion and may lead to inconsistency. In the absence of clear evidence of a widespread problem, our preliminary view is that existing avenues are sufficient and appropriate to address any non-compliance with disclosure requirements or court orders in PRA proceedings, but we are interested in receiving views about this.

CONSULTATION QUESTIONS

H17 Do you think that the current disclosure obligations on parties in PRA proceedings are problematic? If so, have we identified all of the issues?

H18 Which of these options for reform do you support, and why?

H19 Are there any other options for reform that you think we should consider?

Option 7: Encourage better use of section 38 inquiries

25.62 One of the procedural tools available to ensure all relevant information is before the court in PRA proceedings is the power to appoint a person to inquire into and report on facts in issue between the parties under section 38 of the PRA.³⁴³

25.63 Some lawyers consider that section 38 is underutilised.³⁴⁴ This may be for several reasons, including:

³⁴² New Zealand Bill of Rights Act 1990, s 22 and 25(b).

³⁴³ Sub-rule 400(2)(b) of the Family Court Rules 2002 provides that a party may apply to the court for an order under s 38 of the Property (Relationships) Act 1976 if the other party failed to file an affidavit of assets and liabilities, or if the affidavit was inadequate. However, that does not limit the discretion conferred on the court to direct a s 38 inquiry: *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [47]. The judge may order an inquiry under s 38 at a judicial conference: Family Court Rules 2002, sub-r 175D(2)(n)(i).

³⁴⁴ Anne Hinton "Forensic evidence in relationship property cases" (paper presented to New Zealand Law Society Family Law Conference, October 2007) 199 at 205; Simon Jefferson and Paul Moriarty "Valuation of Relationship Property: An Evaluation of Practice and Procedure" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming); and Lynda Kearns "Laying Your Cards on the Table: Disclosure Roulette" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016).

- (a) A referee under section 38 lacks the formal procedural powers of a court. They cannot require a person to attend an interview and answer questions, or require the production of documents. This is not usually an impediment in matters of valuation and analysis of financial records but may make the procedure unsuitable for resolving matters of conflicting credibility or personal conduct, as either partner may refuse to cooperate.³⁴⁵
- (b) Section 38 inquiries have usually been limited to clearly defined discrete topics, and primarily for valuation issues.³⁴⁶ Commentary observes that:³⁴⁷
- Tempting though the prospect may be, it may come close to abdicating the Court's function to delegate to a referee without procedural powers a wide-ranging investigation into the parties' affairs in general.*
- (c) Section 38 inquiries cannot be ordered simply and primarily to assist a party in the preparation of their case.³⁴⁸ They will usually be easier to justify at an interlocutory stage than at the substantive hearing, when counsel will normally have assured the court that the case is in all respects ready for hearing.³⁴⁹
- (d) A court may be reluctant to order a section 38 inquiry because it will inevitably lead to additional delay and expense.³⁵⁰ The cost of a section 38 inquiry is borne by the Crown, although the court may order a party to refund some or all of the cost if it thinks it proper.³⁵¹

25.64 The test for deciding whether to order a section 38 inquiry was recently considered by the High Court in *B v W*.³⁵² The Court

³⁴⁵ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

³⁴⁶ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.35]; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR38.02]

³⁴⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

³⁴⁸ *C v C* (1989) 5 FRNZ 694 (HC).

³⁴⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.36].

³⁵⁰ Anne Hinton “Forensic evidence in relationship property cases” (paper presented to New Zealand Law Society Family Law Conference, October 2007) 199 at 205; and Simon Jefferson and Paul Moriarty “Valuation of Relationship Property: An Evaluation of Practice and Procedure” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³⁵¹ Property (Relationships) Act 1976, s 38(4).

³⁵² *B v W* [2016] NZHC 2481, [2017] NZFLR 258.

explained that section 38 inquiries should not be characterised as a remedy of last resort. While in many cases a section 38 inquiry will not be imposed until after less intrusive remedies have been completed (such as the administration of interrogatories and discovery), there may be circumstances in which the court is so lacking in confidence about the ability of a person to provide adequate disclosure that it concludes an independent inquiry is more likely to yield the information sought.³⁵³ Ultimately the Family Court must determine the best means by which any information deficit can be remedied.³⁵⁴

- 25.65 We are interested in submissions on whether, in light of the High Court's clarification in *B v W*, concerns about the utilisation of section 38 inquiries remain. If so, one option for reform might be to enable the court to direct the parties pay the costs of an inquiry (rather than imposing that cost on the Crown and seeking repayment when proper to do so).

CONSULTATION QUESTION

H20 Do you think that changes need to be made to the power to order section 38 inquiries? If so, what?

³⁵³ *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [52]–[53].

³⁵⁴ *B v W* [2016] NZHC 2481, [2017] NZFLR 258 at [53].

Chapter 26 – Jurisdiction of the courts

Introduction

- 26.1 The PRA provides that “every application under this Act must be heard and determined in the Family Court.”³⁵⁵ There is no monetary limit on the cases the Family Court can hear, unlike the District Court.³⁵⁶ The Family Court can, however, transfer proceedings to the High Court if it decides that the High Court is the more appropriate venue to deal with those proceedings.³⁵⁷ The High Court also hears appeals of Family Court decisions to make or refuse to make an order, dismiss the proceedings or otherwise finally determine the proceedings.³⁵⁸
- 26.2 In this chapter we discuss the roles of the Family Court and the High Court under the PRA. We identify some issues with their respective jurisdictions and propose options for reform.

The Family Court as a specialist court

- 26.3 The Family Court is a division of the District Court.³⁵⁹ It was established by the Family Court Act 1980³⁶⁰ as a specialist forum for resolving conflicts affecting family life.³⁶¹ The Family Court Act includes provisions that promote the specialist nature of the Court:

- (a) **Family Court Judges are specialists:** a person cannot be appointed to be a Family Court Judge unless he or she

³⁵⁵ Property (Relationships) Act 1976 (PRA), s 22(1). Section 22(2) states that this is subject to other provisions of the PRA that confer jurisdiction on any other court.

³⁵⁶ The general civil jurisdiction of the District Court is limited to claims not exceeding \$350,000: District Court Act 2016, s 74.

³⁵⁷ Property (Relationships) Act 1976, ss 22(2) and 38A.

³⁵⁸ Property (Relationships) Act 1976, s 39.

³⁵⁹ Family Court Act 1980, s 4.

³⁶⁰ The statute was originally enacted as the Family Courts Act 1980, but the title was changed to the Family Court Act 1980 in 2017, pursuant to the District Court Act 2016, s 249(a).

³⁶¹ The Family Court was established by the Family Court Act 1980, following the recommendation of the Royal Commission on the Courts: David Beattie “Royal Commission on the Courts: Report 1978” [1978] VII AJHR H2 at 146.

is, by reason of “training, experience, and personality, a suitable person to deal with matters of family law.”³⁶²

- (b) **The Family Court is accessible:** Family Court Judges are stationed in towns across New Zealand, as determined by the Principal Family Court Judge.³⁶³ In 2017, there were 70 Family Court Judges sitting across New Zealand.
- (c) **Proceedings are private:** unless legislation provides otherwise, hearings are not open to the public (although accredited news media reporters and any person whom the Family Court Judge permits to be present can attend),³⁶⁴ and there are restrictions on the publication of information that could identify parties and other affected persons in certain circumstances.³⁶⁵
- (d) **Proceedings are informal:** Family Court proceedings must be conducted in such a way as to avoid unnecessarily formality.³⁶⁶ The Family Court has flexibility in what evidence it may hear.³⁶⁷
- (e) **Conciliation is promoted:** lawyers acting for any party or proposed party in a Family Court proceeding must, so far as possible, promote conciliation.³⁶⁸
- (f) **Counsellors may be appointed:** the Family Court may appoint counsellors to assist it to perform its functions.³⁶⁹

26.4 In addition to its jurisdiction under the PRA, the Family Court has jurisdiction to determine proceedings under the Marriage Act 1955, the Adoption Act 1955, the Care of Children Act 2004, the Domestic Actions Act 1975, the Family Proceedings Act 1980, the Child Support Act 1991, the Oranga Tamariki Act 1989, the Law

³⁶² Family Court Act 1980, s 5(2)(b).

³⁶³ Family Court Act 1980, s 9.

³⁶⁴ Family Court Act 1980, s 11A.

³⁶⁵ Family Court Act 1980, s 11B.

³⁶⁶ Family Court Act 1980, s 10(1).

³⁶⁷ Family Court Act 1980, s 12A enables a Family Court to, in respect of some legislation (including the Property (Relationships) Act 1976), receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

³⁶⁸ Family Court Act 1980, s 9A.

³⁶⁹ Family Court Act 1980, s 8.

Reform (Testamentary Promises) Act 1949, the Family Protection Act 1955, the Civil Union Act 2004 and the Wills Act 2007.³⁷⁰

History of the Family Court’s jurisdiction under the PRA

26.5 Prior to 2001, the Family Court and the High Court had concurrent jurisdiction to hear proceedings under what was then called the Matrimonial Property Act 1976 (1976 Act).³⁷¹ This meant that a person could file an application under the PRA in either court. In 1988 a Working Group was established by the Government to review the 1976 Act, and by that time the “great majority” of cases were being heard in the Family Court.³⁷² The Working Group recommended that concurrent jurisdiction be abolished, and that all cases be heard in the Family Court.³⁷³ The Government adopted that recommendation and in 1998 introduced legislation that gave the Family Court exclusive jurisdiction under the 1976 Act.³⁷⁴ The Parliamentary select committee considering the amendments gave the following reasons for abolishing concurrent jurisdiction:³⁷⁵

- (a) Concurrent jurisdiction with the District Court³⁷⁶ was retained in the 1976 Act largely for reasons of caution. However since 1976, a specialist Family Court had been created, and it was appropriate to recognise this.
- (b) Concurrent jurisdiction was sometimes used for tactical advantage, often to disadvantage the poorer spouse.
- (c) The change reflected the more general move to expand the jurisdiction of the District Court (of which the Family Court is a division).

³⁷⁰ Family Court Act 1980, s 11(1).

³⁷¹ Matrimonial Property Act 1976, s 22.

³⁷² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 39.

³⁷³ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 39.

³⁷⁴ Matrimonial Property Amendment Bill 1998 (109-1), cl 23, enacted as the Property (Relationships) Amendment Act 2001, s 23.

³⁷⁵ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 30.

³⁷⁶ Matrimonial Property Act 1976, s 22 (repealed). The District Court was known as the Magistrates Court prior to 1980.

(d) Costs were likely to be lower for proceedings in the Family Court because its procedures are less formal than those of the High Court.

26.6 The 2001 amendments further limited the High Court’s role in PRA proceedings by abolishing its power to order the transfer of proceedings from the Family Court, and by restricting the grounds on which proceedings could be transferred.³⁷⁷ Under the new provisions, only a Family Court judge could transfer proceedings to the High Court, and only when satisfied that the High Court was the more appropriate venue for dealing with the proceedings, “because of their complexity or the complexity of a question in issue in them.”³⁷⁸

26.7 The High Court in *Corbitt v Rowley* observed these changes “were clearly intended to reinforce the specialised jurisdiction of the Family Court.”³⁷⁹ They were not, however, universally supported. Chief Justice Dame Sian Elias was concerned that the amendments risked undermining the right of litigants to bring cases in the High Court without systematic review.³⁸⁰ The Chief Justice observed:³⁸¹

There are many cases in which matrimonial property and family protection claims are inextricably intertwined with other legal disputes, particularly issues affecting trusts. It would be unfortunate if such cases had to be divided rigidly between the High Court and the District Court.

26.8 Since 2001, the Family Court’s exclusive jurisdiction under the PRA has been revisited on several occasions. In 2011, the Family Court Review identified that relationship property disputes “are not so much about personal relationships as they are about property.”³⁸² It considered whether such cases may be best dealt with in the District or High Courts, given some of the issues involved.³⁸³ While the Family Court’s jurisdiction under the

³⁷⁷ Prior to 2001, the threshold for transfer was simply that any proceedings or questions in proceedings “would be more appropriately dealt with” in the High Court: Matrimonial Property Act 1976, s 22(2) (repealed).

³⁷⁸ Property (Relationships) Amendment Act 2001, s 23, adding the new s 22(3) to the Property (Relationships) Act 1976.

³⁷⁹ *Corbitt v Rowley* 27 FRNZ 852 (HC) at [25].

³⁸⁰ Chief Justice Sian Elias “Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000” at 1.

³⁸¹ Chief Justice Sian Elias “Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000” at 1.

³⁸² Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 25.

³⁸³ Including issues about the Family Court’s limited powers to deal with matters concerning trusts. See Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 26.

PRA did not change as a result of that review, the grounds for transferring proceedings to the High Court were broadened to help in “easing the transfer of relationship property disputes from the Family Court to the High Court.”³⁸⁴

- 26.9 In 2013 the Law Commission considered the Family Court’s jurisdiction under the PRA in the context of its review of the law of trusts.³⁸⁵ The Commission observed that there was an issue – which we explore in detail below – with the extent of the Family Court’s power to resolve PRA proceedings involving trust property. The Commission recommended that the Family Court be given powers to make orders in respect of trusts when it is dealing with PRA proceedings.³⁸⁶

The limited role of the High Court in PRA proceedings

- 26.10 The High Court has a limited role under the PRA to hear and determine:

- (a) proceedings transferred to the High Court by order of the Family Court,³⁸⁷ and
- (b) appeals against decisions of the Family Court made under the PRA.³⁸⁸

- 26.11 Although the PRA states that “every application under this Act must be heard and determined in the Family Court”,³⁸⁹ in *Jew v Jew*, the High Court said that the Family Court’s exclusive jurisdiction only applies to applications seeking orders for the division of relationship property under section 25(1) of the PRA.³⁹⁰ This means that the Family Court does not have exclusive

³⁸⁴ Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3.

³⁸⁵ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

³⁸⁶ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 194–196.

³⁸⁷ Property (Relationships) Act 1976, s 38A.

³⁸⁸ Property (Relationships) Act 1976 (PRA), s 39. Appeals to the High Court are by way of rehearing. The approach the High Court takes on appeal is set out in *B v F* [2010] NZFLR 67 (HC) at [8], applying the principles of the Supreme Court decision of *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. The approach in *B v F* has been adopted in several subsequent cases, including *J v J* [2014] NZHC 1495 at [24] and *Grieg v Hutchison* [2015] NZHC 1309, [2015] NZFLR 587 at [11].

³⁸⁹ Property (Relationships) Act 1976, s 22(1).

³⁹⁰ *Jew v Jew* [2003] 1 NZLR 708 (HC) at [41] followed in *B v F* [2012] NZHC 722, [2012] NZFLR 661 at [31]; *Sloan v Cox* [2004] NZFLR 777 (HC) at [39]; *Hayes v Parlane* [2014] NZHC 2416 at [58]; and *Minister of Education v M* [2017] NZHC 47 at [19]. In addition to determining the status of property owned in the name of a trust, the High Court in *Jew v Jew*

jurisdiction to make orders under other sections of the PRA, including under section 25(3) to make declarations relating to the status, ownership, vesting or possession of any specific property.

