CHAPTER 7

Children's interests

IN THIS CHAPTER:

We consider how the PRA should recognise children's interests following parental separation.

CURRENT LAW

7.1 While the PRA is "mainly" about how partners' property is to be divided when relationships end,[403] the PRA has always recognised that children have an indirect but nonetheless important interest in the division of relationship property.[404] This is reflected in section 1M(c), which states that one purpose of the PRA is to provide for a just division of relationship property, "while taking account of" the interests of any children of the relationship.

7.2 The PRA has separate definitions for "child of the marriage", "child of the civil union" and "child of the de facto relationship" (section 2). These definitions largely mirror each other to mean:

(a) any child of both partners; and

(b) any other child (whether or not a child of either partner) who was a member of the partners' family at the relevant time.[405]

7.3 In this paper we use the single term "child of the relationship" to mean a child of a marriage, civil union or de facto relationship.[406]

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403 Property (Relationships) Act 1976, s 1C. This chapter does not specifically consider children's interests following the death of a parent. Children have different property rights when a parent dies (including possible claims under succession law), and different issues may arise for children, including adult children, under the legislation when a relationship ends on death.

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

405 In *GM v JL* (2005) 24 FRNZ 835 (FC) the Family Court said at [33]–[34] that the second category of this definition captures children who are "wholly or partially dependent on at least one of the parties for physical, material, emotional or social support", and who have "some presence in or belonging to the particular household". This might include stepchildren and children who are also members of another household, where care is shared. See also *A v A* [2012] NZFC 10192 at [26]–[34].

406 As we observed at [28.26] of the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)), there is a small inconsistency in how the definitions treat

7.4 Section 26 gives effect to the PRA's purpose in relation to children's interests. It directs a court to have regard to the interests of any minor or dependent children of the relationship in any PRA proceedings.[407] This direction is not confined to any specific provisions of the PRA, and can influence a court's decision on a wide range of matters.[408]

7.5 Children's interests do not constitute a discrete exception to equal sharing of relationship property, although it is possible that a child's needs or interests could be relevant to a claim under section 13 that there are extraordinary circumstances that would make equal sharing repugnant to justice.[409]

7.6 The PRA also provides a range of tools that can be used to directly or indirectly meet children's needs following parental separation:

(a) Section 26 gives a court the power, if it considers it just, to settle relationship property for the benefit of children.[410] The High Court has clarified that:[411]

> The inquiry is directed to whether there is a need for a s 26 order on the facts of a particular case to provide for the interests of the minor or dependent child or children. Such an order will not usually be required if the Court is satisfied that the parents intend to fulfil their roles as such responsibly.

(b) Section 26A gives a court the power to postpone the vesting of any share in the relationship property (wholly or in part) if immediate vesting would cause undue hardship for the principal provider of ongoing daily care for minor or dependent children of the relationship.[412] Postponement orders are typically made in order to postpone the sale of the family home.[413]

(c) A court can make orders granting either partner the right to occupy the family home (section 27). It can also vest a residential tenancy in either partner (section 28).[414] When considering an application for an occupation or tenancy order, section 28A requires a court to have "particular regard" to the need to provide a home for any minor or dependent child of the relationship. Occupation orders are generally

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children of immediately preceding relationships, but this issue would be resolved if the new statute proposed in Chapter 1: Introduction were to adopt relationship neutral terminology.

407 A minor is a person under the age of 20: Age of Majority Act 1970, s 4(1). See also *B v B* (2009) 27 FRNZ 622 (HC) at [80]. Whether a child is "dependent" for the purposes of the Property (Relationships) Act 1976 is a question of fact; adult children may be dependent if they are physically or intellectually disabled: *B v B* at [80]–[81].

408 Peart notes that children's interests can be relevant to decisions made about the classification, valuation and division of property, even if children have no beneficial interest in the property: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 43. For example children's interests have been relevant in proceedings to set aside a contracting out agreement (*A v W* [2012] NZFC 8640) and in a decision to decline to order compensation for post-separation contributions (*R v D* [2015] NZFC 9450, [2016] NZFLR 37 at [60]).

409 *WMM v SJM* [2012] NZFC 5091, discussed in Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 45–46.

410 Section 26 orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.27]–[29.41].

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

412 Section 26A orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.42]–[29.53].

413 See *H v D* FC Gisborne FAM-2004-016-140, 21 December 2005; and *E v W* (2006) 26 FRNZ 38 (FC). Peart notes they could also be used to allow the primary caregiver to retain the use of the other partner's share of relationship property for a time to help them establish a new home for the children, although we are not aware of any cases where this has occurred. See Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR26A.01].

414 Occupation and tenancy orders are discussed in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.54]–[29.61].

granted for a relatively short period of time, or made on an interim basis pending sale or division of relationship property.[415]

(d) A court can make furniture orders ancillary to an occupation or tenancy order (section 28B) or independent of any other order, granting the possession and use of furniture to either partner (section 28C). When considering an application under section 28C, a court must have particular regard to any need of the applicant to have suitable furniture, household appliances and household effects to provide for the needs of any children of the relationship who live, or will be living with, the applicant (section 28C(4)).

(e) Finally, section 32 of the PRA gives a court the power to make orders under specific provisions of the Child Support Act 1991, such as orders that depart from a formula-assessed amount of child support, or orders that provide for child support to be paid in a lump sum.

7.7 The PRA provides for the appointment of a lawyer to represent any minor or dependent child in PRA proceedings if it considers there are "special circumstances" that make the appointment "necessary or desirable".[416] It has been suggested that special circumstances are likely to exist where children are particularly likely to be affected and the assets at stake are unusually high, or where property might be settled on children.[417] The appointment of a lawyer for child is the primary way in which minor or dependent children can independently participate in PRA proceedings. The role of lawyer for child includes ascertaining, if appropriate, the child's views on matters affecting them relevant to the proceedings, and communicating those views to the court.[418]

ISSUES

The impact of parental separation on children

7.8 Parental separation can have significant and wide-ranging impacts on children.[419] Children may experience new care arrangements. They might be dealing with inter-parental conflict. The family home may be sold as one household splits into two, and children might have to move to a new house, neighbourhood or region. They may lose important

415 Nicola Peart "Occupation orders under the PRA" [2011] NZLJ 356 at 356.

416 Property (Relationships) Act 1976, s 37A. Section 37 is also relevant. It provides that a court may direct that notice be given to any person "having an interest in the property" that would be affected by an order, and any such person shall be entitled to appear and be heard in the matter as a party to the application. However s 37 notices are rarely issued in respect of children.

