CHAPTER 5

Section 15

IN THIS CHAPTER:

We propose repealing section 15 of the PRA and the maintenance regime in Part 6 of the Family Proceedings Act 1980, and replacing both with a new way to share the economic advantages and disadvantages arising from a relationship or its end.

CURRENT LAW

5.1 Section 15 of the PRA was introduced in 2001 to address the economic disadvantage experienced by some partners on separation, because of the effects of the division of functions within the relationship.[283] The principles in section 1N of the PRA were introduced at the same time to guide the achievement of the purpose of the PRA. They included the principle that a just division of relationship property "has regard to the economic advantages or disadvantages" to the partners arising from the relationship or its end (section 1N(d)).[284]

Section 15

5.2 Section 15 provides that a court may award compensation to a partner from the other partner's share of relationship property if three requirements are met.[285] These requirements were discussed in detail in the Issues Paper (Issues Paper at [18.31]–[18.80]), and are summarised below:

(a) First, there must be a significant disparity in both the income and living standards of the partners. This involves a prospective assessment of what each partner's income and living standard is likely to be.[286]

283 Matrimonial Property Amendment and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 16.

284 Other principles introduced to the Property (Relationships) Act 1976 in 2001 included the principle that men and women have equal status, and their equality should be maintained and enhanced (s 1N(a)), and the principle that all forms of contribution to the relationship are treated as equal (s 1N(b)).

285 In *M v B* [2006] 3 NZLR 660 (CA) at [125] the Court of Appeal described these as "hurdles" that "must be overcome" in order to succeed in a claim under s 15.

286 "Significant" being "a more than trivial disparity" relative between the partners: *X v X [Economic Disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [77]. It was described as "noteworthy" or "important" in *P v P* [2003] NZFLR 925 (FC) at [172]; and "somewhere between 'clearly greater' and 'disproportionately greater'" in *N v N* [2003] NZFLR 150 (FC) at [120].

(b) Second, the disparity must be caused by the division of functions within the relationship. This involves a retrospective assessment of what happened during the relationship. The division of functions does not have to be the sole cause of economic disparity,[287] and it is presumed that the division of functions was agreed to by the partners.[288]

(c) Third, compensation must be just in the circumstances.[289]

5.3 If these requirements are met, a court must then assess the amount of compensation to be awarded (Issues Paper at [18.81]–[18.103]). The only guidance in the PRA on quantifying a section 15 award is that it should "compensate" the applicant partner. As a result, different quantum methodologies have developed in the case law. One approach, adopted by the Court of Appeal in *X v X*, is to identify the "income shortfall" by focusing on the applicant partner's lost opportunity to develop a career.[290] Another approach focuses on the enhancement of the respondent partner's earning ability.[291] A third approach is less formulaic and looks more broadly at all the relevant circumstances, taking a "broad brush approach".[292]

5.4 Since publication of the Issues Paper, the Supreme Court has released its decision in *Scott v Williams*, marking the first time the Court had considered section 15.[293] The appeal focused on the methodology used to determine the amount of a section 15 award. The Family Court had awarded $850,000 to Ms Scott, which was reduced to $280,000 in the High Court and then increased to $470,000 in the Court of Appeal. In the Supreme Court, all five Judges issued separate judgments providing a diverse range of views on many matters, although a majority (Glazebrook, Arnold and O'Regan JJ) ordered an increased award of $520,000.[294] Atkin notes that the "disparate results on economic disparity at different levels of the judicial hierarchy are testament to the unfortunate fluidity of the concept".[295]

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287 *M v B* [2006] 3 NZLR 660 (CA) at [201] per William Young P.

288 *X v X [Economic Disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [105].

289 The Court of Appeal explained at [171]:

> The s 15(3) discretionary assessment is not amenable to a prescribed formula, and the justice of an award in any particular case will depend on a comprehensive assessment of the parties' respective financial positions, their earning prospects going forward, their current obligations in respect of any children of the partnership, and other matters that go to the overall fairness of an award.

290 At [171].

291 *M v B* [2006] 3 NZLR 660 (CA) at [199]; *P v P* [2005] NZFLR 689 (HC) at [56]; and *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [164].

292 See for example *J v J* [2014] NZHC 1495.

293 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 Mr Williams was a partner in a law firm and Ms Scott was a qualified accountant and lawyer. From the birth of the couple's first child Ms Scott had reduced her work hours. She then stopped working after the birth of the couple's second child, who required significant medical care for the first eight years of his life. Ms Scott helped do the accounts for Mr Williams' firm on a part-time basis. For a discussion of the Supreme Court judgments see Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 121–127; and Nikki Chamberlain *The Future of Economic Disparity Redress in New Zealand* (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) at 107.

294 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [271]. Elias CJ at [358] held that quantification of the s 15 award should be remitted back to the Family Court for reconsideration, while William Young J at [477] held that the award should be reduced to $188,000.

295 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 121.

Maintenance

5.5 Maintenance is available under Part 6 of the Family Proceedings Act 1980 to meet a partner's reasonable financial needs at the end of a relationship in certain circumstances. This includes where a partner is unable to meet their needs because of the division of functions within the relationship and their likely earning capacity.[296] The applicant partner must, however, assume responsibility for meeting their own financial needs within a reasonable time.[297] Maintenance is, therefore, typically temporary in nature.[298]

5.6 Given their similar subject matter, maintenance and section 15 are often used interchangeably in practice (Issues Paper at [19.60]).[299] This is because they both primarily focus on the future financial consequences arising from the division of functions during the relationship. The benefits of one regime often offset the disadvantages of another. For example, maintenance allows periodic payments and more immediate access to funds, while an award under section 15 is likely to be larger and more reflective of the economic disadvantage due to the division of functions in the relationship. Maintenance might also be a more appropriate response than section 15 in circumstances where one partner has a high income but there is little relationship property.[300]

ISSUES

Failure to share the economic advantages and disadvantages of the relationship

5.7 As explained in Chapter 1: Introduction, a qualifying relationship is a family joint venture to which each partner contributes equally, but in different ways. Partners contribute to the family joint venture with the expectation that they will continue to share in the fruits of that joint venture – the product of their combined contributions – into the future.

5.8 Often, partners will structure their family joint venture in a way that reduces one partner's individual earning capacity, and sustains or enhances the other partner's individual

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296 Family Proceedings Act 1980, ss 63 and 64. Other circumstances in which maintenance may be available is where one partner cannot meet their reasonable needs because of ongoing childcare responsibilities, the standard of living of the partners when they were together, or any undertaking of training by a partner to eliminate the need for maintenance of that partner. Maintenance during a marriage or civil union is also available when the need arises due to physical or mental disability or inability to obtain adequate and reasonable work: Family Proceedings Act 1980, s 63(2)(d)–(e).

297 Section 64A.

298 The Court of Appeal in *C v G* [2010] NZCA 128, [2010] NZFLR 497 observed at [31] that:

> Where one party is liable to maintain the other, the legislative policy is that the liability should ordinarily be temporary in nature while the maintained party consciously moves towards self-sufficiency.

Caldwell also notes that the requirement of reasonableness within s 64A of the Family Proceedings Act 1980 is taken to necessitate a maintenance period that is defined and limited in time, and while the extent of a "reasonable" period of time is left unspecified, "some judges seem to adhere to the view that the expected length of time would ordinarily be in the realm of 3 to 4 years following separation": John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 400.

299 Atkin observes that, since the first decision under s 15 in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC), "maintenance has been seen as a genuine alternative to an economic disparity award": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 172. We understand from our discussions with practitioners before and during public consultation that it is not uncommon for maintenance to be offered by a respondent partner in exchange for an applicant partner withdrawing a s 15 application.

300 This was the case in *McQueen v Penn* [2016] NZHC 699, [2016] NZFLR 795, where lump-sum maintenance in the vicinity of $380,000 was awarded to the wife. The husband was a surgeon and the wife was a nurse but she had stopped work to care for the couple's children. The couple had a high standard of living during the marriage as a result of the husband's high income, but they had very little, if any, relationship property (at [39]–[42]).

earning capacity. A common example is where one partner (Partner A) forgoes their own full participation in the workforce in order to care for the partners' children.[301] This reduces Partner A's individual earning capacity and frees up Partner B to improve or sustain their own individual earning capacity. Both partners benefit from such an arrangement as long as the family joint venture continues. But if the partners separate, the economic advantages arising from the relationship are concentrated in Partner B, while Partner A is at an economic disadvantage. This is illustrated in the examples below.

EXAMPLE: JOAN AND FRANK

Joan and Frank were married for 20 years. When they married, Frank and Joan both worked as sales assistants for an electronics company. Joan stopped work 18 years ago to raise the couple's three children and take responsibility for the household. Frank became the sole breadwinner, and he focused on improving his income earning potential, including working late nights. As a result, Frank's career has advanced and he is now the manager earning $90,000. After separation Joan finds work as a sales assistant in a rival electronics company earning $28,000.

