



Part J – Can
partners make
their own
agreement
about
property?

Chapter 30 – Contracting out of the PRA

Introduction

- 30.1 Partners do not have to divide their property according to the PRA's rules of division. Partners can, at any time, make an agreement under Part 6 of the PRA that governs the status, ownership and division of their property and is enforceable by a court. We call this a “contracting out agreement.”
- 30.2 The provisions governing contracting out agreements in Part 6 of the PRA have a significant role in New Zealand's relationship property regime, both in theory and in practice. Over the years, many partners have substituted the PRA's rules with their own arrangements.
- 30.3 There are two types of contracting out agreements:
- (a) Section 21 provides that partners can make an agreement *before* or *during* their relationship, relating to “the status, ownership and division of their property (including future property)” during the joint lives of the partners, or when one partner dies. Section 21 agreements are sometimes referred to as a “pre-nuptial agreements.”
 - (b) Section 21A provides that partners may make an agreement to *settle* any differences that have arisen between them about their property. Section 21A agreements are sometimes called “settlement agreements.”¹
- 30.4 A contracting out agreement under section 21 can make provision for the death of one partner.² Similarly, section 21B provides that when one partner has died, the deceased's personal representatives and the surviving partner may make an agreement

¹ If one of the spouses or partners dies either during Property (Relationships) Act 1976 proceedings or before proceedings are commenced, the personal representatives of the deceased spouse can enter a settlement agreement under s 21A: s 21B.

² Property (Relationships) Act 1976, s 21(2)(b).

to settle any claim with respect to the partners' property.³ We discuss how these provisions work further in Part M.

- 30.5 Many separating partners will agree on how their property should be divided, but will not enter into a formal contracting out agreement that complies with the PRA. These informal agreements are generally unenforceable, although a court may enforce them in certain circumstances, as we discuss below.
- 30.6 In this part we look at the PRA rules governing contracting out agreements and the basis for these rules. We then examine problems with how the rules may operate in practice.
- 30.7 We address contracting out agreements that involve cross-border issues in Part L.

The law governing contracting out agreements

Why does the PRA allow partners to contract out?

- 30.8 The PRA is often described as an “opt out system.” It will apply to all those in a qualifying relationship and, if those partners wish to deal with their property differently to the PRA’s rules, they must “opt out” by entering into a contracting out agreement under Part 6. This promotes couple autonomy rather than individual autonomy, as both partners must enter the agreement.⁴
- 30.9 When devising the PRA regime, the Government recognised the potential objections to applying general rules of classification and division of property to all relationships. In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice explained that the new law had been prepared on the assumption that most partners would be happy to order their affairs in the way contemplated by the Bill.⁵ It was not, however, the Government’s policy to “force married people within the straight-jacket of a fixed and

³ If the only personal representative is the surviving partner, the court must approve the agreement beforehand in order for it to be valid: Property (Relationships) Act 1976, s 21B(3). In any case, either or both the personal representatives and the surviving partner can submit the draft agreement to the court for approval: s 21C.

⁴ See Chapter 3 for a discussion of the principles of the Property (Relationships) Act 1976.

⁵ AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 11.

unalterable regime of matrimonial property.”⁶ The Minister explained that the Bill therefore granted spouses the freedom to adopt such property arrangements as they saw fit.

30.10 The role of contracting out agreements as described by the Minister of Justice in 1975 has been affirmed and retained. The 2001 amendments strengthened the contracting out provisions to give partners greater certainty that their agreement would be upheld, in light of the PRA’s extension to de facto relationships at the same time.⁷

30.11 Several leading cases dealing with contracting out agreements have given similar explanations for why the PRA allows partners to contract out. In *Wood v Wood* the High Court said that contracting out agreements ensured partners are not consigned to “the same Procrustean bed whether they liked it or not.”⁸ In *Wells v Wells* the High Court observed that the general thrust of the legislation and its legislative history indicated a desire to respect the capacity of persons to contract out of the PRA.⁹ The Court said “[p]ublic acceptance of the whole statutory scheme was based in part on the recognition that people could opt out – it was an integral feature of its public legitimacy.”¹⁰

Matters a contracting out agreement may deal with

30.12 Section 21D prescribes the matters an agreement under sections 21 or 21A may deal with. The agreements may do all or any of the following:

- (a) provide that any property, or any class of property, is to be relationship property;
- (b) define the share of the relationship property, or any part of the relationship property, that each partner is entitled to when the relationship ends;

⁶ AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 11.

⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 21. The threshold at which a court can set aside a contracting out agreement was raised. Previously, a court could set aside an agreement if it would have been “unjust” to give effect to the agreement: Matrimonial Property Act 1976, s 21(10). Parliament amended this test to provide that a court could set aside the agreement if giving effect to it would cause a “serious injustice”: Property (Relationships) Act 1976, s 21(1).

⁸ *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235.

⁹ *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

¹⁰ *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

- (c) define the share of the relationship property, or of any part of the relationship property, that a surviving partner and the estate of a deceased partner is to be entitled to on the death of one partner;
- (d) provide for the calculation of those shares; and
- (e) prescribe the method by which the relationship property, or any part of the relationship property, is to be divided.

30.13 Section 21L confirms that contracting out agreements may be relied upon and enforced like any other contract. It provides that the parties to an agreement enjoy all remedies under law or equity available to enforce contracts to implement an agreement under sections 21 or 21A.¹¹

Requirements of a contracting out agreement

30.14 The PRA's provisions regarding contracting out agreements attempt to strike a balance. They promote partners' autonomy by granting them freedom to choose the property consequences of their separation. The PRA is, however, social legislation aimed at ensuring a just division of property between partners who may be of unequal bargaining positions.¹² The contracting out provisions prevent a partner from signing away his or her rights without appreciating the implications of the agreement and entitlements under the PRA. Part 6 also attempts to prevent a partner from entering an agreement when the partner is under improper pressure.¹³

30.15 Section 21F is the principal mechanism through which Part 6 of the PRA attempts to safeguard partners from bad or oppressive bargains. Section 21F provides that a contracting out agreement is void unless several requirements are complied with.

¹¹ Section 21G of the Property (Relationships) Act 1976 also provides that the particular requirements that apply to contracting out agreements under s 21F do not affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.

¹² See AM Finlay "Matrimonial Property - Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 5. The problems identified with the law under the former Matrimonial Property Act 1963 centred on the onus on a wife to prove specific contributions to identified items of property. This placed a wife in an inferior bargaining position as most often she would seek a share of her husband's property rather than what the law deemed to be their property. The Property (Relationships) Act 1976's approach of classifying certain assets as relationship property and then laying down a general rule of equal sharing of those assets was intended to overcome this disparity by elevating a wife's bargaining position.

¹³ AM Finlay "Matrimonial Property - Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

- 30.16 The first requirement is that the agreement must be in writing and signed by both parties.¹⁴
- 30.17 The second requirement is that each party to the agreement must have independent legal advice before signing the agreement.¹⁵ What constitutes adequate legal advice has been considered by the courts on several occasions. The Court of Appeal decision in *C v C* is often cited as the leading case.¹⁶ The case concerned a settlement agreement between a husband and wife who had separated. The husband had complex business affairs. The wife went to see a lawyer some hours before she was due to travel to London. The lawyer advised the wife he had concerns that the timing did not allow for a proper consideration of the extent of the partners' property and her rights to it. The lawyer signalled that he did not have the necessary information regarding the partners' affairs to properly analyse the agreement. The agreement provided for quite a large disparity between what the wife was to receive and what she may have received under the PRA. The wife executed the agreement. The wife later argued that the agreement was void as she had received inadequate legal advice.
- 30.18 The Court of Appeal said that the lawyer had properly indicated the information he lacked in order to comprehensively advise on the agreement. The Court said that the advice was as complete as it could have been. The lawyer formed a professional opinion on the wisdom of entering the agreement on these terms, which the lawyer advised against. The client was then free to enter the agreement, even though the lawyer believed the agreement was unfair. The lawyer should not have been reluctant to certify that he believed the agreement was unfair.
- 30.19 In a passage often cited, Hardie Boys J explained what is meant by independent legal advice:¹⁷

Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects that party's interests. The touchstone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms

¹⁴ Property (Relationships) Act 1976, s 21F(2).

¹⁵ Property (Relationships) Act 1976, s 21F(3).

¹⁶ *C v C* [1993] 2 NZLR 397 (CA).

¹⁷ *C v C* [1993] 2 NZLR 397 (CA) at 404.

of the agreement. Their implications must be explained as well. In other words the party concerned is entitled to an informed professional opinion as to the wisdom of entering into an agreement in those terms. This does not mean however that the adviser must always be in possession of all the facts. It may not be possible to obtain them. There may be constraints of time or other circumstances, or the other spouse may be unable or unwilling to give the necessary information. The party being advised may be content with known inadequate terms. He or she may insist on signing irrespective of advice to the contrary. In such circumstances, provided the advice is that the information is incomplete, and that the document should not be signed until further information is available, or should not be signed at all, the requirements of [section 21F(3)] have been satisfied.

