A Colloquium on 40 Years of the PRA: Reflection and Reform

What relationships should be included in a property division regime?
A New Zealand perspective

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2016 celebrates two special anniversaries in New Zealand family property law: the ruby anniversary of the Matrimonial Property Act 1976 and the crystal anniversary of its progeny, the Property (Relationships) Amendment Act 2001. In the last four decades society has undergone rapid change, not least in the ways that its citizenry choose to live together and conduct their relationship property affairs. As social legislation, the Matrimonial Property Act 1976 and more recently the Property Relationships (Amendment) Act 2001, were crafted to respond to the changing needs of the populace and to provide an even playing field for couples on relationship breakdown. New Zealand family property law is often cited as an example of a modern and progressive property-sharing system and, for the most part, it works well. The system is not without flaws, however, as evidenced by the diverse range of issues that has emerged in relation to its interpretation and application.

Last year, Justice Minister Amy Adams announced that the Law Commission would undertake a review of the Property (Relationships) Act designed to consider any issues that may have arisen since the Act was last reviewed in 2001. According to the Minister, “[i]t is crucial that the law operates as effectively and as fairly as possible and the review is designed to ensure that is the case.”¹ This colloquium therefore provides a timely opportunity to reflect on whether further change is needed to our relationship property laws. The particular focus of this session is on the types of relationships that should be covered by a property-sharing system. The paper will examine issues concerning the relationships presently covered by the

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legislation, whether the law covers the right range of domestic relationships and what, if anything, might be done to improve the system in order for it to operate more “effectively and fairly”.

I. Relationships covered by the PRA

A. Historical context

The Matrimonial Property Act 1976, self-evidently, only applied to married couples. However, significant shifts in the composition of the traditional family unit in the last decades of the twentieth century, including increasing numbers of unmarried couples living in de facto relationships, led the policymakers and legislators to question whether the Matrimonial Property Act supported the sorts of informal living arrangements that were becoming widespread in the community, and whether it was fair to continue to exclude those couples who, for whatever reason, had not formalised their relationships. The Property (Relationships) Amendment Act 2001 marked a turning point in New Zealand family property legislation. One of the most fundamental changes was the extension of the equal sharing regime to heterosexual and same-sex de facto couples in qualifying relationships of three years or longer.

While the inclusion of de facto partners was largely a response to rapid demographic shifts in the population, it was nonetheless a significant change to the law, and one that was arguably ahead of the expectations and desires of some parts of the community at that time. The proposal to give de facto couples equal property rights to married couples met with strong opposition from some quarters. The amendments in the Property (Relationships) Amendment Act were initially contained in two separate bills, the Matrimonial Property Amendment Bill 1998 and the De Facto Relationships (Property) Bill 1998. There were significant differences between the rights under the two bills of married couples and de facto partners and there was no provision at all for claims by same-sex partners. In 2000, the newly elected Labour-Alliance coalition government proposed an amendment to the Matrimonial Property Bill to include heterosexual and same-sex de facto couples, and suggested that they should have the same rules for the division of property. This indicated a new policy direction that reflected


3 The Property (Relationships) Amendment Act came into force on 1 February 2002. The Act applies on separation and on death (PRA, Part 8). De facto relationships that ended before 1 February 2002 are not covered by the Act: s 4C. De facto relationships of less than 3 years are not covered (s 4(5)) unless the Court is satisfied that there is a child of the de facto relationship or that the applicant has made a substantial contribution to the de facto relationship, and the Court is further satisfied that failure to make the order would result in serious injustice (s 14A(2)). If so, the share of each de facto partner in the relationship property is to be determined in accordance with his or her contribution to the de facto relationship (s 14A(3)).
the view that there was little to distinguish the nature of these relationships and the property issues they faced.4

The Select Committee received many hundreds of submissions opposing the inclusion of de facto and same-sex couples in the same Act as married couples. A common refrain among submitters was that the inclusion of de facto partners would lead to the erosion of the special status of marriage in society and would devalue marriage as the preferred institution for enhancing strong family life.5 The Committee rejected claims that property entitlements of de facto couples and married couples were so different as to require separate laws, and recommended that they be covered by the same legislation. Parliament did bow to public pressure over terminology, however, by accepting that the special status of marriage ought to continue to be respected notwithstanding the inclusion of opposite and same-sex de facto relationships within the Act. The neutral expressions “relationship” and “partner” were thus abandoned in favour of the terms “marriage” and “de facto relationship”, and “spouse” and “de facto partner”.6

When the Bills were debated in Parliament members were given two conscience votes. The first, in favour of amending the Matrimonial Property Bill 1998 to include heterosexual de facto couples was won by a narrow majority of four votes based on party lines. The second vote, in favour of including same-sex couples was won 80 to 39. A number of the members who had voted against the inclusion of heterosexual de facto couples now voted in favour of same-sex couples in the interests of consistency. The legislation was re-named the Property (Relationships) Act 1976 (hereafter the PRA) to recognise the wider range of relationships covered.7

Following the enactment of the Civil Union Act 2004, the PRA was further amended to include registered heterosexual and same sex civil unions.8 Much like the inclusion of de facto couples a few years before, the Civil Union Bill proved controversial. Political opponents argued that it would undermine the role of marriage and families as the cornerstone of New Zealand society, casualise relationships,9 and that the next legislative step would be “gay marriage.”10 The Justice and Electoral Select Committee received over 3,000 public submissions on the Bill, more than 80 per cent of which were opposed to the law being passed.11 Significantly, however, polls of the general public indicated that the