EXAMPLE: ASHLEY AND FRANCIS

Ashley and Francis were in a de facto relationship for 12 years. When they met Ashley was starting a medical degree and Francis was a secondary school teacher earning $45,000, which increased during their relationship to $65,000. Throughout the first 10 years of their relationship Francis supported Ashley financially as Ashley studied. Two years before they separated Ashley started work as a cosmetic surgeon earning $145,000.

EXAMPLE: ALEX AND ROBIN

Alex and Robin were married for 35 years. They met when they were both 20 years old and working as teachers on a starter salary of $18,000 each. They did not have any children. Throughout the relationship both partners worked in a variety of jobs and supported each other through periods of unemployment due to illness, redundancy and the pursuit of interests such as extra study and an art hobby. When the partners separate Alex is earning $90,000 as an education adviser and Robin is earning $60,000 as an art teacher.

5.9 In some cases, the end of the relationship does not put an end to the arrangements that resulted in an unequal distribution of economic advantages and disadvantages. For example, a partner who stopped work in order to care for the partners' children is likely to continue to be the primary caregiver after separation,[302] further impacting on their earning capacity. This is illustrated in the following example:

EXAMPLE: DIANE AND EDDIE

Diane and Eddie were married for 15 years. When they met, Eddie worked on the family farm and Diane worked in a local real estate agency. Diane left work early in their relationship to

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301 In Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) (Issues Paper) at [19.2] we observed that, in 2016, 33 per cent of couples with children were characterised by one partner working full-time and one partner not in paid employment. While financial and non-financial functions might be shared more evenly in more relationships, there remains a strong correlation between having children and reduced workforce participation for women. See Issues Paper at ch 6 citing Bryan Perry *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2016* (Ministry of Social Development, July 2017) at 147.

302 In the Study Paper we identified that, among couples with children, women have a lower workforce participation rate than men, and that motherhood is a significant factor in how women participate in paid work: Law Commission *Relationships and Families in Contemporary New Zealand – He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) at 40–41. We also identified that the division of paid and unpaid work during the relationship can result in different rates of economic recovery after separation, with the ongoing care of children having a significant effect on women's workforce participation (at 60–61). See also Christopher Turnbull "Family Law Property Settlements: Principled Law Reform for Separated Families" (PhD Thesis, Queensland University of Technology, 2017) at 44.

raise their three children, the youngest of whom is disabled. As the children became more autonomous Diane did the accounting work for the farm. When the relationship ends, Diane has primary care of the children. Eddie continues to receive a salary from the farm of $80,000 and lives in a house on the farm. Diane rents a small house in town but can only take on a part-time role in the local supermarket (earning $22,000) in order to be available for the children and, in particular, for the youngest child's therapy sessions.

5.10 In these situations, the PRA fails to divide the fruits of the family joint venture as it does not share the economic advantages one partner leaves the relationship with. Nor does it address the economic disadvantages the other partner suffers, unless that partner can successfully claim under section 15 (we discuss problems with section 15 below). The PRA therefore fails to implement its principle that a just division of relationship property has regard to the economic advantages and disadvantages arising from the relationship.

5.11 Failing to share economic advantages and disadvantages arising from relationships can have significant consequences for the economically disadvantaged partner. They effectively suffer a "double loss", as not only has their own earning capacity reduced, they also no longer get to share in their partner's sustained or enhanced income.[303] They may also be unable to meet their future needs, which can become a societal problem, as State resources are used to provide for them in the future if maintenance is not available. If the economically disadvantaged partner is the primary caregiver of the partners' children, the financial consequences of separation are exacerbated by the inadequacy of the child support regime, discussed in Chapter 7: Children's interests.

A longstanding problem

5.12 How to share economic advantages and disadvantages arising from a relationship has long presented a challenge for policy makers, legislators and the courts, both in New Zealand and elsewhere (see paragraphs 5.28–5.32 for a discussion of comparable jurisdictions).[304] Past efforts to address the problem in New Zealand have included unsuccessful arguments to classify and divide enhanced earning capacity as relationship property,[305] improvements to the maintenance regime to achieve better sharing of future income,[306] and legislative provision for compensation from the relationship property pool, in the form of section 15.

5.13 Despite these attempts, sharing the economic advantages and disadvantages arising from a relationship or its end remains unavailable for most New Zealanders.[307]

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303 *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [13] per Lord Nicholls of Birkenhead.

304 For example, this problem was identified back in 1988, by the Royal Commission on Social Policy. See Report of the Royal Commission on Social Policy/Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi (Government Printer, April 1988) vol 4 at 217–227; and Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4.

305 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 280.

306 In 1999 a majority of the Government Administration Select Committee, when considering the Matrimonial Property Amendment Bill, concluded that sharing future income was best dealt with by the law of maintenance, rather than by treating enhanced earning capacity as matrimonial property: Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at 14. In 2001 Parliament made significant amendments to the maintenance regime in pt 6 of the Family Proceedings Act 1980 that sought to give a court greater flexibility to consider a wider range of circumstances in determining maintenance, including the division of functions during the relationship and the partners' earning capacity: see Matrimonial Property Amendment Bill 1998 and Matrimonial Property Amendment and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 20.

307 As Atkin observes, "the problem of genuine equality of outcome on relationships breakdown remains a real issue": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 102.

Section 15 has failed to provide an effective response

5.14 There are a range of legal and practical problems with section 15 that include:

(a) The time and cost involved in making a section 15 claim puts it beyond the reach of many New Zealanders (Issues Paper at [18.104]–[18.108]).

(b) The inconsistent approach to section 15 awards makes it an uncertain and unpredictable remedy. The lack of consensus between all five Judges in *Scott v Williams* highlighted the complexity of the issues while doing little to clarify the law.

(c) Section 15 fails to provide immediate relief on separation. It applies on the division of relationship property, which may occur months if not years after separation.

(d) The court may only make compensatory awards under section 15 from the other partner's share of relationship property. This makes section 15 an ineffective remedy when the pool of relationship property is small.

5.15 A clear theme in *Scott v Williams* was that section 15 requires reform. Elias CJ stated that section 15 "cannot be accounted to have been successful in meeting its purpose,"[308] while Arnold J observed the "widespread view amongst family law commentators" is that section 15 "has not lived up to expectations".[309] O'Regan J agreed there were problems and noted that:[310]

> Given the difficulties that have been encountered with s 15 so far, it would seem that the best solution to these problems is to learn from them and for Parliament to settle on clear objectives and legislate for a regime that offers more likelihood of resolution of claims without the difficulties and expense that have occasioned s 15 claims up until now.

Maintenance is an inadequate response to sharing economic advantages and disadvantages

5.16 Amendments in 2001 to the maintenance regime were designed to sit alongside the amendments to the PRA. But the resulting overlap between section 15 and maintenance has been described as "baffling", raising "perhaps the greatest question of uncertainty and confusion" since the 2001 package of reforms were introduced.[311]

5.17 While maintenance might provide access to future income, its objective is not to share economic advantages and disadvantages arising from the relationship. It remains focused primarily on meeting needs.

5.18 There is also a broader question as to the role of maintenance in 2018, especially in light of section 15. Caldwell explains:[312]

> The heart of the maintenance problem is that the fundamental moral question of exactly *why* one party would be liable to provide income support to an ex-partner has never been

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308 *Scott v Williams* [2017] NZSC 185. [2018] 1 NZLR 507 at [351].

309 At [279].

310 At [377].

311 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 158 and 176. Caldwell observes that the full ramifications of introducing s 15 on the maintenance regime may not have been properly appreciated at the time, given the possibility of integrating the separate maintenance and relationship property regimes was neither considered nor addressed: John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411.

312 John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411–412.

> properly addressed or answered. Perhaps the need for relationship-derived compensation does offer some explanatory rationale for maintenance in overseas jurisdictions. However … this particular justification has been rendered otiose in New Zealand (at least where there is sufficient relationship property from which to make a compensatory section 15 award). The statutory provisions of the [Family Proceedings Act] are simply not designed to cover the issue of economic disparity specifically. And while the [Family Proceedings Act] does expressly provide that the means, earning capacity, responsibilities and needs of the respondent may affect the quantum of any maintenance, it regrettably fails to shed any light on why maintenance liability to meet the applicant's living expenses should fall on the respondent in the first place.

5.19 These issues have led to calls for greater rationalisation of the two remedies, with some preferring maintenance over section 15,[313] while others preferring to reform section 15 so that the role of maintenance can be subsumed within it.[314]

Results of consultation

5.20 A strong theme of consultation was that section 15 requires reform. Several practitioners we spoke with expressed frustration with being unable to advise their clients with any certainty as to the likely outcome if a section 15 application is pursued. Submitters generally agreed on the need for reform to achieve a just outcome that recognised the reality of what one partner had given up and one partner had gained in terms of their respective careers.

