Home is where the Half is

Division of the family home under the Property (Relationships) Act 1976

Emily McNaughtan

A dissertation submitted in partial fulfillment of the degree of Bachelor of Laws (with Honours) at the University of Otago, New Zealand

October 2017

Acknowledgements

To my supervisor Professor Mark Henaghan, for your constant positivity and encouragement. Thank you for all your advice, guidance and wisdom.

…

To my friends and family, for your ongoing love and support. A special thanks to Caity, Alex, Nee, Helena and Ange for not only being the best flatmates, but also such amazing friends. Also, to Pip and Max for all of your support.

…

To Annie, Mark and Mikay for always having my back and for believing in me.

…

To Mum and Dad, and to Richard, Annie, Andrew, William and Hannah, for supporting me in everything I do. And for challenging me to be better. I am forever grateful for everything you have done and continue to do for me.

Table of Contents

Introduction

This paper considers the unique position of the family home under the Property (Relationships) Act 1976 ("PRA"). In particular, its equal division after the dissolution of a marriage, civil union or de facto relationship[1] of three years or longer.[2] Division occurs regardless of ownership, or how or when the family home was acquired.[3] The principle underlying the PRA is that a relationship is a joint partnership. Upon separation, the wealth created by the partnership must be divided equally to reflect this.[4] Division of the family home irrespective of how it was acquired conflicts with this principle. In cases where the home was acquired through funds extraneous to the relationship, it cannot be said to be joint wealth created by the partnership.

The family home is distinct from other assets. It has many functions which conflict when property is divided post-relationship. First, occupiers often feel a strong emotional attachment towards the home. Second, the home functions as a shelter for the family. Third, the home is often central to family life and is uniquely referable to family relations. On the other hand, the home is an economic asset that must be divided fairly to represent a division of wealth created from a joint economic partnership. The present law reflects policies that were developed for different economic conditions and social expectations existing in the 1970s when the legislation was first enacted.[5] Changing family structures have increased the number of situations where equal sharing of the family home lies contrary to the policy of the PRA. The law creates different outcomes for division depending on whether rights to the family home arise from ownership or from a beneficial interest. There are also substantial differences in the division of assets acquired before the relationship depending on whether or not they are classified as the family home. These discrepancies often unfairly disadvantage one partner.[6] The courts are facing difficulties in attempting to solve modern problems and protect contemporary interests with an outdated legal framework. Change is clearly needed.

---

[1] In this paper, the word "relationship" in relation to the PRA refers to a "marriage" "civil union" and "de facto relationship" unless the context provides otherwise.

[2] Property (Relationships) Act 1976, ss 8(1)(a) and 11(1)(a).

[3] Property (Relationships) Act 1976, ss 8(1)(a).

[4] See Property (Relationships) Act 1976, s 1M.

[5] The Property (Relationships) Act 1976 was originally enacted the Matrimonial Property Act 1976.

[6] In this paper, the words "partner" and "spouse" in relation to the PRA are used interchangeably and refer to a spouse, civil union partner and de facto partner, unless the context provides otherwise.

The aim of this paper is to assess whether equal sharing of the family home remains justified by considering the diversity of current family forms, any inconsistencies created by the home's division and comparison with approaches adopted internationally. The New Zealand Law Commission is currently undertaking a project to review the PRA and will provide a report to the Minister of Justice in 2018.[7] The review includes an evaluation of the definitions of relationship property, separate property and whether the PRA facilitates the resolution of relationship property matters in accordance with the reasonable expectations of the parties. This paper seeks to provide insight on these points in relation to the family home.

Chapter One will consider the legislative history of the PRA to identify the original justifying for equal sharing of the family home. Chapter Two will highlight the changing family structures currently occurring in New Zealand and the problems created by the provisions of the PRA. Chapter Three will evaluate the different options available for reform by comparison of international jurisdictions. Lastly, Chapter Four will provide recommendations for reform.

[7] New Zealand Law Commission "Review of the Property (Relationships) Act 1976" (24 May 2016) <http://www.lawcom.govt.nz>.

Chapter One: History of New Zealand's Family Property System

There's no place like home.

A Overview of the current statutory regime

The division of relationship property in New Zealand is codified in the Property (Relationships) Act 1976 ("PRA"). Upon dissolution of a marriage, civil union or de facto relationship, each spouse or partner is entitled to an equal share in the family home, the family chattels and any other relationship property.[8] Separate property remains the property of the legal or beneficial owner.[9] Two main exceptions to equal sharing include where there are extraordinary circumstances making equal sharing repugnant to justice[10] or where the marriage or civil union is one of short-duration.[11] The family home is therefore given elevated protection over other relationship property and is divided equally regardless of how or when it was acquired.

The family home is the dwellinghouse that either or both partner's to a relationship use habitually or from time to time as the only principal family residence.[12] Enquiry into whether a dwelling is a family home is based on the use of the home rather than the time of purchase, or the source of funds from which it was acquired.[13] This is reinforced by s 8 of the PRA, which states that the family home is relationship property "whenever acquired".[14] This status is entrenched by s 10(4) which prevents the family home from being separate property unless there is a s 21 agreement contracting out of the PRA. Each

[8] Property (Relationships) Act 1976, s 11.

[9] Separate property is defined under s 9 of the Property (Relationships) Act 1976. However, separate property may become relationship property where any increase in value is attributable to the application of relationship property or the actions of the other spouse or partner under s 9A.

[10] Property (Relationships) Act 1976, s 13.

[11] Property (Relationships) Act 1976, ss 14 and 14AA. Equal sharing does not apply to de facto relationships of short duration (s 14A). "Short duration" is defined under s 2E to mean a relationship lasting for a period of less than 3 years subject to the court's discretion.

[12] Property (Relationships) Act 1976, s 2.

[13] See generally *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC), where it was irrelevant that the home had been acquired prior to the de facto relationship and the mortgage paid off as a gift from the husband's mother; and *Newman v Lee* High Court Greymouth CIV-2004-418-3, 23 March 2004, where Justice Fogarty held that those who occupy separate property as homes do so at their own risk.

[14] Property (Relationships) Act 1976, s 8.

partner to a qualifying relationship[15] is entitled to an equal share of the family home upon relationship dissolution.[16] In contrast, other property must fall within the circumstances listed in s 8(1)(c)-(l) to be considered relationship property, otherwise it is separate property exempt from division.[17] This creates inconsistencies in the division of property based on its classification. For example, if the family home was acquired by one partner during a relationship through gift or inheritance, it will be divided equally. A holiday home or other asset acquired under the same conditions would be separate property and its full value retained.[18] Similarly, a family home acquired before the relationship will be divided equally, while an asset acquired before the relationship will be separate property.[19]

Sections 11A and 11B provide compensation where the family home is sold or there is an absence of interest in the family home. If the family home is classified as a homestead[20] (commonly applying to farm properties), ss 12 and 12A provide compensation where each partner is entitled to share equally in a sum of money equal to the equity of either partner or both of them in the homestead. The court may also adjust the shares of relationship property if at the date of the qualifying relationship there were two homes that were capable of being the family home.[21] Further, s 20B states each spouse has a "protected interest" in the family home which is current during the joint life of the partners. One partner is not liable for the unsecured debts of the other partner, except for jointly incurred debts or where bankruptcy has resulted from acquiring, improving or repairing the family home. The value of the protected interest is either the specified sum[22] or one half of the equity of the partners in the family home, whichever sum is the lesser.

---

[15] A qualifying relationship includes a marriage, civil union, or de facto relationship longer than three years duration: Property (Relationships) Act 1976, ss 2, 14, 14A and 14AA.

[16] Property (Relationships) Act 1976, s 11(a).

[17] Property (Relationships) Act 1976, s 9(1).

[18] Property (Relationships) Act 1976, s 10(1)(i).

[19] Assets acquired before the relationship do not fit within the categories described in s 8 as they were not owned jointly (s 8(c)); acquired in contemplation of the relationship for common use (s 8(d)); or acquired during the relationship (s 8(e)).

[20] The homestead is defined in s 2 Property (Relationships) Act 1976 to mean a "family home where the dwellinghouse that comprises the family residence is situated on an unsubdivided part of the land that is not used wholly or principally for the purposes of the household".

[21] Property (Relationships) Act 1976, s 16.

[22] Property (Relationships) Act 1976, s 53A: The Governor-General may from time to time, by Order in Council, prescribe the amount that is the specified sum. Until a different amount is prescribed under this section, the specified sum is $103,000.

B Hypothetical scenarios

The following factual scenarios illustrate that equal sharing of the family home creates fair outcomes in some cases, but unfair outcomes in others. The scenario's will be re-considered in the Chapter Four of this paper to illustrate the application of any recommended reforms to the PRA.

(a) Scenario A

Bob and Jane met in their late 20s and began dating casually. After two years, the couple put a deposit on a home and moved in together. During the relationship, they raised a child together, both worked part-time and split household duties equally. After seven years, the relationship broke-down. Under the PRA, the family home would be shared equally as it is relationship property "whenever acquired".[23] In this scenario, the home was acquired by the joint-efforts of the parties and equal sharing appears to be fair and consistent with the purposes of the PRA in providing a just division of relationship property.[24]

(b) Scenario B

Lucy is a student and was gifted a house by her grandfather. During her university study, she organised flatmates to move into the house with her. Lucy and her new flatmate Fred became romantically involved with one another and after a year, they decided to share a room to reduce rental costs. The couple continued to live together for the remainder of their studies (a total of 6 years). After graduating, Fred decided to re-locate overseas and the couple split up. Under the PRA, Fred would be entitled to a half share of the home that Lucy was gifted prior to the de facto relationship.[25] This situation highlights some initial problems created by the presumption of equal sharing. Unlike Scenario A, the home was not acquired through the joint effort of the parties and Lucy is required to compensate half the equity of a home that she owned prior to the relationship.

(c) Scenario C

[23] Property (Relationships) Act 1976, s 11.

[24] Property (Relationships) Act 1976, s 1M.

[25] Property (Relationships) Act 1976, s 8.

Julie owned a family home before her first marriage, which lasted four years. Upon divorce, the value of the home was divided equally[26] and Julie paid out her ex-husband's share. She entered a second marriage and the second husband subsequently moved into the home. He owned an overseas investment property and had a valuable share portfolio, but had been living in a rented apartment in the city. After five years, the couple divorced. Under the PRA, the second husband would be entitled to an equal share in Julie's home.[27] She would essentially be required to pay the full value of the home in relationship property settlements between the two marriages. The assets owned by the second husband would be classified as separate property[28] and Julie would not be entitled to any share. Like Scenario B, a significant financial burden is placed on Julie. The Scenario further illustrates the inconsistency that depending on the type of asset owned, one partner may be able to exclude pre-relationship property while the other cannot.

C Historical development

Development of the New Zealand family property system provides insight as to why the family home was originally given elevated status. There is a strong historical association between the family home and the family unit, suggesting Parliament considered the home to be so central to family life that is should be shared equally in every relationship.[29]

1 Common law and the Married Women's Property Acts

Before the 1980s, the doctrine of matrimonial unity applied in common law countries.[30] Upon marriage, the legal identity of a wife was absorbed into that of her husband. The husband controlled the wife's property, or had extensive rights to control it, subject to certain equitable principles.[31] Changing social attitude demanding equal legal status to women prompted the enactment of the English Married Women's Property Act 1882 and

[26] Property (Relationships) Act 1976, s 8.

[27] Property (Relationships) Act 1976, s 8.

[28] Property (Relationships) Act 1976, s 9. The assets were acquired before the relationship began and were not acquired in contemplation of the relationship. An argument that the investment property was capable of being a family home at the commencement of the relationship and compensation should be awarded would likely fail due to the geographical location of the home: *VK v FK* FAM-2009-091-717, 1 February 2011.

[29] Property (Relationships) Act 1976, s 11.

[30] J H Baker *An Introduction to English Legal History* (Butterworths, London 1971) at 258-261.

[31] For a detailed discussion on this development see RL Fisher *Fisher on Matrimonial Property* (2nd ed, Butterworths, Wellington, 1984).

New Zealand's 1884 counterpart.[32] The Acts created a system of separate property allowing married women to deal with property under the ordinary rules of common law and equity.[33] However, performance of work in the home was not recognised and women who did not own property, investments nor professional earnings were left vulnerable.[34]

English courts dealt with this problem through the application of s 17 of the English Act, which allowed the court to "make such order with respect to the property in dispute… as he or it thinks fit".[35] This was interpreted as conferring wide discretion to make orders overriding the legal and equitable title of property where it was "fair or just" to do so.[36] Most cases involved division of the matrimonial home as it was the largest asset of the relationship.[37] English courts recognised the duties provided by a homemaker as justifying joint-tenancy in the family home. The judgments referred to the parties "joint efforts" in purchasing the home as a "continuing provision" for the spouses as justifying a departure from legal or equitable title.[38] In New Zealand, the courts adopted a narrow interpretation of the equivalent section to the English Act[39] and refused to interfere with title to property on the grounds of fairness and justness.[40] The conservative approach raised public concern and prompted legislative reform based on the more liberal approach taken in England.[41] This provides early indication of the emphasis placed on the matrimonial home above other assets due to its central function within families. The family home was the "battleground on which women's property rights were first developed".[42]

---

[32] Patrick Parkinson "Forty Years of Family Law: A Retrospective" (2015) 46(3) VLR 611 at 612.

[33] Married Women's Property Act 1884, s 3. See also *E v E* [1971] NZLR 859 (CA) at 872.

[34] Roberta McIntyre The Women's Parliament: *The National Council of the Women of New Zealand*, 1896-1920 (Victoria University Press, Wellington, 1996) at 35-40.

[35] Married Women's Property Act 1882 (UK), s 17.

[36] See *Hine v Hine* [1962] 1 WLR 1124 (CA) at 1127, where Lord Denning stated the court's jurisdiction was "entirely discretionary" and the court was entitled "to make such order as appears to be fair and just in all the circumstances of the case". This was approved by all members of the English Court of Appeal in *Appleton v Appleton* [1965] 1 WLR 25 (CA).

[37] See *Hine*, above n 36; *Appleton* above n 36; *Rimmer v Rimmer* [1952] 2 All ER 863 (QB); *Cobb v Cobb (No. 6)* [1955] 2 Al ER 696 (CA); *Fribance v Fribance (No. 2)* [1957] 1 All ER 357 (CA).

[38] *Rimmer*, above n 37, at 74 per Lord Denning; and *Hine*, above n 36, at 1127 per Lord Denning.

[39] The equivalent section being s 20 of the Married Women's Property Act 1884. This section was carried forward in successive Acts in very similar language: see the Married Women's Property Act 1908, s 23 and the Married Women's Property Act 1952, s 19.

[40] *Masters v Masters* [1954] NZLR 82 (HC) at 83. See also *Peychers v Peychers* [1955] NZLR 564 (HC).

[41] See for example the Joint Family Homes Act 1950 and the Matrimonial Property Act 1963.

[42] Hon John Priestley "Whence and whether? Reflections on the Property Relationships Act 1976 by a retired judge" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, 1 November 2016) at 8-9.

2 Joint Family Homes Act 1950

The Joint Family Homes Act 1950 was enacted over concerns that wives were not adequately protected against their husbands' creditors claiming against the matrimonial home. The Act was described by the National Government as reinforcing Christian family values.[43] It aimed to strengthen the family bond and recognise common interests of the husband and wife in the matrimonial home.[44] This purpose highlights the early association between the family unit and the matrimonial home. Settlement of the matrimonial home under the Act resulted in joint ownership by the husband and wife, with equal rights to its use and possession.[45] The Act protected against unsecured creditors, provided relief from gift and estate duty and enabled the home to pass by survivorship to the surviving spouse.[46] The initiative was popular,[47] however its use depended on the decision of the owner to settle the home under the Act.[48] In 1976, new family property legislation[49] created a "protected interest"[50] in the matrimonial home which essentially made the provisions of the Joint Family Homes Act redundant. In the second reading of the Bill, the Minister of Justice, D S Thomson stated that the "protected interest" is essentially "an enlargement and fulfilment of the principles of the Joint Family Homes Act".[51] This development shows the significance placed on the family home throughout the legislative history and entrenches the purpose of the Joint Family Homes Act into the division of family property.

---

[43] Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001) at 1.

[44] New Zealand Law Society *Matrimonial Property Report of a Special Committee* (presented to the Minister of Justice in June 1972) at 4.

[45] Joint Family Homes Act 1950, s 3. The Act allowed a husband or wife to register the family home as a joint family home under the Act (s 4(1)) which provided certain protections against creditors.

[46] RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed, LexisNexis) at B1.9.

[47] An average of 14,000 homes were settled under the Act in the years leading up to 1974: NZLS *Report of a Special Committee*, above n 44, at 4. Further, injustice often occurred where the home was sold or the settlor became bankrupt prior to cancellation: A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AJHR E6 at 4.

[48] Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975", above n 47, at 4. Injustice would often occur where the home was sold or the settlor became bankrupt prior to cancellation: NZLS *Report of a Special Committee*, above n 44, at 5.

[49] Matrimonial Property Act 1976.

[50] Property (Relationships) Act 1976, s 20B: One partner is not liable for the unsecured debts of the other partner, except for jointly incurred debts or where bankruptcy has resulted from acquiring, improving or repairing the family home. The value of the protected interest is either the specified sum or one half of the equity of the partners in the family home, whichever sum is the lesser.

[51] (1976) 408 NZPD 4565.

