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# Prenuptial/ Contracting Out Agreements

November 2022

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## Research Highlight

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This Research Highlight is based on findings from research about relationship property division in New Zealand,<sup>1</sup> led by researchers from the Faculty of Law at the University of Otago, and generously funded by the Michael and Suzanne Borrin Foundation. This research was undertaken in two phases:

- Phase One involved a nationwide telephone survey ascertaining public attitudes and values about post-separation relationship property division. During 2018, 1,361 telephone interviews were undertaken with a representative sample of 1,011 people, with additional interviews with 150 Māori, 100 Pasifika and 100 Asian respondents.
- Phase Two examined how separated couples divided their property and resolved any disputes. During 2020, an anonymous nationwide online survey was completed by 378 people and 110 of these respondents also participated in a telephone interview about their experiences and perspectives. The majority of the 378 survey respondents were women (82%), were born in New Zealand (79%), and had a tertiary qualification (71%). Most identified as New Zealand European (89%) and/or Māori (7%).

For full details of the study methods, participants and findings, please refer to our research reports and summaries, referenced at the end of this Research Highlight.



## Introduction

The Property (Relationships) Act 1976 (PRA) sets out the rules for how the property of two partners is divided when they separate.<sup>2</sup> The key principle is that 'relationship property', as defined by the Act, should be divided equally between the two partners when their relationship ends (the 'equal sharing law').<sup>3</sup>

In New Zealand, most separated couples do not go to the Family Court to have their property division determined under the PRA. Mostly, people work it out themselves, often by seeking advice from lawyers about the law, dispute resolution processes, and their entitlements under the PRA. Sometimes, when former partners cannot agree on how to divide their property, they may negotiate between their lawyers, or involve a mediator, arbitrator or the Family Court.

<sup>1</sup> The research informed a review of the Property (Relationships) Act 1976; see Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC Report | Pūrongo 143, 2019)

<sup>2</sup> PRA 1976, ss 1C(1), 10A and 25(2). Note that the PRA can also apply to the division of relationship property on the death of one spouse or partner: ss 1C(1) and 10B.

<sup>3</sup> PRA 1976, s 1C(3).

## Research Highlight 5

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Couples can, however, make their own agreement in advance about how they would like their property to be divided if they were to separate in the future. They can choose to opt out of the PRA with a formal contracting out agreement so the equal sharing law will not apply.<sup>4</sup> These agreements can be made at any time by a couple already in, or about to enter, a marriage, civil union or de facto relationship. The agreement will be void (i.e., not valid or legally binding) unless certain requirements are met:

- the agreement is in writing;
- each party has had independent legal advice before signing the agreement;
- the signature of each party is witnessed by a lawyer; and
- the lawyer who witnesses the signature has certified that, before the party signed the agreement, they explained the effect and implications of the agreement to the party.<sup>5</sup>

These requirements allow couples the freedom to choose how to divide their property in a way they both see fit, whilst also ensuring a fair and just division of property between partners who may be of unequal bargaining positions. This helps to safeguard people from signing away their right to an equal share of the relationship property without understanding their statutory entitlements under the PRA and the implications of the agreement for them.

Instead of entering into a formal contracting out agreement, couples may decide to just make an informal agreement, either verbally or in writing, between themselves. This will not be a legally enforceable agreement because it won't meet the legal requirements set out above. However, informal agreements can still assist couples to clarify their intentions regarding the division of their property should they later separate.

In this Research Highlight, we use the term 'prenuptial agreement' to refer to any agreement about the division of relationship property made by a couple prior to separation. This includes both formal contracting out agreements and informal verbal or written agreements. We use this term because the participants in our research commonly referred to such agreements as 'prenups' or 'prenuptial agreements'. However, we distinguish between formal and informal agreements in the text that follows when this is important.

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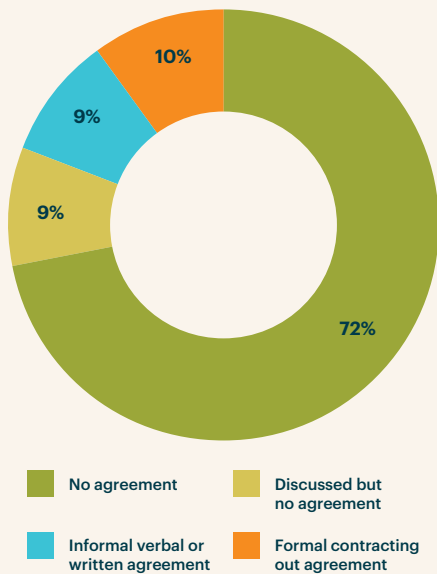
<sup>4</sup> PRA 1976, s 21.