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4 See N Peart, M Briggs, M Henaghan Relationship Property on Death (Thomson Brookers, Wellington 2004) at 15.
5 Above.
6 Above at 16.
7 Property (Relationships) Amendment Act 2001, s 5(1). A proposal in the Matrimonial Property Bill 1975 to extend the new Act to de facto relationships met with vocal opposition on the grounds that the recognition of these relationships would devalue marriage, and it was dropped before the Bill was passed into law: see N Peart “Towards a Concept of Family Property in New Zealand” (1996) 10 International Journal of Law, Policy and the Family 105, 113.
8 Civil Union Act 2004, s 4.
10 Judith Collins MP, National (24 June 2004) 618 NZPD 13943.
11 Civil Union Bill 2004 (149-2) (Commentary) at 3. A common concern was that the Bill would negatively impact on the number of people choosing to marry and that marriage was being systematically eroded: Civil Union Bill 2004 (149-2)
mainstream majority was not as radically split as those groups and individuals who made submissions on the Bill. In two polls taken at the time, a majority polled indicated their support for the Bill.\textsuperscript{12} The Civil Union Bill was treated as a conscience issue and was passed 65 votes in favour, and 55 votes against.

The last piece of the relationship equivalence jigsaw fell into place in 2013 when New Zealand amended the Marriage Act 1955 to provide marriage equality “for people wishing to marry regardless of their sex, sexual orientation, or gender identity.”\textsuperscript{13} While having no direct impact on relationship property matters per se, it is of note that the marriage equality proposal proved somewhat less politically divisive than the civil union law in 2004. When the Marriage (Definition of Marriage) Amendment Bill was put to a conscience vote, it passed its final reading 77:44 – a measurably wider margin than the Civil Union Bill’s 65:55 split.

\textbf{B. The de facto dilemma - towards a functional approach}

De facto couples now make up a significant and unignorable proportion of the New Zealand population living with a partner. In 1981 just 3.8 per cent of people lived with a partner to whom they were not married. By 1996 the number had climbed to 8.5 per cent, and by 2006 the figure had reached 20 per cent.\textsuperscript{14} The most recent 2013 Census records another modest rise to approximately 21.5 per cent.\textsuperscript{15}

The reasons why de facto couples do not formalise their relationships are manifold. For instance, some people feel no need for formal validation and therefore consciously choose not to marry, while others may not be able to marry because one or both of them is already

\textsuperscript{12} Civil Union Bill 2004 (149-2) (Commentary) at 10. A New Zealand Herald poll (2 October 2004) indicated 56 per cent in favour, 39 per cent opposed to the Bill, while a TV3 News poll (July 2004) indicated 59 per cent in favour, 39 per cent opposed.

\textsuperscript{13} Marriage (Definition of Marriage) Amendment Bill 2103 (39-1) (Explanatory Note) at 1. The Marriage (Definition of Marriage) Act 2013 came into effect on 19 August 2013. Section 5 of the Amendment Act amends s 2 of the principal Marriage Act 1955 by inserting a definition of marriage. Marriage is now defined as “the union of 2 people, regardless of their sex, sexual orientation, or gender identity.” Same-sex marriage has impacted on the numbers entering into civil unions. In 2014 the number of couples entering a civil union dropped to 63: <http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/CivilUnionsAndMarriages_HOTPDec14qtr.aspx>.

\textsuperscript{14} Mark Henaghan “Legally defining the family” in Mark Henaghan and Bill Atkin (eds) Family Law Policy in New Zealand (4th ed, LexisNexis, 2013) 1 at 11. The trend towards cohabitation outside marriage is common to many western countries. For a discussion of international trends see Bill Atkin and Wendy Parker Relationship Property in New Zealand (2nd ed, LexisNexis, Wellington, 2009) 24-27.

\textsuperscript{15} <http://www.stats.govt.nz/Census/2013-census/data-tables/total-by-topic.aspx>. In 2013 409,380 people identified themselves as de facto partners, compared with 1,430,379 married spouses and 60,882 partners (civil union partners and others who did not further define their relationship). A de facto partner is defined as a person who usually resides with another as a couple in a relationship in the nature of marriage or civil union and who is not married to, or in a civil union with, the other person.
married to someone else. The broad brush of the PRA does not discriminate between these reasons, but rather sweeps up all qualifying de facto relationships regardless. It may be possible to justify such catholic paternalism on the basis that de facto couples are free to contract out of the PRA if they choose although, as is discussed below, that is no answer for those people who are not aware that they are in a de facto relationship until the court rules that is the case.\(^\text{16}\)

One of the more convincing justifications for the inclusion of de facto relationships in the PRA is functional equivalence: de facto relationships function in much the same way as marriage or civil union despite lacking the formal attributes of a marriage or civil union. Many family law theorists argue that inflexible distinctions between relationships no longer provide a rational basis for legal policy, but that what is required is a more inclusive method of determining when and how adult personal relationships are recognised in the law.\(^\text{17}\) The functional approach posits that relationship status turns on the performance of relationship functions, not the fulfilment of formalised legal status. It identifies the essential characteristics of, or functions performed by, the paradigmatic relationship (the nuclear marital family)\(^\text{18}\) and determines whether an alternative relationship shares those characteristics. If it does, the argument is that the alternative relationship should receive the benefits accorded to the conventionally recognised relationship. The primary goal of this approach is to gain inclusion of non-conventional family forms in the definition of “family” so that they may receive benefits enjoyed by modern marital families.\(^\text{19}\)

Section 2D of the PRA provides the starting point for determining the existence of a de facto relationship:

2D  Meaning of de facto relationship

(1)  For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
    (a)  who are both aged 18 years or older; and
    (b)  who live together as a couple; and
    (c)  who are not married to, or in a civil union with, one another.