417 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.82] citing *Maw v Maw* [1981] 1 NZLR 25 (CA) and *Rhodes v Rhodes (No 1)* (1978) 2 MPC 159 at 160. See also *L v P,* where a lawyer was appointed to represent a child whose substantial inheritance had been partly intermingled with relationship property: *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011.

418 Family Court Act 1980, s 9B(1)–(2).

419 In its submission on the Issues Paper, Barnardos New Zealand (Barnardos) said that "[e]xternal independent research indicates that across the Western world, although the majority of children do not suffer adverse outcomes resulting from parental separation, children who experience parental separation are on average at twice the risk of adverse outcomes" citing Jan Pryor "Separation from children's perspectives: Recent research and some food for thought" (presentation for the Auckland Family Courts Association Conference, April 2006); and P Parkinson, J Cashmore and J Single "Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation" (2005) 43(3) Family Court Review 429. See also Rae Kaspiew and Lixia Qu "Property Division after Separation: Recent Research" (2016) 30 AJFL 1; and M Gollop, M Henaghan and N Taylor *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (Centre for Research on Children and Families, Faculty of Law, University of Otago, June 2010).

connections to family, whānau and friends as well as peer and community support networks, especially if a change of school is required. A geographic move following parental separation may also impact on a child's ongoing relationship with their non-primary caregiver parent. Barnardos New Zealand (Barnardos) observes on a daily basis the impact of parental separation on children. In its submission on the Issues Paper Barnardos noted that parental separation and subsequent repartnering can cause wider social dislocation and isolation, and a period of high mobility and relocation can be a common experience for children who experience parental separation.

7.9 For some children, parental separation is associated with a prolonged period of low living standards.[420] In the Issues Paper and Study Paper we explored the recent research of Dr Michael Fletcher, which identified that separation substantially increases poverty rates among separated parents, and that these negative impacts persist for at least three years following separation.[421] Fletcher also identified that responsibility for the care of children after separation plays a dominating role in influencing financial outcomes,[422] and that child support payments provide little assistance to many primary caregivers.[423] The level of assistance provided through State benefits is "often insufficient to ensure individuals are not below the poverty threshold, especially if they have children living with them".[424]

7.10 Decisions made under the PRA can directly affect children's wellbeing following parental separation. Decisions about how the partners' property is to be used or ultimately divided following separation can affect where children live, their standard of living, and their ability to maintain relationships with family, whānau, friends and community. As Peart notes, section 26 is an acknowledgment of the adverse effect that a division of relationship property may have on children.[425]

Children's interests have a low priority in decisions under the PRA

7.11 Children's interests do not play a prominent role in PRA proceedings.[426] The courts make "little use" of the obligation to take account of children's interests in sections 1M(c) and 26,[427] the tools available to benefit children under the PRA are rarely used,[428] and it is

420 Michael Fletcher "An Investigation Into Aspects of the Economic Consequences of Marital Separation Among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017) at 187.

421 At 185–186.

422 At 151.

423 Of those partners receiving child support, average receipts in the year following separation were $2,367 for women (6.9 per cent of women's average total family income) and $709 for men (1.9 per cent of men's average total family income): Michael Fletcher "An Investigation Into Aspects of the Economic Consequences of Marital Separation Among New Zealand Parents" (PhD Thesis, Auckland University of Technology, 2017) at 188.

424 At 187.

425 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 28. See also *Wheeler v Wheeler* (1984) 2 NZFLR 385 (FC) where the Court noted that the division of property may affect each partner's ability to meet their responsibilities to maintain and provide a home for their children.

426 See Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27; and Bill Atkin "Children and financial aspects of family breakdown" (2002) 4 BFLJ 85.

427 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 67.

428 Peart's review of s 26 applications available on Briefcase and LexisNexis databases identified that a s 26 order was made in only 14 out of 45 cases: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 50. Peart observed at 53 that successful applications under s 26A were also rare, identifying only four successful applications out of a total of 13 applications. In relation to occupation, tenancy and

unusual for children to participate in PRA proceedings or for a lawyer for child to be appointed.[429] Instead, the focus of PRA proceedings is on the property entitlements that the adult partners have acquired during their relationship, consistent with the primary purpose of the PRA.[430]

7.12 Children's interests in PRA matters are also not generally viewed as significant by practitioners. A survey of New Zealand family lawyers carried out by Grant Thornton and the New Zealand Law Society (NZLS) in October 2017 found that only 12 per cent of practitioners felt that consideration of children's interests was of significant importance in managing relationship property cases.[431] This was consistent with another survey finding, that 78 per cent of practitioners felt that children were rarely (72 per cent) or never (6 per cent) a focus of PRA proceedings.[432] The survey observed that:[433]

> Practitioners' views on the rights of any children of the relationship might be seen as surprising, given that the Property (Relationships) Act explicitly directs the courts to consider the interests of any children of the relationship.
>
> It suggests children's rights under relationship property proceedings, both property rights (including any beneficial interests) and other rights, may not be adequately addressed in current practice.

7.13 There may be valid reasons why children's interests are not explicitly referred to when making decisions under the PRA. Partners might have separately agreed between themselves on how their children are to be cared for and financially supported after separation. For example, partners might agree that the children should remain in the family home for a period of time, and make financial provision to support such an arrangement. Recourse under the PRA may therefore be unnecessary in order to recognise children's interests and meet their post-separation needs.

