CHAPTER 8

Contracting out and settlement agreements

IN THIS CHAPTER, WE CONSIDER:

the ability of partners to make their own agreements under Part 6 of the PRA, and whether reform is required in relation to:

- the general scheme of Part 6 of the PRA;
- whether an agreement can govern trust property;
- the practical requirements for making valid agreements under Part 6; and
- the powers of a court to give effect to non-complying agreements, and to set aside complying agreements.

THE GENERAL SCHEME OF PART 6

Current law

8.1 The PRA has always allowed couples to "opt out" of the PRA by making an agreement which will govern the status, ownership and division of their property, instead of the PRA's rules.[484]

8.2 The PRA contemplates two types of agreements. Section 21 allows partners in a relationship or contemplating entering a relationship to make an agreement with respect to the status, ownership, and division of their property (a contracting out agreement). Section 21A provides that partners may enter an agreement for the purpose of settling any differences that have arisen between them with respect to the status, ownership and division of their property (a settlement agreement).[485]

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484 In a White Paper published on the introduction of the Matrimonial Property Bill 1975 to Parliament, the Minister of Justice explained it was not the Government's policy to "force married people within the straight-jacket of a fixed and unalterable regime of matrimonial property": AM Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 11.

485 Section 21D of the Property (Relationships) Act 1976 provides with more specificity the matters contracting out and settlement agreements may deal with without limiting the generality of ss 21-21A.

8.3 The PRA's provisions regarding contracting out and settlement agreements attempt to strike a balance. They promote partners' autonomy by granting them freedom to choose the property consequences of their separation. The PRA is, however, social legislation aimed at ensuring a just division of property between partners who may be of unequal bargaining positions. The provisions in Part 6 of the PRA therefore prevent a partner from signing away their rights without appreciating the implications of the agreement and their entitlements under the PRA. Part 6 also attempts to prevent a partner from entering an agreement when the partner is under improper pressure (Issues Paper at [30.14]). The provisions of Part 6 were discussed in detail in the Issues Paper, and are summarised below (Issues Paper at [30.15]–[30.45]).

8.4 Section 21F is the principal mechanism through which Part 6 of the PRA attempts to safeguard partners from bad or oppressive bargains. It provides that a contracting out or settlement agreement is void unless several requirements are met. They are:

(a) the agreement must be in writing;

(b) each party to the agreement must have independent legal advice before signing the agreement;

(c) the signature of each party to the agreement must be witnessed by a lawyer;[486] and

(d) the lawyer who witnesses the signature must certify that, before the party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

8.5 A court can, however, give effect to a void agreement, wholly or in part or for any particular purpose, if it is satisfied that the non-compliance with section 21F has not materially prejudiced the interests of any party to the agreement (section 21H).

8.6 Section 21J provides that, even if an agreement satisfies the requirements in section 21F, a court may still set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice. In deciding whether giving effect to the agreement would cause serious injustice, a court must have regard to the following matters (section 21J(4)):

(a) the provisions of the agreement:

(b) the length of time since the agreement was made:

(c) whether the agreement was unfair or unreasonable in light of all the circumstances at the time it was made:

(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):

(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering the agreement:

(f) any other matters that the court considers relevant.

8.7 If a contracting out agreement is set aside under section 21J, the PRA has effect as if the agreement had never been made (section 21M).

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[486] In respect of agreements entered into in New Zealand, the lawyer who witnesses the agreement must be the same lawyer that gave the independent legal advice: *Williamson v Williamson* (1980) 3 MPC 200 (HC) at 201.

Issues

8.8 In the Issues Paper our preliminary view was that the overall approach to contracting out and settlement agreements appears sound, and that the provisions in Part 6 generally strike the right balance between the interests of autonomy and protection (Issues Paper at [30.51]).

8.9 We recognised, however, that some partners may resolve PRA matters informally, without complying with the requirements under section 21F (Issues Paper at [30.43]–[30.44]). This might be because they do not know they have property rights under the PRA, or because they do not know they have to comply with the section 21F requirements when making an agreement. Or the partners might encounter practical challenges which make entering an agreement difficult, such as the need to have the resources to obtain independent legal advice. In relation to contracting out agreements, many partners will find it difficult to have conversations about protecting their financial interests should they separate in future. We noted that there may be a need for more public education about the opportunity to contract out of, or resolve PRA matters, by agreement (Issues Paper at [30.53]).

Results of consultation

8.10 We received many submissions that commented on the general ability of partners to make their own agreements, with most submissions focused on contracting out agreements. We received submissions from members of the public, practitioners, law firms and other organisations.

8.11 The New Zealand Law Society (NZLS) submitted that the PRA strikes the right balance in respect of offering partners the freedom to arrange their own property affairs and ensuring each partner contracts with informed consent. McWilliam Rennie Lawyers (McWilliam Rennie) also considered that the PRA strikes the right balance. It observed that contracting out agreements have become increasingly common, and increasingly normalised, in that clients generally seem to view them as more of a pragmatic necessity and less of a representation of lack of trust or expectation of failure in the relationship.