(2)  In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
    (a)  the duration of the relationship:
    (b)  the nature and extent of common residence:
    (c)  whether or not a sexual relationship exists:


\(^\text{19}\) Above.
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
(e) the ownership, use, and acquisition of property:
(f) the degree of mutual commitment to a shared life:
(g) the care and support of children:
(h) the performance of household duties:
(i) the reputation and public aspects of the relationship.

(3) In determining whether 2 persons live together as a couple,—
(a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if—
(a) the de facto partners cease to live together as a couple; or
(b) one of the de facto partners dies.

The “central plank” in s 2D – the test for functionality – is that the parties live together as a couple. In determining whether two persons “live together as a couple” all the circumstances of the relationship are to be taken into account including any of the matters listed in s 2D(2) that are relevant in a particular case. The list of factors assists in determining how the relationship functions. The factors are indicators rather than conclusive evidence of whether the parties were living together as a couple and, as s 2D(3) provides, no finding in respect of any of the matters stated in subsection (2) or in respect of any combination of them, is to be regarded as necessary, and a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.

The courts have consistently emphasised that a general and not overly technical methodology is required to determine whether the parties were living together as a couple. In the leading case of Scrapp v Scott the High Court noted that the approach to s 2D(2) must be broad, with various factors to be weighed up in an evaluative task, similar to those the Courts are frequently called upon to undertake when drawing conclusions from circumstantial evidence. The task requires the application of common sense and it is the cumulative weight of all factors whether specified in the Act or not which is decisive. In B v F Heath J warned judges against reaching final judgments “by an overly-mechanical application of non-exhaustive statutory criteria”, and in L v P Asher J cautioned that “[t]he factors in s 2D(2)…

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20 “The central plank of a de facto relationship is the parties living together”: L v P [2008] NZFLR 401 at [44], per Asher J. Note also that the effect of the requirement that both partners must be 18 years is that the PRA does not recognise the relationship until the younger of the two partners turns 18. If a relationship ends before the younger partner turns 18, the PRA does not apply. While most very young partners are unlikely to have much property to dispute unless they are the recipients of inheritances or the like, it seems unsound in both principle and policy to exclude a section of the population from the PRA for no good reason.
22 Above.
23 B v F [2010] NZFLR 67 at [51], per Heath J.
should not be allowed to assume primacy on their own as qualifiers for a de facto relationship”.

While there may be good reasons in theory for according de facto partners the same property rights as married couples and civil union partners, the practical reality of importing de facto relationships into the PRA - legislation originally designed in the 1970s to resolve property disputes between married couples - reveals a number of problems. There is no doubt that the PRA has made the legal position for many de facto couples less precarious and more predictable on relationship breakdown than under the previous law, where parties with a property grievance had to resort to other measures such as asserting a constructive trust. In the more “marginal” de facto cases, however, determining the existence and/or duration of the relationship is a complex task and can frustrate the key principle of the PRA “that questions about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.”

Marriage and civil union are registered legal states, have a definite starting point, and are entered into through conscious choice, whereas de facto relationships are informal, tend to develop gradually, and more often than not have no identifiable start date. Under the current system it is a question of fact and degree for the court to decide if a couple is in a qualifying de facto relationship and if so, when it began and when it ended.

The flexibility of the definition provided in s 2D has given rise to a substantial body of case law on what it means to “live together as a couple”. Unsurprisingly, parties to proceedings often hold quite different views on the nature and/or length of their relationship. Cases disclose striking variations in de facto couples’ personal circumstances and living arrangements. Heath J recognised as much in B v F:

[54] By their very nature, disputes … will often arise out of the unconventional living arrangements of particular individuals. To some extent, there will always be the problem of trying to fit a square peg (representing the parties’ choices about their own living arrangements) into a round hole (representing the concept of a de facto relationship, for the purposes of the Act). Nevertheless, even in an unusual relationship, the law requires a Court to evaluate the evidence to determine whether the legal threshold is met.

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25 PRA, s 1N(d).
26 Note, however, that if a marriage or civil union was immediately preceded by a de facto relationship between the parties, the de facto relationship must be treated as if it were part of the marriage or civil union: s 2B, s 2BAA. In this context, the start date for the marriage or the civil union is the start date of the de facto relationship.
27 Adding to the air of uncertainty, the same definition of de facto relationship is not currently applied in all legislation. Section s 29A(1)(a) of the Interpretation Act 1999 provides that a de facto relationship is “a relationship in the nature of marriage or civil union”. The definition was inserted by the Interpretation Amendment Act 2005, and applies to statutes that do not contain a definition of de facto relationship (s 4). The result of the two different definitions is that a couple might be in a de facto relationship in certain facets of their lives (eg a property dispute involving the PRA) but not in a de facto relationship in other aspects of their lives (eg for welfare benefit purposes under the Social Security Act 1964).
The courts have had to make difficult decisions on the application of s 2D in many different contexts and in borderline cases outcomes are unpredictable. Examples of the “unconventional living arrangements” referred to by Heath J include cases where applicants have asserted the existence of a de facto relationship where the couple has maintained a high level of independence such as living apart in separate dwellings for at least part of the relationship, where there is no sexual relationship, or where the relationship is more in the nature of lovers, or companions. It is irrelevant that some married couples and registered civil partners may conduct their relationships in an equally unconventional manner: functionality is unimportant when there is objectively identifiable proof of the formal relationship. As Frankie McCarthy aptly observes:

