

Part I: How
should the
PRA recognise
children's
interests?

Chapter 27 – Children and the PRA

Introduction

- 27.1 Many children experience the separation of their parents or caregivers.¹ A smaller number of children will experience the death of one of their parents.² In this part, “children” means minor or dependent children, except where expressly stated.
- 27.2 In this chapter we explore how the end of a relationship affects children, and the role of the PRA in addressing children’s interests. The rest of Part I is arranged as follows:
- (a) In Chapter 28 we look at the case for taking a more child-centred approach in the PRA, and consider who is a “child of the relationship” for the purposes of the PRA.
 - (b) In Chapter 29 we look at what taking a more-child centred approach would look like in practice, with specific options for reform.
- 27.3 Our discussion in this part of the Issues Paper focuses primarily on the division of property following parental separation.³ Different issues might arise on the death of one partner when children are involved. This situation is unlikely to arise as often. Children have different property rights when one parent dies, including possible claims under succession law.⁴ We discuss how the PRA operates on the death of one partner in Part M. Some of

¹ It is difficult to measure rates of relationship separation involving children. In our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3, we identified that in 2016, 42 per cent of all divorces involved children under 17 years, affecting over 6,000 children in total. But this only captures official divorces. Not all married couples who separate will officially divorce. Nor does this capture de facto separations. Given that almost half of all children are now born outside marriage, the number of children affected by de facto separations is likely to be just as high, if not higher, than those affected by divorce.

² In the 2013 Census, 6,606 adults aged 15–49 reported they were widowed or a surviving civil union partner, however it is unknown how many of these people were caring for children, and this does not include surviving de facto partners: Statistics New Zealand “Legally registered relationship status by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006, and 2013 Censuses (RC, TA, AU)” <nzdostatstats.govt.nz>.

³ In this part, we refer to “parental separation” to include the separation of a child’s parents or caregivers.

⁴ Apart from any inheritance a child may receive under the deceased parent’s will, a child may have a claim under the Family Protection Act 1955, Law Reform (Testamentary Promises) Act 1949 and in the case of intestacy, the Administration Act 1969.

the issues and options for reform discussed in this part would, however, also apply when a relationship ends on death.

CONSULTATION QUESTION

I1 Does the way that the PRA operates on the death of one partner raise any specific problems for children?

How does parental separation affect children?

27.4 New Zealand studies observe a steady rate of parental separation in the first few years of a child's life, which means that the number of children experiencing parental separation increases as the children get older.⁵ One recent study of 209 children aged 15 found that only 20 per cent had spent all their childhood living with both biological parents.⁶

27.5 Parental separation is a turbulent time for children. They may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may have to change schools, losing ties with their friends and community. For some children, parental separation is associated with a prolonged period of lower living standards.⁷

⁵ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3. One New Zealand study of over 1,000 children born in 1972–1973 identified that, on average, 2.3 per cent of the children experienced parental separation each year, and that by age 16, 34 per cent had either experienced parental separation or had entered a single parent family at birth: David M Fergusson and L John Horwood “Resilience to childhood adversity: Results of a 21 year study” in Suniya S Luthar (ed) *Resilience and Vulnerability: Adaption in the Context of Childhood Adversities* (Cambridge University Press, Cambridge (UK), 2003) 130 at Table 1. These findings have also been reflected in the early results of the more recent Growing Up in New Zealand study, which identified that, overall, the number of children living in a single parent household is increasing as the children get older (3 per cent lived in a single parent household before birth, rising to five per cent by age two and eight per cent at age four: Susan MB Morton and others *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now we are Four: Describing the preschool years* (University of Auckland, May 2017) at 39.

⁶ Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3, citing JL Sligo and others “The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy” [2016] *Kōtuitui N Z J Soc Sci Online* 1 at 5.

⁷ Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 188. See description of this study and data used at fn 54.

- 27.6 Parental separation affects children differently.⁸ Some children are harmed by their parent's separation while others benefit.⁹ Some experts take the view that:¹⁰

Whether or not the risks for children associated with divorce are actually realised is determined not by the separation itself, but by the complex interplay of other factors that are present before, during, and after separation.

- 27.7 There is some evidence that children whose parents separate are at higher risk of an adverse outcome than children whose parents do not, although the extent of that risk depends on a range of factors.¹¹ Research on parental separation and child outcomes suggests that:¹²

...there is an abundance of evidence that children who experience a parental separation are, on average, worse off than their peers in intact families, on a number of measures of wellbeing. However, the scale of the differences in wellbeing between the two groups of children is not large and most children are not adversely affected. Parental separation then bears down most heavily on a minority of children, generally in the presence of other exacerbating factors.

Underlying these effects are multiple mechanisms: income declines following separation, declines in the mental health of custodial mothers, interparental conflict and compromised parenting. These mechanisms do not operate independently, but are related in complex ways. ...

Part of the effects also arise from non-causal mechanisms: that is to say, not all of the adverse child outcomes following separation can be laid at the door of the separation itself.

⁸ Mark Henaghan "Legally rearranging families: Parents and children after break-up" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 307 at 309.

⁹ Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 257.

¹⁰ Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 257.

¹¹ See Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 66: "Children from separated families typically have from one-and-a-half times to double the risk of an adverse outcome compared to children from intact original families"

¹² Ross Mackay "The Impact of Family Structure and Family Change on Child Outcomes: A Personal Reading of the Research Literature" (2005) 24 *Social Policy Journal of New Zealand* 111 at 127–128. See also Jan Pryor and Bryan Rodgers *Children in Changing Families – Life After Parental Separation* (Blackwell Publishers, Oxford, 2001) at 66.

How do parents care for children after separation?

27.8 Parents have legal obligations to care for their children. The welfare and best interests of the child are the first and paramount consideration under the Care of Children Act 2004, which sets out rules about the guardianship and care of children, and provides that a child's guardians (usually the child's parents) are responsible for providing day-to-care and contributing to the child's intellectual, emotional, physical, social, cultural and other personal development.¹³ The Crimes Act 1961 also imposes a legally enforceable duty on parents and guardians to provide children with necessities (such as food, clothing, housing and medical care) and to take reasonable steps to prevent them from injury.¹⁴ Some parents who do not live with their children, or who share care of their children may have an obligation to pay child support (see paragraphs 27.15 to 27.21).¹⁵ The objects of the Child Support Act 1991 include affirming the obligation of parents to maintain their children, and ensuring that obligations to birth and adopted children are not extinguished by obligations to stepchildren.¹⁶

27.9 Care arrangements for children are likely to change when their parents separate. One parent may become the primary caregiver, or care may be shared, which usually means the children split their time across two different households.¹⁷ Some parents may “live apart” in the same house,¹⁸ or practice “bird’s nest parenting”,¹⁹ so that the children can stay in the family home for

¹³ Care of Children Act 2004, ss 4(1), 5(b) and 16 (in relation to the duties, powers, rights and responsibilities of a guardian of a child). A guardian's responsibilities also extend to determining for or with the child, or helping the child to determine, questions about important matters affecting the child, such as where the child lives, medical treatment, education and identity: ss 16 and 36–38. See also Education Act 1989, ss 20, 24 and 29 in relation to the responsibilities of parents and guardians to enrol children at school and ensure their regular attendance between ages 6 and 16.

¹⁴ Crimes Act 1961, s 152. See also Family Proceedings Act 1980, s 45.

¹⁵ Child Support Act 1991, s 2 definitions of “liable parent” and “receiving carer”; and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

¹⁶ Child Support Act 1991, ss 4(b) and 4(i).

¹⁷ See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017). However information collected on households does not give us information about shared parenting arrangements, as it only counts each child as living in one household, and that is the household where they spend most of their time. A 2012 survey of 8,500 secondary school students found that 29 per cent of students reported that they lived in two or more homes: Adolescent Health Research Group *The Health and Wellbeing of New Zealand Secondary School Students in 2012: Youth' 12 Prevalence Tables* (University of Auckland, 2013) at 31.

¹⁸ For example where a couple's relationship has ended but both partners choose to remain living in the family home for a time to provide stability for the children or for other reasons. See, for example, Colleen Hawkes “Separated couple save \$1500 a week by living together in family home” (29 September 2017) <www.stuff.co.nz>.

¹⁹ “Birds nest parenting” is where the children stay in the family home and the parents rotate in and out of the “nest.” See for example *K v K* [2005] NZFLR 881 (FC) where the court declined an application for exclusive occupation of the family home where the parties had a “nesting” regime. See also Meshel Laurie “My ‘bird-nesting’ arrangement with my ex-

a time. Whānau or extended family may become more involved in care arrangements.²⁰

27.10 Whatever the care arrangements are when parents separate, they will often change over time.²¹ In the period immediately after parental separation, initial arrangements may need modifying as problems surface when arrangements are tried out.²² More broadly, children's needs change as they grow older, and the circumstances of one or both parents may also change (such as a change in job or re-partnering) so that the existing arrangements no longer work for them.²³

27.11 The State provides services for separated parents who cannot agree on how their children are to be cared for, including a free parenting information course, Parenting Through Separation, and access to subsidised Family Dispute Resolution services.²⁴

What financial support is available for parents and caregivers?

27.12 Ideally, future needs should be met without reliance on State support or intervention. Separating parents should be able to agree amongst themselves on how they will meet the needs of any dependent children. Recognising however that it will not always be possible for families and whānau to support themselves when relationships end, the State ensures that there are other means of financial support available. These means of support, described as “pillars”, are discussed in Chapter 2.²⁵ These are maintenance, child support and State benefits. Each addresses a different issue

husband” (3 July 2016) <www.stuff.co.nz>; and Cosima Marriner “Does the ‘bird’s nest parenting’ solution really work?” (13 September 2016) <www.stuff.co.nz>.

- ²⁰ For whānau living in accordance with tikanga Māori, the principle of manaakitanga may guide their involvement with children whose parents have separated.
- ²¹ One Australian study identified that 60 per cent of children whose parents had separated experienced a change in care arrangements in the first five years after parental separation: Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at xvi–xvii.
- ²² Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at 69.
- ²³ Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014) at 69; and Jeremy Robertson, Jan Pryor and Janine Moss “Putting the kids first: Caring for children after separation” (2009) 35 *Social Policy Journal of New Zealand* 129 at 133.
- ²⁴ Family Dispute Resolution is discussed further in Chapter 24 of this Issues Paper. Parents who still cannot agree can ask the Family Court to decide care issues for them.
- ²⁵ See also Joanna Miles and Jens M Scherpe “The legal consequences of dissolution: property and financial support between spouses” in J Eekelaar and R George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 138 at 141.

and together with the PRA they establish a framework of post-separation financial support.²⁶

State benefits

- 27.13 A key State benefit that can meet children’s post-separation needs is Sole Parent Support.²⁷ This is available to a single parent or caregiver with a youngest dependent child under age 14.²⁸ Sole Parent Support is currently \$329.57 (net) per week, subject to an income test.²⁹ Alternative State benefits that may be available to single parents and caregivers include Jobseeker Support (which may replace Sole Parent Support when the youngest dependent child turns 14)³⁰ and the Supported Living Payment.³¹ Other benefits that may be relevant include the Disability Allowance and Temporary Additional Support.³²
- 27.14 Parents and caregivers may also be eligible for housing assistance,³³ subsidies to assist with the cost of childcare³⁴ and Working for Families tax credits.³⁵

Child support

- 27.15 Child support is financial support paid by parents who do not live with their children, or who share care of their children with

²⁶ We discussed maintenance under the Family Proceedings Act 1980 in Chapter 19 of this Issues Paper, under option 3.

²⁷ Sole Parent Support replaced the Domestic Purposes Benefit in 2013.

²⁸ See Social Security Act 1964, ss 20A and 20D. Further information is available at Ministry of Social Development “Sole Parent Support” <www.workandincome.govt.nz>.

²⁹ Social Security Act 1964, s 20G and sch 3A. This amount does not change regardless of the number of children.

³⁰ Social Security Act 1964, s 20H, pt 2 and sch 9. Further information is available at Ministry of Social Development “Jobseeker Support” <www.workandincome.govt.nz>.

³¹ Social Security Act 1964, pt 1E and sch 6. Further information is available at Ministry of Social Development “Supported Living Payment” <www.workandincome.govt.nz>.

³² Further information is available at Ministry of Social Development “Temporary Additional Support” <www.workandincome.govt.nz>.

³³ In the form of State-owned housing or the Accommodation Supplement. See Social Security Act 1964, pt 1K and sch 18. Further information is available at Ministry of Social Development “Accommodation Supplement” <www.workandincome.govt.nz>.

³⁴ The Childcare and Out of School Care and Recreation (OSCAR) Subsidies may be available to assist with the cost of childcare. The OSCAR Subsidy income thresholds and maximum rates at 1 April 2017 are available at Ministry of Social Development “Out of School Care and Recreation (OSCAR) Subsidy” <www.workandincome.govt.nz>. The Childcare Subsidy income thresholds and maximum rates as at 1 April 2017 are available at Ministry of Social Development “Childcare Subsidy” <www.workandincome.govt.nz>. The cost of attending an early childhood service or kōhanga reo may be fully subsidised for some children up to six hours a day and up to 20 hours a week: see Ministry of Education “20 Hours ECE” <www.education.govt.nz> for more information.

³⁵ Available for working parents with dependent children under the age of 18. See Inland Revenue *What are Working for Families Tax Credits?* (IR691, March 2016).

someone else, such as another parent.³⁶ Child support aims to offset the costs to the State of providing financial support for children and their carers by ensuring that liable parents take financial responsibility for their children.³⁷ Child support also ensures that a parent's obligations to birth and adopted children are not extinguished by obligations to stepchildren.³⁸

27.16 A parent can apply to the Commissioner of Inland Revenue for a child support assessment. The amount of child support payable is calculated by a formula set out in the Child Support Act 1991 and is collected by Inland Revenue.³⁹ The formula takes into account each parent's income, living needs, number of dependent children and care arrangements.⁴⁰ Parents can also reach their own private agreement on the payment of child support.⁴¹

27.17 When a parent is receiving a State benefit such as Sole Parent Support, any child support paid by another parent is first used to recover the cost of that benefit to the State.⁴² This means the parent receiving child support will only receive the amount of the child support payment (if any) in excess of his or her net benefit.⁴³

27.18 A court can make a departure from the set formula under the Child Support Act in special circumstances.⁴⁴ Three requirements must be satisfied:⁴⁵

³⁶ Child Support Act 1991, s 2 definitions of "liable parent" and "receiving carer"; and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

³⁷ Child Support Act 1991, ss 4(b) and 4(j); and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

³⁸ Child Support Act 1991, s 4(i); and Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 5.

³⁹ Inland Revenue can only pay the receiving carer the child support it receives from the liable parent. If the liable parent pays Inland Revenue late, the receiving carer will receive child support late. If the liable parent does not pay Inland Revenue, the receiving carer will not receive child support. Penalties for late payment may, however, apply. See Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 20; and Child Support Act 1991, s 134.

⁴⁰ Child Support Act 1991, pt 2. See also Inland Revenue *Helping you to understand child support* (IR100, April 2016) at 8–9.

⁴¹ If the recipient is in receipt of a State benefit, the agreement must be acceptable to Inland Revenue: Child Support Act 1991, s 50. A voluntary agreement can also be registered if the parties want Inland Revenue to be involved in the collection and payment of child support: pt 3.

⁴² Child Support Act 1991, s 142.

⁴³ Child Support Act 1991, s 142.

⁴⁴ Child Support Act 1991, s 106. An application for a departure order may be made by a receiving carer or liable parent if a qualifying formula assessment is in force and certain other criteria are met: s 104. See by way of example *P v R FC* Auckland FAM-2004-004-3234, 30 November 2006 where a departure order was made in respect of ongoing private school and some tertiary fees. The Family Court said at [107]:

Why should the children, as a matter of public interest, not have all the advantages they would have had educationally and in their extracurricular activities but for the parents' separation and subsequent inability to reach agreements to better provide for their welfare?

⁴⁵ Child Support Act 1991, s 105(1).

- (a) First, grounds for departure under the Child Support Act must exist. These grounds include special circumstances relating to a parent’s financial needs (including any duty to support another child), the child’s special needs and other factors which might make a formula assessment “unjust and inequitable” (including any payments made under the PRA to or for the benefit of the child, or to either party).
- (b) Second, it must be “just and equitable” to make a departure order, as regards the child and the parties.
- (c) Third, it must be “otherwise proper” to make the departure order.

