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Tikanga Māori and the Property (Relationships) Act 1976

Excerpts from IP41 *Dividing Relationship Property – Time for Change?*
Te mātatoha rawa tokorau – Kua eke te wā?

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Introduction

This document contains excerpts from the Law Commission’s Issues Paper, *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017). It has been created to bring together material relating to the interaction between the Property (Relationships) Act 1976 (PRA) and tikanga Māori. This document should be read together with Part A of our Issues Paper.

Part A discusses, among other things, whether the current approach of accommodating and responding to tikanga Māori within the framework of the PRA, rather than having a separate regime for property division according to tikanga Māori, remains appropriate (paragraph [4.1] to [4.20]; consultation question A1(c); paragraph [4.48]).

In addition, Part A:

- Provides an overview of the history of marriage and property practices in traditional Māori society (paragraph [2.2] to [2.8]).
- Discusses the impact of introduced law on the role of Māori women in society (paragraph [2.9] to [2.14]).
- Recognises the need to acknowledge tikanga Māori in New Zealand law generally and specifically in the context of the PRA (paragraph [2.53] to [2.58]).
- Explores what is mean by “tikanga Māori” (paragraph [2.59] to [2.64]).
- Discusses the framework of the PRA, its policy, theory and principles (including that a just division of property under the PRA should recognise tikanga Māori and in particular whanaunatanga) (paragraph [3.11(g)]).

Part B – What relationships should the PRA cover?

Chapter 5 - Who is covered by the PRA?

Introduction

- 5.1 New Zealand has undergone significant change in the last 40 years.¹ As a result of changing patterns in partnering, family formation, separation and re-partnering, what it means to be partnered has changed significantly since the 1970s. Public attitudes have also undergone major shifts towards matters such as couples living together before or as an alternative to marriage, separation and divorce, having and raising children outside marriage, and same-sex relationships.
- 5.2 In this chapter we explain the different relationships covered by the PRA, and the history leading up to the inclusion of de facto relationships in 2001. We look at why the PRA should continue to apply to de facto relationships, and on the same “opt-out” basis as marriages and civil unions. The rest of Part B is arranged as follows:
- (a) In Chapter 6 we consider the PRA’s definition of “de facto relationship”, and in particular what it means to “live together as a couple.” We consider potential issues with the definition, and set out some options for reform.
 - (b) In Chapter 7 we look at some specific types of relationships, including Māori customary marriage, and consider how they are treated under the PRA.

¹ These changes are summarised in Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017).

Chapter 7 - Specific relationship types and family arrangements

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Māori customary marriages

- 7.2 Māori customary marriages have as their basis tikanga Māori and whānau approval. Traditionally it was the public expression of whānau approval, as opposed to a formal ceremony or cohabitation, which established a couple as married.² The breakdown of the relationship would bring the union to an end.³ Metge has said that Māori were "...well ahead of the rest of New Zealand society in accepting de facto unions and non-blame divorce."⁴
- 7.3 As discussed in Part A, most Māori married according to their own custom until the early twentieth century.⁵ Successive marriage laws required Māori to conform more closely to the legal requirements for establishing marriage until, in the 1950s, legal recognition of customary marriage was removed.⁶ However subsequent law changes that eliminated the discrimination of children based on their parents' marital status, and the growing prevalence of de facto relationships among non-Māori, reduced pressure for Māori couples to officially register a marriage.⁷ It is not known how many Māori marry according to custom in

² Jacinta Ruru "Kua tutū te puehu, kia mau: Māori aspirations and family law policy" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 62.

³ Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

⁴ Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

⁵ Megan Cook "Marriage and partnering - Marriage in traditional Māori society" (4 May 2017) Te Ara – the Encyclopedia of New Zealand <<https://teara.govt.nz>>.

⁶ Law Commission *Justice: The Experiences of Māori Women; Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 22. Section 8(1) of the Māori Purposes Act 1951 and s 78 of the Māori Affairs Act 1953 both provided that:

Every marriage to which a Māori is a party shall be celebrated in the same manner, and its validity shall be determined by the same law, as if each of the parties was a European; and all provisions of the Marriage Act 1908 shall apply accordingly.

The Māori Affairs Act also invalidated all future Māori customary marriages and any marriages entered into in the past, except as expressly provided by that Act (s 79).

⁷ Kay Goodger "Maintaining Sole Parent Families in New Zealand: An Historical Review" (1998) 10 *Social Policy Journal of New Zealand* at 6.

contemporary New Zealand, but two relatively recent court cases illustrate that the practice continues.⁸

- 7.4 It likely that a Māori customary marriage would fall within the definition of a de facto relationship.⁹ This means that in a formal legal sense Māori who have married according to custom are governed by the PRA, not by principles of whanaungatanga.
- 7.5 In contrast to the law applying to de facto relationships, customary marriage does not carry with it any rights to property held by the other spouse.¹⁰ For example, it was common practice for the wife's parents to gift land to the married couple.¹¹ If the land was gifted to the husband, the right to occupy could terminate on the wife's death and the land would revert to her family as gifting only conveyed a temporary right.¹² Whanaungatanga may be more important to property rights than marriage:¹³

... because of the emphasis they place on descent, Maori do not in general give marriage the priority over all other relations that it has in law. They accept that there are times and circumstances where a person's loyalty and commitment lies with his or her descent line before his or her spouse: e.g. with regard to the transmission of ancestral land and taonga, contribution to whanau activities (especially in connection with tangihanga) and support of kin.

- 7.6 Ruru states that the extension of the PRA to de facto relationships allows someone in a Māori customary marriage to turn his or her back on the nature of the relationship and, upon death or separation, claim a half-share in relationship property as an entitlement under the PRA.¹⁴ Conflict could conceivably arise

⁸ *Re Adoption of T* (1992) 10 FRNZ 23 (DC); and *Re R (Adoption)* (1998) 17 FRNZ 498 (FC). Both were cases concerning the Adoption Act 1955 and whether the couples in question could adopt without being legally married: Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 487.

⁹ Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 335.

¹⁰ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451. See also the discussion on marriage and property practices in traditional Māori society in Part A.

¹¹ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 450–451.

¹² Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 451, citing N Smith *Māori Land Law* (AH and AW Reed, Wellington, 1960) at 37. Ruru refers to situations where the husband has a blood link to the land and where there are children of the marriage as possible exceptions.

¹³ Joan Metge "Succession Law: Background Issues Relating to Tikanga Maori" (paper prepared in connection with Law Commission seminar on succession, 1994) at 4.

¹⁴ Jacinta Ruru "Implications for Māori: Historical Overview" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 488. See also Jacinta Ruru "Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand" (2005) 19 *International Journal of Law, Policy and the Family* 327 at 335.

between the whānau and the person claiming a half-share in property that may, under tikanga, more properly be property of the whānau.¹⁵ However the extent to which this is an issue may be affected by the exclusion of Māori land from the PRA's ambit and the exclusion of taonga from the definition of family chattels.¹⁶

CONSULTATION QUESTIONS

B10 To what extent should Māori customary marriage be subject to the PRA?

B11 Should different rules apply to Māori customary marriage? If so, what would those rules provide? Would they still apply if the parties to the Māori customary marriage also entered a marriage or civil union? Would they be affected by the PRA's approach to classification of property (discussed in Part C) (including or excluding Māori land from the PRA and taonga from the definition of family chattels)?

¹⁵ Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467at 488.

¹⁶ Property (Relationships) Act 1976, ss 2 and 6.

Part C – What property should the PRA cover?

Chapter 8 -What property is covered?

Introduction

- 8.1 The PRA provides the rules for how partners divide their property when a relationship ends. A key part of this process is to first identify what property should be divided. In this part we focus on the rules that determine what property should be shared and what property should be kept separate.
- 8.2 In this chapter we examine the PRA's definitions of "property" and "owner" and consider whether they capture the right types of property. The rest of Part C is arranged as follows:
- (a) In Chapter 9 we look at how the PRA classifies property as either relationship property (which is divided equally between the partners) or separate property (which is not). We also look at the classification of debts. We then examine the basis for classification and ask whether this remains appropriate for contemporary New Zealand.
 - (b) In Chapter 10 we look at situations when a partner's separate property may become relationship property.
 - (c) In Chapter 11 we concentrate on particular items of property and how the PRA classifies them. This includes ACC and insurance payments, super profits and income-earning capacity, heirlooms and taonga. We also look at student loan debts and inter-family gifting and lending.

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Exclusion of Māori land from the PRA

- 8.27 Land is a taonga tuku iho of special significance to Māori people.¹⁷ For that reason Te Ture Whenua Māori Act 1993 (TTWMA) promotes the retention of Māori land in the hands of its Māori owners, their whānau, their hapū, and their descendants.¹⁸ TTWMA operates as a code, and Māori land can only be sold, gifted or otherwise disposed of in accordance with its rules.¹⁹ Proposed alienations of Māori land must generally be approved by the Māori Land Court.²⁰
- 8.28 Only five per cent of New Zealand’s land is Māori freehold land and very little Māori customary land remains.²¹ Māori land is typically owned in common with many other owners.²² It is largely non-arable and some is landlocked.²³ The importance of Māori land however generally lies not in its monetary value, but in its ancestral, spiritual, cultural and historical value.²⁴
- 8.29 Section 6 of the PRA provides that “[n]othing in this Act shall apply in respect of any Māori land within the meaning of [TTWMA].” As noted by the Family Court in *Rawhiti v Marama*, Parliament’s intention seems to have been to exclude Māori land

¹⁷ Te Ture Whenua Māori Act 1993, preamble and s 2.