- 30.20 In other cases, the courts have said that legal advice has been inadequate where the lawyer purported to give advice even though the lawyer had no information about the partners' circumstances surrounding the agreement,¹⁸ where the lawyer had only a 15 minute interview with the partner,¹⁹ or where the lawyer had previously acted for the other partner to the agreement and was not independent.²⁰
- 30.21 The third requirement is that the signature of each party to the agreement must be witnessed by a lawyer.²¹ The courts have said that the lawyer witnessing the signature must be the lawyer who gave the independent legal advice.²²
- 30.22 The fourth and final requirement is that the lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.²³ The courts have said that a lawyer's certificate is not conclusive evidence of the adequacy of advice.²⁴ The courts have also said that the certifying lawyer owes a duty of care to the other partner that advice has been properly given.²⁵ That means if the advice is inadequate and the agreement

¹⁸ *Odlum v Odlum* (1989) 5 FRNZ 41 (HC).

¹⁹ *West v West* [2003] NZFLR 231 (HC).

²⁰ *Wells v Wells* [2006] NZFLR 870 (HC).

²¹ Property (Relationships) Act 1976, s 21F(4).

²² *Williamson v Williamson* (1980) 3 MPC 200 (HC) at 201.

²³ Property (Relationships) Act 1976, s 21F(5).

²⁴ *C v C* [1993] 2 NZLR 397 (CA) at 404; and *Wells v Wells* [2006] NZFLR 870 (HC).

²⁵ *Connell v Odlum* [1993] 2 NZLR 257 (CA).

is void for non-compliance with section 21F, the other partner can make a claim against the lawyer.

Agreements that would cause serious injustice may be set aside

30.23 Even if a contracting out agreement satisfies the requirements of section 21F, section 21J(1) provides that a court may still set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice. A partner may apply to a court specifically to set aside the agreement. A court may set an agreement aside under section 21J(1) on its own initiative, in any PRA proceedings.²⁶

30.24 In deciding whether giving effect to the agreement would cause a serious injustice, a court must have regard to:²⁷

- (a) the provisions of the agreement;
- (b) the time since the agreement was made;
- (c) whether the agreement was unfair or unreasonable because of all the circumstances at the time it was made;
- (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
- (e) the fact that the parties wished to achieve certainty on the status, ownership, and division of property by entering the agreement; and
- (f) any other matters that the court considers relevant.

30.25 Section 21M provides that if a contracting out agreement is set aside under section 21J, the PRA has effect as if the agreement had never been made.

30.26 The purpose of section 21J is to address the situation where, even though a contracting out agreement complies with all requirements under section 21F, the result the agreement will achieve is seriously unjust. In 2001 Parliament amended

²⁶ Property (Relationships) Act 1976, s 21J(2).

²⁷ Property (Relationships) Act 1976, s 21J(4).

section 21J by raising the threshold for when a court could set an agreement aside, from “unjust” to “serious injustice.”²⁸ Accompanying this amendment was the addition of section 21J(4) (e) which, when considering whether the agreement would lead to a serious injustice, requires the court to consider the fact that the parties wished to achieve certainty in their affairs. The basis for these amendments was the concern that the courts were setting aside contracting out agreements too readily.²⁹

30.27 Some examples of notable cases that have interpreted “serious injustice” are discussed below.

Harrison v Harrison

30.28 In *Harrison v Harrison*, the partners encountered difficulties in their relationship.³⁰ At one point they separated, but discussed reconciliation. The husband refused to reconcile unless the wife signed a section 21 agreement. The partners’ principal asset (a farm) had been purchased during the marriage from the sale proceeds of a previous farm owned by the husband. The section 21 agreement protected the partners’ pre-relationship property and gave the wife an interest in the new farm and stock. The wife’s lawyer advised her that she may have had greater entitlements to the farm under the PRA than what she would receive under the section 21 agreement, because it was acquired for the partners’ common use and benefit. The lawyer also advised that the husband had not given adequate disclosure of information. The wife did not follow her lawyer’s advice, and instead executed the agreement. After the partners’ final separation the wife sought to set the agreement aside on the grounds it would cause her serious injustice. The wife had emphasised the pressure the husband placed on her to enter the agreement as a condition of reconciliation.

²⁸ The test provides that a court could set aside the agreement if giving effect to it would cause a “serious injustice”: Property (Relationships) Act 1976, s 21J(1).

²⁹ In *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235 the Court said:

My fear is that these contracting-out agreements are being set aside too readily. Those who criticise the Matrimonial Property Act for the readiness with which it captures property sourced from outside the marriage partnership (pre-marriage assets, third-party gifts and inheritances) are invariably met with the same answer: if people do not like the statutory regime they can contract out of it. One gathers that the same legislative approach is about to be taken with de facto marriage. But if effective contracting out were as difficult to achieve as these Family Court decisions suggest, the answer would be a hollow one. All would be consigned to the same Procrustean bed whether they liked it or not.

In *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82] the Court of Appeal observed “The Parliamentary history of the 2001 amendments shows that the approach taken by Fisher J in *Wood* (which was seen as raising the bar for setting aside agreements) was welcomed.”

³⁰ *Harrison v Harrison* [2005] 2 NZLR 349 (CA).

30.29 The Court of Appeal noted the 2001 amendments and Parliament's intention to raise the test from unjust to serious injustice.³¹ The Court explained the benefits of the higher threshold: unless people can have reasonable confidence that the contracting out agreement will be honoured by a court, they will be less likely to attempt reconciliation, like Mr Harrison did here.³² The Court discussed how the question of serious injustice should be approached, and made these points:

- (a) It would be unreal to measure fairness by assessing the extent to which the agreement deviated from the partners' entitlements under the PRA, as the partners have contracted out of those rights.³³ Partners should be free to agree on different arrangements to those otherwise imposed upon them by the PRA.³⁴
- (b) The position may be different for settlement agreements under section 21A as by that stage a party's relationship property entitlements have already accrued and the agreement should reflect those entitlements.³⁵
- (c) There will always be pressure when one partner asks the other to enter into a contracting out agreement. Usually there will be an implicit threat that the relationship will be terminated if the agreement is not entered. It would therefore be very destabilising if the Court found this pressure, which is almost always present in these cases, is a reason for holding that the agreement is unjust.³⁶
- (d) Serious injustice is most likely to be demonstrated by an unsatisfactory process resulting in an inequality of outcome rather than mere inequality of outcome itself.³⁷
- (e) The Court said that the agreement provided the wife with the entitlements she had accrued when she entered the agreement. Against the higher threshold in the legislation, there was nothing undue about the

³¹ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [28]–[30].

³² *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [88].

³³ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [93].

³⁴ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

³⁵ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

³⁶ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

³⁷ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [112].

pressure the husband may have put on the wife to enter the agreement. The Court said that the agreement should not be set aside.

Clark v Sims

30.30 In *Clark v Sims* the partners had entered a section 21 agreement that provided that a block of land was to be Mr Sim's separate property.³⁸ At the time of the agreement the partners understood the property had an approximate value of \$186,000. The land was subject to a covenant which Ms Clark believed prevented the land from being subdivided. About six years after the partners entered the agreement, Mr Sims obtained approval to subdivide the property into ten lots. He sold seven lots for \$1.5 million and the remaining sections were valued at \$1.5 million.

30.31 The High Court said that the increased value of the property was due to the change in zoning, inflation and the efforts of Mr Sims in obtaining the subdivision. The Court said that, although there was a change in circumstances, the agreement could not be said to have become unfair or unreasonable because of the changed circumstances.³⁹ The partners were mature and intelligent people with business experience. They understood the agreement and were both independently advised. Although the change of circumstances may have become unfair, the agreement had not.⁴⁰

T v T

30.32 In *T v T* the husband operated a company in Christchurch.⁴¹ The shares of the company were held on trust for the husband and wife. The dividends from the company accounted for roughly 80 per cent of the family income. The partners separated in 2010 and entered a settlement agreement under section 21A of the PRA. The pool of property valued for equal distribution was sizeable, reflecting the valuation of the company shares. Under the agreement, the wife was to resign as trustee of the trusts and forgo any interests in them. That provided the husband with the full benefit of the income and assets from the company. In

³⁸ *Clark v Sims* [2004] 2 NZLR 501 (HC).

³⁹ *Clark v Sims* [2004] 2 NZLR 501 (HC) at [74].

⁴⁰ *Clark v Sims* [2004] 2 NZLR 501 (HC) at [74].