7.14 But separation can be a time of high interpersonal conflict. Partners may find it difficult to focus on what is best for their children, or they may prioritise their own interests, for example their desire for a clean break. While we lack empirical evidence, it is reasonable to assume that in some cases partners will negotiate and reach agreements under the PRA without giving their children's interests adequate consideration, or will fail to pursue children's interests before the courts.

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furniture orders, data provided by the Ministry of Justice revealed that, in 2016, there were 59 applications for an occupation order, one application for a tenancy order and 12 applications for furniture orders: Email from Ministry of Justice to the Law Commission regarding applications filed in the Family Court (5 May 2017). We do not know how many of those applications were successful, or how many involved minor or dependent children. We note that Peart estimates children's needs were the principal reason for granting occupation orders in around half of the applications for occupation orders decided between 2002 and 2013: Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 53.

429 Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 21 and 50. See also Pauline Tapp, Nicola Taylor and Mark Henaghan "Agents or Dependents: Children and the Family Law System" in John Dewar and Stephen Parker (eds) *Family Law: Processes, Practices and Pressures* (Hart Publishing, Portland, 2003) 303 at 310–311. Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 states at 54 that the power to appoint lawyer for child is "seldom utilised". For example, in *M v M* [2004] NZFLR 72 (HC) no lawyer for the child was appointed in an application for an order to settle property on a child with special needs.

430 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 67.

431 Grant Thornton New Zealand Ltd and NZLS *New Zealand Relationship Property Survey 2017* (October 2017) at 19.

432 At 19.

433 At 19.

A failure to strike the right balance between partners' entitlements and children's interests

7.15 The low priority given to children's interests in practice reflects a failure to strike the right balance between partners' property entitlements and children's interests following parental separation.

The PRA uses outdated language to promote children's interests

7.16 The language used in the PRA to promote children's interests is outdated by modern standards. The United Nations Convention on the Rights of the Child (UNCROC), to which New Zealand is a signatory, sets out the basic rights of children, including the right to have their "best interests" treated as a "primary consideration" in actions concerning them.[434]

7.17 However section 1M(c) of the PRA provides only that property division should "take account" of children's interests. This suggests that children's interests are something of an "addendum to the adult considerations".[435] Children's interests do not appear at all in the principles provision of the PRA (section 1N). This has significant implications for how the PRA is applied in practice, given the important role of purpose and principle provisions in statutory interpretation.[436] Skellern writes that:[437]

> When [sections 1M and 1N] are considered against the backdrop of [UNCROC], the fact that children's needs are mentioned only in passing at s 1M suggests a lack of attention to increasing the focus on their needs in compliance with the spirit of [UNCROC].

7.18 Further, while the obligation in section 26 is mandatory, it refers only to the interests of children, not to their "best interests". Section 26A fails to refer to children's interests directly at all in the context of a postponement order. Section 28A requires a court to have "particular regard" to the need to provide a home for children when considering an application for an occupation or tenancy order, but it is unclear whether children's needs are particularly relevant to the court's discretion under section 28B to make an ancillary furniture order.[438]

7.19 By failing to reflect the language of UNCROC in the PRA, New Zealand may be failing to meet its international obligations as a party to UNCROC.[439]

Restrictive judicial approach to prioritising children's interests

7.20 In the rare situations where the court is asked to take children's interests into account, the courts typically take a restrictive approach when considering whether to give

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434 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 3(1).

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

436 See Interpretation Act 1999, s 5(1). For a discussion on the importance of principles provisions in statutory interpretation see Law Commission *Review of the Search and Surveillance Act 2012 – Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2018) at ch 3.

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

438 This is because s 28B of the Property (Relationships) Act 1976 does not incorporate an equivalent to s 28C(4), and it is unclear whether the direction in s 28A(1) is relevant to an ancillary order under s 28B.

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

children's interests priority over partners' property entitlements. As Peart observes, to the extent that children's needs and interests require protection, the courts have generally taken a minimalist approach to depriving the partners of their property entitlements.[440]

7.21 The court's restrictive approach is most noticeable in relation to applications under section 26 for the settlement of property for the benefit of children. While the High Court has said that exceptional circumstances are not necessary,[441] in practice successful applications under section 26 have been typically limited to extreme cases involving criminal offending within the family or severe parental neglect.[442] The courts' current approach is illustrated in the recent case of *E v E,* where the High Court upheld a decision declining to make a section 26 order in respect of a 20 year old dependent child who suffered from intellectual disabilities.[443] The application was declined on the basis that the relationship property pool available for division ($237,000) was too small to support a section 26 order, even though the original relationship property pool, before interim distributions had been made, was around $1.4m.[444] The Court also observed that the child will receive State assistance in his own right and that, should he find himself in difficulty, his mother was "well provided for" (presumably as a result of the interim distribution of relationship property) and could assist him, and that there was no evidence to suggest the husband would not help the child, "should a real need for such assistance arise".[445]

7.22 The court's restrictive approach to settling property for the benefit of children is perhaps unsurprising given the lack of direction in section 26 and the limited grounds for departing from equal sharing under the PRA.[446] But Peart argues the restrictive approach severely limits the court's discretion and does not sit well with the direction to have regard to children's interests in section 26, or with UNCROC.[447]

7.23 We also note that the courts typically take a restrictive approach to other tools that do not affect the partners' ultimate property entitlements, but do affect their use and enjoyment of that property. Occupation orders tend to be for short periods only, and while the need to provide a home for children was initially treated as the first and most important consideration,[448] recent cases tend to take a more restrictive approach that

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440 Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 27–28.

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

442 See *X v X* [1977] 2 NZLR 423 (SC); *N v N* (1985) 3 NZFLR 694 (FC); *S v C* (1998) 17 FRNZ 176 (FC); and *R v R* [1998] NZFLR 611 (FC).

443 *E v E* [2018] NZHC 1469.