¹⁸ Te Ture Whenua Māori Act 1993, preamble, s 2 and pt 6. Section 2 defines Māori land as Māori customary land (held in accordance with tikanga Māori) and Māori freehold land (Māori customary land to which the beneficial ownership has been determined according to tikanga Māori by order of the Māori Land Court).

¹⁹ Te Ture Whenua Māori Act 1993, s 146. Information on Māori land is available on the Māori Land Court website <www.maorilandcourt.govt.nz>.

²⁰ Te Ture Whenua Māori Act 1993, pts 7 and 8.

²¹ Statistics New Zealand *He Arotahi Tatauranga: Supplementary Information* (August 2014) at 10.

²² Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 5. Te Ture Whenua Māori Act 1993 (TTWMA), part 12 provides for five types of Māori landowner trusts that may relate to Māori land, other land classified under the TTWMA and shares in a Māori incorporation that is incorporated under part 13 of TTWMA.

²³ The Ministry of Agriculture and Forestry (now Ministry for Primary Industries) estimated that 80 per cent of land held in Māori title is of non-arable class and 30 per cent is landlocked: Ministry of Agriculture and Forestry *Māori Agribusiness in New Zealand: a study of the Māori Freehold Land Resource* (March 2012) at 2.

²⁴ Jacinta Ruru “Implications for Māori: Contemporary Legislation” in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 469. In *Yates v Nathan* the Deputy Chief Judge noted that “general land...lacks the same characteristics associated with land to which Māori people are associated in accordance with tikanga.” In that case the Deputy Chief Judge exercised jurisdiction under s 44 of Te Ture Whenua Māori Act 1993 (TTWMA) to amend orders of the Court constituting a whānau trust under s 214. The respondent had failed to disclose to the Court the applicant’s potential claim under the Property (Relationships) Act 1976 (PRA) in relation to the land which was classified as general land owned by Māori under s 129 of TTWMA. The orders constituting the trust were made conditional on there being no successful PRA claim by the applicant before the Family Court: *Yates v Nathan* (2016) Chief Judge’s MB 223 (2016 CJ 223).

completely from the ambit of the PRA.²⁵ In doing so, section 6 protects the special status of Māori land and recognises the interests of other people in that land.²⁶

What happens when partners separate?

- 8.30 The exclusion of Māori land from the PRA means that if one or both of the partners owns Māori land, that land will not fall within the pool of relationship property available for sharing upon death or separation. This remains the case even if Māori land was used as the family home, and/or if the non-owning partner made or paid for improvements to the land, thereby increasing its value.²⁷ Similarly, a court cannot order one partner to transfer Māori land to the other partner for compensation purposes, such as where one partner used relationship property to pay off a personal debt.²⁸
- 8.31 The rights, if any, of a non-owning partner in respect of Māori land on separation are not covered in TTWMA, although it does provide for a right of occupation when one partner dies.²⁹ Nor does the Te Ture Whenua Māori Bill 2016, as currently drafted, appear to address the position on separation.³⁰ In 2008 Ruru referred to this as a legislative gap between TTWMA and the PRA that is unacknowledged by the judiciary and Parliament.³¹
- 8.32 Historically, owners of Māori land rarely built and resided on their land.³² However more recently owners are increasingly

²⁵ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127. Jacinta Ruru and Leo Watson describe this as “good law”, recognising “the importance of the blood connection that ties land and taonga to a collective rather than an individual responsibility”: Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

²⁶ As discussed in Part A, Māori land was not excluded from the predecessor regime (the Matrimonial Property Act 1963). It was only upon passing of the 1976 Act that Māori land was no longer covered. There was no discussion of the change in Parliament at the time of the 1976 Bill and it seems simply to reflect the evolving paradigm of the 1970s that special rules for Māori land were thought necessary, reflecting the importance of property passing in accordance with the principle of descent in te ao Māori. See Jacinta Ruru “Implications for Māori: Historical Overview” in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 464; and Justice Joseph Williams “The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 11.

²⁷ The provisions of the Property (Relationships) Act 1976 in ss 9A and 10(2) which enable separate property to become relationship property do not apply as Māori land is not separate property.

²⁸ Property (Relationships) Act 1976, s 20E(1)(b).

²⁹ Te Ture Whenua Māori Act 1993, s 328. The right applies where a person has a beneficial interest in that land, such as a life interest devised by will: see s 108(4).

³⁰ Te Ture Whenua Māori Bill 2016 (126-2). At the time of writing, the Bill is currently in the Committee of the Whole House in Parliament.

³¹ Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” (2008) 41 UBC L Rev 315 at 327.

³² Ruru notes that land that stayed in Māori ownership following conversion and alienation through the Native Land Court was often remote and non-arable, and that Māori freehold land titles often have multiple owners and it is nearly impossible for one owner to obtain consent from all the others to build a family home on the land: Jacinta Ruru “Finding

being encouraged and enabled to live and build on their land,³³ which means questions as to the rights of non-owning partners, particularly in respect of family homes built on Māori land, may arise more frequently in future.

The PRA applies if the family home is a chattel

- 8.33 As was observed in *Rawhiti v Marama*,³⁴ because Māori land is exempt from the PRA, a family home that is fixed to Māori land would also be exempt.³⁵ However buildings and other improvements that are not fixed to the land are regarded in law as chattels, and are therefore not excluded under section 6 of the PRA. This means that improvements that are not fixed to Māori land, such as movable houses, can be classified as relationship property and divided under the PRA.
- 8.34 The main indicators of whether a building is a fixture rather than a chattel are the degree of annexation and the purpose of annexation.³⁶ The Māori Land Court used this distinction to provide relief to a non-owner of Māori land in *Epiha William Hills – Kaiapoi MR873 Blk XI Sec 71B*.³⁷ In that case the sole owner of Māori land wished to build a house for his family, but could only do so if his wife contributed \$200,000 towards its construction. The wife would only do so if she could become joint owner of the land. The Māori Land Court said that it had no jurisdiction to transfer half ownership to her, and declined to exercise its jurisdiction to change the status of the land to general land. But if the house were built so that it could be easily transported away from the land, the Court could make an order declaring the house to be a chattel owned solely by the wife.³⁸

Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands* (2008) 41 UBC L Rev 315 at 334 and 337.

³³ See, for example, the proposals emerging from the most recent review of TTWMA: *Te Ture Whenua Māori Act 1993 Review Panel Report of the panel appointed to review Te Ture Whenua Māori Act 1993* (March 2014).

³⁴ *Rawhiti v Marama* (1983) 2 NZFLR 127 (FC) at 127.

³⁵ This reflects the general property law principle that what is fixed to the soil belongs with the soil: *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL). See further *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121); and Jacinta Ruru “Finding Solutions for the Legislative Gaps in Determining Rights to the Family Home on Colonially Defined Indigenous Lands” 41 (2008) UBC L Rev 315 at 339.

³⁶ *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [41] referring to *Auckland City Council v Ports of Auckland* [2000] 3 NZLR 614 (CA) which adopted the approach of the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687(HL).

³⁷ *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85.

³⁸ *Epiha William Hills – Kaiapoi MR 873 Blk XI Sec 71B* (2005) 110 SI 85 at 89. Kāinga Whenua loans are available to build, purchase or relocate a house on multiple-owned Māori land subject to a tripartite deed between the borrower, owners and Housing New Zealand: see Kāinga Whenua information on the Housing New Zealand website <www.hnzc.co.nz>. The terms of the tripartite deed may stipulate design requirements, such as that the house be built on piles. In *Housing Corporation of New Zealand – Waimanoni 1B3B2A* (1996) 19 Kaitaia MB 227 (19 KT 227) the Court found that the parties to the deed had treated the house as a chattel. In *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206) and *Bennett – Estate of Ronald Clifford Bennett* (2017) 156 Waiariki MB 250 (156 WAR 250) the Court found the house to be

A claim in constructive trust

- 8.35 TTWMA does not prevent constructive trust claims being brought in respect of Māori land. The Māori Land Court has said that, although general principles of property law provide that the owners of the land also own any fixtures, section 18(1) (a) of TTWMA enables the Court to recognise that someone may separately own, by way of a beneficial interest under a constructive trust, an improvement on the land.³⁹ The Court has used these principles to recognise a non-owner's beneficial interest in buildings fixed to Māori land.⁴⁰
- 8.36 The leading case is *Stock v Morris – Wainui 2D2B*, decided by the Māori Land Court in 2012.⁴¹ In that case the parties lived together for eight years on Māori land. The applicant was an owner in the land, and the respondent a non-owner. During their relationship the respondent paid approximately \$60,000 for the construction of a cottage on the land. On separation, the applicant claimed ownership of the cottage, supported by her fellow owners. The respondent sought half the value of the cottage. The Court found that the cottage (which had been built on a concrete slab) was part and parcel of the land and could not be treated as a chattel.⁴² It could not be uplifted, and the applicant could not afford to purchase the respondent's claimed half-share in the cottage. The central issue for the Court was how it should do justice between the parties, within the parameters of the TTWMA.⁴³
- 8.37 The Court examined the scope of its powers under section 18(1) (a) of TTWMA to hear and determine a claim in equity. It said that the Court could make orders under that section in favour of a non-owner, and had done so in the past.⁴⁴ The Court went on to say that where a non-owner is entitled to equitable relief in relation to a fixture on Māori land, the Court should in the first place look to award monetary compensation. If monetary

a fixture that would only become a chattel if the lender's right to remove the house was triggered by a default by the borrower.