8.12 Submissions identified that people often consider or enter into contracting out agreements in situations where one or both partners bring property into the relationship. NZLS observed that partners entering contracting out agreements generally fall into three categories:

(a) partners who want to protect property for their children and do not want the equal sharing regime to apply without some modification;

(b) partners entering first relationships where there is a significant difference in the value of property each partner owns; and

(c) partners entering into second or subsequent relationships.

8.13 Submissions from members of the public suggest that the biggest reason for entering into contracting out agreements is to protect the family home from equal sharing when it was owned by one partner before the relationship began. This was also reflected in submissions from practitioners and law firms. McWilliam Rennie observed that contracting out agreements are also common when the partners are financially assisted into the family home by way of gifts or loans from family members. But a clear theme was that contracting out is not considered an adequate substitute for fair rules relating to

the division of relationship property. We discuss this theme further in Chapter 2: Classification.

8.14 Many members of the public told us of their own unsatisfactory experiences with contracting out agreements. Some were unaware of the ability to contract out of the PRA until after separation. Others said that their partner would not agree to a contracting out agreement, or that it created awkwardness and conflict in the early stages of a relationship, in some cases leading to a breakdown in the relationship. For others, the need for legal advice was seen as making contracting agreements too expensive. Some noted that as most people believe their relationship will not break down, the cost of legal advice is difficult to justify. It was also a common source of frustration to submitters that, because a court can set aside an agreement, it does not provide a guarantee that what they perceive as their separate assets are protected if the relationship ends.

8.15 Many submitters commented on the need to make contracting out easier and cheaper, including Community Law Wellington and Hutt Valley, Citizens Advice Bureaux New Zealand (CABNZ) and members of the public. CABNZ suggested that agreements should not need independent legal advice and should instead be able to be lodged with the Family Court, with the lack of legal advice being considered only in the event of a dispute. Some members of the public expressed the view that there should be an easier way for partners to enter into an agreement themselves.

8.16 Many submitted that there was a need for greater public education and information around contracting out and settlement agreements, including NZLS, McWilliam Rennie, the National Council of Women of New Zealand, the New Zealand Federation of Business and Professional Women, CABNZ, practitioners and members of the public. McWilliam Rennie noted this education needed to cover the complexity of agreements, the best time to make an agreement, why legal agreements are necessary and the time and cost to create agreements.

Results of the Borrin Survey

8.17 Results of the Borrin Survey provide, for the first time, a statistically representative picture of contracting out in New Zealand.[487] The Borrin Survey made several key findings:

(a) Seven per cent of all respondents said they made an agreement that was certified by a lawyer, while six per cent of all respondents said they had reached an informal agreement with a partner in the past, but did *not* get that agreement certified by a lawyer.[488]

(b) Twenty five of all respondents said they had considered making a contracting out agreement at some point in their life, but only 15 per cent said they had discussed it with a partner.[489]

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487 The Borrin Survey asked respondents about "making an agreement about how you and your partner would divide your relationship property or debts if you separated", which was then referred to as a "pre-nuptial agreement" that could be made before or during a relationship. See 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 [194].

488 At[195]–[196]. This was often based on a verbal agreement with the other partner.

489 At [195].

(c) Respondents were more likely to have considered making a contracting out agreement if they were living with a partner they were not married to (45 per cent), had experienced a previous relationship breakup after living with their partner for three years or longer (44 per cent, or 47 per cent of those who said there was relationship property to divide on separation), and those who had a dependent child in their household (31 per cent).[490]

(d) Respondents were less likely to have considered making a contracting out agreement if they were unaware of the general rule of equal sharing under the PRA (15 per cent), were Asian (17 per cent), were born outside New Zealand (18 per cent), were married (21 per cent), or rented rather than owned their own home (21 per cent).[491]

(e) Of the respondents who discussed making a contracting out agreement with their partner (15 per cent of all respondents), 47 per cent said that they certified the agreement with a lawyer, 30 per cent made a verbal agreement without involving a lawyer, and 12 per cent discussed it without reaching an agreement.[492]

(f) Of the respondents who considered, but did not discuss making a contracting out agreement with their partner (10 per cent of all respondents), reasons given for not discussing it included that they felt the relationship was not serious enough (16 per cent), there was no need to contract out (11 per cent), there was not sufficient property to divide (10 per cent), or the opportunity to discuss it never came up (10 per cent).[493] Overall, 39 per cent provided an answer suggesting they did not perceive the need for a contracting out agreement, while 30 per cent provided an answer suggesting concern that the discussion could have a negative effect on the quality of their relationship.[494]

Preferred approach

P40 The PRA should continue to enable partners to make their own agreement about how to divide their property during or in anticipation of entering into a relationship, and in order to settle any differences that arise between them. The procedural requirements in section 21F should continue to apply.

8.18 We are satisfied that the general scheme of Part 6 of the PRA remains sound. It strikes the right balance between allowing partners the freedom to make their own agreements about how their property should be divided on separation, while protecting vulnerable partners by ensuring that they enter such agreements with informed consent.