26.12 In some circumstances therefore the High Court can make declarations affecting rights under the PRA, either in exercising its inherent jurisdiction³⁹¹ or its jurisdiction under the Declaratory Judgments Act 1908. In *Jew v Jew*, the High Court determined that it had jurisdiction to make a declaration that a family trust does not hold any property which constitutes relationship property.³⁹² In *Hayes v Parlane* the High Court determined it had jurisdiction to make a declaration there was no qualifying de facto relationship for the purposes of the PRA.³⁹³

26.13 The High Court recently confirmed that the effect of *Jew v Jew* is that the High Court has concurrent jurisdiction with the Family Court in at least two situations (provided it is not dividing relationship property):³⁹⁴

- (a) where the property is vested in a third party (as in *Jew v Jew*); and
- (b) where the property is claimed by a third party not in the relationship.³⁹⁵

26.14 We discuss the application of the PRA to third parties below.

The PRA is a (partial) code

26.15 Section 4(1) of the PRA provides:

also considered it could make orders against one partner's separate property and in appropriate circumstances utilise the provisions of s 44 of the Property (Relationships) Act 1976: *Jew v Jew* [2003] 1 NZLR 708 (HC) at [44].

³⁹¹ The High Court exercises inherent as well as statutory jurisdiction. Inherent jurisdiction enables the High Court to deal flexibly with issues not covered by established procedure, and to protect the administration of justice. Inherent jurisdiction is not shared with any other court. See: Law Commission *Delivering Justice for All: A Vision of New Zealand's Courts and Tribunals* (NZLC R85, March 2004) at 258. The jurisdiction of the High Court is affirmed in s 12 of the Senior Courts Act 2016, replacing s 16 of the Judicature Act 1908.

³⁹² *Jew v Jew* [2003] 1 NZLR 708 (HC) at [38]. However, if a question as to relationship property arises in any proceeding it must be determined in accordance with, and by application of, the principles set out in the Property (Relationships) Act 1976 (PRA), pursuant to s 4(4) of the PRA: *Jew v Jew* [2003] 1 NZLR 708 (HC) at [41]; *B v F* [2012] NZHC 722, [2012] NZFLR 661 at [37]; and *Sloan v Cox* [2004] NZFLR 777 (HC) at [40].

³⁹³ *Hayes v Parlane* [2014] NZHC 2416 at [67]. In that case the application was made under the Declaratory Judgments Act 1908.

³⁹⁴ *Minister of Education v M* [2017] NZHC 47 at [19]–[24], affirming *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [59]–[61]. See also *Hayes v Parlane* [2014] NZHC 2416 at [59]; and *K v S* [2014] NZHC 2765 at [33].

³⁹⁵ As in *Minister of Education v M* [2017] NZHC 47, where the plaintiff sought to claim an interest in the family home in order to recover the value Mrs M had stolen from a third party.

This Act applies instead of the rules and presumptions of the common law and equity to the extent that they apply—

- (a) to transactions between spouses or partners in respect of property; and
- (b) in cases for which this Act provides, to transactions—
 - (i) between both spouses or partners and third persons; and
 - (ii) between either spouse or partner and third persons.

26.16 Section 4(4) then provides:

Where, in proceedings that are not proceedings under this Act, any question relating to relationship property arises between spouses or partners, or between either or both of them and any other person, the question must be decided as if it had been raised in proceedings under this Act.

26.17 Section 4A provides that every enactment must be read subject to the PRA, unless it, or the PRA, expressly provides otherwise.

26.18 The effect of these provisions is that the PRA is a code that “will trump all other regimes (legislative, or common law) where these may otherwise control relationship property, whatever court the issue is being heard in.”³⁹⁶ This is illustrated in *Shirtliff v Albert*, where the High Court determined it did not have jurisdiction to consider the plaintiff’s application under the Property Law Act 2007 for orders to sell the jointly owned former family home, as the exclusive jurisdiction of the PRA prevailed.³⁹⁷

26.19 The PRA is not, however, an exhaustive code. This is because the PRA only applies to transactions between partners regarding property, and, where the PRA provides, transactions between either or both partners and third parties.³⁹⁸ The PRA will not apply in all circumstances where the property rights of partners are in issue.³⁹⁹ As observed in *Fisher on Matrimonial and Relationship Property*:⁴⁰⁰

³⁹⁶ *Minister of Education v M* [2017] NZHC 47 at [9]. See also *Official Assignee v Williams* [1999] 3 NZLR 427 (CA) at [20].

³⁹⁷ *Shirtliff v Albert* [2011] NZFLR 971 (HC) at [13] and [16].

³⁹⁸ It is observed in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.25] that the intention with respect to third parties seems to be that transactions with third parties are affected by the Property (Relationships) Act 1976 (PRA) only where there are express provisions to that effect. The application of the PRA to third parties is discussed below.

³⁹⁹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.24].

⁴⁰⁰ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.23].

The [PRA] may therefore be regarded as the principal source of law for determining property disputes between spouses and de facto partners, rather than an exhaustive code as to relationship property rights in all circumstances.

26.20 There is still scope for the common law and equity to apply in limited circumstances. In *M v M*, the Court of Appeal confirmed that section 4(1) did not preclude a remedy in equity for breach of fiduciary duty by one partner against the other.⁴⁰¹

In terms of s 4(1) the [PRA] has effect in place of the rules and provisions of the common law and of equity to the extent, and only to the extent, that they apply to transactions between husband and wife in respect of property. Its concern is with the identification and classification of interests in property, their value and division. Accounting for a profit arising from breach of fiduciary duty is a different inquiry from the just division of matrimonial property... The section is not directed to a breach of an equitable obligation of that kind resting on all fiduciaries.

26.21 The courts have also upheld claims between partners outside the PRA for negligent misstatement and deceit,⁴⁰² specific performance,⁴⁰³ and claims in conversion and trespass.⁴⁰⁴ Nor does section 4 prevent debt recovery proceedings against a former

⁴⁰¹ *M v M* (1996) 15 FRNZ 15 (CA) at 20. See also *D v D* (1995) 13 FRNZ 623 (FC) at 639; and *Q v Q* (2005) 24 FRNZ 232 (FC) at [157]–[164].

⁴⁰² In *K v K* [2008] NZFLR 30 (HC) at [31]–[35] the plaintiff wife accused the defendant of negligent misstatement, breach of duty of care, and deceit in relation to the transfer of a property to a trust contrary to an agreement and without the wife's knowledge. Note that s 51 of the Property (Relationships) Act 1976 permits spouses and civil union partners to bring proceedings against each other in tort, reversing a previous statutory restriction. The Court of Appeal in *K v K* [2009] NZCA 14, [2009] NZFLR 705 confirmed that this did not override s 4, but, affirming *M v M*, the claim did not hinge on an alleged property transaction and was therefore not barred by s 4.

⁴⁰³ In *Wallis v Wallis* (1990) 6 FRNZ 645 (HC) the plaintiff sought specific performance of an agreement between the spouses as purchasers of a property and a third party as vendor. Proceedings under the Matrimonial Property Act 1976 were pending. Dismissing the defendant's application for a stay of proceedings, the court held that there was no provision in the 1976 Act that enabled the issue (enforcement of an agreement with a third party) to be determined under that Act. See also *Sloan v Cox* [2004] NZFLR 777 (HC), where the plaintiff sought enforcement of an agreement between partners to transfer a formerly jointly owned property to the parties as tenants in common. The defendant applied to strike out the application on the basis that the Property (Relationships) Act 1976 (PRA) was a code that governed property issues between de facto partners. However, it was arguable that there was no qualifying de facto relationship under the PRA, and for that reason alone the court held at [32] that the strike out application failed.

⁴⁰⁴ In *[LC] v B* [2012] NZHC 898 the High Court determined it had jurisdiction to determine the plaintiff's claim in conversion and trespass to goods, regardless of the underlying relationship property dispute. The plaintiff company, controlled by Mrs B, alleged the second defendant company, controlled by Mr B, had unlawfully removed certain stock and equipment following their separation. The High Court held at [24] and [26] that the proceeding did not relate to the classification or division of relationship property, and s 4 of the Property (Relationships) Act 1976 (PRA) was not engaged. Similarly, in *A v B* [2015] NZHC 487 the plaintiff alleged conversion, trespass and negligence, in relation to the defendant's retention and use of certain chattels and other property following their separation, alongside a claim under the Domestic Actions Act 1975. The defendant filed PRA proceedings in the Family Court. The High Court declined the defendant's application to strike out proceedings, noting at [30] that the claims in tort were not issues which could be readily determined by the Family Court in the context of the PRA.

partner⁴⁰⁵ or against a trust established for the benefit of one or both partners.⁴⁰⁶

- 26.22 Similarly, a relationship property dispute will not stop claims for relief under the Companies Act 1993 regarding companies in which both partners hold shares, including interim relief in an injunction,⁴⁰⁷ and prejudiced shareholder claims under section 174 of the Companies Act.⁴⁰⁸ While shares in a company can be relationship property, assets of a company are not.⁴⁰⁹

Is this problematic?

- 26.23 Sometimes a partner may, in addition to a PRA claim, have a claim under another area of the law at the end of a relationship. While this may create some procedural problems (especially if the Family Court does not have jurisdiction under that other area of law), we do not think that the PRA should legislate for all possible eventualities. In other parts of this Issues Paper we explore options to extend the application of the PRA in specific circumstances. In particular in Part G we consider whether the PRA should apply to trust property. However outside these specific circumstances, we think it is appropriate that former partners should continue to be able to exercise rights under the ordinary rules of common law and equity, or claims under another statute, when the PRA does not apply.

⁴⁰⁵ *[LC] v H* [2013] NZHC 294, [2013] NZFLR 658. See also *K v S* [2014] NZHC 2765, involving debt recovery proceedings brought by the defendant's former partner, and by the former partner's parents, as trustees of a family trust.

⁴⁰⁶ See *Shailer v Shailer* [2015] NZHC 250 and *R L Humphries Trustee Ltd v Humphries* [2016] NZHC 57. Proceedings against trusts are discussed in greater detail below.

⁴⁰⁷ In *S v B* [2013] NZHC 497 the parties were in a de facto relationship and had recently separated. They were directors and equal shareholders in a company. The defendant threatened to close down the business, and the plaintiff applied to the High Court for an interim injunction to prevent the defendant from doing so. The Court considered the underlying relationship property dispute but at [8] determined that was not sufficient to persuade the Court that the injunction should not be made.

⁴⁰⁸ In *B v F* [2012] NZHC 722, [2012] NZFLR 661 a property dispute arose following the parties' separation, but the claims were made as between two trusts. One claim was for relief under s 174 of the Companies Act 1993 in respect of a company that was allegedly held for the equal benefit of the two trusts. The High Court, adopting the decision in *Jew v Jew* [2003] 1 NZLR 708 (HC), considered at [37] it had jurisdiction to hear the claims, and that the effect of s 4(4) of the Property (Relationships) Act 1976 (PRA) was not to oust the jurisdiction of any court hearing proceedings which are not brought under the PRA, but that the court hearing the proceeding must determine any issue relating to relationship property as if it had been raised in proceedings brought under the PRA.

⁴⁰⁹ *[LC] v B* [2012] NZHC 898 at [23].

Issues with the Family Court’s jurisdiction

26.24 While section 22(1) of the PRA states that “every application under this Act must be heard and determined in a Family Court”, there are limits regarding:

- (a) the PRA’s application to property disputes at the end of a relationship; and
- (b) the Family Court’s jurisdiction to hear and determine such disputes.

26.25 These limits mean that sometimes the Family Court may not have the jurisdiction to resolve all property disputes that arise at the end of a relationship. In these cases, further proceedings in different courts may be necessary. This gives rise to a further issue: the limited role of the High Court in PRA proceedings. This is a particular concern in relation to proceedings involving trusts. We discuss these issues below.

Issue 1: Can the Family Court decide whether a valid trust exists?

26.26 The PRA only applies to property that is owned by one or both partners unless it expressly provides otherwise.⁴¹⁰ This means that property held on trust in which neither partner holds a beneficial interest is normally excluded from the PRA.⁴¹¹ In Part G we discuss the limited exceptions to this rule and the different actions and remedies that exist outside the PRA in respect of trust property.

26.27 A separate issue is whether the Family Court can, when hearing an application under the PRA, determine whether a valid trust exists. This issue can arise in at least two scenarios:

- (a) Where one partner claims that the person who settled the property on the trust (the settlor) and the trustee intended to create different rights and obligations to those set out in the trust deed. In that case there is a

⁴¹⁰ *Jew v Jew* [2003] 1 NZLR 708 (HC) at [38]; and *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [63].

⁴¹¹ Section 4B of the Property (Relationships) Act 1976 provides that nothing in ss 4 or 4A affects the law applying to partners acting as trustee, thus preserving the law relating to trusts. See Nicola Peart “Equity in Family Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1205. While the Family Court has the power under s 33(3)(m) of the PRA to make an order varying the terms of any trust (other than a trust under a will or other testamentary disposition), that does not confer on the Court an originating jurisdiction. That is, orders under s 33 “may only be made if they are necessary or expedient to give effect or better effect to orders made pursuant to ss 25–32: *B v M* [2005] NZFLR 730 (HC) at [223] referring to *Munro v Munro* [1997] NZFLR 620 (FC) at 622.

“sham” and the trust is therefore invalid. If a trust is declared invalid it means that no trust exists, and the property reverts back to the settlor. If the settlor was a partner, then that property may be subject to the rules of division under the PRA.

- (b) Where one partner claims that trust property is subject to an institutional constructive trust⁴¹² for the benefit of one of the partners. If a constructive trust exists, the partner’s beneficial interest in that trust may be subject to the PRA’s rules of division.

26.28 In *Yeoman v Public Trust Ltd* the High Court explored the extent of the Family Court’s powers under the PRA.⁴¹³ It explained:

- (a) Division of relationship property under the PRA includes inventory-taking, ascertaining relationship debts, applying division provisions under Part 4 of the PRA and making orders under Part 7.⁴¹⁴
- (b) At the inventory stage, the Family Court considers whether the item is “property” within the definition in section 2 of the PRA, whether one or both partners has a beneficial interest in that item,⁴¹⁵ and whether the interest is relationship property or separate property.⁴¹⁶ When the Family Court identifies property beneficially owned by one or both of the partners it applies the general rules of property law, including statute law, the common law and equity.⁴¹⁷
- (c) The Family Court’s function at the inventory stage is declaratory only. It simply recognises and identifies the property interests held beneficially by the partners. It does not make orders conferring new rights.⁴¹⁸

⁴¹² An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the court simply recognises in a declaratory way, as opposed to a remedial constructive trust, which is imposed by the court as an equitable remedy. See *Fortex Group Ltd (in rec, in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) discussed in *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [36]. The Court of Appeal has, in a series of recent decisions, confirmed that a constructive trust can be imposed over trust property: see *Murrell v Hamilton* [2014] NZCA 377 at [22]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [71]; and *Hawke’s Bay Trustee Company Ltd v Judd* [2016] NZCA 397.

⁴¹³ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC).

⁴¹⁴ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

⁴¹⁵ Applying the definition of “owner” in s 2 of the Property (Relationships) Act 1976, which means “the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity”.

⁴¹⁶ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [33].

⁴¹⁷ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [35].