444 At [44]. The modest size of the relationship property pool available for division was also grounds for refusing to make a s 26 order in *WWM v SJM* [2012] NZFC 5019; and *BGR v MR* [2007] NZFLR 177 (FC).

445 *E v E* [2018] NZHC 1469 at [45]–[46].

446 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 80.

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

448 See *W v W* (1984) 2 NZFLR 385 (FC) at 389–390; and *N v N* (1985) 3 NZFLR 766 (HC) at 769.

prioritises partners' property entitlements over children's interests.[449] In *L v B* the High Court said that:[450]

> While the accommodation needs of minor or dependent children must always be taken into account, these should be balanced against all other relevant considerations in the particular case, including the desirability of providing the parties with a clean break in their financial affairs so that they can re-establish themselves.

7.24 The courts have also used their power to revisit child support arrangements under section 32 in a "conservative fashion".[451] In *H v H* the High Court observed that lump sum awards were limited, in all but the "most unusual circumstances", to a capitalisation of the formula assessment in any given financial year.[452]

The financial risks associated with the tools

7.25 The effectiveness of the tools is limited by the financial risks they pose to the partner who is the primary caregiver. In particular, the primary caregiver may be deterred from applying for a postponement or occupation order because of the risk of a claim for occupation rent by the other partner.[453] Such a claim might have the effect of diminishing the primary caregiver's ultimate share in the relationship property pool.

7.26 The use of one of the tools might also risk diminishing the amount of child support payable under the Child Support Act.[454] Under that Act, a liable parent paying child support can apply for a departure from a formula-assessed amount of child support if that amount would be unjust and inequitable because of any payments, transfer or settlement of property made under the PRA, or because the recipient is entitled to occupy a property in which either of them has a financial interest.[455]

Narrow provision for the appointment of lawyer for child

7.27 As noted above, it is unusual for children to participate in PRA proceedings or for a lawyer for child to be appointed. This may be in part due to the high threshold for appointing a lawyer for child under section 37A the PRA (there must be "special circumstances" that make the appointment "necessary or desirable"). It might also be due to the fact that the fees payable to the lawyer for child must be paid by one or both of the parties (section 37A(2)). Peart and Henaghan argue that children's interests are rarely pleaded by partners as "there is no incentive on the parties to put their children's

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449 See for example *G v G* (1988) 3 FRNZ 665 (HC) at 677; and *W v W* [1997] NZFLR 543 (HC) at 547. In *S v W* HC Auckland CIV 2008-404-4494, 27 February 2009 Allan J said at [99] that "[i]n the general run of cases" occupation orders extending over several years will be regarded as "offending against the clean break principle" and will not be appropriate.

450 *L v B* [2013] NZHC 2378 at [8].

451 *F v M* [2012] NZFC 7705 at [110].

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

453 Where one partner occupies the family home after separation, the other partner might be compensated for their loss of enjoyment of that property or delayed access to the capital he or she is entitled to under the Property (Relationships) Act 1976 through ss 18B and 33.

454 See *W v W* [1997] NZFLR 543 (HC) where Robertson J declined to order occupation rent for the period during which the children and one partner lived in the family home pursuant to an occupation order, but acknowledged that the other partner was not precluded from applying for a departure order under the Child Support Act 1991.

455 Child Support Act 1991, ss 105(2)(c)(ii)–(iii).

interests ahead of their own".[456] Without independent representation, the interests of children can be easily overlooked or side-lined,[457] inconsistent with the rights affirmed in UNCROC, including the right to express their views in matters affecting them, and for those views to be given appropriate weight (article 12(1)), and the opportunity to be heard in any judicial proceeding affecting them, either directly or through a representative (article 12(2)).[458]

Results of consultation

7.28 We received 49 submissions that addressed children's interests, being 35 submissions from members of the public, 8 submissions from organisations and 6 submissions from individual practitioner and academic experts.

7.29 Submissions reflected a diverse range of views. Most submitters agreed that the PRA does not give adequate priority to children's interests. Some, however, felt that while children's needs must be provided for after separation, this is not the role of the PRA but of other, more child-centred legislation such as the Child Support Act and the Care of Children Act 2004.

7.30 The Office of the Children's Commissioner (Children's Commissioner), Barnardos, the Human Rights Commission (HRC), the National Council of Women of New Zealand and the New Zealand Federation of Business and Professional Women (BPWNZ) all agreed that children's interests are not given adequate priority in PRA matters. As a result, Barnardos submitted, children's interests often remain invisible. BPWNZ noted that children's interests are rarely considered by the court, given that decisions around living arrangements are by necessity normally resolved before the courts are involved. HRC said that the low priority given to children's interests is partly because the PRA is not currently aligned with New Zealand's obligations under UNCROC.

7.31 NZLS, however, submitted the PRA gave children's interests adequate attention. It submitted that the PRA is about partners' property entitlements, and the current provisions of the PRA adequately recognise children's interests in that context. While orders for the benefit of children are not common, NZLS observed that this may be due to the courts' focus on the purpose of the PRA and the "clean break principle", that property matters should be resolved as soon as practicable at the end of the relationship to enable the parties to live their lives independent of each other.

Children's interests in comparable jurisdictions

7.32 Children's interests play a part in property regimes in comparable jurisdictions. The PRA's tools are broadly consistent with those that exist in the Canadian provinces which, like New Zealand, adopt rules-based statutory property regimes and have separate statutory regimes for spousal maintenance and child support.[459]

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456 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 91.

457 At 91.

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

459 Several Canadian provinces have statutory provisions that allow a court to make an order setting property aside for a child (for example British Columbia, Nova Scotia, New Brunswick, Newfoundland and Labrador, and Yukon). Many provinces also recognise children's interests or needs as relevant to decisions on occupation orders (for example

7.33 Children's interests tend to play a greater role in the discretionary property regimes in Australia and England and Wales. Property division in these jurisdictions is based not only on entitlements to property arising from the relationship, but also on future needs, expressly including children's needs.[460] This enables a court to consider the needs of the family as a whole, with the aim of achieving a fair or just outcome for the parties.[461] The relevant statutes in these jurisdictions deal not only with property division, but also with spousal maintenance, child support and the care of children after separation, which can also facilitate a holistic approach to the consequences of parental separation.[462] However, for the reasons discussed in Chapter 1: Introduction, we do not propose that New Zealand shifts to a discretionary property regime.