5.21 Many members of the public focused on the unfairness to women who had stayed at home to raise children and whose careers had suffered as a result. A common theme amongst the personal stories shared was of a mother who left work (or worked part-time) and had primary responsibility for the care of children and domestic tasks while the father was the primary earner. In these stories, it was considered that during the relationship there was a mutual understanding that the partner's respective contributions were for the benefit of their family. These submitters expressed a strong sense of injustice when the mother no longer received the financial benefits after the relationship ended. There was the perception that the mother had likewise worked for these benefits and simply splitting the relationship property did not reflect her contributions to the family.

5.22 Another theme from these stories was that the period post separation was very difficult as the earning partner would often have control of all the money and the partner who stayed at home would have to take on a loan or apply for a State benefit in order to make ends meet financially. The ongoing financial impact of separation was noted by several submitters who commented that they worried how they would be able to save for retirement or their own home in the future as their reduced income was being used to meet daily living costs for themselves and their children. The Ministry for Women noted the time that women take out of the workforce to care for their dependants may have a negative impact on their lifetime earnings.

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313 Atkin argues that "conceptually, redressing economic disparity fits more easily under the law of maintenance", as maintenance payments are periodic, and "are therefore arguably a more precise tool in redressing income disparities rather than a lump sum or transfer of property": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 129. See also *G v G* [2003] NZFLR 289 (FC) at [132]; and *Hammond v Hardy* [2007] NZFLR 910 (HC) at [97].

314 See for example John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 411.

5.23 Some members of the public considered that sharing anything beyond the relationship property was not appropriate. The need for a clean break was an implicit reason behind opposition to sharing future income. The role of child support to meet the financial needs of any children was also cited. One member of the public remarked that income is linked to the effort and ability of the income earner and should not be shared after the relationship ends.

5.24 Many members of the public also criticised maintenance and child support as providing inadequate support for the primary caregiver following separation. Practitioners we spoke with in public and practitioner meetings described maintenance applications as expensive and time consuming, while the awards were described as conservative.

Results of the Borrin Survey

5.25 The Borrin Survey provides evidence of New Zealander's public attitudes and values about how the economic advantages and disadvantages arising from a relationship should be shared on separation. As we discussed in Chapter 3: Division, the Borrin Survey identified a high level of support for the general rule of equal sharing of relationship property, with 74 per cent of respondents agreeing with the current law. But 88 per cent of respondents who agreed with the current law thought it was appropriate to depart from equal sharing in certain situations.

5.26 One of these situations set out in the Borrin Survey was where one partner (Partner A) had put their career on hold in order to stay at home and look after the couple's children, while the other partner (Partner B) earned the family's income.[315] When the partners separated after 10 years, Partner B had an established career and good income, but Partner A was struggling to find a job. Respondents were asked whether Partner A should receive additional financial support from Partner B after they separate.

5.27 The majority of respondents (59 per cent) felt Partner A definitely or probably should receive additional support and 35 per cent said they definitely or probably should not (three per cent said "it depends" and three per cent responded "don't know").[316] Those respondents who felt Partner A should receive additional support were asked how that additional financial support should be received. Just under half (49 per cent) felt Partner A should receive a share of Partner B's income for a set period, while 27 per cent felt they should receive more relationship property.[317] The rest were either unsure or provided various responses, most of which focused on the need to tailor a solution based upon the individual circumstances of the couple.[318]

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315 The survey used the names "Alice" and "James" in this scenario, but their roles were randomly reversed so that in some surveys Alice was Partner A, and in others James was Partner A. Interestingly when James was Partner A, the proportion of respondents who thought that he should receive additional financial support dropped to 51 per cent, and when Alice was Partner A, the proportion of respondents who thought that she should receive additional financial support increased to 68 per cent. See discussion in I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [180]–[183].

316 At 37 (Figure Eight).

317 At 38 (Figure Nine).

318 At [179].

SHARING ECONOMIC ADVANTAGES AND DISADVANTAGES IN COMPARABLE JURISDICTIONS

5.28 The challenge of how to share economic advantages and disadvantages arising from a relationship is not isolated to New Zealand. Before outlining our preferred approach, it is useful to briefly consider how comparable jurisdictions recognise and address this issue. The fact that each jurisdiction takes a different approach illustrates that there is no "silver bullet" solution.

5.29 Jurisdictions New Zealand often compares itself with (Australia, England and Wales and Ireland) have different approaches to dividing relationship property. Regimes in these jurisdictions are discretionary, rather than rules-based. A court has broad powers to adjust a partner's property interests on separation if it considers it just to do so.[319] There is no general rule of equal sharing. This gives a court greater flexibility to take into account the economic advantages and disadvantages arising from the relationship. In some jurisdictions, the legislation specifically directs a court to consider future earning capacity when making orders. For example, in England and Wales future earning capacity is a factor a court must take into account when exercising its overall discretion in making financial orders when spouses divorce.[320] In Ireland, a court must, when considering whether to make financial orders, have regard to:[321]

> the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

5.30 Scotland is more comparable to New Zealand because, while it is a discretionary regime, judicial discretion is limited by a set of statutory principles, one of which presumes the equal sharing of matrimonial property.[322] Another principle is that:[323]

> fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other or of the family.

5.31 In Scotland, a court does not divide the partner's earning capacity as if it were an item of property. Rather, a court divides the partners' capital assets with regard to the partners' relative earning capacities.[324] In addition, a "periodical allowance" may be ordered for a period of up to three years after divorce is granted,[325] but this will only be ordered if there is insufficient capital for lump-sum financial orders.[326]

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319 Family Law Act 1975 (Cth), s 79; Matrimonial Causes Act 1973 (UK), s 25; and Family Law (Divorce) Act 1996 (Ireland), s 16.

320 Matrimonial Causes Act 1973 (UK), s 25(2)(a).

321 Family Law Act 1995 (Ireland), s 16(2)(g).

322 Family Law (Scotland) Act 1985, ss 9(1) and 10(1).

323 Section 9(1)(b).

324 In an empirical study of family law practitioners' views on the Family Law (Scotland) Act 1985 and Family Law (Scotland) Act 2006, researchers found that there was a perception that it was hard to obtain a departure from equal sharing in order to address economic disadvantages. The practitioners responded that claims were complex to argue and difficult to prove given the difficulties of quantifying economic advantages and disadvantages: Jane Mair, Enid Mordaunt and Fran Wasoff *Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce* (University of Glasgow, 2015) at 75.

325 Family Law (Scotland) Act 1985, s 9(1)(d).

5.32 The law in Canada is most comparable to New Zealand, as the division of relationship property is dealt with under a rules-based relationship property regime, with a separate regime for maintenance. However the Canadian approach varies in two key respects. First, maintenance in Canada has the dual objectives of compensating for economic disparity as well as meeting financial need.[327] Second, comprehensive maintenance guidelines that have been judicially endorsed provide a framework for determining the amount and duration of maintenance awards, making it a more accessible and predictable remedy (see discussion in Issues Paper at [19.72]–[19.82]). In addition to a broader maintenance regime, some Canadian provinces also provide for unequal sharing of relationship property when a just division of all the economic advantages and disadvantages will not be achieved through equal sharing.[328]

OPTIONS FOR REFORM

5.33 In Chapter 19 of the Issues Paper we proposed three options for reform:

(a) **Option 1: Retain section 15 but lower the hurdles the applicant must overcome**. We proposed removing reference to living standards and focusing instead on financial inequality on separation; replacing the causation requirement with a rebuttable presumptive entitlement to compensation if there are both financial inequality and a division of functions; and broadening the property that can be used to satisfy a section 15 award.

(b) **Option 2: Repeal section 15 and address financial inequality in other rules under the PRA**. We identified ways financial inequality could be addressed under other PRA rules. Earning capacity could be treated as property in its own right under the PRA, which would enable the classification of enhanced earning capacity as relationship property that could be divided equally alongside the partners' other property. Alternatively, a court could be given the power to depart from equal sharing when satisfied that equal sharing would not fairly allocate the economic advantages and disadvantages resulting from the relationship.

(c) **Option 3: Replace section 15 with financial reconciliation orders**. This option proposed the introduction of a new regime of financial reconciliation payments to support the economically disadvantaged partner until the financial inequality resulting from the division of functions during, and after, the relationship, ends. It proposed combining the functions of section 15 awards and maintenance payments under the Family Proceedings Act.

Results of consultation

5.34 Views were mixed on the preferred option for reform. Submitters were generally divided between favouring Option 1 and Option 3.

5.35 Practitioners who made a written submission tended to prefer Option 1, citing the period of time that has passed since section 15 was introduced and the perception that issues with section 15 were ameliorating. However, many practitioners we spoke with at public and practitioner consultation meetings preferred Option 3.

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326 Section 13(2)(b).