³⁹ See *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223) at [35]; and *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [26].

⁴⁰ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [30] referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Tauranga MB 150 (73 T 150) and *Brokenshaw – Te Kaha B6X2* (2003) 81 Opotiki MB 18 (81 OPO 18).

⁴¹ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121).

⁴² *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [22].

⁴³ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [1].

⁴⁴ *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [64], referring to *Matenga v Bryan – Parish of Tahawai Lot 18C-F and 181* (2003) 73 Waikato Maniapoto 150 (73 T 150). See also *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

compensation is inappropriate, the Court may award ownership of the fixture if it can be removed from the land. The Court will also take into account the non-owner's free occupation of the land.⁴⁵ However an order vesting interests in the land, or a right of possession in favour of a non-owner would likely offend the kaupapa and provisions of TTWMA,⁴⁶ although it noted that the Court of Appeal had not completely ruled out this possibility.⁴⁷

8.38 The Court in *Stock v Morris* concluded that the applicant was the owner of the cottage but that the non-owner was entitled to compensation. The order declaring the applicant the owner was made conditional upon the respondent paying the non-owner compensation within two years. The Court also issued a charging debt under section 82 of TTWMA, charging the owner's interest in the home with the sum owing.⁴⁸

Issues with the remedies for family homes on Māori land

8.39 While the Māori Land Court can make an order declaring a house to be a chattel, it can only do so if the house was built so that it could be easily relocatable. If the house is a fixture, the Court cannot say it is a chattel as it only has jurisdiction to declare existing ownership rights and cannot transfer or create new ownership rights.⁴⁹ The extent to which the Court can grant equitable relief in respect of houses and other buildings that are fixtures on Māori land remains unclear.⁵⁰

8.40 Ruru notes the reality of removable homes as a solution to the legislative gap is feasible and the concept of removable

⁴⁵ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70].

⁴⁶ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [70]. See also *Tipene v Tipene - Motatau 2 Section 49A4F* (2014) 85 Taitokerau MB 2 (85 TTK 2) at [63] and *Owen v Hauiti - Kiwinui A* (2016) 57 Tairarawhiti MB 70 (57 TRW 70) at [69].

⁴⁷ *Grace v Grace* [1995] 1 NZLR 1 (CA) at 5.

⁴⁸ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [77]. The Court noted at [74] there was some prospect that the respondent may not receive compensation and that the Court had limited powers to enforce payment.

⁴⁹ *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [25]. The Court discussed but did not prefer the line of authority which conceptualised the house as a chattel following the making of an order under s 18(1)(a) (the "fixture to chattel" theory): at [43] to [47].

⁵⁰ Despite the Māori Land Court's willingness to apply constructive trust principles over the family home, there is an argument that a constructive trust over Māori land is inconsistent with Te Ture Whenua Māori Act's prohibition on any form of disposition of any equitable interest in Māori land other than in accordance with that Act: see Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 10; and Te Ture Whenua Māori Act 1993 (TTWMA), s 4, definition of "alienation", para (a)(i), and s 146. The Court in *Stock v Morris* rationalised its ability to "do equity" in relation to Māori freehold land on the basis that the preamble and ss 2 and 17 set the kaupapa of TTWMA and promoted the interests of the owners, but the Court could not allow the actions of owners to cause injustice to non-owners: *Stock v Morris - Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) at [65]. However, it remains unclear what rights a constructive trust over Māori freehold land could confer that would not be contrary to TTWMA.

or relocatable homes is becoming more common.⁵¹ However, removable homes can be both logistically problematic and expensive, and the solution adds another constraint on the effective utilisation of Māori land.⁵² It may also be the case that some homes are regarded as a taonga, imbued with a sense of tapu. In this situation, removal or relocation would be contrary to tikanga Māori and therefore unacceptable.⁵³

- 8.41 For these reasons, there may be merit in clarifying the legal position of non-owning partners when the family home is on Māori land.

Options to provide for family homes on Māori land

- 8.42 The current legislative position reflects a policy decision that the retention of Māori land in the bloodline is preferred over an ability of the non-owning partner to claim an interest in the land. We are not considering removing the exclusion of Māori land from the PRA. This would have significant implications for TTWMA and Māori custom law. Further we are not aware of any issues with the exclusion of Māori land other than the issue of addressing improvements made by the non-owning partner, particularly in respect of family homes.
- 8.43 Enabling a non-owning partner to claim an interest in the family home but not the land on which it sits would represent an alternative policy balance that could be supported on the basis that it enables a just division of property that has a connection to the relationship, either because it is used as the family home or because it is attributable to the relationship.⁵⁴ Alternatively, the non-owning partner's actions or contributions to improving the land could be recognised by way of compensation. These options are discussed below.

⁵¹ Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁵² Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁵³ Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁵⁴ See Chapter 9 for a discussion of the "family use" and "fruits of the relationship" approaches to the classification of relationship property.

8.44 In Part H we discuss which court, or courts, should hear claims that raise issues of importance to Māori, including family homes on Māori land.

Option 1: Treating the family home on Māori land as a family home under the PRA

- 8.45 One option is to enable a non-owning partner to claim an interest in Māori land by treating the family home (but not the land on which it sits) as a family home under the PRA.
- 8.46 The family home could be classified as relationship property either on the basis that it was for family use or that it was attributable to the relationship through the efforts of the partners. The family home could form part of the relationship property pool and a court could make orders with respect to the family home in accordance with the provisions of the PRA.
- 8.47 In practical terms this would mean that the value of the interest in the family home is brought into the relationship property pool and accounted for from other relationship property, but the land itself is not.
- 8.48 This would provide a more equal balance between the policies underpinning the TTWMA and PRA. However, a significant practical limitation is that there may be no other assets from which to satisfy the other partner's entitlement to a share in the relationship property.

Option 2: Providing compensation under the PRA

- 8.49 Another option is to amend the PRA to provide a mechanism to compensate a non-owning partner for his or her actions in increasing the value of Māori land. This would be consistent with the policy and provisions of the TTWMA and would overcome the difficulties identified with the current approach. It would, however, be inconsistent with the focus in the PRA on contributions to the relationship, rather than to specific items of property.⁵⁵

⁵⁵ See Chapter 2 for a discussion on why the Property (Relationships) Act 1976 replaced the earlier approach in the Matrimonial Property Act 1963 which focused on the contributions of the non-owning partner to specific items of property. The exception is s 9A(2)(b), which applies when an increase in the value of separate property is attributable to the actions of the non-owning partner. That section requires the court to determine the partners' respective shares in accordance with "the contribution of each spouse or partner to the increase in value." We discuss the problems with this approach in Chapter 10.

- 8.50 A new mechanism specifically for family homes on Māori land would recognise the unique policy considerations at play. Amending the PRA's existing compensation provisions will not achieve this and is unlikely to be the best conceptual and practical fit in light of the underlying ownership of the land.⁵⁶
- 8.51 Amending the PRA's provisions to provide compensation may acknowledge a non-owner's rights but, again, such opportunities can be limited in practice if the owning partner has insufficient assets from which any compensation can be drawn. Nor would such amendments overcome the difficulties arising from land in multiple ownership as compensation can only be drawn from an owning partner's share in the land.
- 8.52 Te Rata notes, however, that in trying to strike a policy balance between retaining Māori land in the hands of its owners while compensating non-owning partners for their contributions, direction could be provided to the court on how to determine and give effect to a non-owning partner's rights.⁵⁷

Option 3: Remedies under Te Ture Whenua Māori Act 1993

- 8.53 TTWMA operates as a code for interests in Māori land. Although a non-owner's interest in a family home may be a product of a relationship, it is arguable that any attempt to fill the legislative gap in relation to contributions to Māori land should more appropriately sit in TTWMA.
- 8.54 There may be situations where it would be appropriate in the circumstances and in accordance with tikanga for the Māori Land Court to award an interest in land or otherwise provide compensation to a non-owner following a separation. TTWMA currently provides for rights for non-owners, including the

⁵⁶ For example, s 17 of the Property (Relationships) Act 1976 could be applied to order compensation to be paid where a partner's separate property has been sustained by the application of relationship property or the actions of the other partner. Alternatively, Ruru and Watson discuss an amendment to enable the Family Court to take Māori land interests into account when considering a compensatory order under s 11B of the PRA for the absence of an interest in the family home: Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Josie Te Rata suggests a provision similar to s 9A that would compensate a non-owning partner by adjusting the division of other relationship property to reflect the increase in value of the land attributable to the non-landowning partner's actions: Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9.

⁵⁷ Josie Te Rata "Papakāinga: Tools for Determining Rights to the Family Home in a Māori Land Context" (paper prepared for Laws 455 Māori Land Law, University of Otago) at 9 in relation to a suggested amendment similar to s 9A of the Relationship (Property) Act 1976.

provision of a life interest⁵⁸ or a financial interest⁵⁹ following the death of a partner, and the right of an owner of a beneficial interest to occupy land.⁶⁰ These provisions could be adapted, or new compensation provisions added, to recognise a non-owner's contribution to the family home.