⁴¹⁸ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [36] and [38]. The court at [36] referred to the Court of Appeal decision in *Fortex Group Ltd (in rec, in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173, and the distinction between

- (d) If an asset is in the apparent ownership of one or both partners, and a third party contends that he or she has an interest in that asset, the Family Court can determine the extent of the third party's interest at the inventory stage.⁴¹⁹
- (e) However, when the Family Court determines which property interests are relationship property, its decision binds only the partners. It does not make determinations that bind third parties.⁴²⁰
- (f) If one party contends there are assets which belong in the relationship property pool but those assets are in the apparent ownership of a third party, separate proceedings outside the PRA may be required in order to establish relevant beneficial ownership.⁴²¹

26.29 The High Court in *Yeoman* then explained how the Family Court's inventory function under the PRA operates regarding trust property.⁴²² It said the Family Court can, at the inventory stage, declare the extent of rights held by the partners regarding trust property, and whether those rights constitute relationship property under the PRA. The Court makes that determination "as between the partners."⁴²³ In the common case where a partner is one of the trustees, and the trustees contend that the partners have no beneficial interest in the trust property, the Court observed:⁴²⁴

As the situation arises so often, it would be unfortunate if separate proceedings had to be taken in another court to determine the extent of any beneficial ownership. In many cases it should be

an institutional constructive trust, which arises by operation of the principles of equity and whose existence the court simply recognises in a declaratory way, and a remedial constructive trust, which is imposed by an order of the court and would not exist without such an order.

⁴¹⁹ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [43]. See for example *M v N FC Opotiki* FAM 2002-047-42, 18 September 2008. In that case, the respondent claimed at [7] that his legal interest in a residential property was held as a trustee of a constructive or express trust for his mother, and therefore the Family Court did not have jurisdiction under the Property (Relationships) Act 1976 (PRA) to make declarations as to the ownership of that property. The Court rejected that argument, noting at [19] that it is a fundamental function of the Court to determine whether or not the disputed property comes within the definition of relationship property under the PRA. See also *L v P HC Auckland CIV-2010-404-6103*, 17 August 2011, where the High Court suggested that the Family Court may be able to determine third party property interests where there has been an intermingling of third party property with property subject to the PRA. In that case the High Court confirmed at [65] that the Family Court was able to determine the interest that a child of the parties held in the family home in circumstances where the appellant had received an inheritance for the benefit of the child, but had invested it in the family home.

⁴²⁰ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [39].

⁴²¹ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [40].

⁴²² *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [44]-[45].

⁴²³ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [60].

⁴²⁴ *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [45].

possible for the Family Court to make findings that bind only the relationship partners as parties to the proceeding and that decide the extent of beneficial ownership of trust assets. Such findings could not bind the trustees, but they may still be adequate to ascertain the extent of assets to be brought into account for a division of relationship property.

26.30 A similar observation was made by the High Court in *F v F*:⁴²⁵

It is not unusual for the Family Court to have to determine whether either or both of the parties have, during a relationship, acquired a beneficial or equitable interest in property nominally owned by a third party, including trustees. The PRA requires the Family Court to make such determinations and to then bring any property into account between the parties when determining entitlements under the PRA. There is no limit to the Family Court's jurisdiction in this regard.

The limits on jurisdiction for the Family Court only become a potential problem if either of the parties is seeking to obtain judgment against a third party, including trustees, based on a claim in equity such as constructive trust.

26.31 Accordingly, the Family Court's inventory-taking function under the PRA involves the identification of partners' beneficial property interests. But case law is inconsistent on whether, when performing this function, the Family Court can determine the validity of a trust when that is disputed between the parties.

26.32 In *F v W* the High Court considered that the Family Court did not have jurisdiction to declare a trust a sham in PRA proceedings.⁴²⁶ It said that if Parliament had intended to give the Family Court a statutory jurisdiction to declare a trust to be a sham it would have said so.⁴²⁷ In the absence of any clear statutory direction, only the High Court could do so, exercising its inherent jurisdiction.⁴²⁸ A different conclusion was reached in *B v X*.⁴²⁹ After noting the decision in *F v W*, the High Court held there was no problem of jurisdiction for the Family Court to consider whether a trust is a sham. To do so is to apply the common law of fraud, and the Family Court, as a statutory court, has the jurisdiction to find

⁴²⁵ *F v F* [2015] NZHC 2693 at [102]–[103].

⁴²⁶ *F v W* (2009) 2 NZTR 19-024 (HC) at [29]–[31].

⁴²⁷ *F v W* (2009) 2 NZTR 19-024 (HC) at [33].

⁴²⁸ *F v W* (2009) 2 NZTR 19-024 (HC) at [31] and [34].

⁴²⁹ *B v X* [2011] 2 NZLR 405 (HC).

facts, including detecting fraud, when examining the dealings of the parties.⁴³⁰

- 26.33 The case law is also inconsistent as to whether the Family Court has jurisdiction to decide if property is held on constructive trust. The High Court in *F v W*, while stating that the Family Court could not declare a trust a sham, did consider that it could determine whether a constructive trust existed over trust property.⁴³¹ In contrast is *Clark v Clark*.⁴³² In that case, the partners had lived together on a farm which was held on trust. Following their separation Mrs Clark filed PRA proceedings in the Family Court and also sought a declaration in the High Court that the farm was held for Mr Clark on either an express or institutional constructive trust. The High Court noted that it “is necessary for her to obtain such an order if she is to obtain any property relationship order in relation to the [farm].”⁴³³ The PRA application was transferred by the Family Court to the High Court who dealt with the issues together, finding that the farm was held on an institutional constructive trust in favour of Mr Clark and that it was therefore his separate property, and within the scope of the PRA.
- 26.34 These issues were also addressed in the more recent case of *F v F*, where the High Court had to consider if the Family Court could deal with various challenges to the validity of a trust.⁴³⁴ It said that:⁴³⁵

Mr Knight suggested that the evidence before the Court provides a basis for allegations of equitable claims “by way of alter ego, sham and tracing.” These are not causes of action. Rather, they are matters which the Court may have to consider in determining what property is owned by the parties personally, what dispositions may have occurred in relation to that property and how the ultimate value of that property should be brought into account between the parties on application of the PRA. The Family Court is well used to dealing with such issues. In that context, it is not unusual for the Family Court to have to

⁴³⁰ *B v X* [2011] 2 NZLR 405 (HC) at [72]–[75].

⁴³¹ *F v W* (2009) 2 NZTR 19-024 (HC) at [40]–[42]. The court does not explain why the Family Court has jurisdiction to resolve constructive trust claims but not claims of a sham.

⁴³² *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534.

⁴³³ *Clark v Clark* [2012] NZHC 3159 at [15].

⁴³⁴ *F v F* [2015] NZHC 2693.

⁴³⁵ *F v F* [2015] NZHC 2693 at [45].

determine whether property is truly held on an express trust or a constructive trust.

- 26.35 At the time of writing, the Court of Appeal has not had to rule on the Family Court’s jurisdiction to determine whether property in dispute is held on an express trust or a constructive trust.

Issue 2: Does the Family Court have a general civil jurisdiction?

- 26.36 The PRA operates as a partial code, so sometimes a partner may have a claim in common law or equity against a former partner, or against a third party (for example, where trust property is held by a third party trustee). As we have identified above, it is not clear whether the Family Court has jurisdiction under the PRA to decide issues that arise when property is in the apparent ownership of a third party (such as trust property), and enforce its decision on third parties. Sometimes related claims might also arise outside the PRA, such as claims between partners of misrepresentation or deceit during post-separation property negotiations.⁴³⁶ It is therefore necessary to explore the extent of the Family Court’s general civil jurisdiction to hear and determine such claims alongside PRA proceedings.
- 26.37 The extent of the Family Court’s civil jurisdiction, including its jurisdiction in equity, is unclear and is subject to debate and inconsistent decisions.⁴³⁷

The Family Court’s statutory jurisdiction

- 26.38 The Family Court is established by statute and it only has jurisdiction over those matters conferred on it by statute. It does not have inherent jurisdiction, unlike the High Court. Within its statutory jurisdiction, however, the Family Court has “the right to do what is necessary to enable [it] to exercise functions, powers and duties conferred on [it] by statute” (its “inherent powers”).⁴³⁸

⁴³⁶ See paragraphs 26.20-26.21 above.

⁴³⁷ Bruce Corkill and Vanessa Bruton “Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court” (paper presented to New Zealand Law Society Trusts Conference, 2011) 103 at 103. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Thomson Reuters) at [1.36].

⁴³⁸ *F v W* (2009) 2 NZTR 19-024 (HC) at [33]; and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [24] citing *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA), at 276.

- 26.39 Section 11 of the Family Court Act provides that the Family Court has jurisdiction to hear and determine PRA proceedings and other specific statutes, and “any other enactment for the time being in force”
- 26.40 The Family Court is a division of the District Court,⁴³⁹ and section 16 of the Family Court Act provides:⁴⁴⁰

... the District Court Act 2016 applies, with any necessary modifications, to the Family Court and Family Court Judges in the same manner and to the same extent as it applies to the District Court and District Court Judges.

The District Court Act 2016

- 26.41 The District Court Act 2016 came into force on 1 March 2017, replacing the District Courts Act 1947 (1947 Act). While the provisions set out below were largely carried over from the 1947 Act, subtle differences in the text may have a significant impact on their interpretation, as we discuss below. As at the time of writing, there have been no relevant judicial decisions regarding these new provisions.
- 26.42 The District Court has general civil jurisdiction under section 74 of the District Court Act:⁴⁴¹

74 General civil jurisdiction

- (1) The court has jurisdiction to hear and determine a proceeding—
 - (a) in which the amount claimed or the value of the property in dispute does not exceed \$350,000;
 - (b) that, under any enactment other than this Act, may be heard and determined in the court.
- (2) The amount claimed in a proceeding under subsection (1) may be for the balance, not exceeding \$350,000, of an amount owing after a set-off of any claim by the defendant that is admitted by the claimant.

⁴³⁹ Family Court Act 1980, s 4.

⁴⁴⁰ Family Court Act 1980, s 16(1). In the event of conflict, under s 16(2) the provisions of the Family Court Act prevail. Sections (16)(3) and 16(4) list certain provisions of the District Court Act 2016 that do not apply. These provisions relate to the Chief District Court Judge (s 24), court sessions and adjournments (s 72), and appeals to the High Court (ss 125–130).

⁴⁴¹ This replaced s 29 of the District Courts Act 1947.

26.43 Section 4 defines “proceeding” as “any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application.”⁴⁴²

26.44 The District Court Act confers a broad equitable jurisdiction on the District Court under section 76:⁴⁴³

76 Jurisdiction in equity

- (1) Subject to other provisions in this Act, the court has the same equitable jurisdiction as the High Court.
- (2) However, the court does not have jurisdiction under subsection (1) to hear and determine a proceeding in which the amount claimed or the value of the property that is the subject of the proceeding exceeds \$350,000.
- (3) Subsection (1) does not apply if an enactment (other than section 12 of the Senior Courts Act 2016) expressly provides that the proceeding is a proceeding or class of proceeding that another court has jurisdiction to hear and determine.
- (4) Despite subsection (3), the court may make orders under section 49 of the Administration Act 1969.

26.45 The District Court Act also provides, at section 84:⁴⁴⁴

84 Remedies

Subject to section 109, in a proceeding a Judge may, in the same way as a Judge of the High Court in the same or a similar proceeding,—

- (a) grant remedies, redress, or relief:
- (b) dispose of the proceeding:

⁴⁴² This definition remained unchanged from the District Courts Act 1947 definition, in s 2.

⁴⁴³ This replaced s 34 of the District Courts Act 1947, which provided that the District Courts have:
[...] the same equitable jurisdiction as the High Court to hear and determine any proceeding (other than a proceeding in which the amount claimed or the value of the property claimed or in issue is more than \$200,000):
[...]

⁴⁴⁴ Section 84 of the District Court Act 2016 replaced s 41 of the District Courts Act 1947, which was entitled “General ancillary jurisdiction”, and provided that:
Every court, as regards any cause of action for the time being within its jurisdiction, shall (subject to the provisions of section 59) in any proceedings before it—
(a) grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional; and
(b) give such and the like effect to every ground of defence or counterclaim equitable or legal,—
as ought to be granted or given in the like case by the High Court and in as full and as ample a manner.
Section 84 is subject to s 109 of the District Court Act, relating to the operation of equity and good conscience in proceedings in which the amount claimed or the value of property in issue does not exceed \$5,000.

- (c) give effect to every ground of defence or counterclaim, whether legal or equitable.

26.46 The parties to a proceeding can also consent to the extension of the District Court's jurisdiction:⁴⁴⁵

81 Extension of jurisdiction by consent

- (1) This section applies to a proceeding (including a proceeding in admiralty) that, apart from this section, the court would not have jurisdiction to hear and determine because the amount of the claim or the value of the property or relief claimed or in issue exceeds the monetary limit of the court's jurisdiction.
- (2) If the parties to the proceeding or to a counterclaim in the proceeding consent,—
 - (a) the monetary limit of the court's jurisdiction is extended, for the purposes of the proceeding, to the limit of the amount of the claim or the value of the property or relief claimed; and
 - (b) the court may hear and determine the proceeding on that basis.

The Family Court's civil jurisdiction - the competing authority

26.47 There is competing authority as to whether section 16 of the Family Court Act, which provides that the District Court Act applies to the Family Court and Family Court Judges, confers the District Court's civil and equitable jurisdiction on the Family Court. As we explain below, two separate lines of High Court authority have developed on this issue. One line of authority is that the Family Court has the same equitable jurisdiction as the District Court, and that the Family Court can exercise its District Court jurisdiction contemporaneously. Another line of authority, however, firmly states that the Family Court does not have the civil and equitable jurisdiction of the District Court, although it has jurisdiction to grant equitable relief. We explore these decisions below. We do so chronologically, to understand the developments that have taken place over time.

26.48 In *Granville v Grace*, the District Court determined that the Family Court did not have the jurisdiction in equity conferred on the District Court by section 34 of the 1947 Act (now section 76 of

⁴⁴⁵ Section 81 of the District Court Act 2016 replaced s 37 of the District Courts Act 1947.

the District Court Act), to identify and enforce a constructive trust in relationship property proceedings:⁴⁴⁶

The jurisdiction of the Family Court is circumscribed by the Family Courts Act 1980 and the Matrimonial Property Act 1963 (now repealed) and the Matrimonial Property Act 1976 [now the PRA]. It does not have wider jurisdiction. It is not possible, as I understand it, for the Court to exercise jurisdiction in equity, independent of those codes...

The proceedings have been brought in the Family Court, not in the civil jurisdiction of the District Court, and it is that choice which is the obstacle to relief. Section 11(1) of the Family Courts Act does not clothe the Family Court with any form of jurisdiction under the District Courts Act. The District Courts Act does not confer such jurisdiction so s 11(2) does not assist either. The civil jurisdiction of the District Court must be invoked expressly, and the proceedings brought under the District Courts Rules 1992 before a remedy can be given in equity.

- 26.49 The Court did not consider the effect of section 16 of the Family Court Act.
- 26.50 In *Burt v Skelley*, the High Court had to consider the slightly different question of whether the Family Court could grant equitable relief in proceedings under the Family Protection Act 1955.⁴⁴⁷ Therefore *Granville v Grace*, which considered the question of equitable jurisdiction, did not assist.⁴⁴⁸ The Court in *Burt v Skelley* held that the Family Court had jurisdiction to grant equitable relief, in that case to make an order based on the equitable remedy of tracing:⁴⁴⁹

The relevant provision is s 16 of [the Family Court Act] applying the generality of the District Courts Act 1947, with necessary modifications, to Family Courts. That importation into the Family Court structure brings with it s 41 of the District Courts Act 1947 [now s 81 of the District Court Act 2016] conferring general ancillary jurisdiction. The effect is that the Family Court, as regards the Family Protection Act cause of action within its jurisdiction has power (indeed obligation), to grant “such relief, redress, or remedy...” as would be granted in like case by the High Court. This is not conferring additional basic jurisdiction, such

⁴⁴⁶ *Granville v Grace* [1995] NZFLR 905 (DC) at 909–910. The District Court considered that, while it had wide ranging jurisdiction in equity under s 34 of the District Courts Act 1947, the obstacle to relief was the applicant’s decision to bring proceedings in the Family Court, rather than the District Court.