⁴¹ *T v T* [2014] NZFC 5335, [2015] NZFLR 185.

return, the husband agreed to pay the wife her share of the assets by purchasing her a home and making periodic payments up to a certain amount. The purchase of the wife's home was to be financed by a mortgage which the husband took responsibility for paying.

- 30.33 The Christchurch earthquakes in early 2011 affected the company's business. The husband presented evidence he had received no income from the company since the earthquakes. When the agreement was signed he had expected to receive an annual income of around \$230,000-\$250,000 from dividends paid by the company. However, the value of the shares in the company had dropped to less than half their earlier value. The husband claimed he did not have sufficient income or assets to meet his obligations under the settlement agreement. He applied to have the agreement set aside under section 21J.
- 30.34 The Family Court accepted that to enforce the agreement would cause a serious injustice. The agreement had become unfair due to the change of circumstances since the agreement was made. The combination of factors resulting in a considerable loss of value of the company shareholding made it impossible for the husband to meet his payment obligations under the agreement.⁴² The Court set the agreement aside under section 21J.

W v K

- 30.35 In *W v K* the partners separated after a 25 year marriage.⁴³ Eight years earlier, the husband arranged for his lawyer to draft a contracting out agreement, which the parties entered into. The agreement provided that each partner was to retain the property registered in their sole names. The agreement did not, however, identify any particular items of property or the value of any property. During the relationship, the husband held all valuable property in his own name, such as the family home, company shares and cars. The effect of the agreement was that when the partners separated, the husband retained 100 per cent of the property. The family home alone was valued at over \$1 million.
- 30.36 The High Court held that the agreement should be set aside under section 21J. The Court noted that the provisions of the agreement

⁴² *T v T* [2014] NZFC 5335, [2015] NZFLR 185 at [202].

⁴³ *W v K* [2017] NZHC 1643.

were unjust. The Court said that the agreement was “opaquely” drafted; it obscured the level of property the husband held and suggested that the wife held property in her own name when she did not.⁴⁴ The Court also observed that, as to section 21J(4)(e), while the agreement achieved certainty, there was no obvious benefit in certainty for the wife.⁴⁵ The Court noted that the courts in previous cases had said that a disparity in the division of property would not in itself meet the threshold of serious injustice. But given that the agreement split the property 100:0 between the partners to an orthodox 25 year marriage, the Court said “generalities must, in such a case, go out the window.”⁴⁶

A court may give effect to non-complying agreements

30.37 Although section 21F provides that an agreement that does not comply with the requirements is void, section 21H allows a court to give effect to non-complying agreements, wholly or in part, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

30.38 The test is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.⁴⁷

30.39 The courts have said there are two elements to consider when determining whether to give effect to a non-complying agreement:⁴⁸

- (a) Is there an agreement?⁴⁹
- (b) Has the non-compliance materially prejudiced the interests of either partner to the agreement?

⁴⁴ *W v K* [2017] NZHC 1643 at [63].

⁴⁵ *W v K* [2017] NZHC 1643 at [73].

⁴⁶ *W v K* [2017] NZHC 1643 at [80].

⁴⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [5.73].

⁴⁸ *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21].

⁴⁹ There must be an agreement between the parties in terms of s 21 or s 21A of the Property (Relationships) Act 1976 that purports to deal with the status, ownership and division of the property owned by the parties. In *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 a party attempted to enforce a settlement agreement reached at a Family Court settlement conference. The party argued that the agreement was a settlement agreement for the purposes of s 21A although it lacked the solicitor’s certificate under s 21F(5). The High Court held that the agreement could not be declared valid under s 21F as it could not constitute a s 21A agreement. That was because the agreement purported to deal with the distribution of trust property which was not property “owned by the parties” in terms of s 21A.

30.40 There have been a few cases where the courts have found that, even if the agreement had complied with section 21F, the partner challenging the validity of the agreement would have entered it anyway. In those cases, the courts have said the non-compliance does not materially prejudice the interests of that partner.⁵⁰

Are the contracting out provisions working well?

30.41 Below we make some preliminary observations on how well we think the contracting out provisions are working in practice.

Who is using contracting out agreements, when and why?

30.42 We do not know how many people enter into contracting out agreements, when they enter contracting out agreements or why they do so. There is no research in New Zealand that comprehensively studies partners who contract out of the PRA.⁵¹ We intend to use responses to this Issues Paper to add to our understanding of how New Zealanders use (or do not use) contracting out agreements.

30.43 Anecdotal evidence we have received as part of our preliminary consultation suggests the following trends:

- (a) Some partners will not enter a contracting out agreement, either before or during the relationship, or when the relationship ends. Instead, they will resolve their property division by their own informal arrangements. We are unsure about the number of partners who fall into this category. We are also unsure

⁵⁰ *McGill v Crozier* (2001) 21 FRNZ 157 (HC); and *West v West* (2001) 21 FRNZ 157 (HC).

⁵¹ We are cautious about drawing on studies from overseas jurisdictions in order to infer the rates of contracting out in New Zealand. The reasons why partners choose to contract out, and indeed their ability to do so, reflects the “default system” of legal rules that regulate financial relations between partners in those jurisdictions: see Jens M Scherpe “Introduction” in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Oxford, 2012) 1 at 2. The rate of contracting out in other jurisdictions also reflects financial and cultural factors. For example, in France, partners may opt to enter a PACS (Pacte civil de solidarité) agreement. Under a PACS, partners are treated as being married with a separation of property regime so that on leaving the relationship each party retains their own property. On entering the agreement parties may elect to keep certain property in joint names. As well as giving the parties choices in relation to what property will be kept separate, there are certain additional rights that civil servants who have a PACS agreement are entitled to, which helps explain the popularity of the PACS regime. The point being that there are factors unique to France that explain why the PACS is popular, that are unrelated to the flexibility for parties to organise their affairs.

why these partners determine their property relations informally. It may be because partners are happy to divide their property according to their own sense of fairness with no formal agreement.⁵² It may be because they do not know they have property rights under the PRA. Or it could be because legal advice is unaffordable.

- (b) The majority of partners who enter a contracting out agreement either before or during the relationship are entering a second or subsequent relationship. Their motivations usually include a desire to provide protection or certainty regarding assets obtained prior to the relationship. Sometimes the goal may be to protect assets for the benefit of children from a previous relationship.⁵³
- (c) High net worth partners are more likely than partners with few assets to enter contracting out agreements before or during the relationship. High net worth partners, although perhaps disproportionately represented among those who litigate their contracting out agreements, are likely to be a small minority of partners.

30.44 Many people are likely to encounter practical challenges which make entering a contracting out agreement difficult. Partners must know contracting out of the PRA is an option. They must then have sufficient resources to obtain independent legal advice. Partners may also find conversations regarding a contracting out agreement uncomfortable. An agreement that supposes the partners' separation and protects their financial interests is likely to be a difficult subject in most relationships, although we have heard that partners entering a subsequent relationship are less troubled by these types of conversations.

30.45 We do not have information about whether Māori are using, or wish to use, Part 6 of the PRA to ensure that they have

⁵² Anne Barlow "Legal Rationality and Family Property: What has Love got to do with it?" in Jo Miles and Rebecca Probert (eds) *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, Oregon, 2009) 303 at 317-318. Barlow explains, "People do what is right for them in the context of their own lives and to act legally rationally ... is often seen as inappropriate or too difficult."

⁵³ In Part G of this Issues Paper we discuss how trusts are sometimes used for this purpose. The Law Commission of England and Wales has recently undertaken a review of the law in England and Wales governing matrimonial property agreements. The Commission likewise observes that agreements will be helpful in circumstances where the partners have been in a relationship and wish to safeguard a house or other assets for their children from that previous relationship: Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [1.37].

enforceable contracting out agreements which may reflect tikanga Māori.⁵⁴ It may be that, as in these circumstances tikanga Māori would itself likely govern the enforceability of agreements, there is little concern about meeting the Part 6 requirements for an enforceable agreement.⁵⁵ We would like to hear more about whether this is an issue.

CONSULTATION QUESTIONS

- J1 How common is it for partners to enter a contracting out agreement under section 21 or section 21A?
- J2 In what circumstances will partners enter a contracting out agreement under section 21 (pre-nuptial agreement)? For what purposes do partners enter section 21 agreements?
- J3 How common is it for matters to be settled without a section 21A agreement (settlement agreement)? What prevents people from entering a section 21A agreement?
- J4 Are there particular issues in relation to contracting out agreements which reflect tikanga Māori?

Preliminary observations on the policy underpinning Part 6 of the PRA

30.46 Part 6 of the PRA reflects what we have described in Chapter 3 as the implicit principle that, subject to safeguards, the PRA gives partners the freedom to organise their affairs in a manner of their choosing. As we have explained, there are good reasons why partners would want this freedom:

- (a) they may wish to shield the assets they each bring to the relationship from equal sharing;
- (b) they may wish to safeguard the interests of their children from a former relationship;
- (c) they may wish to create a clear method for dividing their property should the relationship end, particularly if their property affairs are extensive or potentially complex.