27.19 Lump sum orders can also be made under the Child Support Act. A court has the discretion to order future or past child support to be paid in a lump sum where it would be just and equitable as regards the child and the parties, and otherwise proper.⁴⁶ A court must have regard to listed matters, including the child’s proper needs and the financial resources of each parent who is a party to the proceeding.⁴⁷ A court may make a lump sum order where a parent has refused or failed to pay child support in the past, or where there is a risk that a parent will fail to pay child support in the future.⁴⁸

27.20 A court must have regard to any child support payable by one partner for a child of the relationship in proceedings under the PRA.⁴⁹ Section 32 of the PRA allows a court to make certain orders under the Child Support Act, including departure and lump sum orders, if it considers it just.⁵⁰ This ensures that child support arrangements can be revisited, if required, in PRA proceedings. Courts have used this power in a “conservative fashion.”⁵¹ In *H v H* the High Court made it clear that the discretion in section 32 is only to make orders under the stipulated provisions of the Child

⁴⁶ Child Support Act 1991, s 109.

⁴⁷ Child Support Act 1991, ss 105(4) and 109(3)(c).

⁴⁸ *L v L* [2015] NZFC 9689 at [60]. Lump sum child support is credited against liability to pay formula-assessed child support unless a court is satisfied that it would be just and equitable as regards the child and the parties, and otherwise proper, not to do so: Child Support Act 1991, s 110.

⁴⁹ Including child support payable under a formula assessment under the Child Support Act 1991 or by a voluntary agreement: Property (Relationships) Act 1976, ss 32(1)(b) and 32(1)(c).

⁵⁰ Property (Relationships) Act 1976, s 32(2)(c). A court may also cancel, vary, extend or suspend a voluntary agreement: s 32(2)(d).

⁵¹ *F v M* [2012] NZFC 7705 at [110].

Support Act, and that this requires sufficient evidence.⁵² The Court went on to say that the amount of a lump sum award was almost certainly limited, in “all but the most unusual circumstances”, to a capitalisation of the formula assessment in any given financial year.⁵³

27.21 Recent research by Fletcher into the economic consequences of separation among couples with children found that child support payments provide little support to many separated partners with the primary care of children.⁵⁴ Of those partners receiving child support, average receipts were \$2,367 for women (7 per cent of average total family income) and \$709 for men (2 per cent of average total family income) per annum, in the year after separation.⁵⁵

Children may live in poverty despite State assistance

27.22 Some research shows that children in sole parent families are more likely to experience poverty than children with two parents.⁵⁶ The main reasons are said to be low rates of paid

⁵² *H v H* [2007] NZFLR 910 (HC) at [100]. See also *L v L* [2015] NZFC 9689 at [43] as to the evidence required.

⁵³ *H v H* [2007] NZFLR 910 (HC) at [104].

⁵⁴ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) (Study Paper) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) (Draft Thesis) at 137–138 and 152. This research was limited to opposite-sex couples who separated in 2009. It looked at the short to medium term financial consequences of separation by analysing the incomes of over 15,000 people in the Working for Families dataset who separated in 2009 and who, prior to separating had at least one child living with them, and comparing outcomes with similar, still partnered individuals. While not representative of the whole population, the dataset covers approximately two-thirds of all parents with dependent children in New Zealand: Draft Thesis at 3. For further information about this dataset see Study Paper at Chapter 8. This research took place before changes to the child support formula were introduced on 1 April 2015. The new child support formula includes, among other things, the estimated average cost of raising children in New Zealand (updated annually); a lower level of minimum shared care (now 28 per cent of ongoing daily care, down from 40 per cent of the nights in the child support year); and the child support income of both parents (not just the liable parent): Inland Revenue “What a child support formula assessment is” (31 March 2016) <www.ird.govt.nz>; and Child Support Act 1991, s 30. Fletcher considered whether the new child support formula could be expected to improve outcomes, using data provided by Inland Revenue based on modelling produced from a dataset consisting of just under 90 per cent the total number of cases, and found that it would have little impact on child support payments and receipts overall: Draft Thesis at 176 to 180, and 189 to 191. Data limitations are discussed in the Draft Thesis at 168 to 170 and include the absence of equal-care cases and third-party carers, and the lack of exact information on the distribution and prevalence of shared care below the 40 per cent level.

⁵⁵ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 8 citing Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 135 and 138.

⁵⁶ Children’s Commissioner’s Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at Chapter 8. See also Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

employment and low levels of welfare benefits.⁵⁷ Fletcher’s research suggests that “[i]n simple terms, the level of assistance provided through welfare and family tax credits is often insufficient to ensure individuals are not below the poverty threshold, especially if they have children living with them.”⁵⁸

- 27.23 Experts say that child poverty can negatively affect child development in numerous ways.⁵⁹ The issue is, however, complex. One expert says that “[a]lthough there is considerable evidence that poor child and later-life outcomes are correlated with household income in early childhood, this does not necessarily mean that low incomes during childhood cause all of these problems.”⁶⁰ Housing is also “critically related” to child poverty.⁶¹ Poor quality housing and overcrowding can lead to health issues for children and impact on their mental health, social wellbeing and school performance.⁶²

How does the PRA fit in?

- 27.24 The PRA governs the division of property when relationships end. Decisions under the PRA can have a significant impact on children’s lives, influencing where children live and what their standard of living will be after parental separation.

Historical background to the PRA

- 27.25 The PRA has always recognised the interests of children in property division at the end of a relationship. In a White Paper

⁵⁷ Children’s Commissioner’s Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 6:

There are two main reasons why sole-parent families in New Zealand have a high rate of poverty: sole-parents have a comparatively low rate of paid employment by OECD standards, and welfare benefits are low relative to the poverty line

⁵⁸ Michael Fletcher “An investigation into aspects of the economic consequences of marital separation among New Zealand parents” (draft PhD thesis submitted for examination, Auckland University of Technology, 2017) at 188. See also Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 8.

⁵⁹ Children’s Commissioner’s Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 14.

⁶⁰ Dave Grimmond “The economic and social impact of growing up in poverty” *Children: A Newsletter from the Office of the Children’s Commissioner* (Issue 79, Summer 2011) at 29. See also David M Fergusson, L John Horwood and Sheree J Gibb “Childhood family income and later outcomes: results of a 30 year longitudinal study” *Children: A Newsletter from the Office of the Children’s Commissioner* (Issue 79, Summer 2011) at 24.

⁶¹ Children’s Commissioner’s Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 45.

⁶² Children’s Commissioner’s Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (December 2012) at 45.

published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice said “[t]he children of a marriage have an indirect but nonetheless important interest in any division of the matrimonial property.”⁶³ The resulting Matrimonial Property Act 1976 contained many of the same provisions that take into account children’s interests that are in the PRA today.⁶⁴

27.26 In 1988 a Working Group was established to review the Matrimonial Property Act 1976.⁶⁵ The Working Group acknowledged that one partner’s responsibility for dependent children following separation may cause problems, such as decreased earning capacity, financial dependency and a much lower standard of living.⁶⁶ It recommended changes to bring more property into the relationship property pool available for equal division, which would mean that more women would leave a marriage with an amount of property equal to that of their husbands, going “some way toward avoiding discrepancies in the spouses’ standards of living.”⁶⁷ These proposals were implemented in the 2001 amendments.

27.27 The 2001 amendments largely retained the previous approach in the way that the interests of children were considered on property division, although children of de facto partners were included for the first time.⁶⁸ The 2001 amendments also gave a court the discretion to make orders postponing vesting of property if immediate vesting would cause undue hardship for the primary caregiver of ongoing daily care for children.⁶⁹ In addition, courts were given the discretion to make orders relating to child support and furniture orders.⁷⁰

⁶³ AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 11.

⁶⁴ See for example the long title and ss 26(1), 26(2), 27, 28 and 33(3) of the Matrimonial Property Act 1976.

⁶⁵ The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to identify the broad policy issues with the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

⁶⁶ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 6.

⁶⁷ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 13–14.

⁶⁸ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 1.6.

⁶⁹ Property (Relationships) Act 1976, s 26A.

⁷⁰ Property (Relationships) Act 1976, ss 28B, 28C, 28D and 32.

Recognising children in a law primarily about adults

27.28 The PRA's historical background shows a longstanding willingness to accommodate children's interests in the division of property at the end of a relationship. But how this is meant to work in practice is a complex issue.

27.29 The PRA is primarily about the property entitlements of adult partners that arise at the end of a relationship. As we discussed in Chapter 3, the PRA is built on the theory that a qualifying relationship is an equal partnership or joint venture, to which partners contribute in different but equal ways. Each partner's contribution to the relationship results in an entitlement to an equal share in the property of the relationship. Dividing relationship property according to the partners' entitlements, however, might not always be in the best interests of children. For example, on separation one partner may wish to sell the family home immediately so that he or she can use the proceeds to buy a new home. But the children's interests may favour delaying the sale of the family home, enabling them to remain in the home for a time and maintain continuity while dealing with their parents separation.⁷¹ The focus on the adult partners may also be at the expense of a wider focus on the family. In te ao Māori, there is greater acknowledgment of the interests of the whānau as well as a recognition of children as taonga.⁷²

27.30 The PRA must therefore balance partners' property entitlements and children's interests. It must also achieve a balance between parental autonomy and State direction. Partners may highly value their parental autonomy to make decisions about how their children are looked after post-separation, without direction from the State. However, the State has a role in protecting children, and it is concerned with children's welfare and best interests.⁷³ The State may also incur costs as a result of separation, including direct costs such as one or both adult partners requiring access to

⁷¹ See for example *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009 where the High Court said at [99] that "[i]n the general run of cases, a s 27 order that is intended to operate for a term of several years will be regarded as offending against the clean break principle."

⁷² See Joan Metge "Ko Te Wero - The Māori Challenge" in *Family Court, Ten Years On* (New Zealand Law Society, 1991) at 24-25 as cited in *Re B* [2016] NZFC 7039 at [22].

⁷³ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at [23]. For example the State has obligations under international treaties like the United Nations Convention on the Rights of the Child and has implemented domestic legislation such as the Care of Children Act 2004 that promotes children's welfare and best interests.

State benefits, and indirect costs that might result from longer-term adverse outcomes for children. It is unclear where the balance lies between the role of the State and parental autonomy in some private law disputes, including care arrangements, relationship property claims or claims against an estate.⁷⁴

- 27.31 The PRA must also achieve a balance between clear rules and discretionary decision-making. Rules and speedy resolution of disputes may favour children because research indicates that “...prolonged exposure to frequent, intense and poorly resolved parental conflict is associated with a range of psychological risks for children.”⁷⁵ Quick resolution may also be more appropriate to a child’s sense of time. However discretion enables a court to treat each child as an individual with his or her own risk factors and interests – which may be different to those of his or her parents.

⁷⁴ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at [23].

⁷⁵ Ministry of Justice *Reviewing the Family Court: A Summary* (September 2011) at 2 referring to J Hunt and L Trinder *Chronic litigation cases: Characteristics, numbers, interventions. A report for the Family Justice Council* (2011); J Tolmie, V Elizabeth and N Gavey “Is 50:50 shared care a desirable norm following family separation? Raising questions about current family law practices in New Zealand” (2010) 24 NZULR 136; J McIntosh and R Chisholm “Cautionary notes on the shared care of children in conflicted parental separation” (2008) 14 Journal of Family Studies 37; E Cummings and P Davies *Children and marital conflict: The impact of family dispute and resolution* (The Guilford Press, New York, 1994); and J McIntosh “Enduring conflict in parental separation: Pathways of impact on child development” (2003) 9 Journal of Family Studies 63.

Chapter 28 – The case for taking a more child-centred approach under the PRA

28.1 Children have an indirect but nonetheless important interest in property decisions following separation. As explored in Chapter 27, decisions under the PRA can have a significant impact on children’s lives, affecting their accommodation, standard of living and ability to maintain relationships with family, whānau, friends and community.⁷⁶ Decisions that negatively affect children can not only harm them, but can also result in high future costs to society.⁷⁷

How does the PRA recognise children’s interests?

28.2 In Chapter 3 we explained that an implicit principle of the PRA is that a just division of relationship property should have regard to the interests of the children of the relationship.⁷⁸ Section 26(1) imposes an overarching requirement on the court to “have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship” in any PRA proceedings. This is of general application and can influence the court’s decision on a wide range of matters.⁷⁹ It recognises that the interests of children may be considered sufficiently important to warrant some degree of priority over their parents’ property entitlements. In practice, however, children’s interests are seldom prioritised in this way.

28.3 The PRA also provides a court with powers to make a range of orders that can directly or indirectly benefit children. These

⁷⁶ Note that the Care of Children Act 2004 ensures that appropriate arrangements are in place for the guardianship and care of children.

⁷⁷ Children’s Commissioner *Being child-centred: Elevating children’s interests in the work of your organisation* (October 2015) at 2.

⁷⁸ This principle is expressed in several places in the Property (Relationships) Act 1976, including ss 1M and 26.

⁷⁹ See discussion at paragraph [29.16].

powers are discussed in detail in Chapter 29, but by way of summary they include:⁸⁰

- (a) settling relationship property for the benefit of children of the relationship;⁸¹
- (b) postponing the vesting of a partner's share in relationship property, if that would cause undue hardship for the principal provider of ongoing daily care for children of the relationship;⁸²
- (c) granting occupation of the family home to one partner, or transferring a tenancy to one partner, so that children can stay in the home for a period of time;⁸³ and
- (d) granting one partner the possession and use of any furniture, household appliances and household effects in order to provide for the needs of any children.⁸⁴

28.4 Despite these provisions, children's interests generally play a minor role in PRA matters. Orders under these sections are rare, and we understand from our preliminary consultation that parents seldom ask the court to make them.

Should children's interests have a role in the PRA?

28.5 The underuse of the PRA's orders that benefit children begs the question: what is the proper role of children's interests in relationship property division? One view is that the PRA has no role in providing for children's needs. Parents already have a fundamental obligation to support their children,⁸⁵ and separating parents should have the freedom to make decisions amongst themselves on how they will meet their children's needs. Where that is not possible, children's needs are addressed elsewhere,

⁸⁰ Sections 15 and 15A of the Property (Relationships) Act 1976 also require the court to have regard to the responsibilities of each partner for the ongoing daily care of any children of the relationship, when making orders under either section to redress economic disparities.

⁸¹ Property (Relationships) Act 1976, s 26.

⁸² Property (Relationships) Act 1976, s 26A.

⁸³ Property (Relationships) Act 1976, ss 27–28A.

⁸⁴ Property (Relationships) Act 1976, ss 28B–28C.

⁸⁵ See Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

under different pillars of financial support (child support, State benefits and maintenance). Any shortcomings would be better addressed by amendments to other legislation such as the Child Support Act 1991 and the Social Security Act 1964, or through broader social action such as eliminating the gender pay gap and child poverty.

- 28.6 Another view is that the PRA is just one pillar of a wider framework of financial support that ensures that parents fulfil their obligations and children's needs are met. On this view, the PRA's purpose is not to substitute or supplement child support. The PRA is, however, well placed to meet particular needs, such as the need of some children to remain in the family home for a time to minimise disruption while they deal with the after-effects of relationship breakdown. It would be unwise not to take advantage of the PRA as another mechanism through which to support children
- 28.7 Our preliminary view is that children's interests have an important role in the PRA. Children's interests have been recognised in the statutory property regime since the 1970s, and we think removing children's interests from the PRA would be a backwards step. Rather, as we discuss below, there is now arguably an even stronger case for recognising and protecting children's interests in the PRA because attitudes towards children (and children's rights) have changed. We should not lose the opportunity presented by PRA to make a difference for children.

Should the PRA take a more child-centred approach?

- 28.8 Our preliminary view is that the PRA should take a more child-centred approach. Our initial consultation indicates that there are concerns that the PRA is not working as well as it could to recognise and protect children's interests. These concerns, and the issues we identify in Chapter 29, suggest that reform is needed.
- 28.9 The Children's Commissioner explains that being child-centred is a way of elevating the status of children's interests, wellbeing and views.⁸⁶ It involves considering the impact of decisions and

⁸⁶ See Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015).

processes on children, and seeking their input when appropriate.⁸⁷ A child-centred approach places children at the centre, but it does not necessarily mean making children's interests paramount over all other considerations, all of the time.⁸⁸ The overarching reason to be child-centred is to ensure that children are supported to thrive.⁸⁹ We consider the arguments for and against taking a more child-centred approach in the PRA below.

