

DEAD WRONG?

A Critique of the Death Provisions of the
Property (Relationships) Act 1976,
and the Case for Change

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TABLE OF CONTENTS

<i>Introduction</i>	1
Chapter One: A History of Change	3
<i>Introduction</i>	3
A. How Does the Property (Relationships) Act 1976 Work on Death?	3
B. A Flawed Scheme.....	4
C. Outline of Matrimonial Property Regimes.....	5
D. A History of Change: Pre-1963	6
i) <i>From one legal person</i>	6
ii) <i>To two</i>	6
iii) <i>The first hints of duty</i>	7
E. The Matrimonial Property Act 1963	8
F. The Matrimonial Property Act 1976.....	10
i) <i>The Working Group's Recommendations</i>	12
ii) <i>The 2001 Amendments</i>	14
<i>Conclusion</i>	15
Chapter Two: The Nature of Relationship Property Rights	16
<i>Introduction</i>	16
A. Pre-existing Rights in the MPA 1963	16
<i>Conclusion</i>	20
B. Pre-existing Rights in the MPA 1976 and the PRA 1976	21
i) <i>Is There a Conceptual Basis for Pre-existing Rights?</i>	21
ii) <i>Evidence in the Provisions</i>	23
(a) <i>Section 25</i>	23
(b) <i>Section 11</i>	24
(c) <i>Protection of Rights: Sections 42, 43 and 44</i>	24
(d) <i>Compensatory Provisions</i>	27
(e) <i>Estate and Gift Duty</i>	28
(f) <i>Separation Agreements: Accrued Rights?</i>	28
C. The Case for Change	29
i) <i>Revisiting the Choice of Option: The Unfairness Explained</i>	30
ii) <i>Disrupting Succession Law</i>	31
<i>Conclusion</i>	32

Chapter Three: Death v Separation	33
<i>Introduction.....</i>	<i>33</i>
A. The Application Process	33
i) <i>Time</i>	<i>34</i>
ii) <i>Formalities</i>	<i>35</i>
iii) <i>The Irrevocable Choice.....</i>	<i>38</i>
iv) <i>Who can apply?</i>	<i>40</i>
B. The Effect of Applying for a Division	44
i) <i>General Provisions.....</i>	<i>44</i>
ii) <i>Section 77: A relief?</i>	<i>45</i>
<i>Conclusion</i>	<i>47</i>
 Chapter Four: Options for Change	 49
<i>Introduction.....</i>	<i>49</i>
A. A Separate Act for Death?	49
i) <i>Conformity with International Regimes</i>	<i>50</i>
ii) <i>Conformity within New Zealand Succession Law</i>	<i>51</i>
(a) <i>Curing Inconsistencies and Meeting Succession Objectives.....</i>	<i>51</i>
(b) <i>Efficient Machinery.....</i>	<i>53</i>
B. What Form Should the Succession Act Take?	54
Option 1	55
Option 2	56
<i>Conclusion</i>	<i>57</i>
 <i>Conclusion.....</i>	 <i>58</i>
 Bibliography	 59

Introduction

People entering into relationships in New Zealand often understand the property consequences of their union. Since 1976, New Zealand ‘matrimonial’ or ‘relationship’ property law has imposed an ‘equal sharing’ regime on separating couples. At the end of a relationship, each spouse or partner is generally entitled to a half share of all ‘relationship property’.¹ That system is often regarded as simple, effective and fair to both sides. The Property (Relationships) Act 1976 (the PRA) recognises the different, but equal, contributions that each partner makes to their relationship.

What is not so well known is how the PRA applies when one spouse or partner dies. Yet since 2001, the PRA’s equal sharing regime has extended to couples whose relationship ends on death. If that seems to be an odd stretch, it is. The PRA was designed for living couples continuing on with their lives after separation. The ‘death provisions’ of Part 8 were portrayed as a mere extension of the existing rules. This paper challenges that notion. Death is not like a separation. In fact, the PRA treats death and separation very differently, but not in a conceptually coherent or consistent way.