⁵⁴ Ruru notes that if a Māori couple want whānaungatanga to determine their property interest, they should make an agreement under s21 contracting out of the Property (Relationships) Act 1976: Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 486.

⁵⁵ See Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Tikanga Māori continues to govern Māori relationship property disputes concerning family chattels, especially taonga, and "[t]hese couples are not bringing these disputes to New Zealand's courts."

- 30.47 Partners may have their own sense of what constitutes a just division of property. The PRA has always reflected the position that it is entirely proper that partners are not forced within the straightjacket of an unalterable relationship property regime.⁵⁶ This is likely to become increasingly important, given the increasing diversity of New Zealand's population.⁵⁷ Partners may wish to contract out of the PRA in a way that allows greater recognition of different cultural values.
- 30.48 The PRA's contracting out provisions attempt to provide effective safeguards so partners do not sacrifice their rights under the PRA through a lack of awareness or foresight or because of undue pressure. Partners in a relationship and in love may agree to things they would not otherwise contemplate.⁵⁸ As the Law Commission of England and Wales has recently observed in its review of the law governing matrimonial property agreements, people in love may have a firm belief the relationship will never end.⁵⁹ They may feel pressure, whether pressure is intended or not, to enter an agreement.⁶⁰ Sometimes there may be an implicit threat that the relationship will be terminated if the agreement is not entered.⁶¹ As the New Zealand Court of Appeal said in *Harrison v Harrison*, there will usually be some pressure when one party asks the other to enter an agreement.⁶²
- 30.49 The procedural safeguards under section 21F may appear to restrict the partners' autonomy as they can impose a fairly significant administrative and financial burden, such as obtaining legal advice. The PRA is premised on the policy that its principles and rules provide for a just division of property. Therefore few partners would lightly give up their rights.⁶³ The section 21F requirements are designed to ensure partners enter a contracting out agreement with a clear understanding of their rights under

⁵⁶ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1976" [1975] II AJHR E6 at 11.

⁵⁷ See our Study Paper Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017).

⁵⁸ Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.27].

⁵⁹ Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [5.27].

⁶⁰ Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) [5.28].

⁶¹ *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

⁶² *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [84].

⁶³ AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1976" [1975] II AJHR E6 at 11. The Minister of Justice claimed that the original Matrimonial Property Act 1976 had "been prepared in the

the agreement in comparison with their rights under the PRA. The requirements are therefore to enhance the partners' ability to make an autonomous decision.⁶⁴

- 30.50 We also recognise that contracting out agreements, particularly settlement agreements under section 21A, are integral to the ability of partners to resolve their property matters without expensive and lengthy dispute resolution processes. We therefore see the contracting out procedure as consistent with the PRA's principle that issues should be resolved as inexpensively, simply and speedily as is consistent with justice.⁶⁵
- 30.51 Although we have come across several deficiencies with the contracting out provisions, which we discuss below, the overall approach appears sound. Our preliminary view is that the contracting out provisions generally strike the right balance between the interests of autonomy and protection.
- 30.52 The PRA has maintained roughly the same balance between the partners' freedom and procedural safeguards during its 40 year life. The section 21F procedural requirements have always been a feature of the contracting out regime. They have been tested and interpreted often. The only aspect of the regime that has been fine-tuned is the test for when a court can set an agreement aside under section 21J. That test, we think, strikes a satisfactory balance. It equips a court to address unjust agreements while still providing partners an adequate level of certainty as to when their bargain might be overturned.
- 30.53 We acknowledge that contracting out is likely to be a difficult process for many New Zealanders. Even though we suggest the procedural safeguards are set at an appropriate threshold, many partners may struggle with the process. They may be unaware of the requirements of the contracting out provisions in the PRA. The costs of compliance, such as the cost of legal advice, may be beyond the reasonable means of many New Zealanders. Also, a contracting out agreement is a bargain struck by the two partners. There may be wider family and whānau interests at stake, especially the interests of children. There may be a need for

belief that most couples entering marriage will be happy to order their affairs in the way provided."

⁶⁴ Jens M Scherpe "Introduction" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Oxford, 2012) 1 at 2. The Law Commission of England and Wales has also cautioned that "autonomy" in this context is not simply the freedom to contract. Rather, it may become the freedom to force one's partner to abide by an agreement when he or she no longer wishes to do so. See Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [5.31].

⁶⁵ Property (Relationships) Act 1976, s 1N(d).

more public education about the opportunity to contract out of the PRA.⁶⁶

CONSULTATION QUESTIONS

- J5 Do the contracting out provisions in the PRA strike the right balance between (a) offering partners freedom to arrange their own property affairs, and (b) ensuring each partner contracts with informed consent?
- J6 Do any issues arise from New Zealand’s increasingly diverse population wishing to contract out of the PRA in order to recognise other cultural norms?
- J7 Is more public education needed so people better understand the opportunity to contract out of the PRA?

Issues regarding what a contracting out agreement can cover

30.54 There is significant uncertainty about whether a contracting out agreement may govern:

- (a) property held on trust;
- (b) claims under section 15 of the PRA; and
- (c) KiwiSaver scheme entitlements.

30.55 We discuss each of these below.

Property held on trust

30.56 Many families in New Zealand use trusts as a way to hold property. Nearly 15 per cent of households have reported that their home was held on trust.⁶⁷ A member of the household in around 20 per cent of New Zealand households has reported some involvement with a trust, meaning they are a settlor, trustee or beneficiary of a trust.⁶⁸

30.57 In Part G we discussed in greater detail how the PRA responds when property is held on trust. By way of summary, we note that:

⁶⁶ See discussion in Chapter 4 about public education.

⁶⁷ Statistics New Zealand “2013 Census QuickStats About Housing” (March 2014) at 12.

⁶⁸ Statistics New Zealand “Household Net Worth Statistics: Year ended July 2015” (28 June 2016). The survey excluded independent trustees.

- (a) Property held on trust is legally owned by the trustees of the trust. The beneficiaries are the beneficial owners of the property.⁶⁹ A person can be both trustee and a beneficiary, but he or she cannot be the sole beneficiary. Only beneficial owners are considered owners of property for the purposes of the PRA.⁷⁰
- (b) If the trust is a discretionary trust and the beneficiaries' interest depends on the trustees exercising discretion in their favour, the beneficiary will not be an owner of property for the purposes of the PRA.
- (c) If a partner transfers property to a trust, the disposition can potentially defeat the other partner's rights to that property under the PRA. Sections 44 and 44C allow the court to recover all or part of that property, or to compensate the other partner, in certain circumstances.
- (d) Besides the remedies in the PRA, a partner can look to wider law to claim property held on trust. Section 182 of the Family Proceedings Act 1980 is relevant in this context. It allows the court to vary a "nuptial settlement" (which can include a trust) when a partner to a marriage reasonably expected to benefit from the settlement, but those expectations have been defeated by the dissolution of the partners' marriage.⁷¹ The courts are also prepared in some circumstances to recognise that a trust is subject to a constructive trust in favour of a partner. To establish a constructive trust, the partner must show he or she made contributions to the trust property and that he or she had a reasonable expectation of an interest in that property.⁷²

30.58 Given the widespread use of trusts in New Zealand, it is common for trusts to be bound up with partners' property matters. Two important questions arise:

⁶⁹ There are, however, different types of beneficial interest under a trust. Notably, a discretionary beneficial interest will not be considered as someone's property for the purposes of the Property (Relationships) Act 1976. The particular rules governing what interests in a trust constitute "property" are discussed in depth in Part G.

⁷⁰ Section 4B of the Property (Relationships) Act 1976 also preserves the law that applies where either partner is acting as a trustee.

⁷¹ For further discussion on s 182 of the Family Proceedings Act 1980, see Part G.

⁷² For further discussion see Part G. Recent cases in which the courts have recognised a constructive trust over an express trust include: *Prime v Hardie* [2003] NZFLR 481 (HC); *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766; *Murrell v Hamilton* [2014] NZCA 377; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 434.

- (a) Can partners agree in a contracting out agreement what will happen to trust property in the event they separate, or if they have already separated?
- (b) Can partners settle a claim against a trust through a section 21A agreement?

Can partners agree in a contracting out agreement what will happen to trust property?