3 Matrimonial Property Act 1963 ("MPA 1963")

The MPA 1963 was enacted in response to the results eventuating from the New Zealand Married Women's Property Acts. The MPA 1963 enabled the courts to override legal and beneficial title of matrimonial property where the claimant could show contributions to the disputed property.[52] Contributions were recognised "whether in the form of money payments, services, prudent management, or otherwise howsoever".[53] Indirect contributions of the homemaker were recognised by the Minister of Justice, the Hon J R Hanan, who stated, while introducing the Matrimonial Property Bill 1975 into the House:[54]

> … in nine cases out of 10 the husband would not have been able to acquire the title to the home had it not been for the support and help of his wife. It can be her home as much as his, in fact if not in law.

One of the principal objects of the MPA 1963[55] was to recognise the importance of the matrimonial home in legislation and provide for its just and equitable division at the end of a marriage.[56] Accordingly, s 5(1) stated the court "shall" have regard to contributions in respect of the family home and "may" have regard to contributions in dealing with property other than the matrimonial home. The Privy Council in *Haldane v Haldane*,[57] stated that this legislative drafting may reflect a parliamentary feeling that a wife's contribution to the home merits special consideration because the home "is peculiarly the wife's sphere of activity and therefore of particular importance to her".[58] This suggests the duties of the homemaker were intrinsically linked to, and valued against, the home.

However, equal sharing under the MPA 1963 was seldom achieved as it was difficult to show non-financial contribution to property and financial contributions carried more weight.[59] In practice, the legislation conferred the right of the wife to apply for an "award"

---

[52] Bill Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships" (2001) 3 EJLR 349 at 350.

[53] Matrimonial Property Act 1963, ss 5 and 6(1).

[54] (1 October – 25 October 1963) 337 NZPD 3291.

[55] On the instructions of the Minister of Justice departmental officers had been working on new divorce legislation since 1958 in collaboration with legal practitioners nominated by the New Zealand Law Society.

[56] NZLS *Report of a Special Committee*, above n 44, at 6.

[57] *Haldane v Haldane* [1976] 2 NZLR 715 (PC).

[58] At 726-727.

[59] Finlay "Matrimonial Property – Comparable Sharing: an Explanation of the Matrimonial Property Bill 1975", above n 47, at 5.

of the home rather than equal sharing, which commonly did not exceed 30 per cent.[60] The overarching feature of the MPA 1963, which ultimately lead to its downfall, was the broad and unfettered judicial discretion to resolve matrimonial disputes.[61]

4 Matrimonial Property Act 1976 ("MPA 1976")

The MPA 1976 was enacted to control judicial conservatism and to reduce inconsistent awards resulting from the application of the MPA 1963.[62] The MPA 1976 was based on the principle that marriage is a partnership and each partner contributes equally, albeit in different ways.[63] Contributions were assessed in relation to the "marriage partnership", rather than contributions to property, as the MPA 1963 had required.[64] This removed any "artificial adjustments founded merely on money contributions" and protected women from economic frustration where they had "devoted themselves to their homes and their families".[65] The MPA 1976 created a system of deferred matrimonial property.[66] Each spouse was free to deal with his or her property during the marriage, but on marriage dissolution the community property regime applied and each spouse was entitled to a share in each other's property.[67]

---

[60] See for example *Re Baigent* (decd) (1988) 4 FRNZ 170 (HC), where the widow was awarded 20 per cent of the home and all other assets. See also: Priestley "Whence and whether?", above n 42, at 7, where the Hon John Priestley, stated that "some judges in the High Court required little persuasion to apply the principle of equal sharing to the matrimonial home, whereas with other judges one had to work very hard to rise above 25 per cent for a wife, despite similarities in such cases of the duration of the marriage and domestic responsibilities shouldered".

[61] *Haldane*, above n 58, at 725, approving the ruling in *E v E*, above n 33. See also Priestley "Whence and whether?", above n 42, at 7.

[62] There was growing following the decision in *E v E*, above n 33, where the Court of Appeal held the wife must prove contributions to each matrimonial asset in dispute rather than to the property as a whole: ((30 October 1975) 402 NZPD, 5116). By the time the Act was introduced, the Privy Council in *Haldane*, above n 58, had returned New Zealand to a more liberal approach whereby domestic contributions were indirectly referrable to non-domestic assets.

[63] Section 18 of the Matrimonial Property Act 1976 defined contributions to include tasks performed by the homemaker such as care of children (s 18(1)(a)) and the management of the household (s 18(1)(b)) alongside the earning of income (s 18(1)(c)) and the acquisition of matrimonial property (s 18(1)(d)) amongst other things. Section 18(2) stated there is no presumption that monetary contributions should be given more weight than non-monetary contributions.

[64] Matrimonial Property Act 1976, s 18.

[65] *Hofman v Hofman* [1965] NZLR 795 (SC) at 801.

[66] A H Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237.

[67] Matrimonial Property Act 1976, s 19.

The MPA 1976 elevated the status of the family home. Upon marriage dissolution, the matrimonial home, matrimonial chattels and the balance of other matrimonial property was shared equally.[68] The threshold to depart from equal sharing of other matrimonial property was easier to satisfy than the threshold for the matrimonial home and chattels. The party seeking to rely on the provision only had to show a clear difference in contributions, rather than a grossly disproportionate difference.[69] This discrepancy was justified with reference to English studies showing that married couples regarded the home differently to other assets.[70] The attitude in New Zealand was presumed to be the same. The Select Committee also felt that if general assets were subject to the same exception for unequal division, the courts would be less inclined to order equal division of the home if that finding also automatically divided the remaining matrimonial property.[71] A fixed interest in the home would provide security and certainty of interest to the wife, which was denied under the MPA 1963.[72] Justification for equal sharing of the matrimonial home was therefore based on the central significance of the home to family relationships. The Minister of Justice, the Hon. David Thomson stated the MPA 1976 accorded with major philosophical Government trends that "the family unit should be recognised and strengthened, and that there should be practical and effective protection for the quality of women".[73]

---

[68] Matrimonial Property Act 1976, s 16.

[69] Matrimonial Property Act 1976, s 15. Unequal division was attributable based on the contributions of the parties. See *Walsh v Walsh* (1984) 3 NZFLR 23 (CA), where the husband owned the family farm. Half the farm was acquired before the marriage and was separate property. The other half was acquired during the marriage was matrimonial property. The half acquired during the marriage (excluding the homestead) was divided 75/25 in favour of the husband, as the Court held the contributions of the husband were "clearly greater" than the wife. The marriage lasted 10 years, with two children of the marriage. The wife contributed to the farming operations and running the home. Under the revised law this would unlikely meet the test to depart from equality due to the length of the marriage and the homemaking contributions of the wife.

[70] J K McLay "The Matrimonial Property Act" (papers presented to the Legal Research Foundation Inc. Seminar, 2 February 1977) at 14.

[71] McLay "The Matrimonial Property Act" above n 70, at 14-15. The Committee considered that both the public and the courts would consider it unfair that a spouse who made no contribution to the building of an extensive business property would be entitled to receive half. This category of property should be able to be divided unequally more readily than the matrimonial home and chattels.

[72] Pauline Vaver "Notes on the Matrimonial Property Act, 1976" (papers presented to the Legal Research Foundation Inc. Seminar, 2 February 1977) at 55.

[73] (16 November – 14 December 1976) 408 NZPD 4564.

5 *Property (Relationships) Act 1976*

The MPA 1976 was amended in 2001 and renamed the Property (Relationships) Act 1976.[74] Among other amendments,[75] the provisions of the Act were extended to include de facto relationships[76] of three years or more in duration.[77] This aimed to create a unified set of rules for married and de facto couples in response to the increasing prevalence of cohabitation.[78] The emphasis of the PRA fundamentally shifted from marriage to relationships as is evident in the renaming of the statute.[79] In 2005, the PRA was further extended to include civil union partners.[80] The presumption of equal sharing of the family home under the PRA impacts a significantly larger number of people than under the MPA 1976. While the reforms recognised the changing nature of family structures occurring in New Zealand, the parliamentary debates did not consider the impact of the provisions relating to the family home.[81]

D Conclusion

The legislative history reveals that the original justification for equal sharing of the family home was based on the home's function as a central and significant family asset. This justification has not been properly recognised since the introduction of the MPA 1976. Subsequent reviews of the legislation assume the significance of the home has remained,

---

[74] Property (Relationships) Amendment Act 2001, s 5(2). The name change reflected the content of the Act and acknowledged that the reforms were amendments to the existing statute rather than a replacement: Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships", above n 52, at 356.

[75] For a detailed discussion see Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships", above n 52.

[76] "De facto relationship" is defined under s 2D to mean a relationship between 2 persons who live together as a couple". The section includes factors the court may take into account in determining the existence and length of a de facto relationship.

[77] Property (Relationships) Act 1976, s 14A.

[78] Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109–1) at 5.

[79] Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships", above n 52, at 364.

[80] Property (Relationships) Amendment Act 2005, s 3(4). This followed the enactment of the Civil Union Act 2004 that came into force on 26 April 2005.

[81] Parliamentary debates, instead focussed on whether cohabitating and married couples should be afforded separate or joint relationship property regimes. The decision was eventually made on the basis that to discriminate on marital status was contrary to the Human Rights Act 1993, as de facto relationships are often functionally similar to marriages and civil unions: Justice and Electoral Committee "Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25" [2000] Reports of Select Committees at 671.

rather than considering any impact of changing family structures. The approach can be summarised by the statement made in the Report of the Working Group on Matrimonial Property and Family Protection in 1988 in assessing the status of the family home:[82]

> The group can see no justification for any change in this situation. The reasons for strict division of what is usually the basic asset of the marriage remain as valid now as they were in 1976.

The assumed significance of the family home has been engrained in the legislation through the historical associations between the home and the family unit and the development of women's property rights and recognition of homemaking contributions pursuant to the family home. Justification should be considered in the context of New Zealand today, rather than based on an assumption created in 1976.

[82] Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 17.

Chapter Two: Problems with the PRA

If it ain't broke – don't fix it.

A Relationships as partnerships

The PRA was founded upon the view that relationships are partnerships. A "just" division of relationship property recognises that each partner contributes equally to the relationship, albeit in different ways.[83] Partnership implies shared functions, mutual rights and co-operation. Under this interpretation, the joint products or the "fruits" of the relationship should be shared equally when the partnership dissolves. Where one partner owned the home prior to the relationship, the full value of the home cannot be considered the joint effort of the partners. Similarly, a family home that was acquired by one partner through inheritance or gift by a third party is not a product of the relationship. Equal sharing of the family home therefore conflicts with the central philosophy of the PRA as it requires the full value to be divided in each of these scenarios.

Equal sharing of the family home acquired through extraneous sources to the relationship, often places a significant disadvantage on one partner and a financial advantage on the other. The following case example and current statistical analysis displays this difficulty. *Martin v Martin*,[84] involved a three-and-a-half-year marriage. The husband owned the family home unencumbered before the time of marriage and financed all the outgoings relating to the home. The wife remained at home and cared for three children, including one child of the marriage. The marriage was "not a happy one at any stage" but the Court considered that the parties had lived together as a couple under one roof and the marriage was not merely a shell.[85] The family home was accordingly split equally between the parties. The financial disadvantage placed on the husband in this scenario, can be considered against current statistics. In 2016, the median house price across New Zealand was $515,000[86] and the average salary was $56,472.[87] If living costs were deducted from

[83] Property (Relationships) Act 1976, s 1M(b) and (c).

[84] *Martin v Martin* [1979] 1 NZLR 97 (CA).

[85] At [101] per Woodhouse J.

[86] Lalaine C Delmendo "New Zealand's house price rises are decelerating. But for how long?" (8 December 2016) Global Property Guide <https://www.globalpropertyguide.com>.

[87] Statistics New Zealand "Earnings for people in paid employment by region, sex, age groups and ethnic groups" (24 August 2017) <http://www.nzdotstats.govt.nz>.

this salary (not including the costs attributable to rent, home ownership and property),[88] it would take approximately 15 years to earn the amount of money equivalent to a half share in a home.[89] In contrast, the PRA entitles an individual to this share after a three-year marriage, civil union or de facto relationship. Evidently, this outcome would be different where there was a mortgage over the home. Nevertheless, the analysis sits uncomfortably with the financial reality of everyday living.

B Changing family structures and social norms

Family structures have undergone significant changes since the enactment of the MPA 1976. This has created situations that were unlikely to have been considered in 1976 and has increased the prevalence of the scenarios described above. These changing family forms question the original justification for the presumption of equal sharing of the family home.

In the 1960s and 70s the most prevalent family structure was that of a nuclear family.[90] In 1972, the Law Society and the Department of Justice considered that most New Zealand families consisted of a wife who spent her youth and early middle age bearing and rearing children and tending to the home, while the husband was freed for economic activities.[91] It was recommended that this family concept should lie at the heart of any matrimonial property legislation, and the MPA 1976 was subsequently enacted on this basis.[92] However, New Zealand has experienced an increase in the diversity of family form over recent

[88] Statistics New Zealand "Average weekly household expenditure. By group, subgroup and expenditure levels. Years ended 30 June 2013 and 2016." (2016) <http://nzdotstat.stats.govt.nz>. The average spend per week is $1299.90 per household and there are approximately 2.5 people per household. $332.30 of this value is attributable to household and household utility costs. Therefore, the average expenditure is $421.60 per week per person and $21,923.20 annually.

[89] Average house price ($515,000) divided by the average income ($56,472) minus expenses per person ($21,923) is equal to 14.9 years.

[90] Jan Pryor "Children in Changing Family Structures" Victoria University (paper presented to 14th Biennial Australasian Human Development Conference, Perth, Western Australia, July 2005) at 5. The nuclear family consists of a working father and a mother who stayed home to look after the children.

[91] NZLS *Report of a Special Committee*, above n 44 at [19]–[20].

[92] NZLS *Report of a Special Committee*, above n 44 at [20]. In 1968, the Minister of Justice, the late Mr Hanan, referred to this quote and went on to say that this was the spirit in which the Matrimonial Property Act 1976 was conceived.

decades, influenced by social, demographic and economic changes.[93] Some of the major changes can be summarised below:

1. There has been a substantial increase in the number of cohabitating couples. Data from the 1981 census revealed that only 3.8 per cent of people over the age of 15 lived with a de facto partner.[94] This number has risen substantially to 21.5 per cent in the latest 2013 census.[95]

2. The prevalence of re-partnering has increased. The per cent of marriages in which one or both partners had previously been married increased from 17 per cent[96] in 1971 to 40 per cent in 2017.[97] Similar trends have been identified for de facto relationships.[98]

3. The rate of marriage is decreasing[99] and more marriages are ending before 5 years[100] and before 25 years[101] in duration.

4. Family formation is occurring later. The median age of men and women upon their first marriage increased from 23 and 20.8 in 1971, to 30.3 and 29 in 2016.[102] Women are having children later in life[103] and family sizes are decreasing. [104]

---

[93] Statistics New Zealand "Review of Official Family Statistics Consultation Paper" (March 2007) <http://www.stats.govt.nz> at [12].

[94] Statistics New Zealand *New Zealand Now: Families and Households* (Statistics New Zealand, Wellington, 1998) at 19.

[95] Statistics New Zealand "2013 Census information by variable" (3 December 2013) <http://www.stats.govt.nz>.

[96] Statistics New Zealand "Marriage and divorce in New Zealand – article" (March 2001) <http://www.stats.govt.nz>.

[97] Statistics New Zealand "Marriages, Civil Unions, and Divorces: Year ended December 2016**"** (3 May 2017) <http://www.stats.govt.nz> at 1.

[98] The 1995 Survey of New Zealand Women: Family, Education and Employment and the follow-up New Zealand Family Formation Survey in 2001 found that in the first two years after separation from cohabitation, around 30 per cent of women had re-partnered and 74 per cent within 10 years.

[99] In 1971 the marriage rate was 45.5 marriages per 1,000 unmarried persons aged 16. In 2016, this figure had decreased to 10.95 marriages per 1,000 unmarried persons: Stats NZ "Marriages, Civil Unions, and Divorces: Year ended December 2016" above n 97, at 3.

[100] Ministry of Social Development "New Zealand Families Today" (July 2004) <http://www.msd.govt.nz> at 28.

[101] 29 per cent of marriages registered in 1971 ended in divorce before 25 years, and 38 per cent in 1991; Stats NZ "Marriages, Civil Unions, and Divorces: Year ended December 2016" above n 97, at 6.

[102] Stats NZ "Marriages, Civil Unions, and Divorces: Year ended December 2016" above n 97, at 5.

[103] MSD "New Zealand Families Today", above n 100, at 29.

[104] MSD "New Zealand Families Today", above n 100, at 18.

5. Family types such as step and blended families, extended families and sole-parent households are becoming more common.[105]
6. The female labour force participation rate has increased and is now above the OECD average.[106] This trend is coupled with increased women's rights in the law,[107] increased participation in tertiary education[108] and a changing view of women in society.[109]
7. Couples previously became engaged and married before negotiating the details of the relationship, such as purchasing a home and raising children. [110] Today, the trend is reversed. Over three quarters of couples live together first and negotiate the relationship before marriage, often just before or after the birth of a child.[111]

These figures suggest the structure and progression of a nuclear family is no longer representative of the population of New Zealand. The broad range of family structures and situations present today, were unlikely to have been considered by the legislature in 1976. Examples include the situations described in Scenario B and Scenario C in Chapter One of this paper.