Alberta, Ontario, Nova Scotia, New Brunswick, Saskatchewan, Quebec, Northern Territories, Yukon and Prince Edward Island). Several Canadian provinces also have statutory provisions allowing a court to direct that the contents of the family home be removed for the use of a child (for example Nunavut and Prince Edward Island). See Family Law Act SBC 2011 c 25, s 97(2)(e); Matrimonial Property Act RSNS 1989 c 275, ss 11(4)(b) and 15(d); Marital Property Act RSNB 2012 c 107, ss 10 and 23; Family Law Act RSNL 1990 c F-2, s 26(d); Family Property and Support Act RSY 2002 c 83, ss 12(2)(d) and 27(4); Matrimonial Property Act RSA 2000 c M-8, s 20(b); Family Property Act SS 1997 c F-6.3, s 7(a); Civil Code of Quebec, arts 409 and 410; Family Law Act SNWT 1997 c 18, s 55; Family Law Act RSO 1990 c F-3, ss 24(3)(a) and (4); and Family Law Act RSPEI 1988 c F-2.1, s 25.

460 The Family Law Act 1975 (Cth) requires a court to take a range of prospective factors into account in the exercise of discretion, including parenting responsibilities and any child support payable through ss 75(2)(c) and 79(4)(e). The Matrimonial Causes Act 1973 (UK) provides in ss 25(1), 27(3) and 27(3A) that it is a court's duty to give first consideration, when granting financial relief, to the welfare of minor children. Both statutory property regimes also contain provisions that enable a court to set property aside for the children's benefit: see Family Law Act 1975 (Cth), ss 79(1)(d) and 90SM(1)(d); and Matrimonial Causes Act 1973 (UK), s 23(1).

461 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 66.

462 At 66.

PREFERRED APPROACH

P34 Children's best interests should be a primary consideration under the PRA. This should be given effect through:

a. a statutory principle, to guide the achievement of the purpose of the PRA;
b. an overarching obligation on the courts to have regard to the best interests of any minor or dependent children of the relationship (replacing the existing obligation in section 26); and
c. procedural rules, to ensure a court is provided with the information it needs in order to effectively perform its obligation at (b) above, and to promote to parents, practitioners and the court the importance of considering children's best interests and the tools available for meeting children's needs.

P35 A court should have the power to set relationship property aside for the benefit of any minor or dependent children of the relationship, if it considers it just (replacing the existing power in section 26). The court should be directed to have particular regard to any unmet needs of the child or children during minority or dependency.

P36 There should be a presumption in favour of granting a temporary or interim occupation or tenancy order on application by the primary caregiver of any minor or dependent children of the relationship. A court may decline to make an order if the respondent partner satisfies the court that an application is not in the child's best interests, or would otherwise result in serious injustice.

P37 The other tools available to meet children's needs should be improved by:

a. broadening the jurisdiction of furniture orders to include family chattels as defined in section 2, and clarifying that a court must have particular regard to children's needs when making furniture orders;
b. requiring a court to postpone vesting, if immediate vesting would cause undue hardship for any minor or dependent child of the relationship; and
c. clarifying that an order made to benefit children under current sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act 1991.

P38 Children's participation in proceedings should be strengthened by lowering the threshold for appointing a lawyer for child to "necessary or desirable", consistent with the Family Proceedings Act 1980.

P39 There is a need to review the effectiveness of the Child Support Act 1991 in meeting children's needs and setting the level of financial support to be provided by parents for their children.

7.34 Our preferred approach will give greater priority to children's interests. This will achieve a better balance between partners' property entitlements and children's interests following parental separation.

Elevating children's interests

7.35 We propose elevating children's "best interests" to a "primary consideration". We consider that this strikes the appropriate balance in the context of legislation that is primarily about the property entitlements of adult partners, arising as a result of their relationship, but which has the potential to impact significantly on children's interests. It rejects the concept of a "clean break" when there are children, and sends a strong signal that a child's best interests may be given greater weight than other competing considerations when a court is exercising discretion. Our proposal is consistent with the rights affirmed in UNCROC (see paragraph 7.16 above), and with New Zealand's obligations as a party to UNCROC to uphold those rights. It also reflects the general responsibility parents have for the care, development and upbringing of their children, and their duty to provide necessaries.[463]

7.36 We propose giving effect to the higher priority accorded to children's interests in three ways:

(a) First, the best interests of any child of the relationship[464] as a primary consideration will be a statutory principle, to guide the achievement of the purpose of the PRA;

(b) Second, a court will be directed to have regard to the best interests of any minor or dependent[465] children of the relationship in any proceeding under the PRA (replacing the existing obligation in section 26).

(c) Third, procedural rules should require that:

(i) lawyers provide information to their clients about how children's interests are relevant to property division, and the tools that can be used to benefit children;

(ii) partners provide the court with basic information about any children of the relationship, including their age, any special needs, likely duration of

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

464 In the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.24]–[28.47]) we explored the definition of "child of the relationship". We consider the definition remains appropriate and do not propose reform. While some submitters, including the Human Rights Commission, supported a more flexible definition, we are satisfied that the current definition is broad enough to accommodate diverse family structures and increasingly broad concepts of family, including stepchildren, whāngai and other, more culturally diverse family structures. We also think it is appropriate that there be some connection or dependency on the partners in order for children's interests to impact on partners' entitlements under the Property (Relationships) Act 1976 (PRA). While some submitters favoured a narrower definition of child of relationship that only captured biological or adopted children of both partners, these submitters tended to be concerned primarily with how the presence of one partner's children from a previous relationship could result in that relationship "qualifying" for property entitlements under the PRA. This is primarily a question of whether the presence of children should affect eligibility under the PRA. We address this issue in Chapter 4: Qualifying relationships.