- 8.55 While amendments to TTWMA are outside our terms of reference, we are interested in hearing whether this is an appropriate avenue for reform.

CONSULTATION QUESTIONS

- C4 Do you think that the law should provide rights or recognise interests in respect of a family home on Māori land, when one partner is not an owner of that land?
- C5 If so, what option do you prefer, and why?

...

Taonga

- 11.42 In 2001 taonga were excluded from the PRA's definition of family chattels. While there was no discussion of Parliament's intention in making this special rule for taonga, it followed the recommendation in 1988 of a Working Group established to review the Matrimonial Property Act 1976.⁶¹ The Working Group recommended the exclusion of taonga and heirlooms (discussed below) for the following reasons:⁶²

- (1) *Heirlooms and taonga are of a special nature as much of their value lies in their individuality; as a family treasure they cannot be replaced by another, although in other ways identical, object. Where an object's value lies partly in the fact that it has been passed down from earlier*

⁵⁸ Te Ture Whenua Māori Act 1993, ss 108(4) and 109(2).

⁵⁹ Te Ture Whenua Māori Act 1993, s 116. Parliament is alive to the issue of injustice: s 116(3) states

"In enacting this provision, Parliament has in mind particularly the possibility of injustice arising in individual cases from the prohibitions enacted by this Act against the alienation of beneficial interests in Māori freehold land to persons outside defined classes, and is therefore desirous of conferring on the court some flexible, if limited, powers to ameliorate any such injustice.

⁶⁰ Te Ture Whenua Māori Act 1993, s 328.

⁶¹ The Working Group was convened by Geoffrey Palmer, then Minister of Justice: Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988). The Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at i states that the amendments in the Bill (including the exclusion of taonga) were largely drawn from the recommendations of the Working Group.

⁶² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 18.

generations its special character is lost if it passes to someone outside the family or tribal group.

- (2) *Other property acquired by succession or survivorship, or under a trust, which does not fall within the category of family chattels, is separate property by virtue of s10. The group is of the opinion that the special nature of heirlooms and taonga outweighs the special nature of family chattels in relation to other types of property.*
- (3) *Taonga have a special cultural and ancestral significance for Maori tribes as well as for individual Maori to whom the property may pass. Maori argue that individuals are not seen as owning such property and therefore able to dispose of it as they wish. Instead, a person in possession of taonga is more of a guardian of taonga for the rest of the tribe and for future generations. Maori thus argue that the matrimonial property regime should not apply to such property in order that the property may pass according to custom.*

11.43 The special significance of taonga was also recognised in a 1996 working paper prepared by Hohepa and Williams for the Law Commission’s review of the law of succession.⁶³ In that paper Williams discussed whether tikanga Māori should govern the succession of items defined by general law as personal property, “on the basis that the items are *not* the personal property of the deceased but are taonga of the [hapū] for which the new kaitiaki may well be a person outside the immediate family of the deceased.”⁶⁴

Taonga are subject to the PRA

11.44 Unlike Māori land, discussed in Chapter 8, taonga are still subject to the PRA, even if they are excluded from the definition of family chattels. This means that taonga that are chattels will generally be treated as one partner’s separate property.⁶⁵ As separate property, taonga are subject to the PRA’s ordinary rules about when separate property becomes relationship property, including through intermingling,⁶⁶ or where the value of the taonga has increased or

⁶³ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46.

⁶⁴ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 46 (emphasis in original).

⁶⁵ This is because s 9(1) of the Property (Relationships) Act 1976 provides that all property of either partner that is not relationship property is separate property.

⁶⁶ Where property acquired by succession, survivorship, or gift becomes so intermingled with relationship property that it is unreasonable or impracticable to regard it as separate property: Property (Relationships) Act 1976, s 10(2).

income or gains have been made as a result of the application of relationship property.⁶⁷

- 11.45 Taonga that are *not* chattels are not excluded from the definition of relationship property. Rather, they are treated like any other item of property that needs to be classified as either relationship property or separate property according to the PRA's rules of classification. For example, land with general title status that nonetheless has ancestral significance is not excluded from the pool of relationship property on the basis that it is taonga, although it may still be separate property under section 9 or section 10. On this point, Ruru suggests that:⁶⁸

If whanaungatanga is operative, it should be for the whānau (not necessarily the nuclear family) to appoint the successive kaitiaki (guardian) of the property, here, ancestral land. However, the placement of taonga in the family chattels definition does not permit such a practice to be given effect.

- 11.46 Taonga that are in the possession of one partner might, in some circumstances, be regarded by the court as being held on trust, in which case the taonga would be excluded from the PRA entirely.⁶⁹

CONSULTATION QUESTIONS

- C5 Should the PRA exclude taonga which fall outside of the definition of family chattels (e.g. land of ancestral significance which is not Māori land)?
- C6 Should the PRA provide that taonga which is initially separate property cannot become relationship property in any circumstances?

The courts' interpretation of taonga

- 11.47 Taonga is not defined in the PRA, but its interpretation in the context of the PRA has been explored in a series of cases.⁷⁰

⁶⁷ Property (Relationships) Act 1976, s 9A.

⁶⁸ Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs, and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) 467 at 482 (footnotes omitted).

⁶⁹ This is pursuant to s 4B of the Property (Relationships) Act 1976 (PRA), which provides that nothing in the Act applies where either partner is acting as a trustee. In *B v P* [2017] NZHC 338 the High Court was required to determine whether the ownership of three items of taonga (two taiaha and a tewhatewha) had passed to the applicant as administrator of the deceased's estate. The applicant argued the taonga were the deceased's personal property, while the respondents (the deceased's parents) argued that it was for them, as guardians of the taonga, to decide what should happen to the taonga. The Court held that, in the particular circumstances of the case, the taonga did not fall into the deceased's estate after his death. That was because the deceased had, six years prior to his death, entrusted the taonga to his parents to care for, and in doing so entrusted his parents to make a decision as to how they should be ultimately dealt with after his death: at [151] and [161].

⁷⁰ The courts' interpretation of the concept of taonga in the context of the Property (Relationships) Act 1976 has been the subject of commentary by Ruru: see Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 and Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

11.48 Initially the courts took a broad approach to the concept of taonga. In *Page v Page* the High Court considered taonga in the context of the PRA for the first time.⁷¹ That case concerned the status of a piece of artwork painted by one partner's mother. Neither partner was Māori. The case was decided in 2001, shortly before taonga was excluded from the definition of family chattels. With that legislative change on the horizon the High Court observed that the "ordinary and everyday use [of the term taonga] would encompass without difficulty the artworks of the mother in this case."⁷²

11.49 In *Perry v West* the District Court and High Court had to determine whether a Colin McCahon painting was taonga.⁷³ Both Courts agreed that the concept of taonga could be applied to describe the relationship between an item of property and a person of any ethnic or cultural background.⁷⁴ The High Court set out two ways in which an item could attain the status of taonga:⁷⁵

The first is where the object is acquired by an individual because it has a special significance to that individual. The second is where the object assumes the special status of taonga because others also ascribe to it or bestow upon it a special significance.

11.50 Both Courts found that the husband had failed to establish that the painting was a taonga but for different reasons. The District Court said it could not be a taonga to the husband if he was willing to sell it to realise cash for other routine purposes,⁷⁶ while the High Court said it could not be a taonga to the husband because he had failed to consistently maintain his personal attachment to it, having only made a claim to the painting nearly a decade after the divorce.⁷⁷

11.51 In a 2004 article Ruru expressed concern at an emerging precedent by which an item could be classified as taonga although it is not owned or held by a Māori person, was not made by a Māori person and has no Māori association or content.⁷⁸ In reference to the judicial approaches in *Perry v West* Ruru noted that:⁷⁹

⁷¹ *Page v Page* (2001) 21 FRNZ 275 (HC).

⁷² *Page v Page* (2001) 21 FRNZ 275 (HC) at [46].

⁷³ *Perry v West* DC Waitakere FP 239/01, 25 March 2003; *Perry v West* [2004] NZFLR 515 (HC).

⁷⁴ *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [89]; *Perry v West* [2004] NZFLR 515 (HC) at [37].

⁷⁵ *Perry v West* [2004] NZFLR 515 (HC) at [37].

⁷⁶ *Perry v West* DC Waitakere FP 239/01, 25 March 2003 at [95].

⁷⁷ *Perry v West* [2004] NZFLR 515 (HC) at [37(b)].

⁷⁸ Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297.

⁷⁹ Jacinta Ruru "Taonga and family chattels" [2004] NZLJ 297 at 298-299.

