



Part M -
What should
happen
when one
partner dies?

Chapter 34 – Dividing relationship property when one partner dies

Introduction

- 34.1 Many relationships will end with the death of one partner.¹ The PRA makes provision for relationships that end on death, as well as relationships ending on separation. The provisions that apply when one partner dies are set out in Part 8 of the PRA, and were introduced in 2001.
- 34.2 In this part we explore how the PRA applies when one partner dies. We discuss the tensions between the PRA's provisions that apply on death and succession law, which provides the rules for what happens to a person's property when they die. The fundamental question in this part is whether the PRA can reconcile the competing interests of all those potentially affected by the death of a partner, given the PRA's focus on the just division of property between partners.² We express our preliminary view that a separate statute dealing with relationship property rights on death, together with the types of claims currently contemplated by the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, is desirable because it would allow a comprehensive approach to the question of how to balance competing interests in a deceased's estate.
- 34.3 One important issue which we do not explore in this part is how the PRA's provisions that apply on death affect succession in tikanga Māori. The Law Commission undertook some preliminary

¹ In the 2013 census, 171,315 people reported they were widowed or a surviving civil union partner. This does not, however, include surviving de facto partners: Statistics New Zealand "Legally registered relationship status by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006, and 2013 Censuses (RC, TA, AU)" <nzdostatstats.govt.nz>.

² There has been relatively little academic commentary on the application of the Property (Relationships) Act 1976 (PRA) on the death of one partner, compared with other aspects of the PRA, particularly in comparison to commentary on other reforms made by the 2001 amendments, such as the economic disparity provisions (ss 15–15A), and other aspects of succession law such as the Family Protection Act 1955. A small number of authors have critically examined the operation of the PRA on death: see Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004); Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 *Common Law World Review* 356; and Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

work in this area as part of its review of the law of succession in the 1990s.³ Careful consideration needs to be given to how relationship property rights should interact with succession in a Māori context.⁴

- 34.4 In this chapter we briefly explain succession law and set out the history of the PRA's provisions that apply on death. We then describe what may happen to property when a person dies and is survived by a partner. The rest of Part M is arranged as follows:
- (a) In Chapter 35 we consider the issues that have emerged since the PRA was extended to apply to relationships ending on death in 2001 and options to address these issues by reform of Part 8.
 - (b) In Chapter 36 we consider the option of having a separate statute which deals with relationship property division on death as well as claims against the estate currently contemplated by the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.
- 34.5 Throughout Part M we use the terms “deceased partner” (the spouse, civil union or de facto partner who has died) and “surviving partner” (the spouse, civil union or de facto partner who has survived his or her partner). We also refer to the “personal representative” of the deceased, being the person who is responsible for administering the deceased’s estate.

Overview of succession law

- 34.6 Succession law determines what happens to people’s property when they die. Given that approximately 30,000 deaths are registered in New Zealand each year, many people will be affected by succession law.⁵ It is important that the law in this area is clear

³ As part of the Law Commission’s review of succession law, Joan Metge prepared a paper on succession law and tikanga: “Succession Law: Background Issues Relating to Tikanga Maori” (paper prepared in relation to the Law Commission seminar on succession, 1994). Pat Hohepa and David Williams also prepared a working paper: *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, February 1996). The Commission also addressed succession issues in its Study Paper: *Māori Custom and Values in New Zealand Law* (NZLC SP9, March 2001).

⁴ In Part C of this Issues Paper we explore the exclusion of Māori land and taonga from the Property (Relationships) Act 1976. These exclusions apply when relationships end on death as well as on separation. For a discussion of possible issues that arise for Māori on the death of one partner see 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 487–490.

⁵ The number of deaths registered in New Zealand totalled 31,179 in 2016; 31,608 in 2015; and 31,062 in 2014: see Statistics New Zealand “Deaths by age and sex (Annual-Dec)” (May 2017) <www.stats.govt.nz>. In 2016, the High Court

and accessible so that people understand both their rights and duties as a will maker and their rights in respect of a deceased's estate.

34.7 Succession law in New Zealand is found in both statute law and common law.⁶ The main statutes dealing with succession law are the Wills Act 2007, the Administration Act 1969, the PRA, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 (TPA). For our discussion in Part M, the PRA, the Family Protection Act 1955 and the TPA are the most relevant.

34.8 Leaving aside the PRA for the moment, a deceased's estate may be dealt with in three ways:

- (a) in accordance with the deceased's will, where he or she sets out what should happen to his or her property on death in a valid will;⁷
- (b) under the rules of intestacy, which apply when there is no valid will, set out in section 77 of the Administration Act 1969; or
- (c) under the rules of survivorship, where the deceased co-owned property with others as joint tenants, which means that the surviving joint tenant or tenants automatically receive the deceased's share of the property.⁸

34.9 The distribution of property under a will or the intestacy rules is sometimes affected by third party claims. There are two statutory avenues for a third party to seek an adjustment to the distribution of property.⁹

34.10 First, the Family Protection Act allows a claim where the deceased has failed to discharge an obligation to provide "proper maintenance and support" for family members in his or her will or under the rules of intestacy.¹⁰ Family members entitled to make

granted probate (i.e. where there is a will) 14,832 times and letters of administration (i.e. where there is no will) 1058 times: data provided by email from the Ministry of Justice to the Law Commission (13 June 2017).

⁶ Testamentary capacity and voluntariness are covered by common law but we do not need to address these points further in Part M.

⁷ The requirements for a valid will are set out in the Wills Act 2007.

⁸ Under the rules of survivorship, any property owned as joint tenants does not form part of the deceased's estate and is not available to be distributed under the deceased's will or the rules of intestacy.

⁹ A dissatisfied individual can also make a claim for a constructive trust over the deceased's estate but these claims are less common. See *C v C* [2016] NZHC 583 for an example of such a claim. It is not necessary for us to discuss such claims further to highlight the general point that third party interests may result in the adjustment of the division of property. The use of constructive trust claims may occur because the Family Protection Act 1955 is not considered adequate and this question falls outside our Terms of Reference.

¹⁰ Family Protection Act 1955, s 4(1).

a claim include any partner,¹¹ child, grandchild, stepchild who was being maintained at the time of death, or parent of the deceased.¹² Proper maintenance and support goes beyond simply providing for a person's needs and requires "recognition of belonging to the family and of having been an important part of the overall life of the deceased."¹³

34.11 Second, the TPA allows a claim where the deceased promised to provide for a person, including a surviving partner, in a will in return for services that the person provided to the deceased during the deceased's lifetime. A surviving partner or third party may have an interest in the deceased's estate that the deceased failed to recognise and account for in his or her will.¹⁴

34.12 A surviving partner can make a claim under the TPA where:¹⁵

- (a) the deceased promised to provide for the surviving partner from his or her estate;
- (b) the surviving partner provided services to the deceased during the deceased's lifetime that went beyond "the normal incidents of the relationship";
- (c) the provision promised was a reward for the services provided by the surviving partner; and
- (d) the deceased failed to keep that promise.

34.13 Given the difficulty of establishing these elements, surviving partners rarely make claims under the TPA and are more likely to make a claim under the Family Protection Act.¹⁶

34.14 The Family Protection Act and the TPA seek to address different rights or needs. The Family Protection Act relates to claims for maintenance and support of family members out of the deceased's estate. The TPA is about enforcing promises made by the deceased in return for services by the party making the claim and is not

¹¹ A spouse or civil union partner can make a claim under the Family Protection Act 1955 even if separated, whereas a de facto partner can do so only if he or she was living with the deceased in a qualifying relationship when the deceased died: Family Protection Act 1955, s 3(1)(aa).

¹² Family Protection Act 1955, s 3. A parent can only make a claim if a parent was being maintained wholly or partly, or was legally entitled to be maintained wholly or partly, by the deceased immediately before his or her death or there was no surviving partner or child of the deceased, at s 3(1A).

¹³ *Williams v Aucutt* [2000] 2 NZLR 479 (CA) at [52].

¹⁴ A court retains discretion to make an order under the Law Reform (Testamentary Promises) Act 1949 (TPA) and the factors relevant to quantum are very wide. This may mean that if competing claims against the estate are strong enough, an applicant under the TPA may not in fact receive any award.

¹⁵ Set out in Nicola Peart "Other Claims Against the Estate" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 419 at 428.

¹⁶ Nicola Peart "Other Claims Against the Estate" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 419 at 428.

limited to family members. Unless there is a very large estate it may be difficult to satisfy claims under these Acts.

- 34.15 Under the PRA, however, the surviving partner can elect to make an application for the division of the partners' relationship property instead of relying on succession law.¹⁷ The personal representative of the deceased may also, in some circumstances, be able to apply for a division of relationship property under the PRA.¹⁸ What happens when an application for the division of relationship property is made following the death of one partner is discussed below.

History of Part 8 of the PRA

- 34.16 Before the enactment of Part 8 of the PRA in 2001, a surviving spouse could make an application under the Matrimonial Property Act 1963 for an order against the deceased spouse's estate for an award based on contributions made by the surviving spouse to the property of the deceased spouse.¹⁹ That Act gave the personal representative of the deceased an equivalent right to apply for orders in relation to the division of property, and this was commonly used to recover assets for beneficiaries of the estate or to enable the estate to meet claims under the Family Protection Act.²⁰ The Matrimonial Property Act 1963 did not address the relationship between matrimonial property orders and rights to provision from the deceased's estate, and this resulted in confusion as to how the Act was to operate on death.²¹ In *Re Mora*, the Court of Appeal clarified that while an order under the Act could take into account any provision made for the spouse under succession law, it was possible for the surviving spouse to retain the entitlement under succession law as well as the matrimonial property award.²²

¹⁷ Property (Relationships) Act 1976, s 61.

¹⁸ Property (Relationships) Act 1976, s 88.

¹⁹ Matrimonial Property Act 1963, ss 5 and 6. For an overview of the earlier background to division of property on the death of a partner see Margaret Briggs "Historical Analysis" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 1 at 1.