The case for taking a more child-centred approach in the PRA

28.10 First, a more child-centred approach is consistent with the general responsibility parents have for the care, development and upbringing of their children and their duty to provide necessities.⁹⁰ Parenthood changes the relationship between partners because it imposes limitations on their individual financial autonomy, and is said to provide the greatest justification for property alteration.⁹¹ Separation is said to “[change] the financial partnership of parents whereas it ends the partnership of childless couples.”⁹²

28.11 Second, the case for a more child-centred approach is supported by the level of change in New Zealand society. New Zealand is a much more diverse society than in the 1970s, and many characteristics of relationships and family life have changed.⁹³ The way we think about children and families has also changed. Children are regarded as people in their own right, entitled to protection and care, and to be treated with dignity and respect.⁹⁴

⁸⁷ Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

⁸⁸ Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

⁸⁹ Children's Commissioner *Being child-centred: Elevating children's interests in the work of your organisation* (October 2015) at 1.

⁹⁰ See Care of Children Act 2004, s 5(b); Crimes Act 1961, s 152; and Child Support Act 1991, s 4(b).

⁹¹ Patrick Parkinson “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 Federal Law Review 1 at 14

⁹² Patrick Parkinson “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 Federal Law Review 1, at 14.

⁹³ See Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction.

⁹⁴ See United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990); Pauline Tapp, Nicola Taylor and Mark Henaghan “Agents or Dependents – Children and the Family Law System” in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303; and Anne B Smith, Nicola J Taylor and Megan M Gollop (eds) *Children's Voices: Research, Policy and Practice* (Pearson Education New Zealand, Auckland, 2000).

- 28.12 Third, a more child-centred approach is also consistent with the Māori view of children as taonga, who are the privilege and the responsibility of not only parents but the whānau and hapū.
- 28.13 Fourth, there has been growing recognition of the importance of human rights, including children’s rights, over the last 40 years. In 1993 New Zealand ratified the United Nations Convention on the Rights of the Child (UNCROC).⁹⁵ UNCROC sets out the basic rights of children, including the right to have their best interests treated as a primary consideration in actions concerning them, the right to be heard on matters affecting them and for those views to be given due weight in accordance with the child’s age and maturity.⁹⁶ Where possible, New Zealand’s domestic law should be interpreted in such a way as to accord with the international treaties New Zealand has ratified.⁹⁷ UNCROC, however, is “rarely mentioned” in PRA proceedings.⁹⁸ The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 also reflect changes to our approach to human rights.⁹⁹
- 28.14 Fifth, taking a more child-centred approach in the PRA would also be consistent with other social legislation that directly impacts on children.¹⁰⁰ The Care of Children Act 2004, for example, makes the welfare and best interests of the child the first and paramount consideration under that Act.¹⁰¹ Principles that must be taken into account when considering the welfare and best interests of a child under that Act include that:¹⁰²

⁹⁵ New Zealand maintains some reservations to the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC) in relation to children in work and detention. To have effect in New Zealand, international obligations must be incorporated into New Zealand’s domestic law: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at [8.2]; and Alice Osman “Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning” (2014) 12 NZJPL 345 at 346 citing *New Zealand Air Line Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 281. New Zealand submits periodic reports to the United Nations Committee on the Rights of the Child on UNCROC: United Nations Human Rights Office of the High Commissioner “Reporting status for New Zealand” <www.ohchr.org>.

⁹⁶ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 3 and 12.

⁹⁷ RI Carter and JF Burrows *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 30.

⁹⁸ Nicola Peart “Protecting children’s interests in relationship property proceedings” (2013) 13(1) Otago LR 27 at 29. A rare example is *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [273]–[286]. In that case the Family Court referred to the United Nations Convention on the Rights of the Child to assist with interpretation of the requirement in s 26 in the Property (Relationships) Act 1976 to have regard to the children’s interests in the context of an application under s 33 for an order for the sale of the family home.

⁹⁹ The New Zealand Bill of Rights Act 1990 came into force on 25 September 1990 and the Human Rights Act 1993 came into force on 1 February 1994.

¹⁰⁰ See also Oranga Tamariki Act 1989. The object of that Act is to promote the well-being of children, young persons, and their families and family groups: s 4.

¹⁰¹ Care of Children Act 2004, s 4(1).

¹⁰² Care of Children Act 2004, ss 4(2)(a) and (5).

- (a) a child's care, development, and upbringing should be primarily the responsibility of his or her parents or guardians;
- (b) a child should have continuity in his or her care, development and upbringing;
- (c) a child should continue to have a relationship with both parents, and his or her relationship with their family group, whānau, hapū or iwi should be preserved and strengthened; and
- (d) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

The case for retaining the current approach to children's interests in the PRA

28.15 The way the PRA currently recognises and protects children's interests might be sufficient, for several reasons. First, as discussed in Chapter 27, the PRA is mainly about how the partners' property is divided when their relationship ends.¹⁰³ It overrides general property rights because of the special nature of the relationship between the partners. A greater focus on children might be inconsistent with the PRA's primary focus and the policy on which it is based.

28.16 Second, it is not necessary to give greater priority to children's interests in the PRA because their needs are already met elsewhere. As discussed in Chapter 27, parents have a fundamental obligation to support their children, no matter what the PRA provides.¹⁰⁴ The cost of providing for children's ongoing financial needs is theoretically already shared between parents by agreement or through the Child Support regime, with any unmet need addressed through State benefits.

28.17 Third, giving children's interests greater priority in the PRA and the indirect benefits that could flow to the primary caregiver (for example a higher standard of living) could inadvertently lead to negative consequences for some children. It may encourage the primary caregiver to go to court in the hope of using the children's

¹⁰³ Property (Relationships) Act 1976, s 1C(1).

¹⁰⁴ See Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

interests to obtain a financial advantage, discouraging partners from resolving their property matters out of court and increasing conflict levels. It may distort care arrangements as parents vie for the role of primary caregiver, or it may encourage other strategic behaviour that is not in the children's best interests. Another view is that these risks are already a reality for some children because "end of relationship" issues such as relationship property division, care and child support are inevitably heavily interlinked, and this will continue regardless of what the PRA provides. Some of these risks may be mitigated by taking a more holistic approach to all legal matters arising from parental separation.¹⁰⁵

- 28.18 Fourth, giving children's interests a greater priority also risks indirectly lowering the priority given to the interests of other family members. The New Zealand family has changed in the last 40 years. The family home does not always accommodate only a couple and their children. Some families live with several generations in one house. Partners may also have financial obligations to their wider family or whānau, or to a new partner, other children or stepchildren.
- 28.19 Fifth, giving children's interests a greater priority may require the exercise of more judicial discretion. This is because a rules-based approach could not capture all possible scenarios. The flexibility that can be achieved through judicial discretion would make it easier to recognise children's individual needs. It could, however, mean less certainty for the majority of people who resolve property matters out of court. It could also unduly restrict parental autonomy.

The general rule of equal sharing should remain

- 28.20 Our preliminary view is that the PRA should take a more child-centred approach. In Chapter 29 we identify specific issues and outline in detail what a more child-centred approach might look like in the PRA.
- 28.21 A significant question, however, is whether a more child-centred approach means that the general rule of equal sharing of relationship property should be changed. Currently, there are few exceptions to equal sharing. For example section 13 allows

¹⁰⁵ See Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependents: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 318.

for a departure from equal sharing where there are “extraordinary circumstances” that make equal sharing “repugnant to justice.” Section 26 can also be used to settle property for the benefit of children, but is not authority for simply reducing the proper entitlement of one partner and increasing that of the other.¹⁰⁶ As Atkin has said:¹⁰⁷

The division of property is premised on the right of each adult party to receive a half share, subject to some narrow exceptions. Thus, the primary rules for dividing property have nothing to do with children and regard for their interests cannot upset these primary rules.

28.22 It could be argued that a more child-centred approach would be to increase the primary caregiver’s share of relationship property to ensure that the children are adequately provided for. This could be achieved in one of two ways:

- (a) The general rule of equal sharing could be replaced with a new rule or rebuttable presumption that the primary caregiver receives a greater share of relationship property (for example 60 per cent) where there are children. This has the advantage of certainty, particularly for couples making their own arrangements in the PRA’s shadow. Litigation would, however, still occur to rebut any presumptive rule and may even increase given that there could be perceptions of unfairness. It may also be too inflexible given other competing interests and possible subsequent changes to care arrangements.
- (b) New Zealand could move away from a rules-based property division regime and adopt a more discretionary regime, like in Australia’s Family Law Act 1975 (Cth).¹⁰⁸ Although this regime has been criticised for its uncertainty, Peart and Henaghan note that it is common for the party with primary responsibility for children of the relationship to receive between 5 per cent

¹⁰⁶ *C v C* (1993) 10 FRNZ 46 (CA) at 58. In that case the Court of Appeal considered a High Court decision to reduce the wife’s property entitlement because, among other things, it would be wrong, in the interests of both the wife and the children, to make an order which would be likely to force the husband into insolvency. See also *B v K* HC Wellington CIV-2004-485-611, 16 March 2005 at [59]: “[s]ection 26 is not intended to be an alternative way of dividing the property unequally.”

¹⁰⁷ Bill Atkin “Children and financial aspects of family breakdown” (2002) 4 BFLJ 85.

¹⁰⁸ Family Law Act 1975 (Cth), s 79 (see in particular ss 79(4)(e) and 75(2)(c)).

and 20 per cent more of the parties' capital assets.¹⁰⁹ A discretionary regime could better accommodate children's individual needs. However greater discretion inevitably has the effect of making the law less predictable.¹¹⁰ As most partners settle their property affairs without going to court, it is desirable that the law provides them with as much certainty as possible in order that disputes may be resolved inexpensively, simply and speedily as is consistent with justice.¹¹¹ This would be a significant change to the PRA and might increase conflict and litigation.

28.23 Changing the general rule of equal sharing would, however, be a major change to the PRA. Our preliminary view is that, while the PRA should take a more child-centred approach, the general rule of equal sharing should remain. Changing that rule would bring the risks we have identified at paragraphs 28.17 – 28.19 to the fore. It may also be unnecessary because the legal link between a parent and child is not broken by the end of a relationship, and there are other mechanisms, such as child support, to provide for children's financial needs.¹¹² Each partner's share of relationship property may need to sustain him or her over a much longer period than that partner, as a parent, is financially responsible to maintain their children. Accordingly, the discussion in Chapter 29 is based on the assumption that the PRA's general rule of equal sharing remains.

CONSULTATION QUESTIONS

- I2 Do you agree with our preliminary view that the PRA should take a more child-centred approach, but that the general rule of equal sharing should remain?
- I3 How can any risks associated with a more child-centred approach be mitigated?

¹⁰⁹ Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹¹⁰ In Australia, questions have been raised as to whether the discretionary nature of the property division regime in the Family Law Act 1975 (Cth) should be replaced with a system based on prescriptive principles, in order to promote greater certainty, fairer outcomes and lower costs. In 2014 the Australian Productivity Commission recommended that the Government review whether presumptions should be introduced, as currently applies in New Zealand, in order to promote greater use of informal dispute resolution mechanisms: Australian Government Productivity Commission *Access to Justice Arrangements: Productivity Commission Inquiry Report* (No 72 Vol 2, September 2014) at 874. In September 2017, the Australian Government commissioned the Australian Law Reform Commission to undertake a comprehensive review of the Family Law Act 1975 (Cth), including the substantive rules and general principles in relation to property division: Attorney-General for Australia "First comprehensive review of the family law act" (press release, 27 September 2017).

¹¹¹ Property (Relationships) Act 1976, s 1N(d).

¹¹² As noted at paragraph [28.5], any shortcomings may be better addressed by amendments to other legislation such as the Child Support Act 1991.

Which children is the PRA concerned about?

28.24 Section 26 of the PRA requires the court to have regard to the interests of any children of the relationship. It is therefore important to understand who is a “child of the relationship” under the PRA.¹¹³

28.25 There are three relevant definitions in the PRA: “child of the marriage”, “child of the civil union” and “child of the de facto relationship.”¹¹⁴ Where we have no need to distinguish between these in this part of the Issues Paper, we use the term “child of the relationship”.

28.26 The three definitions are broadly equivalent. The one difference is that “child of the marriage” includes children of an immediately preceding qualifying relationship between the spouses.¹¹⁵ This creates a distinction between children on the basis of relationship type for no obvious reason, although it is unlikely to affect many children.¹¹⁶ Our preliminary view is that the definitions should be consistent.

28.27 The definitions of child of the relationship include “any child”, without reference to age or dependence. The definitions include two categories of children:¹¹⁷

- (a) any child of both partners; and
- (b) any other child (whether or not a child of either partner) who was a member of the family of the partners at the relevant time, being:
 - (i) when they ceased to live together;
 - (ii) immediately before a PRA application, if they had not ceased to live together; or

¹¹³ The term “child of the relationship” is also used elsewhere in the Property (Relationships) Act 1976. For example, the care of a child of the relationship is one of the contributions to a relationship under s 18(1)(a)(i); having a child of the relationship is relevant to the test in s 14A for short-term de facto relationships; and having a child of the relationship is also relevant to the issue of compensating for economic disparity under s 15(2)(b).

¹¹⁴ Property (Relationships) Act 1976, s 2. Note similar definitions of “child of the marriage”, “child of the de facto relationship” and “child of the civil union” in s 2 of the Family Proceedings Act 1980.

¹¹⁵ Property (Relationships) Act 1976, s 2.

¹¹⁶ As there are few civil unions in New Zealand, the omission of children from immediately preceding qualifying relationships from the definition of “child of the civil union” is unlikely to affect many children. Similarly, the number of de facto relationships immediately preceded by a marriage or civil union is likely to be small.

¹¹⁷ Property (Relationships) Act 1976, s 2.

(iii) at the date of the death of one of the partners.

28.28 The first category is straightforward, and seems intended to include both biological and adopted children.¹¹⁸ The second category can include a child of one partner, or neither partner, provided they were a member of the partners' family at the relevant time. It may include stepchildren, foster children and some children who are also members of another household, such as where care is shared.

The courts' approach to other children who are members of the family

28.29 The Family Court took a narrow approach in *M v L*, a case involving a short-term de facto relationship.¹¹⁹ Section 14A provides that a court cannot make a property division order where there is a short-term de facto relationship unless it is satisfied that there is a child of the relationship or the applicant has made a substantial contribution to the relationship. In either case, the court must also be satisfied that failure to make an order would result in substantial injustice.¹²⁰ The Court in *M v L* said that in interpreting "any other child" it should be mindful of the fact that section 14A enables a court to consider an exception to the general rule that the PRA does not apply to short-term de facto relationships.¹²¹ It said that the definition should not mean any child who has lived with the partners, such as an independent child having a month's holiday with a parent at the time of separation.¹²² The purpose of section 14A suggested to the Court that:¹²³

... "children" are those who are wholly or partially dependent on at least one of the parties for physical, material, emotional or social support. A disabled or invalid adult child, a child without another available home at that time may qualify. A degree of dependence and having interests requiring protection not available in other civil proceedings are entailed.

¹¹⁸ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

¹¹⁹ *M v L* (2005) 24 FRNZ 835 (FC).

¹²⁰ See discussion in Chapter 17.

¹²¹ *M v L* (2005) 24 FRNZ 835 (FC) at [30].

¹²² *M v L* (2005) 24 FRNZ 835 (FC) at [30].

¹²³ *M v L* (2005) 24 FRNZ 835 (FC) at [33]. The Family Court in *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [49] concurred with this reasoning.

28.30 The Court also considered the phrase “member of the family”, saying that:¹²⁴

“Member of the family” suggests some presence in or belonging to the particular household. It would not exclude a child away on school camp, hospital or respite care or on holiday. The provision enables the Court to make an order if it considers it necessary because of such a child. It is not to be used in an arbitrary way to mean any child at all who was in the parties’ home when the parties lived apart.