465 In the Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.52]–[28.56]) we explored whether the terms "minor" and "dependent" required definition. Few submissions were received on this issue, although NZLS submitted that the age limit for a minor should be 18 (rather than the current limit of 20), and supported a definition of "dependent". We are, however, satisfied that no reform is required. The low number of submissions on this issue suggests the current law is not creating problems in practice. We also consider the current approach provides the courts with more flexibility than what would be possible with defined terms.

dependency, care arrangements and financial provision (including any child support arrangements); and

(iii) the court asks each partner whether any of the tools could be used to address any unmet needs the children may have, and, if so, invite them to apply for relevant orders.

7.37 Submitters generally supported making children's best interests a primary consideration in the PRA. Barnardos submitted that this strikes the appropriate balance in the context of the PRA to ensure that children's best interests are treated with the level of attention they deserve and require on parental separation. HRC also supported this proposal, on the basis that it would adopt the UNCROC criteria and would elevate the level of consideration given to children's interests in decision-making under the PRA. NZLS, however, submitted strongly in favour of the status quo.

7.38 In the Issues Paper we proposed, as an alternative option, elevating children's best interests to the "first and paramount consideration" under the legislation (Issues Paper at [29.8]–[29.9]).[466] The Children's Commissioner preferred this option on the basis that the division of property directly impacts children's needs and interests. BPWNZ also supported this option. However this would give children's best interests the highest priority in the PRA, which we do not think is an appropriate priority in a statute that is not primarily focused on children.[467]

7.39 Our proposal in respect of procedural rules at paragraph 7.36(c) above is designed to address the practical difficulties in equipping a court with the information it needs in order to effectively perform its obligation to have regard to children's best interests. The procedural rules should also promote to parents, practitioners and the court the importance of considering children's best interests and the tools available under the PRA for meeting children's needs.

7.40 Atkin proposes a similar, but more "interventionist" approach, under which the Judge would be obliged to "check" the financial arrangements for children, and invite the partners to consider setting relationship property aside to meet the children's needs, such as education, medical, dental or travel costs. If the parties cannot agree, the Judge should, if practicable, order a settlement in the child's interests.[468] Alternatively, Peart and Henaghan propose imposing a requirement on a court to be satisfied that children's needs are met before making an order for division, similar to the current requirement under section 45 of the Family Proceedings Act.[469] This option was favoured by HRC. We do not favour either of these options, because they undermine the proper role of the child support regime (see paragraph 7.43(b) below), may increase the risk of parental conflict and delay resolution of PRA disputes. We also note that section 45 of the Family

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466 The Issues Paper (Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017)) also suggested another option at [29.10], to recognise children's best interests as a relevant consideration only in the implementation of relationship property division (Option 3). This option was not preferred by any submitters, and we have not pursued this option as we prefer to preserve the broad application of the duty currently in s 26 of the Property (Relationships) Act 1976.

467 Compare Care of Children Act 2004, s 4 and Oranga Tamariki Act 1989, pt 2.

468 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 267–268.

469 Nicola Peart and Mark Henaghan "Children's Interests in Division of Property on Relationship Breakdown" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (UK), 2017) 65 at 92–93.

Proceedings Act does not appear to have been a particularly effective mechanism in practice.[470]

No new exception to the general rule of equal sharing

7.41 We do not propose a new exception to the general rule of equal sharing of relationship property in order to give children's interests a higher priority under the PRA.[471] Rather, elevating the "best interests" of children to a "primary consideration" is intended to promote a more focused judicial approach when exercising discretion under the PRA, which may well lead in practice to unequal sharing in favour of the primary caregiver, including when considering orders to:

(a) depart from equal sharing under section 13, where there are extraordinary circumstances that would make equal sharing repugnant to justice; or

(b) set relationship property aside for the benefit of children under section 26 (see discussion below).[472]

7.42 Children will also benefit indirectly from our proposals in Chapter 5: Section 15 to provide for the sharing of the partners' future income for a period of time after separation in certain circumstances, including where the partners have children together.

7.43 We have not proposed a new exception to equal sharing, having regard to:

(a) The primary purpose of the PRA, which is the just division of property between the partners.

(b) The role of other more child-centred legislation in protecting children's interests, including the Child Support Act and the Care of Children Act. In particular, the PRA should respect and complement the role of the child support regime, which is to ensure that parents take financial responsibility for their children.[473] Issues about how parents take financial responsibility for their children ought to be addressed through a review of the child support regime (see paragraph 7.63 below), rather than through reform to the PRA.[474]

(c) The role of other tools within the PRA to respond to children's needs, such as orders to postpone sharing or setting property aside for the benefit of children, and the improvements we propose to other tools below (at paragraphs 7.52–7.57).

(d) The risk that giving children's interests greater priority in property division might have negative consequences for some children. This might include increasing

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470 It is rare for dissolution proceedings to be defended on the grounds that inadequate arrangements have been made for a child's welfare under s 45 of the Family Proceedings Act 1980 (FPA). For example, in *G v M* [2003] NZFLR 97 (FC) the Family Court said at [8] that it is not appropriate to use s 45 of the FPA to require a liable parent to pay more than is required under the Child Support Act 1991.

471 As indicated in the Issues Paper: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [28.20]–[28.23].

472 As Peart notes, the current restrictive view to s 26 of the Property (Relationships) Act 1976 is not mandated in the legislation and, even under the current wording, "there is scope for a more liberal approach that provides better protection for minor or dependent children of the relationship whilst not losing sight of the parties' rights to a just division": Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 51–52.

473 Child Support Act 1991, s 4.

474 We note, however, Atkin's argument that "we should not be embarrassed to make settlements for children [under the Property (Relationships) Act 1976] because of the dubious interests of the child support scheme": Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 268.

parental conflict, distorting care arrangements and encouraging strategic behaviour by the partners in order to achieve more favourable outcomes for themselves.