Couples in formalised adult relationships do not conduct themselves in a uniform manner. Whilst some spouses and civil partners may own property together, have a sexual relationship and co-parent children, none of these factors is essential to the existence of the marriage or partnership. A husband and wife who choose to live apart and speak rarely are just as married as spouses who spend each day together. This notion is reinforced by our modern law of marriage and civil partnership, which has stripped away most of the historical obligations owed by spouses to one another, leaving only a minimal obligation to aliment and title to claim financial provision should the relationship end. The only characteristic which all spouses and civil partners necessarily have in common is that they have formally registered their relationship. In other words, the one characteristic shared by all spouses and partners is the very characteristic that cohabitants by definition do not share.

29 See Scragg v Scott [2006] NZFLR 1076; G v B [2006] NZFLR 1047; B v F [2010] NZFLR 67 at [61] where Heath J observed that it was quite possible that “a person may share a family residence while electing not to sleep at that property exclusively, during the period of the relationship”.
30 See Horsfield v Giltrap (2001) 20 FRNZ 404 (CA), where the partners maintained separate homes and abstained from a sexual relationship because of their religious beliefs, but spent most of their non-working waking hours together, were emotionally dependent, ran a joint investment portfolio and had a relationship lasting 22 years. Although decided just prior to the enactment of the PRA, the High Court in Scragg v Scott [2006] NZFLR 1076 commented that the relationship in Horsfield v Giltrap would have qualified as a de facto relationship under the PRA. For further examples see the discussion in Fisher on Matrimonial and Relationship Property at 2.13.
31 Numerous examples exist. See DEBW v EFP FC New Plymouth FAM-2010-043-928, 18 May 2011, where the Court held that the relationship was "one of close friends who have cared for each other" [86]; PH v GH [2013] NZFLR 387 (HC), where "the overall tenor of the relationship during the relevant period was of a mature ‘dating’ or boyfriend/girlfriend type relationship’ [46] per Katz J, Coll v West FC Morrinsville FAM-2009-039-160, 26 April 2010, where the Court rejected the respondent’s claim that the applicant was no more than a boarder whom she took in out of financial need, finding that they lived in a committed relationship which was, at least initially, sexual and that there was emotional commitment throughout. Even a very lengthy relationship may fall short of what is required for a de facto relationship. In Greig v Hutchison [2016] NZCA 479 the Court of Appeal concluded there was no qualifying de facto relationship contemporaneous with the 47 marriage of the respondent and his wife, notwithstanding that the alleged de facto relationship had endured for 37 years. Even after all that time the Court found that there was an insufficient degree of mutual commitment to a shared life to support the existence of a de facto relationship: [81]. See also Chapman v P [2010] NZFLR 855; C v S FC Dunedin FAM-2005-012-157, 28 September 2006.
32 The notion of de facto partnership is also open to opportunism, not the least in cases where the elderly or physically disabled take another person into their home on terms that may begin on a business footing but subsequently develop into a closer relationship. The elderly and disabled may be at particular risk in this context, having neither the health nor the energy to resist the claim, leading to them cut their losses and opt for a settlement rather than go through the stress and uncertainty of court proceedings.
In addition to the judicial discretion aspect of de facto relationships, the court is unavoidably engaged in a process of retrospective decision-making. Thus, “[m]arriage and civil unions are opt-in relationships in which the commencement date is known, but the law may impose the legal status of a de facto relationship retrospectively upon parties whose relationship gradually and without conscious election assumed that character.” If an individual does not know that he or she is in a de facto relationship and subject to the PRA until the court decides that is the case, the individual cannot take pre-emptive measures to protect his or her property by, for example, contracting out of the Act. The prospective quality of marriage and civil union mean that they do not suffer from the same “element of surprise”. Marriage has always carried some proprietary consequences, even if only to impose maintenance obligations on separation, and spouses can reasonably be held to expect consequences will flow from the change of status. Similarly, a civil union is a registered relationship and the parties will normally have put their minds to the property consequences of entering the union.

Whereas people formally opt-in to marriages and civil unions, they generally only drift into de facto relationships, and this aspect may make the difference to a person’s awareness of their property rights and obligations. To apply an opt-out sharing regime such as the PRA to de facto relationships arguably creates unfairness if one does not know there is a law from which one may opt-out. Such an uncertain pathway into an otherwise largely rigid property-sharing regime therefore creates an awkward mix of discretion and inflexibility. Whether there are any solutions to this and what form they might take will be discussed in Part III of the paper.

II. Including other types of relationships in the property sharing regime

A. Overview

The first part of the paper examined the challenges raised by the inclusion of de facto relationships within New Zealand’s existing property-sharing regime. The second part considers whether there are other types of close domestic relationships that are currently excluded, but which should also be regarded as relationships to which property-sharing principles should be applied.