28.31 The approach in *M v L* has been followed in subsequent Family Court cases. In *H v C* the partners were in a short-term de facto relationship.¹²⁵ Both had children from previous relationships. The Family Court considered that C’s children were children of the relationship because they had lived with the couple every second week for the last nine months of the partners’ relationship, and during that week both partners provided full parental care for the children.¹²⁶ H’s children were not children of the relationship because they had returned to live with their father at the time of separation.¹²⁷ In *A v A* the Family Court similarly found that a child being cared for by the partners was a child of the relationship because the child had spent a significant amount of his life in the couple’s home and they were effectively providing him with a stable and supportive environment.¹²⁸

28.32 The need to have a presence in the household can have significant consequences for stepchildren. It may mean that stepchildren do not qualify as children of one parent’s new relationship, and as a result that their interests are not taken into account if that new relationship ends. In *Public Trust v W* the deceased’s children from a previous marriage would not have qualified as children of his new de facto relationship because they lived with their mother.¹²⁹ As such, the Court of Appeal did not have to take their interests

¹²⁴ *M v L* (2005) 24 FRNZ 835 (FC) at [34].

¹²⁵ *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011.

¹²⁶ *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [48] and [49]. At [49]: “Moreover, I concur with the reasoning of [*M v L* (2005) 24 FRNZ 835 (FC)] that is ‘they are children who are wholly or partially dependant on at least one of the parties for physical, material or social support.’”

¹²⁷ *H v C* FC Christchurch FAM-2007-057-337, 30 August 2011 at [26] and [48].

¹²⁸ *A v A* [2012] NZFC 10192 at [26]–[34].

¹²⁹ *Public Trust v W* (2004) 24 FRNZ 340 (CA); and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2.03.01].

into account in PRA proceedings between the estate and the deceased's new partner.¹³⁰

Is the current interpretation of “member of the family” appropriate?

28.33 The current approach to deciding who is a child of the relationship under the PRA (when the child is not the child of both partners) may be too restrictive. The approach laid down in *M v L* involves establishing a presence in the partners' household.¹³¹ This might be too narrow for several reasons.

28.34 First, it may be outdated. Modern New Zealand families take many different forms:¹³²

Families may have one parent or two, or more; adult family members can be married or living together and sometimes they live in different households. Parents can be same-sex or opposite-sex, biological parents, adoptive parents or step-parents. Adults can formally or informally adopt children, and may have no children, a few children or sometimes many children; they may have adult children and their children living with them, and sometimes other relations and generations too.

28.35 New partners will often accept the other partner's children from a previous relationship as part of their family, and the children may live with the partners full-time or part-time where care is shared.¹³³ One New Zealand study suggests that children have an inclusive view of what constitutes a family.¹³⁴ New Zealand's growing cultural diversity also brings different cultural perspectives on families, some of which may endorse more collective values and family structures.¹³⁵ Superu has identified four core family functions that contribute to family wellbeing.¹³⁶ These are to: care, nurture and support; manage resources; provide

¹³⁰ Nicola Peart “Children's Interests Under the PRA & s 182 FPA” (paper presented to New Zealand Law Society Seminar, May 2013) at 2; and Property (Relationships) Act 1976, s 26(1).

¹³¹ *M v L* (2005) 24 FRNZ 835 (FC).

¹³² See Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 12.

¹³³ This argument was not successful in *M v L* (2005) 24 FRNZ 835 (FC) at [20]. The court rejected the submission that all children of the parties should be regarded as “members of the family” at all material times during the relationship.

¹³⁴ Andrea Rigg and Jan Pryor “Children's Perceptions of Families: What Do They Really Think?” (2007) 21 *Children & Society* 17 at 29. Rigg and Pryor examined the perceptions of 111 New Zealand primary and intermediate schoolchildren.

¹³⁵ Superu *At a Glance - Families: universal functions, culturally diverse values* (July 2017) at 1.

¹³⁶ Superu *At a Glance - Families: universal functions, culturally diverse values* (July 2017) at 3.

socialisation and guidance; and provide identity and a sense of belonging.¹³⁷

- 28.36 Second, it may exclude some children (and some short-term de facto relationships) from the PRA. Peart has said that that the approach in *M v L* could be “unnecessarily narrow”, as it would potentially exclude children at boarding school who regularly return home during the holidays.¹³⁸ It may also exclude some children who are financially dependent on one partner but have no presence in the couple’s household. A narrow interpretation of the second category of children makes it harder to pass the test in section 14A for short-term de facto relationships.
- 28.37 Third, the current approach may also fail to adequately recognise whānau relationships. The PRA does not refer to whānau. While the terms “family” and “whānau” are often used interchangeably, they are not the same.¹³⁹ There is no universal or generic way of defining whānau, but there is broad consensus that genealogical relationships form the basis of whānau, and that these relationships are intergenerational, shaped by context and given meaning through roles and responsibilities.¹⁴⁰ Some legislative definitions refer to whānau as a distinct family type.¹⁴¹
- 28.38 It may, however, be appropriate to have a narrow definition of child of the relationship. Some might even argue that it should be interpreted more restrictively, particularly if the PRA is amended to better provide for children on separation, so that any new benefits are available to a more restricted group of children. A narrower definition may also be considered appropriate because it is relevant to other provisions that require a narrow interpretation, for example the test in section 14A for short-term de facto relationships, which can be partially satisfied if there is a child of the de facto relationship (see Part E). There is a view that the PRA should only be concerned with children who

¹³⁷ Superu *At a Glance – Families: universal functions, culturally diverse values* (July 2017) at 3. See also Families Commission *The kiwi nest: 60 years of change in New Zealand families* (Research Report No 3/08, June 2008) at 16.

¹³⁸ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2.03.01].

¹³⁹ Sarah Mckenzie and Kristie Carter *Measuring Whānau: A review of longitudinal studies in New Zealand* [2010] 3 MAI Review at 2.

¹⁴⁰ Tahu Kukutai, Andrew Sporle and Matthew Roskrug “Expressions of whānau” in Superu *Families and Whānau Status Report 2016* (July 2016) 51 at 53 cited in Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Introduction. See also Jacinta Ruru “Kua tutu te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 59–60.

¹⁴¹ Families Commission Act 2003, s 10(2). The Families Commission Act 2003 requires the Families Commission to have regard to the kinds, structures and diversity of families, and for that purpose a definition of “family” is included. See also the Domestic Violence Act 1995, s 2 definition of “family member”.

have a strong connection to the partners' household or who are financially supported by both partners. This is because a concern for a wider group of children would be inconsistent with the PRA's individualistic focus and the primary theory of entitlement. Acknowledging whānau relationships, for example, could increase the number of children recognised by the PRA which might be out of step with its focus on the partners. Widening the definitions may also create new issues of equity, for example between children with different degrees of connection to the household.

CONSULTATION QUESTION

I4 Is the current interpretation of a “child of the relationship” in the PRA too narrow or too broad?

Option 1: Narrow the concept of “member of the family”

28.39 If a narrower concept of “member of the family” is preferred, this could be achieved by introducing a new maintenance requirement. This would require an inquiry into the partners' financial contributions towards the child's upkeep and would restrict the PRA's benefits to children maintained during the relationship. A similar requirement exists in the Family Protection Act 1955 in relation to stepchildren of the deceased entitled to claim for provision out of an estate.¹⁴² Under that Act, only the stepchildren of the deceased who were being maintained wholly or partly, or were legally entitled to be maintained wholly or partly, by the deceased immediately before his or her death are entitled to claim.¹⁴³ The PRA, however, has a very different focus and this approach may place too much weight on financial arrangements and insufficient weight on affective factors such as whether the partners treated the child as a member of their family.

Option 2: Widen the concept of “member of the family”

28.40 If, however, a wider concept of “member of the family” is preferred, it could be achieved by a new definition.¹⁴⁴ A new definition of “member of the family” could include a broad list of

¹⁴² Family Protection Act 1955, s 3.

¹⁴³ Family Protection Act 1955, s 3(1)(d).

¹⁴⁴ A new definition of “member of the family” would sit in the interpretation section of the preliminary provisions in pt 2 of the Property (Relationships) Act 1976.

factors a court must take into account in determining whether a child qualifies. This option has the advantage of flexibility, but will reduce certainty. A list of factors for a court to take into account in determining whether a child was a member of the family could include:

- (a) the nature and extent of the child's presence in, or belonging to, the partner's household (this would reflect the approach in *M v L*);¹⁴⁵
- (b) any arrangements for the financial support of the child (including but not limited to any obligation to pay child support under the Child Support Act 1991);¹⁴⁶
- (c) guardianship responsibilities and day-to-day care arrangements for the child;
- (d) the child's identity;
- (e) the nature and extent of the partners' role in the care, development and upbringing of the child;
- (f) whether the child is a whāngai of one or both partners;
- (g) whether the child is a member of the partners' whānau or other culturally recognised group.

CONSULTATION QUESTION

I5 Which children should be children of the relationship?

Whāngai relationships

28.41 Whāngai is a Māori customary practice in which a child is raised by whānau members, such as grandparents, or other members of the same hapū or iwi.¹⁴⁷

¹⁴⁵ *M v L* (2005) 24 FRNZ 835 (FC) at [34].

¹⁴⁶ A step-parent may have child support obligations in respect of a stepchild: see Child Support Act 1991, ss 6 and 7(1) (h). A parent or carer of a child may apply to the Family Court for a declaration that a specified person is a step-parent of the child. In determining whether to grant the declaration, a court must have regard to listed circumstances in s 99, including the extent to which that person has assumed responsibility for the maintenance of the child; the liability of any other person to maintain the child; and whether that person has been a guardian of the child.

¹⁴⁷ The term whāngai is used in this part of the Issues Paper as it is defined in s 4 of Te Ture Whenua Māori Act 1993. For some iwi the terms "whangai" and "atawhai" have slightly different meanings: Basil Keane "Whāngai – customary fostering and adoption – The custom of whāngai" (1 June 2017) Te Ara – the Encyclopaedia of New Zealand <www.TeAra.govt.nz>.

- 28.42 Whāngai arrangements have been described as “fluid and open.”¹⁴⁸ Fluid, in that the child may return to the care of his or her birth parents or be cared for by another relative. Open because the arrangement is public and the child knows of, and often has contact with, birth parents and whānau. According to traditional Māori custom whāngai placements may be made for many reasons,¹⁴⁹ including to provide a child for people who cannot have children, consolidate land rights¹⁵⁰ or pass down tribal traditions and knowledge.
- 28.43 The institution of whāngai “remains as a strong vehicle for both the care of children and for the nurturing of whāngai kinship relationships”, and it “will be valued and carried into the future.”¹⁵¹ In a recent study of 209 young people aged 15, four had spent time in a whāngai arrangement.¹⁵²
- 28.44 The PRA does not expressly refer to whāngai, and the status of whāngai for the PRA is not determined in accordance with tikanga Māori.¹⁵³ This means that a whāngai child is treated no differently than any other child under the PRA. There are two consequences. First, a child that is whāngai may be a child of the relationship under the PRA in respect of the partners that are raising him or her, even if there is no relationship of descent as determined by the tikanga of the respective whānau or hapū.¹⁵⁴ Second, a whāngai child might not be considered a child of the relationship

¹⁴⁸ *Brookers Family Law – Child Law* (online looseleaf ed, Thomson Reuters) at PA2.14.03.

¹⁴⁹ Basil Keane “Whāngai – customary fostering and adoption – The custom of whāngai” (1 June 2017) *Te Ara – the Encyclopaedia of New Zealand* <www.teara.govt.nz>.

¹⁵⁰ Māori customary law varies as to whether whāngai may inherit from their foster family: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [326]. Note evidence in *K v P* (2002) 22 FRNZ 792 (CA) that only one category of whāngai may have claim on a deceased estate.

¹⁵¹ Karyn Okeroa McRae and Linda Waimarie Nikora “Whāngai: remembering, understanding and experiencing” [2006] 1 MAI Review at 1.

¹⁵² Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5 citing JL Sligo and others “The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy” [2016] *Kōtuitui NZ J Soc Sci Online* 1 at 8.

¹⁵³ The tikanga relating to whāngai varies between iwi: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [315].

¹⁵⁴ It is unclear whether a child who is a whāngai would qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 under the first or second category of children. Section 19 of the Adoption Act 1955 generally precludes the recognition of Māori customary adoption. Ruru says that that Act continues to “openly reject” Māori beliefs and practices on several fronts: Jacinta Ruru “Kua tutu te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 72. A child who is a whāngai is not a “child” for the purposes of s 3 of the Family Protection Act 1955 (which sets out who is entitled to claim under that Act for provision out of the estate of a deceased person) unless the child has also been adopted by the deceased under the provisions of the Adoption Act 1955: see *K v P* (2002) 22 FRNZ 792 (CA). Although the question arises in a different context, if similar reasoning were followed a child who is a whāngai would only qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 if he or she was a member of the partners’ family at the relevant time (the second category of children).

in respect of a relationship involving a biological parent, because that child may not have a presence in the household.

- 28.45 Te Ture Whenua Māori Act 1993 defines whāngai as a person adopted in accordance with tikanga Māori.¹⁵⁵ This is an exception to the general rule in the Adoption Act 1955, which provides that Māori customary adoptions made after the commencement of the Native Land Act 1909 have no force or effect.¹⁵⁶ However, because the PRA does not apply to Māori land, and focuses primarily on how property is shared between the partners when their relationship ends,¹⁵⁷ there may be less need to provide specifically for whāngai in the PRA.

Should the status of whāngai children be determined in accordance with tikanga Māori?

- 28.46 The PRA currently applies in the same way to all children, regardless of whether a child is whāngai. It might, however, be appropriate that the question of whether a whāngai child is a child of the relationship under the PRA be determined in accordance with tikanga Māori, as it is under Te Ture Whenua Māori Act for certain purposes.
- 28.47 Determining whāngai status by tikanga Māori would, however, add a layer of complexity and potentially cost to PRA proceedings. Expert evidence would be needed on the tikanga of the respective whānau or hapū.¹⁵⁸ In Chapter 26 we discussed options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

CONSULTATION QUESTIONS

- I6 Should the PRA make special provision for the status of whāngai children as a child of the relationship to be determined in accordance with the tikanga of the respective whānau or hapū?

¹⁵⁵ Te Ture Whenua Māori Act 1993, s 4. See also s 115 which relates to the jurisdiction of the court to determine whether a person is to be recognised as having been a whāngai of a deceased owner for certain purposes and the orders a court can make in respect of a whāngai of the deceased owner. Note that Te Ture Whenua Māori Bill 2016 (126-2) seeks to repeal and replace the current law relating to Māori land. The definition of whāngai proposed in cl 5 of the Bill is “someone adopted by Māori customary adoption in accordance with the tikanga of the respective whānau or hapū.”

¹⁵⁶ Adoption Act 1955, s 19.

¹⁵⁷ Property (Relationships) Act 1976, ss 1C(1) and 6.

¹⁵⁸ See the discussion in Part H on resolving matters under the Property (Relationships) Act 1976 in accordance with tikanga Māori, including possible options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

The timing requirement is problematic for the purposes of assessing contributions to the relationship

- 28.48 The timing requirement in the second category of children (see paragraph 28.27(b)) is an issue for the purposes of assessing contributions to the relationship.¹⁵⁹ Contributions to the relationship are relevant in several scenarios under the PRA, including where there are extraordinary circumstances making equal sharing repugnant to justice, where there is a short-term relationship or successive or contemporaneous relationships, or where one party makes post-separation contributions.¹⁶⁰
- 28.49 Under section 18(1)(a)(i) the care of a child of the relationship is a contribution to the relationship. However, as one text notes, in a lengthy relationship the chances are high that at least some children that were previously treated as members of the family will, by the time the partners separate, have reached adulthood and left home.¹⁶¹ They may not qualify as children of the relationship because of the timing requirement, and if so, their care during the relationship would not count as a contribution to the relationship. This is an issue because contributions in the form of childcare are made throughout a relationship, while section 18(1)(a)(i) is confined to the care of a child of the relationship.¹⁶² There are two possible options for reform.

Option 1: Clarify that the care of a child that no longer qualifies as a child of the relationship is still a contribution to the relationship

- 28.50 One option is to add an extra sub-paragraph (b)(iv) to the definitions of child of the relationship. This could include, for the definition of contribution to the relationship in section 18 only, any child who was a member of the family of the partners during their relationship.