(e) The practical difficulties with giving children's interests greater priority in property division, including the reality of ongoing changes to care arrangements and parental income,[475] and the fact that a partner's share of relationship property may need to sustain the partner over a much longer period of time than a partner, as a parent, is financially responsible to maintain their children.

(f) The advantages for children of a clear and certain rule of equal sharing (minimising parental conflict and promoting speedy resolution consistent with justice),[476] which in our view outweigh the advantages of discretionary decision-making that would allow a court to treat each child as an individual with their own risk factors and interests.

(g) The need to balance parental autonomy and State direction.[477] Parents may highly value their autonomy to make decisions about the care and support of their children. While the State has an important role in protecting children and promoting their welfare and best interests, we do not think it should extend to mandating an unequal division of relationship property when there are children of the relationship.

(h) Submitters' mixed views on this issue. NZLS did not favour any change to the current law. Barnardos agreed that changing the equal sharing law was not necessary in order to ensure the PRA takes a more child-centred approach. The Children's Commissioner, in contrast, submitted that the presumption of equal sharing should be altered where children are involved, on a case-by-case basis.

Setting property aside for the benefit of children

7.44 We propose that the power to settle property for the benefit of any children of the relationship should remain, but that it should require a court to have particular regard to any unmet needs of the children.[478] This would involve identifying the child's needs (for example, any special needs arising from intellectual or physical disability), assessing what provision has been made to meet those needs and considering whether any unmet needs could be met by setting aside a portion of relationship property for the benefit of that child.

7.45 Submissions on this issue were mixed. NZLS submitted that the power to settle property should be retained in its current form, as an amendment to signal that orders can be made to meet children's specific needs would be inconsistent with the PRA's main focus on partners' property entitlements and would undermine parental autonomy. NZLS submitted that it is not the PRA's role to address actual or perceived shortcomings with the child support regime. Barnardos, in contrast, was of the view that the court should be

475 See for example Lixia Qu and others *Post-separation parenting, property and relationship dynamics after five years* (Australian Institute of Family Studies, 2014).

476 While our preferred approach rejects the concept of a "clean break" when children are involved, this does not mean that resolution of property disputes should be delayed unnecessarily. At [27.31] of the Issues Paper we cite research that indicates prolonged exposure to frequent, intense and poorly resolved parental conflict is associated with a range of psychological risks for children: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) citing Ministry of Justice *Reviewing the Family Court: A Summary* (September 2011) at 2.

477 See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [27.30].

478 See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.35]–[29.37].

putting specific items of property aside for children in more cases than currently happens.

7.46 We also propose to clarify in the PRA that the power to settle property for the benefit of children applies only in relation to minor or dependent children, affirming the position taken in case law. While this would exclude independent adult children who may have a need arising from parental conduct (such as criminal offending or severe neglect) which occurred during minority or dependency,[479] this group is less vulnerable due to age and independence, and may have other avenues of recourse or support, such as State benefits.

New provision for temporary occupation and tenancy orders

7.47 We propose a new presumption in favour of a temporary or interim occupation or tenancy order for the benefit of any minor or dependent child of the relationship. This would require a court to grant temporary occupation to the primary caregiver unless the other partner satisfies the court that an order would not be in the best interests of the child, or that making such an order would result in serious injustice. In determining the best interests of a child, the court should be directed to consider:

(a) the need to provide a home for the child;

(b) the disruptive effects on the child of a move to other accommodation; and

(c) the child's views and preferences, if they can be reasonably ascertained.[480]

7.48 Occupation and tenancy orders can provide children with stability during the upheaval of parental separation by maintaining continuity of housing, schooling, social and sporting activities while children adjust to new care arrangements. They can also ensure that children's needs for adequate housing are met, and provide the primary caregiver with a temporary reprieve in order to plan an orderly transition from one household to two.

7.49 This proposal responds to submissions highlighting the significance of the family home to children's wellbeing. Barnardos submitted that the family home may be associated with the formation and preservation of the child's identity, as well as being a physical place of safety and belonging. When children have to move following parental separation, they not only lose that place of safety and sanctuary, they may also lose important connections to their friends, peer and community support networks if they are required to move schools or neighbourhoods. Barnardos submitted in favour of the courts routinely assessing, on a case-by-case basis, whether making specific orders concerning the child's family home is appropriate. However some submitters disagreed that children's interests should be given greater priority in relation to occupation and tenancy orders, including NZLS. One practitioner argued that a clean break is preferable for children, and that, in his experience, partners' motivations for wanting to remain in the family home were seldom child-focused.

7.50 For most separating couples, the long-term occupation of the family home by one partner will simply be unachievable, as the income that was previously supporting one household must now support two. But in light of the conservative approach taken to occupation and tenancy orders in recent years (discussed at paragraph 7.23 above), and

479 See for example *R v R* [1998] NZFLR 611 (FC).

480 This proposal is modelled on provisions in the Canadian provinces of Ontario (Family Law Act RSO 1990 c F-3, s 24) and Prince Edward Island (Family Law Act RSPEI 1988 c F-2.1, s 25(3)).

submissions and evidence on the significance of the family home to children, we consider that children's interests in staying in the family home on a temporary or interim basis should have greater priority under the PRA. While this may disadvantage the partner who is not the primary caregiver following separation, we note that the extent of the disadvantage is limited to an inability to use and enjoy their property for a specified period of time, does not affect underlying property rights, and is rebuttable in situations where it would cause serious injustice. We also note that compensation in the form of occupation rent may also be available.

7.51 As noted at paragraph 7.25 above, the risk of a claim for occupation rent can deter primary caregivers from applying for an occupation order, as it can diminish their ultimate share of relationship property. Our proposal, outlined in Chapter 5: Section 15, to require partners with children to share their income for a specified period of time following separation, will go some way to responding to this risk. It will provide primary caregivers who are not the main income earner with an additional source of income, against which a claim of occupation rent could be offset. This will provide couples with more tools to negotiate an arrangement that best meets the children's needs in the period immediately following separation.