The original justification that the family home is a basic asset of a marriage is also questioned. In a nuclear family, a couple would become engaged and married before purchasing the family home and raising children.[112] The home was acquired during the relationship and was a central product of the relationship. Today, individual's frequently own the family home before they enter a relationship. Although the home still functions in the same way and is central to the operation of the family, it is not a central product of the relationship. In this situation, the home is a basic asset *to* the relationship, but it is not a

[105] Stats NZ "Review of Official Family Statistics Consultation Paper", above n 100, at [13].

[106] Ministry for Women "Labour force participation" (6 September 2016) <http://women.govt.nz>. The Labour force participation rate increased from 54.7 per cent in 1986 to 64.6 per cent in 2016.

[107] For example, women were granted equal pay under the Equal Pay Act 1972, the right to be paid parental leave under the Parental Leave and Employment Act 1987 and the 2004 Action Plan for New Zealand women aimed to promote women's financial self-sufficiency, work/life balance and general well-being.

[108] Ministry of Women's Affairs *Indicators for Change: Tracking the Progress of New Zealand Women* (2008).

[109] P Gendall "The Roles of Men and Women in Society: International Social Survey Program" (paper presented at Massey University Palmerston North, 2003).

[110] MSD "New Zealand Families Today", above n 100, at 18.

[111] Pryor "Children in Changing Family Structures", above n 90, at 7.

[112] MSD "New Zealand Families Today", above n 100, at 18.

basic asset *of* the relationship. Therefore, a blanket rule securing equal division of the family home cannot be supported by the original justification that the home is assumed to be a central asset to every relationship. The role of families is often used as a vehicle for a range of policy interventions.[113] Accordingly, as the typical nuclear family of the 1970s is no longer representative of New Zealanders, therefore the policy and justifications originally implemented in 1976 must be changed to reflect society today.

C Departure from equal sharing – s 13 PRA

Equal sharing may be departed from where the court considers there are extraordinary circumstances making equal sharing repugnant to justice.[114] The section was intended to be used in a very limited number of situations. The words "extraordinary circumstances" and "repugnant to justice" have been recognised as strong words reflecting Parliament's intention that equal sharing of relationship property must not be eroded in the ordinary circumstances of a relationship.[115] However, recent cases appear to stretch the interpretation of s 13, indicating a discrepancy between the law, changing family forms and societal expectations.

The courts have traditionally allowed unequal sharing in two factual situations. First, where property was acquired towards the end of the relationship, with equity extraneous to that relationship.[116] For example, in *McLaughlan v McDonald,*[117] contribution of the equity in a family home 12 months prior to the couple's separation was sufficient to trigger unequal sharing of 65/35. In *Dew v Dew,*[118] the wife contributed all the equity for purchase of the family home from sources extraneous to the relationship, including inheritance received towards the end of the relationship. She took almost all the responsibility for raising the children and worked part-time to supplement financial shortfalls due to the husband's lack

[113] Stats NZ "Review of Official Family Statistics Consultation Paper", above n 100, at [16].

[114] Property (Relationships) Act 1976, s 13.

[115] *Martin v Martin*, above n 84, at 111.

[116] See *Carson v Carson* [1980] 1 NZLR 14 (CA); *Waldron v Waldron* (1990) 6 FRNZ 683 (DC); *Humphrey v Humphrey* (1990) 7 FRNZ (FC); and *Crossan v Crossan* 23 FRNZ 305 (FC). In *Byrne v Byrne* (1986) 2 FRNZ 340 (FC), Williamson J dealt with a case where the wife contributed $124,000 toward the purchase and construction of the family home, while the husband contributed $20,000. The wife's contribution was sourced from inherited moneys six months before the couple separated in a marriage of 12.5 years. A division of 65/35 in favour of the wife was justified. The contribution of inherited capital, was held to be the only outstanding factor that might have justified unequal sharing of the family home.

[117] *McLaughlan v McDonald* FC New Plymouth 14 February 2006.

[118] *Dew v Dew* [2013] NZFC 4258.

of ability to apply himself in his work, instead choosing to consume cannabis and alcohol. A division of 75/25 was awarded in favour of the wife.

Second, unequal sharing has been awarded where there were grossly disproportionate contributions during the relationship. In *Kauwhata v Kauwhata*, Baragwanath J observed that most cases of unequal sharing involve "features of moral deficiency, such as failure to contribute significantly let alone to the best of one's ability, chronic alcoholism destructive of the relationship, or cynical manipulation".[119] These situations display the difficulty in satisfying the s 13 threshold and the determinacy of the courts in upholding the presumption of equal sharing.

However, recent cases appear to establish a third factual category extending the application of s 13. Traditionally, gross difference in financial contributions, such as providing the family home prior to the relationship, would be insufficient to justify unequal sharing.[120] However, cases such as *Bowden v Bowden*,[121] *Vann v Fay*[122] and *Venter v Trenberth*[123] indicate that financial disparity, coupled with other factors, may be regarded as extraordinary in the circumstances of a relationship.[124] In these cases, significant departures from equal sharing were awarded where the circumstances of the relationships do not seem altogether removed from an ordinary relationship. The cases display the following factual similarities:

(a) Each case involved a de facto relationship of three-four years in duration, being around 10-15 per cent of each partner's adult life.[125]

(b) Each partner had previously been married and had settled relationship property with their former spouse before the commencement of the relationship.

---

[119] *Kauwhata v Kauwhata* [2000] NZFLR 755 (FC) at [44].

[120] See generally *Martin v Martin*, above n 84; *Williams v Williams* [1979] 1 NZLR 122 (CA); and *de Malmanche*, above n 13.

[121] *Bowden v Bowden* [2016] NZHC 1201.

[122] *Vann v Fay* [2016] NZFC 1676.

[123] *Venter v Trenberth* [2015] NZHC 545

[124] *Brown v Starke* [2016] NZFC 7132 at [47] per Judge Fleming, while describing the ratio in *Bowden v Bowden*, above n 121.

[125] *Bowden v Bowden*, above n 121, involved a relationship of three years and six months; *Vann v Fay*, above n 122, involved a relationship of four years and two months. *Venter v Trenberth*, above n 123, involved a relationship of four years.

(c) Most assets, including the family home, were brought into the relationship by one partner.[126]

(d) Each partner kept separate finances and there was no joint bank account.

(e) There were no children of the relationships.

(f) The home-owner predominantly met the cost of running the household while the other partner made small, but not insignificant, financial contributions.[127]

(g) The couples did not acquire any relationship property together.

(h) Each partner's earning capacity remained the same before and after the relationship.

In *Vann*, Judge M B T Turner felt that while none of the factors could be described as extraordinary individually, their cumulative effect lead to the conclusion that extraordinary circumstances existed in the 3-and-a-half-year relationship.[128] A split of 65/35 was awarded in favour of Mr Fay. Similarly, in *Venter*, a combination of all the factors of the relationship made the relationship extraordinary.[129] A split of 85/15 was awarded in favour of Mr Trenberth. Woolford J considered that equal sharing of relationship property would be "completely unfair" in light of the principles and purposes of the PRA.[130] The lack of economic disadvantage placed on Ms Venter was emphasised and that she had, in fact, been financially advantaged through rent or mortgage free accommodation and fully paid overseas holidays. Similar remarks were made in *Bowden*, where the Court awarded an 80/20 split.[131] In all three cases, the intangible benefits of love, friendship, loyalty and support were considered.[132] However, each judge considered that these were mutual and did not provide sufficiently more weight in favour of one partner.[133]

---

[126] In *Bowden v Bowden*, above n 121, the homestead was valued at $395,000; In *Vann v Fay*, above n 122, the home was valued at approximately $300,000; In *Venter v Trenberth*, above n 123, the home was valued between $562,500 and $617,500.

[127] In *Bowden v Bowden*, above n 121, JB contributed $100 per week; In *Vann v Fay*, above n 122, Ms Vann contributed towards the cost of groceries and other expenditure from time to time; In *Venter v Trenberth*, above n 123, Ms Venter contributed $500 per week.

[128] *Vann v Fay*, above n 122, at [139].

[129] *Venter v Trenberth*, above n 123, at [22].

[130] At [25].

[131] At [66].

[132] *Joseph v Johansen* (1993) 10 FRNZ 302 (CA) at 307 emphasised it is crucial not to de-value intangible benefits.

[133] *Bowden v Bowden*, above n 121, at [55]; *Vann v Fay*, above n 122, at [70]; *Venter v Trenberth*, above n 123, at [29].

These decisions represent a significant departure from the established principles under s 13. First, the factual scenarios do not display the same level of imbalance in contributions as other cases decided under the section. For instance, *Dew v Dew* (discussed above),[134] involved a similar split of relationship property (75/25) however the difference in contributions were much more significant compared to the normal nature of the relationships in *Vann, Venter* and *Bowden*. Second, although such circumstances may have been extraordinary when the legislation was enacted in 1976, changing demographic and social trends means this type of relationship is common in New Zealand and not "extraordinary". Third, it had previously been argued that due to the 2001 amendments and changing social norms, the previous rigidity of s 13 should be relaxed and applied more liberally to family homes.[135] This argument was firmly rejected by the High Court in *de Malmanche v de Malmanche,* where the Court stated the policy of s 13 "remains unchanged".[136] In contrast to this statement, the cases appear to change and widen the application of s 13.

The outcomes are "just" considering shifts in society, however they clearly step beyond the intended scope of the provision. However, they show that courts have recognised the imbalance between the outcomes under the PRA and the changing expectations of society, and are attempting to use the discretion available to re-distribute property division in certain situations. However, increased judicial discretion was one aspect linked to the downfall of the MPA 1963[137] and has attracted criticism in overseas jurisdictions.[138] Each of the cases presented very similar factual scenarios, yet the results diverge from 65-85 per cent awarded in favour of the home-owner. The discrepancy in awards produces unpredictability and uncertainty, which may encourage further litigation. The courts are attempting to solve modern problems with an outdated legal framework, suggesting change to the underlying legislation is greatly needed.

D Ability to contract out

It is argued that people who wish to avoid equal sharing of the family home can do so by contracting out of the PRA. As Fisher J stated, those who criticise the PRA "are invariably

[134] *Dew v Dew*, above n 118.

[135] *de Malmanche*, above n 13, at [129].

[136] *de Malmanche*, above n 13, at [138].

[137] Priestley "Whence and whether?", above n 42, at 7.

[138] See generally John H Wade "Matrimonial Property Reform in Australia: An Overview" (1988) 22 Fam Law Q 41 at 52; and Law Reform Commission of British Columbia *Working Paper on Property Rights on Marriage Breakdown* (No 63, 1989).

met with the same answer: if people do not like the statutory regime they can contract out from it".[139] However, the use of s 21 agreements is limited and where agreements do exist, the court has discretion to overturn them.

There is a presumption that a s 21 agreement is invalid unless it fulfils technical statutory requirements set out in s 21F(2)-(5). The agreement must be in writing and signed by both parties;[140] each party must have received independent legal advice before signing the agreement;[141] the signature must be witnessed by a lawyer;[142] and the lawyer must certify he or she has explained the effect and implications of the agreement.[143] An agreement that has not complied with these formalities may be upheld where non-compliance has not materially prejudiced the interests of any party to the agreement.[144] The agreement may also be set aside if the court considers giving effect to it would cause serious injustice.[145]

These sections raise several issues. First, the requirement for legal advice limits the availability of contracting out agreements to couples who are financially able to afford legal fees. These have been estimated at starting from $3,000, which is a significant cost for most New Zealanders.[146] Courts have held that legal advice is a fundamental requirement and it is very difficult to argue an agreement should be upheld where there has been little or no legal advice,[147] or where inadequate legal advice is provided.[148] Second, the purpose of

---

[139] *Wood v Wood* [1998] 3 NZLR 234 (HC) at 235.

[140] Property (Relationships) Act 1976, s 21F(2).

[141] Property (Relationships) Act 1976, s 21F(3). The lawyers must be from separate firms: *Edmond v Edmond* (1992) 9 FRNZ 180 (HC); the advice will not be independent if the solicitor has an interest in the proceedings: *Sutherland v Sutherland* (2000) 20 FRNZ 281 (HC); the other partner must not be present: *Maxfield v Maxfield* HC Hamilton AP106/02, 22 June 2004; and the agreement may be void where inadequate advice is provided by the lawyer: see generally *SAB v JJB* FC Christchurch FAM-2005-009-3163, 29 June 2009; and *Hanks v Hanks* FC Hamilton FAM-2008-019-1480, 12 November 2008.

[142] Property (Relationships) Act 1976, s 21F(4).

[143] Property (Relationships) Act 1976, s 21F(5).

[144] Property (Relationships) Act 1976, s 21H.

[145] Property (Relationships) Act 1976, s 21J(1). The element of "serious injustice" will not be met by one party establishing that he or she did not receive what he or she may have received under the provisions of the Property (Relationships) Act 1976 due to the legislative policy that parties are free to enter into different arrangements: *Clark v Sims* [2004] 2 NZLR 501 (HC) at [27]–[28]. However, gross disparity may be a factor weighing heavily on the determinative process of the court: *Harrison v Harrison* [2005] NZFLR 252 (HC); *Wells v Wells* [2006] NZFLR 879 (HC) at [37] per Simon France J.

[146] Richard Meadows "Personal Finance: Prenuptials on the Rise" Stuff NZ (28 January 2015) <http://www.stuff.co.nz>.

[147] *West v West (No 2)* [2004] NZFLR 164 (HC) at [45].

[148] *DR v NLS* FC Nelson FAM-2003-42-217, 30 June 2005 at [23].

obtaining legal advice is to ensure that both parties are informed and independently advised on the effects of the s 21 agreement and their statutory entitlements.[149] This purpose assumes that couples are *unaware* of their rights under the PRA and must be educated of their rights through legal advice. However, the argument that parties can contract out of the PRA assumes that couples are *aware* of their rights and choose to deviate. These two propositions contradict each other and limit the argument that people may avoid equal sharing of the family home by contracting out.

Third, an agreement that has failed to comply with statutory formalities is less likely to be upheld where the informal agreement differs from the outcome under the PRA.[150] The family home is shared equally in every situation under the PRA. Any informal agreement stipulating the home as separate property would significantly differ from this and would unlikely be validated. There is also indication that courts are more willing to alter agreements involving the family home. For example, in *Mead v Graham-Mead*, Mackenzie J stated that "to the extent that that it [the s 21 agreement] might be regarded as ambiguous, the very clear status given by the Act to the family home is relevant to the determination of any ambiguity".[151]

Fourth, the enforcement of an oral agreement is rare,[152] which may leave people vulnerable where they are unaware of the formal requirements or trust their partner to uphold a promise. Fifth, a significant number of agreements are deemed to be invalid. A survey of s 21 agreements considered by the courts up to October 2010 indicated that 39 per cent of all agreements were not upheld.[153] 73 per cent were invalid due to deficiencies in technical requirements and 27 per cent were invalid on the grounds of "serious injustice", despite the threshold being raised from "injustice to "serious injustice" in the 2001 amendments.[154]

---

[149] *Jayachandran v Daswani* [2015] NZFC 5238 at [11]. See also *Property (Relationships) Act 1976* (NZ) (online looseleaf ed, Westlaw) at PR21F.01.

[150] *Mills v Graham* FC Hamilton FAM-2004-019-1914, 3 March 2005, at [21].

[151] *Mead v Graham-Mead* [2015] NZHC 825 at [15].

[152] *Brooks v Chamberlain* [2015] NZFC 8940 at [76].

[153] Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012). See also Margaret Briggs "Marital Agreements and Private Autonomy in New Zealand" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Ltd, Oxford, 2012) 256 at 256.

[154] Property (Relationships) Act, s 21J(1). Inserted by the Property (Relationships) Amendment Act 2001.

Sixth, there are practical difficulties for de facto couples who wish to contract out of the PRA. De facto relationships often form unsuspectingly and are only recognised retrospectively by the courts.[155] In contrast, marriages and civil unions have a defined duration and must satisfy formal requirements.[156] The existence of a de facto relationship turns on whether the two persons "live together as a couple" considering the circumstances and the list of factors under s 2D of the PRA.[157] The test is fact specific, evaluative and involves "common sense objective judgment" in each case.[158] If a couple is unaware they would be classified as a de facto relationship, they do not have the ability to contract out as they were unaware the relationship was covered under the PRA.

Last, there is a social stigma attached with pre-nuptial agreements and such an agreement may be taken to mean that one partner does not have faith in the relationship. A contracting out agreement is a difficult concept to bring up at any time in a relationship as it undermines the core qualities of trust and commitment associated with a relationship. These points invariably reveal the weakness in the argument that parties may avoid equal sharing of the family home by contracting out. It reinforces the conclusion that legislative reform is required rather than reliance on narrow exceptions to the PRA.

E Property in trusts

New Zealand has a large number of trusts in comparison to familiar jurisdictions such as the United Kingdom, Australia and Canada.[159] The family home is an asset commonly transferred into a trust,[160] often motivated by a desire to safeguard against relationship property claims and protect assets for the use of future generations in the family.[161] The

[155] Dr Lynda Scott (29 March 2001) 591 NZPD 8632-3.

[156] Marriage Act 1955; and Civil Union Act 2004.

[157] This includes the duration of the relationship; nature and extent of the common residence; whether a sexual relationship exists; the degree of financial interdependence; ownership, use and acquisition of property; degree of mutual commitment; care and support of children; performance of household duties; and the reputation and public aspects of the relationship.

[158] *Scragg v Scott* [2006] NZFLR 1076 (HC) at [37] per Gendall and Ellen France JJ. See also *G v B* [2006] NZFLR 1047 (HC).