¹⁵⁹ Property (Relationships) Act 1976, s 18.

¹⁶⁰ Property (Relationships) Act 1976, ss 13, 14–14A, 18B and 52A–52B. Where one of these provisions applies, a court has to assess a partner's share of the relationship property (or in the case of s 18B, the compensation a partner should receive), according to the contribution that partner made to the relationship.

¹⁶¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

¹⁶² RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.81].

Option 2: Remove the timing requirement from the definition

28.51 Another option is to remove the timing requirement from the definitions of child of the relationship. This option would, however, have a broader effect and may risk unintended consequences.

CONSULTATION QUESTION

I7 Is there a need for a timing requirement in the definition of the second category of children?

Minor or dependent children

28.52 The PRA is primarily concerned with the interests of “minor or dependent” children of the relationship.¹⁶³ Our preliminary view is that this is appropriate because it focuses on protecting the vulnerable and recognises the obligations of the partners as parents.

Should a “minor” be a person under the age of 18?

28.53 For the purposes of the PRA, a “minor” is a person under the age of 20.¹⁶⁴ This is on the high side when compared to other age limits, and may be out of step with how we think about age limits in 2017.¹⁶⁵ There is a view that the age limit is too high, as by 18 years guardianship responsibilities have ceased and child support may no longer be payable in respect of the child. However parents may still feel a moral duty to support children up until the age of 20, particularly during a period of relationship breakdown and separation.

¹⁶³ There are only a few provisions of the Property (Relationships) Act 1976 where adult independent children of the relationship are directly relevant: see for example ss 14A(2)(a)(i) and 18(1)(a)(i). See also paragraphs 29.38 to 29.41 where we discuss whether an order can be made under s 26 to settle relationship property for the benefit of adult independent children.

¹⁶⁴ Age of Majority Act 1970, s 4(1). See also *B v B* (2009) 27 FRNZ 622 (HC) at [80].

¹⁶⁵ For example the age limit for entering into a marriage or civil union is 18 years, or 16 or 17 years with consent of specified individuals such as the minor’s guardian: Marriage Act 1955, ss 17 and 18; and Civil Union Act 2004, ss 7 and 19. At 18 years a child is legally independent of guardianship: Care of Children Act 2004, s 28(1); and will not qualify for child support unless he or she is enrolled at and attending school: Child Support Act 1991, s 5(1). For the purposes of the United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), a child is a person under the age of 18 years unless under the law applicable to the child majority is attained earlier: art 1.

Option for reform: Define “minor” as a person under the age of 18

28.54 One option is to include a new definition of “minor” meaning “a person under the age of 18 years.” This would lower the age limit where the PRA specifically refers to minors without disturbing more general references to children, such as in the context of the test for short-term de facto relationships or the definition of contribution to a relationship.¹⁶⁶

CONSULTATION QUESTIONS

I8 Do you agree with our preliminary view that the PRA’s current focus on minor or dependent children is appropriate?

I9 Should a “minor” for the purposes of the PRA be a person under the age of 18?

Who is a “dependent” child?

28.55 Whether a child is “dependent” for the purposes of the PRA is a question of fact.¹⁶⁷ Adult children may depend on their parents for support if they are physically or intellectually disabled.¹⁶⁸ *B v B* suggests that adult children without a disability and who have not progressed to financial independence due to lack of desire or motivation are unlikely to be “dependent.”¹⁶⁹ Our preliminary view is that this approach is sound. It follows the view of children as independent actors who, once they have reached adulthood, no longer need a court’s “protective” overview.¹⁷⁰ It strikes an appropriate balance between protecting the vulnerable and recognising the partners’ entitlements. The lack of direction in the PRA as to the type or level of dependence required may, however, mean that the PRA is not as accessible or clear as it could be.

Option for reform: Define “dependent child”

28.56 Definitions of “dependent child” in other legislation may provide a starting point for a new definition of “dependent child” in the

¹⁶⁶ Property (Relationships) Act 1976, ss 14A(2)(a)(i) and 18(1)(a)(i).

¹⁶⁷ *B v B* (2009) 27 FRNZ 622 (HC) at [80]–[81].

¹⁶⁸ *B v B* (2009) 27 FRNZ 622 (HC) at [81].

¹⁶⁹ In *B v B* (2009) 27 FRNZ 622 (HC) at [88] the High Court declined to make a s 26 order in favour of the parties’ 21 year old daughter because she was neither a minor nor dependent on her parents as she was able bodied and could earn income.

¹⁷⁰ See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26.02(2)].

PRA.¹⁷¹ For example, the Social Security Act 1964 and Income Tax Act 2007 share a core definition of “dependent child” that includes a child whose care is primarily the responsibility of the person; who is being maintained as a member of that person’s family; and who depends financially on that person.¹⁷² A similar definition for the PRA would adopt a relatively high threshold and may provide an accessible concept of dependency that is consistent with the purpose of restricting the focus of some of the PRA’s provisions to “minor or dependent” children.

CONSULTATION QUESTION

I10 Who should be a dependent child for the purposes of the PRA?

¹⁷¹ See discussion in Anna-Marie Skellern “Children and the Property (Relationships) Act 1976” (LLM Dissertation, Victoria University of Wellington, 2012) at 71.

¹⁷² Social Security Act 1964, s 3(1) and Income Tax Act 2007, s YA1. Note that these definitions are not the same and are subject to exclusions, for example some children in respect of whom payments are being made under s 363 of the Oranga Tamariki Act 1989 are excluded. See also Child Support Act 1991, s 35B.

Chapter 29 – Options for reform that take a more child-centred approach

- 29.1 In this chapter we identify issues with specific provisions of the PRA that affect children’s interests and propose some options for reform that would take a more child-centred approach.

Promoting children’s interests in the principles of the PRA

- 29.2 As explained in Chapter 3, the policy of the PRA is the just division of property at the end of a relationship. This policy is reflected in the statutory purpose and principles set out in sections 1M and 1N of the PRA. Children’s interests are referred to in section 1M, but not section 1N, although we think the principle that a just division of property should have regard to the interests of children of the relationship is implicit in the framework and rules of the PRA.¹⁷³
- 29.3 Children’s interests have been described as something of an “addendum to the adult considerations” in section 1M.¹⁷⁴ It provides that property division should “take account” of the interests of any children of the relationship.¹⁷⁵ Children’s interests are referred to at the end of section 1M and the language used is weak.¹⁷⁶
- 29.4 This is an issue because of the role purpose and principle provisions can play in statutory interpretation. The Interpretation Act 1999 provides that the meaning of an enactment must be

¹⁷³ See discussion in Chapter 3 of this Issues Paper.

¹⁷⁴ Anna-Marie Skellern “Children and the Property (Relationships) Act 1976” (LLM Dissertation, Victoria University of Wellington, 2012) at 33.

¹⁷⁵ Property (Relationships) Act 1976, s 1M(c).

¹⁷⁶ The purpose in s 1M(c) of the Property (Relationships) Act 1976 (PRA) reflects the obligation in s 26 to “have regard” to the interests of any minor or dependent children of the relationship in PRA proceedings.

ascertained from its text and in the light of its purpose.¹⁷⁷ The principles form the basis for the PRA's rules.¹⁷⁸ This means that the way children's interests are presented in the purpose provision and their absence in the principles provision can set the theme for the entire PRA. For example, in *B v B* the High Court said that section 26 authorities must be read in the context of sections 1C and 1M, which "recognise the subsidiary nature of the children's interests in the division of relationship property."¹⁷⁹

- 29.5 In Chapter 4 we said that the PRA should include a comprehensive list of principles to guide the interpretation of the rules of the PRA. We outline three options for addressing the priority of children's interests in a new explicit principle in the PRA. These options recognise that partners have responsibilities if they are parents and that children's interests must be a consideration in PRA proceedings. These responsibilities underpin the basis for a more child-centred approach in the PRA. Recognition of these responsibilities through a principle that promotes the interests of children would also be consistent with the Care of Children Act 2004 and the Child Support Act 1991 and the view that State assistance is a "safety net."¹⁸⁰
- 29.6 Each of these options propose to replace the existing language of children's "interests" with a reference to children's "best interests." The concept of a child's best interests is flexible and must be assessed and determined in light of the child's specific circumstances.¹⁸¹ This inquiry could help highlight where the child's interests are independent of, or in conflict with, the partner's interests. A reference to children's "best interests" would also align more closely with the wording of the United Nations Convention on the Rights of the Child (UNCROC) and other

¹⁷⁷ Interpretation Act 1999, s 5(1). Note that the Legislation Bill 2017 (275-1) currently before Parliament proposes to relocate the Interpretation Act within the new legislation: Legislation Bill 2017 (275-1), cls 10–12 (general principles of interpretation) and cl 150 (repeal of Interpretation Act 1999). See also Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2014) at 46.

¹⁷⁸ See the discussion on what is meant by a principle in William Dale "Principles, Purposes, and Rules" [1988] 1 Stat LR 15 at 18 and 22. Dale suggests that a principle is a first idea which is the starting point or basis for legal reasoning. A rule in a statute answers the question "what", whereas a principle answers the question "why".

¹⁷⁹ *B v B* (2009) 27 FRNZ 622 (HC) at 636.

¹⁸⁰ Care of Children Act 2004, s 5(b) (a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians) and Child Support Act 1991, s 4(b) (to affirm the obligations of parents to maintain their children). See also United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 18 and 27.

¹⁸¹ See also Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) UN Doc CRC/C/GC/14 (29 May 2013) at 9.

child-focused legislation such as the Care of Children Act, where the child's "welfare and best interests" are relevant.¹⁸²

Option 1: Children's best interests as a primary consideration

- 29.7 One option is to elevate children's best interests to a *primary* consideration.¹⁸³ This would require a court to assess children's best interests and take them as a primary consideration when different interests (such as the interests of the partners) are being considered. It may mean that children's best interests are sometimes given greater weight than other considerations when a court is exercising discretion.¹⁸⁴ This option reflects the language of UNCROC, which refers to children's best interests as "a primary consideration" in actions concerning them.¹⁸⁵

Option 2: Children's best interests as the first and paramount consideration

- 29.8 Another option is to treat children's best interests as the *first and paramount* consideration. This would adopt a higher standard than option 1. It would give children's best interests the highest priority in the PRA, either generally (with the exception of the general rule of equal sharing) or in relation to specific provisions such as non-division orders. It would mean that children's best interests may trump a partner's interests where there is a conflict. The Care of Children Act 2004 takes this approach, although in a different context, as it requires that the welfare and best interests of the child be "the first and paramount consideration."¹⁸⁶ A similar

¹⁸² United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 3.1 and 18.1; and Care of Children Act 2004, s 4.

¹⁸³ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 70.

¹⁸⁴ For example, when deciding whether to make a non-division order or to exercise discretion under s 13 of the Property (Relationships) Act 1976. Children's interests have rarely featured as a justification for departing from equal sharing under s 13: Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 20. An unsuccessful application was made in *M v M* [2012] NZFC 5019 (FC), however the Family Court did not exclude the possibility that children's interests could constitute exceptional circumstances warranting an unequal division.

¹⁸⁵ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC), art 3.1. See also Committee on the Rights of the Children *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* UN Doc CRC/C/GC/14 (29 May 2013). Note that art 21 of UNCROC strengthens the right of best interests in respect of adoption.

¹⁸⁶ Care of Children Act 2004 (COCA), s 4. It is understandable that the child's welfare and best interests are given paramountcy in COCA as it is principally concerned with children's welfare, care and protection. See also pt 2 of the Oranga Tamariki Act 1989. This can be contrasted with the youth justice provisions in pt 4 of the Oranga Tamariki

approach is taken in the United Kingdom. The Matrimonial Causes Act 1973 (UK) provides that it is a court's duty to give *first consideration*, when granting financial relief, to the welfare of any minor child of the family who has not attained the age of 18.¹⁸⁷

- 29.9 This option might not, however, be consistent with the PRA's focus on the division of property between the partners or the primary theory of entitlement. It may put "needs" above "entitlement" and therefore not achieve an appropriate balance between partners' interests and children's best interests. It may not take sufficient account of other legal obligations parents have to maintain their children.¹⁸⁸

Option 3: Refer specifically to implementation of relationship property division

- 29.10 A further option is for a new principle recognising children's best interests to specifically refer to the implementation of relationship property division under the PRA. At paragraph 29.20 we consider the option of introducing a specific duty to consider children's interests in the implementation of property division between the partners. If that option is pursued it would be consistent to signal in a new principle that the primary way the PRA prioritises children's best interests is through the use of non-division orders.

Preferred option

- 29.11 Our preliminary preferred option is to elevate children's best interests to a *primary* consideration (option 1). This would give children's interests a higher priority and align the PRA more closely with the wording of UNCROC.¹⁸⁹ A court would be required to give more weight to children's interests when balanced against

Act where paramountcy of the child's best interests does not apply and guidance is given in the principles in s 208, recognising that there are competing objectives in youth justice.

¹⁸⁷ Matrimonial Causes Act 1973 (UK), ss 25(1), 27(3) and 27(3A). We use the term "financial relief" to encompass the court's broad powers to make financial provision orders (s 23); property adjustment orders (s 24); orders for the sale of property (s 24A); pension sharing orders (s 24B); pension compensation sharing orders (s 24E); and orders for financial provision during the subsistence of a marriage (s 27(1)). Note that in England and Wales the matrimonial property regime is a more discretionary regime than the Property (Relationships) Act 1976, and that de facto couples are not brought within the statutory regime for married couples in terms of financial arrangements at the end of the relationship.

¹⁸⁸ Crimes Act 1961, s 152; Care of Children Act 2004, s 5(b); and Child Support Act 1991, s 4(b).

¹⁸⁹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3.1.

those of the partners and other third parties. For example, a court may be more willing to make non-division orders that would indirectly benefit children, or to take children's interests into account when calculating occupation rent, or to find that children's interests constitute extraordinary circumstances that make equal sharing repugnant to justice for the purposes of section 13. We prefer option 1 over option 2 and option 3 as we think it strikes the right balance between the interests of the partners and children. Option 2 would prioritise children in all cases, which is inconsistent with the PRA's primary focus on the partner's property entitlements, while option 3 is too limited (it is narrower than section 26, which requires the court to have regard to children's interests in all PRA proceedings).

CONSULTATION QUESTIONS

- I11 Do you agree with our preliminary view that children's interests should be a primary consideration in PRA proceedings?
- I12 Should parents' responsibilities have greater prominence in the PRA's principles provision?

Section 26

29.12 Section 26 is the primary provision through which children's interests are recognised and protected:

26 Orders for benefit of children of marriage, civil union, or de facto relationship

- (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.
- (2) If the court makes an order under subsection (1), the court may reserve such interest (if any) of either spouse or partner, or of both of them, in the relationship property as the court considers just.
- (3) An order under this section may be made and has effect regardless of any agreement under Part 6.

The dual functions of section 26(1)

- 29.13 Section 26(1) has two functions.¹⁹⁰ First, it requires a court to “have regard” to the “interests” of any minor or dependent children of the relationship in PRA proceedings. Second, it gives a court discretion, if it considers it just, to make an order settling relationship property for the benefit of children of the relationship.¹⁹¹
- 29.14 The attempt to deal with two significant and distinct functions in section 26(1) has led to issues of statutory interpretation.¹⁹² Our preliminary view is that section 26(1) should be separated into two stand-alone sections to clarify the purpose and scope of each:
- (a) The first function of section 26 should form the basis for a new stand-alone operative provision dealing with the priority of children’s interests in PRA proceedings and setting out what that means in practice. This new section would reflect the language of any new principle.
 - (b) This would leave the existing section 26 to fulfil the function of focusing on orders settling relationship property for the benefit of children.
- 29.15 The options discussed below are presented on this basis.

Requirement to have regard to children’s interests

- 29.16 The requirement to have regard to children’s interests in section 26(1) is of general application. It applies in any proceedings under the PRA, including proceedings where children’s interests may not be an obvious concern.¹⁹³ Children’s interests have been considered relevant in proceedings to set aside a contracting out agreement,¹⁹⁴ and to decline to order compensation for post-

¹⁹⁰ See *L v L* (1993) 11 FRNZ 81 (FC) at 82–83.