It has already been observed that New Zealand is generally seen to take a liberal approach to the types of relationships that are treated alike for property sharing purposes. Indeed, Atkin and Parker have observed, “New Zealand stands out on the international stage for its statutory equating of different types of relationship.” So far, however, New Zealand has restricted

36 See, for example, Bill Atkin and Wendy Parker Relationship Property in New Zealand above n 14 at 52.
recognition to people living together in “intimate couple” relationships. People in non-intimate domestic relationships such as an aged parent and an adult child, siblings, or platonic housemates, are excluded from the rights and obligations imposed by the PRA. Notwithstanding their exclusion, some of these domestic relationships may bear many of the functional characteristics of marriages, civil unions and de facto relationships. The “partners” may satisfy many of the indicia in s 2D(2) and make contributions to the relationship in the ways described in s 18. However, if the relationship ends and there are property matters to be resolved, such individuals must look for other ways to work out their disputes. Unlike New Zealand, some jurisdictions including most states in Australia, give relationship status to non-intimate domestic relationships.

There has been some limited support in New Zealand for the recognition of non-intimate domestic relationships within the property-sharing regime. At the bill stages of both the Property (Relationships) Amendment Act 2001 and the Civil Union Act 2004, some submitters argued that a wider range of relationships should be taken into account.37 When the Government Administration Committee reported back to the House on the De Facto Relationships (Property) Bill 1998 in September 1999 (before it was combined with the Matrimonial Property Amendment Bill 1998), the Committee recorded that four of the 163 submissions argued that the Bill should be widened to include all domestic relationships.38 Three of the four submissions suggested that New Zealand should follow the lead of the Domestic Relationships Act 1994 (ACT), which covers de facto and same-sex relationships, as well as a wider range of relationships such as where an adult child provides support to a parent. The Committee distinguished the Australian legislation, however, noting that a major difference between the ACT scheme and New Zealand’s proposal was that under the Australian scheme the court had wide discretionary powers to adjust the property interests of those in a domestic relationship. Thus an Australian court could tailor any property award to meet the facts of a particular situation, whereas the New Zealand Bill contained a presumption of equal sharing.39 Presumably, the Committee was concerned that pushing the relationship issue too far in combination with New Zealand’s rigid property division rules would be a step too far. It is of note then, that the wording eventually used in s 2D(2) and (3) of the PRA to determine the existence of a qualifying de facto relationship was taken from

37 There has also been academic support. In 2000, before the proposed changes to New Zealand's relationship property laws had been enacted, in a speech at the International Society of Family Law Conference, Bill Atkin observed that same-sex relationships were included in the amendments, but other domestic relationships such as family ones which were covered by legislation in other jurisdictions were excluded. Atkins noted that this was “a little anomalous, given that the focus is now firmly on the law of property, rather than the nature of the relationship, and is illustrated by the change of name from the Matrimonial Property Act to the [Property (Relationships) Act]. Logically, other domestic relationships, such as those between family members, could have been brought within the scope of the legislation”: Bill Atkin and Wendy Parker “De Facto Property Developments in New Zealand: Pressures Impeded Progress” in John Dewar and Stephen Parker (eds) Family Law Process, Practices and Pressures: Proceedings of the Tenth World Conference of the International Society of Family Law (Hart Publishing, Oxford, 2003) 555 at 562.
the De Facto Relationships Act 1984 (NSW). Like ACT, New South Wales applies a discretion-based methodology to property sharing.

Non-intimate domestic relationships were also discussed in the debates prior to the enactment of the Civil Union Act 2004. In a Supplementary Order Paper National Party MP Richard Worth argued that the Civil Union Bill was not inclusive and discriminated against non-sexual relationships such as those between siblings or friends. Mr Worth proposed replacing the term “civil union” with the term “civil relationship”, which would increase the number of couples who would be able to register their relationship and enjoy the protections and benefits that the companion Bill, the Relationships (Statutory References) Bill would provide. The proposal received some cross-party support in the House, with one MP arguing that registering a relationship did not have to be “a bedroom issue”, and that a lot of relationships would benefit from establishing clear next-of-kin status, provision of protection of jointly owned property, and would reflect “the investment over a period of years that [had] been given to the relationship by providing some legal framework and some legal protection around that”. However, supporters of the Civil Union Bill saw the Supplementary Order Paper as a delaying tactic rather than a serious proposal, and when put to the vote, the proposed amendments were defeated by a margin of 46 votes in favour to 74 votes against. Prime Minister Helen Clark observed that the issues raised by Mr Worth could be considered in another forum, but not in the context of the current Bill.

B. Demographic trends

The absence of any in-depth discussion in New Zealand on the issue of domestic relationships belies the reality that a large number of people currently live in a wide variety of domestic settings. A brief review of statistics gathered from the most recent 2013 Census reveals that many New Zealanders live together in ways that do not conform to the notion of the conventional nuclear family. Some of these alternative living arrangements could potentially qualify as domestic relationships. In 2013 there were 1,549,890 households in New Zealand, of which qualified as “families” (defined as two or more people