⁴⁴⁷ *Burt v Skelley* (1998) 17 FRNZ 152 (HC).

⁴⁴⁸ *Burt v Skelley* (1998) 17 FRNZ 152 (HC) at 158.

⁴⁴⁹ *Burt v Skelley* (1998) 17 FRNZ 152 (HC) at 157–158.

as the spectre of criminal jurisdiction, but merely conferring an ancillary jurisdiction as to relief necessary for the Family Court to act effectively. That is the nature of an equitable tracing order. It is ancillary relief of a procedural character, necessary at times to enable the effective resolution of a cause of action separately established.

26.51 In *Singh v Kaur*, the High Court considered the wider issue of the Family Court’s jurisdiction to deal with civil matters, including claims in equity.⁴⁵⁰ Specifically, it considered the Family Court’s jurisdiction to consolidate a District Court claim for exemplary damages with a Family Court proceeding under the PRA. The High Court undertook an extensive consideration of the statutory provisions and the case law. Regarding section 11 of the Family Court Act, the Court observed:⁴⁵¹

Section 11 lists proceedings which must be heard and determined by Family Court Judges (who are also District Court Judges pursuant to s 5); that is the effect of subs (2). But importantly, s 11 does not exclude Family Court Judges from exercising any of the powers of District Court Judges; it simply requires that proceedings under specified enactments are to be heard and determined only by District Court Judges who are also Family Court Judges.

26.52 The High Court considered the decision in *Granville v Grace*, but preferred the approach of the High Court in *Pedersen v Vaughan*.⁴⁵² There the High Court had determined that a power vested in the District Court could also be exercised by the Family Court contemporaneously.⁴⁵³ The High Court in *Singh v Kaur* held:⁴⁵⁴

In my view there is nothing in the Family Courts Act 1980 which limits the jurisdiction of the Family Court and Family Court Judges so as to exclude the jurisdiction they exercise as District Court Judges. Rather, as Master Williams [in Pedersen v Vaughan] concluded, the jurisdiction conferred on the Family Court by s 11 of the Act is “super-added” to the general jurisdiction of the District Court. By s 16 the provisions of the

⁴⁵⁰ *Singh v Kaur* [2000] 1 NZLR 755 (HC).

⁴⁵¹ *Singh v Kaur* [2000] 1 NZLR 755 (HC) at [30] (emphasis added).

⁴⁵² *Pedersen v Vaughan* [1990] NZFLR 203 (HC).

⁴⁵³ *Pedersen v Vaughan* [1990] NZFLR 203 (HC) at 208:

When one considers those provisions as a whole, the implication which they strongly give is that a Family Court Judge, who must also be a District Court Judge, can sit in both capacities, simultaneously, and contemporaneously exercise the jurisdiction of the Family Courts and the District Courts. That is to say, the implication is that Parliament intended the special jurisdiction of the Family Court should be superadded to the general jurisdiction of the District Court.

⁴⁵⁴ *Singh v Kaur* (1999) [2000] 1 NZLR 755 (HC) at [31].

District Courts Act 1947 apply to the Family Court except where there is conflict with the Family Courts Act... Thus, Part III of the District Courts Act 1947 which confers jurisdiction on the District Court (and importantly with relevance to this case and most of the decided cases referred to above, the equity jurisdiction of the District Court conferred by s 34 of the District Courts Act), applies to Family Courts and Family Court Judges.

26.53 On this approach, the Family Court retained the civil jurisdiction of the District Court and in appropriate circumstances could exercise that jurisdiction contemporaneously with its specialist jurisdiction under the Family Court Act.⁴⁵⁵ The decision in *Singh v Kaur* has been applied in several subsequent cases.⁴⁵⁶

26.54 In *F v W*, discussed above, the High Court reached a different conclusion. It did not refer to the decision in *Singh v Kaur*. It noted that the Family Court had often considered that it had jurisdiction in equity (to declare a trust a sham in PRA proceedings),⁴⁵⁷ but it considered that such jurisdiction came from the High Court's inherent jurisdiction, and that:⁴⁵⁸

The ability to grant remedies in equity is not the equivalent of having inherent jurisdiction in the Family Court to declare a trust a sham. This Court is not bound by Family Court decisions which have effectively held otherwise. I respectfully do not agree with those conclusions as to jurisdiction. The District and Family Courts jurisdiction arises from statute. Inherent jurisdiction is vested only in the High Court. I do not accept that s 34 of the District Courts Act applies.

26.55 On this view, the Family Court could not set aside a trust on the basis of, and make a declaration that, it is a sham. That required

⁴⁵⁵ *Singh v Kaur* [2000] 1 NZLR 755 (HC) at [38]–[39].

⁴⁵⁶ Including by the High Court in *Perry v West* HC Auckland M1331-SD00, 8 September 2000 at [7], and by the Family Court in *C v C* (No 2) [2006] NZFLR 908 (FC) at [36]; *O v S* (2006) 26 FRNZ 459 (FC) at [75] (following *C v C* (No 2)); *A v B* FC Timaru FAM-2005-076-276, 30 June 2006 at [2]; and *M v N* FC Opotiki FAM 2002-047-42, 18 September 2008 at [13]–[14] and *D v P* [2013] NZFC 1254 at [97]. In *D v P*, the Family Court held at [100] that, while the Family Court could exercise the District Court's civil jurisdiction contemporaneously, an application seeking to have a constructive trust imposed under the District Court's civil jurisdiction needed to have been filed in the District Court before it could be consolidated with Family Court proceedings. However, this seems contrary to the earlier High Court decision in *Pedersen v Vaughan* [1990] NZFLR 203 (HC), which confirmed the Family Court could exercise a power vested in the District Court even in circumstances where proceedings had been filed in the Family Court.

⁴⁵⁷ *F v W* (2009) 2 NZTR 19-024 (HC) at [29].

⁴⁵⁸ *F v W* (2009) 2 NZTR 19-024 (HC) at [31] (emphasis added). The court at [35] did not consider this conclusion was inconsistent with *Burt v Skelley*, as in that case “their Honours expressly stated that it was not a question of whether s 34 applied.” One commentator suggests that the court in *F v W* misinterpreted *Burt v Skelley*. In *Burt v Skelley* the court did not have to consider s 34 at all, because the Family Court in that case already had jurisdiction under s 11, and the issue of a tracing order was ancillary to that primary jurisdiction. Therefore it was not a question of whether s 34 “applied”, it was simply not relevant in that case. See Andrea Manuel “Why the Family Court has jurisdiction in equity” New Zealand Lawyer (New Zealand, 17 June 2011) at 10–11.

an exercise of inherent jurisdiction by the High Court.⁴⁵⁹ However, as noted above, the Court considered that the Family Court had jurisdiction to determine whether a constructive trust should be imposed on trust property.⁴⁶⁰ The Court did not explain the Family Court’s source of jurisdiction for considering constructive trust claims.

- 26.56 While the High Court’s conclusion in *F v W* regarding jurisdiction to declare a trust a sham has not been followed subsequently,⁴⁶¹ its conclusion in relation to the Family Court’s equitable jurisdiction was followed by the High Court in *Yeoman v Public Trust Ltd*, which determined:⁴⁶²

[Section 34 of the District Courts Act 1947] cannot be used to confer jurisdiction on the Family Court for a cause of action founded in equity. Under s 2 of the District Courts Act:

proceeding means any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application:

Section 34 accordingly applies only to civil proceedings. Section 11(1) of the Family Courts Act does not expressly confer a civil jurisdiction on the Family Court. “Any other enactment for the time being in force” in s 11(1)(h) is not a reference to s 34. Section 34 confers an equitable jurisdiction on the District Court, but further words are required to confer on the Family Court the civil jurisdiction of the District Court. Those further words are absent. No doubt Parliament intended s 11(1)(h) to operate eiusdem generis – to apply only to family law statutes conferring jurisdiction on the Family Court.

- 26.57 The High Court in *Yeoman* placed an emphasis on the word “proceeding” in section 34 of the 1947 Act, and its definition in section 2, in determining that section 34 applied only to “civil proceedings”. The word “proceeding” did not appear in section 41. The replacement of the 1947 Act with the District Court Act 2016 challenges this interpretation. In particular, section 76, conferring equitable jurisdiction on the District Court, no longer refers to “proceeding”, but the section conferring ancillary jurisdiction to

⁴⁵⁹ *F v W* (2009) 2 NZTR 19-024 (HC) at [34]

⁴⁶⁰ *F v W* (2009) 2 NZTR 19-024 (HC) at [40]–[42].

⁴⁶¹ As discussed above, in *B v X* [2011] 2 NZLR 405 (HC) the High Court came to a very different conclusion to that in *F v W*, on the basis that it was not a question of whether the Family Court had jurisdiction in equity, but rather, the law of sham is part of the common law of fraud, and the Family Court, as a statutory court, has the necessary jurisdiction to find facts and detect fraud: *B v X* [2011] 2 NZLR 405 at [72]–[75].

⁴⁶² *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC) at [27]–[28].

grant equitable relief does (these sections are set out above). If the interpretation of the 1947 Act rested on the word “proceeding”, as suggested in *Yeoman*, then applying that interpretation to the 2016 Act could cause the unworkable situation where the Family Court has equitable jurisdiction, but not the power to grant equitable relief.

26.58 In another decision of the High Court one week after *Yeoman* was decided, a different conclusion was reached. In *L v P* the High Court confirmed that the Family Court “has the equitable jurisdiction of the District Court, which equitable jurisdiction is the same as the equitable jurisdiction of the High Court.”⁴⁶³ In that case the Family Court Judge had jurisdiction in PRA proceedings to make orders creating an interest in the family home in favour of a trustee for the child of the partners.⁴⁶⁴ The decision in *F v W* was cited in relation to a separate point in that decision,⁴⁶⁵ but not as authority on the question of the Family Court’s jurisdiction. The High Court in *F v F* took a similar approach. There, discussed below, the Court proceeded on the basis that the limits on the Family Court’s jurisdiction in equity were the same as those on the District Court.⁴⁶⁶

26.59 The competing High Court authorities have been considered by the Family Court, in *C v C*⁴⁶⁷ and *F v O*.⁴⁶⁸ In *C v C* the Family Court preferred the approach in *B v X*, and doubted the Family Court lacked jurisdiction in equity to consider constructive trust claims.⁴⁶⁹ However, in *F v O* the Family Court determined that:⁴⁷⁰

[The decision in F v W] is not confined to the Court’s jurisdiction to find that a trust is a sham: the essential finding is that the Family Court has no jurisdiction of any kind as to the validity of trusts.

⁴⁶³ *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [81].

⁴⁶⁴ *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [85]. This was in circumstances where the child’s inheritance had been invested in the family home.

⁴⁶⁵ *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at [21] affirming the Family Court’s discussion on continuous relationships for the purposes of the Property (Relationships) Act 1976 in *F v W* (2009) 2 NZTR 19-024 (HC) at [49].

⁴⁶⁶ *F v F* [2015] NZHC 2693 at [40] and [104], where the court said, “If such a claim [against a third party based on a claim in equity] is for an amount or for property of a value in excess of \$200,000, it might be necessary to pursue that claim in the High Court.”

⁴⁶⁷ *C v C* FC Rotorua FAM-2007-063-652, 29 April 2011.

⁴⁶⁸ *F v O* [2012] NZFLR 541 (FC).

⁴⁶⁹ *C v C* FC Rotorua FAM-2007-063-652, 29 April 2011 at [17]–[19] and [26].

⁴⁷⁰ *F v O* [2012] NZFLR 541 (FC) at [84].

26.60 Uncertainty as to the jurisdiction of the Family Court in equity has also been recognised in several High Court decisions. In *H v H*, the High Court recognised that Judges of the Family Court “are Judges of the District Court and have, with necessary modifications, the same jurisdiction”,⁴⁷¹ but it did not have to confirm the extent of the Family Court’s jurisdiction to determine the equitable claims, as the value of the disputes in issue exceeded the District Court’s statutory limit.⁴⁷² In *F v O* the High Court declined to address whether the Family Court has jurisdiction to determine the validity of trusts, instead determining that appeal on different grounds.⁴⁷³

Discussion

26.61 Two separate lines of High Court authority have developed on the Family Court’s jurisdiction in equity.⁴⁷⁴ On one line of authority, the Family Court has the same equitable jurisdiction as the District Court, and the Family Court can exercise its District Court jurisdiction contemporaneously: *Pedersen v Vaughan, Singh v Kaur, Perry v West, L v P, F v F*. That would enable the Family Court to deal with any equitable claims in PRA proceedings. Another line of authority, however, firmly states that the Family Court does not have the civil and equitable jurisdiction of the District Court, although it has jurisdiction to grant equitable relief: *Burt v Skelley, F v W, Yeoman v Public Trust*. On that line of authority, separate proceedings in the High Court would probably be necessary to resolve equitable claims arising in PRA proceedings.

26.62 Commentators have questioned the High Court’s interpretation of the relevant statutory provisions in *F v W* and the distinction

⁴⁷¹ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [44].

⁴⁷² *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [48] where the court said,

“Whatever the doubts may be as to the jurisdiction of the Family Court as to equity and trusts, it is quite apparent that it is more probable than not that the disputes between these parties will include applications for relief in equity in respect of assets exceeding \$200,000.”

⁴⁷³ *F v O* [2012] NZHC 1021 at [88].

⁴⁷⁴ A related issue is whether the Family Court can, irrespective of the conflicting authority, consider related claims in equity with the parties’ consent under s 81 of the District Court Act 2016. In several Family Court decisions it was determined that the parties could consent to the Family Court determining claims in equity contemporaneously with Property (Relationships) Act 1976 proceedings: *Q v Q* (2005) 24 FRNZ 232 (FC) at [163]; *C v C* FC Rotorua, FAM-2007-063-652, 29 April 2011; and *H v H* FC North Shore FAM-2010-044-1909, 17 June 2011 at [32]–[35]. This was confirmed in *F v F* [2015] NZHC 2693 at [102]–[108]. In *F v W* (2009) 2 NZTR 19-024 (HC), however, the High Court at [31] rejected the idea that the parties could validly consent to the Family Court determining whether a trust was a sham, as it was not given on the basis that there was a waiver to the absence of jurisdiction, because the parties believed jurisdiction in fact existed.

drawn between equitable jurisdiction and equitable remedies, but note there is scope for judicial interpretation:⁴⁷⁵

[W]e do not have the benefit of [the Judge's] express views on why s 16(1) of the Family Courts Act 1980, which as noted above provides "the District Courts Act 1947 shall apply, with any necessary modifications, to Family Courts and Family Court Judges in the same manner and to the same extent as it applies to District Courts and District Court Judges", does not mean that s 34 of the District Courts Act 1947 – a provision of the District Courts Act 1947 – applies to Family Courts and Family Court Judges in the same manner and to the same extent as it applies to District Courts and District Court Judges. With respect, that would appear to be the obvious position. Perhaps it can be inferred that His Honour's answer is that a modification is "necessary" so that only the provisions of the District Court Act 1947 that are properly characterised as powers, and not those provisions that confer jurisdiction, apply to the Family Courts. But if that was right, Parliament could have easily stated that was the case. Equally, however, Parliament could have specified in s 11 of the Family Courts Act 1980 – that is, the provision entitled "Jurisdiction of the Family Courts" – that the Family Courts have the same jurisdiction as District Courts. Instead, Parliament has placed the link to the District Courts Act 1947 in a different provision (which admittedly leaves, as borne out by F v W, scope for judicial interpretation). It is arguable that Parliament meant to do something other than confer jurisdiction on the Family Court in s 16 (otherwise it would be in s 11).