¹⁹¹ Note that this discretion cannot be exercised in respect of Māori land: see s 6 of the Property (Relationships) Act 1976. See also Matrimonial Property Act 1976, s 26.

¹⁹² See paragraphs 29.38 to 29.41 where we discuss whether s 26(1) of the Property (Relationships) Act 1976 should enable a court to settle property for the benefit of children of the relationship that are independent adults.

¹⁹³ See Nicola Peart “Protecting Children’s Interests in Relationship Property Proceedings” (2013) 13(1) Otago LR 27; and Nicola Peart and Mark Henaghan “Children’s Interests on Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁹⁴ See *A v W* [2012] NZFC 8640; and Chapter 30 of this Issues Paper, where we discuss protecting children’s interests in contracting out and settlement agreements.

separation contributions.¹⁹⁵ Children’s interests are also arguably relevant to the general exercises of classification, valuation and division of relationship property.¹⁹⁶ Other sections of the PRA also require a court, when considering how it will exercise its powers, to have regard to the position of children, such as sections 15–15A (economic disparity awards), 28A (occupation orders), 28C (furniture orders) and 44C (compensation for property disposed of to a trust).

- 29.17 A court has a wide discretion in interpreting and providing for children’s interests.¹⁹⁷ For example, in *C v B* the Family Court considered that it was in the children’s interests to have the security of a home with their mother, and therefore declined the father’s application for an order for the sale of the family home.¹⁹⁸ In *J v [LC]*, the Family Court considered the child’s interests by giving the wife the first option to buy out the husband’s share in the family home.¹⁹⁹

The requirement to have regard to children’s interests has little practical impact

- 29.18 Section 26 has been criticised for failing to ensure that children’s interests are given a sufficiently prominent role in PRA proceedings.²⁰⁰ There are several reasons why section 26 could be said to have little practical impact:²⁰¹

- (a) **Section 26 is of “indirect application” to the implementation of other PRA orders which can benefit children.**²⁰² Key non-division orders that can benefit children already refer to children’s interests. For example, sections 28A and 28C already require a court

¹⁹⁵ Property (Relationships) Act 1976, s 18B; and *R v D* [2015] NZFC 9450, [2016] NZFLR 37 at [60]. See Part D where we discuss compensation for contributions made after separation.

¹⁹⁶ Nicola Peart “Protecting Children’s Interests in Relationship Property Proceedings” (2013) 13(1) Otago LR 27 at 43.

¹⁹⁷ *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [286].

¹⁹⁸ *C v B* [2013] NZFC 1105, [2014] NZFLR 277 at [287] and [291]. The Court instead made an order that monies due to the father should be paid in instalments and offset against child support payments, at [292].

¹⁹⁹ *J v [LC]* HC Auckland CIV-2007-404-2955, 16 November 2007 at [16].

²⁰⁰ See Bill Atkin “Children and financial aspects of family breakdown” (2002) 4 BFLJ 85; and Nicola Peart “Children’s Interests Under the PRA & s 182 FPA” (paper presented to New Zealand Law Society Seminar, May 2013) at 1.

²⁰¹ See also paragraphs 28.20 to 28.23 where we discuss the relationship between s 26 of the Property (Relationships) Act 1976 and the general rule of equal sharing.

²⁰² Bill Atkin “Children and financial aspects of family breakdown” (2002) 4 BFLJ 85.

to have particular regard to children's needs in relation to occupation, tenancy and furniture orders.

- (b) **The clean break concept can soften the impact of section 26.** The value placed on a clean break for the adult partners can reduce the priority given to children's interests. For example, in *P v P* the wife suggested options enabling her to remain in the family home so that she could live close to services she and the children were used to.²⁰³ The Family Court had regard to the interests of the children, one of whom had a "special need" due to health issues, and for whose benefit \$4,000 had already been allocated pursuant to section 26.²⁰⁴ However, the Court "...did not regard it as a wise exercise of any discretion ...to produce a result which will require the parties to continue in partnership in property for longer than is necessary."²⁰⁵
- (c) **Section 26 uses weak language.** A court is simply required to "have regard" to children's interests. It does not have to have regard to children's *best interests* or treat them as a *primary consideration*.
- (d) **No guidance is provided on how children's interests should be ascertained or what they might be.** A court has a wide discretion in interpreting what a child's interests are, and can face a significant challenge in deciding how best to give effect to section 26 in the absence of statutory guidance.

29.19 If children's interests are given a higher priority in PRA proceedings it is critical that the PRA clearly sets out what that means in practice.

Option 1: Give children's interests a higher priority, in particular in the implementation of the division of property between the partners

29.20 One option is to replace section 26 with a provision that does three things:

²⁰³ *P v P* FC Auckland FP004/596/94, 18 October 1996 at 3–4.

²⁰⁴ *P v P* FC Auckland FP004/596/94, 18 October 1996 at 4.

²⁰⁵ *P v P* FC Auckland FP004/596/94, 18 October 1996 at 4.

- (a) **Retains the general duty to consider children’s interests in PRA proceedings.** This would, however, reflect and reinforce the standard set in the PRA’s new principle promoting children’s best interests (see paragraphs 28.20 to 28.23). While abstract, this would maintain and enhance the current approach and general application of section 26(1) (see paragraphs 29.16 and 29.17). Our preliminary view is that the general duty should be qualified so it is clear that children’s interests do not affect the general rule of equal sharing (see paragraphs 28.20 to 28.23).
- (b) **Introduces a new specific duty to consider children’s interests when implementing a division of property.** This would also reflect the standard set in the PRA’s new principle promoting children’s best interests (see paragraphs 29.2 to 29.11). This would direct a court to have particular regard to children’s interests in determining whether to make non-division orders such as an order postponing vesting, or occupation, tenancy or furniture orders. It would direct a court to give less weight to a “clean break” in this context. The focus of a specific duty is a concrete way to incentivise the use of non-division orders, which can make a practical difference for some children by keeping them in the family home for a time to maintain continuity and help ensure an orderly transition from one household to two. It would also require a court to focus on children’s interests when deciding which items of property should be allocated to each partner once the net value of each partner’s half share in the global relationship property pool is ascertained. For a discussion on how the court implements a division of property, see Chapter 14.
- (c) **Incorporates non-division orders.** Re-worked versions of sections 26A, 28A and 28C(4) (and potentially other sections in Part 7 of the PRA) would emphasise the priority to be given to children’s interests in the implementation of the division of relationship property between the partners. Options to re-work these provisions are considered below, and should be considered regardless of what this new section provides.

29.21 This option would recognise that separation can have a significant impact on children and their living standards. It may make it easier to obtain a non-division order if the applicant is the primary caregiver for all children. However, where each partner is the primary caregiver for one or more children of the relationship or care is equally shared it will continue to be a complicated exercise as a court must balance the interests of each child.

Option 2: Retain the general duty but provide guidance in a list of factors to consider when making non-division orders

29.22 Another option is to retain the general duty to consider children's interests in PRA proceedings, reflecting the standard set in the PRA's new principle promoting children's best interests (see paragraphs 29.2 to 29.11), and add a new section to incorporate guidance setting out an inclusive list of matters to which a court must have regard when considering an application for a non-division order. The list of relevant factors could include matters such as the provision of a home for the child; the child's educational requirements; the child's need for suitable furniture, household appliances and household effects (including toys); and the maintenance of the child's relationships with the partners, family and whānau, and friends. This would enhance the duty and may help a court identify children's interests and guide the use of judicial discretion where children's interests are relevant to non-division orders. It may, however, increase uncertainty and raise new practical issues in terms of how evidence is funded and placed before a court (see paragraph 29.26).

Option 3: Require a court to be satisfied that children's needs have been met before making a division order

29.23 Peart and Henaghan have suggested that a court could be mandated not to make a property division order unless it is satisfied that the needs of any minor or dependent children are adequately met.²⁰⁶ The duty would only apply after the partners' relationship property entitlements had been provisionally determined, including any provision for economic disparity made

²⁰⁶ Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Peart and Henaghan note that Marian Hobbs (Wellington Central) made a similar suggestion during the debates on the Matrimonial Property Amendment Bill in 1998: Marian Hobbs (6 May 1998) 568 NZPD.

under section 15 of the PRA.²⁰⁷ Peart and Henaghan say that this option would better protect children’s welfare, provide for a family-centred approach in decisions affecting property division and improve New Zealand’s compliance with its obligations under UNCROC.²⁰⁸

- 29.24 Peart and Henaghan refer to children’s “needs” in a similar way to which we have referred to children’s “interests” in this Issues Paper, and suggest that they should include:²⁰⁹

...the children’s financial needs, their housing, the standard of living enjoyed by the family during the relationship, the manner in which the children were being educated and the parties’ expectations as to their children’s education, any special needs arising from a child’s physical or mental disability, the financial resources available to each party and the children, and the parties’ own financial needs.

- 29.25 A similar provision exists in the Family Proceedings Act 1980 in relation to an order dissolving a marriage or civil union.²¹⁰ It provides that a court must normally be satisfied that arrangements have been made for the day-to-day care, maintenance and other aspects of the welfare of any children under 16 years and those arrangements are satisfactory or the best that can be devised in the circumstances.²¹¹ Unlike this provision, however, Peart and Henaghan’s duty would apply following separation and include de facto relationships.²¹²

²⁰⁷ Nicola Peart and Mark Henaghan “Children’s Interests on Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Another option is for this duty to apply before the partners’ relationship property entitlements have been determined, however that may have the effect of changing the general rule of equal sharing. See paragraphs 28.20–28.23.

²⁰⁸ Nicola Peart and Mark Henaghan “Children’s Interests on Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²⁰⁹ Nicola Peart and Mark Henaghan “Children’s Interests on Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²¹⁰ Family Proceedings Act 1980, s 45.

²¹¹ Family Proceedings Act 1980, s 45. The provisions of the Child Support Act 1991 are of primary importance in determining if child maintenance arrangements are satisfactory: *Laws of New Zealand Dissolution of Marriage* (online ed) at [24]. For example, in *G v M* [2003] NZFLR 97 (FC) at [8] the Family Court said that it was not possible for one partner to claim that unsatisfactory arrangements had been made for the children’s maintenance because the other partner was paying child support assessed under the Child Support Act 1991. The Child Support Act 1991 is outside the terms of reference for our review.

²¹² Nicola Peart and Mark Henaghan “Children’s Interests on Division of Property on Relationship Breakdown” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Note that an application for an order dissolving a marriage or civil union may be made only on the ground that the marriage or civil union has broken down irrevocably, and this is established if the court is satisfied that the parties have been living apart for at least two years: Family Proceedings Act 1980, s 39.

29.26 A court would be required to discharge this obligation regardless of the evidence offered by the partners. It would not rely on the partners to proactively raise matters such as the children's accommodation interests. As such, to ensure a court is able to make an informed decision it may also require the power to order that evidence and reports about children (such as social worker's reports) be provided.²¹³ This raises practical issues in terms of how provision of this evidence would be funded and the threshold for appointment of lawyer for child (see paragraphs 29.69 and 29.70), and may require additional State funding to implement. This option may also be viewed by some as an unacceptable erosion of parental autonomy.

CONSULTATION QUESTION

I13 How should the children's interests be given a higher priority in PRA proceedings?

Property orders for the benefit of children

29.27 The second function of section 26 is to give a court the power, if it considers it just, to make an order settling relationship property for the benefit of children of the relationship.²¹⁴ This is an important tool.

29.28 The principles that guide the exercise of the power in section 26 have developed through case law. In *R v R*, the Family Court set out the approach in these terms:²¹⁵

- (1) *Prima facie the matrimonial property is to be regarded as the property of the parties.*
- (2) *In every case where there are minor or dependent children the Court is obliged to have regard to the respective interests of each such child.*
- (3) *The context of the consideration of the welfare and interests of the children is "In the light of the property division between husband and wife, to ensure their financial protection during minority or dependency"...*

²¹³ See for example Family Proceedings Act 1980, s 46.

²¹⁴ Note that this discretion cannot be exercised in respect of Māori land: see s 6 of the Property (Relationships) Act 1976. See also Matrimonial Property Act 1976, s 26.

²¹⁵ *R v R* [1998] NZFLR 611 (FC) at 622. See also *B v K* HC Wellington CIV-2004-485-611, 16 March 2005 at [56]–[57]; and *C v B* [2012] NZFC 7042 at [153].

- (4) *The Court is not precluded from considering the interests of adult children and may have jurisdiction under s 26 to settle property for the benefit of an adult child...*
- (5) *It will be the exceptional case where the consideration leads to an actual award for a child.*
- (6) *It would be wrong in principle to use s 26 to anticipate succession.*
- (7) *Default or inability of a parent to provide appropriate maintenance, upbringing, shelter or nurture for a child are relevant factors, whether or not the default is wilful.*
- (8) *In the general run of cases a s 26 order should not be used to substitute or supplement child support arrangements. Nonetheless the Court's discretion is unfettered by statute.*
- (9) *Section 26 is not a backhanded means of providing damages to a child for ordinary parenting shortcomings.*
- (10) *An award under s 26 must be reasonable in all the circumstances.*

29.29 Peart notes that "...the courts have generally adopted a very restrictive approach by insisting on evidence of exceptional and extraordinary circumstances, such as criminal offending within the family or severe parental neglect."²¹⁶ A review of cases supports this:

- (a) In *X v X*, one partner had been admitted to a psychiatric hospital with no prospect of recovery.²¹⁷ The Supreme Court made an order vesting part of that partner's share of relationship property in a trustee for the maintenance, education and advancement of some children of the relationship who were under the care of child welfare authorities.²¹⁸
- (b) In *N v N*, one partner was charged with the murder of the other.²¹⁹ The accused renounced their interest under

²¹⁶ Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 33–34. Referring to *N v N* (1985) 3 NZFLR 694 (FC); *R v R* [1998] NZFLR 611 (FC); and noting *H v H* [2007] NZFLR 910 (HC). In *H v H* the High Court said at [109] that "An award is normally only justified if, after a division of property and taking into account child support obligations, there are remaining grounds for belief that during a child's minority or dependency he or she will not be adequately provided for by the parents. Settlements appear to occur where the situation is 'somewhat out of the ordinary', there being cited examples of parental disappearance or death; sexual abuse; or some form of physical or mental disability on the part of the child."

²¹⁷ *X v X* [1977] 2 NZLR 423 (SC) at 424.

²¹⁸ *X v X* [1977] 2 NZLR 423 (SC) at 428.

²¹⁹ *N v N* (1985) 3 NZFLR 694 (FC) at 695.

the deceased's will and the children were substituted as legatees. The accused agreed that the estate should be compensated for the loss of value of some property by providing for the accused's share in the family home to be vested in the estate. The Family Court made a section 26 order vesting the family home in a trustee for the children's benefit.²²⁰

- (c) In *S v C*, one partner had killed another person in front of a child of the relationship.²²¹ That partner had mental health issues and would likely never be subject to less than full-time care and supervision.²²² The Family Court concluded that that partner probably would not have need for the whole of their property entitlement and that some recompense for the most difficult of upbringings could and should in justice be made by settling property on the children.²²³
- (d) In *R v R*, a child of the relationship suffered post-traumatic stress disorder as a result of sexual abuse by one partner.²²⁴ The Family Court ordered that a payment be made directly to the child from that partner's estate, and that the child be trusted to apply it to counselling and to setting themselves up in life.²²⁵

29.30 Despite what these cases suggest, however, the High Court has said that it is not necessary to show "exceptional circumstances" before a section 26 order may be made.²²⁶ Cases where section 26 orders have been made in less extreme circumstances include:

- (a) *H v H*, where the partners intended a life insurance policy to be a benefit for their children.²²⁷ The Family Court used a section 26 order to vest one half of a life insurance policy in trust for the children's benefit.²²⁸

²²⁰ *N v N* (1985) 3 NZFLR 694 (FC) at 696.

²²¹ *S v C* (1998) 17 FRNZ 176 (FC) at 177.

²²² *S v C* (1998) 17 FRNZ 176 (FC) at 178–179.

²²³ *S v C* (1998) 17 FRNZ 176 (FC) at 181.

²²⁴ *R v R* [1998] NZFLR 611 (FC) at 622.

²²⁵ *R v R* [1998] NZFLR 611 (FC) at 623.

²²⁶ *B v B* (2009) 27 FRNZ 622 (HC) at [83].