40 Property (Relationships) Act 1984 (NSW), s 4(1)–(3).
42 (9 December 2004) NZPD 17658.
43 (7 December 2004) NZPD 17437.
45 The Prime Minister suggested that the proposed amendment was a copy-cat measure of a similar amendment which was unsuccessfully tried by a junior Conservative MP in the House of Commons during the debates on the Civil Partnership Act 2004 (UK). The House of Commons rejected that proposal by 381 votes to 74 and went on to pass the Civil Partnerships Bill by 389 votes to 47: Kevin List “PM’s Presser: Civil Unions and Mr Zaouli's Bail” (press release, 7 December 2004).
46 The Census definition of a household is either one person who usually lives alone, or two or more people who usually live together and share facilities (such as for eating or cooking) in a private dwelling. A household may contain one or more families, other people in addition to a family, or no families at all, such as unrelated people living together: 2013 Census QuickStats about families and households, at 21 <www.stats.govt.nz>.
living in the same household who are either a couple with or without children, or one parent and their children). There were also 100,605 “extended families” (defined as a group of related people who usually reside together as a family nucleus with one or more other related people, or two or more related family nuclei, with or without other related people), ranging between one generation and three or more generations living in the same dwelling. Within the “extended families” grouping, 58.2 per cent of extended families consisted of three or more generations, 36.4 per cent consisted of two generations, and the remaining 5.4 per cent were one-generation families (such as couples living with siblings or cousins).

Many families included adult children living at home. 110,559 families included adult children aged 20 years or older, 42,894 of which included a child aged 30 years or over. In 11.9 per cent of one-parent families, the youngest child was aged 30 years or over. In addition, there were 72,384 “other” multi-person households, defined as households not forming a “family”, comprising either related people such as siblings, or related and unrelated people, or unrelated people such as flatmates.47

Social and economic conditions currently prevailing in New Zealand indicate that the number of multi-generational households, adult children remaining or returning to live with a parent or parents, and other multi-person household configurations is a trend that will continue to rise. For instance, with immigration numbers currently high, and with many people emigrating from countries where the incidence of multi-generational households is common, it might be supposed that there will be a corresponding rise in the number of multi-generational households in New Zealand. Fast rising real estate prices and the relative scarcity of housing could likewise have an impact on living arrangements and may influence people’s decisions to “join forces” in a single household. New Zealand’s ageing population may also create a rise in the number of elderly people living in households with close platonic companions.

C. Towards a fully functionalist approach?

The inclusion of de facto relationships in the PRA recognises that they function in much the same way as marriage despite lacking the formal attributes of a marriage. By logical extension, a functional approach ought also allow the case to be made that domestic relationships are, in many ways, the normative equivalent to marriage and marriage-like relationships. This would represent a genuine “movement towards a more fluid concept of relationships governed by redistributive law”.

In response to concerns that recognition of too wide a range of relationships would undermine traditional values, it has been argued that while a functional approach undoubtedly broadens the law’s reach, “it is unlikely to disrupt

48 McKenzie v Storer [2007] ACTSC 88 at [57] per Stone J.
the privileging of marriage and domesticity.”

Other relationships are recognised “…only to the extent that they mirror … the traditional nuclear family. Sex is expendable, but other aspects of domesticity are required. Therefore, the way of life known as marriage is largely affirmed, not challenged.”

Moreover, s 2D(3) of the PRA provides that in determining whether 2 persons live together as a couple no finding in respect of any of the matters stated in subsection (2) is to be regarded as necessary. Although a sexual relationship is a relevant consideration – an important one, even – it is not a precondition for a de facto relationship. This arguably supports recognition of domestic relationships, since all the other criteria listed in s 2D(2) support a functional approach and can be carried out by non-conjugal domestic partners just as they can by de facto partners.

Some New Zealand legislation already recognises non-sexual domestic relationships for certain purposes. For example, s 4 of the Domestic Violence Act 1995 provides that a person is in a “domestic relationship” with another person if the person is a spouse or partner, family member, ordinarily shares a household, or has a “close personal relationship” with the other person. In determining whether a person has a “close personal relationship” with another person, the Court must have regard to the nature and intensity of the relationship, and in particular the amount of time spent together, the places where that time is ordinarily spent, the manner in which that time is ordinarily spent and the duration of the relationship. However, it is not necessary for there to be a sexual relationship between the persons.

While judicial precedent is scarce, the case of Re Cotton (dec’d) reveals the practical reality that people in domestic relationships may struggle to find a cause of action to resolve property differences. The plaintiff, a trained teacher, was in her early 30s when she returned to the family home to help look after her elderly parents and a physically disabled brother. There was a family understanding that she would be financially reimbursed by her retirement being taken care of by her brother who, despite his disability, maintained a successful business career for many years. Unfortunately, the plaintiff’s sisterly devotion was not reciprocated because the brother, in breach of their agreement to provide for each other and without informing his sister, made a will in favour of two nephews. She successfully applied for provision from the estate of her brother under the Law Reform (Testamentary Promises) Act 1949.