327 Divorce Act RSC 1985 c 3, s 15.2(6).

328 For example, British Columbia: see Family Law Act SBC 2011 c 25, s 161.

5.36 The New Zealand Law Society (NZLS) favoured Option 1 and considered it would address the key problems with section 15. In relation to quantum, NZLS set out the judgment of Arnold J in *Scott v Williams* as a model for how quantum could be assessed. NZLS considered there to be a need for guidance on the range of outcomes to increase certainty and consistency, and that awards should have access to separate as well as relationship property.

5.37 There was some support from members of the public for Option 2, and in particular the proposal to treat enhanced earning capacity as an item of relationship property. However, no solutions to deal with the considerable hurdles associated with Option 2 were suggested (see discussion in Issues Paper at [19.32]–[19.40]).

5.38 Option 3 received the most support from members of the public,[329] and was also supported by practitioners and academics we spoke with during public and practitioner consultation meetings. Some practitioners also highlighted the need to be able to capitalise periodic payments if Option 3 were adopted. Members of the public pointed to the advantages of Option 3, including access to money immediately after separation, the use of a formula to determine the amount payable and the end of maintenance.

5.39 The Judges of the Family Court preferred Option 3, although they also expressed support for Option 1. They submitted that, if Option 1 were preferred, consideration should be given to ensuring that section 15 is accessible to the "average" relationship, ensuring there is an effective enforcement mechanism, and to providing legislative guidance as to quantum. NZLS saw merit in Option 3 but cited the benefits of lump sum over periodic payments, the attraction of a clean break and issues relating to enforcement as factors working against Option 3. If Option 3 were adopted, NZLS considered that the period that payments were to endure should perhaps be longer if there are dependent children of the relationship, or if the relationship was long (because the post relationship effects on an older partner will probably endure longer). It did not consider an arbitrary cut off point was appropriate, instead preferring the end date to be determined by a court.

5.40 The Ministry for Women did not express a preference for an option but submitted that, when dividing property, the projected future income and employment opportunities of both the primary caregiver and the other party should be considered.

5.41 Regardless of their preferred option, submitters generally supported reform that provides a solution that is easy to understand and to access. Submitters also noted that the need to prove that the division of functions caused a partner's economic disadvantage should be removed or reduced.

[329] This is reflected in submissions received through the consultation website. 25 submitters preferred Option 3, 12 submitters preferred Option 1, and six submitters preferred Option 2.

PREFERRED APPROACH

P18 Section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act 1980 should be repealed and replaced with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement or FISA.

P19 A partner (Partner A) should be entitled to a FISA in the following circumstances:

a. the partners have a child together; or

b. the relationship was 10 years or longer; or

c. during the relationship:

(i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or

(ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

P20 The amount and duration of a FISA should be determined by a statutory formula that equalises the partners' incomes for a period of time that is approximately half the length of the relationship, up to a maximum of five years.

P21 Entitlement to a FISA should arise from the date of separation and default rules should provide for the implementation of a FISA by way of monthly periodic payments, unless the partners agree otherwise.

P22 Partners should be able to make their own agreement as to the amount, duration and implementation of a FISA. The PRA should specify when an agreement should be regarded as a settlement agreement under section 21A, requiring compliance with the safeguards in section 21F in order for it to be enforceable.

P23 A court should be able to adjust a FISA and depart from the statutory formula and/or default rules of entitlement if satisfied failure to grant the application would result in serious injustice, having regard to a number of specified considerations.

P24 Partners should be able to contract out of the FISA provisions before or during the relationship under section 21 of the PRA.

P25 Strict enforcement measures should be put in place to ensure that, when partners cannot reach agreement, a FISA is implemented in accordance with the statutory formula and default rules of implementation or as otherwise ordered by the court.

P26 The Government should consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act 1991 to include the administration and enforcement of FISAs.

A new entitlement

5.42 Our preferred approach is to replace both section 15 of the PRA and maintenance under Part 6 of the Family Proceedings Act with a new, limited entitlement to share future family income through a Family Income Sharing Arrangement (FISA).[330] Currently section 15 and maintenance are often used interchangeably, but both fail to provide an effective and accessible remedy for most New Zealanders, for the reasons we discussed above.

5.43 The objective of a FISA is to share the economic advantages and disadvantages arising from a relationship or its end. But FISAs are not intended to achieve an exact account and division of all economic advantages and disadvantages. This would likely result in the same issues that frustrated section 15 in practice, such as the need for extensive and expensive advice from valuers, forensic accountants, human resource specialists and other experts. Our preference therefore is to use a formula that shares the future family income of the partners for a specified period, subject to the court's power to adjust the entitlement when necessary to avoid serious injustice. We consider this provides a workable, effective and accessible solution.

5.44 FISAs are effectively a hybrid of Option 1 and Option 3 from the Issues Paper. We expressed a preference for Option 3 in the Issues Paper, referring to the Canadian regime for spousal support and the Canadian Spousal Support Guidelines. However, further research, the results of consultation and the development of our thinking has led us to conclude that although there are features of the Canadian regime that we can draw upon (such as the use of a simple and easy to use formula to determine the amount owing), it was designed specifically for Canada and certain features would not be appropriate in the New Zealand context (such as the potential unlimited duration of spousal support). New Zealand needs an approach suitable to the social and legal context of this country.

5.45 FISAs are not intended to substitute the role of child support under the Child Support Act, which is discussed in Chapter 7: Children's interests. However given that the economically disadvantaged partner is often the primary caregiver (see paragraph 5.9 above), FISAs will also often benefit dependent children of the relationship.

5.46 In reaching our preferred approach we have been guided by the need to ensure our proposals:

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330 We are not alone in proposing a period of future income sharing following separation, either as a remedy in itself or as a proxy for identifying and sharing the economic advantages resulting from the relationship. In Mark Henaghan "Sharing family finances at the end of a relationship" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 293 at 323–325, Henaghan proposes repealing s 15 and instead classifying and dividing earning capacity as relationship property in its own right. As a way to calculate the value of earning capacity that ought to be shared, Henaghan proposes a "combined income equalisation payment approach", which is similar to a FISA and involves identifying and combining the partners' respective future incomes for the 12 month period after separation, dividing that total in half, and then multiplying by half the number of years the partners have been together, up to a maximum of 10 years. Henaghan also proposes that a court use its discretion to adjust the figure for relevant contingencies. This could then be paid as a lump-sum or periodic payment Likewise, in his paper "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 83 at 89, Stephen van Bohemen mooted a similar idea of sharing family income for a prescribed period. A judge of the Family Court, in a submission on the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)) also suggested treating future income as relationship property until the partners' property matters are resolved, in order to incentivise prompt resolution of relationship property matters.

(a) give effect to the purpose of the PRA and the principle that the economic advantages and disadvantages arising from the relationship or its end should be shared;

(b) provide an accessible remedy, with minimal need for legal or other professional advice and without the need to go to court in most cases;

(c) provide immediate relief on separation, as this is often the period during which the economically disadvantaged partner suffers the most; and

(d) strike a pragmatic balance between providing a workable and predictable outcome that the partners can be confident will endure, and providing an outcome tailored to the partners' individual circumstances (this is sometimes referred to as the need to balance "average" with "individualised" justice).[331]

Repeal of maintenance

5.47 FISAs have a different objective to maintenance, which is about meeting financial need. However a natural consequence of sharing economic advantages and disadvantages under a FISA will be that the economically disadvantaged partner is in a better position to recover financially from separation and to transition out of the family joint venture, as is the intention with maintenance. FISAs share three key characteristics with maintenance. First, FISAs are short-term, but as we propose that the length of the entitlement should be linked to the length of the relationship, partners in longer relationships will have greater assistance to transition from the relationship. Second, FISAs will be available immediately on separation. Third, the amount of a FISA is an approximation rather than an exact calculation. FISAs will, therefore, fundamentally displace the role of maintenance.

5.48 By replacing maintenance with FISAs there will be a small group of people who will no longer be entitled to income sharing on separation. These are married or civil union partners who were in a relationship for less than 10 years, did not have children together, and suffer financial need on separation for reasons unconnected to the relationship or its end.[332] These partners are currently entitled to maintenance but only until their marriage or civil union is dissolved. We are not satisfied of the merits in retaining a maintenance regime for this group alone. The availability of maintenance for this group appears to reflect a traditional view that, on formalising a relationship through marriage or civil union, partners undertake a responsibility to support each other that endures beyond separation.[333] We consider this view to be outdated and also inconsistent with the courts'

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331 Carol Rogerson and Rollie Thompson concluded in their review of the Canadian Spousal Support Guidelines that "in this highly-contested area of family law, the greater consistency and predictability of outcomes ultimately leads to greater fairness and legitimacy for the substantive remedy itself": C Rogerson and R Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Fam LQ 241 at 269. See also the discussion in Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 261 at 289–290. See also Ira Mark Ellman "The Theory of Alimony" (1989) 77 California Law Review 3.