²⁰ See s 5 of the Matrimonial Property Act 1963; and the discussion in Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²¹ Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²² *Re Mora* (1988) 4 NZFLR 609 (CA) at 614.

34.17 The Matrimonial Property Act 1976 did not apply on the death of a spouse.²³ In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice said, however, that “the rights of a widow (or widower) should not be inferior in any way to those of a divorced or separated spouse.”²⁴ Consideration of how this was to be achieved was deferred.²⁵ This meant that the Matrimonial Property Act 1963 continued to apply on the death of a spouse. There was no presumption of equal sharing and the surviving spouse had to prove contributions to the property to justify receiving property, besides any inheritance he or she may have received.

34.18 The position was considered again by the Working Group established in 1988 to review the Matrimonial Property Act 1976,²⁶ and by the Law Commission in its review of succession law in the 1990s.²⁷ Both identified as an anomaly the failure of the Matrimonial Property Act 1976 to apply when one spouse died.²⁸ As the law stood, the situation could arise where a spouse was given less property on the death of one spouse under the Matrimonial Property Act 1963 than he or she would have been entitled to had the spouses separated and the equal sharing regime applied.

34.19 The Working Group recommended that when a marriage ended on death the surviving spouse should have a choice between dividing the spouses’ matrimonial property under the Matrimonial Property Act 1976 or taking whatever entitlement was provided under the deceased’s will.²⁹ The Law Commission made a similar proposal.³⁰ Both emphasised the principle that the surviving

²³ AM Finlay “Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 13–14.

²⁴ AM Finlay “Matrimonial Property – Comparable Sharing: an Explanation of the Matrimonial Property Bill 1975” [1975] II AJHR E6 at 13.

²⁵ JK McLay MP “The Matrimonial Property Act 1976” (papers presented to the Legal Research Foundation Seminar, Auckland, 2 February 1977) at 18:

[a] number of submissions [to the Statutes Revision committee] advocated that the principles in the [1975] Bill should be extended to operate after the death of one spouse. There was general agreement with that proposition – however the Bill itself could not be so extended. . . . In the meantime the 1963 Act must continue in force for the limited purpose of enabling matrimonial property proceedings to be instituted after the death of one party; this is an interim situation which all would regard as unsatisfactory but unavoidable.

²⁶ The Working Group was convened by Geoffrey Palmer, then Minister of Justice, to identify the broad policy issues with the Matrimonial Property Act 1976, the Family Protection Act 1955, the provision for matrimonial property on death and the provision for couples living in de facto relationships: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 1–2.

²⁷ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996); and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

²⁸ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40; and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [4] and [15].

²⁹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 44.

³⁰ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at C36.

spouse should be no worse off than one whose marriage had broken down during the joint lives of the spouses.³¹ The Working Group was careful to distinguish between matrimonial property law and inheritance law, observing that:³²

The function of matrimonial property law is to ensure that a marriage partner whose marriage has come to an end receives what is rightfully his or her own property. It should go no further than that. If a deceased has failed to make proper provision for the survivor out of the deceased's share of matrimonial property or separate property, the survivor should apply for an appropriate award under inheritance law.

34.20 The Working Group did not, however, consider that the estate should have a right to bring proceedings against the surviving spouse.³³ Noting that the broad object was to ensure that the surviving spouse was no worse off than one whose marriage had broken down, the Working Group felt that:³⁴

It does not follow that the estate should be able to sue the survivor to ensure that the survivor is left with no more than his or her share of matrimonial property. Where one spouse has died the contest is no longer between two partners who take their share and then go their different ways. It is between the survivor of a marriage and the beneficiaries under a will or on an intestacy, or potential family protection claimants. There is also the obvious point that the deceased may have wished the survivor to take the deceased's share of matrimonial property.

34.21 The Law Commission came to a different conclusion. In its Preliminary Paper on succession law it took the position that “a property division may be initiated either by the surviving spouse or else by the will-maker’s administrator.”³⁵ In theory, the Commission said, “if property is held unequally between husband and wife, either should be able to reclaim their own property. It does not matter who dies first.”³⁶ This was in accordance the

³¹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40; and Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [4] and [15]. Also discussed in Nicola Peart “Family Finances on Death of a Spouse or Partner” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

³² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40 (emphasis in original).

³³ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46.

³⁴ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46. The Working Group noted at 46–47 that the Ontario Law Reform Commission reached the same conclusion, and this conclusion was reflected in the resulting legislation. Among reasons given by the Ontario Law Reform Commission were that (a) to permit such claims would in many cases result in property returning in due course to the survivor, and (b) a survivor with children should not have his or her assets diminished by such claims.

³⁵ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [106].

³⁶ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [107].

Commission's view that property division on death should "be governed by the principles of the law of matrimonial property, as they apply to spouses whose marriage ends by divorce."³⁷ These views were reflected in the Commission's Final Report.³⁸ The Commission noted, however, that the survivor should be able to advance a "support claim" if the administrator of the deceased spouse's estate initiates the recovery of the estate's share of the matrimonial property.³⁹ A support claim would permit the surviving spouse to maintain a reasonable, independent standard of living but only until he or she could reasonably be expected to become self-supporting, having regard to the financial consequences of the partnership.⁴⁰ The Commission said:⁴¹

In practice, it may not be worthwhile for the administrator to bring property division proceedings during the survivor's lifetime. The claim is likely to be met by the survivor's claim for support. But on the survivor's death, the equalisation of estates may well be desirable, for example, to secure provision for the children from the previous marriage of the partner who dies first.

34.22 Both the Working Group and the Law Commission also made recommendations in relation to the Family Protection Act and the TPA. The Working Group proposed that the provisions covering division of matrimonial property on death should be included in the Matrimonial Property Act 1976, while the Family Protection Act and TPA provisions should be combined in a new statute.⁴² The Law Commission recommended that rules relating to the division of matrimonial property on the death of a spouse, support claims and contribution claims all come under a new statute, to be called the Succession (Adjustment) Act, and that the Family Protection Act and the TPA be repealed.⁴³ The purpose of the proposed Succession (Adjustment) Act was to align claims against estates with claims that could be made against the deceased during his or her lifetime.⁴⁴ Neither of the new statutes

³⁷ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [99].

³⁸ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C31] and [C35].

³⁹ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [107].

⁴⁰ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [52]–[55] and [C3]–[C5]. This was consistent with "spousal support rules for when a marriage ends on dissolution of marriage during spouses' joint lifetime" in s 64 of the Family Proceedings Act 1955 (Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 80).

⁴¹ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C35].

⁴² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 40 and 63. Having noted that not allowing the estate to make a claim could give rise to issues where children from a previous relationship are not provided for, the Working Group commented that a new Inheritance Act could be created allowing step-children to sue step-parents (at 47).

⁴³ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at vii.

⁴⁴ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [C4].

proposed by the Working Group or the Law Commission has been implemented.

- 34.23 Instead, the 2001 amendments introduced Part 8 into the PRA, extending the equal sharing regime to relationships ending on death.⁴⁵ The amendments were intended to address the “major anomaly” that the Matrimonial Property Act 1963 applied on a spouse’s death rather than the equal sharing regime.⁴⁶

What happens to a partner’s property when they die?

- 34.24 We set out below how succession law and the PRA can apply when a person dies, leaving behind a partner and other potential beneficiaries.

The surviving partner’s choice under the PRA

- 34.25 When one partner dies, there is a risk that his or her will does not make adequate provision for the surviving partner’s relationship property entitlement under the PRA. For example, if most of the partners’ property was in the deceased’s sole name, and the deceased leaves his or her property to the partners’ children, the surviving partner is worse off than if the partners had separated before death.⁴⁷
- 34.26 To protect against this risk, and the risk that the rules of intestacy might apply, section 61 of the PRA gives a surviving partner the choice to:
- (a) apply for a division of relationship property under the PRA (option A); or
 - (b) receive an entitlement provided under the deceased’s will, or if the deceased dies without a will, under the intestacy rules (known as option B).

⁴⁵ Property (Relationships) Amendment Act 2001, pt 8.

⁴⁶ Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i.

⁴⁷ Section 19 of the Property (Relationships) Act 1976 provides that while property is undivided either partner can dispose of property in any way whatsoever.

- 34.27 If the surviving partner does not make a choice of option A or option B in the required manner and within the required timeframe, he or she is treated as having chosen option B.⁴⁸
- 34.28 Once the surviving partner chooses option A or option B, he or she cannot withdraw that choice.⁴⁹ A court can set aside the choice, however, but only if it is satisfied that either:⁵⁰
- (a) the decision was not freely made;
 - (b) the surviving partner did not fully understand the effect of the choice;
 - (c) the surviving partner has received relevant information since the choice was made; or
 - (d) someone other than the surviving partner has made an application under the Family Protection Act or the TPA in relation to the deceased partner's estate; and
 - (e) in all the circumstances it would be unjust to enforce the choice.

The personal representative's choice under the PRA

- 34.29 The surviving partner is not the only person who can apply for a division of relationship property under the PRA.⁵¹ Sometimes the personal representative of the deceased will want a court to determine the deceased's interest under the PRA. This situation will usually arise because the personal representative wants to ensure that some of the deceased's estate is available for other beneficiaries under the will or for potential claimants under the Family Protection Act or the TPA.
- 34.30 A personal representative may only apply for a division of relationship property if a court grants leave to do so.⁵² A court can only grant leave if it is satisfied that failing to do so would cause "serious injustice."⁵³ In *Public Trust v W*, for example, leave was granted because the court was satisfied that the deceased had

⁴⁸ Section 68 of the Property (Relationships) Act 1976. The choice must be made within six months of death or the grant of administration of the estate of the deceased spouse as set out in s 62. The choice must be made in the manner required by s 65.

⁴⁹ Property (Relationships) Act 1976, s 67.

⁵⁰ Property (Relationships) Act 1976, s 69.

⁵¹ Property (Relationships) Act 1976, s 88.

⁵² Property (Relationships) Act 1976, s 88(2).