26.63 Whatever the correct interpretation, this lack of certainty is problematic. It is already resulting in inconsistent decisions on jurisdiction, and it creates opportunity for delay and dispute on the proper forum for resolving the issues. If the Family Court does not have substantive jurisdiction in equity, then where trust property is in issue, it may not have jurisdiction to resolve all the claims before it in PRA proceedings. This could require dual proceedings in the Family Court and High Court, which again has consequences in terms of cost and delay.

⁴⁷⁵ Andrew Butler "The Family Court's jurisdiction to deal with equitable matters" in Mark O'Regan and Andrew Butler "Equity and Trusts in a Family Law Context" (paper presented to New Zealand Law Society Family Law Conference, November 2011) 269 at 295–296. See also Andrea Manuel "Why the Family Court has jurisdiction in equity" *New Zealand Lawyer* (New Zealand, 17 June 2011) at 10–11.

Issue 3: Should the Family Court have jurisdiction under the Trustee Act 1956 and Companies Act 1993?

- 26.64 A further jurisdictional limitation on the Family Court is its lack of jurisdiction under the Trustee Act 1956⁴⁷⁶ and the Companies Act 1993.⁴⁷⁷
- 26.65 Trust law in New Zealand is contained in both case law and statute, and some of the court's powers relating to trusts are contained in the Trustee Act. The provisions of the Trustee Act relate mainly to the administration of trusts and their oversight by the High Court. The High Court's powers include the power to appoint new trustees,⁴⁷⁸ to authorise dealings with trust property,⁴⁷⁹ to authorise variations of a trust,⁴⁸⁰ to review the actions of trustees,⁴⁸¹ and to relieve a trustee from personal liability for any breach of trust.⁴⁸²
- 26.66 These powers could be engaged where a difficult separation has affected the administration of a trust. A partner could invoke the High Court's supervisory jurisdiction under the Trustee Act to ensure the trust is being properly administered. The High Court's powers do not, however, enable it to divide and distribute the trust property between the partners. Distributions of trust property under a discretionary trust will remain at the discretion of the trustees. Applications to the High Court to appoint a new trustee or concerning any trust property can only be made by a trustee or a person with a beneficial interest in the trust property.⁴⁸³ The usefulness of the Trustee Act for partners who have separated may be limited.

⁴⁷⁶ Section 2 of the Trustee Act 1956 defines "court" to mean the High Court. The Court of Appeal in *Morris v Templeton* (2000) 14 PRNZ 397 (CA) confirmed at [9] that the equitable jurisdiction of the District Court under s 34 of the District Courts Act 1947 did not extend to granting relief under s 73 of the Trustee Act.

⁴⁷⁷ Section 2 of the Companies Act 1993 defines "court" to mean the High Court of New Zealand.

⁴⁷⁸ Trustee Act 1956, s 51.

⁴⁷⁹ Trustee Act 1956, s 64.

⁴⁸⁰ Trustee Act 1956, s 64A.

⁴⁸¹ Trustee Act 1956, s 68.

⁴⁸² Trustee Act 1956, s 73.

⁴⁸³ Trustee Act 1956, s 67. Note that a person with a beneficial interest in trust property does not include a beneficiary with a discretionary interest only.

The Law Commission’s review of trust law and the resulting Trusts Bill

26.67 The Law Commission observed in its review of the law of trusts that the lack of jurisdiction under the Trustee Act (regarding the District Court) causes inconvenience and difficulty.⁴⁸⁴ The Commission noted that perhaps the District Court’s equitable jurisdiction under the District Courts Act 1947 regarding trusts “is rendered ineffective” because it cannot make orders under the Trustee Act.⁴⁸⁵ For example, while the District Court has jurisdiction to hear claims for breach of trust, it cannot grant relief under section 73 of the Trustee Act to indemnify a trustee from personal liability.⁴⁸⁶ A separate application to the High Court is necessary. As the Law Commission observed:⁴⁸⁷

This is not a satisfactory situation because two separate courts will have to consider the same salient facts and make determinations. It may also effectively force such breach of trust cases into the High Court notwithstanding that there are relatively modest sums involved purely to avoid a multiplicity of proceedings.

26.68 The Commission recommended that both the District Court and the Family Court should have jurisdiction under the new trusts legislation.⁴⁸⁸ It observed that the Family Court is required to consider aspects of trust law when they arise in PRA proceedings or the Family Protection Act 1955.⁴⁸⁹ The Commission considered

⁴⁸⁴ Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at [3.12].

⁴⁸⁵ Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* NZLC IP28, 2011) at [3.12].

⁴⁸⁶ This is illustrated in the Court of Appeal decision in *Morris v Templeton* [2000] 14 PRNZ 397 (CA). In that case beneficiaries brought proceedings against a trustee in the District Court alleging that the trustee had breached his trust by investing funds in unauthorised securities. The District Court Judge found for the applicants that the trustee had breached his trust, but then purported to exercise the discretion given to the High Court under s 73 of the Trustee Act 1956 and excuse the trustee from personal liability for losses suffered as a result of the breach. The beneficiaries appealed. Eventually the case reached the Court of Appeal, which held at [9] that “[t]he Legislature specifically reserved the power to grant relief under s 73 to the High Court.”

⁴⁸⁷ Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* NZLC IP28, 2011) at [3.14].

⁴⁸⁸ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 194–196. The Commission observed in its Issues Paper *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at [3.40] that a line of High Court cases had confirmed that the provisions of the Family Court Act 1980 and District Courts Act 1947 “do not confer the District Court’s substantive equitable jurisdiction under section 34 on the Family Court.” It cited *Singh v Kaur* [2000] 1 NZLR 755 (HC); *Perry v West* HC Auckland M1331-SD00, 8 September 2000; *F v W* (2009) 2 NZTR 19-024 (HC); and *Yeoman v Public Trust Ltd* [2011] NZFLR 753 (HC). However, as we discuss above, we consider that there are now in fact two distinct lines of High Court cases (including the more recent cases of *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 and *F v F* [2015] NZHC 2693), which calls into question whether this view is correct. Clearly, there is uncertainty.

⁴⁸⁹ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.19].

that the Family Court should have the same powers as the District Court under the new trusts legislation to better deal with matters properly before it and reduce the need for parties to bring subsequent proceedings in the High Court.⁴⁹⁰ Accordingly it recommended that the Family Court be able to exercise powers and make orders under new trusts legislation as an ancillary jurisdiction, to provide a remedy where a matter is already within its jurisdiction:⁴⁹¹

We recommend that the Family Court should be able to make orders under the new Act where these are necessary during the proceedings to protect or preserve any property or interest that is the subject of those proceedings until the issues are fully resolved by the court. Our recommendation would allow the Family Court to, for example, make an order removing one trustee and appointing (even on a temporary basis) a new independent trustee where this is necessary to manage serious deadlock, hostility between trustees, ascertain the nature of the trust assets, or to preserve those assets until the property claims of the parties can be properly resolved.

- 26.69 The Commission also recommended that the Family Court have the power to make orders, with the consent of the parties, to resolve a closely related dispute or issue between the parties where this is necessary, or would better promote the resolution of the substantive proceedings between parties.⁴⁹² This would give the Family Court power beyond its ordinary jurisdiction to resolve closely related trust matters with the consent of the parties, therefore avoiding the need for a separate hearing.⁴⁹³
- 26.70 In August 2017 the Government introduced the Trusts Bill to Parliament.⁴⁹⁴ The Bill includes the following provision, implementing the Commission's recommendations regarding Family Court jurisdiction:

136 Jurisdiction of Family Court

- (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.

⁴⁹⁰ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.22].

⁴⁹¹ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.25].

⁴⁹² Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.26].

⁴⁹³ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, Wellington, 2013) at [13.26].

⁴⁹⁴ Trusts Bill 2017 (290-1).

- (2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—
 - (a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or
 - (b) to give proper effect to any determination of the proceeding.
- (3) Where the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute between the parties that is closely related to the proceeding (but only if the Family Court considers that making the order is necessary or desirable to assist the resolution of the proceeding).
- (4) Despite subsections (2) and (3), the Family Court does not have jurisdiction to appoint a receiver to administer a trust under section 130.
- (5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.

26.71 The Government notes that this provision will give the Family Court the tools necessary to deal with trust matters closely related to proceedings properly before it, reducing the need for parties to bring subsequent proceedings in the High Court to resolve disputes.⁴⁹⁵

Jurisdiction under the Companies Act

26.72 Occasionally end of relationship disputes will involve companies, and one or both partners may seek to rely on the remedies under the Companies Act. This could include interim remedies to prevent one partner from operating in a way not in the best interests of the company,⁴⁹⁶ or for relief as a shareholder in that company.⁴⁹⁷

⁴⁹⁵ Ministry of Justice Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement (August 2017) at 28.

⁴⁹⁶ For example *S v B* [2013] NZHC 497.

⁴⁹⁷ Section 174 of the Companies Act 1993 enables a shareholder to apply for relief where the acts of the company have been, are or are likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her. See for example *B v F* [2012] NZHC 722.

- 26.73 The Family Court has no jurisdiction to hear claims under the Companies Act. However it is not clear this is an issue that interferes with resolving relationship property disputes as inexpensively, simply and speedily as is consistent with justice.⁴⁹⁸ This is for several reasons. First, unlike dispositions of property to a trust, which results in the complete alienation of that property (and its value), the value of company assets are ordinarily reflected in their share value. Company shares are property under the PRA and are therefore potentially divisible as relationship property.
- 26.74 Second, there appears to be a clearer distinction between issues of ownership of company shares (which can be relationship property) and issues about the control and management of a company, including company assets, which are governed by the Companies Act. While there could be scenarios where separate proceedings are required under the PRA and the Companies Act (for example where partners run a company together), the issues will be distinct. At this point we are not aware of any problems arising with the Family Court's lack of jurisdiction under the Companies Act.⁴⁹⁹

Summary of issues with the Family Court's jurisdiction

- 26.75 The issues identified above affect the ability of the Family Court to hear and determine all issues that may arise in PRA proceedings. By far the most significant issue is the Family Court's jurisdiction regarding trust property. Trusts are now widely used in New Zealand to hold property, including the family home. The PRA broadly recognises that when property is transferred to a trust, it is no longer the separate property of the partners, nor is it

⁴⁹⁸ Property (Relationships) Act 1976, s 1N(d).

⁴⁹⁹ During Parliament's consideration of the 2001 amendments the question was raised as to whether the Family Court should have jurisdiction under the Trustee Act and Companies Act, but the Ministry of Justice, advising the Parliamentary select committee considering the Matrimonial Property Amendment Bill observed:

Proceedings under the 1976 Act are concerned with the division of property between spouses. Proceedings concerning breaches of directors' or trustees' duties and the like are of a different character altogether, although there will be some interrelationship if the shares are matrimonial property or there is jurisdiction to exercise powers under proposed new sections 44A–44F. The relevant considerations and the implications for third parties (including trustees, directors, shareholders and beneficiaries) who may also need to be represented take such proceedings well beyond the scope of matrimonial property proceedings which are essentially family disputes. Accordingly we do not consider it appropriate that such extended powers are granted.

See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 30–31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill – Departmental Report* (16 August 2000) at 26.

relationship property. However the availability of several remedies (within and outside of the PRA) recognises that sometimes it is appropriate that trust property (or its representative value) is brought into account between the partners for division under the PRA. The adequacy of these remedies is the focus of Part G of this Issues Paper.

- 26.76 In this section we have canvassed the limitations on the Family Court's jurisdiction to grant those remedies. This includes the PRA's limited jurisdiction regarding third party and trust property, the unresolved question on its ability to hear and determine claims in equity, including constructive trust claims against third party trustees, and its lack of jurisdiction under the Trustee Act 1956 to ensure the proper administration of trusts while property issues are being resolved. The effect of these limitations is that multiple proceedings under different areas of law and potentially in different courts may have to resolve partners' property disputes when they separate. This increases costs to the parties, will likely result in delay in proceedings and risks inconsistent findings of fact.
- 26.77 We discuss options to address these issues after our discussion of issues with the High Court's jurisdiction.

Issues with the High Court's jurisdiction

- 26.78 The issues with the Family Court's jurisdiction discussed above highlight another matter – the limited role of the High Court in PRA proceedings.

Issue 4: Should the High Court have greater oversight of PRA proceedings?

- 26.79 As discussed at the start of this chapter, prior to 2001 the High Court enjoyed concurrent jurisdiction with the Family Court to hear and determine PRA proceedings. The 2001 amendments abolished concurrent jurisdiction, restricted the grounds for transferring proceedings from the Family Court and removed the High Court's power to hear and determine transfer applications itself.⁵⁰⁰ These amendments reflected a deliberate policy

⁵⁰⁰ *Corbitt v Rowley* [2009] NZFLR 676 (HC), confirming that there is no jurisdiction for the High Court to order the transfer of proceedings.

decision that the Family Court should hear and determine PRA proceedings, balanced by a limited exception for particularly complex cases to be transferred to the High Court. While the extent of the High Court’s jurisdiction under the PRA was revisited as part of the Family Court Review, resulting in changes to the test for transfer, concerns remain that it is too difficult to have complex PRA proceedings transferred to the High Court.⁵⁰¹

- 26.80 The issue is whether Parliament’s deliberate decision to limit the role of the High Court in PRA proceedings remains appropriate, and whether the right balance has been achieved.

Test for transferring proceedings to the High Court

- 26.81 Under the 2001 amendments, PRA proceedings could only be transferred to the High Court where a Family Court Judge was satisfied that the High Court was “the more appropriate venue for dealing with the proceedings, because of their complexity or the complexity of a question in issue in them.”⁵⁰² Initially the Family Court took a fairly restrictive approach to transfer applications. It interpreted Parliament’s intention as being that proceedings should be heard in the Family Court “where at all possible.”⁵⁰³ Transfers were, therefore, rare.⁵⁰⁴ However, that restrictive approach was rejected by the High Court in *H v H*⁵⁰⁵ and *J v J*.⁵⁰⁶ In *H v H* the High Court confirmed that:⁵⁰⁷

The safest course when applying statutory criteria is not to gloss them. The statutory test is not a simple complexity test. The test includes complexity but requires a characterisation and evaluation of the complexity against consideration of whether or not the High Court is the more appropriate venue. A case might be very complex but still quite appropriate for the Family Court.

⁵⁰¹ Concerns were raised, for example, during the Law Commission’s review of the law of trusts. See *Ministry of Justice Regulatory Impact Statement: A New Trusts Act – Agency Disclosure Statement* (August 2017) at 28.

⁵⁰² Property (Relationships) Act 1976, s 22(3) (repealed by the Property (Relationships) Amendment Act (No 2) 2013).

⁵⁰³ See *Sanders v Sanders* FC Auckland FAM-2009-004-1777, 4 November 2009, where the Court observed at [21] that Parliament “intended where at all possible for all first instance proceedings under the Act to be dealt with in the Family Court” and that “[i]t follows that there will be only a very limited number of cases which are sufficiently complex to justify transfer.”

⁵⁰⁴ Vivienne Crawshaw “Jurisdiction Issues – Should I Stay or Should I go?” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 2.

⁵⁰⁵ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [23].

⁵⁰⁶ *J v J* [2012] NZHC 2292 at [20].

⁵⁰⁷ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [29] adopted in *J v J* [2012] NZHC 2292 at [19].