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50 Hamilton, above n 18. The functional theory has also been criticised in that in order to achieve legal recognition of non-traditional relationships it fact implicitly concedes that the marital nuclear family is the paradigmatic form: Hamilton at 321.
51 Atkin and Parker, above n 14 at 42.
52 Re Cotton (dec’d) HC Dunedin CP18/00, 5 April 2001. See also Burden v United Kingdom (2008) 47 EHRR 38 (Grand Chamber, ECHR). There, two elderly sisters unsuccessfully appealed to the Grand Chamber of the European Court of Human Rights that the European Convention on Human Rights unfairly discriminated against them. Their argument was that when the first of them died, the survivor would be required to pay inheritance tax on the deceased’s share of the family home, whereas the survivor of a married couple or a homosexual relationship would be exempt from paying inheritance tax in these circumstances. The majority of the Grand Chamber (15:2) noted that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners. The fact that the applicants had chosen to live together all their adult lives did not alter this essential difference between the two types of relationship.
53 There was a second sister, but she had left home years earlier to get married.
The facts revealed a level of interdependence and a division of domestic functions between the brother and sister reminiscent of what might be found in many traditional marriages of days gone by. The degree of care and support between the parties would exceed that which exists in a large number of marriage or marriage-like relationships. In her evidence the plaintiff described herself as “a housekeeper, personal assistant and hostess”, and she characterised her life with her brother as an excellent one:

[right]

[S]ome people thought they were a married couple … [T]hey were committed companions for life; they lived together, travelled together, and had a good life. … [S]he cooked a three course meal every night … got his breakfast ready, and had lunch waiting for him when he came home in the afternoon. She washed and ironed his clothes.

The Court considered that to the outside world they appeared as a couple, the plaintiff's services going much further than the natural incidents and consequences of family life, thereby enabling the brother to accumulate his estate. Hansen J acknowledged that “[i]t is hard to conceive of a case where the support was as great as this particular one.”

*Re Cotton (dec'd)* shows that relationship functionality does not depend on being married, in a civil union or even a de facto relationship. It was fortunate that the existence of the promises could be established in that case. But in other cases claimants may be less lucky if they are unable to prove an express or implied promise by the deceased to reward the claimant for the services or work by making some testamentary provision for the claimant, for the purposes of the Law Reform (Testamentary Promises) Act 1949. Some individuals in domestic relationships may have recourse to remedies under the Family Protection Act 1955, or the ordinary principles of contract, property and trust law provided that they satisfy the qualification criteria. Even if they do, the outcomes under these laws are less predictable than under the PRA. If these avenues of redress are unavailable, a claimant could be left without provision. This may be especially problematic if the claimant had assumed a domestic caring role in the relationship, and is left without current work skills, or is at an age where re-entry into the workforce would be difficult. Spouses, civil partners and de facto partners in such circumstances would instead have recourse to the PRA and possibly also maintenance claims.

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54 The only two indicia missing from the list in s 2D(2) were: (c) a sexual relationship; and (g) the care and support of children. Yet, because the parties were related by blood, the PRA was unavailable to the plaintiff.
55 At [35].
56 At [41].
57 At [103].
58 Law Reform (Testamentary Promises) Act 1949, s 3(1).
59 Family Protection Act 1955, s 3. The plaintiff in *Re Cotton (decd)*, as the sister of the deceased, would not have been able to make a claim.
60 For example, the PRA applies a system of equal sharing of the relationship property, whereas other legislation requires the applicant to make out their claim, and the awards are discretionary.
III. The future of relationships and the PRA

One of the benefits of New Zealand’s system of property sharing has been to ensure, as far as possible, that a person’s property position is knowable at the end of the relationship without the need to go to court. Treating marriage, civil union and de facto relationships the same regardless of the formality or informality of the relationship strengthens the notion of an even playing field. At another level, however, the inclusion of de facto relationships within the system undermines the ideal of certainty because the notion of a de facto relationship is inherently uncertain. Placing de facto relationships into a system originally designed for married couples is awkward because it introduces uncertainty into legislation designed for maximum clarity. If non-intimate domestic relationships were added to the mix, there would be even more uncertainty. There are numerous responses to these problems, a few of which are noted in skeleton below.

A. Status quo

Cogent arguments exist for maintaining the current scheme of treating married couples, civil union partners and de facto partners alike. The inclusion of de facto couples in the PRA has been a largely positive addition and to make wholesale changes to rectify problems in a minority of unconventional or marginal cases would disrupt settled patterns of law that work well for the majority of people. Laws, after all, are better drafted for the norm rather than the exception.

A practical advantage in treating de facto partners much the same as married couples is that “the same body of jurisprudence” may be drawn upon “instead of re-inventing the wheel each time an issue arises.” To establish a separate statutory system tailored for de facto couples would create unnecessary duplication, incur the expense of setting up and operating a separate system, and could lead to claims of unfairness if an individualised scheme for de facto couples were to implement different rules for sharing and so on. Therefore, it may be as well to retain the current system in much the same form and concede that, as there is in any law, there will inevitably be the occasional casualty or “hard case”. It is difficult to envisage how the definition of de facto relationship in the PRA could be made any more certain – adding to or altering the list of criteria is unlikely to make any concrete difference.

Various safeguards are already built into the PRA that provide the courts with some leeway in both determining the length of the relationship and sharing the relationship property. These safeguards help to address some, though not all, of the marginal cases. Pursuant to s 14A a finding that the relationship is one of short duration (generally, less than three years, see s 2E

below) means orders cannot be made under the Act unless there is a child of that relationship or the court finds that the applicant has made a substantial contribution to the de facto relationship and that in those circumstances a failure to make an order would result in serious injustice. If those grounds are made out the share of each de facto partner in the relationship property is to be determined in accordance with the contribution of each de facto partner to the de facto relationship. Further, s 2E allows the court to make a finding that a de facto relationship is of short duration notwithstanding that it lasted for more than three years “if the Court, having regard to all the circumstances of the de facto relationship, considers it just to treat the de facto relationship as a relationship of short duration.”62 A further backstop is s 13, which enables the court to depart from equal sharing where “the Court considers that there are extraordinary circumstances that make the equal sharing of property… repugnant to justice.”63

While not a cure-all, one possible way to reduce the number of difficult de facto cases would be to review the three-year requirement for qualifying relationships. To the writer’s knowledge there is no special significance attached to the current three-year requirement.64 The threshold could be increased with the aim of securing evidence of a more settled and committed relationship. Shorter duration relationships with extenuating circumstances would continue to fall under the protection of s 14A. Extending the probation period for de facto relationships would not necessarily require an equivalent change for short duration marriages and civil unions because the formal entry requirements already put couples on alert to the property implications of their change in relationship status.