⁵³ Property (Relationships) Act 1976, s 88(2).

structured his affairs in order to avoid fulfilling his moral duty to provide for the minor children of a former relationship.⁵⁴

Option A – dividing the relationship property under the PRA

- 34.31 If option A is chosen the surviving partner’s relationship property entitlement under the PRA has priority over claims under the Family Protection Act or the TPA, as well as priority over any beneficial interest under a will or the rules of intestacy.⁵⁵
- 34.32 If a surviving partner chooses option A, or a court grants the deceased’s personal representative leave to apply for a division of relationship property, the PRA’s general rules of classification and division of relationship property (discussed in Part C and Part D of this Issues Paper) apply, with some modifications.⁵⁶
- 34.33 There are several important modifications to the PRA’s rules of classification and division that apply only on death:
- (a) First, section 81 presumes that all of the deceased’s property is relationship property.⁵⁷ Any person who asserts otherwise must prove the disputed property is not relationship property.⁵⁸ This is subject to the provisions of the PRA relating to contracting out agreements, discussed below.⁵⁹
 - (b) Second, section 83 provides that property that would have otherwise passed to the surviving partner by the rule of survivorship (that is, any property owned as joint tenants) is not automatically the separate property of the surviving partner. The status of that property as relationship property or separate property is determined according to the status it would have had if the deceased partner had not died, unless a court decides otherwise.⁶⁰ The High Court has clarified that section 83

⁵⁴ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [50]–[51].

⁵⁵ Property (Relationships) Act 1976, s 78.

⁵⁶ Property (Relationships) Act 1976, s 75(b).

⁵⁷ Other than any property the deceased received under from a third person by way of gift, inheritance or as a beneficiary under a trust, to which s 10(2) of the Property (Relationships) Act 1976 applies: s 81(4).

⁵⁸ Property (Relationships) Act 1976, s 81(2). Note that the Property (Relationships) Act 1976 also contains a presumption that property acquired by the deceased’s estate is relationship property: s 82.

⁵⁹ Property (Relationships) Act 1976, s 81(3).

⁶⁰ Property (Relationships) Act 1976 (Act), s 83(1)(b). In *B v A* (2005) 25 FRNZ 778 (FC) the Family Court considered at [57] that although the surviving spouse had chosen option A, and thus would only receive a half interest in a holiday home jointly owned by the partners, the phrase “decides otherwise” authorised the Court to exercise its discretion where it was

only applies where the surviving partner chooses option A.⁶¹ It cannot be relied on when the deceased's personal representative applies for a division of relationship property.⁶²

- (c) Third, the rules of division for short-term relationships that end on death are different to the rules for short-term relationships that end on separation.⁶³ If a short-term marriage or civil union ends on death, the PRA treats the relationship as if it was not of short duration, unless the result would be "unjust."⁶⁴ If, however, a short-term de facto relationship ends on death, the same rules apply as for short-term relationships ending on separation, and a court cannot make an order for a division of relationship property unless either:⁶⁵
- (i) there was a child of the relationship; or
 - (ii) the surviving partner made a substantial contribution to the relationship;⁶⁶ and
 - (iii) not making the order would cause serious injustice.

34.34 In practice, when option A is chosen, the surviving partner and the personal representative of the deceased will usually agree on the classification and division of the partners' property, in the same way separating partners negotiate a property division under the PRA. Any agreement reached should be formalised in accordance with section 21B of the PRA. If agreement is not reached, the surviving partner can apply to a court for division of relationship property.

just to do so. The Court found that the survivorship rule should apply and the widow was allowed to retain the holiday home. The Court relied on the purposes and principles of the Act as stated in ss 1M and 1N. The Court also considered factors at [61]–[62] such as the sentimental value of the holiday home to the surviving spouse and the deceased's intention that the surviving partner would acquire the asset by survivorship. Other factors that were not expressly mentioned in the judgment were that the bulk of the deceased's estate was separate property that was left to a friend, and that there were no competing claims as the deceased had no children: Nicola Peart (ed) *Brookers Family Law – Family Property* at [PR83.04]. This decision was criticised in *Brookers Family Law – Family Property* at [PR83.03] because the Court should have classified the assets as the widow's separate property rather than holding that the survivorship rule should apply. Classification would have achieved the same result in the case.

⁶¹ *Thompson v Public Trust* [2014] NZHC 1374, [2014] NZFLR 902 at [88].

⁶² *Thompson v Public Trust* [2014] NZHC 1374, [2014] NZFLR 902 at [88].

⁶³ Property (Relationships) Act 1976, s 85.

⁶⁴ Property (Relationships) Act 1976, s 85(1). If a court considers it would be unjust to apply the general rule of equal sharing to a short-term marriage or civil union, the rules for short-term marriages and civil unions that end on separation will apply: s 85(2).

⁶⁵ Property (Relationships) Act 1976, s 85(3). If this test is satisfied, the share of the surviving partner and of the deceased partner's estate in the relationship property is to be determined in accordance with the contribution of each partner to the relationship: s 85(4).

⁶⁶ What constitutes a "substantial contribution" was considered in the case of *H v H* [2013] NZHC 443, [2013] NZFLR 387. The High Court settled on stating that it was a contribution "over and above" what would usually be expected in the normal course of a relationship at [53]–[56].

- 34.35 When a partner chooses option A, he or she foregoes any gifts under the will, unless the will-maker has expressed a contrary intention in the will.⁶⁷ The will is then interpreted as if the surviving partner has died before the deceased.⁶⁸
- 34.36 A court may make an order under section 77 that the surviving partner should receive a gift under the will if it is necessary to avoid injustice.⁶⁹ In addition, section 57 of the PRA preserves the right of a surviving partner to make a claim under the Family Protection Act or the TPA. An example of the courts exercising discretion under section 77 is in *B v A*, where the surviving partner would have been left little of the deceased's estate, which was principally a large farm that was the deceased's separate property, regardless of whether option A or option B was chosen.⁷⁰ The court ordered that the surviving partner was to receive gifts provided for under the will of the deceased.⁷¹

Option B – relying on succession law

- 34.37 If the surviving partner chooses option B and the deceased partner left a will, the estate will be administered according to the terms of that will, subject to any claims brought under the Family Protection Act 1955 or the TPA, as discussed below.⁷²
- 34.38 If the surviving partner chooses option B and the deceased partner died intestate, the surviving partner receives all of the deceased's personal chattels, a prescribed amount of money which is set by regulation,⁷³ and a certain portion of the remainder of the estate depending on whether there were other surviving family members.⁷⁴ If the deceased left behind children, the surviving partner receives one-third of the residue of the estate and the children receive two-thirds.⁷⁵ If the deceased left behind no children but one or both parents are still alive, the surviving partner receives two-thirds and the parent or parents receive one

⁶⁷ Property (Relationships) Act 1976, s 76.

⁶⁸ Property (Relationships) Act 1976, s 76(3).

⁶⁹ Property (Relationships) Act 1976, s 77.

⁷⁰ *B v A* (2005) 25 FRNZ 778 (FC).

⁷¹ *B v A* (2005) 25 FRNZ 778 (FC).

⁷² Or under common law or equity.

⁷³ Administration Act 1969, s 82A. The prescribed amount is currently \$155,000: Administration (Prescribed Amounts) Regulations 2009, reg 5.

⁷⁴ Administration Act 1969, s 77.

⁷⁵ Administration Act 1969, s 77.

third of the estate. If there are no children and no parents, the surviving partner receives the entire estate.

Case study: Robin's estate

Robin and Ataahua have been married since their early 20s. They have two children. They own two properties; their family home and a holiday house. All significant property they own was acquired during their relationship. Any money they have been gifted or inherited, or owned before they married, has been intermingled with property obtained during the relationship. Both the family home and the holiday house are held in Robin's name. Robin dies (aged 70), leaving Ataahua (aged 67) and the two children (both in their mid 30s). Robin leaves a will in which he leaves the family home and all family chattels to Ataahua. He leaves the holiday home and everything else that is left over after the express gifts (known as the residue) to his children jointly.

Ataahua has two options. She can choose option A, and apply for a division of relationship property. This would give her a half share in all the property, including both the property left to her in the will (the family home and chattels) and the property left to the children in the will (the holiday home and any residue). Alternatively, she can elect option B and take what she has been left under the will. If she elects option A, she will lose any gifts under the will that are not her share of relationship property because there was no contrary intention expressed. These gifts are Robin's half of the home and the family chattels. They would become part of the residue of the estate and go to the children in half shares.

Third party claims

- 34.39 The rights available to the surviving partner can affect the interests of third parties. As discussed at paragraph 34.31, if a surviving partner chooses option A, his or her relationship property entitlement under the PRA takes priority over the will or the intestacy rules, any duties and fees payable by the estate, and any orders made under the Family Protection Act or TPA.⁷⁶
- 34.40 In addition to electing option A or option B, a surviving partner is also able to bring a claim under the Family Protection Act or TPA.⁷⁷ This might occur where a large portion of the deceased's estate is separate property left to a third party under the will, so little property is available to the surviving partner under either option A or option B. For example in *B v A*, discussed at paragraph 34.36, the court made an award under the Family Protection Act

⁷⁶ Property (Relationships) Act 1976 (PRA), s 78. This might mean that a claim to a specific item of property under the Law Reform (Testamentary Promises) Act 1949 could not be met because it was relationship property and therefore subject to division under the PRA.