Chapter One briefly outlines how the PRA works on death, and gives an overview of the historical developments leading up to this point. Chapter One shows that the various matrimonial property statutes have always been conceptualised narrowly as social legislation, and as deferred schemes.

Chapter Two challenges that narrow conception of relationship property rights. As this chapter explains, the drafters of the Acts never fully appreciated the nature of the schemes they created. Death was therefore included due to a conceptual misunderstanding. This chapter also argues that the general scheme of Part 8 operates unfairly in death cases.

Chapter Three explains why the death provisions are not merely an extension of the provisions for separating couples. The PRA tries to meet the demands of death and

¹ ‘Relationship property’, as it is now called, is defined in s 8 of the Property (Relationships) Act 1976. The term generally captures all assets integral to the relationship, and property associated with the relationship ‘partnership’.

succession law, at the cost of the Act's own principles. That situation is untenable; Chapter Three concludes that death should be removed from the PRA altogether.

Chapter Four proposes placing the death provisions in a separate Act for succession law. The chapter puts forward the case for a separate Act, and explores potential models for that scheme.

Overall I contend that death should never have been included in the relationship property scheme that applies on separation. Succession and relationship property are uncomfortable bedfellows, and they will never fit well together. The solution is to place property claims on death in an Act designed specifically for that purpose.

CHAPTER ONE: A HISTORY OF CHANGE

Introduction

This Chapter outlines the PRA's 'choice of option' scheme for widowed spouses or partners, and provides an historical account of the developments leading to this scheme. The Chapter also touches on how the various matrimonial property schemes were traditionally conceptualised.

A. How Does the Property (Relationships) Act 1976 Work on Death?

The basic scheme of the PRA death provisions is the election in s 61. On the death of one spouse or partner, the surviving spouse or partner has a choice between 'option A' or 'option B'.² Option A is to proceed under the PRA: to apply for a division of relationship property. Given the strong presumption of equal sharing in the Act, the survivor then generally takes half the couple's relationship property.³ Option B is to elect not to apply for a property division. Instead, the survivor retains their own property, and takes any property they are entitled to by survivorship, including any jointly owned assets.⁴ The survivor then receives any existing provision made for them under the deceased's will, or if there is no will, under the intestacy rules. Option B applies as a default if the survivor fails to make a positive election in six months.⁵

The critical point is that this choice is exclusionary. If the survivor chooses option A, he or she generally forfeits the right to inherit from the deceased. Gifts to the survivor in the will are treated as revoked, unless the will expresses a contrary intention or the Court is satisfied it should reinstate all or any of the gifts to avoid injustice.⁶ The will is redrafted as if the survivor had predeceased the deceased. The survivor also forfeits any intestacy entitlements and the estate is distributed as if the deceased left no surviving spouse or partner.⁷ The PRA

² Property (Relationships) Act 1976, s 61.

³ Section 11. Section 13 provides a limited exception to equal sharing, if there are extraordinary circumstances that make equal sharing repugnant to justice, then the share of each spouse or partner is assessed according to their contributions to the relationship.

⁴ Section 61(3).

⁵ Section 62.

⁶ Sections 76 and 77.

⁷ Section 76(3).

alone determines how the property is distributed. Jointly owned assets do not pass to the survivor; instead, these assets will be classified as relationship property. Conversely, choosing option B denies the survivor any claim to relationship property.⁸ Regardless of the choice of option, the surviving spouse or partner may still bring a claim under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949.⁹

B. A Flawed Scheme

The exclusionary ‘choice of option’ scheme is conceptually flawed. Under option A, the survivor claims relationship property rights. Option B means the survivor retains his or her succession entitlements. The PRA effectively says the survivor cannot have both. Yet those rights are of a fundamentally different nature.¹⁰ Relationship property rights are a statutory construct: the PRA accords spouses or partners rights based on their contributions to the relationship, irrespective of legal title.¹¹ Commentators have dubbed a relationship property share as payment of a ‘debt’.¹² Succession law, on the other hand, rests firmly in the testator’s private property right to dispose of their property on death.¹³ The survivor then takes under the will or rules of intestacy by virtue of the deceased’s moral ‘duty’ to the survivor. By forcing survivors to choose between entitlements, the PRA confuses these competing concepts of ‘debt’ and ‘duty’.