8.19 There is, however, a need for more public education including about the ability to contract out of or resolve PRA matters by agreement, and the procedural requirements for making those agreements valid and enforceable under the PRA. In Chapter 10: Resolution we recommend the publication of an information guide for separating

490 At [197].

491 At [198].

492 At [210].

493 At 47 (Figure Eleven).

494 At 47 (Figure Eleven).

partners, and that should also include information about contracting out and settlement agreements under the PRA. We also make recommendations in Chapter 10 that are directed to ensuring appropriate access to affordable legal advice when resolving PRA matters out of court.

8.20 The rest of this chapter considers specific issues with the provisions relating to contracting out and settlement agreements in Part 6 of the PRA.

AGREEMENTS AND TRUST PROPERTY

Current Law

8.21 Partners can only make contracting out or settlement agreements with respect to property they own.[495] As a general rule, trust property is not "owned" by the partners for the purposes of the PRA.[496] Even if a partner is a trustee of the trust property themselves, they legally own that property in their capacity as trustee, rather than in their personal capacity.[497] As a result, partners cannot agree in a contracting out agreement what will happen to trust property in the event they separate. Nor can they agree, in a settlement agreement, how trust property is to be divided.[498]

8.22 When a relationship ends, a partner may have a claim against a trust, under section 44 or 44C of the PRA, section 182 of the Family Proceedings Act 1980, or under the law of constructive trusts. Under the current law, trustees cannot be bound, through a settlement agreement, to use trust property to settle a partner's claim.

Issues

8.23 The widespread use of trusts in New Zealand means it is common for trust property to be bound up with PRA matters (Issues Paper at [30.58]). The inability to deal with trust property through a contracting out or settlement agreement raises several issues.

Agreements purporting to deal with trust property

8.24 In the Issues Paper we observed that, regardless of the strict legal position, in practice partners may agree to a division of trust property between themselves as if the property was their own and the trust did not exist (Issues Paper at [30.65]). The partners often record their agreement in a contracting out or settlement agreement, and the trustees will simply accept and apply the agreement.

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495 Section 21 of the Property (Relationships) Act 1976 (PRA) provides that partners can, for the purposes of contracting out of the PRA, make any agreement they think fit "with respect to the status, ownership, and division of *their* property". Similarly, s 21A provides that partners can, for the purpose of settling any differences that have arisen between them "concerning property *owned* by either or both of them, make any agreement they think fit with respect to the status, ownership and division of *that* property".

496 However some beneficial interests under a trust may constitute "property" within the meaning of the Property (Relationships) Act 1976, as may some powers to control a trust: see Chapter 6: Trusts for further discussion.

497 The law in relation to trustees is preserved where either partner is acting as trustee by s 4B of the Property (Relationships) Act 1976.

498 *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554. However we note that in some cases the courts have been prepared to take a more flexible approach: *M v S* [2012] NZFLR 594 (HC). See discussion in Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [30.62]–[30.64].

8.25 This practice is undesirable for several reasons. First, purporting to deal with trust property in a contracting out or settlement agreement may invalidate the agreement if it is challenged in future. Second, trustees have a duty to deal with the property in accordance with the terms of the trust. If they simply accept and apply the terms of the agreement, they may risk breaching their duties as trustees. Third, if the trustees are third parties, the partners cannot purport to bind them through their own contracting out or settlement agreement.[499]

8.26 In the Issues Paper we noted that there are ways to resolve questions about trust property in a contracting out or settlement agreement, without invalidating the agreement (Issues Paper at [30.66]).[500] A contracting out or settlement agreement can record the details of the trust and the arrangements in respect of the trust property. The agreement may then be made conditional upon the trust arrangements being completed. The trustees are then recommended to execute separate documents, such as a deed of ratification, linking the arrangements set out in the agreement to the trustees.

Settlement agreements resolving claims against a trust

8.27 Because trustees cannot be bound through a settlement agreement to use trust property to settle a partner's claim against a trust, sometimes the trustees may enter an agreement directly with the partners to settle the claim. Such an agreement would not be a settlement agreement under section 21A of the PRA. Rather, it would be a separate agreement exercised pursuant to the trustees' power under section 20(g) of the Trustee Act 1956 or under the trust instrument to settle claims relating to the trust.[501]

8.28 The need for a separate agreement settling claims against a trust is likely to become increasingly common, given our proposal in Chapter 6: Trusts to amend section 44C of the PRA to provide a comprehensive remedy to respond to the various ways in which a trust might hold property that is produced, preserved or enhanced by the relationship. We anticipate that amended section 44C will become the primary mechanism through which partners seek relief in respect of trust property at the end of a relationship. This may increase the number of potential claims under the PRA in relation to trust property.

Is reform required?

8.29 The limitations on dealing with trust property in contracting out and settlement agreements means that partners often have to contract with trustees outside the PRA framework. This might create additional and unnecessary costs and complexity, especially where the trust is a simple one, and the partners are the trustees and beneficiaries themselves. It may also be undesirable if the contracting out or settlement agreement is incomplete (in the sense that it depends on a separate ratification by the trustees, or the trustees to enter a separate settlement agreement with the partners), or

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

500 See discussion in Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21A.11]; and Rachel Dewar "s 21 Contracting Out Agreements: Best Practices" (paper presented to Legalwise Presentation Series, Wellington, 25 February 2016) at 19.