<sup>5</sup> PRA 1976, s 21F. Note that, even when an agreement satisfies these legal requirements, the court can set it aside if satisfied that giving effect to it would cause serious injustice: s 21J.

### How Common Were Prenuptial Agreements?

It was not common for the participants to have had an agreement with their partner about how their property would be divided should they separate (see Figure 1). Only around 10% had made a formal contracting out agreement with a partner that had been certified by a lawyer. Even fewer (9%) had made some type of informal agreement, with most of these being just a verbal agreement. Sometimes participants had considered making an agreement, but hadn't discussed it with their partner and, for those who did discuss this, an agreement was not always made. In fact, it was far more common for couples to have not considered making any agreement at all. Overall, 72% hadn't discussed making one and most (81%) had had no prenuptial agreement, either formal or informal.

**Figure 1: Prevalence of prenuptial agreements**





## Research Highlight 5

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### Why Didn't People Make Prenuptial Agreements?

Participants gave various reasons for why they did not make, or consider making, a prenuptial agreement. Most commonly, they said they had had no need for one, particularly when each partner had brought assets of a similar value into the relationship or the couple had too little property to warrant making such agreement. This was particularly the case for participants who had been married some time ago in an era when such agreements were not common and young couples began married life with few assets.

*It was not common when we were married. Never thought it would apply to us.*

*We were together since aged 15, so didn't need it.*

*We both entered the relationship with low value of assets. We both contributed to the growth of our asset base.*

For others, the reasons for not having an agreement related to perceptions about the relationship. Some had (sometimes misguided) trust in their partner to act fairly and/or faith that their relationship would not break down. There were also concerns that any discussion about an agreement could adversely affect the relationship by implying a lack of trust or an expectation that it might not last.

*Probably not the most romantic or display of trust.*

*When you go into a relationship, you're in love with someone. You don't think these things will be an issue down the track. You've rose-tinted glasses on really.*

*They can make it very awkward and makes one partner feel like the other doesn't trust them.*

The cost of seeking legal advice to meet the requirements for a formal contracting out agreement (that was legally enforceable) was challenging for some participants. Concerns were also expressed that there was little point in having an agreement because it could be easily dismissed or might not be enforceable after a period of time.

Instead of having a prenuptial agreement, some participants had opted to protect their assets (or thought they had done so) with a trust. This, however, had not always been sufficiently protective.

*I actually thought the fact that the house was in the trust effectively ringfenced that. I will never enter another relationship without a prenup again. It's cost me a lot of money over the years.*

There were also those who had wanted an agreement, but their partner had not or had refused to have one. In some cases, a proposal for a prenuptial agreement had been met with strong opposition, threats, or manipulative behaviour.

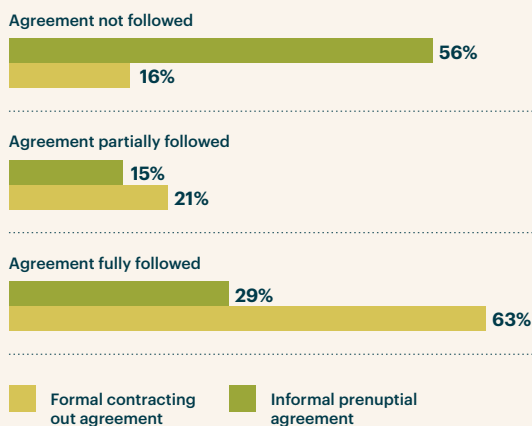
*My ex said he would not marry me if I insisted on a prenup agreement.*

*We briefly discussed an agreement, but it was met with significant resistance from my partner, so we didn't discuss it further.*

## Were Prenuptial Agreements Followed in the Property Division?

Prenuptial agreements aim to provide couples with clarity and certainty in advance about how their property will be divided should they separate. Around two-thirds of the participants who had had an agreement said they were followed (either fully or partially) when they divided their property. However, the type of agreement was important. Formal contracting out agreements were much more likely to be followed than informal ones – most (84%) formal contracting out agreements were fully, or partially, followed compared with only 44% of informal agreements (see Figure 2).