⁷⁷ Property (Relationships) Act 1976, s 57. See also Family Protection Act 1955, s 4; and Law Reform (Testamentary Promises) Act 1949, s 3.

in circumstances where the surviving partner would have been left little of the deceased's estate (principally a large farm that was his separate property) regardless of whether option A or option B was chosen.⁷⁸

- 34.41 Claims brought by third parties as beneficiaries under the will or the rules of intestacy, or under the Family Protection Act and TPA, can affect the rights of the surviving partner. If option B is chosen,⁷⁹ the surviving partner's share of the estate may be reduced. The personal representative of the deceased may also seek leave to apply for a division of property under the PRA, as discussed at paragraphs 34.29 and 34.30.
- 34.42 The PRA prioritises applications for the division of relationship property over other claims on the deceased's estate.⁸⁰ As we discuss in Chapter 36, the PRA, with its focus on the partners' interests, is arguably not well-equipped to address the tension between the interests of surviving partners and third parties, nor the appropriate role of the personal representative.
- 34.43 The rights of creditors under the Insolvency Act 2006 and Administration Act 1969 are, however, preserved as if the PRA did not exist.⁸¹ This means that the rights of the deceased's creditors against the estate are unaffected by a surviving partner's rights under the PRA. This is very similar in effect to section 20A of the PRA which provides that the rights of creditors continue as if the PRA had not been enacted.

Contracting out agreements and death

- 34.44 An implicit principle of the PRA is that, subject to safeguards, partners should have the freedom to organise their property affairs in a manner of their choosing.⁸² This includes deciding how property should be divided on the death of one partner.
- 34.45 Section 21 of the PRA provides that partners can make an agreement before or during a relationship, relating to the "status, ownership and division of their property (including future

⁷⁸ *B v A* (2005) 25 FRNZ 778 (FC).

⁷⁹ Or if option A is chosen and the surviving partner also receives property under the will: see discussion at paragraph 34.35.

⁸⁰ Property (Relationships) Act 1976, s 78.

⁸¹ Property (Relationships) Act 1976, s 58. See discussion in Part K.

⁸² This implicit principle is discussed in Chapter 3. In Chapter 30 we discuss contracting out agreements in more detail.

property)”, when one partner dies.⁸³ This means that if the partners had a contracting out agreement under section 21 which provided for how property was to be classified or divided on the death of a partner, that agreement would apply instead of the rules of the PRA.⁸⁴ In order to rely on a section 21 agreement, the surviving partner must elect option A.

- 34.46 Section 21B provides that when one partner has died, the deceased’s personal representative and the surviving partner may make an agreement to settle any claim with respect to the partners’ property. If the surviving partner is also the personal representative of the deceased then section 21B(3) requires the agreement to be approved by a court under section 21C.
- 34.47 Contracting out agreements under section 21 and section 21B must comply with the procedural requirements in section 21F. If these requirements are not satisfied then the agreement is void, subject to section 21H.⁸⁵
- 34.48 Even if a valid contracting out agreement is made, the court retains a power to set aside the agreement if it would cause a serious injustice.⁸⁶ Section 87 provides for a surviving partner to challenge a section 21 agreement before or after option A is chosen.⁸⁷

⁸³ In *C v C* [2016] NZHC 583, for example, the partners made an agreement that provided that all property held by the partners was relationship property and that it would be evenly divided on separation but that the surviving partner would receive more than half of the property if one partner died. The terms of a variation to the wills indicated that the partners expected the surviving partner to choose option B (which gave the surviving partner in this case all the relationship property subject to obligations to others recorded under the variation). Any property that passed by survivorship was not part of the estate. Even if option A were chosen, the division of property would be determined pursuant to the terms of the relationship property agreement and the variation (unless the arrangements were set aside under s21J). Concern has been expressed to us that in practice, some contracting out agreements are drafted ambiguously which can give rise to uncertainty about their operation on the death of a partner.

⁸⁴ Property (Relationships) Act 1976, s 81(3).

⁸⁵ Section 21H of the Property (Relationships) Act 1976 provides that even though an agreement is void for non-compliance with a requirement of s 21F, the court may declare that the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance has not materially prejudiced the interests of any party to the agreement.

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

⁸⁷ Property (Relationships) Act 1976, s 87(2)(b). When determining if an agreement would cause serious injustice the court must also have regard to whether the estate of the deceased has been partly or wholly distributed: s 87(3).

Chapter 35 – Specific issues with Part 8

Issue 1: Public understanding of the application of the PRA on death

- 35.1 From our research and preliminary consultation we understand that many will-makers and surviving partners are not aware of the choice a surviving partner can make between option A and option B, or the implications of making a choice.⁸⁸ This may be due in part to a lack of debate and public promotion of the 2001 amendments extending the PRA to relationships ending on death when they were introduced.⁸⁹ It may also reflect an assumption by the public that, because a relationship ending on death is different to a relationship ending on separation, different rules apply.
- 35.2 Lawyers and other professional advisers may tell a will-maker about option A and option B but what these options mean for the will-maker can be difficult to explain in simple terms. Complex legal advice on the likely outcome of a future division of relationship property under the PRA might be necessary, requiring an assessment of the will-maker's assets and the circumstances that could lead to those assets being classified as relationship property or separate property. Any legal advice would likely be qualified to acknowledge possible changes in circumstances between the time of drafting of the will and the will-maker's death. Such changes could affect classification of property, the division of relationship property or the will-maker's vulnerability to a claim under either the Family Protection Act or the TPA.⁹⁰
- 35.3 Exploring the potential PRA implications of making a will may be time-consuming and costly. It may increase costs so much that

⁸⁸ Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 *Common Law World Review* 356 at 372.

⁸⁹ Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 *Common Law World Review* 356 at 368.

⁹⁰ People may also be unaware of the way that wills are affected by changes in relationship status. Under s 18 of the Wills Act 2007, wills are revoked when people get married or enter into civil unions. There is no equivalent rule for de facto relationships. This rule was called into question by the Law Commission in their review of succession law in the 1990s: *Law Commission Succession Law Wills Reforms* (NZLC MP2, 1996) at [128]. It is possible that enough people now make wills in favour of their partners before marriages or civil unions that the rule is no longer useful.

the will-maker cannot or will not seek professional advice. The set fee option lawyers may offer for preparing a will is unlikely to allow for the additional time required to fully address the PRA implications.

- 35.4 The lack of public awareness of the PRA's application to relationships ending on the death of one partner has several consequences:
- (a) First, people make wills without realising that their will may not apply if the surviving partner elects option A. If will-makers knew this, they might make different estate plans.
 - (b) Second, by not knowing they can elect option A, surviving partners may be missing out on property rights under the PRA that would be financially beneficial to them.⁹¹
 - (c) Third, surviving partners who do choose option A may do so without full knowledge of its consequences. We have heard anecdotal evidence of surviving partners choosing option A without knowing the extent of the estate and being unaware that property owned in their name (that they assumed was their own separate property) is also subject to division.
 - (d) Fourth, there is insufficient consideration of contracting out of the PRA.
- 35.5 Greater awareness among both professional advisers and the general public of the implications of the PRA for relationships ending on death seems desirable. We are interested in suggestions as to how this could be achieved.

CONSULTATION QUESTION

M1 Are the options available to the surviving partner under the PRA, and the implications of those options, well known and understood by will-makers, surviving partners and professional advisers? If not, what could be done to better inform people?

⁹¹ In 2016, probate or letters of administration were granted to nearly 16,000 estates, but option A was elected only 14 times: data provided by email from the Ministry of Justice to the Law Commission (13 June 2017).

Issue 2: The different treatment of short-term relationships on Death

35.6 Two issues arise with the rules for short-term relationships that end on death.

Should short-term marriages and civil unions be treated the same as qualifying relationships?

35.7 The minimum duration requirements that apply when partners separate do not normally apply to marriages and civil unions ended by death.⁹² Section 85 provides that the general rule of equal sharing will apply to short-term marriages and civil unions that end on the death of one partner unless a court, having regard to all the circumstances, considers that would be unjust.⁹³ If the court does consider that would be unjust, the rules of property division set out in section 14 for short-term marriages and civil unions ending on separation will apply.

35.8 The PRA does not define “unjust” and its meaning in this context has not often been considered by the courts. In *S v S*, the Family Court found that the threshold of “unjust” was not met, despite stating that “the marriage could well be described as one of convenience for both parties.”⁹⁴ In that case the Court found that equal sharing was not unjust because both parties benefited from the marriage.⁹⁵ Had the deceased partner remained alive, there was no reason to think the marriage would not have passed the three-year threshold.⁹⁶

35.9 The approach set out in section 85 reflects the recommendations of the Working Group in 1988.⁹⁷ The Working Group said that the surviving partner could suffer hardship if the same rules that applied to short-term relationships that ended on separation applied to those that ended on the death of one partner, in essence because the relationship had not ended by

⁹² Property (Relationships) Act 1976, ss 2E and 85(1).

⁹³ Property (Relationships) Act 1976, s 85(2).

⁹⁴ *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [31].

⁹⁵ *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [34]–[35].

⁹⁶ *S v S* FC Invercargill FAM-2007-025-750, 7 March 2008 at [38].

⁹⁷ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988).

choice.⁹⁸ Short-term relationships ended by death may share some characteristics with short-term relationships ended by separation.⁹⁹ Such relationships may be transient or not have developed the commitment that often comes with time. The difference, however, is that when the partners have separated there is clear evidence that a relationship is, for example, transient or lacking commitment. Our preliminary view is that, without evidence to the contrary, it is appropriate for the PRA to assume that, but for the death of one partner, the relationship would have continued.

Should short-term de facto relationships ending on death be treated differently?

- 35.10 The PRA does not generally apply to short-term de facto relationships that end on the death of one partner. The court can only order the division of property if the short-term de facto relationship passes the two-stage test that applies to short-term de facto relationships that end on separation (see paragraph (c)).¹⁰⁰ If that test is met, a court may order division of the relationship property in accordance with the contributions of each partner.¹⁰¹ If that test is not met, the surviving partner has no rights under the PRA.
- 35.11 The different treatment of short-term de facto relationships on separation under section 14A is discussed in Part E of this Issues Paper, and is probably the basis for the different treatment of short-term de facto relationships on death. However, if the reason for treating short-term marriages and civil unions ending on death differently from those ending on separation is that death is not a voluntary ending to the marriage or civil union, it is unclear why the same reasoning does not apply to short-term de facto relationships ended by death. The perception that people are more likely to “drift” into de facto relationships and that de facto relationships involve a lesser commitment than marriages and civil unions may be part of the justification.¹⁰²

⁹⁸ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 43.