501 For trustees' powers to engage in dispute resolution, see Robert Fisher "Including Trusts in Relationship Property Arbitrations" (2014) 8 NZFLJ 76; and Law Commission *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts Fifth Issues Paper* (NZLC IP28, 2011) at ch 5.

does not record the partners' overall bargain, especially if key assets, such as the family home, are trust property (Issues Paper at [30.70]).

8.30 In light of these issues, in the Issues Paper we asked whether Part 6 of the PRA should be expanded to enable partners and trustees to resolve matters regarding trusts, and if so, what the appropriate amendments would be (Issues Paper at [30.72]).

Results of consultation

8.31 NZLS recognised that the proposal to enable partners to contract out and settle the division of trust assets under Part 6 of the PRA has merit, given the widespread use of trusts to hold family assets and the frequent disregard by partners of the legal requirements of trust law. It did not, however, support such a proposal. It submitted that the distinction between trust property and property owned by the partners should be emphasised, not blurred. It pointed to the risk of litigation by disaffected beneficiaries against trustees who implement settlements without reference to the beneficiaries of the trust. NZLS preferred continuing the developing practice of having two separate agreements, one to deal with the partners' property under the PRA and another property sharing agreement to deal with trust property.

8.32 McWilliam Rennie made a similar submission. It said that enabling partners and trustees to resolve matters regarding trust property under Part 6 of the PRA may appear attractive at first blush, particularly in simple cases where both partners are the only trustees and beneficiaries. However, it noted a number of issues arise where more complex trusts are involved, with numerous trustees and beneficiaries. For example, every trustee would have the right to peruse the agreement, raising privacy issues, and would be required to sign the agreement, raising cost issues. The trust, and perhaps individual trustees, would be required to obtain independent legal advice. McWilliam Rennie also raised an issue as to what extent the partners' respective lawyers would be required to provide advice about the trust to the partners. It considered that the current system seems to work well, with partners recording information in respect of the distribution of trust assets in their agreement as 'background', and recording that the division as set out in the agreement is conditional upon the trustees' consent and signature of the necessary trust resolutions. In tandem with the agreement, the trust lawyer prepares appropriate documentation to ensure the proper management of the trusts. This, McWilliam Rennie said, maintains the integrity of the trust and does not run the risk of privacy issues and of multiple lawyers having to advise trustees.

8.33 Few members of the public commented on this issue, and their views were mixed. Professor Nicola Peart shared anecdotal evidence that trusts settled by the partners during the relationship tend to be ignored for the purposes of settlement agreements, and the assets are treated as if they were relationship property owned by the partners. She questioned whether lawyers advising the partners check the trust deed to ensure it permits the property to be dealt with as envisaged in the settlement agreement.

Preferred approach

8.34 Our preferred approach is that the law governing contracting out and settlement agreements should retain the current distinction between trust property and the partners' personal property. While we recognise there would be advantages in enabling partners to make arrangements regarding trust property through contracting out and settlement agreements, we also recognise the disadvantages identified by submitters in

consultation. On balance, we are satisfied that the current approach, whereby arrangements in relation to trust property can be recorded in an agreement, and be given effect through separate documentation, achieves an appropriate balance between protecting partners' entitlements under the PRA and the preservation of trusts.

8.35 We are giving further consideration to whether trustees should be able to be a party to a settlement agreement, for the purposes of settling any claim against the trust. Our proposal in Chapter 6: Trusts to amend section 44C will, we anticipate, increase the number of potential claims against a trust arising in the context of PRA matters. There may, therefore, be a stronger case for enabling trustees to enter a settlement agreement for the purposes of settling any claims against a trust. This matter will be addressed in our final report.

WITNESSING CONTRACTING OUT AGREEMENTS THROUGH AUDIO-VISUAL COMMUNICATIONS

Current law

8.36 Section 21F sets out the procedural requirements for making valid agreements (see paragraph 8.4 above). One of these requirements is that the signature of each partner to a contracting out or settlement agreement must be witnessed by a lawyer (section 21F(4)). That lawyer must also certify that he or she has explained to the partner the effect and implications of the agreement (section 21F(5)).

8.37 It is unclear from section 21F whether a lawyer can witness the signature of a partner to the agreement via an audio-visual communication, like Skype or similar programmes.[502] To date there has been no case law on this issue. The Relationship Property Standing Committee of the NZLS Family Law Section has said that section 21F(4) implies that the witnessing and certifying lawyer is to be in the physical presence of the party signing the agreement.[503]

Issues

8.38 We understand that a question often arises as to whether a lawyer can witness a partner signing a contracting out or settlement agreement via an audio-visual communication (Issues Paper at [30.83]). The current uncertainty in the law is undesirable. If an agreement is witnessed via an audio-visual communication, there is a risk that the agreement could be set aside and the lawyer sued for negligence if the agreement was voided for lack of compliance with section 21F.