- 26.82 In *J v J* the High Court confirmed that the test requires an assessment of the relative appropriateness of each court to deal with the particular proceedings.⁵⁰⁸ In making that assessment, due recognition should be given to the specialist nature of the Family Court and the warranting of judges as being suitably qualified to sit in that jurisdiction.⁵⁰⁹ There is no particular onus on the party applying for transfer.⁵¹⁰ There is no jurisdiction to transfer proceedings simply because the parties agree to a transfer.⁵¹¹
- 26.83 Complex or novel legal or factual questions will not justify a transfer to the High Court. The question is whether the High Court is more appropriate than the Family Court to deal with those questions. In *J v J* the High Court observed that the Family Court is often called upon to rule upon issues not previously determined by a higher court.⁵¹² Nor is complexity determined by the amount at stake.⁵¹³ Similarly, valuation issues will not usually be of such complexity to justify a finding that the High Court is better equipped to determine such matters. Family Court Judges can be expected to be experienced in addressing valuation issues in the PRA framework.⁵¹⁴ The High Court has also doubted whether the likelihood of further appeals due to complex or novel questions, the value at stake or the distance between the parties' positions would justify a transfer of proceedings, noting that any pre-trial assessment of the prospect of appeal is likely to be highly speculative.⁵¹⁵
- 26.84 The complexity test may be satisfied where there is a challenge to the Family Court's jurisdiction to resolve all related issues. In *H v H*, the High Court concluded it was the more appropriate venue as the proceedings involved a challenge to the Family Court's jurisdiction to deal with equitable claims regarding property

⁵⁰⁸ *J v J* [2012] NZHC 2292 at [21].

⁵⁰⁹ *J v J* [2012] NZHC 2292 at [21].

⁵¹⁰ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [30].

⁵¹¹ *J v J* [2012] NZHC 2292 at [32]. The Family Court is not empowered to make an order for transfer unless it is satisfied that the grounds for transfer have been made out.

⁵¹² *J v J* [2012] NZHC 2292 at [25].

⁵¹³ *J v J* [2012] NZHC 2292 at [25]. The court noted that, if the novelty of the question or the amount at issue were factors favouring a determination that it is appropriate to transfer proceedings to the High Court, Parliament could be expected to have said so. See also *C v C* FC Rotorua FAM-2007-063-000652, 29 April 2011 where the Family Court noted at [12] that the proceeding had always been a complex case involving a number of trusts and companies, but that there was nothing particularly noteworthy which differentiated that case to a number which have been heard by the Family Court and which are still before the Family Court. In that case an application to transfer proceedings to the High Court was declined.

⁵¹⁴ *J v J* [2012] NZHC 2292 at [24].

⁵¹⁵ *J v J* [2012] NZHC 2292 at [29].

exceeding \$200,000 in value.⁵¹⁶ Also relevant was the Family Court’s lack of inherent jurisdiction and its inability to exercise powers under the Trustee Act.⁵¹⁷ The High Court observed that, had proceedings not been transferred, the result could have been multiple and overlapping proceedings before the Family Court and High Court contemporaneously, which contradicts the principle of inexpensive, simple and speedy resolution of relationship property disputes enshrined in section 1N(d) of the PRA. In principle, the Court considered that one judge should be seized of such a complex dispute as that involved before him.⁵¹⁸

26.85 The grounds for transferring proceedings were expanded in 2014,⁵¹⁹ but the central question remains whether the High Court is a more appropriate venue than the specialist Family Court.⁵²⁰ Section 38A now provides that proceedings may be transferred if a Family Court Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings, having regard to:

- (a) the complexity of the proceedings or of any question in issue in the proceedings;
- (b) any proceedings before the High Court that are between the same parties and that involve related issues; and
- (c) any other matter that the judge considers relevant in the circumstances.

26.86 The new test was expected to lower the barriers to transfer.⁵²¹ Family Court data demonstrates that there has been an increase in the number of cases transferred to the High Court, but the numbers remain small.

Number of PRA Proceedings Transferred from the Family Court to the High Court												
2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
3	5	4	12	5	9	11	9	8	6	17	15	15

⁵¹⁶ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [35]–[48].

⁵¹⁷ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [48].

⁵¹⁸ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

⁵¹⁹ Property (Relationships) Amendment Act (No 2) 2013.

⁵²⁰ *A v B* [2015] NZHC 1113, [2015] NZFLR 379 at [26] citing *J v J* [2012] NZHC 2292 at [21].

⁵²¹ Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note) at 3. See also RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.17] and Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [13.29].

26.87 Two decisions under the new section 38A suggest that transfers may continue to be rare. In *H v H*, the Family Court refused an application to transfer proceedings to the High Court, despite accepting these were complex proceedings.⁵²² Mrs H claimed that the relationship property comprised assets of up to \$100 million in value, which were held in at least 28 trusts and 12 companies, while Mr H argued the relationship property was near \$10,000 in value.⁵²³ In that case greater weight was given to the anticipated additional costs associated with the High Court hearing the proceedings and the impecunious position of Mrs H, particularly because of Mr H's unwillingness or inability to pay the "substantial" spousal maintenance awarded in her favour.⁵²⁴ The Family Court Judge considered that it would be "inequitable to force Mrs [H] to litigate in a forum that she is unable to afford, particularly when that inability is directly related to Mr [H]'s failure to pay spousal maintenance that has been ordered."⁵²⁵ It noted, however, that should Mrs H file proceedings in the High Court seeking to establish constructive trusts, then these proceedings should be conducted from that point in the High Court.⁵²⁶

26.88 In *F v F*, the High Court upheld the Family Court's decision refusing to transfer proceedings to the High Court.⁵²⁷ That case involved a challenge to a settlement agreement and issues on the use of property owned by Mr or Mrs Fisher to acquire trust property. The High Court observed these are claims which the Family Court regularly deals with as part of its specialist jurisdiction.⁵²⁸ The appellant challenged the Family Court's jurisdiction to deal with all issues raised in the proceeding, arguing that the case involved consideration of whether there was a constructive trust and issues of tracing, the value of which might exceed the limit on the District Court's jurisdiction.⁵²⁹ The High Court observed that the potential for separate proceedings in that Court could be considered, however, the mere possibility

⁵²² *H v H* [2015] NZFC 635 at [24].

⁵²³ *H v H* [2015] NZFC 635 at [9]–[11].

⁵²⁴ *H v H* [2015] NZFC 635 at [39] and [42].

⁵²⁵ *H v H* [2015] NZFC 635 at [42].

⁵²⁶ *H v H* [2015] NZFC 635 at [42].

⁵²⁷ *F v F* [2015] NZHC 2693.

⁵²⁸ *F v F* [2015] NZHC 2693 at [44].

⁵²⁹ *F v F* [2015] NZHC 2693 at [35]. This case proceeded on the basis that the Family Court had the same equitable jurisdiction as the District Court.

of such a claim or a mere statement of intention to bring such a claim is “likely to be of little consequence” and.⁵³⁰

For this to be a significant consideration there should be some real and substantial evidential basis for such a claim. There should be at least a high likelihood that such a claim will eventuate.

26.89 The High Court also considered that it was relevant that the parties could agree to the Family Court hearing such claims under what is now section 81 of the District Court Act 2016. The possibility of such an agreement, and the appellant’s failure to consider or pursue that possibility, was “another reason why the decision over transfer should not be made on the basis that there will inevitably be proceedings that can be dealt with only in the High Court.”⁵³¹

26.90 Further, the Court was not convinced by an argument that the High Court was more appropriate because of its case management protocols and the potential for proceedings to come to hearing earlier:⁵³²

I am not satisfied that the implicit criticisms of the Family Court are justified or that such benefits would necessarily result from the transfer of the proceedings to the High Court.

26.91 These decisions suggest that the threshold for transferring cases to the High Court will remain high. There must be clear evidence that the High Court is the more appropriate venue, while having regard to the Family Court’s specialist expertise in PRA proceedings. Until questions on the Family Court’s jurisdiction to determine the validity of express trusts and of constructive trusts (either under the PRA or in equity) are resolved, however, there may continue to be uncertainty and inconsistency in decisions.

⁵³⁰ *F v F* [2015] NZHC 2693 at [41].

⁵³¹ *F v F* [2015] NZHC 2693 at [108].

⁵³² *F v F* [2015] NZHC 2693 at [111]. In contrast the High Court in *J v J* [2012] NZHC 2292 considered that there was force to the submission that the case management procedures in the High Court would enable the parties to have the comfort of a known hearing date and enable a tidier disposal of interlocutory issues. However, it was noted at [30] that the Family Court Judge had not accepted that the Family Court was not capable of giving the matter a fixture at least as soon as one could be obtained in the High Court, and had indicated that he had given directions to ensure the case received appropriate administrative attention from registry staff.

Issue 5: Should there be a right of appeal for interlocutory decisions?

26.92 Section 39 of the PRA provides a right of appeal to the High Court regarding Family Court decisions to:⁵³³

- (a) make or refuse to make an order; or
- (b) dismiss the proceedings; or
- (c) otherwise finally determine the proceedings.

26.93 While section 39 refers to any decision to “make or refuse to make an order”, this has been interpreted by the High Court to mean only orders that finally determine proceedings:⁵³⁴

That section confers a right of appeal in respect of orders finally determining proceedings under the Act. While paragraph (a) is not, on the words of that paragraph, limited to orders which finally determine some substantive right of the parties, the use of the word “otherwise” in paragraph (c) makes it clear that paragraph (a) extends only to the making of an order, or the refusal to make an order, which has the effect of finally determining the proceedings. Interlocutory orders are not included.

26.94 This suggests that orders made during the case management or trial aspects of proceedings may not be appealable under the PRA. This might include any orders made prior to the final determination, including interim distributions of property under section 25(3), orders restraining the disposition of property under section 43, and transfer decisions under section 38A,⁵³⁵ all of which may have important consequences for one or both parties.

26.95 There is, however, authority that section 124 of the District Court Act 2016⁵³⁶ provides a right of appeal against interlocutory orders.⁵³⁷ Appeals under section 124 are heard in the same manner as appeals under section 39 of the PRA.⁵³⁸

⁵³³ Property (Relationships) Act 1976, s 39(1).

⁵³⁴ *Dunsford v Shanly* [2012] NZHC 257 at [7] applying *E v E* [2005] NZFLR 806 (HC) and *Crick v McLraith* HC Dunedin CIV 2004-412-37, 1 June 2004.

⁵³⁵ However we note the High Court in *F v F* [2015] NZHC 2693 proceeded on the basis that s 39 of the Property (Relationships) Act 1976 applied to allow an appeal against the refusal to order a transfer.

⁵³⁶ Formerly s 72 of the District Courts Act 1947.

⁵³⁷ *E v E* [2005] NZFLR 806 (HC); *G v G* [2007] NZFLR 27 (HC); *Dunsford v Shanly* [2012] NZHC 257; and *J v P* [2013] NZHC 557.

⁵³⁸ That is, both are general appeals heard by way of rehearing. The principles in the Supreme Court decision of *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 apply.

- 26.96 Regardless of the right of appeal under the District Court Act, this is one area that calls for reform. Sometimes an interlocutory decision may be of such importance that an appeal is appropriate. Arguably it is not desirable to have two sources of appeal rights, one under the PRA for final decisions and one under the District Court Act for interim decisions.

CONSULTATION QUESTION

H21 Should section 39 of the PRA be amended to provide for a right to appeal interlocutory decisions under the PRA? If so, should there be guidance as to what interlocutory decisions are appealable?

Options for reforming the jurisdiction of the Family Court and High Court

- 26.97 We think that all property disputes arising at the end of a relationship should be decided by the same court, at the same time. This is consistent with the principle that all questions arising under the PRA “should be resolved as inexpensively, simply and speedily as is consistent with justice.”⁵³⁹ Existing issues with the Family Court’s jurisdiction, in particular to determine issues regarding trust property, and the limited role of the High Court, risk the need for multiple proceedings to resolve related property disputes. This increases costs, will likely delay proceedings and risks inconsistent findings of fact. Reform is called for so that “all issues can be placed before the appropriate Court(s) and dealt with in a principled coherent way.”⁵⁴⁰

- 26.98 The real question is whether, when there are issues outside the PRA that arise in the context of PRA proceedings, that court should be the Family Court or the High Court. The options for reform fall into two broad categories. They favour either providing the Family Court, as a specialist court, with all the powers to hear and determine PRA proceedings and related issues, or a broader role for the High Court in PRA proceedings, so the High Court’s wider jurisdiction can be called upon. There are valid arguments to support both approaches. In recent history Parliament has favoured the latter approach, by making changes in 2014 that

⁵³⁹ Property (Relationships) Act 1976, s 1N(d).

⁵⁴⁰ Bruce Corkill and Vanessa Bruton “Trustee Litigation in the Family Context: Tools in the Family Court, and Tools in the High Court” (paper presented to New Zealand Law Society Trusts Conference, 2011) 103 at 106.

were intended to ease the transfer of proceedings to the High Court.⁵⁴¹ The question one commentator raises is “whether that ease of movement to the High Court is also a move towards access to justice.”⁵⁴²

26.99 We note that while the options below represent two different approaches, they are not mutually exclusive.

Option 1: Extend the jurisdiction of the Family Court to address current gaps

26.100 The first option is to amend the PRA to ensure the Family Court has jurisdiction to hear and determine related matters in PRA proceedings, including trust claims. There are several aspects to this option:

- (a) **Confirming that the Family Court has civil jurisdiction to hear claims in equity.** This would resolve the current uncertainty discussed above as to whether the Family Court has jurisdiction to hear and determine a claim of constructive trust against a third party trustee. This could be achieved by way of an amendment to the Family Court Act, confirming that the Family Court has the civil jurisdiction of the District Court, including in equity. However this would have wide application and would affect not only PRA proceedings, but all proceedings of the Family Court. Alternatively the PRA could include a provision conferring such jurisdiction on the Family Court only if the claim is related to PRA proceedings.
- (b) **Extending jurisdiction under the PRA to make decisions binding on third parties in limited circumstances.** This would ensure that a Family Court is not limited in its ability to bring trust property into account between the parties when determining entitlements under the PRA, where a third party trustee has legal ownership of the property. It may avoid the need to bring a separate claim in equity against trustees.

⁵⁴¹ Those changes were in the context of a review of the Family Court, however, not a review of the Property (Relationships) Act 1976.

⁵⁴² Vivienne Crawshaw “Jurisdiction Issues – Should I Stay or Should I go?” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 2. Crawshaw concludes, at 10, that ideally, parties to litigation should be able to have all issues relating to the relationship property dispute heard in a local court, by a suitably qualified judicial officer, as speedily and inexpensively as possible.

Such provision would require careful consideration in order to avoid unintended consequences. Given the Court would be determining the third party's beneficial interest in the property, appropriate safeguards must be in place to ensure that party can participate in proceedings. One option would be to amend section 37 to enable claims in respect of property owned by third parties to be dealt with alongside PRA proceedings.