⁹⁹ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 43.

¹⁰⁰ Property (Relationships) Act 1976, s 85(3).

¹⁰¹ Property (Relationships) Act 1976, s 85(4).

¹⁰² These views are discussed further in Part E of this Issues Paper.

- 35.12 The current approach ensures that a de facto partner in a short-term relationship is not worse off if their partner dies, compared to if they separate. A surviving de facto partner can still make a claim under both the Family Protection Act and the TPA, independent of any claim under the PRA. If the law was to be changed to allow all surviving de facto partners (regardless of the length of the relationship) to make a claim under the PRA, careful consideration would be needed as to how to guard against undesirable results. For example, if short-term de facto relationships that ended on death were treated as a qualifying relationship, some surviving de facto partners would be better off than if the relationship ended by separation (because they would be entitled to an equal share of relationship property regardless of their contribution to the relationship or the existence of a child of the relationship). A provision similar to section 85(2), which permits the court to apply the rules for short-term marriages and civil unions that end on separation if it would be unjust to apply the general rule of equal sharing, could address this risk.¹⁰³
- 35.13 In Part E we propose options for reforming the rules that apply when short-term relationships end on separation. One option is to adopt the same rules of division for all short-term marriages, civil unions and de facto relationships that end on separation. Any proposal to reform the rules that apply to short-term relationships ending on death must be considered alongside those options.

CONSULTATION QUESTIONS

- M2 On the death of a partner, should short-term marriages and civil unions continue to be treated the same way as qualifying relationships?
- M3 On the death of a de facto partner, should short term de facto relationships continue to be treated differently to short-term marriages and civil unions?

Issue 3: Problems with option A and option B

- 35.14 Various problems arise with the way option A and option B operate in practice.

¹⁰³ See the discussion in Chapter 3 as to potential human rights implications that arise in the scope of this review.

- 35.15 First, until a surviving partner chooses option A or option B, no one can be sure whether the deceased's will is going to apply or not. The surviving partner has six months from the grant of administration of the estate to make his or her choice.¹⁰⁴ This uncertainty affects the will-maker while he or she is alive, the beneficiaries of the deceased's estate and even the surviving partner. It may also affect professional advisers and the deceased's personal representative. While a surviving partner is deliberating which option to elect, an estate is unlikely to be distributed in accordance with the deceased's will.
- 35.16 Second, in most cases the surviving partner must choose to either wholly accept (option B) or wholly forfeit (option A) the benefits he or she has under the will. If, in contrast, the partners had separated and there was a relationship property division before one partner died, the surviving spouse does not lose the right to take gifts under the deceased partner's will.¹⁰⁵ The separated partner could therefore be better off than a partner whose relationship ended on death.
- 35.17 Peart suggests that this approach confuses the boundary between a partner's entitlements under the PRA and under succession law.¹⁰⁶ When partners elect a division of the partners' relationship property under the PRA, they are rightfully claiming their own property. When partners receive an inheritance, they are receiving the deceased's property as a gift. It is arguably unfair that surviving partners must forfeit the gifts the other partner chooses to give them if they are to claim what is in any event their property.
- 35.18 Although a will-maker can expressly provide in the will that any gifts to a surviving partner are to have effect even if the partner elects option A, we understand that wills seldom contain such a provision.¹⁰⁷ This may be due to a lack of understanding of the need to make such express provision, rather than a deliberate step to deprive a surviving partner of gifts under the will or a

¹⁰⁴ Property (Relationships) Act 1976, s 62, with the possibility of an extension granted by the court.

¹⁰⁵ This may occur where separated partners have not updated their wills to reflect the end of their relationship. A will remains valid even if a person's marriage or civil union comes to an end unless they have a separation order or if their relationship is formally ended by a dissolution order: see s 19 of the Wills Act 2007. Ending a de facto relationship has no effect on a will. We acknowledge that in most cases, it would only be by oversight that a separated partner continued to leave property to their former partner under a will.

¹⁰⁶ Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Section 76 of the Property (Relationships) Act 1976 provides that if a partner elects option A under s 61, every gift to that surviving partner is treated as having been revoked.

¹⁰⁷ Property (Relationships) Act 1976, s 76(1).

public consensus that the “all or nothing” approach in the PRA is the right one. Partners who anticipate that the surviving partner would receive a half share of relationship property together with gifts under the will may be disappointed.

- 35.19 Third, the requirement that a surviving partner must choose option A or option B may impose costs and delay on both the surviving partner and the deceased’s personal representative. A surviving partner must give written notice of his or her choice of option A or option B in the prescribed form.¹⁰⁸ The surviving partner’s lawyer must certify that he or she has explained the effect and implications of the notice.¹⁰⁹ Both exercises take time for which the lawyer will be entitled to charge.
- 35.20 Fourth, we understand that there can be uncertainty about how a contracting out agreement entered into under section 21 affects the surviving partner’s choice of option A or option B, because of the way in which some agreements are drafted.
- 35.21 If the surviving partner makes no election, he or she will be treated as having chosen option B.¹¹⁰ We understand that usually option B is automatically engaged and that a formal election under section 61 is uncommon.¹¹¹

Option for reform: Should the PRA presume election of option A (division of relationship property under the PRA)?

- 35.22 If the potential problems we have identified above are material issues, a possible option for reform is to remove the requirement that a surviving partner must choose option A or option B. Instead, the PRA could provide that:
- (a) A surviving partner has a minimum entitlement to an equal share of the partners’ relationship property regardless of the provisions of the deceased partner’s will. That is, all cases would proceed as if the surviving partner had elected option A.

¹⁰⁸ Property (Relationships) Forms Regulations 2001, sch 2.

¹⁰⁹ Property (Relationships) Act 1976, s 65(2)(b).

¹¹⁰ Property (Relationships) Act 1976, s 68(1).

¹¹¹ See fn 91 above.

- (b) The surviving partner is also entitled to any gifts under the deceased's will, assuming that gift is not already accounted for in the division of the partners' relationship property. There would be no need for the will-maker to make his or her intentions clear in accordance the current requirement in section 76.

35.23 This approach would give the will-maker more certainty about what will happen to his or her property on death. There would no longer be a need for the deceased's personal representative to apply for a division of relationship property under the PRA, as that would become the default position. Administration of an estate would not have to wait until the surviving partner makes an election. Any Family Protection Act and TPA claims would be dealt with after the pool of relationship property is identified and divided. Such claims would be limited to the deceased's share of relationship property, and any other separate property that makes up the deceased's estate.

35.24 This approach would also avoid problems that arise from people being uninformed about the application of the PRA on the death of one partner. Surviving partners would not be disadvantaged by being unsure of their rights, and will-makers would, with proper advice, know that they could not deal with relationship property as if it was entirely their own. This should assist professional advisers and will-makers in estate planning.

35.25 Reform of the intestacy rules under the Administration Act 1969 would be required under this option to reflect the surviving partner's minimum entitlement. One way to deal with this would be to give the surviving partner their portion of relationship property, and any additional property from the deceased's estate up to the surviving partner's entitlement on intestacy.¹¹²

¹¹² Under s 77 of the Administration Act 1969 the surviving partner's entitlement is the family chattels, a statutory sum of (currently) \$155,000, and a portion of the remainder of the estate that changes in size depending on whether there are surviving children or parents of the deceased. When the Law Commission reviewed New Zealand's succession laws in the 1990s, a review of the Administration Act was initially part of the reference. In its report on wills, the Law Commission noted it was conducting research on "the conceptual basis of the system of intestate succession" and that the current intestacy rules failed to give effect to either the duties or the assumed wishes of the deceased: Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R41, 1997) at v. Although there were no further publications on this matter, law reform bodies in other jurisdictions have conducted reviews of the division of property on intestacy, for example, New South Wales, where the rules were changed to provide the surviving partner with all the property in the estate unless there were children of a previous relationship: Succession Act 2006 (NSW), ss 110-113; and New South Wales Law Reform Commission *Uniform succession laws: intestacy* (NSWLRC R116, 2007) at xiii-xiv. This reform reflected the view, as stated by the Commission, that these rules better reflected the presumed intentions of the deceased person and the rules which provided otherwise did not "reflect the current demographic makeup of early 21st century Australia, community expectations ... and other factors": New South Wales Law Reform Commission *Uniform succession laws: intestacy* (NSWLRC R116, 2007) at 8 and 35.

35.26 This option would also need to be considered in light of the rule of survivorship (that any property owned as joint tenants automatically passes to the surviving tenants on death). Section 83 provides that the survivorship rule does not apply under option A. Instead, any jointly owned property must be assessed as relationship property or separate property in accordance with the PRA's classification rules. This option for reform would therefore mean that the partners' intentions, demonstrated by their joint ownership of property, have little effect on how that property is divided under the PRA. This might, however, be seen as desirable, as the deceased's share of the jointly held property would remain part of his or her estate and would be available for distribution under the will or intestacy rules, subject to any Family Protection Act or TPA claims.

35.27 Finally, careful consideration is needed as to how to balance the competing interests of all those potentially affected by the death of a partner, including:

- (a) the deceased's freedom to deal with property under a will as he or she chooses and the deceased's rights under the PRA;
- (b) the surviving partner's rights under succession law and the PRA;
- (c) the rights of the deceased and the surviving partner to hold property in joint ownership or to enter a contracting out agreement under section 21 of the PRA; and
- (d) the rights of third parties who may benefit under succession law.

35.28 Often competing claims to the deceased's estate will arise. Consideration is needed as to which claims ought to be given priority. This policy question goes to the heart of what is a fair distribution of a deceased's estate on death. It must therefore be considered in the broader context of succession law, rather than the PRA, which is primarily about the property rights of partners. We address this policy question further in Chapter 36.

35.29 This option may be perceived as a big change. Many New Zealanders make wills assuming they have complete testamentary freedom to deal with property to which they hold legal title. Consequently, many people may see a legal requirement to

provide a partner half the relationship property as an unwelcome change in New Zealand’s succession law. Given that testamentary freedom is in fact constrained in a number of ways, this perception may simply be misplaced.