**Figure 2: Whether formal and informal agreements were followed**



When *formal* contracting out agreements were not fully or partially followed, this most commonly related to a lack of robustness in the wording of the agreement and/or lawyers or parties believing the agreement was out of date or void. Sometimes both parties jointly agreed not to follow the agreement if they thought it was no longer applicable.

*There was a technicality in the witnessing of the prenup and it was thrown out on that basis only.*

*Her lawyer argued it was too old and unenforceable.*

*The agreement was not particularly robust legally. My ex and I also felt that it was out-of-date. It was written when we first bought our house before children.*

The most common reasons given for why *informal* agreements were not followed were that one party changed their mind, reneged on the agreement, and/or denied that such an agreement existed. Sometimes this happened after a former partner sought legal advice and was informed of their property entitlements under the PRA and/or discovered that the agreement was void because it had not been certified by a lawyer. In some instances, the agreement was not followed because one party did not seek compliance with all of its aspects in order to reach a settlement.

*My partner disregarded the verbal agreement we had. ... No come back for a verbal agreement.*

*My ex-partner decided to follow legal advice which said our verbal agreement didn't stand.*

*We had a very clear verbal agreement and I had talked to her about getting that put in writing before we got married. But that created issues and we never got round to doing that I guess. [When] she saw her lawyer, that verbal agreement no longer existed!*

## Research Highlight 5

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### How Helpful Was Having a Prenuptial Agreement?

Overall, more participants found having a prenuptial agreement helpful (42%) than found them unhelpful (37%). These agreements were considered helpful because they:

- Provided greater clarity and certainty.
- Reflected the financial contributions made by each partner.
- Provided evidence of what had been previously agreed.
- Acknowledged the separate assets and debts/liabilities of each partner.
- Enabled property to be divided more easily, quickly and fairly.
- Removed stress and conflict.
- Provided a starting, or fall-back, position for negotiation.
- Ensured parties were not financially disadvantaged in the property division.
- Meant they were in a much better financial position than they would have been had they not contracted out of the PRA and avoided equal sharing.

*Made it much easier to agree who owned what and the financial implications and what assets during the relationship needed to be divided.*

*Having the legal document that gave a bare bones outline of what would happen definitely helped. Because, even though there was some wiggle room about exactly when it would all come to pass and the final numbers, at least we knew what we were working towards.*

*The prenup provided excellent evidence of unequal sharing in my favour when [my] former partner was denying we had agreed.*

*I would say it could be hard for any couple starting out to make such an agreement as you don't enter thinking you'll separate. I didn't. But pre-planning is really wonderful. Knowing what a split would involve helps for knowing boundaries and also what each party would legally be entitled to – no surprises.*

*Made it clearer with less room for argument.*

However, the type of agreement was important in how helpful they were considered to be. Around half of those who had a formal contracting out agreement certified by a lawyer found it helpful, compared to only around a third of those who had an informal agreement. An agreement was also more likely to be considered helpful when it had been followed for the property division and this was more likely when the agreement was a formal one.

Issues with prenuptial agreements were reported. Formal contracting out agreements could be problematic if they were not specific or clear enough, leaving them open to interpretation. This could lead to them being “twisted” by lawyers and overturned.

*My ex-partner's lawyer found a loophole and tried to argue the agreement. ... It wasn't worth the paper it was written on.*

*The agreement should have been clear. However, missed wording left it open to varying the value.*

As noted above, those with informal agreements sometimes reported that these were not legally enforceable and were disregarded, reneged on, not honoured, or denied.

Agreements made some time ago and not updated could fail to reflect a change in circumstances, such as the birth of children, the lengthy duration of a relationship or the assets since accumulated.

*It was good to a point, but should have been revisited and updated like a will or any other agreement.*

*The prenuptial agreement did not take into account that we had children and that therefore our need to provide, and our ability to provide, had changed radically since we first entered into the agreement.*



## Once Bitten, Twice Shy

While very few participants in our research had prenuptial agreements (either formal or informal), many regretted not having had one and, in hindsight, wished that they had.