Of course, a likely result of retaining the current system would be that other non-intimate domestic relationships would not be included in any reforms. To add domestic relationships would create another layer of complexity in addition to the problems already generated by de facto relationships. Therefore, if domestic relationships were to be given recognition, more fundamental changes may need to be made to the way the PRA currently operates.

B. Two schemes

A more radical option would be to remove de facto relationships from the PRA, which would be limited to marriage and civil union. A separate scheme could be created for informal

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63 Where s 14A potentially applies, “an alternative argument can be mounted that the brevity of the relationship and a gross disproportionate contribution by one party should be addressed by application of section 13. This also could be particularly useful if the length of the relationship exceeds the limits of ss 14–14AA and the court is not minded to treat the relationship as one of short duration”: *Brookers Family Law – Family Property* (Wellington, Brookers, 2008) PR13.04.
64 For example, Australia imposes a two-year threshold, but that is coupled with discretionary property redistribution. A proposal in the Matrimonial Property Bill 1975 to extend the new Act to de facto relationships was dropped before the Bill was passed into law. The initial Bill proposal was to make strictly limited provision for parties to de facto marriages that lasted for at least two years, on the basis of giving the court a discretion to apply its provisions: *Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975* (AJHR 1975, Vol II, B 11 – E 19) E 6 at pp12-13.
relationships, including non-intimate domestic relationships (with an appropriate definition of the qualifying criteria). While it is outside the remit of this paper to inquire into alternatives for property division, one option would be to forgo the current equal sharing regime of the PRA, justified on the basis that since informal relationships are found at the discretion of the court, a more discretionary basis (quaere how much discretion) for property sharing is likewise warranted. An attenuated version of a discretionary scheme would be to regard equal sharing as no more than a presumptive starting point, but with greater room to depart from equal sharing in those cases where the relationship presents as “unconventional”.

A similar proposal was originally made in the De Facto Relationships (Property) Bill 1998, before it and the Matrimonial Property Amendment Bill 1998 were subsumed into the Property (Relationships) Amendment Act 2001. Under the original Bill, the presumption of equal sharing was to apply only to the family home and chattels, although if the court considered that equal sharing would cause serious injustice it would have a discretion to depart from the equal sharing presumption and divide the family home and chattels on the basis of the contributions of the partners. Relationship property other than the family home and chattels would have been divided according to the contributions of the partners.65

Disadvantages may well overshadow the advantages of such a proposal, however. As noted earlier, there would be practical costs and difficulties in setting up a separate scheme. Moreover, greater discretion would inevitably fuel the incentive to engage in litigation, resulting in more time and expense for the parties involved. In terms of policy, to reduce the level of protection currently enjoyed under the PRA would also be seen by many as a retrograde step, a rejection of functionality, and a value judgment that informal relationships are less worthy of equal sharing rights than married couples and civil union partners.

C. Opt-out v opt-in systems

A third alternative may be to treat the PRA as an opt-in scheme for all informal relationships. However, that option militates against the core protective function of including de facto couples under the PRA. Only a minority of couples currently contract out of the PRA, so to assume that large numbers of de facto partners and domestic partners would actively contract into the PRA seems unrealistic. An opt-in scheme would also be susceptible to claims of unequal treatment for informal partners.

Another option would be to leave the PRA much as it currently is, but to require non-intimate domestic partners to register their partnership in order to achieve legal recognition. As Richard Worth MP argued during the debates on the Civil Union Bill66 that could be achieved within the structure of the Civil Union Act 2004 by including “civil relationships”, thereby

65 De Facto Relationships (Property) Bill 1998 (108-1) cl 42.
66 (7 December 2004) NZPD 17437.
increasing the number of couples who would be able to register their relationship. Imposing a registration system on domestic partners may raise objections in both practice and principle, however. For instance it is unlikely that many people in close family relationships (such as the sister in *Re Cotton*) would think it necessary that they would need to register their relationship to protect their property interests. They would assume (as the sister in *Re Cotton* did) that the other family member would make adequate testamentary provision for them or otherwise not defeat their accrued property entitlements.

**CONCLUSION**

Family law uniquely represents a conjunction of law, sociology, ethics, religion and economics. This statement is particularly true of that part of family law which touches upon the property relations of husband and wife. There is a sense in which the law of matrimonial property is concerned, not with property at all, but with human relations and ideologies in respect of property.67

Kevin Gray made those observations in 1977 in his work on the *Reallocation of Property on Divorce*. In the four decades that have followed, little has changed. Relationship property law continues to be a mixed bag of disciplines that must be balanced against one another. Any alterations to the existing law will require careful consideration since they risk upsetting the delicate ecosystem already in place. The question of who should be included in our relationship property laws cannot be decided in isolation from the issues what should be included and how it should be divided. This colloquium provides the ideal opportunity to try to fit the pieces of the puzzle together.

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