CONSULTATION QUESTIONS

M4 Should the application of the PRA on death continue to be based on an election by the surviving partner?

M5 If not, should the PRA presume an election of option A? If not, what would you change?

Issue 4: The deceased’s personal representative does not have the same rights as the surviving partner

35.30 The Matrimonial Property Amendment Bill 1998 as introduced to Parliament adopted the Working Group’s recommendation that only the surviving partner should have the right to elect a division of the partners’ relationship property under the PRA.¹¹³ The Parliamentary select committee, however, amended the Bill by providing for the personal representative of the deceased to apply for a division of relationship property with leave of the court.¹¹⁴ No explanation was given in the select committee report for the amendment although it was likely related to a desire to give some protection to other beneficiaries to the deceased’s estate.¹¹⁵

¹¹³ See discussion in Nicola Peart “Part 8: The Election” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 59 at 60–61. The Working Group on Matrimonial Property and Family Protection felt that an estate was not required to ensure that the surviving partner received no more than his or her share of the relationship property, and that the contest is between the surviving partner and any beneficiary under the will, not the two surviving partners who go their separate ways. The Working Group also noted that the deceased may have wished that the surviving partner take the deceased’s share of relationship property: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 46. When the Law Commission considered the question in 1997, it took a different view to the Working Group. The Law Commission recommended that the personal representatives of the deceased’s estate have a right to initiate a division of the partners’ relationship property. The Law Commission’s reasons were that the estate had a right under the Matrimonial Property Act 1963 to apply for a division. The Commission also noted that the estate may wish to seek a division in order to secure provision for the children of a former marriage, although the Commission accepted that it may be desirable that the division be sought after the death of the surviving partner. See Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 58–59.

¹¹⁴ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report).

¹¹⁵ Nicola Peart states “[i]t is safe to assume, though, that s 88(2) was inserted in response to submissions identifying the risk of dependent family members being rendered destitute if the estate could not seek a division”: Nicola Peart “Relationship Property on Death” [2004] NZLJ 269 at 270. Some indication on the purpose of allowing the personal representatives to apply for division can be gleaned from the Ministry of Justice Departmental Report on the Bill to the Select Committee: Ministry of Justice *Matrimonial Property Amendment Bill - Departmental Report Clause by Clause Analysis* (2 March 1999). At 50 the Ministry advised:

[I]t is acknowledged that there may be cases where preventing the estate applying for a division could cause injustice. For example, where the surviving spouse owns a substantial amount of the matrimonial property, the inability of the estate to

35.31 This late-stage change to the Bill has likely contributed to the range of issues that arise when a personal representative seeks to apply for a division of relationship property under the PRA.

Section 88 of the PRA

35.32 Section 88(1) of the PRA gives a surviving partner the right to apply to a court for a division of relationship property. Section 88(2) provides that the personal representative of the deceased may only apply for an order dividing relationship property with the leave of a court. A court may grant leave only if it is satisfied that refusing leave would cause “serious injustice.”¹¹⁶ We discuss the “serious injustice” test below.

35.33 The leave of a court is not, however, required for the personal representative to apply for any other order under the PRA, including a declaration or order in relation to a specific item of property under section 25(3). The reason for this distinction is unclear. It might have odd outcomes. For example, a personal representative could rely on section 25(3) to seek a declaration as to ownership of individual items of property rather than seeking the leave of the court under section 25(1)(a). This could effectively undermine the leave requirement in relation to section 25(1)(a). However, in this scenario the court might be inclined to exercise its discretion against making such an order, on the basis that it undermines the intent of section 88(2).

Should a personal representative need leave of the court to apply for a division under the PRA?

35.34 If the choice to elect option A or option B remains in the PRA, another option for reform is to grant the same rights to apply for a division of relationship property under the PRA to the deceased’s personal representative. Peart has argued that the deceased’s personal representative should be able to apply for a division of relationship property under the PRA as of right, in the same way a surviving partner can, because the deceased partner should have an equal right to distribute his or her share of relationship

have its share divested from the survivor may be unfair to the other beneficiaries under the deceased’s will. It is therefore proposed that the Court have a discretion to allow the estate to make an application for a division where the inability to do so would cause serious injustice. This would provide a mechanism for deserving cases to be addressed, while not opening up the regime to significant increases in litigation.

¹¹⁶ Property Relationships Act 1976, s 88(2).

property on death.¹¹⁷ She argues that providing both the surviving partner and the deceased's estate with an unqualified right to their respective share of the relationship property would be a more consistent approach that does not favour either party. The division would be governed by the PRA. Succession law would only be relevant after division of the relationship property.¹¹⁸ This is potentially undermined if the surviving partner takes most of the relationship property by survivorship, or has legal title to most of the relationship property, and elects option B. In those situations, the deceased partner's share of relationship property would not be part of his or her estate, unless the deceased's personal representative obtained a division of relationship property under the PRA.

35.35 A review of the cases decided under section 88(2) identifies that a personal representative will generally apply for leave to divide the partners' relationship property under the PRA when:

- (a) the deceased partner's property has passed to the surviving partner by the rules of survivorship rather than coming within the estate; and
- (b) a third party wishes to claim against the estate under the Family Protection Act or the TPA.¹¹⁹

35.36 Cases where the personal representative seeks leave to apply for a division of relationship property under the PRA tend to involve a will that does not provide adequately for the children of the deceased, who therefore wish to bring a claim under the Family Protection Act.¹²⁰ In some cases it might be unfair to allow a deceased partner to ignore the obligations he or she owes to others.¹²¹ In *Public Trust v W*, the deceased structured his affairs so all property passed to the surviving partner by survivorship.¹²²

¹¹⁷ Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹¹⁸ Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹¹⁹ We are unsure whether the personal representatives of an estate would be entitled to seek leave under s 88(2) of the Property (Relationships) Act 1976 (PRA) in order to restore funds to the estate to meet creditors' claims. Section 20A provides that, unless the PRA provides otherwise, creditors have the same rights against a partner as if the PRA had not been passed. It would be odd if a creditor's position could be improved beyond that provided for in s 20A by a claim by the personal representatives for division.

¹²⁰ The major exception we have found to this is a case where the surviving partner murdered the deceased: *H v T* HC Christchurch CIV-2006-409-2615, 5 June 2007. Section 12 of the Succession (Homicide) Act 2007 now provides that a refusal of leave will cause a serious injustice if it would allow a killer to retain a more certain or valuable interest in the property of the estate.

¹²¹ Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹²² *Public Trust v W* [2005] 2 NZLR 696 (CA).

The deceased's two minor children were left with no provision. In those circumstances, the Court of Appeal appointed the Public Trust as the deceased's personal representative and observed that it would have very reasonable prospects of obtaining leave under section 88(2) to commence proceedings under the PRA.¹²³ This raises a broader question of policy. That is, which claims against a deceased's estate ought to be given priority? As discussed at paragraph 35.28 above, this policy question goes to the heart of what is a fair distribution of a deceased's estate on death. It must therefore be considered in the broader context of succession law, rather than the PRA, which is primarily about the property rights of partners. We address this policy question further in Chapter 36.

- 35.37 In seeking a division of relationship property under the PRA a personal representative is effectively acting for the benefit of third parties.¹²⁴ Consequently, the justification for why a personal representative should be granted leave will reflect the merits of the third party claim. This is not an inquiry with which the PRA is primarily concerned, and uses the PRA as a mechanism to enhance rights under the Family Protection Act and the TPA. A third party making such a claim has no ability to access property that has passed by survivorship to anyone other than the surviving partner.
- 35.38 It might be argued, however, that the differences between a relationship ending on separation and a relationship ending on death justify a difference in rights between the surviving partner and the personal representative (who is typically acting in the interests of third parties). If there is a will, it might be said that this reflects the deceased's wishes and those wishes should be respected.
- 35.39 This issue demonstrates the tension that arises between the provisions of the PRA that apply on death and succession law. As we discuss in Chapter 36, our preliminary view is that a separate statute would better allow the development of a coherent approach to claims made against a deceased's estate.

¹²³ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [51].

¹²⁴ Although we note that the position in Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 cases is that the personal representative remains neutral and third parties argue their own case: Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [FP4.05] citing *Re McCarthy* [1919] NZLR 807 (SC); *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA); and *Re Schroeder's Will Trusts* [2004] 1 NZLR 695 (HC).

Is the “serious injustice” threshold in section 88(2) appropriate?

- 35.40 If the personal representative should continue to be required to obtain leave from the court to apply for a division of relationship property under PRA, it is necessary to consider whether the test in section 88(2) (refusing leave would cause “serious injustice”) is appropriate.
- 35.41 The PRA does not explain what is meant by “serious injustice” for the purposes of section 88(2) but a series of cases have considered its meaning.¹²⁵
- 35.42 The Courts initially took a strict approach to the meaning of “serious injustice.” In *K v W*, the High Court stated that the injustice had to be “intolerable.”¹²⁶ There, the partners held almost all their property as joint tenants. When one partner died, property valued at \$820,000 passed to the surviving partner by survivorship. Only \$8,000 was left in the deceased’s estate, and the will gifted the \$8,000 to the surviving partner. An adult child from the deceased’s first marriage was left with no provision. An application was brought by the personal representative of the deceased under section 88(2). If successful, this would have meant that the deceased’s share of any relationship property would form part of the deceased’s estate, rather than going to the surviving partner by survivorship, and would be available to satisfy any successful claim brought by the adult child under the Family Protection Act. In that case, however, the High Court said that the circumstances did not amount to a serious injustice as required under section 88(2).
- 35.43 In *Public Trust v W* the Court of Appeal disagreed with this approach, stating that no gloss should be placed on the words of section 88(2) and indicating that it would have granted leave in the circumstances of *K v W*.¹²⁷ In *Public Trust v W*, the deceased died without a will. Three properties which the deceased held as a joint tenant passed to the surviving partner by survivorship. The deceased’s minor children from a previous relationship stood to inherit nothing from the estate. The surviving partner and the Public Trust applied for administration of the estate under

¹²⁵ *K v W* [2004] 2 NZLR 132 (HC) at [48]; *Public Trust v W* [2005] 2 NZLR 696 (CA); *Tod v Tod* [2015] NZHC 528, [2015] 3 NZLR 397; *C v C* [2016] NZHC 583; and *Kennedy v Kennedy* [2017] NZHC 168, [2017] NZFLR 149.