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502 The Contract and Commercial Law Act 2017 sets out some default rules regarding the use of electronic communication, for the purpose of clarifying that certain paper-based legal requirements may be met by using electronic technology that is functionally equivalent to those legal requirements (s 207). However while that Act addresses the use of electronic signatures, including electronic signatures of witnesses (ss 226–227), it does not address whether a signature, electronic or otherwise, can be witnessed via audio-visual communication.

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

8.39 There are clear advantages to allowing an agreement to be witnessed via audio-visual communication. For example, if a client and lawyer are in distant locations, there are obvious savings in travel time and costs.[504] But there are also risks. In particular:[505]

(a) the lawyer cannot be certain the document the partner signs and the document the lawyer is to sign are the same agreement;

(b) the lawyer cannot know whether the partner is affected by off-screen influences;[506]

(c) the lawyer may have difficulties verifying the identity of the person who signs the document; and

(d) there may be issues with the quality of the communication which may compromise the quality of the advice required by the PRA.

8.40 In the Issues Paper we asked whether the PRA should allow the signature of a partner to an agreement to be witnessed by a lawyer through audio-visual communication, and if so, what safeguards should be put in place to ensure the reliability of the witnessing process.

Results of Consultation

8.41 NZLS supported amending the PRA to allow for the signature of a party to a contracting out or settlement agreement to be witnessed using audio-visual technology. In its view, the issue was not so much about the reliability of the witnessing process but more about the reliability of the lawyer's certification that they have explained the effect and implications of the agreement. It also noted that it would be rare for a lawyer to witness an agreement without having first established a relationship with a client and being confident that when the client executes the agreement, they do so of their own free will. NZLS submitted that any safeguards should address issues identified at 8.39(a) and 8.39(b) above as well as any language issues, and ensure the process for witnessing the advice has been agreed to.

8.42 McWilliam Rennie agreed that witnessing via audio-visual communication should be permitted under the PRA, although they anticipated it being used as the exception rather than the rule. They noted that whether this is an appropriate means of certification would be part of the judgement call made by the lawyer when considering whether their client understands the agreement. It submitted that the agreement should be required to note that it was signed via audio-visual communication.

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504 In one of our consultation meetings with a practitioner, she said she had a client in London who wished to execute a contracting out agreement. The practitioner was therefore obliged to travel to London in order to witness and certify the agreement.

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

506 See also Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [R21F.07] which observes that it would not be desirable for agreements to be certified by video link or Skype in the absence of an overseas lawyer sitting with the overseas person, given there is no way of knowing who else might be present and what pressures may be brought to bear on the person signing the agreement.

Preferred approach

P41 A new provision should be included in Part 6 of the PRA to the effect that a lawyer may use audio-visual technology to witness a partner signing a contracting out or settlement agreement under section 21F(4).

8.43 We propose clarifying in the PRA the ability of a lawyer to witness a partner signing a contracting out or settlement agreement under section 21 or 21A using audio-visual technology.[507]

8.44 We do not propose prescribing a process that lawyers must follow in every case when using audio-visual technology. We consider this would be too burdensome and inflexible, given the wide variety of different situations in which lawyers may wish to use audio-visual technology to witness an agreement, and the risk that a prescribed process may be rendered unsuitable in light of future advances in technology. Ultimately, it will be up to the lawyer in question to decide how they will ensure the agreement is correctly witnessed.

8.45 Consistent with a lawyer's broader duties under section 21F (to provide independent legal advice and to certify that they have explained the effect and implications of the agreement), a lawyer should consider whether the use of audio-visual technology is appropriate in all the circumstances to witness a signature under section 21F(4). This should include consideration of:

(a) whether the partners agree to the use of audio-visual technology to witness the agreement;[508]

(b) the availability and quality of the technology that is to be used;

(c) the arrangements for confirming the identity of the partner who is signing the agreement;[509]

(d) the need for any safeguards to ensure that the partner signing the agreement is free from off-screen influences; and

(e) the arrangements for ensuring the agreement being signed is the same agreement the lawyer has explained the effect and implications of, under section 21F(5).

MODEL AGREEMENTS

Current law

8.46 Section 21E provides for model contracting out and settlement agreements to be made by regulation, in order to "minimise the legal expense of people who wish to enter into"

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507 We note similar provisions exist in the Courts (Remote Participation) Act 2010 in relation to audio-visual link, or AVL, which is defined in s 3 as:

> … facilities that enable both audio and visual communication between participants, when some or all of them are not physically present at the place of hearing for all or part of the proceeding.

508 In some cases a lawyer witnessing and certifying an agreement will also have a duty of care to the other partner (that is, the other party to the agreement): see for example *Odlum v Odlum* (1989) 5 FRNZ 41 (HC). It may be prudent, therefore, to ensure that both parties agree to the use of audio-visual technology.

509 This may be unnecessary if the lawyer already has an established relationship with the partner signing the agreement.

such an agreement (section 21E(1)). Only one model agreement has been provided, for contracting out agreements under section 21 of the PRA. It was made under the Property (Relationships) Model Form of Agreement Regulations 2001 (2001 Regulations).