²²⁷ *H v H* [2015] NZFC 4376, [2015] NZFLR 107.

²²⁸ *H v H* [2015] NZFC 4376, [2015] NZFLR 107 at [36].

- (b) *L v L*, where the partners made a joint application for orders by consent vesting part of their relationship property in trust.²²⁹

29.31 The following are examples of cases where courts have declined to make section 26 orders:

- (a) In *M v M*, the dependent child had high and complex needs relating to a medical condition, however the relationship property pool was modest.²³⁰
- (b) In *C v B*, the child did not have a disability or special needs; and the child's primary caregiver was able to provide adequately for the child's needs, which were not found to be exceptional or out of the ordinary.²³¹
- (c) In *H v H*, the child's attention deficit hyperactivity disorder was not significant enough to be relevant, only a modest amount was in dispute between the parties, each party had a new home and one was paying child support.²³²
- (d) In *B v B*, the child had the capacity to earn income while attending university, or to undertake tertiary studies with a student loan.²³³ There were no issues of misconduct and the fact that the child was estranged from one partner was not relevant.²³⁴

29.32 Section 26 orders are contemplated on "rare occasions."²³⁵ Potential reasons for the low number of section 26 orders may be the restrictive approach discussed above; a reluctance to undermine the partners' property rights; insufficient or unavailable evidence; lack of lawyer for child; and/or the low number of applications. The low number of applications may indicate that section 26 orders are not appealing to parents (as the most obvious

²²⁹ *L v L* (1993) 11 FRNZ 81 (FC).

²³⁰ *M v M* [2012] NZFC 5019 (FC).

²³¹ *C v B* [2012] NZFC 7042 at [157]. See also *H v H* [2007] NZFLR 910 (HC) at [110] where a s 26 application was declined because the child did not have special needs, and both parents were employable and had a demonstrable capacity to earn good incomes.

²³² *H v H* [2012] NZFC 4543 at [66]–[70].

²³³ *B v B* (2009) 27 FRNZ 622 (HC) at [89].

²³⁴ *B v B* (2009) 27 FRNZ 622 (HC) at [89]–[90].

²³⁵ *De Malmanche v De Malmanche* (2002) 22 FRNZ 145 (HC) at [202]. See also Nicola Peart "Children's Interests Under the PRA & s 182 FPA" (paper presented to New Zealand Law Society Seminar, May 2013) at 33.

applicants) or that lawyers are not providing advice on section 26 orders because they are not seen as a useful tool.

Courts have taken a restrictive approach to section 26 orders

29.33 The current approach to section 26 demonstrates a reluctance to disturb the partners' property entitlements, which arguably does not sit well with UNCROC²³⁶ and places too much of an adult focus on a child-centred provision.²³⁷ Peart is of the view that:²³⁸

As the constraint is a judicial gloss on the section, there is scope for a more liberal approach that provides better protection for minor or dependent children of the relationship whilst not losing sight of the parties' rights to a just division.

29.34 The current approach may, however, achieve an appropriate balance between competing interests. A power that takes property and settles it for the benefit of children should only be used sparingly because it is inconsistent with the PRA's primary theory of entitlement on the part of the adult partners. Parents have an obligation to provide for their children's needs regardless of the PRA, and there are other mechanisms, such as child support, to ensure that happens. Parents should have the freedom to use their property to provide for any additional needs as they see fit.

Option for reform: Section 26 orders to meet children's specific needs

29.35 If the approach taken under section 26 is unduly restrictive, an option is to amend section 26 to signal that orders can be made to meet children's specific needs in certain circumstances.²³⁹ Specific needs could include children's educational requirements, high medical costs such as dental costs, or costs arising due to special needs. Other factors may also be relevant in determining whether to make an order, such as whether it would cause hardship, the partners' ability and willingness to provide for the child, and the partners' financial resources and other responsibilities. This could

²³⁶ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 52.

²³⁷ Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 45.

²³⁸ Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 52.

²³⁹ Advice to the Law Commission from Bill Atkin regarding options for reforming s 26 of the Property (Relationships) Act 1976 on file with the Law Commission (5 July 2017).

be recognised by, for example, providing that an order may only be made if it would be just and equitable as regards the child and the partners, and otherwise proper. This option could be accompanied by a more general mechanism that allowed, for example, for an order to be made for the payment of a third party invoice or the payment of money to the child's guardian.

29.36 One concern with this option may be that it is inconsistent with the PRA's main focus on a just division of property between adult partners, underpinned by a primary theory based on entitlement. It could also be said to undermine parental autonomy and may be unnecessary given the other obligations parents have to provide financial support for their children.²⁴⁰ It would risk extending the PRA into territory already covered to an extent by the Child Support Act 1991.²⁴¹ Orders can be made under the Child Support Act to meet some specific needs in special circumstances.²⁴² It is not the PRA's role to address any actual or perceived shortcomings with the Child Support Act. Further work would be required to consider the risks, complexity and policy difficulties associated with the PRA's interaction with the Child Support Act if this option is favoured. Issues may arise if orders are made at the point property is divided and circumstances subsequently change, or one partner refuses to pay. Such orders may lead to repeat applications to the court, leading to ongoing costs for parents as well as requiring further court resources.

29.37 However, children's needs are already recognised in the PRA, consistent with the secondary theory of need that sits alongside the primary entitlement theory. This option simply recognises the PRA as another way to provide for children's specific needs, at a particular point in time. An order to meet a specific need may be of considerable benefit to children where assessed child support is low or the child has expensive specific needs that cannot be met in another way.²⁴³ It avoids the need to navigate the lump sum provisions of the Child Support Act 1991 (see paragraph 27.19). It may also benefit children where child support is retained by the

²⁴⁰ Child Support Act 1991, s 4(b).

²⁴¹ Child Support Act 1991, s 4(f), states that an object of that Act is "to provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined".

²⁴² Child Support Act 1991, ss 104–106. Note that s 105(2)(c)(ii) of the Child Support Act 1991 links with the Property (Relationships) Act 1976 and would require careful consideration if this option is pursued.

²⁴³ Child Support Act 1991, ss 32 and 72. The minimum annual rate of child support payable under a formula assessment by a liable parent in respect of all of his or her children is \$905 for the child support year 1 April 2017 to 31 March 2018: see Inland Revenue "Child support annual adjustments" (9 February 2017) <www.ird.govt.nz>. Note that the minimum rate of child support is adjusted each year in line with inflation.

State to offset a benefit. Some parents may favour this option as a way to ring-fence property for a specific purpose that directly benefits the children, with no implication that the primary caregiver has been unjustly enriched by increasing their share. In our preliminary consultation, we were told by practitioners that often one of the few things parents can agree on is that their children should be adequately provided for.²⁴⁴

CONSULTATION QUESTION

I14 In what circumstances should a court settle property for the benefit of children?

Should section 26 allow property to be settled for the benefit of independent adult children?

29.38 Section 26 tries to do two things at once (see paragraphs 29.13 and 29.14). Its first function is clearly limited to minor or dependent children. Whether this limitation extends to the second function has been the subject of debate. This is due to the way section 26 is drafted and the wide definitions of “child of the relationship”, which include independent adults.²⁴⁵

29.39 In *Re Roberts* the Family Court held that the court had jurisdiction to vest relationship property in a family trust for the benefit of independent adult children.²⁴⁶ However, more recently in *B v B*, the High Court held that section 26 orders may only be made for the benefit of minor or dependent children.²⁴⁷ The Court held that settlement of property on an independent adult child would only be justified if the child held property for the benefit of one or more minor or dependent siblings.²⁴⁸

29.40 One view is that section 26 orders should only be made for the benefit of minor or genuinely dependent children, and not for the benefit of adult children who remain dependent by reason of lack of desire or motivation to become independent.²⁴⁹ This approach

²⁴⁴ See also Margaret Casey “Mitigating the Painful Effects of a Clean Break” (paper presented to New Zealand Law Society Family Law Conference, October 2003) 225 at 233.

²⁴⁵ Property (Relationships) Act 1976, s 2.

²⁴⁶ *Re Roberts* (1993) 10 FRNZ 668 (HC) at 675. See also *L v L* (1993) 11 FRNZ 81 (FC).

²⁴⁷ *B v B* (2009) 27 FRNZ 622 (HC) at [83]. The High Court said at [83(a)] that “[s]ettlement of property on an independent adult child is only justifiable if the child holds property for the benefit of one or more ‘minor’ or ‘dependent’ siblings”.

²⁴⁸ *B v B* (2009) 27 FRNZ 622 (HC) at [83].

²⁴⁹ Anna-Marie Skellern “Children and the Property (Relationships) Act 1976” (LLM Dissertation, Victoria University of Wellington, 2012) at 45 and 71–72.

would follow *B v B*, protect the most vulnerable children of the relationship and avoid the risk of claims by independent adult children seeking to anticipate succession. This clarification may also be desirable if section 26 is extended to signal that orders can be made to meet children’s specific needs in certain circumstances (see paragraphs 29.35 to 29.37).

- 29.41 It might, however, be appropriate that a court have the discretion to make section 26 orders in favour of independent adult children in limited circumstances. For example, to address need arising from parental criminal offending or severe parental neglect while the child was a minor, or where a joint application is made by both partners.²⁵⁰ It may only be appropriate for this power to be exercised in exceptional circumstances. This is because an independent adult can earn income themselves and it should be the parents’ decision as to whether any further support is provided.²⁵¹

CONSULTATION QUESTION

I15 Should orders be able to be made settling relationship property for the benefit of independent adult children? If so, should these orders only be made in exceptional circumstances?

Postponement of vesting

- 29.42 Section 26A gives a court the power to make an order postponing the vesting of any share in the relationship property. There are several limitations:

- (a) First, it can only be used for the benefit of the partner who is the “principal provider” of ongoing daily care for one or more minor or dependent children of the relationship (we refer to this partner as the “primary caregiver”). Logic suggests that where ongoing daily care is shared equally neither partner will be the primary caregiver.²⁵²
- (b) Second, a court must be satisfied that immediate vesting would cause “undue hardship” for the primary caregiver.

²⁵⁰ For example *R v R* [1998] NZFLR 611 (FC); *N v N* (1985) 3 NZFLR 694 (FC); and *L v L* (1993) 11 FRNZ 81 (FC).

²⁵¹ See *B v B* (2009) 27 FRNZ 622 (HC) at [88].

²⁵² See also Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.02(2)].

In *H v H* the High Court said that the threshold for “undue hardship” is high.²⁵³

- (c) Third, vesting cannot be postponed indefinitely. Vesting can only be postponed for as long as necessary, and only to the extent necessary, to alleviate the undue hardship. A court must specify when vesting will occur, either by reference to a specified future date or a specified event.

29.43 The following cases are examples where children’s interests have been considered by the court in deciding whether to make an order under section 26A to postpone vesting:²⁵⁴

- (a) In *H v D*, the Family Court postponed vesting for three years because, among other things, the children were young, the house was modest and in need of repair, and the wife was not in a position to pay out the husband and purchase reasonable alternative accommodation.²⁵⁵ The wife did not have to pay interest or occupation rent²⁵⁶ to the husband because he had traditionally been a poor provider and was at the time in prison and unable to provide for the children either by way of care or child support.²⁵⁷
- (b) In *E v W*, the relationship ended when Ms W’s daughters disclosed that they had been sexually abused by Mr E.²⁵⁸ Ms W’s objective was to remain in the family home to avoid further disruption to the children.²⁵⁹ Immediate division would involve the sale of the family home, and possibly a move away from the area and a change of school.²⁶⁰ This amounted to hardship and division was deferred for just over two years, until Mr E’s sentence end date, to give the children time to adjust to the separation and Ms W a longer period to improve her circumstances.²⁶¹ Mr E was unlikely to be disadvantaged

²⁵³ *H v H* [2007] NZFLR 910 (HC) at [114].

²⁵⁴ See also *F v H* FC Porirua FAM-2005-004-1312, 11 April 2011.

²⁵⁵ *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005.

²⁵⁶ See Chapter 14 for a discussion on interest and occupation rent.

²⁵⁷ *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005 at [112].

²⁵⁸ *E v W* (2006) 26 FRNZ 38 (FC) at [1].

²⁵⁹ *E v W* (2006) 26 FRNZ 38 (FC) at [3].

²⁶⁰ *E v W* (2006) 26 FRNZ 38 (FC) at [92].

²⁶¹ *E v W* (2006) 26 FRNZ 38 (FC) at [92] and [96].

because he was in prison and, even if released early, it would take him some time to obtain employment and find a suitable property.²⁶²

29.44 Section 26A orders appear to be uncommon,²⁶³ and this is likely due to a combination of reasons. First, few applications are made. Lawyers might not advise their client to seek a postponement order, due to the perceived desirability of immediate vesting, or because the partners might share care, in which case section 26A may not be applicable.²⁶⁴ Second, there is a high threshold for making a postponement order, which suggests that section 26A was designed to meet exceptional circumstances. Changing social conditions, including residential mobility and re-partnering²⁶⁵ may also explain why it is difficult for the primary caregiver to show that immediate vesting will result in undue hardship.

29.45 Our preliminary view is that there is a clear need for section 26A. For some primary caregivers, immediate vesting does not result in independence or allow them to “move on” with their lives.²⁶⁶ Property division often results in the sale of the family home, and the proceeds may not be sufficient to enable the primary caregiver to purchase a new house of the same standard in the same area, although this may also be the result for the other partner. Immediate sale of the family home requires some children to move schools and break ties with friends and community when they are dealing with the trauma of separation. Some primary caregivers and children may be left in difficult circumstances if property is divided immediately.

²⁶² *E v W* (2006) 26 FRNZ 38 (FC) at [97].

²⁶³ See Nicola Peart “Children’s Interests Under the PRA & s 182 FPA” (paper presented to New Zealand Law Society Seminar, May 2013) at 36.

²⁶⁴ Property (Relationships) Act 1976, s 23(1). See also Margaret Casey “Mitigating the Painful Effects of a Clean Break” (paper presented to New Zealand Law Society Family Law Conference, October 2003) 225 at 234.

²⁶⁵ In *H v H* [2007] NZFLR 910 (HC) the High Court said at [114] that:

In the 1960s and 1970s, agreements were relatively commonplace whereby the primary caregiver and children would remain in a family home with its sale being delayed until certain stipulated events occurred. Social conditions, however, have changed with geographic relocation and relatively rapid re-partnering in the wake of broken relationships being commonplace.

²⁶⁶ See Margaret Casey “Mitigating the Painful Effects of a Clean Break” (paper presented to New Zealand Law Society Family Law Conference, October 2013) 225 at 234.

Should it be easier for the primary caregiver to obtain a postponement order?

- 29.46 Postponement orders can have a positive impact for some children, yet section 26A sets a high threshold and the evidence we have suggests that few applications are made. A postponement order can enable children to stay in the family home for a time, postponing the disruption caused by changing schools and communities and allowing for better planning. A postponement order may also assist in circumstances where an occupation order would not. For example, where a primary caregiver has insufficient income to retain the family home post-separation. It would allow for the family home to be sold, a cheaper home purchased, and for the primary caregiver to retain the other partner's share in the equity of the family home to provide the funds to establish the new home for the children.²⁶⁷ It might also assist when continuing capital provision not necessarily tied to providing a home may be necessary for the benefit of the children.²⁶⁸ It could, however, be argued that the high threshold in section 26A is appropriate because a postponement order interferes with the other partner's property entitlement, may cause him or her hardship, and means that he or she does not get an immediate "clean break."
- 29.47 The restrictions on the power to postpone vesting in section 26A are unusual when contrasted with other PRA provisions. For example, the discretion in section 26 to settle property for children's benefit is relatively unencumbered in its drafting, yet it can have the effect of permanently depriving one or both partners of property rights. Another example is the ancillary power in section 33(3)(d) to postpone vesting of relationship property until a specified future date or event. This power has the same effect as section 26A, it may even be used in wider circumstances to postpone vesting, and yet section 33 is not restricted by an "undue hardship" test.
- 29.48 Section 26A focuses on undue hardship for the primary caregiver. There is no express requirement to consider whether immediate vesting would cause undue hardship for the children. Many children will experience some hardship as a result of immediate

²⁶⁷ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

²⁶⁸ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

vesting because household income generally declines as one household becomes two. Some children may experience a significant decline in housing quality or living standards, disadvantage or risk of negative outcomes if immediate vesting occurs close to a life event such as exams or the birth of a sibling, or the child's special needs going unmet. Courts, however, seem to be alive to the impact of immediate vesting on children's circumstances.²⁶⁹ This may be due to the general requirement in section 26 to have regard to children's interests in PRA proceedings. Or it may simply be because it is difficult to determine the undue hardship of the primary caregiver without considering the children's situation.²⁷⁰

29.49 We explore some options for changing the threshold for section 26A orders below.

Option 1: Expressly refer to undue hardship for children in section 26A

29.50 An option is to extend section 26A to provide that a court may make a postponement order if it is satisfied that immediate vesting would cause undue hardship for children. Relevant factors may include whether a postponement order is necessary in order for the child to remain in the family home, for example where the home has been adapted to accommodate any physical disabilities of the child, or to remain in proximity to the child's school or day care (whether the child remains in the family home or the proceeds of that home's sale are needed to purchase a smaller, less valuable home nearby), or whether a child would face a significant reduction in standard of living if an order is not made. This would ensure that the impact of immediate vesting on children is always considered and recognises that children's interests may be different to those of the primary caregiver. It would retain the well-understood test of "undue hardship". This option may not be a significant change from the current approach given the way the

²⁶⁹ For example, in *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009 the High Court said at [38] that:

Undue hardship will generally be reflected in evidence of the inability of the principal provider of care to manage financially in the event that the house is sold immediately. That will usually entail a need to examine income and outgoings, the ability of the claimant to meet his or her own needs, the proper requirements of the children as to schooling and so forth.