- (a) Neither Court had attempted a particularly comprehensive definition of taonga.
- (b) Each Court relied on broad concepts of taonga as employed by the Waitangi Tribunal, but failed to acknowledge that the Tribunal’s approach to taonga, while broad, is necessarily still Māori-specific.
- (c) Jurisprudence on taonga in other contexts recognises it as a Māori-specific term (as does jurisprudence on Māori concepts in other statutes, for instance, “kaitiaki” under the Resource Management Act 1990).
- (d) Each Court noted the importance of the existence of a relationship with the object in question, but placed importance on a personal attachment. Under tikanga, personal attachment to the taonga is largely irrelevant; more important is the kaitiakitanga exercised over the taonga for the purposes of wider family expectations.
- (e) The Courts did not discuss Parliament’s likely intention in making the special rule for taonga, and did not refer to the 1988 Working Group’s reasons for recommending the exclusion of taonga, which referred specifically to the Māori cultural significance of taonga.
- (f) The Courts did not consider the effect of the broad interpretation of taonga on the meaning of “heirloom.” If taonga is so broadly interpreted, arguably the separate category for heirlooms becomes superfluous.

11.52 In subsequent cases the courts have restricted the interpretation of taonga.⁸⁰ In *Kininmonth v Kininmonth* the husband argued that his interest in a family bach was taonga and was therefore excluded from the pool of relationship property.⁸¹ The Family Court, referring to Ruru’s article, did not accept that the concept of taonga could be relied upon in respect of a non-Māori asset such as an interest in a bach.⁸²

11.53 In *S v S*, the husband, an artist, claimed that his art collection was a taonga, and thus was excluded from the definition of family chattels in the PRA.⁸³ The Family Court observed that case law to

⁸⁰ Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁸¹ *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008.

⁸² *Kininmonth v Kininmonth* FC Auckland FAM-2004-004-509, 27 August 2008 at [26].

⁸³ *S v S* [2012] NZFC 2685.

date provided no definitive definition of taonga.⁸⁴ It concluded that the term should be defined within a tikanga Māori construct, noting the reference of the 1988 Working Group to taonga as a Māori concept and the need to avoid interpreting the term through a Pākeha lens. However, it found that the concept of taonga, as defined within a tikanga Māori construct, could be applied “pan-culturally”:⁸⁵

[P]rovided the central elements of Tikanga Māori can be shown to exist on the evidence before the Court, there can be no sound basis as to why a particular item of property could not be classified as taonga, notwithstanding that the parties to the proceedings are non-Māori.

11.54 To help identify what made a chattel a “taonga”, the Court relied on writings of Professor Paul Tapsell (who also gave evidence in the proceedings) and concluded that:⁸⁶

... for an item to become taonga it must be accompanied, through a marae or marae like setting, with elements of whakapapa, mana, tapu and korero. For an item to become taonga it must therefore be presented, either by a group or an individual (but only on behalf of a kin group/tribal group) to another, in a marae like setting. It must additionally have accompanying it a history or whakapapa, some particular significance or mana, and be presented in the context of an oration or korero. Professor Tapsell accepted that application of taonga using this definition could involve non-Māori.

11.55 Applying that definition, the husband’s art collection were not taonga as there was no evidence that he had acquired the paintings in a marae like setting, no evidence of any particular speech or history associated with the paintings and no evidence that the paintings were received on behalf of others who were representatives of a wider group.⁸⁷

11.56 Ruru has observed that the Court’s decision in *S v S* has provided “a more Māori aligned precedent for understanding taonga.”⁸⁸

⁸⁴ *S v S* [2012] NZFC 2685 at [48].

⁸⁵ *S v S* [2012] NZFC 2685 at [54(b)].

⁸⁶ *S v S* [2012] NZFC 2685 at [57].

⁸⁷ *S v S* [2012] NZFC 2685 at [59].

⁸⁸ Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

Should taonga be defined in the PRA?

- 11.57 Ruru has previously suggested that it would be prudent for Parliament to engage with Māori about a possible definition of taonga for the PRA.⁸⁹ This was echoed by the Family Court in *S v S*.⁹⁰ The decision in that case however may have “reduced any urgency for the legislature to clarify its intent to confine taonga to Māori generational treasures.”⁹¹
- 11.58 If Parliament opts not to define taonga, Ruru stresses that there must be ways for evidence from experts on tikanga to be obtained and applied by a court that has a working knowledge of tikanga.⁹²
- 11.59 The use of expert evidence on tikanga was evident in *S v S*, discussed above, and was also demonstrated in the recent High Court case of *B v P*.⁹³ While this case did not involve a claim under the PRA, the High Court had to decide whether taonga belonging to the deceased should go to his surviving partner or to his parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased’s three sons). The Court heard evidence from two kuia. The evidence confirmed that, according to tikanga, taonga had a guardian instead of an owner. If the taonga were entrusted into the care of someone, those people were responsible for protecting and caring for them and for making decisions about what would happen to them. The Court concluded that in the circumstances, the taonga were held on trust by the deceased’s parents. At least in this instance, the Court had little trouble resolving the issue with the assistance of the expert evidence from the kuia.⁹⁴

CONSULTATION QUESTION

C7 Should the concept of taonga be defined in the PRA? Or should it be left to be considered on a case by case basis with evidence called as necessary in each case?

⁸⁹ Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 299.

⁹⁰ *S v S* [2012] NZFC 2685 at [48].

⁹¹ Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

⁹² Jacinta Ruru “Taonga and family chattels” [2004] NZLJ 297 at 300.

⁹³ *B v P* [2017] NZHC 338. The facts of this case are summarised above at n 293.

⁹⁴ Note also the discussion in John Chadwick “Whanautanga and the Family Court” (2002) 4 *Butterworths Family Law Journal* 91 at 94 where the author noted that whanautanga prevails over the law in relation to matrimonial property because Māori, as a rule, do not have the same emotional attachment to property like family chattels.

Part H – Resolving property matters in and out of court

Chapter 23 - How are property matters resolved in practice?

Introduction

- 23.1 In this part of the Issues Paper we look at how property matters are resolved when relationships end, both in and out of court. We want to understand whether the PRA facilitates the resolution of property matters in accordance with people’s reasonable expectations, and as inexpensively, simply and speedily as is consistent with justice. We focus primarily on how separating partners resolve their property matters, although some of the issues identified in this part may also appear when one partner dies and disputes arise among the surviving partner, the personal representative of the deceased and third parties.⁹⁵
- 23.2 Separating partners can agree to divide their property in any manner they think fit. They are not required to apply the PRA’s rules of division, however, if they want their agreement to be enforceable by a court they must meet certain procedural requirements set out in the PRA.⁹⁶
- 23.3 Partners resolve their property matters in a range of different ways, including by negotiation, with or without legal advice, or by mediation, arbitration or some other dispute resolution process. We use the term “out of court” to refer to this range of options, unless indicated otherwise. A smaller number of separating partners will have their property dispute determined by a court.
- 23.4 No information is routinely collected in New Zealand about how people resolve their property matters at the end of relationships.

⁹⁵ The special rules that apply to relationships ending on death are discussed in Part M.

⁹⁶ For an agreement to be binding it must be in writing and signed by both partners. Each partner must receive independent legal advice before signing and their signature must be witnessed by a lawyer. That lawyer must also certify that they have explained the effect and implications of the agreement to the partner, before the partner signed. See: Property (Relationships) Act 1976, s 21F.

As a result, we lack the necessary information to fully analyse how the PRA is operating in practice. Your views on the practical issues people face when resolving property matters, and how those issues might be addressed, are therefore important to our review.

- 23.5 In this chapter we explore what is needed to achieve a just and efficient resolution of property matters under the PRA, and summarise what we know about what currently happens *in practice*. The rest of Part H is arranged as follows:
- (a) In Chapter 24 we look at how property matters are resolved out of court. We explore the range of information, support and dispute resolution services that are currently available, and ask whether there is a need for the State to do more to encourage out of court resolution in a way that achieves just and efficient results.
 - (b) In Chapter 25 we identify broader issues with the Family Court’s processes and powers, which can hinder the just and efficient resolution of property matters in court.
 - (c) In Chapter 26 we explore more complex and technical issues with the jurisdiction of the courts to decide property matters that arise at the end of relationships, focusing in particular on the roles of the Family Court and High Court.
- 23.6 Throughout this part of the Issues Paper we refer to the comprehensive review of the Family Court carried out by the Ministry of Justice in 2011, which led to important changes to the family justice system such as the introduction of the Family Dispute Resolution service for parenting disputes.⁹⁷ We refer to this as the “Family Court Review.”

...

Resolving PRA matters in accordance with tikanga

- 23.15 Māori have different values and different ways of resolving disputes according to tikanga. Māori place greater importance

⁹⁷ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011).

on the whānau than on individuals or nuclear families. Tikanga relies on a “collective sharing of decision making, tied to the community”, and differs from both the court process and the underlying assumption that separation is of concern only to the partners, their children and the State.⁹⁸

23.16 Non-Māori often do not recognise the part played in relationship breakdown by tensions inherent in Māori social organisation (such as conflicting whānau loyalties and differences in tikanga between iwi) or resulting from social change (such as the difficulties of parents who grew up in whānau raising children without whānau support).⁹⁹ When relationships are threatened with breakdown, relatives have valuable knowledge and skills to offer:¹⁰⁰

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

23.17 In a draft paper prepared for the Law Commission’s review of Māori customary law, Durie noted that resolution of disputes according to tikanga depends not upon finding for one or the other, or upon making one subordinate to the other, but upon recognising the status and contribution of each, and upon finding a structure that accommodates the various interests.¹⁰¹ Ruru has observed that:¹⁰²

Overall, the rules relating to marriage and property are haphazard and often contrary to tikanga Maori in that they deny the whanau and hapu the responsibility to mediate and determine rights and responsibilities to property. The rules are based on an

⁹⁸ Pat Hohepa and David Williams *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19; and Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

⁹⁹ Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

¹⁰⁰ Donna M Tai Tokerau Durie-Hall “Māori Marriage: Traditional marriages and the impact of Pākehā customs and the law” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 186 at 187.