- (c) **Granting the Family Court jurisdiction under the Trustee Act.** As discussed above, the Trusts Bill currently before Parliament proposes to grant the Family Court ancillary jurisdiction to exercise powers under that Bill in PRA proceedings.
- (d) **Granting the Family Court jurisdiction under the Companies Act 1993.** This would give the Family Court an ancillary jurisdiction under the Companies Act, similar to that proposed in the Trusts Bill. However we are not convinced there is a compelling need for the Family Court to have such powers. There appears to be a clearer distinction between issues of ownership of company shares (which can be relationship property) and control and management of a company, including company assets, which is governed by the Companies Act. While there could be scenarios where separate proceedings are required under the PRA and the Companies Act (for example, where partners run a company together), the issues will be separate. At this point we are not aware of any problems arising with the Family Court's lack of jurisdiction under the Companies Act.⁵⁴³

26.101 The advantages of extending the Family Court's jurisdiction in these respects is that it would mean the related issues can be

⁵⁴³ During Parliament's consideration of the 2001 amendments the question was raised as to whether the Family Court should have jurisdiction under the Trustee Act and Companies Act, but the Ministry of Justice, advising the Parliamentary select committee considering the Matrimonial Property Amendment Bill, observed:

Proceedings under the 1976 Act are concerned with the division of property between the spouses. Proceedings concerning breaches of directors' or trustees' duties and the like are of a different character altogether, although there will be some interrelationship if the shares are matrimonial property or there is jurisdiction to exercise powers under proposed new sections 44A–44F. The relevant considerations and the implications for third parties (including trustees, directors, shareholders and beneficiaries) who may also need to be represented take such proceedings well beyond the scope of matrimonial property proceedings which are essentially family disputes. Accordingly we do not consider it appropriate that such extended powers are granted.

See Ministry of Justice *Matrimonial Property Amendment Bill – Departmental Report Clause by Clause Analysis* (2 March 1999) at 30–31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill – Departmental Report* (16 August 2000) at 26.

dealt with in the Court with the specialist jurisdiction in this area, and where the hearing costs are less than in the High Court.⁵⁴⁴ As one practitioner observes, it means that the judge hearing the case will be:⁵⁴⁵

... well aware that the nature of their dispute is not simply ordinary commercial litigation and is conversant with the sensitivities required to manage the previously domestic nature of the parties' relationship and all its attendant emotional turbulence.

26.102 This option also seems consistent with the general approach in the Trusts Bill, which is to grant the Family Court the necessary powers to deal with ancillary matters arising in the context of PRA proceedings. In the context of the Family Court Review, several legal academics and the Auckland District Law Society recommended that the Family Court's jurisdiction be extended so that it may deal with trust and company issues that must currently be dealt with in the District Court or High Court.⁵⁴⁶

26.103 As well as being a specialist court, the Family Court is also more readily accessible than the High Court for those living outside the major cities.

26.104 There is, however, some concern that the Family Court is not resourced to deal with cases involving complex issues of trust law. While Family Court Judges are specialists in the PRA, the High Court has the advantage of experience in dealing with complex issues of variation of trust and tracing.⁵⁴⁷ In its review of the law of trusts, the Law Commission observed that in consultation meetings some practitioners suggested that some members of the Family Court have been operating under a misunderstanding

⁵⁴⁴ These advantages were recognised by the High Court, in relation to the question of whether proceedings should be transferred to that Court, in *F v F* [2015] NZHC 2693 at [107].

⁵⁴⁵ Vivienne Crawshaw "Jurisdiction Issues - Should I Stay or Should I go?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 1-2.

⁵⁴⁶ See Ministry of Justice *Family Court Proceedings Reform Bill: Departmental Report* (April 2013) at 85. Professor Bill Atkin, Professor Mark Henaghan and the Auckland District Law Society all submitted that the Family Court Proceedings Reform Bill amend the Property (Relationships) Act should extend the jurisdiction of the Family Court in respect of trusts and company issues. The Ministry noted that the Law Commission was currently considering the Family Court's jurisdiction in respect of trust issues and recommended that any change to the Family Court's jurisdiction should await the outcome of the Law Commission's review.

⁵⁴⁷ The Family Court's lack of expertise to deal with issues concerning the governance of trusts or companies, or the actions of trustees or directors, was cited by the Ministry of Justice in 1999 as the reason for not giving the Family Court powers under the Trustee Act or the Companies Act. See Ministry of Justice *Matrimonial Property Amendment Bill - Departmental Report Clause by Clause Analysis* (2 March 1999) at 30-31. See also Ministry of Justice *SOP To Matrimonial Property Amendment Bill - Departmental Report* (16 August 2000) at 26. The different expertise of the Family Court and High Court was also recognised, for example, in *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

of trust principles.⁵⁴⁸ They therefore questioned how appropriate it is for Family Court Judges to deal with trust cases. During that review, submissions were evenly divided on the Family Court having jurisdiction under the new trustee legislation.⁵⁴⁹ However, the prevalence of family trusts in New Zealand means that more and more PRA proceedings involve trusts. As the High Court observed in *F v F*, the Family Court regularly deals with claims in relation to trust property as part of its specialist jurisdiction under the PRA.⁵⁵⁰ Not only does this mean that Family Court Judges are now likely to be more familiar with the legal issues this involves, but it may also be difficult to justify a carve out of what is becoming a common aspect of PRA proceedings.

Option 2: Return to concurrent jurisdiction

26.105 The second option is to give the High Court concurrent jurisdiction to hear and determine PRA proceedings, as it had prior to 2001.

26.106 This option would not resolve the issues with the Family Court's jurisdiction, but would instead enable parties to avoid those issues by applying directly to the High Court. The High Court would be able hear and determine all related issues in exercising its inherent jurisdiction (and its jurisdiction under the Trustee Act and Companies Act where appropriate).

26.107 There are several advantages to this option:

- (a) The High Court has supervisory jurisdiction over trusts, and has experience in dealing with complex trust issues.
- (b) The High Court has a more sophisticated set of rules on discovery than the Family Court, enabling tailor-made discovery and utilising electronic technology,⁵⁵¹ and a more comprehensive and arguably efficient case management system. As a result proceedings can be heard and determined more efficiently in the High Court in some cases.⁵⁵² One practitioner notes that, even

⁵⁴⁸ Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Issues Paper* (NZLC IP20, 2010) at [4.56].

⁵⁴⁹ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [13.23].

⁵⁵⁰ *F v F* [2015] NZHC 2693 at [44].

⁵⁵¹ *H v H* [2012] NZHC 537, [2012] NZFLR 688 at [55].

⁵⁵² This was raised as a possible reason to transfer proceedings from the Family Court to the High Court in *F v F* [2015] NZHC 2693, however, the High Court at [111] did not accept that "the implicit criticisms of the Family Court are justified

though the High Court is assumed to be the costlier venue (its filing costs and hearing fees are higher than the Family Court), its case management system often enables the High Court to determine PRA proceedings more cheaply and quickly than the Family Court.⁵⁵³ However these concerns could also be addressed by changes to the Family Court case management procedures, as we discussed in the previous chapter.

- (c) With complex or high value proceedings that are likely to be appealed further, the ability to apply directly to the High Court removes a layer of decision-making and enables parties to appeal to the Court of Appeal by right, without leave.⁵⁵⁴ However, appeals can already be fast-tracked from the Family Court to the Court of Appeal where the case is exceptional.⁵⁵⁵
- (d) This option would be simpler to implement than option 1 (extending the jurisdiction of the Family Court) and would avoid any risk of unintended consequences encompassed within option 1.
- (e) Concurrent jurisdiction may avoid the expense and delay associated with an application to transfer proceedings from the Family Court to the High Court, but not where proceedings are first filed in the Family Court.

26.108 Arguments against concurrent jurisdiction remain largely the same as they did in 2001, when Parliament gave the Family Court sole originating jurisdiction under the PRA.⁵⁵⁶ At that point in time, very few people were choosing to file in the High Court. The arguments against concurrent jurisdiction include:

- (a) The Family Court is a specialist court, with particular expertise in resolving family matters, including PRA

or that such benefits would necessarily result from the transfer of proceedings to the High Court." Similarly, in *H v H* [2015] NZFC 635 the Family Court considered at [37] that it can deal with applications made before it expeditiously.

⁵⁵³ Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

⁵⁵⁴ Decisions of the High Court on appeal from the Family Court can only be appealed to the Court of Appeal with leave, pursuant to s 60 of the Senior Courts Act 2016.

⁵⁵⁵ As in *Z v Z* [1997] 2 NZLR 258 (CA). See s 59 of the Senior Courts Act 2016.

⁵⁵⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 30.

proceedings. It is appropriate that the specialist nature of that Court is recognised.

- (b) Concurrent jurisdiction is sometimes used for tactical advantage, often to disadvantage the poorer partner. PRA proceedings can occur at a time of emotional distress and can have a deeply personal impact on partners. Disputes can be fraught, and power imbalances between the parties can lead to abuse of process, by filing proceedings in the more expensive forum.
- (c) Costs, including filing and hearing costs, are presumed to be lower for proceedings in the Family Court (however as noted above, this may not always be the case). For example, interlocutory applications attract a filing fee of \$200 in the High Court, whereas there is no such fee in the Family Court. In an application to transfer a complex proceeding to the High Court, this was noted as a significant factor in declining the application.⁵⁵⁷

26.109 We also note that applications for spousal maintenance and child support are often heard alongside PRA applications, and in rarer situations, applications to vary a nuptial settlement under section 182 of the Family Proceedings Act 1980.⁵⁵⁸ The Family Court has jurisdiction to hear those applications,⁵⁵⁹ and concurrent jurisdiction under the PRA risks these matters being heard in separate courts.

Option 3: Empower the High Court to transfer proceedings and/or reduce the threshold for transfer

26.110 This option would seek to improve the balance between the Family Court's exclusive jurisdiction and the High Court's limited role in PRA proceedings.

26.111 The High Court can only consider whether PRA proceedings should be heard in that Court on appeal from a decision of the

⁵⁵⁷ *H v H* [2015] NZFC 635 at [41].

⁵⁵⁸ We discuss options for reform with respect to s 182 of the Family Proceedings Act 1980 in Part D.

⁵⁵⁹ Family Court Act 1980, s 11.

Family Court.⁵⁶⁰ The retention of the High Court’s power to hear and determine applications for transfer was considered by Parliament during its consideration of the 2001 amendments, in response to concerns raised by the Chief Justice Dame Sian Elias.⁵⁶¹ The Ministry of Justice, however, in advising the Justice and Electoral Committee, was concerned that:⁵⁶²

Reinstating the power for a party to apply directly to the High Court for transfer would risk negating part of the purpose of the change which is to ensure that the parties do not use High Court jurisdiction for tactical advantage.

26.112 One lawyer also argues there have been conflicting and inconsistent responses to applications to transfer proceedings.⁵⁶³ Where proceedings only involve PRA matters, and there is no question of other proceedings having been filed in the High Court, there is room for judges to form different value judgements about the appropriate forum.⁵⁶⁴

26.113 As we noted above, the courts have interpreted the test for transfer in section 38A to be a relatively high threshold.⁵⁶⁵ Further, the High Court recognises the Family Court’s specialist expertise in determining whether transfer is appropriate. In *Corbitt v Rowley* the High Court observed that:⁵⁶⁶

... the special skill and experience of Family Court Judges, in my view, put them in as good a position as a Judge of the High Court to determine whether the complexity of the issue warrants transfer.

26.114 The High Court in *Fisher v Fisher* similarly observed that:⁵⁶⁷

It is appropriate for me to recognise the specialist experience and knowledge which the Family Court Judge had in making an assessment as to what were likely to be the real issues in the case,

⁵⁶⁰ This was confirmed by the High Court in *Corbitt v Rowley* 27 FRNZ 852 (HC) at [30].

⁵⁶¹ Chief Justice Sian Elias “Submission to the Justice and Electoral Committee on the Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000” at 1.

⁵⁶² Ministry of Justice *Advice to Justice and Electoral Committee: SOP to Matrimonial Property Amendment Bill* (21 September 2000) at 5.

⁵⁶³ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1975 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

⁵⁶⁴ Jan McCartney “Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1975 – and Proposed Changes to Improve Achievement of Resolution” (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, December 2016) at 12.

⁵⁶⁵ See *Fisher v Fisher* [2015] NZHC 2693.

⁵⁶⁶ *Corbitt v Rowley* 27 FRNZ 852 (HC) at [25].

⁵⁶⁷ *Fisher v Fisher* [2015] NZHC 2693 at [8].

how they were likely to be most effectively resolved and whether the High Court was the more appropriate forum for continuing proceedings.

26.115 Because of these cases, it is unclear whether a power to hear an application to transfer proceedings directly would, by itself, effect any change in practice. Accordingly, consideration should also be given to whether the grounds for transfer should be amended, to provide a broader discretion and reduce the threshold for transfer. As we note above, the grounds for transfer under section 38A were only recently reviewed and broadened in 2014, however the overall question remained the same – whether the High Court is the more appropriate venue for hearing the proceedings. Further legislative guidance could be provided as to when this test will be met.

CONSULTATION QUESTIONS

H22 Have we identified all of the issues with the jurisdiction of the Family Court and High Court to determine PRA and related disputes?

H23 Should the Family Court have jurisdiction to determine all issues related to PRA proceedings, in particular to determine issues regarding trust property? (Option 1)

H24 Should the High Court have a broader role under the PRA, to either hear and determine PRA proceedings concurrently with the Family Court (Option 2), or to hear and determine applications to transfer proceedings (Option 3)?

Other jurisdiction issues

Issue 6: How should the courts resolve questions of tikanga Māori?

26.116 Property matters under the PRA, including those where tikanga Māori is especially relevant, may be heard and determined by the Family Court or, in more limited circumstances, the High Court.⁵⁶⁸ These and other courts have developed a number of requirements for the recognition of Māori custom law.⁵⁶⁹ Māori custom law is part of the common law in New Zealand but what constitutes Māori custom or tikanga in any particular case is a question of

⁵⁶⁸ Property (Relationships) Act 1976, ss 38A and 39.

⁵⁶⁹ See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [204]–[220] and [252].

fact for expert evidence, unless the particular tikanga has become notorious by frequent proof and so judicial notice can be taken of it.⁵⁷⁰ Customary rules in issue have been proved in evidence by kaumātua or by academics, by reliance on earlier published decisions of the Māori Appellate Court and in an affidavit filed “by a distinguished New Zealand chief.”⁵⁷¹ In a recent case under the PRA the Family Court relied on expert evidence from a Māori academic relating to taonga.⁵⁷²

26.117 However, there may be other measures that could better enable a court to resolve questions of tikanga Māori. We consider a number of options that may be relevant in the PRA context.

Should the Family Court be able to seek assistance from experts in tikanga?

26.118 David Williams notes that the procedures of the adversarial mode of trial in the general courts may often entail that tikanga Māori elements of cases are overlooked.⁵⁷³ We noted at paragraph 25.17 that the Family Court takes a semi-inquisitorial approach in making its decisions, but that it can only proceed on the evidence that is before it. Expert evidence may not be given to support an assertion of tikanga or may not be of sufficient assistance to the court.

26.119 One option is to enable the Family Court to obtain advice during the proceedings. Under some statutes, judges can request cultural reports to be completed to provide information that may better inform their decisions and this information may include the cultural ties and values of the people concerned.⁵⁷⁴

⁵⁷⁰ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 per Elias CJ at [95]; Richard Boast “Māori Customary Law and Land Tenure” in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.2.5]; and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Justice Joseph Williams “The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1. For discussion on the status of tikanga Māori as the first law of New Zealand with respect to which all other law must be negotiated see Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330; and Valmaine Toki “Tikanga Māori in criminal law” [2012] NZLJ 357 for tikanga Māori in the criminal law context.

⁵⁷¹ Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [205]. See *S v S* [2012] NZFC 2685 and *B v P* [2017] NZHC 338 for recent cases where evidence of tikanga was given.

⁵⁷² *S v S* [2012] NZFC 2685. See Chapter 11 for a discussion of this case. See also Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁵⁷³ David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 41. See also Judge Annis Somerville “Tikanga in the Family Court – the gorilla in the room” (2016) 8 NZFLJ 157 at 159.