[159] The Law Commission estimated that there were between 300,000-500,000 trusts in New Zealand in 2013, however, the true figure could be much greater: Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013**)** at 6 and 55.

[160] Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17(9) T.&T. 866 at 866.

[161] Bill Atkin and Wendy Parker *Relationship Property in NZ* (Butterworths, Wellington, 2001) at 172. Other motivations include reducing tax, or avoiding creditors.

most common form of trust in New Zealand is a discretionary family trust settled for the benefit of the partners' and their children.[162] Trust property is not owned by the partner's and is not subject to equal sharing as it falls outside the provisions of the PRA.[163] In contrast, a family home owned outright[164] by one or both partners is divided equally under the PRA.[165] These outcomes create a significant difference in the ability of the court to divide the value of the family home depending on whether the home is owned outright or forms part of trust property. This creates an incentive to transfer assets into a trust to avoid the provisions of the PRA. Initially, the prospect of the MPA 1976 caused an increase in the number of trusts[166] as individuals wished to protect their assets from the introduction of equal sharing of relationship property in this manner.[167] Since, the 2001 amendments the MPA 1976, the number of trusts continues to rise.[168] Individuals now wish to shield property to avoid the PRA's extended reach to de facto relationships, to avoid the equal sharing regime and ensure that property is left to their children without competing claims from other relationships.[169]

The courts have several avenues available to access trust property, however each is limited in application. The Supreme Court in *Clayton v Clayton*[170] recently held that Mr Clayton's

---

[162] A discretionary trust only includes powers of appointment where trustees are not under a duty to distribute property: *McPhail v Doulton* [1971] AC 424 (HL).

[163] Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443 at 443. Section 2 of the Property (Relationships) Act 1976 defines "owner" as "the beneficial owner of the property under any enactment or rule of common law or equity".

[164] Reference to the words "owned outright" in this paper refers to a family home where the registered proprietor of the property includes at least one partner. A mortgage on the certificate of title does not preclude the home from being "owned outright" in this context.

[165] Property (Relationships) Act 1976, s 2.

[166] NZCL *Some issues with the use of trusts in New Zealand,* above n 159, at 2.11. The previous Matrimonial Property Act 1963 divided matrimonial property on the basis of judicial discretion.

[167] This was easier and more effective than entering into a s 21 agreement, which was vulnerable to being set aside: *Wood v Wood,* above n 139; and could have undesirable social consequences: Sean Conway "What's Mine is Yours, Or is it? (LLB (Hons) Dissertation, University of Otago, 2011) at 5. See generally Department of Justice *Report of the Working Group,* above n 82, at 28, which established that trusts were a common way of avoiding the MPA.

[168] In 2001, there were 145,900 income tax returns filed by estates or trusts, which increased to 253,251 in 2015: Inland Revenue "Number of customers by return types 2006 – 2015" (5 January 2017) <http://www.ird.govt.nz>. These figures exclude trusts that do not produce an income, such as those holding only the family home and the true figure is likely to be higher.

[169] Anthony Grant and Nicola Peart "The case for the spouse or partner" (paper presented to the NZLS Trusts Conference, June 2009) at 9; NZLC *Some issues with the use of trusts in New Zealand,* above n 166, at 2.11.

[170] *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29 at [38].

extensive and unfettered powers in respect of a trust, allowing him to treat the property as his own, qualified as "property" under s 2 of the PRA.[171] This ruling may provide some relief, but will not assist scenarios where the level of control over trust property is not as unusually extensive.[172] Sections 44 and 44C allow the Court to order compensation where relationship property has been disposed of during the relationship in order to defeat the rights of one spouse or partner under the PRA. These provisions only provide limited protection and do not give any remedies where the property was transferred into a trust prior to the relationship. The courts also have a broad power under s 182 of the Family Proceedings Act 1980 to access trust capital under nuptial settlements. However, this provision is not available to de facto relationships, creating uneven footing for couples depending on the status of a relationship. The courts discretion is not subject to the equal sharing principle and division may contravene the policy of the PRA. The section is also unhelpful when the trust is ante-nuptial and the spouse is one of many beneficiaries.[173]

F Conclusion

Equal sharing of the family home creates an inconsistency between the outcomes under the PRA and changing societal norms. Changes since 1976 have increased the prevalence of situations where the outcome of equal sharing lies repugnant to the underlying philosophy of the PRA. Changing family forms provide doubt over the assumption that the family home is a basic asset of every relationship. This undermines the original justification for protection of the family home and suggests equal sharing is no longer appropriate. Courts have recognised these changes and have widened the scope of s 13 to cover situations that previously would not have met the high threshold. However, application of a provision that is not equipped to deal with modern problems is not a satisfactory solution. In doing so, the courts have departed from long standing principles and have created an aspect of uncertainty in the law. The argument that couples may elect to contract out of equal sharing of the home is illusory due to the stringent nature of the provisions and the difficulties of

[171] Mr Clayton, as a trustee of the Vaughan Road Property Trust, had the power to appoint and remove trustees and discretionary beneficiaries, appoint capital and income to any of the discretionary beneficiaries during the existence of the trust and on vesting day, bring the vesting day forward, resettle the trust find, and had the power to exercise any power and discretions in his own favour.

[172] See *Buxtone v Buxtone* [2017] NZHC 131, where Mrs Buxton's powers did not enable her to treat the trust property as her own and was therefore not property under s 2 of the PRA. See also *da Silva v da Silva* [2016] NZHC 2064 where Mrs da Silva's trustee powers did not give her unfettered discretion of the trust fund. She was subject to fiduciary obligations to all beneficiaries.

[173] Andrew Watkins and Simon Weil "Trusts for Property Lawyers" (paper presented to NZLS CLE seminar, November 2012) at 97.

producing an agreement that it fundamentally contrary to the principles that a relationship is built upon.

Additionally, the limited ability of the court to interfere with trust property means there is a significant difference in the outcome of property division depending on whether the family home was included as trust property or owned outright. Individuals' are essentially able to contract out of the PRA by transferring the family home into a trust, showing clear societal discomfort with the current provisions. A change is greatly needed to alleviate these inconsistencies and create a system of dividing the family home that reflects society as it operates today, rather than a system based on the expectations of society in 1976.

Chapter Three: Evaluation of the Options Available

Sometimes, the best closure involves leaving the door open.

A Special rules applying to the family home

The first option is to retain the provisions requiring equal sharing of the family home. Many jurisdictions operate under a similar approach and the family home is divided equally regardless of when it was acquired. For example, in Ontario, the assets of each spouse form part of their net family profit,[174] which is divided equally. The full value of the matrimonial home is always included in this division, even in situations where the spouse would have had the benefit of a deduction or an exemption for owning the asset before the marriage.[175] Numerous other Canadian provinces also provide rules dividing the home equally, distinct from other assets.[176] Similarly, in Scotland the family home always forms part of the matrimonial property subject to equalisation.[177] These systems consider the family home to be so central to common life that it should be shared equally in every situation.[178] Canadian commentators have emphasised that special rules ensure the family home is "always sharable"[179] and recognises its importance in family life.[180]

Treating the family home separately can simplify the division of property and create certainty.[181] The family home is often the most substantial asset to be divided and many people would agree that it should be divided equally. However, equal sharing is potentially

---

[174] This is calculated by taking the total value of each spouse's property at the valuation date and subtracting the value of all assets owned on the date of the marriage and any debts and liabilities.

[175] Family Law Act RSO 1990 c F3, s 4.

[176] See Matrimonial Property Act RSNS 1989 c 275, s 12; Family Law Act RSNL 1990 c F2, s 21; The Family Property Act RSM 1987 c M45, ss 1(1) and 13; Marital Property Act RSNB 2012 c 107, ss 1 and 3(1); and The Family Property Act RSS 1997 c F6.3, s 22(1).

[177] Family Law (Scotland) Act 1986, s 10.

[178] Property (Relationships) Act 1976, s 11.

[179] Testimony of Ian Scott, then Attorney General of Ontario, to the Committee on the Administration of Justice on November 6, 1985. There are some situations where the home will not be shared equally, for example where the value of the home is offset by deductions or a debt at the valuation date. However, in most cases, the legislation achieves equal sharing.

[180] Heather Conway and Philip Girard "No Place Like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) Queen's L.J. 30 715 at 724.

[181] British Columbia Ministry of Attorney General *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (July 2010) at 3.

subject to exceptions.[182] Further, there are other ways to achieve simplicity. The regime in British Columbia is based on the desire to create certainty and predictability but does not differentiate between the family home and other assets.[183] The divergence of contemporary family situations[184] makes it difficult to create rules that will consistently implement legislative policy. Rules may single out the family home too much, produce un-intended consequences,[185] or be manipulated by a knowledgeable spouse to minimise their impact and may disadvantage a spouse who is unaware of their implications.[186]

Equal sharing of the family home means it is always available for the dependent spouse, particularly where there are children to support, and ensures that spouse would receive a measure of proper compensation.[187] This has a knock-on effect for dependent children. If the family home could be excluded from the pool of divisible relationship property, a non-owning dependent spouse may be vulnerable where the home was the only asset of value in the relationship. Special rules for division of the family home provide more divisible property in those instances. However, concern over compensation and support should not be addressed through division of the family home. Value and occupation are two separate issues. Equal sharing of the home's value does not enhance the courts ability to make a possession order in favour of a non-owning spouse. This depends entirely upon whether provisions in the legislation empower the court to do so.[188]

---

[182] For example, Property (Relationships) Act 1976, s 13, which allows unequal division where there are "extraordinary circumstances".

[183] Kathryn O'Sullivan "Legislative Comment: Family Property Division Under the Family Law Act 2011" (2017) 50 U.B.C. L. Rev. 161 at [162].

[184] See Chapter Two of this paper.

[185] For example, the large number of New Zealander's transferring their family home into a trust to protect against relationship property claims: see Chapter Two of this paper.

[186] For example, the following situation in Ontario illustrates this point. If a spouse enters a second marriage having retained title to the family home in the first marriage as acknowledgement of contributions made during that marriage. On a further division of property, he or she would be prevented from deducting from the net family profit, the value of the family home from the first marriage. However, the other spouse could deduct property of any other kind that they had owned on the date of marriage. A similar phenomenon is created under the PRA: see Chapter Two of this paper.

[187] Law Reform Commission of British Columbia *Report on Property Rights on Marriage Breakdown* (No 11, March 1990) at 40.

[188] BC Law Reform Commission *Report on Property Rights on Marriage Breakdown* (1990), above n 187, at 40.

B Division based on discretion

The second option is the adoption of a discretionary approach akin to England and Australia.[189] Division of the family home is based on the merits of each case, avoiding the inconsistencies created by the PRA.

In England, the Matrimonial Causes Act 1973 (UK) allows a court to make financial provision orders upon divorce.[190] Property division is based on achieving the overall goal of "fairness".[191] In achieving this goal, the courts have developed a principle of equal sharing applying to "matrimonial property", distinct from "non-matrimonial property".[192] The family home is normally treated as matrimonial property regardless of its acquisition due to its "central place in any marriage".[193] However, equal sharing is not required in every case. Instead, the courts have interpreted this principle to mean the home's value and "the lifestyle that it produced" should be considered in determining overall fairness.[194] The factors commonly considered by courts in determining whether to depart from equal sharing include:[195]

(a) the source and nature of the asset, such as whether it is a valuable or personal item;

(b) the duration of the marriage and the length of time the wealth was enjoyed by both parties. The longer it has been enjoyed, the less it should be protected;[196]

---

[189] Matrimonial Causes Act 1973 (UK); Family law Act 1975 (Cth).

[190] Under the Matrimonial Causes Act 1973 (UK) a court may orders requiring periodic of lump sum payments for the benefit of a child (s 23); property adjustment orders (s 24); orders for the sale of property (s 24A); pension sharing orders (s 24B); and pension compensation sharing orders (s 24E).

[191] Fairness was described in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 at [4] per Lord Nicholls as an elusive concept. "It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case."

[192] *White v White* [2001] 1 AC 596 (HL) at 610 per Lord Nicholls; *Miller; McFarlane*, above n 191, at [21] per Lord Nicholls and [150] per Baroness Hale.

[193] *Miller; McFarlane*, above n 191, at [22] per Lord Nicholls.

[194] *NA v MA* [2006] EWHC 2900 (Fam) at [175] per Baron J.

[195] *JL v SL (Appeal: Non-Matrimonial Property*) [2015] EWHC 3658 (Fam) at [41] per Mostyn J, confirming the statements made by District Judge Reid.

[196] See also *Miller; McFarlane*, above n 191, at [147]–[153] per Baroness Hale.

(c) the extent of any intermingling with matrimonial property, to the degree that identifying its separate current value is difficult;[197] and

(d) the extent to which the home was treated as a central item of matrimonial property.

These factors show the wide range of considerations available to the court. The fourth factor and the reason for recognising the family home as "matrimonial property" in most situations reflects the justification for equal sharing of the family home in New Zealand. However, under the English approach this is only a consideration rather than a reason for equal sharing in every situation. The courts can consider any other circumstances relating to the relationship including how the family home was acquired.

A number of cases have awarded unequal division of the family home due to unequal contributions to its acquisition.[198] For example, *FB v PS*[199] involved a 16-year childless marriage where the family home was valued at £3.5 million among a pool of assets valued around £19 million. The home was purchased by the husband's father many years before the marriage. Moor J held this reflected a "significant unmatched contribution" entitling the husband to a "significant departure from equality".[200] The wife submitted that if the home had not been owned prior to the marriage, the couple would have purchased their own property which would have appreciated significantly in value. Moor J accepted this argument and held that a sum of £500,000 would be subject to division to "mark" the home as matrimonial property and to represent the lost investment in the property market.[201] The remaining equity in the home was excluded from division. The wife was awarded an equal split of the remaining assets, receiving a total of approximately £8 million. In *S v AG*,[202] the family home was purchased through the wife's lottery winnings. This was not a joint endeavour and due to the short period of residence in the home (less than four years) the husband was only entitled to 15-20 per cent of the value of the home.[203] These cases show the advantages of a discretionary approach. Courts can recognise situations where financial

[197] This resembles s 10(2) of the Property (Relationships) Act 1976, which states that property acquired with the proceeds of any disposition of inherited or gifted property, "have been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property."

[198] See *Vaughan v Vaughan* [2007] EWCA Civ 1085 (CA); *NA v MA*, above n 194; *FB v PS* [2015] EWHC 2797 (Fam); and *JL v SL*, above n 195; *S v AG* [2011] EWHC 2637 (Fam).

[199] *FB v PS* [2015] EWHC 2797 (Fam).

[200] At [120] and [123] per Moor J.

[201] At [126].

[202] *S v AG* [2011] EWHC 2637 (Fam).

[203] At [37] per Mostyn J.

disadvantage or unfairness may be created by equal sharing and discretion is available to exclude all or part of the home from division.

In other cases, the pre-marital family home has been divided equally or in favour of the non-owner. This is because the overall goal of "fairness" requires consideration of the ongoing needs of each spouse and any compensation that may be required due to the relationship.[204] In *Vaughan v Vaughan*,[205] the husband owned the home unencumbered for three years before the commencement of the 14-year marriage. Wilson LJ stated that the husband's prior ownership of the home was a significantly unmatched contribution.[206] However, an award of 57 per cent in favour of the wife was found to compensate her needs[207] and the reckless acts of the husband is dissipating assets. Similarly, in *N v F*,[208] the husband's extensive pre-marital property, including the family home, was divided roughly in half.[209] Mostyn J emphasised that but for the wife's needs,[210] possibly the entirety of the husband's pre-marital wealth would have been withheld from division.[211]

The varying results achieved in each of these cases highlights the main criticism of a discretionary approach. Inconsistency and unpredictability is widely perceived as unfair by litigants.[212] An important function of the law is to provide a basis for negotiation and settlement. Where the law is based on the prospect of unfettered judicial discretion, a lawyer's advice "will inevitably be speculative and clients may feel that their affairs are out of their control".[213] A discretionary system also offers more opportunity for abuse of litigation and negotiation processes compared to systems of fixed rules.[214] Additionally, the English approach combines assessment of property value with the assessment of

---

[204] *Miller; McFarlane*, above n 191, at [11]–[16] per Lord Nicholls and [138]–[141] per Baroness Hale.

[205] *Vaughan v Vaughan*, above n 198.

[206] At [49].

[207] The wife's needs included housing, her limited liquid capital and lower income compared to her husband.

[208] *N v F* [2011] EWHC 586 (Fam).

[209] The exact division was 44.7 per cent to the wife and 53.3 per cent to the husband.

[210] The wife's needs included housing of £1.75m to enable a reasonable home to be purchased, annual income fund of £104,000 and child maintenance of £15,750 per child (2 children of the marriage). The total assets were around £9.714m in value and the marriage lasted 16 years. The parties enjoyed a high standard of living during the marriage and Mostyn J stated at [44] that the pre-marital property was a "bedrock" on which the marriage was founded.

[211] At [44].

[212] Mary Ann Glendon "Family Law Reform in the 1980's" (1983-1984) La.L.Rev. 44 1553 at 1556.

[213] BC Law Reform Commission *Working Paper on Property Rights on Marriage Breakdown* (1989), above n 252,187 at V(D)(1)(f).