See also *E v W* (2006) 26 FRNZ 38 (FC).

²⁷⁰ See Ministry of Justice *Matrimonial Property Amendment Bill - Departmental Report Clause by Clause Analysis* (2 March 1999) at 23.

courts have interpreted section 26A in practice, but would remove any doubt.

Option 2: Replace the undue hardship test in section 26A with a more general discretion

29.51 This option could be achieved by providing that a court may make a postponement order if it considers it just. Removing the undue hardship requirement would give a court more discretion, however the court would be required to balance the interests of the partners and any children of the relationship. This may not be advantageous for children unless children's interests are given a higher priority in the implementation of the division of property between the partners (see paragraphs 29.20 to 29.21).

Option 3: Automatic postponement of vesting where there are minor or dependent children

29.52 A more significant reform option is a new presumption that vesting must be postponed for a short period in prescribed circumstances unless the partner that is not the primary caregiver can show undue hardship.²⁷¹ Automatic postponement could be appropriate where immediate vesting would lead to sudden and significant geographical relocation for the primary caregiver and children. This would recognise the importance of stability and continuity for children in the aftermath of relationship breakdown. It may only be appropriate for an automatic postponement to apply for a period of say six or 12 months from the date of separation, to provide a short window for adjustment and planning.

29.53 This option may not strike an appropriate balance between the interests of the primary caregiver, the other partner, and the children. It may also be too inflexible and unnecessary where there is a large property pool or where the primary caregiver has no need for the property. It may also distort care arrangements and create an incentive for parents, at least initially, to insist that care is shared equally. There are also questions about the practical

²⁷¹ Note that in 1998 the Commissioner for Children submitted that s 26A be deleted and replaced with a new provision which defers sale of the family home where there are minor dependent children, until the youngest child is 16 or the parties otherwise agree, unless the party seeking to sell the home can prove that deferred sale would cause undue hardship for that party: see Roger McClay "Submission to the Government Administration Select Committee on the Matrimonial Property Amendment Bill 1998" at 5.

impact this option would have. It may not make much difference where relationship property disputes are resolved through the courts because it is likely that a short automatic postponement period would expire before PRA orders are made. It may influence those settling relationship property disputes in the shadow of the law, however our preliminary consultation suggests that many couples that resolve their property matters out of court already postpone vesting.

CONSULTATION QUESTIONS

I16 Should the threshold for making postponement orders be changed? If so, what should the threshold be?

I17 Should vesting be automatically postponed in certain circumstances?

Occupation and tenancy orders

29.54 Section 27 gives a court jurisdiction to make an occupation order granting exclusive possession of the family home (or other premises) to one partner provided it forms part of the relationship property.²⁷² Section 28 gives a court jurisdiction to vest the tenancy of any dwellinghouse in either partner. Section 28A is an attempt to improve the chances of primary caregivers staying in the family home with the children in either situation.²⁷³ It provides that a court, in determining whether to make an occupation or tenancy order, and the period and conditions of such an order, “shall have particular regard” to the need to provide a home for any minor or dependent children of the relationship. A court may also have regard to all other relevant circumstances.

29.55 Occupation and tenancy orders can provide children with stability during the upheaval of relationship breakdown by maintaining continuity of housing, schooling, social and sporting activities and helping them cope with stress. They can also ensure that children’s need for adequate housing is met.

29.56 In 2016, 785 applications for the division of relationship property under section 25 were filed in the Family Court, but only 59 applications were filed for occupation orders and one application

²⁷² Occupation rent is discussed in Chapter 14 of this Issues Paper.

²⁷³ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.1].

for a tenancy order.²⁷⁴ We do not know how many of those applications were granted.²⁷⁵ The low number of applications is likely due to a combination of factors such as couples reaching agreement as part of a wider discussion around childcare and support, trends towards shared parenting, the accommodation needs of children of new relationships, and the possibility that such orders are unattractive to parents, for example due to the prospect of occupation rent.²⁷⁶ New arrangements such as “bird’s nest parenting”²⁷⁷ or couples “living apart” in the same house²⁷⁸ may have also eroded the need for such orders.

The priority given to children’s accommodation needs

29.57 The need to provide a home for the children of the relationship was initially treated as the first and most important consideration by the courts, and given greater weight than the “other relevant circumstances” that a court may consider under section 28A.²⁷⁹ In *N v N* the High Court remarked that it must usually be “paramount.”²⁸⁰ More recent cases have taken a more subdued approach. In *G v G* the High Court said that elevating the need to provide a home to the status of paramountcy seemed to go further than section 28A requires.²⁸¹ In *W v W* the High Court took a moderate approach, saying that the children’s interests should be given weight greater than other considerations, but that where children would not be significantly prejudiced, competing considerations were not to be overlooked.²⁸²

²⁷⁴ Email from Ministry of Justice to the Law Commission regarding applications filed in the Family Court (5 May 2017).

²⁷⁵ See also Nicola Peart “Occupation orders under the PRA” [2011] NZLJ 356 at 356.

²⁷⁶ See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.1].

²⁷⁷ “Bird’s nest parenting” is where the children stay in the family home and the parents rotate in and out of the “nest”. See for example *K v K* [2005] NZFLR 881 (FC) where the court declined an application for exclusive occupation of the family home where the parties had a “nesting” regime. See also fn 19 for recent media coverage of bird’s nest parenting.

²⁷⁸ For example where a couple’s relationship has ended but both partners choose to remain living in the family home for a time to provide stability for the children or for other reasons. See fn 18 for recent media coverage of couples “living apart” in the same house.

²⁷⁹ See *W v W* (1984) 2 NZFLR 385 (FC) at 389–390.

²⁸⁰ *N v N* (1985) 3 NZFLR 766 (HC) at 769.

²⁸¹ *G v G* (1988) 3 FRNZ 665 (HC) at 677.

²⁸² *W v W* [1997] NZFLR 543 (HC) at 547.

Option for reform: Give more weight to children's accommodation needs

29.58 An option is to amend section 28A to direct a court to give children's accommodation needs a higher priority when considering occupation or tenancy orders. This could be achieved by replacing the direction to have "particular regard" to the children's need for a home with a direction to treat the children's need for a home as a primary consideration, or even the first and paramount consideration. This would give children's accommodation needs greater weight when balanced against other relevant factors. This may, however, not achieve an appropriate balance between children's interests and the interests of others, such as the partners, other family members or children of new relationships.

CONSULTATION QUESTION

I18 Should more weight be given to the need to provide a home for the children when considering occupation and tenancy orders?

Furniture orders

29.59 The PRA gives a court the discretion to make furniture orders under sections 28B, 28C and 28D. Under section 28B, a court may make an ancillary furniture order giving the use of furniture to the partner in whose favour an occupation or tenancy order has been made. The direction in section 28A to have particular regard to the need to provide a home for children is arguably relevant to the making of an ancillary furniture order under section 28B, however that could be usefully clarified.²⁸³

29.60 Under section 28C, a court may make a furniture order giving the use of furniture to either partner. In determining whether to make an order under section 28C a court must have particular regard to the applicant's need to have suitable furniture to provide for the needs of any children of the relationship living with him or her.²⁸⁴ Furniture orders can be made in relation to "furniture, household appliances, and household effects" – this is likely to

²⁸³ See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR28B.02].

²⁸⁴ Property (Relationships) Act 1976, s 28C(4).

cover essential items such as cots and car seats, and is arguably wide enough to cover children's toys.²⁸⁵

- 29.61 Furniture orders are uncommon. In 2016, 785 applications for the division of relationship property under section 25 were filed in the Family Court, but only 10 applications were filed for ancillary furniture orders under section 28B and only two applications for furniture orders under section 28C.²⁸⁶

There is no separate category of children's property

- 29.62 Calls have been made for a separate category of children's property in the PRA. In the lead up to the 2001 amendments, submissions were made that children's property should be excluded from relationship property because its inclusion could diminish the caregiver's share.²⁸⁷ The direction in section 28C to have particular regard to children's needs when making furniture orders was included as a compromise.²⁸⁸
- 29.63 Children's property may include gifts to children, children's bedroom furniture, car seats, clothes, toys, and school and hobby equipment used for and by children of the relationship. A separate category of children's property could help ensure that it is identified, ring-fenced and set aside for their continued use and benefit. It would also recognise children's interests in a way that is independent of those of the partners.
- 29.64 A separate category of children's property may, however, pose problems and there is a view that it is not required. It may be difficult to determine whether mixed-use assets are children's property. For example, a computer may be used by both the children and the partners. It may also be difficult to determine where children's property should be physically situated when care of children is shared. There are also existing mechanisms in the PRA that can address issues with children's property, such as orders settling property for children's benefit.²⁸⁹

²⁸⁵ See Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [11.4.4].

²⁸⁶ Email from Ministry of Justice to Law Commission regarding applications filed in the Family Court (5 May 2017).

²⁸⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 26.

²⁸⁸ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 26.

²⁸⁹ Property (Relationships) Act 1976), s 26(1). See also ss 26A, 28B and 28C.

CONSULTATION QUESTION

I19 Is there a need for a separate category of children's property? If so, how should it be defined and dealt with under the PRA?

Participation of children in PRA proceedings

29.65 Section 37 sets out who is entitled to be heard in PRA proceedings. It provides that a court may direct that notice be given to any person “having an interest in the property” that would be affected by a PRA order.²⁹⁰ In *H v R* children with a contingent interest in trust property that would be affected by PRA orders were joined as parties to their parents' relationship property proceedings.²⁹¹ One commentator says that it is “rare” for this discretion to be exercised in respect of minor children.²⁹² Possible explanations for this are the lack of specific reference to children in section 37, the requirement for a property interest and the view that ordinarily children should be kept out of their parents' property disputes.²⁹³

29.66 Section 37A sets out when a lawyer for child is appointed in PRA proceedings.²⁹⁴ It provides that a court may appoint a lawyer for any minor or dependent children of the relationship if “special circumstances” make the appointment necessary or desirable. Special circumstances may exist where children are likely to be affected and the assets at stake are unusually high or where property might be settled on children.²⁹⁵ For example, in *L v P* a lawyer was appointed to represent a child whose substantial inheritance had been partly intermingled with relationship

²⁹⁰ Section 37 of the Property (Relationships) Act 1976 is a right to be heard in the specific matter of interest to the extent that it would be affected by an order: *H v H* FC Wellington FAM-2010-085-450, 17 August 2010 at [6].

²⁹¹ *H v R* [2017] NZFC 761 at [10], [26] and [29]–[33]. In that case the children's interests needed to be represented because the wife had a conflict in her roles as applicant and trustee, and the other trustee was not actively involved.

²⁹² Anna-Marie Skellern “Children and the Property (Relationships) Act 1976” (LLM Dissertation, Victoria University of Wellington, 2012) at 21. See also Pauline Tapp, Nicola Taylor and Mark Henaghan “Agents or Dependents: Children and the Family Law System” in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 310–311.

²⁹³ See *H v R* [2017] NZFC 761 at [33(b)] where the Family Court accepted the submission that ordinarily children should be kept out of their parents' property disputes.

²⁹⁴ See also Family Courts Act 1980, s 9B(1).

²⁹⁵ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.82].

property.²⁹⁶ Peart says that this power is “seldom utilised.”²⁹⁷ The threshold for appointment, the expense that may be incurred by the partners²⁹⁸ and the potential delay involved are possible explanations.

Should children’s voices be heard more often in PRA proceedings?

- 29.67 Perceptions of children and their rights to be heard in decision-making processes that affect them have changed.²⁹⁹ This is recognised in the Care of Children Act 2004, which provides for children to be given reasonable opportunities to express views on matters affecting them, not only in care or guardianship arrangements but also in decisions about their property.³⁰⁰ Any views the child expresses, either directly or through a representative, must be taken into account.³⁰¹ However although the outcome of PRA proceedings can affect children, the primary focus is generally on the division of property between the partners.
- 29.68 Court proceedings can be difficult and stressful for children. Any occasion to be heard would require safeguards that consider the age and maturity of the child, do not require participation and do not require a court to act in accordance with the child’s views.

²⁹⁶ *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011.

²⁹⁷ Nicola Peart “Protecting children’s interests in relationship property proceedings” (2013) 13(1) Otago LR 27 at 54. For example, in *M v M* [2004] NZFLR 72 (HC) no lawyer for child was appointed in an application for an order to settle property on a child with special needs.

²⁹⁸ Nicola Peart “Protecting children’s interests in relationship property proceedings” (2013) 13(1) Otago LR 27 at 54. See Property (Relationships) Act 1976 (PRA), s 37A(2). The amount of the fees and expenses of the lawyer for the child are currently set out on the Ministry of Justice’s website <www.justice.govt.nz>. Prior to July 2014, a court could also order payment out of public money appropriated by Parliament for the purpose: s 37A(3) (repealed, on 15 July 2014, by s 4 of the Property (Relationships) Amendment Act 2013).

²⁹⁹ See United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 12.

³⁰⁰ Care of Children Act 2004, s 6.

³⁰¹ Care of Children Act 2004, s 6. See also the Oranga Tamariki Act 1989, ss 5, 11 and 22.

Is the threshold for appointment of lawyer for child too high?

29.69 The threshold for appointment of lawyer for child is relatively high.³⁰² This may be an issue if there is a risk that children are unable to exercise a right to be heard effectively (particularly if children are given additional rights in PRA proceedings) or in a manner free of parental influence. It may also be an issue if children's interests are inadequately represented by the partners or overlooked, for example if it is not in the partners' interests to raise them or because the partners are distressed or distracted, and not well placed to focus on their children's needs.

29.70 Another view is that more frequent appointments of lawyer for child is inappropriate because of the PRA's focus on the partners and their entitlements, and could turn PRA proceedings into a three-way contest between the partners and the children in which some children feel pressure to choose sides.

How would greater participation of children in PRA proceedings be funded?

29.71 If greater participation of children in PRA proceedings is considered desirable it raises the issue of how the associated costs are funded. Increased costs may be incurred in providing support structures and procedural mechanisms to enable children to express their views, and in the form of lawyer's fees where lawyer for child is appointed.³⁰³

CONSULTATION QUESTIONS

I20 Should children's views be heard more often in PRA proceedings, and if so, in what circumstances?

I21 Is the threshold for appointment of lawyer for child too high? If so, what should the threshold be?

I22 Who should pay for the cost of greater participation of children in PRA proceedings?

³⁰² In other family law contexts, appointment of lawyer for the child ranges from mandatory (such as in care and protection proceedings under the Oranga Tamariki Act 1989: s159) to discretionary (such as in civil proceedings under the Family Proceedings Act 1980 where a court can appoint a lawyer for the child if necessary or desirable: s 162).

³⁰³ See fn 298 above.