*I was too naïve at the start of the relationship to think about this. Definitely should have done it regarding [my] family inheritance.*

*I will forever regret the decision not to have a prenup. I was too scared to raise the issue and thought my marriage would be permanent.*

*I regret not protecting my home for my children. I lost equity from the relationship and have struggled financially since. I was too trusting.*

Similarly, some who had only made an informal agreement, wished that they had formalised it with lawyers to make it legally enforceable.

*I should have got a real agreement from a lawyer instead of trusting my ex's word.*

*I just wish I'd put pen to paper with it, but that's hindsight. You don't expect at that time when things are joyous that things won't be down the track.*

*I wish to God I had formalised it. I was advised to protect myself legally, but didn't.*

While only 10% of the participants had had a formal contracting out agreement, nearly six times (56%) as many had (or would have) an agreement in place for current or future relationships because of their experience of post-separation property division. Many of those who had already re-partnered had made a prenuptial agreement with their current partner. Others said they would only contemplate entering a new relationship with such an agreement in place.

Nearly three-quarters of those who had had an informal agreement thought they would get, or had already obtained, a prenuptial agreement, with a new partner. This was thought to be particularly important for people entering a new relationship with considerable assets and/or children from a previous relationship which they wished to protect.<sup>6</sup> Others wanted to have a prenuptial agreement to acknowledge that they were bringing less into the relationship, so as to protect their new partner's assets.

*Naïve, trusting, loyal. Never thought I would ever get divorced, so this never crossed my mind. I am, without a shadow of a doubt, sure about my partner now, but still have entered one to cover ourselves.*

*I would certainly go to overt lengths if my new lady friend had property to make sure that she ringfenced that before our relationship got to any serious part. The last thing I would want is to be seen by her children or siblings or any other family to think that I was seeking out assets that she may have. ... Purely from the point of view that I would be contributing zero.*

*I will never go into a relationship without one now. You have to protect yourself.*

*It's about protecting the future of the kids.*

*I think if I ever decided to do that again, I would have a prenup and something in writing that says, 'Right, this is yours and this is mine and that's that'. Hopefully that would be legally binding because I have heard that sometimes they aren't. ... I used to just think that prenups were absolutely ridiculous and why would you ever do that, but I can see why, especially if, for example, you are a home owner and your new partner is not, or whatever that looks like. That's a lot to lose a second time.*

<sup>6</sup> This is consistent with the findings of two recent surveys of New Zealand family lawyers which noted an increase in the number of people aged over 50 years seeking legal advice about formal (s 21) contracting out agreements – 66% of the lawyers reported this in 2017, and 85% in 2019: New Zealand Relationship Property Survey 2017 (Grant Thornton and Family Law Section, New Zealand Law Society, October 2017); New Zealand Relationship Property Survey 2019 (Grant Thornton and Family Law Section, New Zealand Law Society, November 2019).

## Research Highlight 5

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### Pros and Cons

Both positive and negative views were expressed about prenuptial agreements. Many participants thought that they were a very good idea and strongly recommended them or regretted not having had one themselves. Whilst acknowledging that raising the issue with a new partner could be awkward or difficult, and perhaps be regarded as implying a lack of trust in the relationship, they urged others to consider getting a prenuptial agreement. Some even went so far as to suggest that they ought to be compulsory or automatic, with people having to opt out of (rather than opt into) one.

*I would almost say everyone who gets married to just have a prenup mandatory. Like it should just be a thing. ... I know it sounds unromantic and cynical, I get all of that, but it's never a bad idea to just give a quick glance to what if that rainy day comes? Because at the end of the day, you have to look after yourself, you know. If you're splitting from someone, you're splitting for a reason and they're certainly not going to look after you and, you know, they have no obligation to look after you, so you've just got to be smart and look after yourself.*

*This is a very good idea. I have entered into a prenuptial agreement with my current partner given my past experience. I have suggested this and support others to do the same. We all agree this was a difficult conversation ... but it saves the relationship issues in many ways. I feel much more secure in my relationship with this in place given my past experience.*

*These are difficult. Their existence suggests you are considering that the relationship might fail. This is a reasonable position to take, but could imply a lack of confidence. On the whole, I think they are well worth considering if you have assets of some significance (both kind and amount).*

*It was the absolute saving grace in this mess. ... When you buy a house, you buy an insurance policy. No one gets offended when they buy an insurance policy, so why would you get offended when a prenup is essentially an insurance policy for your marriage. Why would you do that? So, I just think people's attitude towards it needs to change a bit because it's probably going to save a lot of grief.*

While the cost of legal advice could discourage people from obtaining a formal contracting out agreement, some participants thought that the money they had spent on legal fees had been well worth it and, in the long-run, had saved them a lot of money because they avoided having to share property equally with their former partner.