Improving other tools under the PRA

7.52 We propose a range of improvements to the other tools available under the PRA in order to better respond to children's needs in the period immediately following separation. We consider this is an area where the PRA can perform a role that respects and complements the role of other, more child-centred legislation such as the Child Support Act and the Care of Children Act.

Broadening the scope of furniture orders

7.53 We propose extending the scope of furniture orders to include other types of property that come within the definition of family chattels. We also propose clarifying that, when considering any application for a furniture order, a court must have particular regard to children's needs.

7.54 Currently, furniture orders are available only in respect of "furniture, household appliances, and household effects". However, Barnardos submitted that there are other types of property that are particularly relevant to children's interests. Barnardos pointed specifically to the need for children to have access to transport property. Children can be disadvantaged if the family vehicle goes to the parent who is not the primary caregiver when the partners separate. Leaving the primary caregiver and children without a vehicle can have a significant impact on children on a day-to-day basis, such as missing out on education and activities, visiting family and friends, or having to walk long distances to access public transport and services. Barnardos said it is currently seeing this as a particular issue impacting separated families and children in South Auckland. Barnardos also pointed to children's interests in respect of family pets. Children are often closely bonded and attached to family pets, and no longer living with or not seeing the family pet can have negative impacts on a child's wellbeing, which can manifest itself as another significant loss for a child.

7.55 We see merit in extending the scope of furniture orders to other family chattels, which are already defined in section 2 the PRA. We agree with Barnardos that the use of other types of chattels may benefit children, pending final resolution of property division.

Improving the focus on children's interests in postponement orders

7.56 We propose amendment to the provisions relating to postponement orders to require a court to grant an order if the effect of immediate vesting would cause undue hardship for any minor or dependent child of the relationship. This recognises that the effect of immediate vesting on the child may be different to the effect on the primary caregiver. We consider this will make the law more child-centred, while retaining the existing framework which enhances certainty.[481]

Clarifying that child support obligations are not affected

7.57 We propose amendment to section 32 of the PRA to clarify that an order made pursuant to sections 26, 27 or 28A is not grounds for departure from formula-assessed child support obligations under the Child Support Act. A consequential amendment will also be required to section 105 of the Child Support Act. This proposal would ensure that child support is not affected by the use of one of the tools under the PRA,[482] although a court will still have an obligation under section 32 to have regard to any child support payable when considering whether to utilise those tools.

Strengthening child participation in PRA proceedings

7.58 We propose strengthening child participation in PRA proceedings by lowering the threshold for appointing a lawyer to represent any minor or dependent child of the relationship to the simple "necessary or desirable" threshold used in section 162(2) of the Family Proceedings Act. This proposal recognises the importance of giving children a voice in matters that directly affect them, consistent with the rights affirmed under UNCROC (see paragraph 7.27 above).

7.59 Submitters generally agreed that children's views should be heard more often in PRA proceedings, and that section 37A should be amended to lower the threshold for appointment of lawyer for child. The Children's Commissioner submitted that a lawyer for child should always be appointed when children are involved. However NZLS submitted that section 37A should be retained in its current form, as more frequent appointment of lawyer for child could turn proceedings into a three-way contest between partners and children.

7.60 Barnardos, HRC and the Children's Commissioner all submitted in favour of giving children greater participation rights. The Children's Commissioner submitted that the PRA should direct that children's views should always be taken into account, whether a claim is heard in court or otherwise. Barnardos and HRC submitted that children should be given the opportunity to express their views in all matters affecting them, either directly or through a representative. Barnardos submitted that:

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481 In the Issues Paper we explored whether the undue hardship test should be replaced with a lower threshold: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [29.50]–[29.53]. We are satisfied that reform is not required. An order postponing vesting has potentially significant consequences for the partners. It could mean that a partner cannot re-establish themselves in new accommodation that allows the children to visit for overnight stays. We are not convinced that there is a significant need to lower the threshold for postponement orders if accessibility of occupation and tenancy orders is improved as proposed above.

482 See discussion in Sanne Berkman "Children in Relationship Property Proceedings: Are they getting a fair share?" (LLB(Hons) Dissertation, University of Otago, 2017) at 35–36.

> Unfortunately, when relationships breakdown and proceedings under the PRA occur, parents do not always discharge [their responsibility under UNCROC to treat the best interests of their children as their basic concern] and in some instances children are – whether intentionally or not – treated in ways that amounts to them being treated as property to be divided or retained.

7.61 Lowering the threshold for appointing a lawyer for child, along with our proposal at paragraph 7.47(c) above, will strengthen child participation in PRA proceedings. But we do not propose wider rights of participation for children. The PRA, as legislation that is primarily about partners' property entitlements, will not always have a significant impact on children. Providing greater rights of participation also runs the risk that parents may manipulate their children to support their own position, which would not be in the children's best interests. For these reasons we consider it is appropriate that a court have discretion to decide whether, in all the circumstances, it is necessary or desirable for a child to be represented by a lawyer in PRA proceedings, and to manage that process accordingly. Our proposal in respect of procedural rules at paragraph 7.36(c) above should ensure that a court is, in every case, given the basic information that will enable it to identify, and further inquire into, the need to appoint a lawyer for child on a case-by-case basis.

7.62 We also note the concerns raised by Peart regarding the decision in 2013 to repeal the court's power to order the lawyer for child's fees be paid out of public money rather than by the partners themselves.[483] We will address this issue in our final report.

Review of the child support regime is necessary

7.63 The role of the child support regime is to ensure that parents take financial responsibility for their children. However Fletcher's research identifies that child support payments are inadequate for many primary caregivers following separation (see paragraph 7.9 above). During consultation we heard from many submitters who also pointed to the inadequacies of child support payments in meeting children's needs. We propose a review of the Child Support Act to address the issues with the child support regime highlighted by Fletcher's research and our review.

[483] Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 13(1) Otago Law Review 27 at 54.