- 30.59 Section 21 provides that the partners may make any agreement regarding the “status, ownership and division of *their* property”. Similarly, section 21A provides that the agreement may address property “*owned* by either or both” partners.
- 30.60 Often, the trust property cannot accurately be described as property owned by the partners. If the partners are not beneficiaries, or have only discretionary beneficial interests, they will have no property interest for the purposes of the PRA.
- 30.61 In addition, the trustees may be third parties. As legal owners of the trust property, they have a duty to deal with the property in accordance with the terms of the trust. The partners cannot purport to bind third party trustees through their own contract under section 21 or section 21A.⁷³
- 30.62 Sometimes the courts have been prepared to take a more flexible approach. In *M v S* partners entered a contracting out agreement under section 21 that purported to deal with trust assets.⁷⁴ The partners had previously established mirror trusts into which significant assets had been transferred.⁷⁵ The beneficiaries under the trusts were the partners and their family. The partners later entered an agreement that provided that, if the partners separated, the mirror trusts were to be resettled on separate trusts under which the partners’ children were to be the sole beneficiaries. One partner sought to challenge the agreement under section 21J because, among other reasons, the agreement

⁷³ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]; and Vanessa Bruton and Isaac Hikaka “Trusts and Relationship Property for Family Lawyers” (paper presented to the New Zealand Law Society Trusts and Relationship Property for Family Lawyers Conference, 2013) at 70.

⁷⁴ *M v S* [2012] NZFLR 594 (HC).

⁷⁵ Mirror trusts are trusts established by each partner which are in identical terms albeit each partner names the other partner as beneficiary of the trust he or she settles along with other family members.

had “wrongly regarded” the trust assets. In response the High Court said:⁷⁶

I do not accept the [contracting out agreement] disregarded or wrongly regarded assets when it came to the [the trust property]. There is a growing tendency to treat trusts as transparent for the purposes of a relationship property agreement. The legal basis for drawing trust property into a relationship property assessment is in s 44C of the Act and s 182 of the Family Proceedings Act 1980.

- 30.63 The High Court in *M v S* declined to set aside the agreement under section 21J based on how the agreement treated the trust property. Other cases have taken a similar approach.⁷⁷
- 30.64 In other cases, however, the courts have not taken such a flexible approach. In *Phipps v Phipps* the partners had entered an agreement following a judicial settlement conference in the Family Court.⁷⁸ The partners did not then implement the agreement and so the issue was whether that agreement could be viewed as a section 21A agreement. The Court said that a “formidable argument” against treating the agreement as a section 21A agreement was that section 21A could only apply to “property owned by either or both of the spouses or partners” and the agreement purported to deal with property held on trust legally owned by the trustees.⁷⁹
- 30.65 Regardless of the strict legal position, we understand from our preliminary consultations with lawyers that in many cases involving trusts, the partners will agree to a division of the trust property between themselves as if the property was their own and the trust did not exist. The partners often record their agreement in a contracting out agreement. The trustees will simply accept the

⁷⁶ *M v S* [2012] NZFLR 594 (HC) at [76].

⁷⁷ In *T v T* [2014] NZFC 5335, [2015] NZFLR 185 the family’s principal income-earning asset was shares held in a company. The shares were held on a discretionary trust. The trustees were the husband and wife and a third party. When the partners separated, they entered a settlement agreement under s 21A of the Property (Relationships) Act 1976. As part of the settlement agreement, the wife forfeited her rights under the trust and resigned as trustee. In return, the husband promised to use the income earned from the shares to make certain payments to the wife and purchase a house for her. The husband’s obligations were secured by a general security agreement over the shares in the company held by the trustees. In an application to set aside the agreement under s 21J, the court noted that the s 21A agreement purported to deal with trust property. The court noted this was trust property, but did not question that the agreement could legitimately deal with the property. The court observed at [68]:

Clearly the parties adopted what could be described as an expedient and pragmatic approach by dealing with the trust property in the agreement. I note that there was no provision to have the parties, in their capacities as trustees and [a third party] in his capacity as a trustee sign any collateral agreement so as to legally bind the trusts to the terms of the agreement.

⁷⁸ *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554.

⁷⁹ *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 at [29].

partners' agreement. We have no evidence to test how widespread this practice is.

- 30.66 Some have suggested that there are some, albeit limited, ways for partners to resolve questions about trusts when the trust is a discretionary trust and the trustees are third parties. The authors of *Family Property* say that a contracting out agreement can simply record the details of the trust, what is happening with the trust property and what each partner will retain.⁸⁰ The authors also say that the agreement can be made conditional upon other arrangements in relation to a trust being completed. This could include the trustees agreeing to exercise their discretion in a manner consistent with the agreement. Other commentators and practitioners affirm this approach.⁸¹ They say the way to deal with trust property through a contracting out agreement is to refer to the property in the agreement. The trustees are then recommended to execute separate documents, such as a deed of ratification, linking the property division in the agreement to the trustees.⁸²

Can partners settle a claim against a trust through a section 21A agreement?

- 30.67 Similar principles apply when a partner makes a claim against a trust. When a relationship ends a partner may make a claim against a trust, such as claims under sections 44 or 44C of the PRA, or under section 182 of the Family Proceedings Act 1980, or a constructive trust. The partners cannot bind third party trustees through a section 21A settlement agreement to use trust property to settle the partner's claim.⁸³
- 30.68 Instead, the trustees may sometimes enter an agreement directly with the partner to settle the claim. Such an agreement would not be a contracting out agreement under the PRA. Rather, it would

⁸⁰ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]. Likewise, Bruton and Hikaka say that the purported basis for justifying the disposal of trust assets under a contracting out agreement as the parties' property is not sound and is irreconcilable with both the scheme and essence of the Property (Relationships) Act 1976 as well as the trustees' irreducible core obligations: Vanessa Bruton and Isaac Hikaka "Trusts and Relationship Property for Family Lawyers" (paper presented to New Zealand Law Society Trusts and Relationship Property for Family Lawyers Conference, 2013) at 70.

⁸¹ Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016).

⁸² Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 19.

⁸³ It may, however, be possible for one partner to settle the other partner's claim against the trust by using his or her own property by way of settlement.

be a separate agreement exercised pursuant to the trustees' power under the Trustee Act 1956⁸⁴ or under the trust instrument to settle claims relating to the trust.⁸⁵

Should the PRA be amended to better enable partners and trustees to resolve matters regarding trusts?

- 30.69 Based on the law discussed above, the partners cannot bind third party trustees through their own contracting out agreement. Usually the trustees must separately agree to deal with the trust property outside the framework of the PRA.
- 30.70 There are, however, advantages if the partners and trustees can resolve all of their property matters at the same time and record that agreement in the same document. Given how often families use trusts to hold key items of family property, like homes, the treatment of trust property could well form a key part of the partners' overall bargain about their property matters. It is undesirable for the partners' agreement to be incomplete in the sense that it depends on a separate ratification by the trustees, or the trustees to enter a separate settlement agreement with the partner. The procedure could be made more inexpensive, simple and speedy if the PRA gave the partners and trustees the ability to make agreements regarding the totality of their property matters.
- 30.71 In any event, it appears from what people have told us during our preliminary consultation that in many instances the partners and trustees will treat the trust property like it is the partners' personal property. The trustees will simply implement whatever agreement the partners reach between themselves. It may be desirable to regulate this practise by expanding the contracting out provisions in the PRA to include trustees.
- 30.72 If the contracting out provisions of the PRA were expanded to enable partners and trustees to resolve matters regarding trusts, careful consideration would be required on several matters, such as:

⁸⁴ Trustee Act 1956, s 20(g).

⁸⁵ For trustees' powers to engage in dispute resolution, see Robert Fisher "Including Trusts in Relationship Property Arbitrations" (2014) 8 NZFLJ 76; and Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at Chapter 5. The Trusts Bill 2017 currently before Parliament contains provisions regarding the trustees' ability to participate in dispute resolution processes: Trusts Bill 2017 (290-1), cls 137-142.

- (a) What particular matters should the partners and trustees be able to agree? For example, could the trustees commit through a section 21 agreement to distribute property to the partners according to their respective beneficial interests if the partners separated? What types of claims could the trustees agree to settle through a section 21A agreement?⁸⁶
- (b) Should the trustees be subject to the same requirements under section 21F? Should, for instance, they be required to obtain independent legal advice?
- (c) How should the interests of other beneficiaries under the trust be protected, particularly if those beneficiaries are minors, incapacitated or unascertained?

CONSULTATION QUESTION

J8 Should the contracting out provisions in the PRA be amended to enable partners and trustees to resolve matters regarding trusts? If so, what would be appropriate amendments?

Can partners contract out of claims under section 15 of the PRA?

30.73 Some uncertainty exists about whether partners can contract out of section 15 of the PRA. Section 15 provides that if, after the relationship ends, the income and living standards of one partner are likely to be significantly higher than the other partner due to the division of functions within the relationship, a court may order that the partner with the higher living standards pay compensation to the other.⁸⁷

30.74 It is unclear whether an agreement that addresses a claim under section 15 can be an agreement regarding the “status, ownership, and division” of the partners’ property. Although very few cases have addressed this issue directly, commentators have suggested that an agreement under section 21A to settle the partners’ relationship property dispute can properly address a section 15

⁸⁶ The framework presented in the Trusts Bill 2017 currently before Parliament regarding the trustees’ ability to enter alternative dispute resolution procedures could provide a good model: Trusts Bill 2017 (290-1), cls 137–142.