Issues

8.47 In the Issues Paper we observed that the general view is that the model contracting out agreement prescribed by the 2001 Regulations is inadequate (Issues Paper at [30.91]–[30.94]).[510] As a result, it is unlikely that any lawyer would draft or certify a contracting out agreement based on the model agreement. The 2001 Regulations are therefore failing to meet the objective of minimising legal costs.[511]

8.48 The criticisms of the model contracting out agreement raise the broader question of whether any model agreement prescribed by regulations under the PRA could save on legal costs. Any model agreement would need to be adapted to the particular circumstances of each relationship and the agreement the partners have reached. The actual drafting of an agreement is only a portion of the work the lawyer must undertake, and usually lawyers will have their own precedent documents that will also save on time and cost.

Results of consultation

8.49 NZLS, McWilliam Rennie and Nicola Peart all submitted that the model contracting out agreement prescribed by the 2001 Regulations is an inadequate precedent. Nor did they consider that, if the deficiencies in the existing model contracting out agreement were remedied, it would save on legal costs. McWilliam Rennie noted that lawyers must always ensure that an agreement, whether based on a model or otherwise, meets their clients' needs and that they have provided adequate advice. They submitted that a model agreement may make contracting out more difficult, as it may be seen as the "norm" for the public, and may create an expectation for the client that the matter can be straightforward. This may also make it harder for lawyers to explain why their client's situation means the model is not appropriate. McWilliam Rennie submitted that a better way of saving costs for partners wishing to contract out would be the provision of better information about the documents they are likely to need to provide to their lawyer in order to complete such an agreement.

Preferred approach

P42 Section 21E of the PRA and the Property (Relationships) Model Form of Agreement Regulations 2001 should be repealed.

8.50 For the reasons given above, it is very unlikely that a model agreement could ever have the effect of minimising the partners' legal costs. We therefore recommend the repeal of

510 Stephen Franks "Yes Member: or why the model contracting out agreement is useless" (2001) 3 BFLJ 281; Nicola Peart (ed) *Brookers Family Law — Family Property* (online looseleaf ed, Thomson Reuters) at [PR21E.02]; and Karen Harvey-Vallee (ed) *New Zealand Forms and Precedents* (online ed, LexisNexis) at [3010].

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

section 21E to remove the potential risk that partners think reliance on a model form agreement is an effective means of minimising cost.

GIVING EFFECT TO NON-COMPLYING AGREEMENTS

Current law

8.51 Section 21H allows a court to give effect, either wholly or in part, to a contracting out or settlement agreement that fails to comply with the requirements in section 21F. Section 21H is aimed at capturing circumstances where the partners intended to create a legally binding arrangement but failed to do so under the requirements of section 21F.[512]

8.52 In order to give effect to a non-complying agreement, a court must be satisfied that:[513]

(a) there is a contracting out or settlement agreement, in terms of section 21 or 21A of the PRA;[514] and

(b) the non-compliance has not materially prejudiced the interests of either partner to the agreement.[515]

8.53 Even if satisfied of the above matters, a court retains a residual discretion as to whether to give effect to a non-complying agreement, either wholly or in part.[516]

Issues

8.54 In the Issues Paper we observed that some separating partners will make informal agreements to divide their property without observing the formalities under the PRA (Issues Paper at [30.96]). Results of the Borrin Survey (summarised at paragraph 8.17 above) also identified that almost as many people make informal contracting out agreements (six per cent of all respondents), as make formal contracting out agreements (seven per cent of respondents).

8.55 The question is therefore when a court should give effect to an agreement that fails to comply with section 21F. In the Issues Paper we also asked whether section 21H could be improved by providing more guidance on when a court should give effect to a non-complying agreement (Issues Paper at [30.97]).

Results of consultation

8.56 NZLS submitted that the test in section 21H is set at the proper threshold. It considered however that section 21H would benefit from additional criteria to guide a court on when a non-complying agreement should be given effect. It submitted that section 21H should

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

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

514 In *Phipps v Phipps* [2015] NZHC 2626, [2016] NZFLR 554 the Court held that the partners' agreement, reached at a Family Court settlement conference, was not an agreement under s 21A of the Property (Relationships) Act 1976 as it purported to deal with the distribution of trust property, which was not property "owned by the parties" in terms of s 21A.

515 In some cases the courts have found that, even if the agreement had complied with s 21F, the partner challenging the validity of the agreement would have entered it anyway. In those cases, the courts have said that the non-compliance has not materially prejudiced the interests of that partner. See for example *McGill v Crozier* (2001) 21 FRNZ 157 (HC); and *West v West* (2001) 21 FRNZ 157 (HC).

516 *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [21]; and *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [13].

be amended to incorporate provisions similar to those in section 21J(4) (set out at paragraph 8.6 above). NZLS also noted that an extra consideration could be whether the parties had complied with the terms of any informal agreement throughout the relationship.

8.57 McWilliam Rennie also considered that the test in section 21H is, broadly speaking, set at the proper threshold. It considered that if there was a clear and provable agreement that nevertheless failed to comply with section 21F, it should be given effect, either when neither party is materially prejudiced by the agreement or in circumstances when one partner has subsequently changed their own position in reliance on that agreement. It considered that these criteria should be set out in the legislation.