The conceptual problems of the ‘choice of option’ scheme will be explained in full in Chapter Two. For now, it is enough to say that the scheme unjustifiably forces partners to choose between two sets of equal rights.

How did we get here? In order to understand the current scheme, we must trace the history of matrimonial property law and its relationship with succession law over the past century.

⁸ Section 61.

⁹ Section 57.

¹⁰ See generally the criticisms of how the Act operates on death in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004). The authors recognised very early on that the scheme of Part 8 unacceptably mixes succession law and relationship property law.

¹¹ Nicola Peart “Part 8: The Election” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 59 at 62.

¹² See, for example, Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change” (2008) 39 VUWLR 813 at 829.

¹³ Nicola Peart “Property (Relationships) Act 1976” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 19 at 24-25.

Before launching in, however, it is worth briefly examining the general forms of matrimonial property regimes, to understand where New Zealand's scheme fits.

C. Outline of Matrimonial Property Regimes

Matrimonial property regimes generally fit into one of three systems: the unitary system, separation of property, and community of property.¹⁴ The unitary system developed in the common law world. The unitary model essentially merges the rights of both spouses into one spouse, typically the husband.¹⁵ Separation of property, on the other hand, does not recognise any special property rights formed by virtue of marriage. Legal title alone governs property rights. That is a stark contrast to the community property system commonly found in civil law countries.¹⁶ Spouses in a community property regime share property ownership and control during the marriage itself.¹⁷ As spouses clearly have pre-existing rights over the community, they are also entitled to an equal share at the breakdown of the marriage. The community of property system is open to innumerable variations, including regimes of "deferred community" or community property based on an accrual system.¹⁸

As the following historical analysis reveals, New Zealand's various matrimonial property statutes have never sat comfortably within any of those categories. That in part explains the confusion between succession and relationship property in the current Act: our scheme has never been clear from the start.

¹⁴ A H Angelo and W R Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237 at 239.

¹⁵ Angelo and Atkin, above n 14, at 241. See further A Sim "Matrimonial Property in New Zealand" in Inglis and Mercer (eds) *Family Law Centenary Essays* (Sweet and Maxwell, Wellington, 1967); Susan Staves *Married Women's Separate Property in England 1660-1833* (London, Harvard University Press, 1990) at 1-6 and 30-35.

¹⁶ Branka Rešetar "Matrimonial Property in Europe: A Link between Sociology and Family Law" (2008) EJCL 12.3 <<http://www.ejcl.org/123/art123-4.pdf>> at 4-8. The community of property system exists to various degrees in civil law countries. The Netherlands remains the last country to have a 'true' system of universal community of property, regulated by Civil Code (Title 7 of Book 1). Other countries with community of property systems include South Africa (Matrimonial Property Act 1984) and France, although the French system operates a limited community property system.

¹⁷ Angelo and Atkin, above n 14, at 243-244.

¹⁸ Denmark, for example, has a system of deferred community of property; at the end of the relationship, the marital property is divided equally. (Legal Effects of Marriage Act (Denmark).) The accrual system operates in Germany: on divorce, any increase in the spouses' respective assets that occurs during the marriage is divided equally between them. (1363 par 2 BGB (German Civil Code).) For a full comparison of these systems, see Branka Rešetar "Matrimonial Property in Europe" above n 16, at 4-8.