¹⁰¹ ET Durie “Custom Law” (unpublished confidential draft paper for the Law Commission, January 1994) at [105] prepared for Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

¹⁰² Jacinta Ruru “Indigenous Peoples and Family Law: Issues in Aotearoa/New Zealand” (2005) 19 Int J Law Policy Family 327 at 336.

ethic that endorses individual rights and ability to own property exclusively.

23.18 Therefore the whānau, not the State, is seen as the first line of defence in times of trouble.¹⁰³ If the whānau is not functioning effectively, the responsibility for supervision and intervention lies next with the hapū and then, if necessary, with the iwi.¹⁰⁴ Only after both options have collapsed should the responsibility fall to the State.¹⁰⁵

23.19 These cultural practices mean that Māori may rarely use the courts to enforce their rights under the PRA, preferring instead to manage their own dispute resolution processes within their tribal communities.¹⁰⁶ In the Family Court Review, the Ministry of Justice observed that Māori comprised just six per cent of applicants and respondents in PRA cases.¹⁰⁷ There may, however, be other reasons for this trend. Chadwick has observed that:¹⁰⁸

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

23.20 When Māori do go to court, they may find it is not responsive to their values and beliefs.¹⁰⁹ The processes, language and culture of the adversarial court system can be mysterious and intimidating¹¹⁰ and its focus on individuals can be alienating, not only for Māori but also Pasifika and other cultures who often want to resolve disputes by involving the wider family or whānau.¹¹¹ However in recent years the judiciary has made significant efforts to upskill in this area. Tikanga and te reo are important elements in the ongoing judicial education provided by the Institute of Judicial

¹⁰³ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

¹⁰⁴ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

¹⁰⁵ Donna M Tai Tokerau Durie-Hall “A view of the Māori family: Whānau, Hapū, Iwi” in Sandra Coney (ed) *Standing in the Sunshine: A history of New Zealand women since they won the vote* (Viking, Auckland, 1993) 68 at 69.

¹⁰⁶ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53 and 238.

¹⁰⁷ In contrast, New Zealand European/Pākehā are overrepresented in Property (Relationships) Act 1976 (PRA) cases, comprising 85 per cent of all applicants and respondents. Asian peoples comprise seven per cent, and Pacific peoples two per cent of applicants and respondents in PRA cases. The remaining one per cent is “other” ethnicity. The Ministry notes that these proportions represent only a partial count of ethnicities due to incomplete data: Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 83.

¹⁰⁸ John Chadwick “Whanaungatanga and the Family Court” (2002) 4 BFLJ 91.

¹⁰⁹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

¹¹⁰ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 53.

¹¹¹ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 16.

Studies.¹¹² The court can also use its powers to hear evidence of tikanga. This was demonstrated in the recent High Court case of *B v P*, where the High Court received evidence from two kuia on principles of tikanga relating to the guardianship of taonga.¹¹³

23.21 The Family Court Review recognised that dispute resolution services, discussed in Chapter 24, are more flexible and can be modified to better respond to the needs of Māori, for example by being inclusive of the wider family.¹¹⁴ In Chapter 26 we also discuss whether, when out of court resolution is unsuccessful, Māori should be able to resolve their property matters involving issues of tikanga in the Māori Land Court, which has a better understanding of tikanga, instead of the Family Court.

...

Issue 6: How should the courts resolve questions of tikanga Māori?

26.116 Property matters under the PRA, including those where tikanga Māori is especially relevant, may be heard and determined by the Family Court or, in more limited circumstances, the High Court.¹¹⁵ These and other courts have developed a number of requirements for the recognition of Māori custom law.¹¹⁶ Māori custom law is part of the common law in New Zealand but what constitutes Māori custom or tikanga in any particular case is a question of fact for expert evidence, unless the particular tikanga has become notorious by frequent proof and so judicial notice can be taken of it.¹¹⁷ Customary rules in issue have been proved in evidence

¹¹² Nick Butcher “The pathway to becoming a judge” Lawtalk 910 (Wellington, September 2017) at 43. This is against the backdrop of what might be a broader shift in public values and attitudes regarding te reo. In 2015 the New Zealand Attitudes and Values Study asked 15,821 adults to rate how strongly they opposed or supported teaching te reo Māori in primary schools and singing the national anthem in Māori. The study found that most New Zealanders were either on the fence or supportive. Only a very small number of people were opposed: see CM Matika “Support for Te Reo Māori in Aotearoa” (New Zealand Attitudes and Values Study Policy Brief 8, 2016) at 1–2.

¹¹³ *B v P* [2017] NZHC 338. The issue in that case was whether taonga belonging to the deceased should pass to the surviving partner or the deceased’s parents (with both the surviving partner and the parents intending to ultimately pass them on to the deceased’s three sons). See also *S v S* [2012] NZFC 2685 and Chapter 11 for a discussion of these cases.

¹¹⁴ Ministry of Justice *Reviewing the Family Court: A public consultation paper* (20 September 2011) at 40.

¹¹⁵ Property (Relationships) Act 1976, ss 38A and 39.

¹¹⁶ See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [204]–[220] and [252].

¹¹⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 per Elias CJ at [95]; Richard Boast “Māori Customary Law and Land Tenure” in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.2.5]; and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Justice Joseph Williams “The Henry Harkness Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1. For discussion on the status of tikanga Māori as the first law of New Zealand with respect to which all other law must be negotiated see Ani Mikaere “The Treaty of

by kaumātua or by academics, by reliance on earlier published decisions of the Māori Appellate Court and in an affidavit filed “by a distinguished New Zealand chief.”¹¹⁸ In a recent case under the PRA the Family Court relied on expert evidence from a Māori academic relating to taonga.¹¹⁹

26.117 However, there may be other measures that could better enable a court to resolve questions of tikanga Māori. We consider a number of options that may be relevant in the PRA context.

Should the Family Court be able to seek assistance from experts in tikanga?

26.118 David Williams notes that the procedures of the adversarial mode of trial in the general courts may often entail that tikanga Māori elements of cases are overlooked.¹²⁰ We noted at paragraph 25.17 that the Family Court takes a semi-inquisitorial approach in making its decisions, but that it can only proceed on the evidence that is before it. Expert evidence may not be given to support an assertion of tikanga or may not be of sufficient assistance to the court.

26.119 One option is to enable the Family Court to obtain advice during the proceedings. Under some statutes, judges can request cultural reports to be completed to provide information that may better inform their decisions and this information may include the cultural ties and values of the people concerned.¹²¹

26.120 In option 7 at paragraph 25.62 above we discussed the ability of the court under section 38 of the PRA to appoint a person to inquire into and report on facts in issue between the parties.¹²² This procedure could be adapted to enable the court to inquire into matters of tikanga.

Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330; and Valmaine Toki “Tikanga Māori in criminal law” [2012] NZLJ 357 for tikanga Māori in the criminal law context.

¹¹⁸ Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [205]. See *S v S* [2012] NZFC 2685 and *B v P* [2017] NZHC 338 for recent cases where evidence of tikanga was given.

¹¹⁹ *S v S* [2012] NZFC 2685. See Chapter 11 for a discussion of this case. See also Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming).

¹²⁰ David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 41. See also Judge Annis Somerville “Tikanga in the Family Court – the gorilla in the room” (2016) 8 NZFLJ 157 at 159.

¹²¹ Oranga Tamariki Act 1989, 187; and Care of Children Act 2004, s 133.

¹²² Property (Relationships) Act 1976, s 38.

26.121 Another option is to empower the Family Court to appoint cultural advisers to assist, as full members of the court, in particular cases.¹²³

26.122 The use of experts in tikanga, whakapapa and te reo Māori sitting with judges of the court has significant precedent.¹²⁴ The original statute creating the Māori Land Court, the Native Lands Acts 1862 provided for “assessors” to sit with judges. In practice this meant Māori of chiefly status who sat in an advisory capacity.

26.123 There is also precedent in contemporary New Zealand law for experts to sit with the court. Te Ture Whenua Māori Act 1993 (TTWMA) allows experts in tikanga to be involved in the hearing of cases.¹²⁵ In addition, the Commerce Act 1986 requires the High Court to sit with two lay members appointed from a pool of people with relevant experience to hear appeals from Commerce Commission determinations.¹²⁶

Should the Māori Land Court and/or Māori Appellate Court have a role in PRA cases involving questions of tikanga?

26.124 The Māori Land Court and/or the Māori Appellate Court and its judges could play an important role in PRA cases involving questions of tikanga. In the Law Commission’s 2004 report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* the Commission stated:¹²⁷

Tikanga, by its very nature, is difficult to define and not universal. The Māori Land Court and the Māori Appellate Court are markedly more appropriate than any other forum in our court structure to make determinations about tikanga. It ignores the very substance of what requires determination to suggest that decisions can simply be made after hearing competing experts give evidence. The adjudicator needs an understanding of the context, beyond fact and precedent. It involves sets of beliefs and values which are subjected to careful and sensitive assessment.