8.58 Some members of the public thought that non-complying agreements should be upheld if the agreement was in writing and signed, was not entered into under duress, and neither partner was concealing relevant information.

Preferred approach

8.59 We are satisfied that the test for giving effect to a non-complying agreement in section 21H is appropriate. While section 21H preserves a residual discretion to a court, we are satisfied that this strikes an appropriate balance between flexibility and certainty. Further, our review of the cases does not identify any cause for concern that this discretion is being exercised inappropriately.

8.60 We have given particular consideration to including in section 21H a list of matters for a court to consider, similar to those in section 21J(4). However we are not convinced that this is necessary, given the High Court has confirmed on several occasions that, when exercising residual discretion under section 21H, it is appropriate that a court have regard to the criteria in section 21J(4).[517] This is because it would be "illogical" to give effect to a non-complying agreement under section 21H, only to set that agreement aside under section 21J.[518] Matters, therefore, that are relevant to section 21J, such as the extent to which each partner has relied on the agreement, are also relevant to the exercise of residual discretion under section 21H.[519]

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517 *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [26]; *West v West (No 2)* [2004] NZFLR 164 (HC) at [53]; *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [14]–[16]; and *C v W* HC New Plymouth CIV-2010-443-192, 28 July 2010 at [59].

518 *McGill v Crozier* (2001) 21 FRNZ 157 (HC) at [26]. See also *Radisich v Taylor* HC Auckland CIV-2007-404-3276, 10 March 2008 at [11].

519 See for example *Yates v Yates* [2015] NZFC 1141, where Mrs Yates had acted upon a non-complying agreement, and the Court held at [82] that failure to give effect to the agreement under s 21H of the Property (Relationships) Act 1976 would cause considerable prejudice to Mrs Yates, who had implemented her side of the agreement without receiving the benefits promised to her.

VARYING OR UPHOLDING AN AGREEMENT IN PART

Current law

8.61 Section 21J provides that, even if an agreement satisfies the requirements in section 21F, a court may set the agreement aside if giving effect to the agreement would cause serious injustice. If an agreement is set aside, the provisions of the PRA apply as if the agreement had never been made (section 21M).

Issues

8.62 The effect of sections 21J and 21M is that a court is unable to salvage any part of an agreement that is set aside for serious injustice. This is in contrast to section 21H, which allows a court to give effect to a non-complying agreement "wholly or in part".

8.63 In the Issues Paper we observed that, even if some parts of an agreement would cause serious injustice, there may be elements of the bargain that the partners wish to retain (Issues Paper at [30.99]). It may therefore better serve the partners' intentions if a court could preserve some aspects of the partners' agreement, or vary the agreement rather than set the whole agreement aside.

8.64 We are mindful that the 2001 amendment to section 21J, raising the threshold for setting aside an agreement from "unjust" to "serious injustice", was based on a concern that the courts were setting aside agreements too readily.[520] In the Issues Paper we observed that partners and their advisers would need certainty on when an agreement would be varied or set aside completely (Issues Paper at [30.100]).

Results of consultation

8.65 NZLS submitted that a court should have the power under section 21J to set aside an agreement wholly or in part, or to vary an agreement. However a high threshold should be required before a court is able to do so. It also noted that if a court is to have this power under section 21J, there should be a similar provision for agreements that would be void for non-compliance under section 21F, but only if enforcement of the agreement would not cause serious injustice.[521]

8.66 McWilliam Rennie submitted that a court should have the power to set an agreement aside wholly or in part, but that this should be done only in circumstances where the parties consent to this occurring, and/or when a court is satisfied on the evidence that doing so does not render the entire agreement materially prejudicial to one party, or contrary to the intentions of the partners with respect to the overall distribution of property.

8.67 Jan McCartney QC also submitted that the courts need wider powers and discretions to give relief when contracting out agreements are, or have become, seriously unjust, including the power to vary or partially set aside an agreement, or to provide compensation in respect of an agreement.

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520 See *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235; and *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82].

521 NZLS submitted that if a court had a power to vary any agreement, s 25(1)(a) of the Property (Relationships) Act 1976 would need to be amended by adding a new paragraph (ii), "implementing in whole or in part an agreement made by the parties pursuant to section 21, but which has been declared void, wholly or in part, pursuant to section 21J or section 21F".

Preferred approach

P43 A court should have the additional powers under section 21J to set aside an agreement in part, or to vary an agreement if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.

8.68 We propose that a court should have the additional powers to partially uphold or vary an agreement under section 21J, if giving effect to that original agreement would cause serious injustice. We consider that granting a court these additional powers best promotes partners' autonomy to choose the property consequences of their separation, while still protecting a partner from serious injustice.

8.69 We note the risk of imposing an unintended bargain on the partners when a court varies or only partially upholds an agreement. Often agreements will include trade-offs and compromises. A partner may agree to accept less than an equal share of relationship property under a settlement agreement, for example, in return for the payment of an agreed amount of maintenance. A court should therefore only exercise the additional powers to partially uphold or vary an agreement if it is satisfied that the partners would have entered into the partially upheld or varied agreement in the first place. This will ensure that the partially upheld or varied agreement does not upset the partners' original bargain. We are also giving further consideration to the need for additional safeguards, and will address this in our final report.