332 Specifically, married or civil union partners who suffer a physical or mental disability, or who are otherwise unable to obtain adequate and reasonable work, are entitled to maintenance until the marriage or civil union is dissolved under s 63(2)(d)–(e) of the Family Proceedings Act 1980. There is no equivalent entitlement for de facto partners. Unless these partners can establish an entitlement to a FISA, they will no longer be entitled to income sharing.

333 Atkin observes in Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 164 that the logic of the distinction between an entitlement to maintenance on these grounds during, but not after dissolution of a marriage or civil union, is that:

record of short or interim awards of maintenance for conservative amounts. When financial need is unconnected to the relationship, in our view it is the responsibility of the State, rather than the other partner, to meet those needs through the provision of social welfare where the individual is unable to do so.[334]

5.49 The rest of this chapter explains how we propose the FISA regime will work.

When entitlement to a FISA arises

5.50 We propose that the PRA specify the circumstances in which a partner[335] will be entitled to a FISA, rather than simply providing a general entitlement for a partner who is economically disadvantaged as a result of the relationship or its end. A clear statement of statutory entitlement will enable couples, lawyers and the courts to easily identify those relationships that give rise to an entitlement, reducing the scope for dispute and promoting the inexpensive, simple and speedy resolution of PRA matters.

5.51 A partner (Partner A) will be entitled to a FISA in the following circumstances:

(a) the partners have a child together; or

(b) the relationship was 10 years or longer; or

(c) during the relationship:

(i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or

(ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

5.52 When any of these circumstances apply, Partner A will not need to show that the relevant circumstance caused economic advantages or disadvantages, unlike the current test under section 15. There are two main reasons why we have not proposed a requirement to prove causation. First, we are satisfied that in each of these circumstances the partners' contributions can reasonably be expected to give rise to economic advantages and/or disadvantages. Causation can therefore be deemed. Second, as we outline below at paragraphs 5.99–5.102, Partner B can apply to a court to adjust a FISA if, having regard to the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship, failure to grant an adjustment would result in serious injustice. The regime therefore places an onus on Partner B to show the circumstances of the relationship *did not* result in economic advantage or disadvantage. Given the difficulties experienced in providing causation under section 15, we think it is appropriate that the onus be reversed.

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during the marriage, the vows 'or richer or poorer, in sickness and in health' will still hold sway but, after divorce, they lose all their force. Disability and failure to get a job because of high unemployment are usually personal or externally generated factors, not ongoing effects of having lived with someone.

334 Caldwell notes that when the cause of financial difficulty is attributable in the main to considerations such as prevailing socio-economic circumstances, societal values, or an individual's personal skill set, it is hard to determine why, once the compensatory obligation is discharged (that is, an adjustment is made for the relationship-caused disparity), a former partner bears any responsibility at all to meet the other's reasonable needs: John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 413.

335 In this chapter we use the term "partner" to mean a partner who is in a qualifying relationship. For discussion of what is a qualifying relationship see Chapter 4: Eligibility criteria.

5.53 The circumstances in which a partner is entitled to a FISA are designed to capture situations where, through the partners' varying contributions, there is an (often implicit) expectation to share economic advantages and disadvantages throughout the relationship. When the relationship ends, the partners' expectations are defeated. In general, this expectation will increase with time or with a key event such as the birth of a child. But we also recognise that important contributions can be made in shorter, child-free relationships that also give rise to an expectation of sharing economic advantages and disadvantages. This is recognised in category (c). Unlike under section 15, Partner A will not have to establish a difference in income and living standards due to the division of functions during the relationship.

5.54 We consider that these circumstances (explained in more detail below) reflect New Zealanders' attitudes and values as to when an obligation to share the economic advantages and disadvantages resulting from a relationship should arise. As noted at paragraphs 5.25–5.27 above, results of the Borrin Survey indicate that most New Zealanders support the idea of sharing the economic advantages and disadvantages associated with having children. Another relevant finding from the Borrin Survey is that nine in 10 respondents thought that having children together, buying a house together, living together as a couple and sharing finances were all important factors to consider when deciding whether to apply the equal sharing law.[336] This indicates that New Zealanders place significant weight on whether a couple has children together, and the extent of their interdependence, when deciding whether the partners should have property sharing obligations. It is reasonable to think that the same attitudes and values will extend to sharing all the economic advantages and disadvantages of the relationship.

5.55 Entitlement to a FISA is established as at the date of separation. If a partner is entitled to a FISA, they remain entitled for the length of the FISA.

The partners have a child together

5.56 A partner will be entitled to a FISA if the partners have a child together. The child must be the child of both partners (for example an adopted or biological child of the partners). This is more limited than the PRA's definition of "child of the relationship", which can, for example, include children from one partner's previous relationship (see discussion in Chapter 7: Children's interests). This distinction is drawn in the context of FISAs because when both partners are the parents of a child, it is reasonable to infer that they expect to share the economic advantages or disadvantages arising from satisfying the responsibilities associated with having and raising the child, and make contributions to the relationship on that basis.[337] The same can be said in respect of a child of both partners who is born after the relationship ends, and so an entitlement should also arise if one partner was pregnant with the partners' child at the time of separation.

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336 I Binnie and others *Relationship Property Division in New Zealand: Public Attitudes and Values – A general population survey* (Michael and Suzanne Borrin Foundation, Technical research report, October 2018) at [124].

337 Fisher explains that the care of children of the relationship is the equal and continuing responsibility of both parents. If the custodial parent discharges that responsibility on behalf of the non-custodial parent, the latter should compensate the caregiver accordingly: Robert Fisher "Should a Property Sharing Regime be Mandatory or Optional?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 329 at 334. While Fisher was commenting here on the rationale of maintenance stemming from the care of dependent children of the relationship, his comments are also relevant to the basis for sharing the economic advantages and disadvantages resulting from the care of children of the relationship.

5.57 While the same expectations *may* arise in relation to a child from a previous relationship, this cannot be presumed to the same extent and does not necessarily endure beyond the partners' separation. We note, however, that the care of *any* child of the relationship is a relevant contribution to the relationship under category (c) of the statutory entitlement (see paragraph 5.61–5.62).

5.58 We do not propose limiting the entitlement to circumstances where the child is a minor or dependent child at the time of separation. It is the presence of a child, rather than their age, that establishes an expectation of sharing the economic advantages and disadvantages. Further, decisions the partners make in relation to the care of their children can have long-term effects on the partners earning capacity that extend beyond the child's dependency. However we note that most relationships with adult children will have lasted for 10 years or longer and will therefore give rise to an entitlement to a FISA in any event (see below).

The relationship was 10 years or longer

5.59 A partner will be entitled to a FISA if the relationship was 10 years or longer. This recognises that, over time, partners will usually become increasingly interdependent and can be presumed to have made all kinds of contributions to the relationship with the expectation that the economic advantages and disadvantages arising from those contributions would be shared had the relationship continued.

5.60 Ten years is an arbitrary length of time, but we prefer this over a more discretionary threshold such as "a long-term relationship". A 10 year threshold provides a bright line that is certain and predictable, and reduces the scope for dispute. The risk of strategic behaviour, such as ending or maintaining a relationship just within or outside the 10 year mark, is, we think, small given the ability to establish entitlement to a FISA by other means.

A partner's earning capacity has been reduced, sustained or enhanced by the relationship

5.61 The third category of circumstances that give rise to an entitlement recognises that even in child-free, shorter-term relationships, partners may make contributions to the relationship that have economically advantaged or disadvantaged either or both partners, with an expectation that all economic advantages and disadvantages would be shared had the relationship continued. The PRA defines contributions to the relationship in section 18.

5.62 An entitlement will arise where Partner A has stopped, reduced or did not ever undertake paid work in order to make contributions to the relationship. This might include caring for a child from a previous relationship or other dependent family members, managing the household or supporting Partner B, for example by relocating in order to support a career opportunity (even if Partner A worked in the new location).

5.63 An entitlement will also arise where Partner B has been enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions made by Partner A to the relationship. This may include the provision of financial, emotional or professional support, or assuming greater responsibility for household management.

EXAMPLE: LEON AND NINA

Leon and Nina were married for five years and have no children. During the marriage Nina stopped work to go to university and retrain as a lawyer. Leon paid for most of the couple's expenses while Nina was studying. Nina graduated one year before the partners separated. Leon is entitled to a FISA.

EXAMPLE: JI-WOO AND GAVIN

Ji-Woo and Gavin were in a de facto relationship for six years. During the relationship Ji-Woo's disabled mother came to live with them and Gavin dropped from full-time to part-time work to care for Ji-Woo's mother. Gavin is entitled to a FISA.

Establishing an entitlement

5.64 If Partner A considers they are entitled to a FISA based on one or more of the categories of statutory entitlement, all that is required in order to activate the FISA regime is for Partner A to give written notice to Partner B. Notice can be given at any time after separation, up until the partners have resolved all their PRA matters (either by court order or by agreement under section 21A of the PRA).