[214] Glendon "Family Law Reform in the 1980's", above n 212, at 1556.

compensation and needs. These are two distinct concepts, which are recognised by their separation in the PRA.[215] Assessing the concepts together creates heightened uncertainty. Needs and compensation may differ depending on the circumstances of each case, however the value of property is constant and directly measurable. Discretion sits uncomfortably with the principle under the PRA that disputes should be resolved as "inexpensively, simply, and speedily as is consistent with justice".[216] As Heath J stated in *Gray v Gray*, "relationship property is an area of law that is likely to affect almost all New Zealanders. Some degree of certainty is required, against which parties can order their affairs".[217]

C All assets

A third option could be to extend the provisions of the family home to all relationship property to create consistency and simplicity. Such an approach is taken in many civil law jurisdictions including Sweden, Denmark, Norway, France and Spain.[218] All assets owned by the spouses are divided equally regardless of ownership or acquisition, and all assets are subject to the same rules of exclusion.[219] This type of system is based on a high view of marriage and allows little scope for autonomy.[220] However, due to the extensive range of property subject to division, couples will often contract out of the default regime.[221] In practice, the approach is inconsistent with the views of individuals and is an unfavourable option for reform.

D Excluded property regime

[215] This is covered under Part 7 of the Property (Relationships) Act 1976, for example orders for the benefit of children (s 26), occupation orders (s 27) and orders in relation to maintenance and child support (s 32).
[216] Property (Relationships) Act 1976, s 1N(d).
[217] *Gray v Gray* [2013] NZHC 2890 at [37].
[218] Swedish Marriage Code 1987 (Sweden); Act on the Legal Effects of Marriage (Denmark); Marriage Act 1991 (Norway); French Civil Code – Code de Procédure Civile Français Traduit; Spanish Civil Code 1889.
[219] See Appendix A and B. Excluded property is generally limited to assets excluded in a valid marriage settlement, assets inherited or given as gift on the condition that they were to be separate property, income from separate property and property replacing excluded property.
[220] Bill Atkin "Classifying Relationship Property: A Radical Re-shaping?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, 1 November 2016) at 7.
[221] See generally Jens M Scherpe "Relationship Property – Should New Zealand's Regime be Mandatory or Optional?" (paper presented to Colloquium on the Property (Relationships) Act 1976, University of Otago, Auckland Centre, 9 December 2016).

The final option, and the option recommended by this paper, is a provision that divides the family home equally where it was acquired by the joint efforts of the relationship. This excludes any value that cannot be attributed to the relationship.

Such an approach has recently been adopted in British Columbia[222] and applies to all property, including the family home. "Family property" is divided equally and includes property owned by at least one spouse[223] at the date of separation unless the property was excluded.[224] Excluded property includes property that was gifted, inherited or acquired before or after the relationship.[225] Each spouse will share in any increase in value of excluded property during the relationship.[226] This framework provides a middle-ground between the discretionary approach in England and the all-inclusive provisions under the PRA. For instance, if one spouse contributes funds acquired through gift or inheritance towards some or all of the purchase price of a family home, then the amount contributed remains that spouse's excluded property.[227] Additionally, the value of a family home brought into a relationship by one partner is excluded while its increase in value is divided. This avoids inconsistencies occurring under the PRA and accounts for the current diversity of family forms. Concerns over certainty under a discretionary approach are also alleviated as the value of excluded and family property is clearly defined.

A similar approach is taken in Alberta. If property was acquired through a gift by a third party, inherited or acquired before the marriage, the market value of that property at the time of the marriage or on the date the property was acquired by the spouse, is exempt from

---

[222] The Family Law Act RSBC 2011 c 25 was enacted 23 November 2011 and came into force 3 March 2013.

[223] "Spouse" is defined in the Family Law Act RSBC ch 1, s 3 to include married couples and couples that have lived in a marriage-like relationship for a continuous period of 2 years.

[224] Family Law Act RSBC 2011 c 25, s 85.

[225] Family Law Act RSBC 2011 c 25, s 85.

[226] Family Law Act RSBC 2011 c 25, ss 84 and 85.

[227] The spouse claiming that the property is excluded has the evidentiary burden under s 85(2) of the Family Law Act RSBC 2011 c 25. This requires proof on the balance of probabilities: *Shih v Shih* 2017 BCCA 37. In *Kalmiakov v Shylova* 2016 BCSC 2095, MacNaughton J held that a gift of $65,000 to the wife from her mother, which was used as a payment toward the family home was "readily traceable and capable of mathematical certainty" and held that the wife was entitled to an additional $65,000.00 in excluded property from the proceeds of sale of that home. In *Lahdekorpi v Lahdekorpi* 2016 BCSC 2143, Harris J found the wife's $30,000 inheritance, used to partly purchase a jointly held property, could not reasonably be said to have intended to gift her inheritance to her husband. It remained excluded property. In *Oleksiewicz v Oleksiewicz* 2017 BCSC 228, the Court held that if a spouse uses excluded property to pay down family debts then the amount the spouse paid from the excluded property remains that person's excluded property.

distribution.[228] However, the increase in value of that excluded property is divided to achieve a result that the court considers "just and equitable" rather than being divided equally.[229] This creates a level of unnecessary judicial discretion in comparison to the approach taken in British Columbia.

1 Division of excluded property

Excluded property must not be divided unless it would be significantly unfair not to divide it having regard to the duration of the parties' relationship and any direct contribution by one partner to the preservation or maintenance of the property.[230] Only significant financial contributions will be sufficient to engage this exception. For example, in *Cabezas v Maxim,*[231] but for the wife's financial contributions to the home's maintenance and her decision to undertake liability on the mortgage, the home would have been lost to foreclosure.[232] Similarly, in *V.J.F. v S.K.W.,*[233] the wife put her own property at risk, saved her husband from a significant loss in the value of the property acquired for the family home, increased her personal indebtedness by over $1 million and bore legal responsibility for payment of all the construction bills. These cases demonstrate that the financial contribution made by the non-owner must have significantly impacted the ability to maintain the asset in question to come within the exception. This would only apply to a very limited number of assets.

It has been suggested that excluding the value of the family home may leave a non-owning partner in a particularly vulnerable position where the family home was held solely in the other partner's name and constituted excluded property.[234] There may be situations where it would be fair for the non-owning spouse to be entitled to a share in excluded property in the absence of significant financial contributions. Further protection could be provided by extending the ability of the court to divide excluded property on the basis of indirect contributions.[235] For example, in Alberta, the court has a much wider discretion and may

---

[228] Matrimonial Property Act RSA 2000 c M8, s 7(2)(a)-(c).

[229] Matrimonial Property Act RSA 2000 c M8, s 7(3).

[230] Family Law Act RSBC 2011 c 25, s 96.

[231] *Cabezas v Maxim* 2013 BCSC 983 at [71].

[232] At [75]–[77].

[233] *V.J.F. v S.K.W.* 2015 BCSC 593 at [81]. Appeal to the British Columbian Court of Appeal was dismissed in *V.J.F. v S.K.W.* 2016 BCCA 186.

[234] Kathryn O'Sullivan "A critique of the legal protections afforded to the matrimonial home in Ireland: lessons from British Columbia" (Doctoral Thesis, University of Limerick, 2012) at 202.

[235] Kathryn O'Sullivan "Family Property Division Under the FLA" 50 UBC L Rev 161 at [192].

declare that a spouse has an interest in property to achieve a just and equitable result irrespective of the legal or equitable interest in the property.[236] Although this jeopardises the foreseeability of the system, it may incorporate flexibility.[237] However, indirect contributions relate to the relationship and impact family property. This is displayed through equal sharing of such property. It is harder to justify that indirect contributions impact separate property as it is not a product of the relationship. This type of concern is directed to assessment of compensation and needs, rather than the division of an economic asset. The concepts should be kept distinct to maintain certainty within the law.

2 Excluded property intended to be shared

There may be circumstances where property is accepted to be a shared asset.[238] For example, where excluded property is transferred into the joint names of the couple or the sole name of the other spouse during the relationship. British Columbian courts have upheld the property's status as excluded despite this transfer.[239] Certainty was prioritised over importing a need to consider the intention of the transfer.[240] However, in *V.J.F. v S.K.W.,*[241] Madam Justice Newbury argued that the purpose of excluding property is to ensure that individuals "keep what is theirs".[242] An individual who is listed against the title to property could rightly argue that the property was "theirs" as they are the legal owner of that property.[243] Her Honour further argued that a transfer of property does not fall within the legislative wording. To constitute excluded property, the property in question must be "derived" from excluded property or the disposition of excluded property.[244] No property is "derived" where rights are transferred (gifted) into different names.[245] In contrast, where excluded property is sold and the proceeds used to purchase new property, the new property is clearly "derived" from the old. This situation is fundamentally different from a transfer

[236] Matrimonial Property Act RSA 2000 c M8, s 9(2).

[237] O'Sullivan "Family Property Division Under the FLA", above n 235, at [195].

[238] BC Law Reform Commission *Report on Property Rights on Marriage Breakdown* (1990), above n 187, at 38.

[239] *Remmem v Remmem* 2014 BCSC 1552 at [48] per Butler J. The opposite finding was reached in *Wells v Campbell* 2015 BCSC 3 per Masuhara J. However, subsequent cases have preferred the approach taken in *Remmem*: see *Andermatt v Tahmasebpour* 2015 BCSC 1743; *Shih v Shih* 2015 BCSC 2108; *Pearson v Graham* 2016 BCSC 671.

[240] *Remmem*, above n 239, at [48].

[241] *V.J.F. v S.K.W.* 2015, above n 233.

[242] At [70].

[243] At [70].

[244] Family Law Act RSBC 2011 c 25, s 85(1)(g).

[245] At [68].

of names. It would be open to the courts to take an alternative approach. The potential inconsistency under the legislation may be reflective of judicial interpretation rather than the underlying statutory framework.

3 Excluded property mixed with family property

If excluded property can be traced into the increase in value of any property held by the spouses, then the spouse who contributed to the excluded property is entitled to an exclusion. Absence of any evidence precludes a finding that any portion of the property in question is excluded property.[246] This may create uncertainty and expense for the parties in producing the required evidence where excluded property becomes so mixed that the task of identifying separate values becomes impractical or impossible. However, the evidential burden is on the individual seeking to prove the property is excluded.[247] This creates a safeguard for the other partner and rightfully places any expense on the partner seeking to rely on the provision.

4 Policy considerations

There may be concern that the increased value of a property does not promote the policy of an equal partnership any more than special division of the family home. External factors outside of the control of the parties may affect value, including changes in the housing market, inflation and the economy. Consequently, a non-owning spouse's ability to share in any value of the property, if excluded, may depend heavily on the performance of the wider economy and the continued upward-trend of property prices.[248] This is of topical concern in New Zealand. In Auckland, house prices have increased by 59.5 per cent since the market peak rate in 2007 and increased 54.8 per cent nationwide, when adjusted for inflation.[249] It may be difficult to justify that these changes were due to the relationship.

However, each partner is assumed to contribute equally to the relationship[250] and therefore contributes equally to maintaining and preserving the family home directly or indirectly.[251]

---

[246] *Asselin v Roy* 2013 BCSC 1681 at [210].

[247] Family Law Act RSBC 2011 c 25, s 85(2).

[248] O'Sullivan "Family Property Division Under the FLA" above n 235, at 192.

[249] Liam Dann "Latest QV data shows Auckland housing market stalls" *The New Zealand Herald* (online ed, New Zealand, 2 August 2017). These figures are substantially higher if they are not adjusted for inflation, the corresponding figure being a 91.1 per cent increase in Auckland.

[250] Property (Relationships) Act 1976, s 1M(b).

[251] Property (Relationships) Act 1976, s 1N(b).

A natural result is that the wealth accumulated in the home during the relationship should be shared.[252] The Minister of Justice, the Hon J R Hanan, when introducing the MPA 1976, stated that in 9 out of 10 cases, "the husband would not have been able to acquire the title to the home had it not been for the support and help of his wife".[253] The quote refers to the acquisition of the home, but it applies equally to its retention and maintenance. If the home was not maintained, then neither spouse would be entitled to share the increase in value due to changes in the property market. Individuals often struggle to finance the family home separately after a relationship breakdown, further illustrating this point.[254] Division of the increase in property value therefore accords with the policy that relationships are joint economic partnerships and the acquired wealth should be distributed equally.

E The family trust

Overseas jurisdictions have a much greater discretion to divide a family home owned by a trust upon relationship breakdown than under the PRA. In England, trust property may be subject to the yardstick of equal sharing if it was a resource that could be used by that spouse.[255] The test is whether the trustees would be likely to advance the asset to that spouse immediately or in the foreseeable future if a request was made.[256] The court may consider the terms of the trust, the history of dispositions and any patterns of provision for the spouses as beneficiaries.[257] Similarly, in Ontario, a discretionary interest in a trust may be property subject to equalisation where there is a sufficient level of control and certainty over trust property.[258] This falls on the merits of each case and involves a contextual analysis informed by the relationship between the parties, and consideration of the degree

---

[252] BC Law Reform Commission *Working Paper on Property Rights on Marriage Breakdown* (1989), above n 138, at 28.

[253] (1 October – 25 October 1963) 337 NZPD 3291.

[254] Robert Leckey "Gimme Shelter" (2011) Dalhousie LJ 34 197 at 206.

[255] *Charman v Charman* [2007] EWCA Civ 503. For example, in *P v P* [2015] EWCA Civ 447, the family home was a farmhouse held by a trust established by the husband's parents, of which the husband was the principal beneficiary. The High Court judge, Mostyn J, divided the farmhouse equally and held that a sum of £23,000 was to be paid to the wife and the remaining £134,000 was to be provided for the benefit of the wife for life, to be held by independent trustees, with the wife entitled to use the capital sum for or towards the purchase of a property for her occupation (*AB v CB (Financial Remedies: Variation of Trust)* [2014] EWHC 2998 (Fam)). This decision was upheld on appeal to the Court of Appeal.

[256] *Charman*, above n 255, at [13]. The likelihood test is on the balance of probabilities: *Whaley v Whaley* [2011] EWCA Civ 617 at [44] per Lewison J.

[257] See for example *Whaley*, above n 256; and *Charman*, above n 255, where these factors were taken into consideration.

[258] See for example *Tremblay v Tremblay* [2017] O.J. No. 377 at [32].

to which the beneficiary can directly or indirectly control the actions of the trustees.[259] The extended ability of the courts to divide trust property in each of these jurisdictions ensures that realistic assessments of wealth are made.[260] This avoids the current situation created by the PRA where the law operates differently depending on whether an individual's interest in the family home is beneficial or outright.

In British Columbia, the legislation expressly states that family property includes trust property contributed by a partner to a trust in which the individual:[261]

(a) is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment; or
(b) has a power to transfer to himself or herself that part of the trust property; or
(c) has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

The legislation also allows any increase in value of excluded trust property during the relationship to be divided.[262] This includes property held in a discretionary trust to which the spouses did not contribute, of which the spouse is a beneficiary and that is settled by a person other than the spouse.[263] Even footing for division of all property is created under these provisions irrespective of whether they are owned outright or owned by a trust.

However, the entire value of the trust property is included, which raises two problems. First, trust property may be shared between multiple beneficiaries and the spouse with an interest in the property may not always be entitled to its full value. Second, beneficiaries only have a potential interest in the trust property as the trustees have the discretion to distribute it. Each beneficiary is not entitled to the property as a matter of fact.[264] A particular issue is raised where the value of excluded trust property has substantially increased. A spouse of any beneficiary would be entitled to half of that value upon divorce. If multiple beneficiaries experienced a divorce, this would create multiple claims against the same property. This would significantly reduce the amount of property left for other

[259] *Tremblay*, above n 258, at [32]. In that case, the husband was able to direct the dispersal of the trust funds in his favour and this amounted to a property interest.
[260] *Whaley*, above n 256, at [142].
[261] Family Law Act RSBC 2011 c 25, s 84(3).
[262] Family Law Act RSBC 2011 c 25, s 84(2)(g).
[263] Family Law Act RSBC 2011 c 25, s 85.
[264] Helen J Low and Fasken Martineau DuMoulin "Avoiding Family Law Fiascos in Family Estate Freezes: British Columbia and Alberta Family Law Considerations (paper presented to STEP Conference, Canada, 2014) at 8.

beneficiaries, irrespective of whether the trustees would have distributed the trust property in the first place.[265] The discretionary approaches in England and Ontario allow for consideration of these factors. But, discretion must be weighed against the certainty and predictability provided by clear statutory rules. Additionally, the provisions in British Columbia apply to all property. Limiting these provisions to the family home owned by a trust would mitigate problems by reducing the amount of property that a beneficiary's spouse would have a claim against. A balance could be created between the two approaches by maintaining certainty where family home was contributed by a spouse, and allowing discretion where the spouses did not contribute.

Despite these differences, each jurisdiction allows greater discretion for the courts to divide trust property than under the PRA. The significant number of trusts in New Zealand, coupled with the contrasting provisions requiring equal sharing of a family home owned outright, clearly shows the unsatisfactory position provided under the PRA.

F Conclusion

Equal sharing of the family home in every situation has been adopted by many jurisdictions. However, the benefits of the systems are outweighed by the inconsistencies created. Protection of occupation rights and security over compensation can be achieved in other ways, and do not justify equal division of the family home at the expense of recognising the accurate contributions of parties to a relationship.

Other approaches show a conflict between discretion and certainty. A discretionary regime may be preferred because of its flexibility to achieve justice in each individual case. However, if society cannot agree on what is fair, it may be naïve to think that judges can create consistent results. There are many different views on how relationship property should be divided and this is evident through the divergence of regimes created internationally. Discretion encourages litigation and increases costs for the parties involved. On the other hand, civil law jurisdictions providing broad identification of assets

[265] For example, a parent establishes a discretionary trust to hold shares worth $1 million. The beneficiaries include his two children (X, Y) and four grandchildren (A, B, C, D). Twenty years later, all the grandchildren are married, and the trust property is worth $20 million. If grandchild A divorces, A's spouse would arguably be entitled to $9.5 million (ie half the increase in the trust property). If B also divorces, B's spouse would be entitled to the other $9.5 million, leaving the other beneficiaries with the original $1 million: adapted from Low and DuMoulin "Advoiding Family Law Fiascos" above n 264, at 8.

also produces unsatisfactory results. The large amount of property subject to division means that most couples will chose to opt out of the regime.