D. A History of Change: Pre-1963

i) *From One Legal Person...*

New Zealand inherited the unitary system of matrimonial property law from England in 1840. On marriage, husband and wife became one person for all legal purposes.¹⁹ The husband was the controlling mind of that legal person; he retained his own property, but also gained extensive rights over his wife's property.²⁰ The wife lived under her husband's protection in the condition of "coverture". Over the centuries, the law of equity developed several protections for wives, particularly in the field of trusts.²¹ Widows also traditionally acquired dower rights, generally amounting to a life-interest in a third of their husband's real estate.²² Dower proved to be extremely restrictive to property ownership, and the law increasingly found methods to get around dower rights.²³ But it did give women limited legal and property rights by virtue of their marriage.

ii) *To Two...*

New Zealand moved to a separate property system in 1884 with the passing of the Married Women's Property Act. The Act gave married women the right to acquire, hold and dispose of all real or personal property in the same manner as a 'feme sole' (an unmarried woman).²⁴ Despite this monumental change, the reforms would have made little practical difference to most married women, who had no way of earning income or acquiring property.²⁵ Nevertheless, 1884 marks a crucial turning point. Married women finally had their own legal

¹⁹ Bettina Bradbury "From Civil Death to Separate Property" (1995) 29 NZJH 40 at 42.

²⁰ Nicola Peart "Towards a Concept of Family Property in New Zealand" (1996) 10 IJLPF 105 at 107.

²¹ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.6]. See further Staves *Married Women's Separate Property*, above n 15, at 27-95. These protections included the doctrine of equitable separate estate and resulting trusts in favour of wives. While a wife could not hold her own property, there was nothing to prevent a trustee from holding property on her account.

²² Rosalind Atherton "New Zealand's Testator's Family Maintenance Act of 1900—The Stouts, The Women's Movement and Political Compromise" (1990) 7 No 2 Otago LR 202 at 202. For a full account of dower rights, see Robert Megarry and William Wade, *The Law of Real Property* (5th ed, Sweet & Maxwell, London, 1984) at 544-546; Staves, above n 15, at 27-31.

²³ Atherton, above n 22, at 202-203.

²⁴ Married Women's Property Act 1884, s 3.

²⁵ Margaret Briggs "Historical Analysis", in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 1 at 7.

identity, completely separate from their husband's. That extended well beyond property ownership into other legal rights.²⁶

The Married Women's Property Act made limited provision for summary disposal in matrimonial property disputes.²⁷ However, disputes over property ownership ultimately rested on financial contributions.²⁸ Inevitably this favoured husbands, who were nearly always the family breadwinners.

Separate property for women was therefore both a victory for and a limitation on women's rights. Severing the unity of husband and wife had unforeseen consequences: married women were vulnerable to being left completely destitute should their husbands desert or disinherit them.²⁹ Dower, for all its shortcomings, had provided women with a safety net.³⁰ But dower was rendered obsolete by reforms in New Zealand in 1874, leaving nothing in its place.³¹ The law imposed only minimal maintenance obligations on husbands.³² Complete testamentary freedom meant that husbands could leave their spouses and children destitute should they wish to.³³ Women were left in a precarious state.³⁴

iii) The First Hints of Duty

New Zealand was the first country to introduce legislation to limit testamentary freedom: namely, the Testator's Family Maintenance Act of 1900.³⁵ Where a testator's will or intestacy failed to make adequate provision for the proper maintenance or support of the spouse or

²⁶ Briggs, above n 25, at 7.

²⁷ Married Women's Property Act 1884, s 20. Later s 19 of the Married Women's Property Act 1952. Surprisingly, s 5 of the Matrimonial Property Act 1963, while providing for a much wider class of matrimonial property claims based on contributions, borrowed the same procedural phraseology from this original section.

²⁸ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.7].

²⁹ Briggs, above n 25, at 7.

³⁰ Atherton, above n 22, at 202.

³¹ Dower was not formally abolished until The Property Law Act 1905 (s 21), but it had been rendered practically obsolete by reforms to the intestacy rules in Real Estate Descent Act 1874 (38) Vict No 84 (UK)).

³² Destitute Persons Act 1894 (later 1904 1905, 1908 and 1910 versions of the Act).

³³ Atherton, above n 22, at 204.

³⁴ Briggs, above n 25, at 9.