26.125 The Māori Land Court is “essentially a family court where te reo Māori is spoken, and where tikanga is observed in the processes

¹²³ See David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 43–44; see also the recommendation for the Māori Land Court to be able to appoint pū-wananga to assist the court in Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 240–241; and Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at [24.33].

¹²⁴ See discussion in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 193.

¹²⁵ Te Ture Whenua Māori Act 1993, ss 28 and 31–33.

¹²⁶ Commerce Act 1986, ss 52ZA and 77.

¹²⁷ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [342].

of the court.”¹²⁸ Both the Māori Land Court and Māori Appellate Court have specialist knowledge and expertise in matters concerning Māori land, tikanga and customary practices. The procedure of both courts is flexible, and allows a high degree of judicial discretion. Judges are directed to avoid formality, to apply the rules of marae kawa and to encourage the appropriate use of te reo Māori.¹²⁹

26.126 Justice Durie, (now Sir Edward Taihakurei Durie) former Chief Judge of the Māori Land Court, said in a submission to the 1988 Royal Commission on Social Policy that the Court is both a court of law and one of “social purpose”:¹³⁰

....as distinct from most courts of law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find solutions for the problems that come before it; to settle differences of opinion so that co-owners might exist with a degree of harmony, to seek a consensus viewpoint rather than to find in favour of one; to pinpoint areas of accord, and to reconcile family groups.

26.127 It has also been suggested by another former Chief Judge of the Māori Land Court that disputes involving Māori communities are of a similar nature, whether they involve land or other property.¹³¹

26.128 Broadening the role of the Māori Land Court in some PRA cases would be consistent with recent calls to extend its jurisdiction in other areas of family law that concern Māori. During the Government’s review of TTWMA, judges of the Māori Land Court proposed that the jurisdiction of the Māori Land Court be broadened to include claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 concerning Māori land estates.¹³²

¹²⁸ Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [368].

¹²⁹ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [308].

¹³⁰ As cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 191.

¹³¹ Submission of the Chief Judge of the Māori Land Court cited in Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (2002 NZLC PP52) at 191.

¹³² Māori Affairs Select Committee *Te Ture Whenua Māori Bill 2016: Submission for the Judges of the Māori Land Court*, 14 July 2016, at [189]–[191]. in relation to the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 discussed in Jacinta Ruru and Leo Watson “Should Indigenous Property be Relationship Property?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). See also Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 189.

Enable a Māori Land Court judge to sit in the Family Court

26.129 An option is to enable a judge of the Māori Land Court to sit in the Family Court on PRA matters that are likely to involve questions of tikanga.¹³³ Family Court Judges are themselves District Court judges that are by reason of training, experience and personality suitable to deal with matters of family law.¹³⁴ Another example of the cross-warranting of judges can be found under the Resource Management Act 1991 where Māori Land Court Judges can sit as an alternate Environment Court Judge.¹³⁵ This option could utilise the judges' expertise and knowledge of tikanga and may assist with raising the level of understanding of tikanga in the Family Court.

Empower the Family Court to refer questions of tikanga

26.130 Another option is to empower the Family Court to refer a question of tikanga to the Māori Land Court or the Māori Appellate Court for consideration. A process could be adopted similar to section 61 of TTWMA which empowers the High Court to state a case to the Māori Appellate Court on matters of custom. The opinion of the Māori Appellate Court is then binding on the High Court. The Court of Appeal has described this section as giving the High Court access to the expertise of the Māori Appellate Court in respect of matters of fundamental importance, land and tikanga.¹³⁶

26.131 The Family Court could refer a question of tikanga to the Māori Land Court in the first instance or directly to the Māori Appellate Court. In the Law Commission's report *Delivering Justice for All* the Commission recommended that, in the interests of consistency, efficiency and justice, the expertise of the Māori Appellate Court should be used by all courts where issues of tikanga require determination.¹³⁷

¹³³ It was suggested in submissions to the Law Commission's review of the courts that Māori Land Court Judges could sit in the Family Court in cases involving applications under the Guardianship Act 1968 and the Property (Relationships) Act 1976: see Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, 2002) at 192. The Law Commission subsequently recommended that Māori Land Court Judges be cross-warranted to sit in other primary court jurisdictions (such as the Family Court) as and when appropriate and as resourcing may permit: Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [333] and R119.

¹³⁴ Family Court Act 1980, s 5(2).

¹³⁵ Resource Management Act 1991, s 249(2).

¹³⁶ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [345] citing *Hauraki Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1995] 2 NZLR 702 (CA).

¹³⁷ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [348]–[349].

Empower the Māori Land Court and/or Māori Appellate Court to hear PRA cases

26.132 A further option is to grant the Māori Land Court concurrent jurisdiction to hear PRA cases in the first instance. A claimant could have the choice to file their claim either in the Family Court or in the Māori Land Court if there was a question of tikanga.¹³⁸ If the parties cannot agree where the case should be heard, the case could be heard by the Family Court by default.

26.133 Alternatively, the Family Court could be empowered to transfer a case to the Māori Land Court, or to the Māori Appellate Court if matters were particularly complex, along the lines of the section 38A process, discussed at paragraphs 26.79 to 26.91 above.

26.134 However, while the Māori Land Court and its judges are specialists in tikanga, there are arguments against the Māori Land Court or Māori Appellate Court hearing PRA cases, including:

- (a) the Family Court is a specialist court, with particular expertise in resolving family matters, including PRA proceedings. It is appropriate that the specialist nature of that Court is recognised;
- (b) the Māori Land Court and Māori Appellate Court do not have expertise in property relationship matters and there may not be many cases where the question of tikanga is the only matter in dispute; and
- (c) the general courts would not be able to build up a body of knowledge of tikanga, which may be useful in other cases, if most or all PRA cases involving a question of tikanga were heard in the Māori Land Court or Māori Appellate Court.

Appeals on matters of tikanga

26.135 Appeals from the Family Court in PRA matters are heard by the High Court.¹³⁹ Given the Māori Appellate Court's expertise, it may be appropriate to enable an appeal from the Family Court on a matter of tikanga to be heard by the Māori Appellate Court rather than the High Court. However, the arguments against the Māori

¹³⁸ The Law Commission recently recommended that the Māori Land Court be given concurrent jurisdiction to hear questions about the funeral, burial or cremation of a deceased Māori person: Law Commission *Death, Burial and Cremation: A New Law For Contemporary New Zealand* (NZLC R134, 2015) at R119.

¹³⁹ Property (Relationships) Act 1976, s 39.

Land Court and Māori Appellate Court hearing cases noted in points (b) and (c) of paragraph 26.134 above would also apply in relation to appeals.

CONSULTATION QUESTIONS

H25 Should the Family Court be able to seek assistance from experts in tikanga Māori, such as through powers of inquiry or through the appointment of cultural advisers?

H26 Should the Maori Land Court and/or Maori Appellate Court have a role in PRA cases involving questions of tikanga? If so, should that be through:

- Enabling Māori Land Court Judges to sit in the Family Court?
- Referring questions of tikanga to the Māori Land Court?
- Allowing claimants to file a PRA case involving a question of tikanga in the Māori Land Court?
- Enabling the Family Court to transfer a PRA case involving a question of tikanga to the Māori Land Court, or to the Māori Appellate Court if the matter was complex?

H27 Should appeals from the Family Court on matters of tikanga be heard in the Māori Appellate Court rather than the High Court?

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

Chapter 27 - Children and the PRA

Introduction

- 27.1 Many children experience the separation of their parents or caregivers.¹⁴⁰ A smaller number of children will experience the death of one of their parents.¹⁴¹ In this part, “children” means minor or dependent children, except where expressly stated.
- 27.2 In this chapter we explore how the end of a relationship affects children, and the role of the PRA in addressing children's interests. The rest of Part I is arranged as follows:
- (a) In Chapter 28 we look at the case for taking a more child-centred approach in the PRA, and consider who is a “child of the relationship” for the purposes of the PRA.
 - (b) In Chapter 29 we look at what taking a more-child centred approach would look like in practice, with specific options for reform.
- 27.3 Our discussion in this part of the Issues Paper focuses primarily on the division of property following parental separation.¹⁴² Different issues might arise on the death of one partner when children are involved. This situation is unlikely to arise as often. Children have different property rights when one parent dies,

¹⁴⁰ It is difficult to measure rates of relationship separation involving children. In our Study Paper, Law Commission *Relationships and Families in Contemporary New Zealand - He hononga tangata, he hononga whānau i Aotearoa o nāianeī* (NZLC SP22, 2017) at Chapter 3, we identified that in 2016, 42 per cent of all divorces involved children under 17 years, affecting over 6,000 children in total. But this only captures official divorces. Not all married couples who separate will officially divorce. Nor does this capture de facto separations. Given that almost half of all children are now born outside marriage, the number of children affected by de facto separations is likely to be just as high, if not higher, than those affected by divorce.

¹⁴¹ In the 2013 Census, 6,606 adults aged 15–49 reported they were widowed or a surviving civil union partner, however it is unknown how many of these people were caring for children, and this does not include surviving de facto partners: Statistics New Zealand “Legally registered relationship status by age group and sex, for the census usually resident population count aged 15 years and over, 2001, 2006, and 2013 Censuses (RC, TA, AU)” <nzdotstats.stats.govt.nz>.