The excluded property approach taken in British Columbia is much more compelling as it is clear and simple to apply.[266] This scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This means that divisible property is easier to identify, and the potential for disagreement is reduced. People are able to "keep what is theirs",[267] such as pre-relationship property, gifts and inheritances, but share in the property accumulated during their relationship and the increase in value of excluded assets. This would alleviate most of the problems highlighted in Chapter Two of this paper, that are currently occurring through the application of the PRA.

It is also clear that the PRA provides extremely limited ability to interfere with trust property in comparison to international jurisdictions. This has significantly contributed to the discrepancy in results that can be achieved under the PRA despite the asset being the same. The law is clearly in need of reform in this area.

[266] BC Ministry of Attorney General *White Paper on Family Relations Act Reform* (2010), above n 181, at [76].

[267] *V.J.F. v S.K.W.*, above n 241, at [70].

Chapter Four: Recommendations

You miss 100% of the shots you don't take.

A Significance of the family home

There is a clear tension between the significance of the home to family relationships and its function as an asset that must be divided upon relationship breakdown. The PRA favours the former view and justifies equal division of the family home through its function as a basic asset of a relationship. The significance of the home can be broken down into three points. However, none of these points support the conclusion that the family home should be shared equally in every situation.

First, occupiers often feel strong emotional and personal attachment towards their homes, distinct from other assets. Extensive literature on the meaning of the home reveals that people create and experience the home through their behaviours, routines,[268] relationships,[269] emotions and sensory experiences.[270] The home's importance therefore extends beyond its physical existence to include its social, psychological and emotional dimensions.[271] It is treated differently to all other assets by its occupants and is a source of comfort, security and protection.[272] This may be seen to justify its current position in the law. However, the meaning of a home can be subject to change depending on the context and time in a person's life.[273] For instance, an individual may prefer to make a fresh start after a break-up and may not feel the same attachment to the family home as they felt during the relationship. The concept of a home is more akin to a personal relationship subject to change, rather than a physical asset that remains constant.[274] The emotional attachment to

[268] A Dupius and D C Thorns "Home, Home Ownership and the Search for Ontological Security" (1998) 46(1) The Sociological Review 24.

[269] C Smart *Rethinking Family Practices* (Palgrave Macmillan, United Kingdom, 2001).

[270] For a detailed review see: Kristin Natalier and Belinda Fehlberg "Children's experiences of 'home' and 'homemaking' after parents separate: A new conceptual frame for listening and supporting adjustment" (2016) AFLJ 29 111.

[271] S Mallet "Understanding Home: A Critical Review of the Literature" (2004) 52(1) The Sociological Review 62 at 64; G Crow "The Post-War Development of the Modern Domestic Ideal" in S Allan and G Crown (ed) *Home and Family: Creating the Domestic Sphere* (Macmillan, United Kingdom, 1989) 1 at 14.

[272] Berend Hovius "Property Rights for Common-Law Partners" in Martha Shaffer, ed, *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Toronto: Carswell, 2007) 115 at 127.

[273] Kristin Natalier and Belinda Fehlberg "Children's experiences of 'home' and 'homemaking' after parents separate: A new conceptual frame for listening and supporting adjustment" (2016) AFLJ 29 111.

[274] Leckey "Gimme Shelter", above n 254, at 206.

the "home" is also not limited to the "family home" as defined by the PRA or any other comparable statute and may include a previous home, a holiday home, or a particular region.[275] It is inappropriate to justify the economic division of the family home which is mathematical and constant, on "vague and fuzzy" [276] concept subject to such change.

Second, the family home provides physical shelter for its occupiers, which separates it from other assets and signifies its importance in family relationships. This statement is certainly true, but does not support the proposition that the home should be split equally in every situation. Occupation and economic value are two different concepts. While the physical function of the home provides justification for occupation rights being attached to the home, it does not justify equal sharing of its value.

Lastly the family home is often the focal point of family life and is the central asset of the family. The Ontario Law Reform Commission observed that there is no other asset so uniquely referable to family relations, or which involves "such exacting and prolonged demands for management of finances, mutual sacrifice and physical efforts towards a common goal, as does the matrimonial home".[277] This is the main justification relied on for equal sharing of the family home under the PRA.[278] However, the justification directly contradicts the central statutory idea that relationships are equal partnerships. A family home acquired before the relationship, through inheritance, or gifted by a third party, is not a product of the relationship and was not acquired through the joint efforts of both parties. Equal sharing in these situation lies hostile to the underlying policy of the PRA. Changing family structures have increased the prevalence of these situations and the original justification is clearly outweighed by the inconsistency arising from the rules dividing the home equally. Although the family home undeniably holds significance in the lives of a family, this can be addressed through other provisions and does not justify a blanket rule dividing its value.

---

[275] See for example English Oxford Dictionary "Definition of *home* in English" (2017) <https://en.oxforddictionaries.com>, which includes definitions ranging from the place where one lives permanently" to "a place where something flourishes."

[276] Lorna Fox "The Meaning of Home: A Chimerical Concept or a Legal Challenge?" 29(4) Brit.J.L.& Soc'y 580 at 589.

[277] Ontario Law Reform Commission *Report on Family law: Part IV – Family Property Law* (Department of Justice, 1974) at 134.

[278] See Chapter One of this paper.

B Relationship property in the family home

It is recommended that equal sharing of the family home in every situation should be removed. In light of changing family structures and societal norms, there is no clear justification for the provisions currently existing in the PRA. The following amendments accurately reflect the needs and expectations of New Zealand society when dividing the family home:

8 Relationship property defined

(1) Relationship property shall consist of—

(a) ~~the family home whenever acquired;~~ [the value of the family home as defined under s 8A;] and

(b) …

[8A Value of relationship property in the family home

(1) Relationship property shall include –

(a) subject to subsections (2) and (3), the family home owned by at least one spouse or partner; or

(b) subject to subsections (2) and (3), the family home contributed by either spouse or partner to a trust in which at least one spouse or partner –

(i) is a beneficiary, and has a vested interest in the family home; or

(ii) has a power to transfer the family home to himself or herself; or

(iii) has a power to terminate the trust and, on termination, the family home reverts to that spouse or partner; or

(c) any increase in value of separate property in paragraphs (2)(a)-(d) since the later date –

(i) the marriage, civil union or de facto relationship began; or

(ii) the property was acquired; or

(d) any increase in value of separate property in paragraph (2)(e) since the later date –

(i) the marriage, civil union or de facto relationship began; or

(ii) the property was acquired;

if the court is satisfied that the family home is likely to be advanced to that spouse or partner immediately or in the foreseeable future if requested by that spouse or partner.

(2) Subject to paragraphs (1)(c) and (d), the portion of value of the family home is separate property where that value –

(a) was acquired by either spouse or partner before the marriage, civil union, or de facto relationship began; or

(b) was acquired through assets held before the marriage, civil union, or de facto relationship began; or

(c) was acquired from a third party –

(i) by gift; or

(ii) by inheritance; or

(d) is derived from property or the disposition of property described in paragraphs (a) to (e); or

(e) is included in a discretionary trust –

(i) in which one spouse or partner is a beneficiary, and has a vested interest in the home; and

(ii) to which the spouse did not contribute; and

(iii) that is settled by a person other than the spouse.

(3) Any increase in value of the family home that is directly attributable to the application of separate property of one spouse or partner, is separate property of that spouse or partner.

(4) A spouse or partner claiming that the family home is separate property is responsible for demonstrating that the property is separate property.

(5) Unless an agreement or order provides otherwise the value of the family home must be based on its fair market value.]

11 Division of relationship property

(1) On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in –

(a) ~~the family home;~~ [the value of the family home as defined under s 8A;] and

(b) …

Any reference to the equal share of the home in the PRA would need to be adjusted to reflect entitlement under s 8A rather than equal division. Affected sections include, ss 11A,[279] 12,[280] 16,[281] 10(4)[282] and 20B.[283] For example, s 11A would be amended as follows:

> **11A Where family home sold**
>
> (1) If the family home has been sold, each spouse or partner is entitled to share ~~equally~~ in the proceeds of the sale as if they were the family home, if the following conditions are satisfied:
>
> …

1 Explanation

Paragraphs 8A(1)(a) and (b) provide a starting point that the family home is relationship property regardless of whether the home is owned outright or owned by a trust. This creates equal footing for the division of the family home, resolving the difference in rules under the PRA.[284] This starting point is subject to s 8A(2), which provides situations where the family home is separate property. This alleviates the problems raised in Chapter Two of this paper arising where the family home was acquired through funds extraneous to the relationship.

Paragraphs 8A(1)(c) and (d) recognise that the value of the family home, if excluded under s 8A(2), may be subject to an increase in value during the relationship. This increase should be shared as it is a joint product of the relationship. In contrast, s 9A of the PRA provides a similar provision where the increased value of a separate asset attributable directly or indirectly to the actions of the non-owning spouse will render that increase relationship

[279] Compensation where the family home is sold.

[280] This section states that each spouse or partner is entitled to share equally in a sum or money equal to the equity of either spouse or both of them in the homestead.

[281] This section allows adjustment when each spouse or partner owned home at date relationship began.

[282] This section relates to property acquired by succession or by survivorship or as a beneficiary under a trust or gift and states that both the family home and chattels are relationship property, unless designated separate property by an agreement made in accordance with Part 6 of the Property (Relationships) Act 1976.

[283] This section provides a "protected interest" in the lesser of the specified sum or one half of the equity of the partners in the family home, whichever sum is the lesser.

[284] See Chapter Two of this paper discussing the difference in rules applying to trust property and property owned outright. See also Chapter Three of this paper which evaluates overseas approaches to division of the family home included in trust property. It is noted that the issues relating to trusts are extremely extensive and a full review of the law in this area constitutes a separate dissertation.

property.[285] Entitlement of each partner is determined in accordance with the contributions of each spouse. This is subject to discretion and may create an avenue for disagreement between partners. Section 8A provides a better approach as it creates greater certainty and predictability to facilitate settlement out of court.

Section 8A(1)(d) imports the statutory test from England used to determine whether trust property is subject to division.[286] Where the test is met, the increased value of the family home in a trust that constitutes excluded property will also be divisible as relationship property. The reform seeks to avoid inconsistencies under the British Columbian approach where other beneficiaries may be disadvantaged by entitlement to equal sharing of increased value in every situation.[287]

2 Application to the hypothetical scenarios in Chapter One

(a) Scenario A

In Scenario A, Bob and Jane acquired the family home jointly during their de facto relationship. Under the PRA, the home would be shared equally. Under s 8A, the source of the funds used to purchase the home becomes important. If Bob and Jane financed the home through income earned during the relationship, the full value would be relationship property under s 8A(1)(a), reaching the same result as the current PRA. However, if Bob and Jane financed the home through sources extraneous to the relationship listed under s 8A(2), the value of each contribution would be separate property, and the remaining value would be relationship property.

For instance, the home was purchased for $500,000 with a deposit of $100,000. Bob contributed $30,000 to the deposit through inheritance moneys (s 8A(2)(c)) and Jane contributed the remaining $70,000 through prior savings (s 8A(2)(b)). The market value of the property upon relationship breakdown was $600,000. Jane would be entitled to $70,000, plus $250,000 (half of the remaining value). Bob would be entitled to $30,000, plus $250,000. The ability to allow unequal division where each partner contributed different amounts to the purchase price recognises that the initial contributions were not a product of the relationship and should not be divided.

---

[285] Property (Relationships) Act 1976, s 9A(2). This does not currently apply to the family home and chattels as they are relationship property whenever acquired.

[286] See Chapter Three of this paper.

[287] See Chapter Three of this paper.

(b) Scenario B

In Scenario B, Lucy was gifted a home from her grandfather before her six-year de facto relationship with Fred. Under the PRA, the home would be shared equally. Under s 8A, only the increase in value of the property would be divided equally as the home is excluded property under s 8A(2)(a) and (c). For instance, if the value of the home increased from $400,000 to $575,000 during the de facto relationship,[288] Lucy would be entitled to $400,000, plus $87,500 (half the increase in value). Fred would be entitled to $87,500. Under the PRA, Lucy and Fred would be entitled to $287,500 each. This is a substantial difference and clearly indicates that the PRA was operating unfairly against home-owners.

Another inconsistency caused by the PRA can be shown in the situation where Fred used separate property to improve the home. The use of extraneous funds to repair or enhance the family home will not impact division of the family home under the PRA.[289] This may create disincentive to use separate funds on the family home. A disconnect is also created between the property entitlement of individuals depending on the allocation of extraneous funds.[290] For instance, if inheritance was used to purchase an investment property, this would be separate property under the PRA.[291] But if the inheritance was used to enhance the family home, the value would be halved. This inconsistency is removed by the s 8A(3). If Fred used separate funds to improve the family home, any enhanced value caused by those improvements would be Fred's separate property. For instance, if Fred can show that use of inheritance money to renovate the home, caused a $100,000 increase in its value, this value would be Fred's separate property.

(c) Scenario C

In the final scenario, Julie was subject to a double division of the family home over two marriages. She was essentially required to account for the full value of the home between the two relationship property settlements. Under s 8A, this outcome is removed. The first

[288] This figure is based on the average increase in house prices in 2016, which was 6.26 per cent, compounded annually: data from Delmendo "New Zealand's house price rises are decelerating" above n 86.

[289] Unless the factual circumstances fit within an exception. See for example Property (Relationships) Act 1976, s 13.

[290] John D McCamus "Family Law Reform in Ontario" (Special Lectures of the Law Society of Upper Canada, 1993) 451 at 460.

[291] Property (Relationships) Act 1976, s 10.

and second husband would only be entitled to the increase in value of the home under s 8A(1)(c). This lifts the heavy financial burden placed on Julie under the current PRA.

Section 8A also mitigates the difference in rules applying to pre-marital assets depending on their classification. In Scenario C, the second husband's substantial pre-marital assets were excluded from division, while the classification of Julie's asset as the family home, meant it was divided equally. If the family home increased in value from $500,000 to $600,000 during the marriage, under the current PRA each spouse would be entitled to $300,000. Under s 8A, Julie would be entitled to $550,000 and the second husband would be entitled to $50,000. The second husband's assets would remain excluded. However, the reduction in value shared with respect to the family home (ie $50,000, instead of $300,000) significantly softens the difference in entitlement between the different types of pre-marital property.[292]

3 Exceptions to s 8A

Exceptions to equal sharing under the current PRA will continue to apply to the value of relationship property in the family home under s 8A.

(a) Section 13 PRA "extraordinary circumstances"

Cases that seek unequal division under s 13 where the family home was acquired through sources extraneous to the relationship will be significantly reduced due to the exclusions under s 8A(2).[293] Previously established exceptions such as where the family home was acquired through gift or inheritance will be codified.[294] Additionally, the reform brings the legislation in line with the recent decisions in *Vann, Venter* and *Bowden,*[295] where the Courts broadened the application of s 13 in certain situations.[296] Based on figures that house prices are increasing by 6.26 per cent per year,[297] after four years a home would be split

[292] A further proposal for reform may be to apply s 8A to all property to create a completely level playing field in this area. However, this proposal is outside the scope of this paper.

[293] See Chapter Two of this paper which highlights the situations where s 13 Property (Relationships) Act 1976 is sought to be relied upon.

[294] See *McLaughlan,* above n 117; and *Dew v Dew,* above n 118. See also Chapter Two of this paper.

[295] *Vann v Fay*, above n 122; *Venter v Trenberth*, above n 123; and *Bowden v Bowden*, above n 121.

[296] See Chapter Two of this paper.

[297] Delmendo "New Zealand's house price rises are decelerating" above n 86.

89/11 in favour of the home owner if the family home was brought into the relationship.[298] This outcome is similar to the rulings in *Vann* and *Venter*, where the Court awarded a split of 85/15 and 80/20, after relationships of similar length. Section 8A provides these outcomes with certainty and avoids the application of judicial discretion.

(a) Section 17 PRA

Section 17 allows the court to make an adjustment to the entitlement of relationship property or order monetary compensation where the separate property of one spouse has been sustained by either the application of relationship property or the actions of the other spouse. The provision can be argued in conjunction with s 9A, which specifies when an increase in value of separate property becomes relationship property.

The application of s 17 is inappropriate in relation to separate property under s 8A(2). First, the wording provides broad judicial discretion. Although its application has been limited,[299] s 8A may produce a desire to extend its application to achieve results reflective of previous decisions rather than accepting change. Second, the section applies if separate property is "sustained by the application of relationship property". It is highly likely that relationship funds would be used to sustain the family home. Everyday living costs such as household bills and expenses are centred around the home. This consideration means the courts would *always* have discretion to adjust property or order compensation, undermining the certainty and predictability provided in s 8A. The use of relationship funds in the sustenance of the family home is accounted for through the categorisation of increased value in the home as relationship property. Application of s 17 to the family home would enable contributions of relationship property to be considered twice. It is suggested that the following be inserted into s 17 and a new provision be added:

17 Sustenance of separate property

…

[(4) This section does not apply to separate property under s 8A.]