*It saved me financially. Otherwise I would have paid off the debts he arrived with, I would have paid most of the mortgage and I would have left with not enough to buy a house.*

*I think for the service that I got, with the benefit of hindsight, it was obviously worth it. Because it saved me hundreds of thousands of dollars.*

However, prenuptial agreements were sometimes regarded less positively. Some participants were concerned that these agreements (particularly informal ones) could be easily overturned, contested or invalidated.

*I've also seen in case law, people that have had prenups and they've been overruled. So, they're not the be all and end all and the saviour that some people have thought they are.*



Being pressured or coerced into either making, or conversely, not making, a prenuptial agreement was also reported. This could result in participants being disadvantaged by the property division outcome. Some thought that agreements made under duress, when in situations involving financial disparity, family violence, and/or unequal contributions, could result in unfair property divisions, undermine statutory principles designed to protect vulnerable parties, and be a form of financial abuse.

*Where there is a power imbalance and financial disparity, a prenup can be created in circumstances of duress and unfair bargaining.*

*Having a prenuptial was very unhelpful for me. I was forced to sign it. I was in a very abusive relationship, so I signed it to have the peace. ... I renounced on my rights by signing the prenuptial. Maybe some are good, but mine was awful and very abusive. ... A prenuptial agreement is good when it's fair but, if you are forced like I was, I find it personally very bad and useless.*

## Research Highlight 5

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### What People Recommended

As well as recommending the use of prenuptial agreements, some participants also suggested that these should include clauses for dealing with valuations and ongoing post-separation household costs (such as rates, insurance, mortgage payments etc.) while the property division was being sorted out.

*Having in the contracting out agreement what would happen in terms of who pays for what during the separation process, because I think that tends to be forgotten about. The agreement is about how things are going to be divided but it doesn't talk about, okay, well, who pays the mortgage, rates, insurance while the separation occurs because that can take months, and that's thousands of dollars and expenses that someone's got to cover. So, we didn't outline what was going to happen in that case, so I think in hindsight it would have been good to have something like that.*

The need to review and update agreements to take changing circumstances into account was also advised.

*These sorts of agreements are essential whether or not you're getting married or you're just in a de facto relationship. ... It's important to have them signed, have them sorted and then put them in a drawer. But then you also need to get them out of the drawer every now and then and make sure that they're still fit for purpose. ... These need to be living documents that change as people's situations change.*

Participants also recommended making the process of obtaining and/or updating a prenuptial agreement easier, simpler and cheaper.

*Having to get my lawyer to put it together and then send it to her lawyer and then pay two different bills. The whole thing just seemed really, really difficult. I totally understand the intention of the law. ... You don't want a situation where a partner just puts a contract in front of someone and coerces them to sign it. The intention of the law is very much to make sure that everyone's on an equal footing. I do wonder if there needs to be a process to make these sorts of things easier to do, because I'm also aware that [the cost] is a huge barrier to a lot of people.*

*It would be great if they were more, maybe, mainstream and not considered to be something that rich people do or something that people who've had children from previous relationships. ... Something that's relatively simple and mainstream that people could do that sparks conversations.*

## Summary

Making a prenuptial or contracting out agreement is a personal decision by a couple already in, or about to enter, a marriage, civil union or de facto relationship regarding the division of their relationship property should they separate in the future. Our research has shown the importance of, at the very least, considering whether an agreement might be useful. Such conversations can be awkward or difficult because these agreements are not currently mainstream. However, many of those who had experienced the division of their relationship property without one, later became strong advocates for their use – either, personally, when they entered a new relationship or, more generally, by other people.