¹²⁶ *K v W* [2004] 2 NZLR 132 (HC).

¹²⁷ *Public Trust v W* [2005] 2 NZLR 696 (CA).

intestacy rules. Public Trust did so on the basis that it would seek the court's leave under section 88(2) to apply for a division of relationship property in order to restore funds to the estate to meet the Family Protection Act claims of the deceased's children. The Court of Appeal observed that the primary reason for allowing applications for a division of relationship property by a personal representative was, presumably, to address situations of the type presented by that case and *K v W* and granted Public Trust's application to be appointed administrator.¹²⁸ The Court added that it thought Public Trust would have reasonable prospects of satisfying the test under section 88(2) in the Family Court.¹²⁹

CONSULTATION QUESTIONS

M6 If the choice to elect option A or option B remains in the PRA, should the personal representative have an automatic right to apply for a division of relationship property, or should the requirement to seek leave of the court remain?

M7 If the requirement to seek the leave of the court remains, is the threshold in section 88(2) the right one and if not what should it be?

Other issues in relation to Part 8

35.44 Additional points arise from the personal representative's power to apply for a division of relationship property under section 88(2). First, sections 75 to 78 (discussed in Chapter 34) set out consequences if the surviving partner elects option A. It is not clear, however, if these provisions apply when the personal representative seeks a division of relationship property.

35.45 Second, section 87 is silent on the rights, if any, of the personal representative to challenge a section 21 agreement. Peart argues there is no "plausible justification for preventing the personal representative from mounting such a challenge."¹³⁰ The case law is conflicting on this issue.¹³¹ In *C v C*, the most recent decision, the High Court said that if a personal representative can apply for a division of relationship property due to serious injustice (the test

¹²⁸ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [48].

¹²⁹ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [51]. A later case stated that "[w]hat is or is not a 'serious injustice' is likely to depend very much on impression": *Public Trust v Relph* [2009] 2 NZLR 819 (HC) at [39].

¹³⁰ Nicola Peart "Contracting Out of the Act" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 309 at 322.

¹³¹ *S v P* [2010] NZFLR 230 (FC); *Tod v Tod* [2015] NZHC 528, [2015] 3 NZLR 397; and *C v C* [2016] NZHC 583.

under section 88(2)), he or she should also be able to apply to set aside a section 21 agreement.¹³² It said that section 88(2):¹³³

provided an avenue for a personal representative to override the surviving spouse's election not to seek a division under s 25(1) where serious injustice would otherwise arise. It is consistent with that decision to also permit the Court to set aside a [section] 21 agreement which likewise may give rise to serious injustice.

35.46 Third, if a surviving partner elects option B, section 95 provides that the estate must be administered in accordance with the deceased's will. Section 95 is silent on the right of the personal representative to seek leave to apply for a division of relationship property under section 88(2) if the surviving partner has already elected option B. The Court of Appeal considered section 95 in *Public Trust v W*.¹³⁴ It observed that the language of section 95 was awkward and presented difficulties when an estate wished to apply for division.¹³⁵ The Court said, however, that it must have been Parliament's intention that a surviving partner's election of option B should not preclude the personal representative's ability to seek leave under section 88(2), otherwise there would be no point to the provision.¹³⁶

35.47 Fourth, an issue may also arise as to the effect of section 95 where there is a section 21 agreement. The provisions of the PRA that deal with contracting out agreements are not included in the list of provisions specified in section 95 as still applying if option B is chosen. This leaves uncertain the enforceability of any section 21 agreement and the impact of non-compliance with section 21F when option B is chosen.

35.48 Fifth, orders to postpone the vesting of property under section 26A can only be made for the benefit of the surviving partner. Section 26A allows for postponement if immediate vesting of property:¹³⁷

...would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children....

¹³² *C v C* [2016] NZHC 583 at [72]–[86]. The court considered that the provisions in s 87 and s 88 are complementary: at [79].

¹³³ *C v C* [2016] NZHC 583 at [85].

¹³⁴ *Public Trust v W* [2005] 2 NZLR 696 (CA).

¹³⁵ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [38] and [41].

¹³⁶ *Public Trust v W* [2005] 2 NZLR 696 (CA) at [38] to [41].

¹³⁷ Property (Relationships) Act 1976, s 26A.

- 35.49 The postponement of sharing might also be appropriate where the surviving partner is not the primary caregiver. For example, if a third party or parties, such as the deceased's parents, care for the children after the death of a partner, immediate vesting might require the home where the children are living to be sold, against their interests and the interests of their primary caregivers. The PRA does not provide for this scenario. Providing for situations where someone other than the surviving partner is the primary caregiver may be complex, for example, where the interests of the surviving partner conflict with those of the children of the relationship or where there are other children involved, such as children of the deceased's previous relationship. This complexity does not, however, seem to justify excluding the possibility of orders for the benefit of caregivers other than the surviving partner on death.
- 35.50 Sixth, third parties have no right to apply directly for a division of relationship property under the PRA. In the case of a personal representative who is unwilling to make an application under section 88(2), the third party must first apply to the court to replace the personal representative.¹³⁸
- 35.51 If the choice to elect option A or option B remains in the PRA, another option could be to allow third parties to apply for leave to seek a division of relationship property. The advantages of this approach are that:
- (a) the personal representative could remain neutral as is generally required in proceedings under the Family Protection Act;¹³⁹
 - (b) if a personal representative refused to seek leave, the third party would not need to take the additional step of applying to the High Court to replace the personal representative; and
 - (c) often the court may want to consider the leave application contemporaneously with the substantive Family Protection Act application and the third party claimant will already be before the court.

¹³⁸ This was recently the case in *C v C* [2016] NZHC 583; and *Kennedy v Kennedy* [2017] NZHC 186, [2017] NZFLR 149.

¹³⁹ See fn 124 above.

Option for reform: clarifications and amendments to existing provisions in Part 8

35.52 Our preliminary view, set out in Chapter 36, is that a separate statute would better allow the development of a coherent approach to claims made against a deceased's estate. Earlier in this chapter we set out an alternative option whereby option A becomes the default position and the surviving spouse has a minimum entitlement of a half share in the partners' relationship property. That would avoid the need for a personal representative of the deceased (or a third party) to apply for a division of relationship property under the PRA.

35.53 If neither of those options are preferred, a third alternative option is to retain Part 8 of the PRA with the following clarifications and amendments:

- (a) First, a personal representative's ability to seek the court's leave should be transferred from section 88(2) to a specific provision early on in Part 8 so it stands alongside section 61. This would send a clear signal that the right of the personal representative to apply for division is not related to the circumstances in section 88.¹⁴⁰
- (b) Second, the "serious injustice" test could be clarified. Section 88(2) could be amended so the court must have regard to listed matters when assessing serious injustice. These matters could include whether the deceased had failed to make adequate provision for people able to claim under the Family Protection Act or the TPA.¹⁴¹
- (c) Third, various provisions in Part 8 could be reworked so to clarify the consequences that follow when a personal representative seeks a division of property under the PRA. We suggest these provisions require attention:

¹⁴⁰ There is currently an issue that s 88 of the Property (Relationships) Act 1976 (PRA) itself appears to address the circumstances when a surviving partner elects option A. For example, under s 88(1)(b) a person on whom conflicting claims are made may apply for an order under s 25(1)(a) or 25(1)(b) to determine and divide the partners' relationship property. It would be odd that, if the surviving partner and the estate were content to proceed under the will (i.e. the surviving partner elects option B), a person on whom conflicting claims are made had the right to apply to divide the partners' property under the PRA. Consequently, s 88 seems aimed at circumstances where the surviving partner or the estate has opted to divide the property under the PRA. Giving the personal representatives the right to seek leave in s 88(2) confuses s 88. We therefore favour removing the personal representatives' right to seek leave from s 88.

¹⁴¹ It is outside our terms of reference to consider the adequacy or otherwise of the Family Protection Act 1955 or Law Reform (Testamentary Promises) Act 1949.

- (i) section 75 – an equivalent provision for applications brought by the personal representative;
- (ii) section 76 – the effect on the will when a personal representative seeks division under the PRA;
- (iii) section 87 – whether a personal representative can challenge a section 21 agreement under Part 6 of the PRA;
- (iv) section 95 – whether a surviving partner’s election of option B precludes a personal representative’s right to seek leave to apply for a division of property under the PRA.

35.54 Third parties with claims against the estate could have a direct right to seek leave to divide the relationship property of the surviving partner and the deceased partner.

CONSULTATION QUESTIONS

M8 Do you have any further suggestions for reform of the rights of the personal representative or third parties to apply for a division of property under the PRA on death of a partner?

Chapter 36 – Resolving the tensions between the PRA and succession law: the case for a separate statute

- 36.1 In this chapter we discuss the tensions that arise when the rules of the PRA, which were originally devised solely for relationships ending on separation, are applied on death. We express our preliminary view that these tensions would be best managed by having a separate statute to deal with division of relationship property on the death of a partner, along with the claims presently allowed for under the Family Protection Act and the TPA.

The different contexts of relationships ending on death and on separation

- 36.2 The context for dividing property on the death of a partner is different to the context for dividing property when a relationship ends by separation. Key differences include:
- (a) A relationship that ends on death is not one ended by choice. Without contrary evidence it can reasonably be assumed that, if the partner did not die, the relationship would have continued.
 - (b) There is no conflict between the partners to be resolved. Any dispute, if one arises, will not be between the partners to the relationship but between the surviving partner and the personal representative of the estate and/or third parties who claim an interest in the estate. These disputes are of a different nature.
 - (c) The deceased partner has no future need for his or her property but may have expressed wishes about what should happen to it on death (through a will or a contracting out agreement).