5.65 Once Partner A's entitlement to a FISA is established (by giving notice to Partner B or the partners otherwise agreeing), the partners must work out the amount and duration of the FISA, guided by the statutory formula, and decide whether they want the FISA to be implemented in accordance with the default rules of implementation, or to agree an alternative arrangement.

5.66 A FISA is payable from the date of separation, but partners should be given a reasonable period of time to make the necessary arrangements before penalty interest on any unpaid amount starts to accrue.[338] We propose a period of eight weeks from the date that Partner A's entitlement is established would provide sufficient time for partners to seek advice on implementing a FISA, and reach an agreement.

5.67 If the partners cannot reach an agreement within eight weeks about how the FISA is to be implemented, the default rules of implementation will apply. Under the default rules, Partner B must make monthly payments to Partner A of the amount and for the duration determined under the statutory formula. The first payment must be made within eight weeks from entitlement being established and should include any amount owing for the period between separation and the first payment. Failure to make the first payment within eight weeks will mean that interest starts to accrue on all outstanding sums, and Partner A can take steps to enforce the FISA on the basis of the statutory formula and default rules. We discuss enforcement at paragraphs 5.103–5.107 below.

5.68 If there is any disagreement as to how to apply the statutory formula and default rules that requires resolution by a court (for example, disagreements over the partners' income or the date of separation), a court may make an order for correction for any underpayment or overpayment, along with interest and costs, if appropriate. The court would do this when an entitlement is challenged or an adjustment order is sought, as discussed below.

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338 Caldwell notes in John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 409 that it would be:

> somewhat heartless to expect an instant reordering of financial lives while the parties are still coming to terms with the emotional and financial fallout of their separation. Some buffer zone does seem desirable.

Challenging an entitlement

5.69 Partner B can challenge the entitlement of Partner A by seeking a declaration of non-entitlement from a court. However, an intention to challenge Partner A's entitlement does not affect Partner B's obligation to pay the FISA in the interim. This will ensure that the effectiveness of FISAs in providing immediate relief on separation is not undermined by Partner B seeking to challenge the entitlement. Should Partner B's challenge be successful, a court may order repayment of any amount that was paid under a FISA, with interest and costs if appropriate in the circumstances.

5.70 A declaration of non-entitlement can be sought at any time, up until the partners have resolved all their PRA matters (either by court order or by agreement under section 21A of the PRA).

5.71 A court may make a declaration of non-entitlement if it is satisfied that none of the categories of statutory entitlement apply. The onus of proof will be on Partner B. We expect that successful challenges will be rare and, given the objective nature of categories (a) and (b), will be limited to child-free relationships that lasted less than 10 years. In respect of category (c), if Partner A stopped, reduced or did not ever undertake paid work, we expect that it will be difficult for Partner B to prove that this was not in order to perform other contributions to the relationship. Similarly, if Partner B undertook training, education, or other career sustaining or advancing opportunities, it would be difficult for them to prove they were not enabled to do so, due to Partner A's contributions to the relationship. Partner B could however challenge the amount and duration of a FISA through an adjustment order. Adjustment orders are discussed at paragraphs 5.99–5.102 below.

EXAMPLE: DENISE AND ROD

Denise and Rod were married for eight years and had no children. Denise stopped work four years after they were married in order to write a novel, telling all their friends of her plans. At the same time Rod was offered a post in Sydney for three years and the partners moved there together. The partners separated a year after moving back to New Zealand and Denise was unable to find work. Rod successfully applied for a declaration of non-entitlement, having satisfied the court that Denise did not stop work in order to make other contributions to the relationship (such as to relocate with Rod) but to write a novel.

EXAMPLE: ALAN AND BETH

Alan and Beth were in a de facto relationship for five years. Three years after the relationship started Alan was in a workplace accident and had to stop work. His recovery was slow and when he was able to return to work it was only part-time and in a much lower-paid role. When the partners separated Beth successfully applied for a declaration of non-entitlement having satisfied the court that the reason Alan stopped work and subsequently undertook part-time work was due to personal injury and not to make other contributions to the relationship.

5.72 A declaration of non-entitlement can be sought under urgency, but only on the grounds that payment of the FISA would result in serious and irreversible injustice. This is a high threshold. A court will need to be satisfied that the possibility of future repayment of the FISA, along with costs and interest, would fail to undo the serious injustice caused by requiring Partner B to pay the FISA in the interim.

The statutory formula

5.73 The amount and duration of a FISA will be determined by a statutory formula. The objective of the statutory formula is to equalise the partners' incomes following separation for a period of time that is approximately half the length of the relationship, up to a maximum of five years.

Amount of a FISA

5.74 Under the statutory formula Partner A will be entitled to half the family income, which will be defined as the combined net (post tax) income of both partners.

5.75 The statutory formula will use each partner's annual income, as at the date of separation, with six monthly adjustments (if needed) to take into account changes in the income of either partner during the FISA.

Definition of income

5.76 Income should include any form of taxable and non-taxable income a partner receives, except for those specifically excluded below (at paragraph 5.80).

5.77 A court may impute income if it considers that the amount declared by a partner for the purposes of calculating a FISA does not fairly reflect all the income available to that partner. We propose including a comprehensive list of circumstances in which a court may impute income, in order to provide clear guidance to partners. This will encourage and facilitate the resolution of any disputes over declared income out of court wherever possible.

5.78 The circumstances in which a court may impute income should include (but not be limited to) where a partner:[339]

(a) is a shareholder, director or officer of a company and the amount of income declared by that partner does not fairly reflect the financial resources available to that partner;

(b) is intentionally under-employed or unemployed, other than to meet the needs of a child or other dependant or by the reasonable educational or physical or mental health needs of that partner;

(c) has diverted income so that it is not able to be included in the calculation of a FISA (regardless of intent);

(d) owns property that is not reasonably utilised to generate income;

(e) fails to disclose income information so there is insufficient or no information available on which to calculate a FISA;

(f) unreasonably deducts expenses from income;

(g) fails to declare the value of non-taxable benefits; or

(h) is a discretionary beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

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339 Similar provision is made for imputing income in the Federal Child Support Guidelines (SOR/ 97-175, Canada) at cl 19(1), which are used as the starting point for income determination in the Canadian Spousal Support Guidelines: Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 46.

5.79 For the purpose of imputing income a court may either:

(a) have regard to the partner's income over the three years prior to separation and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years; or

(b) where appropriate, impute an amount the partner would have otherwise received from a relevant third party.

Excluded income

5.80 We propose explicitly excluding from the definition of income:

(a) any child support received or paid in relation to any child;

(b) State benefits, including student allowances and New Zealand Superannuation payments;

(c) income derived from any property acquired from a third person after separation by succession, survivorship, or gift; and

(d) income received as a beneficiary under a trust settled by a third person after separation.

5.81 We consider it would be inappropriate to require partners to share the value of child support payments and State benefits, as these are designed to meet the needs of the child or recipient partner.[340] We also propose excluding income received in relation to third party gifts and inheritances that one partner receives following separation, as this cannot be regarded as being an economic advantage arising from the relationship.

EXAMPLE : ANNE AND BOB

Anne and Bob were in a de facto relationship for 10 years and have three children aged three, five and eight when the partners separate. Anne had stopped work to stay at home with the children. Anne is entitled to a FISA for five years. On separation Bob is earning $95,000 (post tax) and Anne is earning $35,000 (post tax). Bob pays child support for the three children of $14,000 annually. Bob also has a child from a previous relationship and pays annual child support of $6,200 for that child. Bob's income for the purposes of the statutory formula is $74,800. Anne's income for the purposes of the statutory formula is $35,000. The family income is $109,800 and each partner is entitled to an equal share of $54,900. Bob must pay Anne $19,100 per annum.

Income thresholds

5.82 We propose setting a minimum income threshold that Partner B must meet in order for Partner A to receive FISA payments under the statutory formula. This recognises that it would be undesirable to require partners to share income if the result would be that both partners are put in a position of financial hardship. Further work is required to determine an appropriate minimum income threshold, having regard to the need to minimise the risk of perverse incentives and ensure that access to State benefits is not compromised.

5.83 Whether Partner B meets the minimum income threshold would be determined as at the date of separation, and would be revisited at each subsequent adjustment event (discussed at paragraph 5.88 below) for the duration of the FISA.

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340 We note that eligibility for State benefits will likely take into account any FISA payments received.

5.84 We do not propose an upper limit or cap on the income to be used to calculate a FISA under the statutory formula. However Partner B could seek an adjustment from the statutory formula (see paragraphs 5.99–5.102 below).

Duration of a FISA

5.85 We propose that the duration of a FISA should reflect the length of the relationship. This is on the basis that the longer the relationship, the greater the partners' contributions will have been, and the greater the expectation of sharing the product of those contributions. We think this reflects the interdependence that grows in a relationship over time, as choices and decisions relating to the family joint venture are made, whether actively or not.