CONTRACTING OUT AND CHILDREN'S INTERESTS

Current Law

8.70 The contracting out provisions in Part 6 of the PRA do not expressly refer to the interests of children.

8.71 Section 26 does, however, direct a court to have regard to the interests of any minor or dependent children of the relationship in PRA proceedings.[522] Children's interests may therefore be considered by a court when deciding whether to give effect to a non-complying agreement under section 21H, or whether to set aside an agreement if it would cause serious injustice under section 21J.[523]

8.72 The presence of children may also be relevant in determining whether an agreement gives rise to serious injustice. For example, the birth of a child following the execution of a contracting out agreement has been recognised as a significant matter relevant to the application of section 21J(4)(d).[524]

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522 Section 26 of the Property (Relationships) Act 1976 (PRA) also includes a power to settle property for the benefit of children of the relationship, and s 26(3) expressly notes that an order will have effect regardless of any agreement under pt 6 of the PRA.

523 *McMahon v McMahon* [1990] NZFLR 37 (HC) at 42–43; and *M-LA v AVW* [2012] NZFC 8640 at [38].

524 *M-LA v AVW* [2012] NZFC 8640 at [26]–[27].

Issues

8.73 The lack of reference to children's interests in Part 6 means that partners may be entering into contracting out or settlement agreements without having regard to how an agreement affects any children of the relationship. This may be a particular issue where partners enter into a contracting out agreement before the partners contemplate having, or have, children together.

8.74 An agreement that fails to recognise or provide for children's interests may disadvantage children. For example, the primary caregiver may have no rights of occupation or ownership in relation to the family home under the agreement. An agreement that fails to recognise or provide for children's interests also risks being set aside in future, on the grounds that it may cause serious injustice, under section 21J.

8.75 In the Issues Paper we asked whether the interests of children should be a consideration when partners enter into contracting out or settlement agreements, and identified two possible options for reform (Issues Paper at [30.105]–[30.110]):

(a) Option 1: Amend section 21D to require partners to have regard to the interests of their children, or to ensure they have made adequate provision for the needs of their children, when entering into a contracting out or settlement agreement.

(b) Option 2: Amend section 21J(4) to expressly require a court to consider the interests of children when considering whether giving effect to a contracting out or settlement agreement would cause serious injustice.

Results of Consultation

8.76 The Office of the Children's Commissioner submitted that, where there are children of the relationship, there should be no ability to contract out of the PRA. It considered that the interests and rights of children, as protected in the PRA, should always apply.

8.77 NZLS did not consider that children's interests should be a consideration when partners contract out of the PRA, as a contracting out agreement is about adult property rights, not children's rights. It submitted that incorporating children's interests as a consideration when reviewing a contracting out agreement is likely to add more complexity, uncertainty and expense, which is likely to outweigh any benefit. It also observed that it would be difficult for a lawyer to properly advise a client at the start of a relationship how the interests of children might be affected by a contracting out agreement if the relationship ends. If the interests of children are to be a consideration when entering into a contracting out or settlement agreement, NZLS preferred Option 2 (amending section 21J(4)) over Option 1 (amending section 21D). This was because the court's consideration of the interests of children will be at the time the parties are seeking to rely on their agreement, and the many different ways in which the end of a relationship could affect the children will have resolved into more concrete realities.

8.78 McWilliam Rennie submitted that a requirement to have regard to children's interests, or make provision for the needs of children, is potentially problematic in relation to contracting out agreements, as the parties may not know at the time the agreement is made whether they will have children and what those children's needs might be. In addition, if one partner has children from a previous relationship, it may not be reasonable for a new partner to be expected to consider their needs when making a contracting out agreement. McWilliam Rennie submitted that such a requirement would be less problematic when partners are entering into a settlement agreement, as at

separation the partners know how many children they have, and can make a better judgement call about their needs. McWilliam Rennie also supported an amendment to section 21J(4).

Preferred approach

P44 Section 21J(4) should be amended to require a court to have regard to the best interests of any minor or dependent children of the relationship in deciding whether giving effect to a contracting out or settlement agreement would cause serious injustice.

8.79 Our preferred approach is to clarify in the PRA that the best interests of any minor or dependent children of the relationship is relevant to a court's consideration of whether an agreement would cause serious injustice under section 21J.

8.80 This is consistent with the courts' current approach under section 21J, although we propose referring to children's "best" interests, in accordance with the proposals made in Chapter 7: Children's interests. Amending section 21J to reflect the courts' current approach has the advantage of providing clear direction to partners and their advisers, when drafting contracting out and settlement agreements, to consider their children's best interests (or otherwise risk the agreement being set aside in future). We prefer an amendment to section 21J over amending section 21D, as section 21D is focused on the subject matter of agreements, and it may be difficult to give proper effect to a duty to have regard to children's best interests at the time the agreement is entered into, which may be before any children are born.