⁵⁷⁴ Oranga Tamariki Act 1989, 187; and Care of Children Act 2004, s 133.

- 26.120 In option 7 at paragraph 25.62 above we discussed the ability of the court under section 38 of the PRA to appoint a person to inquire into and report on facts in issue between the parties.⁵⁷⁵ This procedure could be adapted to enable the court to inquire into matters of tikanga.
- 26.121 Another option is to empower the Family Court to appoint cultural advisers to assist, as full members of the court, in particular cases.⁵⁷⁶
- 26.122 The use of experts in tikanga, whakapapa and te reo Māori sitting with judges of the court has significant precedent.⁵⁷⁷ The original statute creating the Māori Land Court, the Native Lands Acts 1862 provided for “assessors” to sit with judges. In practice this meant Māori of chiefly status who sat in an advisory capacity.
- 26.123 There is also precedent in contemporary New Zealand law for experts to sit with the court. Te Ture Whenua Māori Act 1993 (TTWMA) allows experts in tikanga to be involved in the hearing of cases.⁵⁷⁸ In addition, the Commerce Act 1986 requires the High Court to sit with two lay members appointed from a pool of people with relevant experience to hear appeals from Commerce Commission determinations.⁵⁷⁹

Should the Māori Land Court and/or Māori Appellate Court have a role in PRA cases involving questions of tikanga?

- 26.124 The Māori Land Court and/or the Māori Appellate Court and its judges could play an important role in PRA cases involving questions of tikanga. In the Law Commission’s 2004 report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* the Commission stated:⁵⁸⁰

Tikanga, by its very nature, is difficult to define and not universal. The Māori Land Court and the Māori Appellate Court are markedly more appropriate than any other forum in our court

⁵⁷⁵ Property (Relationships) Act 1976, s 38.

⁵⁷⁶ See David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 43–44; see also the recommendation for the Māori Land Court to be able to appoint pū-wananga to assist the court in Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 240–241; and Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at [24.33].

⁵⁷⁷ See discussion in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 193.

⁵⁷⁸ Te Ture Whenua Māori Act 1993, ss 28 and 31–33.

⁵⁷⁹ Commerce Act 1986, ss 52ZA and 77.

⁵⁸⁰ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [342].

structure to make determinations about tikanga. It ignores the very substance of what requires determination to suggest that decisions can simply be made after hearing competing experts give evidence. The adjudicator needs an understanding of the context, beyond fact and precedent. It involves sets of beliefs and values which are subjected to careful and sensitive assessment.

26.125 The Māori Land Court is “essentially a family court where te reo Māori is spoken, and where tikanga is observed in the processes of the court.”⁵⁸¹ Both the Māori Land Court and Māori Appellate Court have specialist knowledge and expertise in matters concerning Māori land, tikanga and customary practices. The procedure of both courts is flexible, and allows a high degree of judicial discretion. Judges are directed to avoid formality, to apply the rules of marae kawa and to encourage the appropriate use of te reo Māori.⁵⁸²

26.126 Justice Durie, (now Sir Edward Taihakurei Durie) former Chief Judge of the Māori Land Court, said in a submission to the 1988 Royal Commission on Social Policy that the Court is both a court of law and one of “social purpose”:⁵⁸³

...as distinct from most courts of law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find solutions for the problems that come before it; to settle differences of opinion so that co-owners might exist with a degree of harmony, to seek a consensus viewpoint rather than to find in favour of one; to pinpoint areas of accord, and to reconcile family groups.

26.127 It has also been suggested by another former Chief Judge of the Māori Land Court that disputes involving Māori communities are of a similar nature, whether they involve land or other property.⁵⁸⁴

26.128 Broadening the role of the Māori Land Court in some PRA cases would be consistent with recent calls to extend its jurisdiction in other areas of family law that concern Māori. During the Government’s review of TTWMA, judges of the Māori Land Court proposed that the jurisdiction of the Māori Land Court be broadened to include claims under the Family Protection Act

⁵⁸¹ Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [368].

⁵⁸² Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [308].

⁵⁸³ As cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191.

⁵⁸⁴ Submission of the Chief Judge of the Māori Land Court cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (2002 NZLC PP52) at 191.

1955 and the Law Reform (Testamentary Promises) Act 1949 concerning Māori land estates.⁵⁸⁵

Enable a Māori Land Court judge to sit in the Family Court

26.129 An option is to enable a judge of the Māori Land Court to sit in the Family Court on PRA matters that are likely to involve questions of tikanga.⁵⁸⁶ Family Court Judges are themselves District Court judges that are by reason of training, experience and personality suitable to deal with matters of family law.⁵⁸⁷ Another example of the cross-warranting of judges can be found under the Resource Management Act 1991 where Māori Land Court Judges can sit as an alternate Environment Court Judge.⁵⁸⁸ This option could utilise the judges' expertise and knowledge of tikanga and may assist with raising the level of understanding of tikanga in the Family Court.

Empower the Family Court to refer questions of tikanga

26.130 Another option is to empower the Family Court to refer a question of tikanga to the Māori Land Court or the Māori Appellate Court for consideration. A process could be adopted similar to section 61 of TTWMA which empowers the High Court to state a case to the Māori Appellate Court on matters of custom. The opinion of the Māori Appellate Court is then binding on the High Court. The Court of Appeal has described this section as giving the High Court access to the expertise of the Māori Appellate Court in respect of matters of fundamental importance, land and tikanga.⁵⁸⁹

⁵⁸⁵ Māori Affairs Select Committee *Te Ture Whenua Māori Bill 2016: Submission for the Judges of the Māori Land Court*, 14 July 2016, at [189]–[191]. in relation to the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 discussed in Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 189.

⁵⁸⁶ It was suggested in submissions to the Law Commission's review of the courts that Māori Land Court Judges could sit in the Family Court in cases involving applications under the Guardianship Act 1968 and the Property (Relationships) Act 1976: see Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 192. The Law Commission subsequently recommended that Māori Land Court Judges be cross-warranted to sit in other primary court jurisdictions (such as the Family Court) as and when appropriate and as resourcing may permit: Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [333] and R119.

⁵⁸⁷ Family Court Act 1980, s 5(2).

⁵⁸⁸ Resource Management Act 1991, s 249(2).

⁵⁸⁹ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [345] citing *Hauraki Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1995] 2 NZLR 702 (CA).

26.131 The Family Court could refer a question of tikanga to the Māori Land Court in the first instance or directly to the Māori Appellate Court. In the Law Commission's report *Delivering Justice for All* the Commission recommended that, in the interests of consistency, efficiency and justice, the expertise of the Māori Appellate Court should be used by all courts where issues of tikanga require determination.⁵⁹⁰

Empower the Māori Land Court and/or Māori Appellate Court to hear PRA cases

26.132 A further option is to grant the Māori Land Court concurrent jurisdiction to hear PRA cases in the first instance. A claimant could have the choice to file their claim either in the Family Court or in the Māori Land Court if there was a question of tikanga.⁵⁹¹ If the parties cannot agree where the case should be heard, the case could be heard by the Family Court by default.

26.133 Alternatively, the Family Court could be empowered to transfer a case to the Māori Land Court, or to the Māori Appellate Court if matters were particularly complex, along the lines of the section 38A process, discussed at paragraphs 26.79 to 26.91 above.

26.134 However, while the Māori Land Court and its judges are specialists in tikanga, there are arguments against the Māori Land Court or Māori Appellate Court hearing PRA cases, including:

- (a) the Family Court is a specialist court, with particular expertise in resolving family matters, including PRA proceedings. It is appropriate that the specialist nature of that Court is recognised;
- (b) the Māori Land Court and Māori Appellate Court do not have expertise in property relationship matters and there may not be many cases where the question of tikanga is the only matter in dispute; and
- (c) the general courts would not be able to build up a body of knowledge of tikanga, which may be useful in other cases, if most or all PRA cases involving a question of

⁵⁹⁰ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [348]–[349].

⁵⁹¹ The Law Commission recently recommended that the Māori Land Court be given concurrent jurisdiction to hear questions about the funeral, burial or cremation of a deceased Māori person: Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at R119.

tikanga were heard in the Māori Land Court or Māori Appellate Court.

Appeals on matters of tikanga

26.135 Appeals from the Family Court in PRA matters are heard by the High Court.⁵⁹² Given the Māori Appellate Court's expertise, it may be appropriate to enable an appeal from the Family Court on a matter of tikanga to be heard by the Māori Appellate Court rather than the High Court. However, the arguments against the Māori Land Court and Māori Appellate Court hearing cases noted in points (b) and (c) of paragraph 26.134 above would also apply in relation to appeals.

CONSULTATION QUESTIONS

H25 Should the Family Court be able to seek assistance from experts in tikanga Māori, such as through powers of inquiry or through the appointment of cultural advisers?

H26 Should the Maori Land Court and/or Maori Appellate Court have a role in PRA cases involving questions of tikanga? If so, should that be through:

- Enabling Māori Land Court Judges to sit in the Family Court?
- Referring questions of tikanga to the Māori Land Court?
- Allowing claimants to file a PRA case involving a question of tikanga in the Māori Land Court?
- Enabling the Family Court to transfer a PRA case involving a question of tikanga to the Māori Land Court, or to the Māori Appellate Court if the matter was complex?

H27 Should appeals from the Family Court on matters of tikanga be heard in the Māori Appellate Court rather than the High Court?

Issue 7: Should the separate regime under the Domestic Actions Act 1975 remain?

26.136 The final issue we identify in this chapter does not relate to the PRA itself, but another statute, the Domestic Actions Act 1975. While our review does not extend to the Domestic Actions Act, the way in which it overlaps with the PRA is of concern and, we think, ought to be addressed.

⁵⁹² Property (Relationships) Act 1976, s 39.

26.137 The Domestic Actions Act was originally introduced to abolish actions for damages for various family-related matters including adultery and breach of a promise of marriage. However Part 2 of that Act also provides for the settlement of property disputes arising out of the termination of agreements to marry. Section 8 of the Domestic Actions Act provides that, where the termination of an agreement to marry gives rise to a property dispute, a party may apply to the Family Court or the High Court for an order that will “restore each party... as closely as practicable to the position that party would have occupied if the agreement had never been made.”⁵⁹³

26.138 The Domestic Actions Act is an uncomfortable fit with the PRA. The two regimes partially overlap, as the Domestic Actions Act can apply to de facto relationships where the partners were engaged.⁵⁹⁴ The difficulty in applying the Domestic Actions Act to this category of relationships was recognised by the Court of Appeal in *Oliver v Bradley*.⁵⁹⁵ The parties were engaged in 1980 and purchased a home together where they lived until their separation in 1984. In relation to the plaintiff’s application under the Domestic Actions Act, the Court of Appeal commented:⁵⁹⁶

My reservation about applying [the Domestic Actions Act] to these circumstances arises from the pending words of subs (1) – “Where the termination of an agreement to marry gives rise to any question between the parties” etc. These parties not only agreed to get married, but they also agreed to live in a “de facto” domestic and sexual relationship, and it was their decision to embark on that which can be seen as leading to the acquisition of the house property and to its maintenance as their family home. Similarly, it was the termination of that relationship which led to the dispute about dividing their property. The concurrent agreement to marry appears to be no more than a facet of that more fundamental association. It seems quite artificial to regard this question about the property as being merely the result of their broken engagement. This is borne out by the difficulties experienced in trying to restore the parties to the position they would have been in if the agreement to marry had never been made, as enjoined by s 8(3).

⁵⁹³ Domestic Actions Act 1975, s 8(3).

⁵⁹⁴ The potential for overlapping claims was recognised by the High Court in *M v D* [2012] NZHC 1152 at [66].

⁵⁹⁵ *Oliver v Bradley* [1987] 1 NZLR 586 (CA).

⁵⁹⁶ *Oliver v Bradley* [1987] 1 NZLR 586 (CA) at 591–592. These reservations have been shared by other courts, for example in *Lee v Mahon* [2002] NZFLR 1136 (FC) at 1140; and *Nye v Reid* [1993] NZFLR 60 (DC) at 62–63.

Rather than introduce into the arena of domestic property disputes a new category of “engaged de factos”, I would prefer to see s 8 confined to what I think is its real purpose – namely, the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship. I do not think the legislation was ever intended to apply to the de facto situation in this case... However, in the absence of any argument about the application of the Act, I content myself only with the expression of these reservations.

26.139 These comments were made in 1987. The Domestic Actions Act has not been updated to reflect the inclusion of de facto relationships into the PRA regime in 2001. It has been described by the High Court as legislation “from another age.”⁵⁹⁷ However, applications under that Act, while uncommon, are still made.⁵⁹⁸ In *A v B*, a case from 2015, the parties were in a de facto relationship and had two children.⁵⁹⁹ Following their separation the plaintiff commenced proceedings under the Domestic Actions Act for the return of items allegedly given to Ms B throughout their relationship, or damages of at least \$126,900. The defendant applied to strike out the Domestic Actions Act application. The High Court, while “very much doubt[ing]” whether the Domestic Actions Act application would succeed, could not strike out the proceeding as, assuming the pleaded facts were true (as required for strike out applications), the claim was not “clearly untenable.”⁶⁰⁰

26.140 The existence of a separate regime for resolving property disputes under the Domestic Actions Act is problematic, as it means a specific category of relationships are subject to two overlapping regimes, each with different aims (restoring the parties to their position but for the engagement under the Domestic Actions Act, as opposed to achieving a just division of relationship property under the PRA). Further, as the High Court has concurrent jurisdiction under the Domestic Actions Act, there is a risk of parallel proceedings in different courts and, as observed in *A v B*,

⁵⁹⁷ *M v D* [2012] NZHC 1152 at [66].

⁵⁹⁸ This is despite the courts having taken a narrow interpretation to its application. Casey J’s observation that s 8 of the Domestic Actions Act 1975 should be confined to property acquired to mark the engagement, or in contemplation of the marriage envisaged by it, has been adopted by the High Court in *Zhao v Huang* [2014] NZHC 132, [2014] NZFLR 782 at [39]; and *Stopforth and Roddick* (1990) 6 FRNZ 392 (HC) at 396.

⁵⁹⁹ *A v B* [2015] NZHC 487.

⁶⁰⁰ *A v B* [2015] NZHC 487 at [29].

the risk of contradictory findings.⁶⁰¹ The regime created under the Domestic Actions Act is also unnecessary. Parties in a qualifying de facto relationship under the PRA can apply to the Family Court for resolution of their property disputes under the PRA, while partners not subject to the PRA but who were engaged to be married may pursue a claim in equity based on constructive trust.⁶⁰²

26.141 Our preliminary view is that Part 2 of the Domestic Actions Act 1975, providing for resolution of property disputes arising out of agreements to marry, should be repealed. Parties would continue to have a claim based on constructive trust, and in respect of qualifying de facto partners, they could apply to the Family Court under the PRA for resolution of their property disputes.

CONSULTATION QUESTION

H28 Should Part 2 of the Domestic Actions Act 1975 be repealed?

⁶⁰¹ *A v B* [2015] NZHC 487 at [32]. A further application to transfer the Domestic Actions Act claim to the Family Court to be heard alongside the Property (Relationships) Act 1976 claim was granted: *A v B* [2015] NZHC 1113, [2015] NZFLR 579.

⁶⁰² In *Oliver v Bradley* [1987] 1 NZLR 586 (CA) at 201 per Henry J the Court of Appeal considered that “an approximately identical result would be achieved whether entitlement is assessed under the Domestic Actions Act 1975 or on a constructive basis”. See also the comments of Cooke P at 198–199.