Ideally, prenuptial agreements should be formal contracting out agreements that comply with the PRA's legal requirements, rather than informal verbal or written agreements. While informal arrangements might be sufficient at times, our research found that they were not as helpful, or as likely to be followed, as formal contracting out agreements were. Obtaining independent legal advice, as is necessary with a formal contracting out agreement, also helps to ensure the agreement is fair for each partner and that no coercion is involved. This can better safeguard and protect each person.

Our research also identified the importance of ensuring that prenuptial agreements are clearly written, regularly reviewed and updated if necessary (e.g., when children are born, an inheritance is received, or new assets/debts are acquired). Thinking of these as “living documents”, that need to be revisited will help ensure they remain fit for purpose, and therefore valid and enforceable, if ever needed.

The Law Commission's recent review of the PRA concluded that the current contracting out provisions already strike “the right balance” as the PRA:

*... gives partners the freedom to make their own agreements about how their property should be divided on separation while protecting vulnerable partners by ensuring that they enter such agreements with informed consent.<sup>7</sup>*

Perhaps the time has arrived for greater public awareness and debate about whether contracting out agreements, and/or discussions between partners about them, should become more commonplace when new relationships form.

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<sup>7</sup> Te Aka Matua o te Ture | Law Commission (2019), see n 5 above, Executive Summary, p. 16, para 67. The Law Commission did, however, recommend four improvements to the contracting out regime: use of audio-visual technology by lawyers to witness a partner signing an agreement; repealing the provisions relating to a model form agreement; enabling courts to set aside seriously unjust agreements wholly or in part; and courts having regard to the best interests of any minor or dependent children when considering whether to give effect to a non-compliant agreement or to set aside an agreement because it would cause serious injustice (para 68).



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### Relationship Property Division in NZ Research Highlight Series

There are six Research Highlights in this series.  
Each provides helpful information and advice about:

1. Knowledge and Understanding of Relationship Property Division
2. Relationship Property Division: Insights From Those Who've 'Been There, Done That'
3. How the Relationship Between Former Partners Affects Their Property Division
4. The Challenges and Impact of Relationship Property Division
5. Prenuptial/Contracting Out Agreements
6. Dividing Relationship Property: A Guide about Issues to Consider

### Research Reports and Summaries

#### Phase One

Ian Binnie, Nicola Taylor, Megan Gollop, Mark Henaghan, Shirley Simmonds and Jeremy Robertson, *Relationship Property Division in New Zealand: Public Attitudes and Values. A General Population Survey* (Technical Research Report, Michael and Suzanne Borrin Foundation, Wellington, New Zealand, 2018).

Ian Binnie, Nicola Taylor, Megan Gollop, Mark Henaghan, Shirley Simmonds and Jeremy Robertson, *Relationship Property Division in New Zealand: Public Attitudes and Values. A General Population Survey* (Research Summary, Michael and Suzanne Borrin Foundation, Wellington, New Zealand, 2018).

<https://www.borrinfoundation.nz/report-relationship-property-division-in-new-zealand-public-attitudes-and-values>

#### Phase Two

Megan Gollop, Nicola Taylor, Ian Binnie, Mark Henaghan and Jeremy Robertson, *Relationship Property Division in New Zealand: The Experiences of Separated People* (Descriptive Research Report, Children's Issues Centre, Faculty of Law, University of Otago, Dunedin, New Zealand, 2021).

Megan Gollop and Nicola Taylor, *Relationship Property Division in New Zealand: The Experiences of Separated People* (Research Summary, Children's Issues Centre, Faculty of Law, University of Otago, Dunedin, New Zealand, 2022).

<https://www.otago.ac.nz/cic/research/index.html#relationship-property>

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ISBN 978-1-99-117744-5

**Please cite this as:** Nicola Taylor and Megan Gollop, *Prenuptial/Contracting Out Agreements* (Research Highlight 5, Michael and Suzanne Borrin Foundation, Wellington, New Zealand, 2022).

Many thanks to the Michael and Suzanne Borrin Foundation, Ian Binnie (Solasta Consulting), Professor Mark Henaghan (University of Auckland), Dr Jeremy Robertson, Nicola Liebergreen (Assistant Research Fellow), Blair Hughson (Core Development), and Helen McQueen and Nichola Lambie (Te Aka Matua o te Ture | Law Commission) for their invaluable contributions to the research project. Particular thanks to the many participants for sharing their views on, and experiences of, post-separation relationship property division.

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