[298] A house price of $500,000 would increase in value by $137,455 to hold a value of $637,455 at the end of the relationship. Half of the increase in value would be $68,727.50 which is approximately 11 per cent of the total value of the home, being $637,455.

[299] Awards in favour of non-owners have been small despite extensive efforts: see *Nation v Nation* [2005] 3 NZLR 46 (CA), where the wife was awarded $35,000 of a farm property valued at around $1 million. She was involved in extensive farm work over the 12-year relationship (dagging sheep, working dogs, mustering, fencing, general work and irrigation, spraying, mowing and irrigating the orchard).

[13A Division of separate property in the family home

(1) The court must not order division of separate property in the family home unless the court considers it would be manifestly unjust not to divide the separate property on consideration of –

(a) the duration of the marriage, civil union or de facto relationship; and

(b) any direct contributions towards the sustenance, maintenance, improvement, operation or management of separate property in the family home through the actions of the other spouse or partner.]

This section is intended to provide limited discretion in exceptional circumstances where it may be unjust for separate property not to be divided. The section mirrors the equivalent provision in British Columbia.[300]

C Restricted dealings relating to the family home

During a relationship, each partner can deal with his or her assets freely. It is only upon relationship dissolution that a share in relationship property crystallises.[301] Several sections in the PRA fetter this ability and provide protection for a non-owning spouse.

(a) Section 42

Section 42 allows any party with a claim to an interest in land under the PRA to lodge a claim against the title as a registerable interest. Notice of a claim acts as a caveat under the Land Transfer Act 1952. This seeks to prevent dispositions of assets against which a claim could be made and ensures that claims are not defeated by the disposition of assets generally.[302] Disposition of the family home during a relationship would be captured by this purpose. This provision will continue to operate in the same way with the inclusion of s 8A. The protection afforded through this section ensures that the family home is recognised in its function as a shelter for the family home and encourages consultation before any major change is made to the families living arrangements.[303]

---

[300] Family Law Act RSBC 2011 c 25, s 96.

[301] Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution" (paper presented to Colloquium on the Property (Relationships) Act 1976, University of Otago, Auckland Centre, 9 December 2016) at 2.

[302] *Clapham v Clapham* (1993) 10 FRNZ 584 (HC) at 587 per Gallen J.

[303] H Conway and P Girard "No Place like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30(2) QLJ 715.

(b) Sections 43 and 44

Sections 43 and 44 allow the Court to interfere where any disposition of property is made, or is about to be made, to defeat the claim or rights of a person under the PRA. Proof is required that following the disposition there will be insufficient property to ensure the applicant receives his or her entitlement under the PRA.[304] The family home is often the most valuable asset subject to division, therefore in most cases, disposition of the home would result in insufficient property to cover entitlement.[305] However, s 8A reduces the entitlement of the family home in some circumstances and may limit the application of ss 43 and 44. For example, in a situation where the increase in value of the family home was considered relationship property but the value was offset by other family assets. There is no proof that entitlement under the PRA will be extinguished as it could be compensated by other relationship property.[306] This may limit the ability of a non-owning partner to seek a remedy where the family home is disposed of during the relationship. It is recommended that ss 43(1) and 44(1) be amended to the following:

> (1) Where it appears to the High Court or the District Court or the Family Court that any disposition of property is about to be made whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to –
>
> (a) defeat the claim or rights of any other person (**party B**) under this Act; or
>
> (b) [affect the claim or rights of party B under s 8A under this Act;]
>
> the Court may, on such notice being given as the Court may direct, by order restrain the making of the disposition or may order any proceeds of the disposition to be paid into Court to be dealt with as the Court directs.

This amendment ensures that ss 43 and 44 will continue to operate in the same way and will continue to protect the family home's function as a shelter during the relationship.

---

[304] McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (Relationships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution", above n 301, at 3.

[305] See *PRP v GSC* [2012] NZFC 6835; *Ali v Begum* HC Auckland CIV-2005-404-496, 1 June 2005; *Nation*, above n 299; *Stewart v Stewart* [2003] NZFLR 400 (FC).

[306] See or example *Hilterman v Hilterman* FC Whakatane FAM-2008-087-161, 11 July 2008, where the Court held that even if the husband had intended to dispose of a superannuation drawn down during the relationship, the wife's interest was limited and there was sufficient other relationship property to cover her entitlement.

(a) Section 44C

Claims under s 44C where a family home has been disposed of to a trust will be unnecessary as s 8A provides equal rules for a family home owned outright and a family home owned by a trust. Any residual attempts to avoid the wording of s 8A could be captured by s 44C.

D Occupation rights

Section 27 of the PRA gives the court wide discretion to grant occupation orders in favour of either spouse or partner, for such period or periods and on such terms and subject to such conditions as the court thinks fit. A court can grant occupation rights regardless of which partner has a property interest in the home[307] and must have "particular regard" to the needs of any minor or dependent children of the relationship.[308] Section 8A will not affect the operation of this section or any other order made under Part 7 of the PRA relating to compensation or occupation.[309] Section 8A is concerned only with the division of value in the home based on the joint-efforts of a partnership. In contrast, occupation and compensation orders ensure that the needs of each partner and their children are considered and adequately accounted for. This is an important function of the law, which operates separately to the division of value in the family home and is based on different principles and considerations.

E Conclusion

The proposed reforms accord with the changes that have occurred in New Zealand society since the enactment of the MPA 1976.[310] The provisions more accurately divide relationship property based on the joint-efforts of an economic partnership, while providing certainty and predictability to facilitate out-of-court settlements. Differences in the division of a family home included in trust property is removed and even footing is created for all family homes. The function of the home in providing shelter is accounted for by provisions restricting the disposition of the home during the relationship and the ability of the court to award an occupation order regardless of ownership.

---

[307] See *R v R* [2010] NZFLR 555 (FC) at [44] per Judge Burns.

[308] Property (Relationships) Act 1976, s 28A.

[309] For example, orders for the benefit of children (s 26); occupation orders (s 27); and orders in relation to maintenance and child support (s 32).

[310] See Chapter Two of this paper.

Conclusion

The family home has been subject to equal division under relationship property law since the enactment of the MPA 1976. This has created the following undeniable problems and inconsistencies in the operation of the law:[311]

1. Equal sharing of the family home in every situation conflicts with the underlying policy of partnership that the PRA was founded upon.
2. The original justification found in the home's assumed function as a basic asset of a marriage no longer holds the same weight due to extensive changes in family structures.
3. Home-owners are often significantly financially disadvantaged where the family home was acquired through funds extraneous to the relationship, yet the value is divided equally.
4. Depending on the whether a pre-relationship asset is classified as the family home, one partner may be able to exclude pre-relationship property while the other cannot.
5. Division of the family home differs depending on whether the home was owned outright or included in trust property. Individuals can effectively contract out of the PRA by transferring the family home into a trust.

The need for change in the legislation is clear. The reforms proposed in this paper remove these problems and are summarised below:[312]

1. The value of the family home acquired by gift, inheritance, or acquired prior to the relationship is excluded from division and constitute separate property.
2. Where the initial value of the family home is excluded, any increase in value during the relationship is included as relationship property. Increased wealth during the relationship is acquired jointly and should be divided equally.
3. The law should create consistent results regardless of whether the family home was owned outright or owned by a trust.

These reforms create certainty, predictability and better accord with the principles of the PRA and the expectations of a changing society.

---

[311] See Chapters One, Two and Three of this paper.

[312] See Chapter Four of this paper.

Bibliography

A Cases

1 New Zealand

AMR v RCS [2012] NZFC 8586.

Aschenbrenner v Williams [2015] NZFC 3602.

Avison v McFarlane [2015] NZCA 409.

Bowden v Bowden [2016] NZHC 1201.

Brock v Norton [2016] NZFC 468.

Brooks v Chamberlain [2015] NZFC 8940.

Brown v Starke [2016] NZFC 7132.

Byrne v Byrne (1986) 2 FRNZ 340 (FC).

Buxtone v Buxtone [2017] NZHC 131.

C v B [2015] NZCA 421.

Carson v Carson [1980] 1 NZLR 14 (CA).

Castle v Castle [1977] 2 NZLR 97 (SC).

Clapham v Clapham (1993) 10 FRNZ 584 (HC).

Clark v Sims [2004] 2 NZLR 501 (HC).

Clayton v Clayton [Vaughan Road Property Trust] [2016] NZSC 29.

Cross v Cross [2017] NZHC 1272.

Crossan v Crossan 23 FRNZ 305 (FC).

da Silva v da Silva [2016] NZHC 2064.

de Malmanche v de Malmanche [2002] 2 NZLR 838 (HC).

Dew v Dew [2013] NZFC 4258.

DR v NLS FC Nelson FAM-2003-42-217, 30 June 2005.

E v E [1971] NZLR 859 (CA).

Edmond v Edmond (1992) 9 FRNZ 180 (HC).

Farrimond v Farrimond [2017] NZHC 1450.

French v French [1988] 1 NZLR 396 (CA).

G v B [2006] NZFLR 1047 (HC).

Gray v Gray [2013] NZHC 2890.

Haldane v Haldane [1976] 2 NZLR 715 (PC).

Hanks v Hanks FC Hamilton FAM-2008-019-1480, 12 November 2008.
Harrison v Harrison [2005] NZFLR 252 (HC).
Hazelwood v Marquand [2015] NZFC 1499.
Hilterman v Hilterman FC Whakatane FAM-2008-087-161, 11 July 2008.
Hofman v Hofman [1965] NZLR 795 (SC).
Humphrey v Humphrey (1990) 7 FRNZ (FC).
Hyde v Hyde [2009] NZCA 125.
Jackman v Clague [2015] NZHC 2316.
Jayachandran v Daswani [2015] NZFC 5238.
Joseph v Johansen (1993) 10 FRNZ 302 (CA).
K v V [2012] NZHC 1129.
Kauwhata v Kauwhata [2000] NZFLR 755 (FC).
MAC v KH [2016] NZHC 1417.
Martin v Martin [1979] 1 NZLR 97 (CA).
Masters v Masters [1954] NZLR 82 (HC).
Mauger v Mauger [2015] NZFC 570.
Maxfield v Maxfield HC Hamilton AP106/02, 22 June 2004.
Mead v Graham-Mead [2015] NZHC 825.
McLaughlan v McDonald FC New Plymouth 14 February 2006.
Mills v Graham FC Hamilton FAM-2004-019-1914, 3 March 2005.
Nation v Nation [2005] 3 NZLR 46 (CA).
Newman v Lee High Court Greymouth CIV-2004-418-3, 23 March 2004.
Peychers v Peychers [1955] NZLR 564 (HC).
Powers v Powers [2016] NZFC 4413.
R v R [2010] NZFLR 555 (FC).
Re Baigent (decd) (1988) 4 FRNZ 170 (HC).
Richmond v Richmond [2013] NZFC 6022.
Ryan v Unkowich [2010] 1 NZLR 434 (HC).
SAB v JJB FC Christchurch FAM-2005-009-3163, 29 June 2009.
Scragg v Scott [2006] NZFLR 1076 (HC).
Sutherland v Sutherland (2000) 20 FRNZ 281 (HC).
Sydney v Sydney [2012] NZFC 2685.
Thackwray v Thackwray [2014] NZFC 8702.

Thaller v Trotter [2016] NZHC 1508.

Vann v Fay [2016] NZFC 1676.

Venter v Trenberth [2015] NZHC 545.

VK v FK FAM-2009-091-717, 1 February 2011.

Waldron v Waldron (1990) 6 FRNZ 683 (DC).

Walsh v Walsh (1984) 3 NZFLR 23 (CA).

Wells v Wells [2006] NZFLR 879 (HC).

West v West (No 2) [2004] NZFLR 164.

Williams v Williams [1979] 1 NZLR 122 (CA).

Wood v Wood [1998] 3 NZLR 234 (HC).

2 Australia

R v Watson; Ex parte Armstrong (1976) 136 CLR 248.

Stanford v Stanford [2012] HCA 52.

Writh v Writh [1956] HCA 71.

3 England and Wales

AB v CB (Financial Remedies: Variation of Trust) [2014] EWHC 2998 (Fam).

Appleton v Appleton [1965] 1 WLR 25 (CA).

Charman v Charman [2007] EWCA Civ 503 (CA).

Cobb v Cobb (No. 6) [1955] 2 All ER 696 (CA).

CPS v Piper [2011] EWHC 3570 (Fam).

FB v PS [2015] EWHC 2797 (Fam).

Fribance v Fribance (No. 2) [1957] 1 All ER 357 (CA).

Hine v Hine [1962] 1 WLR 1124 (CA).

JL v SL (Appeal: Non-Matrimonial Property) [2015] EWHC 3658 (Fam).

JS v RS [2017] EWCA Civ 408 (CA).

McPhail v Doulton [1971] AC 424 (HL).

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 (HL).

N v F [1991] FCR 649 (Fam).

NA v MA [2006] EWHC 2900 (Fam).

P v P [2015] EWCA Civ 447 (CA).

Rimmer v Rimmer [1952] 2 All ER 863 (QB).

S v AG [2011] EWHC 2637 (Fam).

Vaughan v Vaughan [2007] EWCA Civ 1085 (CA).
Whaley v Whaley [2011] EWCA Civ 617 (CA).
White v White [2001] 1 AC 596 (HL).

4 Canada

Andermatt v Tahmasebpour 2015 BCSC 1743.
Asselin v Roy 2013 BCSC 1681.
Cabezas v Maxim 2013 BCSC 983.
Dhillon v Gaba 2014 BCJ 2031.
Kalmiakov v Shylova 2016 BCSC 2095.
L.A.F. v. E.H.D. 2015 BCSC 1450.
Lahdekorpi v Lahdekorpi 2016 BCSC 2143.
Oleksiewicz v Oleksiewicz 2017 BCSC 228.
Remmem v Remmem 2014 BCSC 1552.
Shih v Shih 2017 BCCA 37.
Tremblay v Tremblay 2016 ONSC 588.
V.J.F. v S.K.W. 2015 BCSC 593.
V.J.F. v S.K.W. 2016 BCCA 186.
Wells v Campbell 2015 BCSC 3.

B Legislation

1 New Zealand

Civil Union Act 2004.
Equal Pay Act 1972.
Human Rights Act 1993.
Land Transfer Act 1952.
Marriage Act 1955.
Married Women's Property Act 1884.
Married Women's Property Act 1908.
Married Women's Property Act 1952.
Matrimonial Property Act 1963.
Matrimonial Property Act 1976.
Parental Leave and Employment Act 1987.

Property (Relationships) Act 1976.

Property (Relationships) Amendment Act 2001.

2 Australia

Family law Act 1975 (Cth).

3 Canada

Family Law Act RSBC 2011 c 25.

Family Law Act RSO 1990 c F3.

Marital Property Act RSNB 2012 c 107.

Matrimonial Property Act RSA 2000 c M8.

Marital Property Act RSNB 2012 s 107.

Family Law Act RSNL 1990 c F2.

Matrimonial Property Act RSNS 1989 c 275.

The Family Property Act RSM 1987 c M45.

The Family Property Act RSS 1997 c F6.3.

4 Denmark

Danish Act on the Legal Effects of Marriage.

5 England and Wales

Married Women's Property Act 1882 (UK).

Matrimonial Causes Act 1973 (UK).

6 France

French Civil Code – Code de Procédure Civile Français Traduit.

7 Norway

Marriage Act 1991 (Norway).

8 Scotland

Family Law (Scotland) Act 1986.

9 Spain

Spanish Civil Code 1889.

10 Sweden

Swedish Marriage Code 1987.

C Books and chapters in books

Berend Hovius "Property Rights for Common-Law Partners" in Martha Shaffer (ed) *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Carswell, Toronto, 2007) 115.

Bill Atkin and Wendy Parker *Relationship Property in NZ* (Butterworths, Wellington, 2001).

C Smart *Rethinking Family Practices* (Palgrave Macmillan, United Kingdom, 2001).

G Crow "The Post-War Development of the Modern Domestic Ideal" in S Allan and G Crown (ed) *Home and Family: Creating the Domestic Sphere* (Macmillan, United Kingdom, 1989) 1.

J H Baker *An Introduction to English Legal History* (Butterworths, London 1971).

Mark Henaghan and Bill Aitkin *Family Law policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013).

Margaret Briggs "Marital Agreements and Private Autonomy in New Zealand" in Jens M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Ltd, Oxford, 2012) 256.

RL Fisher *Fisher on Matrimonial Property* (2nd ed, Butterworths, Wellington, 1984).

D Journal Articles

A Dupius and D C Thorns "Home, Home Ownership and the Search for Ontological Security" (1998) 46(1) The Sociological Review 24.

A H Angelo and WR Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237.

Anne Sanders "Cohabitants in private law: frustration and unjust enrichment in England, Germany and Canada" (2013) 62(3) ICLQ 628.

Bill Atkin "Harmonising Family Law" (2006) 37 VULR 465.

Bill Atkin "Reforming Property Division in New Zealand: From Marriage to Relationships" (2001) 3 EJLR 349.

Bill Atkin "The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation" (2008) 39 VUWLR 793.

H Conway and P Girard "No Place like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30(2) QLJ 715.

Heather Conway and Philip Girard "No Place Like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 QLJ 715.

John H Wade "Matrimonial Property Reform in Australia: An Overview" (1988) 22 Fam Law Q 41.

Kathryn O'Sullivan "Legislative Comment: Family Property Division Under the Family Law Act 2011" (2017) 50 U.B.C. L. Rev. 161.