- (d) There is an expectation that a deceased partner will provide for the surviving partner to enable him or her to continue to enjoy the same lifestyle shared by the partners during the relationship.¹⁴² The expectations that arise on separation are different, and are canvassed throughout this Issues Paper.
- (e) The rights of and obligations owed to third parties become relevant on death in a way that does not occur when a relationship ends on separation, and is not provided for in the PRA. Third parties may feel that they have a legitimate interest in the deceased's estate.

36.3 There may be tension between the competing interests of all those potentially affected by the death of a partner, including:

- (a) the deceased's freedom to deal with property under a will as he or she chooses and the deceased's rights under the PRA;
- (b) the rights of a surviving partner under the deceased's will, the rules of intestacy, the PRA, the Family Protection Act and/or the TPA;
- (c) the rights of the deceased and the surviving partner to hold property in joint ownership or to have entered a contracting out agreement under section 21 of the PRA;
- (d) the rights of third parties who may benefit under the will or the rules of intestacy, or who may have a claim under the Family Protection Act or the TPA.

36.4 Key policy questions that arise in respect of the division of property on the death of a partner are the priority to be given to a surviving partner relative to the rights of third parties, and in relation to what property. The competing interests of the surviving partner and third parties are particularly evident where the deceased had a previous relationship and children from that relationship.¹⁴³ Data suggests that the numbers of people re-partnering after separation is increasing.¹⁴⁴ In those cases, there may be tensions between the deceased wishing to give most of

¹⁴² *Re Z* [1979] 2 NZLR 495 (CA); *Re Hilton* [1997] 2 NZLR 734 (HC); and *EM v SL* [2005] NZFLR 281. The deceased's duty to support the surviving spouse is well established in common law jurisdictions and is associated with the marriage commitment, although this is now extended to include de facto relationships.

¹⁴³ See Donna Chisholm "Sense of Entitlement" *New Zealand Listener* (Auckland, 23 September 2017) at 14–21 for a discussion of cases involving claims by adult children in the context of blended families..

¹⁴⁴ *Law Commission Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 4.

their property to the children of a prior relationship while the PRA gives the surviving partner half the partners' relationship property. Or the deceased may have made a will, arranged for all property to be held jointly or entered into a contracting out agreement with the result that the surviving partner receives all or the vast majority of property on the deceased partner's death. There may be a particular sense of injustice on the part of children where the partners' relationship property was largely acquired before the relationship began, especially if this includes the family home and family chattels.¹⁴⁵

36.5 In *M v L*, the Family Court summarised these tensions in this way:¹⁴⁶

[28] *Where there is a second marriage it is difficult for adult children from a first marriage to appreciate the commitment their parent has made to a new partner. Adult children tend to regard themselves as prior claimants as they have known their parent for all their lives and were already adults when he re-partnered. They have a sentimental attachment to belongings that were part of their life together and to which their father had an attachment. In most cases, if their parents had remained married and their father had died first, they would not have expected to inherit personal items until after their mother had died. Where there is a second marriage they can no longer assume that the new partner will leave property to them in her will or whether she will consider she has more compelling obligations to others such as her own children.*

[29] *On the other hand, the surviving widow feels that her primary relationship was with her husband and his with her. They are likely to have spent a great deal more time together than he has spent with his adult children. His history as well as the period of time they were together has personal significance for her. She expected that they would share their resources for their lifetimes.*

¹⁴⁵ From our review of the cases we have noticed in some cases the deceased provided in his or her will that the surviving partner was to have a life interest in the family home but, upon the surviving partner's death, the property was to fall into the residuary of the estate for the beneficiaries. This is clearly a lesser entitlement than an equal share in the family home under the Property (Relationships) Act 1976. See *Love v Scannell* [2016] NZFC 8114, [2017] NZFLR 226; *Thurston v Thurston* [2014] NZHC 2267; *Thrasher v Allard* [2013] NZFC 5260; *Gera v Moir* [2016] NZHC 613, [2016] NZFLR 875; *N v N* [2013] NZFC 2695; *Re Estate of H* [2012] NZFC 2869; *H v H* [2012] NZFC 1303; *S v G* FC Auckland FAM-2007-004-3009, 26 February 2010; *Mulder v Mulder* [2009] NZFLR 727 (FC); *Slatter v Estate of Sydney Ernest Slatter* FC Christchurch FAM-2003-009-4322, 10 August 2005; and *M v L* [2005] NZFLR 281 (FC). Note though that in *Re W Deceased* HC Tauranga M75/88, 23 October 1990 the High Court said that life interests were now unusual in a will and "redolent of the patronising parsimony of former generations" cited in *M v L* [2005] NZFLR 281 (FC) at [40].

¹⁴⁶ *M v L* [2005] NZFLR 281 (FC) at [28]-[30].

[30] *These issues fall to be sorted out at a time when everyone in the family is grieving. Any dispute about the distribution of the property is an extra assault on the sensibilities of the individual family members.*

- 36.6 These competing interests emphasise the need to clarify the policy basis of the law. By way of an example, we understand from our preliminary consultation that a practice is developing of lodging a notice of claim under section 42 of the PRA on behalf of children of a person who has a claim to an interest, typically children of a deceased partner where the surviving partner is from a subsequent relationship. The claim is made on the basis that the child or children is entitled to lodge a section 42 notice because of special circumstances supporting a derivative claim (in equity) on behalf of the estate for division of property under the PRA.¹⁴⁷ The division of property is typically sought in order to make assets available to the estate to meet a Family Protection Act claim.¹⁴⁸
- 36.7 The policy of the PRA is the just division of property. Its main focus, as a result of original design and legislative intention, is on dividing property between partners who separate. In our view, the problems discussed above have arisen primarily because relationships that end on death are fundamentally different to relationships that end on separation. The framework of the PRA cannot easily accommodate both. It was designed to provide a just division of property on separation, and is inadequate to inform the division of property on death.¹⁴⁹ The competing interests that arise on the death of one partner discussed above need to be considered and resolved as matters of policy.
- 36.8 Our preliminary view is that a separate statute is required. For relationship property claims, that statute could have the same broad policy as the PRA, that is, a just division of property. This means a surviving partner would be able to seek an equal division of relationship property as an alternative to taking an entitlement under a will (unless the option for reform discussed in Chapter 35 is preferred, in which case the PRA will presume an election of

¹⁴⁷ This practice relies on *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973. In this case, the executor was the surviving spouse, who had taken most of the deceased's property through survivorship with a small amount being left to her in the deceased's will. A son from the deceased's first marriage wished to pursue a claim under the Family Protection Act 1955.

¹⁴⁸ A consequence of adult children being able to make successful claims under the Family Protection Act 1955 is arguably a greater incentive for the use of trusts and "other will substitutes" to protect a partner's assets from such potential claims: Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹⁴⁹ See the discussion in Part A. Peart describes the conceptual confusion in Nicola Peart "Family Finances on Death of a Spouse or Partner" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

option A). The property rights that the PRA bestows on partners in qualifying relationships should not be lost when one partner dies. Nor should those rights be defeated by the unilateral decision of one partner as reflected in his or her will or the use of provisions of the Family Protection Act or the TPA by third parties.

36.9 We agree with Peart’s point that:¹⁵⁰

There is currently a real tension in succession law between testamentary freedom and family obligations, which makes it difficult for property owners to make reliable arrangements for the disposal of their property after death. Little wonder that property owners have sought refuge in the law of trusts. Through trusts they are able to control the destiny of their property and know that by and large their arrangements are safe from challenge, certainly from claims under the Family Protection Act.

36.10 The questions as to how to balance the various interests go to the heart of what is a fair distribution of a deceased’s estate on death. They must be considered in the broader context of succession law.

Preferred approach: a separate statute for succession law

36.11 The Law Commission has previously recommended that a single, separate statute (the proposed Succession (Adjustment) Act) was needed to deal comprehensively with relationship property claims, testamentary promises claims and family protection claims on death.¹⁵¹

36.12 We are attracted in principle to this proposal, although any such legislation would fall outside the scope of the PRA review.¹⁵²

¹⁵⁰ Nicola Peart “Property Rights on Death: Policies in Conflict” (Ethel Benjamin Address 2017, 11 September 2017) at 18. Peart cites the case of *Penson v Forbes* [2014] NZHC 2160.

¹⁵¹ Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

¹⁵² Peart recently reached a similar conclusion in giving the Ethel Benjamin address: Nicola Peart “Property Rights on Death: Policies in Conflict” (Ethel Benjamin Address 2017, 11 September 2017). Peart stated:

Reform is needed to provide certainty and predictability. In my view that is best achieved by accepting that death is different from separation. Property rights on death are best regulated through succession law, covering both the property entitlements of spouses and partners, based on the principle of equality, and the deceased’s support obligations to family members based either on need or contribution to the deceased.

As a first step, I hope that the Law Commission recommends that the Property (Relationships) Act be left to deal with the property rights on separation, while relationship property rights on death are dealt with in a separate statute to which at a later stage support obligations could be added. In my view that would provide a more coherent approach to property rights on death, and remove at least some of the current conflict in policies governing relationship property and succession law.

- 36.13 We suggest that such a separate statute would make the law more accessible and efficient.¹⁵³ It would also allow proper consideration of the interests of surviving partners, deceased partners, beneficiaries under a will or the rules of intestacy and potential claimants against the estate. It would likely also assist those advising on estate planning and those administering estates.
- 36.14 The mere proposal of a separate statute would raise public awareness about what may happen to property on death. Debating and enacting a separate statute would raise public awareness even further.

CONSULTATION QUESTION

M9 Do you agree there should be a separate statute? If not, why not?

¹⁵³ See *Nawisielski v Nawisielski* [2014] NZHC 2039, [2014] NZFLR 973. At [9] and [10] the court commented on the “stamina” required to deal with the multiple proceedings required in different courts at different times.