⁸⁷ Property (Relationships) Act 1976, s 15.

claim.⁸⁸ Section 21A agreements are used “for the purpose of settling any differences” that have arisen between the partners about their property. It is reasonable to suggest that such an agreement can settle differences when one partner claims property from the other as compensation under section 15.

30.75 Commentators are less certain about whether a contracting out agreement under section 21 can effectively deal with a section 15 claim. An agreement under section 21 is made either before or during the relationship. If the agreement addressed a claim under section 15, the partners would effectively make promises either not to make a claim or in terms of how they will resolve a claim. The difficulty commentators identify is that when an agreement is drafted, the partners cannot predict how to quantify a section 15 claim.⁸⁹ That is because it is difficult to assess an agreement’s fairness against any future disparity of income and living standards.⁹⁰ An agreement that deals pre-emptively with a claim under section 15 is vulnerable to a challenge under section 21J if the agreement becomes unfair as the partners’ circumstances change during the relationship.⁹¹

30.76 We realise that the uncertainty surrounding section 15 claims may present a challenge to lawyers and partners who draft contracting out agreements under section 21. We are unsure, however, whether any reform to the PRA would resolve what is likely to be an unavoidable uncertainty. Our preliminary view is that the contracting out provisions of the PRA are not in need of substantive reform to address contracting out of section 15.

CONSULTATION QUESTION

J9 Can and should the contracting out provisions in the PRA be reformed to achieve greater certainty regarding the reliability of agreements made under section 21 that address a claim under section 15?

⁸⁸ John Priestley “Mine, Mine, Mine – Serious Injustice and the Statutory Right to Contract Out” (paper presented to the New Zealand Law Society Family Law Conference, Christchurch, October 2001) and Mark Henaghan “Property Relationship Masterclass” (paper presented to LexisNexis Professional Development, 2006) as cited in Amanda Donovan and Jennie Hawker “Section 21 Agreements – Shades of Grey?” (paper presented to New Zealand Law Society Seminar, June 2015).

⁸⁹ Rachel Dewar “s 21 Contracting Out Agreements: Best Practices” (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker “Section 21 Agreements – Shades of Grey?” (paper presented to New Zealand Law Society Seminar, June 2015) at 53.

⁹⁰ Rachel Dewar “s 21 Contracting Out Agreements: Best Practices” (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker “Section 21 Agreements – Shades of Grey?” (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.

⁹¹ Rachel Dewar “s 21 Contracting Out Agreements: Best Practices” (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker “Section 21 Agreements – Shades of Grey?” (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.

KiwiSaver scheme entitlements

30.77 KiwiSaver providers will not deal with a partner's entitlements in a KiwiSaver scheme solely because the partners have agreed in a contracting out agreement to divide the entitlements. This is based on a decision of the Banking Ombudsman.⁹² A husband and wife had separated and entered a settlement agreement.⁹³ The wife agreed to transfer her savings from her KiwiSaver scheme to her husband's KiwiSaver scheme. The wife's KiwiSaver provider refused to action the transfer. The provider said it required a court order before it could make the transfer.

30.78 The Banking Ombudsman agreed with the KiwiSaver provider,⁹⁴ saying that the KiwiSaver funds could not be released under a section 21 agreement. The Ombudsman reasoned that section 196 of the KiwiSaver Act 2006 (which has since been repealed and re-enacted as section 127) provides that KiwiSaver funds may only be released "if required by the provisions of any enactment (including an order made under section 31 of the Property (Relationships) Act 1976)". The Ombudsman said the section therefore required an order under section 31 of the PRA to transfer a partner's KiwiSaver scheme entitlement. A section 21 agreement on its own was insufficient. The Ombudsman explained that a contract represents a voluntary agreement between at least two parties, while a court order is a proclamation determining the legal relationship between the parties.

30.79 It is probable that a court would take a similar view to the KiwiSaver provider and the Banking Ombudsman.⁹⁵ This raises a question of whether the PRA should provide that partners can implement a division of a partner's KiwiSaver entitlements by a contracting out agreement made under the PRA.

⁹² Banking Ombudsman Scheme "Case - 37858: 2013-2014" <www.bankomb.org.nz>.

⁹³ The Ombudsman's note of the case refers to the agreement as a s 21 agreement, although if the agreement was used to settle the parties' property entitlements it is more likely to have been made under s 21A of the Property (Relationships) Act 1976.

⁹⁴ Banking Ombudsman Scheme "Case - 37858: 2013-2014" <www.bankomb.org.nz>.

⁹⁵ The court may, however, use different reasoning and focus more on an interpretation of s 31 of the Property (Relationships) Act 1976 (PRA). In *Trustees Executors Ltd v Official Assignee* [2015] NZCA 118, [2015] 3 NZLR 224 the Court of Appeal considered the issue of whether a bankrupt's interest under a KiwiSaver scheme should vest in the Official Assignee. The Court held at [52] that in order for an enactment to allow divestment of a member's interest in a KiwiSaver scheme, the legislation must expressly provide that the interest can be divested. As ss 101 and 102 of the Insolvency Act 2006 provided in general terms that the property of a bankrupt vested in the Official Assignee, the legislation did not expressly require the vesting of a member's interest in a KiwiSaver scheme. Consequently, s 127(1) of the KiwiSaver Act 2006 prevented the bankrupt's interest in the scheme from vesting in the Assignee and s 127(2) did not apply. In light of this judgment, pt 6 of the PRA is probably insufficient to require a KiwiSaver provider to implement a division of a member's entitlements in the scheme because of the absence of any express reference in pt 6 to the vesting of a member's interest in a KiwiSaver scheme.

30.80 There are several reasons why the PRA should allow partners to adjust their KiwiSaver entitlements by a contracting out agreement.⁹⁶ First, given that KiwiSaver schemes have existed for a relatively short time,⁹⁷ it is reasonable to assume that interests in KiwiSaver schemes will be an increasingly common asset in relationship property divisions. It may be preferable that, if the actual division of a partner's KiwiSaver entitlements is required,⁹⁸ that can happen without the need to apply to a court for orders, given the principle that matters under the PRA should be resolved as inexpensively, simply and speedily as possible.⁹⁹

30.81 Second, other superannuation schemes may be varied by a partners' contracting out agreement. Section 92(1) of the Government Superannuation Fund Act 1956 provides that a retirement allowance under the superannuation scheme established under that Act is not assignable. Section 92(2), however, provides that the prohibition does not prevent "the operation of any agreement entered into under Part 6 of the Property (Relationships) Act 1976." Instead, the section provides that a contracting out agreement is binding in relation to the scheme, so long as it does not alter the liabilities of and contributions to the scheme.

30.82 Third, it should be borne in mind that the partners must go through a reasonably thorough process to create a valid contracting out agreement. Section 21F provides that the agreement must be in writing. Each partner's signature must be witnessed by a lawyer who has given that partner advice on the

⁹⁶ In addition to the reasons we give here for why partners should arguably have the ability to deal with KiwiSaver scheme entitlements, there are several other potential issues with s 127 of the KiwiSaver Act 2006. Firstly, it is questionable whether s 31 is the only means under the Property (Relationships) Act 1976 (PRA) of implementing a division of a partner's superannuation scheme entitlements. The authors of *Fisher on Matrimonial and Relationship Property* suggest that instead of making orders under s 31, the court could achieve the same effect by using a combination of its powers to transfer rights under certain instruments under s 33(1)-(3) or s 33(6) of the PRA: RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.39]. A credible argument could also be made that the PRA gives partners the ability to implement a division of a superannuation scheme entitlement through a contracting out agreement: s 21D(1)(e) provides that a contracting out agreement may prescribe the method by which the relationship property is to be divided. The second potential issue is that s 31 provides that an order under the section may be conditional on the partners entering "an arrangement or deed of covenant" which ensures each partner receives his or her share of the property. Section 31(2) then provides that the partners' arrangement or deed may be served on the superannuation scheme manager. The provision does not refer to the court's order being served on the scheme manager but only the arrangement or deed. Consequently, on a plain reading of s 31, there does not appear to be any requirement that a scheme manager be given notice of the court's order.

⁹⁷ KiwiSaver came into full operation on 1 July 2007: KiwiSaver Act Commencement Order 2006, s 2.

⁹⁸ When a partner's superannuation scheme entitlements are classified as relationship property, it is not always necessary for those specific funds to be divided between the partners. It may, for example, be preferable to leave the sole rights to the superannuation with one partner and pay an equivalent property or cash value to the other partner. For the common ways in which superannuation scheme entitlements can be dealt with see RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.38].