Kristin Natalier and Belinda Fehlberg "Children's experiences of 'home' and 'homemaking' after parents separate: A new conceptual frame for listening and supporting adjustment" (2016) 29 AFLJ 111.

Lorna Fox "The Meaning of Home: A Chimerical Concept or a Legal Challenge?" (2002) 29(4) Brit.J.L.& Soc'y 580.

Mark Henaghan, Saskia Righarts, Alex Latu & Ruth Ballantyne "Property (Relationshhips) Amendment Act 2001 and Retirement: Are Separated Women More Disadvantaged Than Men?" (Faculty of Law, University of Otago, August 2012) at 16.

Mary Ann Glendon "Family Law Reform in the 1980's" (1983-1984) 44 La.L.Rev. 1553.

Mary Ann Glendon "Is There a Future for Separate Property?" (1974) 8(3) FLQ 315.

Masha Antokolskaia and Katharina Boele-Woelki "Dutch Family Law In The 21st Century: Trend-Setting and Straggling Behind at the Same Time" (2002) 6(4) EJCL 20.

Max Rheinstein "Division of Marital Property" (1975-1976) 12 Willamette L.J. 413.

Nicola Peart, Mark Henaghan and Greg Kelly "Trusts and relationship property in New Zealand" (2011) 17(9) T.&T. 866.

Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813.

Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for Reform" (2016) 47 VUWLR 443.

Nicola Peart "The Tension Between Private Property and Relationship Property in Rural New Zealand" (2007) 11(1) Journal of South Pacific Law 4.

Patrick Parkinson "Forty Years of Family Law: A Retrospective" (2015) 46(3) VLR 611.

R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law" (1979) 88 Yale U 950.

Robert Fisher "Relationship property arbitration" (2014) 9 NZFLJ 15.

Robert Leckey "Gimme Shelter" (2011) 34 Dalhousie LJ 197.

Royston J Lawson "A comparative study of domestic contribution and family property allocation in Australia, New Zealand and the United Kingdom" (1991) Journal of Consumer Studies and Home Economics 367.

S Mallet "Understanding Home: A Critical Review of the Literature" (2004) 52(1) The Sociological Review 62.

Wendy Parker "Sameness and difference in the Property (Relationships) Act 1976" (2001) 3 BFLJ 276.

E Parliamentary and government materials

(1 October – 25 October 1963) 337 NZPD 2117.

(16 November – 14 December 1976) 408 NZPD 3918.

(24 June 2004) 618 NZPD 13927.

(7 December 2004) NZPD 17437.

A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AJHR E6 at 4.

Dr Lynda Scott (29 March 2001) 591 NZPD 8632-3.

Justice and Electoral Committee "Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25" [2000] Reports of Select Committees.

Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109–1).

F Reports

British Columbia Ministry of Attorney General *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (2005).

British Columbia Ministry of Attorney General *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (July 2010).

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

Ingrid Lund-Andersen and Ingrid Magnussen *National Report: Denmark* (Commission on European Family Law, August 2008).

Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013**)**.

Law Commission *Some issues with the use of trusts in New Zealand: Review of the law of trusts second issues paper* (NZLC IP20, 2010).

Law Commission *The Future of the Joint Family Homes Act* (NZLC R77, 2001).

Law Reform Commission of British Columbia *Report on Property Rights on Marriage Breakdown* (Report No 111, March 1990).

Law Reform Commission of British Columbia *Working Paper on Property Rights on Marriage Breakdown* (Working Paper No 63, 1989).

Michael Bassett and Luke Malpass *Priced Out: How New Zealand Lost its Housing Affordability* (The New Zealand Initiative, Wellington, 2013).

Miguel Checa Martinez *National Report: Spain* (Commission on European Family Law, March 2001).

Ministry of Women's Affairs *Indicators for Change: Tracking the Progress of New Zealand Women* (2008).

New Zealand Law Society *Matrimonial Property Report of a Special Committee* (presented to the Minister of Justice in June 1972).

Ontario Law Reform Commission *Report on Family law: Part IV – Family Property Law* (Department of Justice, 1974).

Prof. Cristina González Beilfuss Dr. Monica Navarro-Michel *National Report: Spain, Information relationships – Spain* (Commission on European Family Law, May 2015).

Prof. Frédérique Ferrand and Dr. Bente Braat *National Report: France* (Commission on European Family Law, September 2008).

Prof. Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng *National Report: Sweden* (Commission on European Family Law, October 2008).

Prof. Tone Sverdrup *National Report: Norway* (Commission on European Family Law, August 2008).

Prof. Tone Sverdrup *National Report: Norway, Informal Relationships - Norway* (Commission on European Family Law, April 2015).

Roberta McIntyre The Women's Parliament: *The National Council of the Women of New Zealand*, 1896-1920 (Victoria University Press, Wellington, 1996).

Statistics New Zealand *New Zealand Now: Families and Households* (Statistics New Zealand, Wellington, 1998).

G Conference papers and presentations

Anthony Grant and Nicola Peart "The case for the spouse or partner" (paper presented to the NZLS Trusts Conference, June 2009).

Andrew Watkins and Simon Weil "Trusts for Property Lawyers" (paper presented to NZLS CLE seminar, November 2012).

Bill Atkin "Classifying Relationship Property: A Radical Re-shaping?" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, 1 November 2016).

Helen J Low and Fasken Martineau DuMoulin "Avoiding Family Law Fiascos in Family Estate Freezes: British Columbia and Alberta Family Law Considerations (paper presented to STEP Conference, Canada, 2014).

Hon John Priestley "Whence and whether? Reflections on the Property Relationships Act 1976 by a retired judge" (paper presented to A Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, 1 November 2016).

Hon Robert Fisher QC "Relationship Property – Should New Zealand's Regime be Mandatory or Optional?" (paper presented to Colloquium on the Property (Relationships) Act 1976, University of Otago, Auckland Centre, 9 December 2016).

J K McLay "Contracting out of the default relationship property regime – comparative observations" (papers presented to the Legal Research Foundation Inc. Seminar, 2 February 1977).

Jan McCartney "Tactics Used in Litigation to Undermine or Frustrate the Property (RElaitonships) Act 1976 – and Proposed Changes to Improve Achievement of Resolution"

(paper presented to Colloquium on the Property (Relationships) Act 1976, University of Otago, Auckland Centre, 9 December 2016).

Jens M Scherpe "Relationship Property – Should New Zealand's Regime be Mandatory or Optional?" (paper presented to Colloquium on the Property (Relationships) Act 1976, University of Otago, Auckland Centre, 9 December 2016).

John D McCamus "Family Law Reform in Ontario" (Special Lectures of the Law Society of Upper Canada, 1993).

John-Paul Boyd "Dividing Property and Allocating Debt under British Columbia's *Family Law Act:* The Case Law to Date" (paper presented to Supreme Court of British Columbia Education Seminar, Kelowna, British Columbia, May 2016).

Jan Pryor "Children in Changing Family Structures" Victoria University (paper presented to 14th Biennial Australasian Human Development Conference, Perth, Western Australia, July 2005).

P Gendall "The Roles of Men and Women in Society: International Social Survey Program" (paper presented at Massey University Palmerston North, 2003).

Pauline Vaver "Notes on the Matrimonial Property Act, 1976" (papers presented to the Legal Research Foundation Inc. Seminar, 2 February 1977).

Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012).

H Looseleafs

RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed, LexisNexis).

Property (Relationships) Act 1976 (NZ) (online looseleaf ed, Westlaw).

I Dissertations and theses

Emily Devaney "How can the Property (Relationships) Act be 'Trusted'? An Analysis of Trust Law and its Interface with Relationship Property Law" (LLB(Hons) Dissertation, Victoria University, 2016).

Kathryn O'Sullivan "A critique of the legal protections afforded to the matrimonial home in Ireland: lessons from British Columbia" (Doctoral Thesis, University of Limerick, 2012).

Rachel Riddle "Turning Family Homes into Castles: Testing the fortress of 'dynastic' trusts against relationship property rights in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2012).

Sean Conway "What's Mine is Yours, Or is it?" (LLB (Hons) Dissertation, University of Otago, 2011).

J Internet resources

English Oxford Dictionary "Definition of *home* in English" (2017) <https://en.oxforddictionaries.com>.

Ian Pool and Rosemary Du Plessis "Families: a history - Baby boom continues: 1960s – early 1970s" (5 May 2011) Te Ara - the Encyclopedia of New Zealand <http://www.TeAra.govt.nz>.

Inland Revenue "Number of customers by return types 2006 – 2015" (5 January 2017) <http://www.ird.govt.nz>.

Lalaine C Delmendo "New Zealand's house price rises are decelerating. But for how long?" (8 December 2016) Global Property Guide <https://www.globalpropertyguide.com>.

Liam Dann "Latest QV data shows Auckland housing market stalls" *The New Zealand Herald* (online ed, New Zealand, 2 August 2017).

Marina Maric "New Dutch matrimonial property regime: a 'limited community of property'" (7 February 2017) RWW Advocaten <http://rwv.nl/en>.

Maryla Rytter Wróblewski "Family Law in Denmark: Overview" (1 June 2015) Thomson Reuters <https://uk.practicallaw.thomsonreuters.com>.

Ministry for Women "Labour force participation" (6 September 2016) <http://women.govt.nz>.

Ministry of Social Development "New Zealand Families Today" (July 2004) <http://www.msd.govt.nz>.

New Zealand Law Commission "Review of the Property (Relationships) Act 1976" (24 May 2016) <http://www.lawcom.govt.nz>.

Richard Meadows "Personal Finance: Prenuptials on the Rise" Stuff NZ (28 January 2015) <http://www.stuff.co.nz>.

Statistics New Zealand "Average weekly household expenditure. By group, subgroup and expenditure levels. Years ended 30 June 2013 and 2016." (2016) <http://nzdotstat.stats.govt.nz>.

Statistics New Zealand "2013 Census information by variable" (3 December 2013) <http://www.stats.govt.nz>.

Statistics New Zealand "Earnings for people in paid employment by region, sex, age groups and ethnic groups" (24 August 2017) <http://www.stats.govt.nz>.

Statistics New Zealand "Marriages, Civil Unions, and Divorces: Year ended December 2016**"** (3 May 2017) <http://www.stats.govt.nz>.

Statistics New Zealand "Marriage and divorce in New Zealand – article" (March 2001) <http://www.stats.govt.nz>.

Statistics New Zealand "2013 Census QuickStats about housing" (18 March 2014) <http://www.stats.govt.nz>.

Statistics New Zealand “Review of Official Family Statistics Consultation Paper” (March 2007) <http://www.stats.govt.nz>.

K Other resources

Testimony of Ian Scott, then Attorney General of Ontario, to the Committee on the Administration of Justice on November 6, 1985.

Canadian Bar Association British Columbia Branch “Submission to Ministry of Attorney General White Paper on Family Relations Act Reform Proposals For A New Family Law Act” (October 2010).

Appendices

Appendix A: Nordic countries (civil law)

Jurisdiction	***Deferred community property***	***Excluded property***	***Allocation of the family home***	***De facto relationships***
Denmark[313] Act on the Legal Effects of Marriage (Denmark)	All property owned by each spouse at the time of the marriage and property acquired during the marriages (§ 15 para 1)	• Property excluded in a valid marriage settlement. • Income from (and property purchased with) separate property. • Inherited or gifted property, received on the condition that it is separate property. • Property replacing separate property.	The property-owning spouse may not engage in certain transactions without consent of the other spouse (§§ 18 and 19). The matrimonial home, furniture and other household effects may be taken into possession by one spouse if the property is necessary for the maintenance of the matrimonial home of that spouse (§ 70 para 2).	There is no legislation governing the division of property for unmarried couples**.** There are court procedures that can result in compensation being granted, but it is difficult to obtain such compensation**.**[314]
Sweden[315] Marriage Code 1987 (Sweden)	All property of the spouses (c 7 § 1).	• Property excluded in a valid marriage settlement.	The property-owning spouse may not, without the consent of the other spouse, alienate, pledge as security or mortgage, let or grant the use of	The Cohabitees Act (2003: 376) applies to unmarried couples living permanently together and sharing the same household.

[313] Information retrieved from: Ingrid Lund-Andersen and Ingrid Magnussen *National Report: Denmark* (Commission on European Family Law, August 2008).

[314] Maryla Rytter Wróblewski "Family Law in Denmark: Overview" (1 June 2015) Thomson Reuters <https://uk.practicallaw.thomsonreuters.com>.

[315] Information retrieved from: Prof. Maarit Jänterä-Jareborg, Margareta Brattström and Kajsa Walleng *National Report: Sweden* (Commission on European Family Law, October 2008).

	Personal property (eg clothes) and rights that cannot be transferred can be excluded (c 10 § 2).	• Property inherited or given as a gift by a third party, on the condition that the assets are to be separate property. • Property replacing separate property. (c 7 § 2)	the home without the other spouse's consent during the marriage (c 7 § 5). The spouse who has the greatest need of the spouses' joint dwelling or household goods has the right to be allocated this property in property division following a divorce (c 11 § 8).	Only the cohabitees' joint home and household goods purchased for joint use may be subject to division. The cohabitee with the greatest need of the home can be granted occupation rights over the home regardless of ownership, on the condition that the property is held on lease/tenant ownership (§§ 16 and 22).
Norway[316] Marriage Act 1991 (Norway)	All assets of the spouses after deductions have been made for debts (§ 58 para. 2 and 3)	• Assets excluded in a valid marriage settlement (§ 42). • Assets owned before the marriage and assets acquired by inheritance or gift (§ 59 para 1). • Non-transferable assets and personal assets (§ 61).	The property-owning spouse may not, without consent of the other spouse, transfer, mortgage, lease out, etc. a common residence, ordinary household goods in the common home or objects specified for use by the children (§ 32 and 33). When there are "special reasons" for doing so, a spouse may demand to take over the family home irrespective of previous ownership (§ 67 para. 1 (a) and (d)).	There is no legislation governing the division of property for unmarried couples. The Norwegian Household Community Act 1991 allows members of a household to acquire the previous family home and household goods at market value. If cohabitees have not established the owner of the common residence or items for common personal use, the court may establish joint ownership. The parties must have contributed (directly or indirectly) to the acquisition and the acquisition must constitute a joint project.

[316] Information retrieved from: Prof. Tone Sverdrup *National Report: Norway* (Commission on European Family Law, August 2008); Prof. Tone Sverdrup *National Report: Norway, Informal Relationships - Norway* (Commission on European Family Law, April 2015).

Appendix B: Napoleonic countries (civil law)

Jurisdiction	*Community property*	*Excluded property*	*Allocation of the family home*	*De facto relationships*
France[317] French Civil Code - Code de Procédure Civile Français Traduit	All assets are presumed to be acquired property unless it is proven that they belong exclusively to one of the spouses (art 1402).	• Assets owned by one of the spouses before the marriage. • Assets acquired by inheritance or legacy during the marriage. • Assets excluded by a marital agreement. (arts 1404 to 1408)	The spouses may not separately dispose of the family home (eg mortgage, sell or donate) during the marriage (art 215 para 3). The family home, may be leased to one spouse upon divorce on account of the social and family interests concerned, to one of the spouses, subject to the rights to reimbursement or indemnity for the benefit of the other spouse (art 1751 para 1).	Cohabitating couples operate under a separate property regime (arts 515 to 518). Property rights are determined by reference to ordinary common law.
Spain[318] Spanish Civil Code 1889	All gains and profits made by any of the spouses during the marriage are considered community property (art. 1347).	• Property owned by one of the spouses before the marriage. • Property acquired by any of them by means of will, intestate succession or donation.	Selling or transfer of any interest in the habitual matrimonial home or in relation to home furnishings requires the consent of both spouses (art 1320).	The Spanish Civil Code does not have legal provision for unmarried couples.

[317] Information retrieved from: Prof. Frédérique Ferrand and Dr. Bente Braat *National Report: France* (Commission on European Family Law, September 2008).

[318] Information retrieved from: Miguel Checa Martinez *National Report: Spain* (Commission on European Family Law, March 2001); and Prof. Cristina González Beilfuss Dr. Monica Navarro-Michel National *Report: Spain, Information relationships – Spain* (Commission on European Family Law, May 2015).

		• Property acquired during marriage with separate property, damage awards, clothing and other personal objects. (art 1346 Civil Code). • Assets excluded by a marital agreement (art 1355)		
Netherlands[319] Book 1 Dutch Civil Code (title 7) The Netherlands remains the last country where a *universal community of property* operates.	All assets and debts acquired before and during the marriage become community property upon marriage (art 1:94). Note: A new Bill passed by the lower house of the Dutch parliament (and now awaiting approval by the upper house) in 2017 proposes that only property acquired during a marriage should be regarded as community property.[320]	• Assets excluded in a valid marriage settlement • Assets inherited or given as a gift by a third party, on the condition that the assets are to be separate property. • A very limited category of assets which are closely attached to the person of one of the spouses. (art 1:94)	Each spouse has the right to manage property he or she brought into the community scheme. However, the disposition of the family home or donations, exceeding the value of ordinary gifts; require the consent of the other spouse (art 1:88).	The law does not Regulate cohabitating couples and there is uncertainty about the rights and obligations of such partners.

[319] Information retrieved from: Masha Antokolskaia and Katharina Boele-Woelki "Dutch Family Law In The 21st Century: Trend-Setting and Straggling Behind at the Same Time" (2002) 6(4) EJCL 20.

[320] Marina Maric "New Dutch matrimonial property regime: a 'limited community of property'" (7 February 2017) RWW Advocaten <https://rwv.nl/en>.