5.86 Under the statutory formula, the duration of a FISA will be calculated by halving the length of the relationship, and rounding up to the nearest three months for relationships shorter than two years, or six months for longer relationships, up to a maximum of five years. The five year maximum is an arbitrary length of time, but we are not convinced a longer period is justifiable in contemporary New Zealand, or practically achievable.[341] The examples below illustrate how the duration of a FISA would be calculated, assuming the entitlement is established.

EXAMPLE: CAROLINE AND RANGI

Caroline and Rangi were married for 10 months (they were not in a de facto relationship before they got married). Caroline is entitled to a FISA. The duration of the FISA is six months.

EXAMPLE: STEVE AND EMMA

Steve and Emma were in a de facto relationship for eight years and two months. Emma is entitled to a FISA. The duration of the FISA is four years and six months.

EXAMPLE: CHEN AND TROY

Chen and Troy were married for twelve years and three months and the marriage was preceded by a de facto relationship that lasted four years and six months. Chen is entitled to a FISA. The duration of the FISA is five years.

5.87 Basing the duration of a FISA on the length of the relationship will inevitably increase the risk of disputes over when the relationship began and ended. By rounding up to the nearest three months for relationships shorter than two years, or six months for longer relationships, we hope to minimise this risk. Limiting FISAs to a maximum duration of five years for relationships of 10 years or longer will also minimise the risk of disputes in longer relationships, when it will be harder to look backwards and determine when the relationship began.

Adjustments for changes in income

5.88 The family income may be reassessed on a six monthly basis under the statutory formula and adjusted if necessary to reflect any increase or decrease in the income of either partner. This means that Partner A's entitlement may go up if Partner B's income

[341] We note that Henaghan proposes a period of income sharing to a maximum of 10 years, while van Bohemen proposes a period of 2 years: see Mark Henaghan "Sharing family finances at the end of a relationship" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 293 at 323–325; and Steven van Bohemen "Relationship Property – A Practitioner's Perspective" (paper presented to New Zealand Law Society Future of Family Law Conference, Auckland, 20 September 2018) 83 at 89.

increases. Or Partner A's entitlement may go down, if their income increases or Partner B's income decreases. While Partner A's entitlement could reduce to nil if Partner B's income equals Partner A's, the formula would not permit Partner A's entitlement to become a negative amount (if Partner B's income is less than Partner A's income).

EXAMPLE: BOB AND JANE

Bob is entitled to a FISA for four years. On separation Bob's income is $20,000 and Jane's income is $65,000, resulting in a family income of $85,000. Bob is therefore entitled to a FISA of $22,500 per year.

One year after separation Bob starts a new job and his income increases to $50,000. At the next adjustment date the family income is adjusted to $115,000 and Bob's entitlement drops to $7,500 per year.

Five months later Jane is made redundant. At the next adjustment date (one month after redundancy) the family income drops to $50,000 and Bob's entitlement drops to nil.

Jane finds a new job three months later and her income increases to $70,000. At the next adjustment date the family income is adjusted to $120,000 and Bob's entitlement increases to $10,000.

Partners can make their own FISAs

5.89 Our proposals seek to encourage partners to reach their own, mutually satisfactory agreement as to the amount, duration and implementation of a FISA, whenever possible. This will give partners the freedom to choose an arrangement that best meets their needs and circumstances, including the needs of their children, in the period immediately following separation. Such agreements are more likely to endure and to be complied with by both partners. Partners are guided by a clear statement of statutory entitlement to a FISA, a statutory formula for calculating the amount and duration of a FISA, and default rules of implementation. In addition, the statutory threshold for making an adjustment order, and the range of relevant considerations a court must consider, also provide guidance as to when and how a court might adjust the FISA in the partners' circumstances.

5.90 The partners might agree to vary the frequency of periodic payments (for example from monthly to fortnightly or weekly), or the amount and duration of periodic payments (for example, the partners might agree to a smaller amount being paid over a longer duration, or vice versa). Or partners might agree to offset a FISA entitlement against the payment of occupational rent, allowing Partner A to remain in the family home without diminishing their share of relationship property. Partners can also agree to capitalise a FISA entitlement.

Partners can agree to capitalise a FISA entitlement

5.91 The partners might agree to capitalise a FISA entitlement through the payment of a lump sum or the transfer of property. We expect that it will be common for partners to capitalise the FISA entitlement when settling relationship property matters under the PRA, for example by adjusting Partner A's share of relationship property or by vesting key items of relationship property in Partner A.[342]

[342] As Caldwell notes, any agreements negotiated between separated partners are likely to involve bargaining property against income support, so a less generous provision of relationship property may be offered alongside an extended FISA (and vice versa). It therefore makes sense for the partners to resolve all of their property matters, relating to both capital and income, at the same time. See John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer and

5.92 Capitalising a FISA entitlement has many advantages. It avoids the enforcement issues that can arise with periodic payments, and helps the partners to achieve a clean financial break and avoid the risk of future disputes over the extent of the entitlement. Partner A may also benefit from having early access to the full entitlement, for example it might allow them to put a deposit on a new home, or to buy out Partner B's share in the existing family home.

5.93 Capitalising a FISA entitlement also has disadvantages. Capitalisation occurs with no knowledge of the future, whereas periodic payments can be adjusted to take into account changes in the partners' circumstances, including any changes in their income over the duration of a FISA. The partners may also prefer periodic payments as they may be more affordable for Partner B, and may provide a more consistent stream of income to Partner A (presuming no enforcement issues arise). Capitalisation of a FISA entitlement may often be agreed to as a compromise, including when settling relationship property matters, and so might not reflect the full value of the FISA had it been paid periodically. If the partners do agree to capitalise a FISA entitlement, they should do so having considered these advantages and disadvantages.

Some agreements must be subject to safeguards

5.94 It is important to strike a balance between enabling partners to make their own FISAs with minimal costs and delay, and protecting vulnerable partners from making bad bargains. The PRA already enables partners to settle any differences as to the status, ownership and division of their property by agreement (section 21A), but in order for that agreement to be enforceable, it must comply with certain safeguards. In particular, the agreement must be in writing and signed by both partners, and each partner must have received independent legal advice before signing the agreement (section 21F). Settlement agreements are discussed further in Chapter 8: Contracting out and settlement agreements.

5.95 We propose that some agreements between the partners relating to a FISA entitlement should be regarded as a settlement agreement under section 21A, and must therefore comply with the safeguards in section 21F in order for it to be enforceable. This includes agreements that:

(a) adjust the amount of FISA payments, with the effect that the total amount payable under the agreement is materially different to the amount payable under the formula (this would include any agreement to capitalise a FISA entitlement);

(b) adjust the duration of the FISA and/or frequency of FISA payments, with the effect that the duration of the FISA under the agreement is more than twice the duration determined under the statutory formula, or the time between FISA payments is longer than six months; or

(c) is an agreement that neither partner is entitled to a FISA.

5.96 An agreement that does not fall within one of these categories will not be treated as a settlement agreement under section 21A, and will not have to satisfy the procedural requirements in section 21F. This includes agreements that adjust the family income in

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others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 393 at 402.

accordance with the statutory formula to reflect a change in income of either partner, following an adjustment event (discussed at paragraph 5.88 above).

5.97 It is likely that many FISAs will require adjustment, either temporarily or permanently, throughout the duration of the FISA in order to respond to changes in income or life events. Requiring all agreements to satisfy the requirements in section 21F would be costly, inefficient and would act as a disincentive to partners making their own, mutually beneficial agreements. But for any agreement partners should be encouraged, through professional advice and information provided about the FISA regime, to clearly identify the reasons why an adjustment is being agreed.

5.98 We discuss the partners' ability to contract out of the FISA provisions before or during the relationship below.

Seeking an adjustment to the statutory formula or default rules

5.99 Either partner may apply to a court for an order adjusting the amount, duration (including a break in payments) or implementation of a FISA at any time during the life of the FISA (adjustment order).