⁹⁹ Property (Relationships) Act 1976, s 1N(d).

effect and implications of the agreement.¹⁰⁰ That lawyer must then certify that he or she has given the partner the advice.¹⁰¹ These safeguards may arguably ensure that a partner's KiwiSaver entitlements are not affected without the member partner's informed consent. If the partners deliver a contracting out agreement that complies with the section 21F requirements to a KiwiSaver provider, the provider may have sufficient confidence that the proposed dealing with the partner's entitlement is intended and authorised.

CONSULTATION QUESTION

J10 Should the PRA provide that a contracting out agreement made under the PRA requires a KiwiSaver provider to implement a division of a partner's KiwiSaver scheme entitlements?

Other issues

Can contracting out agreements be signed and witnessed through audio-video communication technologies?

30.83 Audio-video communication technologies have advanced in a way that was probably not foreseen by the original drafters of the PRA in the 1970s or by those responsible for the amendments in 2001. A question often asked is whether a lawyer can witness a client signing a contracting out agreement via an audio-video communication, such as Skype.¹⁰²

30.84 Section 21F(4) simply provides that the signature of each party to the agreement must be witnessed by a lawyer. The Relationship Property Standing Committee of the New Zealand Law Society Family Law Section has said that section 21F(4) implies that the witnessing and certifying lawyer is to be in the physical presence of the party signing the agreement.¹⁰³ If the agreement was witnessed via Skype or similar audio-video communication, the

¹⁰⁰ Property (Relationships) Act 1976, ss 21F(3)-21F(5).

¹⁰¹ Property (Relationships) Act 1976, s 21F(5).

¹⁰² Ingrid Squire "Certifying s 21 agreements" (2013) 15 Fam Advocate 26; Amanda Donovan and Jennie Hawker "Section 21 Agreements - Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 24-25; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21F.07].

¹⁰³ Relationship Property Standing Committee of the New Zealand Law Society Family Law Section cited in Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21F.07].

lawyer would risk the agreement being set aside and the lawyer being sued if the agreement was voided for lack of compliance with section 21F.

30.85 Squire identifies several issues with a lawyer witnessing a signature through audio-video communications:¹⁰⁴

- (a) the lawyer cannot be certain the document the partner signs and the document the lawyer is to sign are the same agreement;
- (b) the lawyer cannot know whether the partner is affected by off-screen influences;
- (c) the lawyer may have difficulties verifying the identity of the person who signs the document; and
- (d) there may be issues with the quality of the audio-video call which may compromise the quality of advice required by the PRA.¹⁰⁵

30.86 Some commentators say there are methods through which a lawyer can legitimately witness the signature so it meets the requirements of section 21F, even though the lawyer is not physically present when a partner signs. Donovan and Hawker suggest that the client could attend another lawyer's office at the client's location. The witnessing and certifying lawyer would be connected via a Skype or audio-video connection to the meeting. The lawyer physically present at the office with the client can confirm that the client is alone (so as not to be subject to off-screen influences) and has with him or her, a copy of the agreement the witnessing lawyer has provided.¹⁰⁶

30.87 There are obvious advantages to allowing an agreement to be witnessed via audio-video communication. If a client is overseas or it is otherwise very impractical or expensive for the lawyer to physically attend when the client signs the agreement, audio-video communication may be useful. We agree there are real concerns with reliability of the witnessing process but, as

¹⁰⁴ Ingrid Squire "To skype or not to skype: that is the question" *The Family Advocate* (Wellington, Autumn 2014) at 17.

¹⁰⁵ Kim and Woo also caution that a lawyer who witnesses a partner's signature to a contracting out agreement via video link may be unable to pick up on the social cues which might indicate that the partner did not truly comprehend the effect of what he or she is signing: Jason Kim and Eugenia Woo "Video-conferencing technology and the witnessing of documents" (12 February 2016) Auckland District Law Society <www.adls.org.nz>.

¹⁰⁶ Amanda Donovan and Jennie Hawker "Section 21 agreements - Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 24-25.

Donovan and Hawker explain, there may be ways to mitigate the risks.

- 30.88 To date, no case in New Zealand has decided whether a contracting out agreement signed and witnessed through audio-video communication meets the requirements of section 21F.

CONSULTATION QUESTION

J11 Should the PRA allow the signature of a party to the agreement to be witnessed by a lawyer through audio-video communication? If so, what safeguards should be put in place to ensure the reliability of the witnessing process?

Problems in the prescribed form of agreement under section 21E

- 30.89 When the PRA was amended in 2001, there was debate about whether the requirement to obtain independent legal advice under section 21F would be too costly.¹⁰⁷ The Government and Administration Select Committee kept the requirement for independent legal advice, reasoning that if it was removed, there was a risk that more agreements would be challenged. This would increase costs eventually.
- 30.90 Instead, the Committee proposed section 21E. It aims to “minimise the legal expenses of people who wish to enter” into a contracting out agreement by providing a model agreement that can be used by the parties. Only one model agreement has been provided under the Property (Relationships) Model Form of Agreement Regulations 2001. Regulation 6 provides that the agreement has no special effect or status just because it is in the prescribed form; it must be treated the same way as any other agreement under section 21.
- 30.91 The general view is that the model agreement is inadequate. Franks identifies these problems:¹⁰⁸
- (a) the agreement is a pre-nuptial agreement under section 21 of the PRA, not a settlement agreement under section 21A;

¹⁰⁷ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 24–25.

¹⁰⁸ Stephen Franks “Yes Member: or why the model contracting out agreement is useless” (2001) 3 BFLJ 281; and Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.02].

- (b) the agreement does not record the partners' relationship property;
- (c) the agreement does not deal with future property;
- (d) the agreement does not deal with situations where separate property can be converted into relationship property under sections 9A, 10 or 15A;
- (e) the agreement does not deal with compensation for one partner's contributions to the separate property of the other partner under sections 17 or 17A;
- (f) the agreement does not deal with economic disparity claims under section 15;
- (g) there is no clause relating to full and final settlement;
- (h) there is no clause requiring the partners to disclose to each other all property; and
- (i) the agreement does not deal with wills and testamentary intentions.

30.92 The authors of *New Zealand Forms and Precedents* give a very critical appraisal of the model form agreement:¹⁰⁹

The model form is, with respect to the statutory draftsman, not sufficient in many important aspects (it comprises approximately 8 lines of operative text), and should not be employed (nor certified) by any practitioner. There is a proper basis to suggest that certification of the model form would (absent highly mitigating circumstances (such as an express instruction that the client wishes to execute the agreement notwithstanding competent written advice concerning its inadequacies and risks) found a valid action in negligence against the certifying practitioner.

30.93 Because of these criticisms it is unlikely any lawyer would draft or certify a contracting out agreement based on the prescribed model form agreement.¹¹⁰ It therefore fails in its principal objective to minimise legal costs. As the authors of *Family Property* say:¹¹¹

[a] prudent lawyer would require a number of amendments to the model form, with the end result being that it would probably be less expensive if the lawyer prepared the agreement from scratch.

¹⁰⁹ Karen Harvey-Vallee (ed) *New Zealand Forms and Precedents* (online ed, LexisNexis) at [3010].

¹¹⁰ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.03].

¹¹¹ Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.03].

30.94 The criticisms of the model form agreement raise the broader question of whether a template agreement would ever save legal costs. Usually lawyers will have their own precedent documents they prefer to use, given their familiarity with and confidence in the documents.¹¹² Any template agreement may need to be adapted to the particular circumstances of each relationship and the agreement the partners have reached. The actual drafting of an agreement is only a portion of the work the lawyer must undertake. A lawyer must give an informed professional opinion on the effect, implications and wisdom of the transaction. To do this, the lawyer must have reviewed all information or, at the very least, advised that the information is inadequate and further information is needed. The lawyer must have assessed the partner's entitlements under the PRA and compared them to the partner's entitlements under the agreement. Our preliminary view is that no model agreement will reduce the legal costs of this exercise.

CONSULTATION QUESTIONS

J12 Do you agree that the model agreement prescribed by the Property (Relationships) Model Form of Agreement Regulations 2001 is inadequate as a precedent?

J13 If the model form agreement was amended to address its deficiencies, could it save legal costs for partners wishing to contract out?

Should a court have wider powers to give effect to non-complying agreements?

30.95 Section 21H, discussed at paragraphs 30.37 to 30.40 above, allows a court to give effect to a contracting out agreement that does not comply with section 21F. The test is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.¹¹³

30.96 We have heard in our preliminary consultations that some partners who separate will make informal agreements to divide their property without observing the formalities under PRA. If this is correct, the question is to what extent an agreement that violates section 21F should be given effect.

¹¹² Stephen Franks "Yes Member: or why the model contracting out agreement is useless" (2001) 3 BFLJ 281 at 281.

¹¹³ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [5.73].