¹⁴² In this part, we refer to “parental separation” to include the separation of a child's parents or caregivers.

including possible claims under succession law.¹⁴³ We discuss how the PRA operates on the death of one partner in Part M. Some of the issues and options for reform discussed in this part would, however, also apply when a relationship ends on death.

...

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

...

Whāngai relationships

28.41 Whāngai is a Māori customary practice in which a child is raised by whānau members, such as grandparents, or other members of the same hapū or iwi.¹⁴⁴

28.42 Whāngai arrangements have been described as “fluid and open.”¹⁴⁵ Fluid, in that the child may return to the care of his or her birth parents or be cared for by another relative. Open because the arrangement is public and the child knows of, and often has contact with, birth parents and whānau. According to traditional Māori custom whāngai placements may be made for many reasons,¹⁴⁶ including to provide a child for people who cannot have children, consolidate land rights¹⁴⁷ or pass down tribal traditions and knowledge.

¹⁴³ Apart from any inheritance a child may receive under the deceased parent’s will, a child may have a claim under the Family Protection Act 1955, Law Reform (Testamentary Promises) Act 1949 and in the case of intestacy, the Administration Act 1969.

¹⁴⁴ The term whāngai is used in this part of the Issues Paper as it is defined in s 4 of Te Ture Whenua Māori Act 1993. For some iwi the terms “whangai” and “atawhai” have slightly different meanings: Basil Keane “Whāngai – customary fostering and adoption – The custom of whāngai” (1 June 2017) Te Ara – the Encyclopaedia of New Zealand <www.TeAra.govt.nz>.

¹⁴⁵ *Brookers Family Law – Child Law* (online looseleaf ed, Thomson Reuters) at PA2.14.03.

¹⁴⁶ Basil Keane “Whāngai – customary fostering and adoption – The custom of whāngai” (1 June 2017) Te Ara – the Encyclopaedia of New Zealand <www.teara.govt.nz>.

¹⁴⁷ Māori customary law varies as to whether whāngai may inherit from their foster family: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [326]. Note evidence in *K v P* (2002) 22 FRNZ 792 (CA) that only one category of whāngai may have claim on a deceased estate.

- 28.43 The institution of whāngai “remains as a strong vehicle for both the care of children and for the nurturing of whāngai kinship relationships”, and it “will be valued and carried into the future.”¹⁴⁸ In a recent study of 209 young people aged 15, four had spent time in a whāngai arrangement.¹⁴⁹
- 28.44 The PRA does not expressly refer to whāngai, and the status of whāngai for the PRA is not determined in accordance with tikanga Māori.¹⁵⁰ This means that a whāngai child is treated no differently than any other child under the PRA. There are two consequences. First, a child that is whāngai may be a child of the relationship under the PRA in respect of the partners that are raising him or her, even if there is no relationship of descent as determined by the tikanga of the respective whānau or hapū.¹⁵¹ Second, a whāngai child might not be considered a child of the relationship in respect of a relationship involving a biological parent, because that child may not have a presence in the household.
- 28.45 Te Ture Whenua Māori Act 1993 defines whāngai as a person adopted in accordance with tikanga Māori.¹⁵² This is an exception to the general rule in the Adoption Act 1955, which provides that Māori customary adoptions made after the commencement of the Native Land Act 1909 have no force or effect.¹⁵³ However, because the PRA does not apply to Māori land, and focuses primarily on how property is shared between the partners when their relationship ends,¹⁵⁴ there may be less need to provide specifically for whāngai in the PRA.

¹⁴⁸ Karyn Okeroa McRae and Linda Waimarie Nikora “Whangai: remembering, understanding and experiencing” [2006] 1 MAI Review at 1.

¹⁴⁹ Law Commission *Relationships and Families in Contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at Chapter 5 citing JL Sligo and others “The dynamic, complex and diverse living and care arrangements of young New Zealanders: implications for policy” [2016] Kōtuitui NZ J Soc Sci Online 1 at 8.

¹⁵⁰ The tikanga relating to whāngai varies between iwi: Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) at [315].

¹⁵¹ It is unclear whether a child who is a whāngai would qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 under the first or second category of children. Section 19 of the Adoption Act 1955 generally precludes the recognition of Māori customary adoption. Ruru says that that Act continues to “openly reject” Māori beliefs and practices on several fronts: Jacinta Ruru “Kua tutu te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 72. A child who is a whāngai is not a “child” for the purposes of s 3 of the Family Protection Act 1955 (which sets out who is entitled to claim under that Act for provision out of the estate of a deceased person) unless the child has also been adopted by the deceased under the provisions of the Adoption Act 1955: see *K v P* (2002) 22 FRNZ 792 (CA). Although the question arises in a different context, if similar reasoning were followed a child who is a whāngai would only qualify as a child of the relationship for the purposes of the Property (Relationships) Act 1976 if he or she was a member of the partners’ family at the relevant time (the second category of children).

¹⁵² Te Ture Whenua Māori Act 1993, s 4. See also s 115 which relates to the jurisdiction of the court to determine whether a person is to be recognised as having been a whāngai of a deceased owner for certain purposes and the orders a court can make in respect of a whāngai of the deceased owner. Note that Te Ture Whenua Māori Bill 2016 (126-2) seeks to repeal and replace the current law relating to Māori land. The definition of whāngai proposed in cl 5 of the Bill is “someone adopted by Māori customary adoption in accordance with the tikanga of the respective whānau or hapū.”

¹⁵³ Adoption Act 1955, s 19.

¹⁵⁴ Property (Relationships) Act 1976, ss 1C(1) and 6.

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

- 28.46 The PRA currently applies in the same way to all children, regardless of whether a child is whāngai. It might, however, be appropriate that the question of whether a whāngai child is a child of the relationship under the PRA be determined in accordance with tikanga Māori, as it is under Te Ture Whenua Māori Act for certain purposes.
- 28.47 Determining whāngai status by tikanga Māori would, however, add a layer of complexity and potentially cost to PRA proceedings. Expert evidence would be needed on the tikanga of the respective whānau or hapū.¹⁵⁵ In Chapter 26 we discussed options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

CONSULTATION QUESTIONS

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

¹⁵⁵ See the discussion in Part H on resolving matters under the Property (Relationships) Act 1976 in accordance with tikanga Māori, including possible options to improve access to experts in tikanga and to extend the jurisdiction of the Māori Land Court in some cases.

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

Chapter 30 -Contracting out of the PRA

- 30.1 Partners do not have to divide their property according to the PRA's rules of division. Partners can, at any time, make an agreement under Part 6 of the PRA that governs the status, ownership and division of their property and is enforceable by a court. We call this a "contracting out agreement."
- 30.2 The provisions governing contracting out agreements in Part 6 of the PRA have a significant role in New Zealand's relationship property regime, both in theory and in practice. Over the years, many partners have substituted the PRA's rules with their own arrangements.
- 30.3 There are two types of contracting out agreements:
- (a) Section 21 provides that partners can make an agreement *before* or *during* their relationship, relating to "the status, ownership and division of their property (including future property)" during the joint lives of the partners, or when one partner dies. Section 21 agreements are sometimes referred to as a "pre-nuptial agreements."
 - (b) Section 21A provides that partners may make an agreement to *settle* any differences that have arisen between them about their property. Section 21A agreements are sometimes called "settlement agreements."¹⁵⁶
- 30.4 A contracting out agreement under section 21 can make provision for the death of one partner.¹⁵⁷ Similarly, section 21B provides that when one partner has died, the deceased's personal

¹⁵⁶ If one of the spouses or partners dies either during Property (Relationships) Act 1976 proceedings or before proceedings are commenced, the personal representatives of the deceased spouse can enter a settlement agreement under s 21A: s 21B.

¹⁵⁷ Property (Relationships) Act 1976, s 21(2)(b).

representatives and the surviving partner may make an agreement to settle any claim with respect to the partners' property.¹⁵⁸ We discuss how these provisions work further in Part M.

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

...

Who is using contracting out agreements, when and why

- 30.45 We do not have information about whether Māori are using, or wish to use, Part 6 of the PRA to ensure that they have enforceable contracting out agreements which may reflect tikanga Māori.¹⁵⁹ It may be that, as in these circumstances tikanga Māori would itself likely govern the enforceability of agreements, there is little concern about meeting the Part 6 requirements for an enforceable agreement.¹⁶⁰ We would like to hear more about whether this is an issue.

CONSULTATION QUESTION

J4 Are there particular issues in relation to contracting out agreements which reflect tikanga Māori?

¹⁵⁸ If the only personal representative is the surviving partner, the court must approve the agreement beforehand in order for it to be valid: Property (Relationships) Act 1976, s 21B(3). In any case, either or both the personal representatives and the surviving partner can submit the draft agreement to the court for approval: s 21C.

¹⁵⁹ Ruru notes that if a Māori couple want whānaungatanga to determine their property interest, they should make an agreement under s21 contracting out of the Property (Relationships) Act 1976: Jacinta Ruru "Implications for Māori: Contemporary Legislation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 445 at 486.

¹⁶⁰ See Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances - Legal Perspectives* (2017, Intersentia, Cambridge) (forthcoming). Tikanga Māori continues to govern Māori relationship property disputes concerning family chattels, especially taonga, and "[t]hese couples are not bringing these disputes to New Zealand's courts."