5.100 A court may make an adjustment order if it is satisfied that, having regard to the extent to which the partners have been economically advantaged or disadvantaged as a result of the relationship or its end, failure to grant the application would result in serious injustice. We also propose including a list of statutory considerations that the court must have regard to, in addition to the purpose and principles of the legislation, when determining any application for an adjustment order. These statutory considerations should include:

(a) the length of the relationship;

(b) the age of the partners;

(c) each partner's obligations in relation to the care of any minor children or other dependents;

(d) each partner's current and likely future employment situation;

(e) the financial resources (being broader than income) available to each partner, including the income-generating potential of any property owned by either or both partners, and whether that potential is being realised;

(f) any other agreements or orders made under the PRA, in relation to a FISA or otherwise, and including any payment or transfer of property between the partners, or any payment of relationship debt;

(g) any significant change in financial circumstances that have arisen since separation; and

(h) any other relevant circumstance.[343]

5.101 A court should state its reasons for its decision with reference to these considerations.

EXAMPLE: PARKER AND DIANE

Parker and Diane met at high school and were married for 30 years. They have four children together. Diane worked at home throughout the relationship, raising the couple's four children and taking responsibility for the couple's house and garden, while Parker was

[343] This might include, for example, whether Partner B is already subject to a FISA payable to a third party.

employed full time. The couple were 52 when the marriage ended and they divided the relationship property pool of $1,000,000 equally. Diane's skills are not easily converted into paid work skills and she is struggling to find paid work. She is currently receiving a benefit of approximately $8,000 per year. Parker is a senior police officer earning $160,000. Diane is entitled to a FISA for five years. However given the length of the relationship, the age of the partners and the challenges Diane faces in recovering financially from the separation compared to Parker who has an established career, Diane successfully seeks an adjustment order seeking payment of the FISA for an extended duration of 10 years.

EXAMPLE: TAYLOR AND ELLIE

Taylor and Ellie were in a de facto relationship for 11 years. On separation, they have twins aged three. When the twins were born, it was agreed that even though Ellie earned more as a HR consultant ($150,000), she would be the one to stay at home while Taylor kept working. Taylor was a junior doctor and his career progression would be jeopardised by taking family leave. The partners had savings they relied on to supplement Taylor's salary. After the parties separated, Ellie returned to work but has struggled to rebuild a client base and earns $100,000. Taylor's career has progressed well and a surgical position is expected within the next few years. However at the time of separation Taylor's salary as a junior doctor is $65,000. The twins live with Ellie due to Taylor's work commitments. Because the couple have children together, Taylor is entitled to a FISA for five years. However, despite having the larger income, it is Ellie who made and continues to make significant non-financial contributions to the relationship and whose earning capacity has reduced as result. Meanwhile, Taylor has been able to enhance his career prospects as a result of Ellie's contributions, and a much higher salary is anticipated in future. Ellie will not benefit from this, despite having supported Taylor throughout their relationship. Ellie successfully applies for an adjustment order reducing the entitlement to nil.

5.102 As with applications for a declaration of non-entitlement (see paragraphs 5.69–5.72), urgent applications for an adjustment order may only be made on the grounds that a payment of the FISA would result in serious and irreversible injustice, and a partner's obligation to comply with the FISA according to the statutory formula and default rules of implementation will continue until such time as the court makes an adjustment order. This may mean a court also makes an order for correction in relation to any prior overpayment or underpayment of the FISA. A court may make any orders it deems necessary to satisfy that debt, including interest, taking into account the circumstances of the partners and the need to avoid imposing economic hardship on either partner.

Enforcing a FISA

5.103 Enforcement of FISAs will be a key issue.[344] While our proposals seek to encourage partners to reach their own, mutually satisfactory agreement whenever possible, there will be situations where a partner cannot, or will not, meet their obligations under the FISA regime. Non-payment of a FISA, regardless of the reasons, can have serious financial implications for the partner entitled to the FISA and any dependents in their care. The stress and anxiety associated with non-payment may also inhibit that partner's ability to recover from the separation and become economically self-sufficient. The State is also directly affected, as recourse to a State benefit may be necessary.

5.104 We therefore propose that strict enforcement measures should be put in place to ensure FISAs are implemented in accordance with the statutory formula and default rules, or as

[344] Enforcement is a broader issue across all areas of the Property (Relationships) Act 1976. For broader discussion on the question of enforcement see Chapter 10: Resolution.

otherwise ordered by the court or in accordance with the partners' agreement. In particular, we propose that the same mechanisms used to enforce the child support regime under the Child Support Act are available to enforce the FISA regime.[345]

5.105 Further work is required to determine whether other enforcement measures would be appropriate in different circumstances. We note in particular that coercive or punitive enforcement measures will be ineffective and counterproductive in situations where Partner B *cannot* pay.[346] In these cases, a negotiated or mediated agreement between the partners may be a more appropriate option.[347] Further work is also required to determine whether stricter enforcement measures than those provided for under the child support regime should be available in circumstances where Partner B *will not* pay.

5.106 We also propose that the Government consider extending the existing administration and enforcement role of the Inland Revenue Department under the Child Support Act to administer and enforce the FISA regime. This would rationalise the use of existing logistical support already available to support families and the transfer of finances.

5.107 In Chapter 10: Resolution we propose that the Ministry of Justice develop a comprehensive information guide for separating partners that explains the property sharing regime and provides information about the different options for resolving relationship property disputes. This should include describing the scope of the FISA entitlement under the statutory formula and default rules, and the ability for partners to make their own agreements or seek an adjustment from the court.

Contracting out of the FISA regime

5.108 Partners should be able to contract out of the FISA provisions before or during a relationship under section 21 of the PRA.

5.109 As FISAs are an entitlement to share the economic advantages and disadvantages arising from the relationship through sharing future family income, the partners cannot predict the value of that entitlement before separation. Therefore any agreement made between the partners before or during the relationship that relates to the FISA provisions should be treated as a contracting out agreement under section 21, and the procedural safeguards in section 21F, including the requirement that both partners seek independent legal advice, will apply. This differs from our proposals in relation to some agreements that may be entered into after separation (see paragraphs 5.94–5.98), when the value of any FISA entitlement is clear.

5.110 A contracting out agreement that deals with an entitlement to a FISA may be vulnerable to a challenge on the ground that giving effect to the agreement would cause serious injustice, if the partners' circumstances have changed since the agreement was made

345 Under the Child Support Act 1991, the Family Court has the power to make a charging order against income, order a non-payer to complete community service, issue a warrant for arrest, order surrender of a passport and sentence a nonpayer to imprisonment: Child Support Act 1991, ss 189–199.

346 For example, the use of punitive penalties in relation to the non-payment of child support was a focus of reforms in 2006, due to the negative impact these penalties had on the non-paying parent's capital: Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 175. A similar outcome could be expected in the context of FISAs if such an approach were taken. For further discussion see Law Commission of England and Wales *Enforcement of Family Financial Orders* (LAW COM No 370, 2016).

347 This may include a delayed or moderated payment scheme: Partner A may agree to accept a smaller amount over a longer period, or Partner A may accept a greater percentage of the relationship property pool. See discussion on agreements below.

(section 21J).[348] We are satisfied that section 21J provides an appropriate safeguard given the inevitable uncertainty in seeking to predict the future.

5.111 In order to minimise the risk of contracting out agreements being challenged, partners should be encouraged, through professional advice and information provided about the FISA regime (see paragraph 5.107), to revisit their agreement throughout the relationship and at key life events, such as when the partners start planning or having children together, when the relationship passes the 10 year mark, and when the partners are contemplating decisions that would significantly affect one partner's earning capacity (such as the partners moving countries in order for one partner to take up a new job).

Effect of the death of one of the partners

5.112 Our proposals apply when a relationship ends on separation. We have not considered whether a surviving partner should be entitled to a FISA when a relationship ends on the death of one partner, for the reasons discussed in Chapter 1.

5.113 If either partner dies following separation but during the FISA, we propose that Partner A's entitlement should come to an end. This is on the basis that the deceased partner can no longer be said to be economically advantaged or disadvantaged as a result of the relationship. That is, if Partner B dies, they can no longer enjoy any economic advantages arising from the relationship that ought to be shared with Partner A. Similarly if Partner A dies, they are no longer shouldering the burden of economic disadvantage that Partner B ought to share.

5.114 We recognise that this approach may lead to anomalous or unfair outcomes in some situations. For example, if a FISA was capitalised by way of a lump sum payment or transfer of property before either partner died, Partner A (or their estate) would have received more (and Partner B would have paid more) than they would have, had the partners agreed to periodic payments. We also recognise that this approach might be unfair on Partner A if their entitlement ends as a result of the death of Partner B, as they may still be suffering economic disadvantage as a result of the relationship or its end. We note however that the surviving partner may have a claim against the deceased's estate under the Family Protection Act 1955.

5.115 Ultimately, however, we prefer an approach that promotes simplicity and pragmatism. If the entitlement were to continue after the death of one of the partners, this is likely to add to the complexity and costs of administering the deceased's estate. For example if Partner B died, their personal representative would have to apply for an adjustment order in order to stop or reduce the amount payable under a FISA.

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348 A similar issue arises currently in the context of contracting out of section 15. See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.73]–[30.76]. We received a submission from McWilliam Rennie Lawyers who felt it was not possible to contract out of s 15 in advance, while NZLS submitted that partners should be able to contract out of s 15, as with any compensatory entitlement under the PRA. For further discussion see also Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 4; and Amanda Donovan and Jennie Hawker "Section 21 Agreements – Shades of Grey?" (paper presented to New Zealand Law Society Seminar, June 2015) at 53–55.