30.97 Section 21H may be improved by providing more guidance on when a court should give effect to a non-complying agreement. Sometimes the courts have acted to protect a partner who has performed a non-complying agreement to his or her disadvantage. In *Yates v Yates*,¹¹⁴ for example, the partners orally agreed prior to their marriage that Ms Yates would provide the equity from her home to purchase a new home jointly in the names of the parties. In return, Mr Yates was to make Ms Yates a director and shareholder of the company through which he conducted business. Ms Yates implemented her side of the agreement and the proceeds from the sale of her home were used to purchase a new house for the partners. Mr Yates, however, did not appoint Ms Yates a director and shareholder. The Family Court said that neither partner would be materially prejudiced by the enforcement of the oral agreement. However, the Court said that to consider the non-complying agreement ineffective would cause considerable prejudice to Ms Yates as she had implemented her side of the agreement without receiving the benefits promised to her.¹¹⁵

CONSULTATION QUESTIONS

- J14 Is the test in section 21H for when a court can give effect to a non-complying agreement set at the proper threshold?
- J15 Would section 21H benefit from additional criteria to guide a court on when a non-complying agreement should be given effect? If so, what criteria should there be?

Should a court have the power to vary or uphold a contracting out agreement in part?

30.98 Section 21J provides that a court may set an agreement aside if the agreement would cause a serious injustice. If a court sets the agreement aside, the PRA has effect as if the contracting out agreement had never been made. There is no ability for a court to salvage a contracting out agreement, either by varying the agreement or by enforcing only part of it. Section 21J stands in

¹¹⁴ *Yates v Yates* [2015] NZFC 1141.

¹¹⁵ *Yates v Yates* [2015] NZFC 1141 at [82]. See also *Hazelwood v Marquand* [2015] NZFC 1499. In that case the partners had kept their income separate in accordance with the terms of an oral agreement. Ms Hazelwood argued the oral agreement was void for non-compliance and should not be enforced under s 21H of the Property (Relationships) Act 1976. The court rejected Ms Hazelwood's argument and held that she would suffer no material prejudice if the agreement was given effect. The court also noted the unfairness of Mr Marquand's income being brought into the relationship property net, when Ms Hazelwood's income was never treated as relationship property: at [194].

contrast to section 21H, as section 21H allows a court to give effect to a non-complying agreement “wholly or in part.”¹¹⁶

30.99 If partners have attempted to contract out of the PRA, they have intended to regulate their own affairs differently from its provisions. Even if some aspects of the agreement will cause a serious injustice, there may be elements to their bargain they may still like to retain. It may be preferable, therefore, for a court to preserve those aspects of the partners’ agreement. Alternatively, the partners’ intentions may be better served if the court could vary an agreement that would cause serious injustice.

30.100 If the court was given such powers, the PRA may need to give clear direction on when the court could exercise them. Partners and their advisers would require certainty on when an agreement would be varied or set aside completely. We are mindful too of the sentiment behind the 2001 amendments to raise the threshold in section 21J because of the view that the courts were setting aside agreements too readily. Our preliminary view is there would need to be a high threshold before the court varied or partially saved an agreement.

CONSULTATION QUESTIONS

J16 When exercising its power under section 21J, should a court have the power to set aside an agreement wholly or in part? Should the court have power to vary an agreement?

J17 In what circumstances should the court exercise its powers?

Protecting children’s interests in contracting out and settlement agreements

30.101 The contracting out provisions of the PRA do not expressly refer to the interests of children. Section 21D sets out what a contracting out agreement may do. It does not, however, require partners to consider the interests of, or provide for, the children of the relationship. It is, therefore, theoretically possible that an agreement may fail to recognise or provide for the financial needs of the children of the relationship. An agreement could contain terms that disadvantage children.

30.102 By contrast, if the court decides how the partners’ property is to be divided, it has jurisdiction to make certain orders to protect

¹¹⁶ Property (Relationships) Act 1976, s 21H(1).

the interests of children. Notably, section 26 requires the court to “have regard” to the interests of any minor or dependent children in any proceeding under the PRA and if it considers it just, the court may make an order settling any property for the benefit of the children.

30.103 In recent years the Law Commission of England and Wales has explored whether pre-nuptial agreements should be recognised under English and Welsh law. Throughout the review process, the Commission was guided by the principle that parties should not be allowed to contract out of their responsibility for any children and that reforms should not disadvantage children and those who care for them.¹¹⁷ The Commission ultimately recommended that a qualifying agreement should displace a court’s discretion to award ancillary relief under the Matrimonial Causes Act 1973.¹¹⁸ However an agreement would not be valid if it was detrimental to the interests of the children of the family.¹¹⁹ We recognise that in the United Kingdom, a court’s first consideration is the welfare of minor children.¹²⁰ New Zealand law differs because the PRA’s primary focus is the partners’ entitlement to an equal share of relationship property.

30.104 We have not come across any information or commentary in New Zealand on the extent to which children in New Zealand are disadvantaged through contracting out agreements. This suggests there may not be a significant problem. Parents cannot contract out of their basic legal obligations towards children. For example, a partner cannot exclude his or her minimum child support or guardianship obligations through a contracting out agreement under the PRA.¹²¹ We note, however, that children’s interests may need to be given greater priority in the division of relationship property. We consider this question in depth in Part I.

¹¹⁷ Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [1.7], [1.48] and [3.26].

¹¹⁸ Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.87].

¹¹⁹ Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [5.87].

¹²⁰ Law Commission of England and Wales *Matrimonial Property Agreements: A Consultation Paper* (Consultation Paper No 198, 2010) at [1.14] and [1.32].

¹²¹ Section 21D of the Property (Relationships) Act 1976 provides that an agreement under pt 6 may only deal with matters relating to the classification and division of their property. Any provision in the agreement that purported to exclude legal duties that were beyond the status, ownership and division of property would not be considered a contracting out agreement under pt 6. Rather, the enforceability of those matters would need to be determined pursuant to the law that applied to those matters.

CONSULTATION QUESTION

J18 Should the interests of children be a consideration when partners contract out of the PRA?

30.105 If there is a material problem with protecting children's interests in contracting out agreements, the PRA could be amended to provide additional safeguards. We consider two options below.

Option One: Amend section 21D to require partners to have regard to the interests of their children

30.106 Section 21D could contain an additional provision that requires all partners who enter a contracting out agreement to "have regard to" the interests of their children (similar to the language in section 26), or to ensure that they have made "adequate provision" for the needs of their children. The standard of adequate provision is, however, difficult to define. Inevitably it will depend on the circumstances of every family.

30.107 Any duties imposed by section 21D should follow the wider provisions in the PRA. In Part I of this Issues Paper, we explored wider options for reform that could be made to the PRA regarding the interests of children. The precise nature of any new provision imposing a duty to provide for the needs of their children when entering a contracting out agreement should reflect the preferred option from those we identified in Part I.

Option Two: Amend section 21J(4) to expressly state a court may set aside a contracting out agreement which harms the children's interests

30.108 There is scope for a court to consider the interests of children when faced with an application under section 21J. Section 21J(4) (f) provides that a court may consider "any other matters that the court considers relevant", which could include the interests of children. Section 26 provides that in PRA proceedings, a court must have regard to interests of any minor or dependent children of the marriage, civil union or de facto relationship. Under the current wording of section 21J(4), however, a court must have regard to other competing matters, such as the fact that the

parties to the relationship (the children's parents) wished to achieve certainty.¹²²

30.109 It is conspicuous that section 21J does not expressly state that a court is to consider the interests of children who may be affected by that agreement. The matters set out in section 21J(4) can also be contrasted with other sections of the PRA in which, when considering how it will exercise its powers, a court must have regard to the position of children, such as sections 15 (economic disparity awards), 28A (occupation orders), 28C (furniture orders), and 44C (compensation for property disposed of to a trust). There is also the PRA's overarching purpose to provide for a just division of relationship property, *while taking account of the interests of children*.¹²³

30.110 It may be possible for children's interests to be overlooked when partners enter into a contracting out agreement, especially if they enter a section 21 agreement before any children are born. The agreement is solely between the partners. It will organise their affairs differently from the PRA's protective provisions. If they take no issue with the agreement, the bargain will not be scrutinised by third parties such as the court. It may therefore be the case that the interests of children are severely disadvantaged, but the agreement is never questioned. Arguably, a court should have a remedial jurisdiction to set aside an agreement when it is against the interests of children, and this should be emphasised in the wording of section 21J.

CONSULTATION QUESTIONS

J19 Should partners be required to have regard to the interests of children, or make provision for the needs of their children, when entering into a contracting out agreement under the PRA?

J20 Should section 21J(4) expressly direct the court to consider the interests of children when assessing whether giving effect to a contracting out agreement would cause serious injustice?

¹²² Property (Relationships) Act 1976, s 21J(4)(e).

¹²³ Property (Relationships) Act 1976, s 1M(c).