³⁵ The Act was renamed the Family Protection Act in 1907; today it is the Family Protection Act 1955. The Act remains much the same in substance, but the courts have given it such a wide interpretation that it now appears almost unrecognizable.

children of the marriage, the Court could make any order for provision for that person from the deceased's estate.³⁶ That provision continues today virtually unchanged in substance, in the Family Protection Act 1955.³⁷ The growing social recognition of the need to recognise the common interests of husbands and wives in the family home culminated in the Joint Family Homes Act 1950, which allowed the home to be settled for both as joint owners. Parliament further enacted laws to provide for the transfer of tenancies in homes on divorce or separation.³⁸

But these developments merely provided limited protection for married women. Clearly the law needed to grant women *property* interests in the property produced by the marriage.

E. The Matrimonial Property Act 1963

The Matrimonial Property Act 1963 (MPA 1963) was introduced against this background, largely as a response to the need to grant women further protection. The Act applied to matrimonial property disputes. The Act gave the Court wide discretionary powers to redistribute or vest property at the end of a marriage, based on evidence of individual contributions by the parties to that property.³⁹ Relevant contributions included non-financial contributions, such as “prudent management,” which were (theoretically at least) accorded equal weight to financial contributions.⁴⁰ Crucially for our purposes, the Act also applied to claims on death. Widowed spouses could apply for a matrimonial property order in addition to provision they received under their spouse's will or under the intestacy rules.⁴¹

Why did the MPA 1963 extend to widowed spouses? It comes down to how the Act was conceptualised. The MPA 1963 was seen to preserve the separate property regime, subject to the courts' overriding discretion to adjust property interests on the breakdown of the

³⁶ Testator's Family Maintenance Act 1900, s 2.

³⁷ Family Protection Act 1955, s 4.

³⁸ For example, the Destitute Persons Amendment Act 1951, s 3, and the Divorce and Matrimonial Causes Act 1953. These enactments provided for the transfer of tenancies in homes on separation or divorce. This allowed wives whose husbands had left them to stay in the family home—but only in the case of rental properties.

³⁹ Matrimonial Property Act 1963, ss 5 and 6.

⁴⁰ Matrimonial Property Act 1963, s 6(1).

⁴¹ Angelo and Atkin, above n 14, at 248.

marriage.⁴² Until then, the ordinary rules of legal title prevailed. Given that awards were entirely at the courts' discretion, it would have been difficult for one spouse to claim they had a pre-existing entitlement to the other spouse's property. Furthermore, many viewed the Act as broad social legislation, aimed to rectify the imbalance against married women.⁴³ On that basis, death appeared to be an easy fit. The MPA 1963 seemed to merely provide another vehicle to ensure fair outcomes for widowed spouses.

As Chapter Two will explain, that was not a correct conceptualisation of the MPA 1963. In fact, the Act's scheme hints that spouses have *pre-existing* property interests in matrimonial property.

The 1963 Act was a turning point in family property law, in that it finally recognised non-monetary contributions. However, the limitations of the legislation soon became apparent. The courts, exercising their full discretionary powers, typically gave far greater weight to financial contributions.⁴⁴ The courts' failure to give effect to domestic contributions failed to recognise that "[t]he cock bird can feather his nest precisely because he is not required to spend most of his time sitting in it".⁴⁵ In *E v E*, for example, the Court of Appeal insisted that a wife could only claim an interest if she could prove contributions to specific items of property.⁴⁶ In *Haldane v Haldane*, the Privy Council criticised that approach. The wife's contributions and property rights should be assessed on a "global basis", not item by item.⁴⁷ However, this came too late; legislative change was already underway.

In 1972 a Select Committee reported on the Matrimonial Property Act 1963. The Committee recommended a comprehensive new code to replace the 1963 Act, one that extended globally to all the assets of the marriage.⁴⁸ The Committee preferred not to suggest any conceptual

⁴² Angelo and Atkin, above n 14, at 248.

⁴³ For example, the Minister of Justice, introducing the second reading of the Matrimonial Property Amendment Bill 1968, said the "spirit" of the Act was to allow the wife a share of the fruits of her husband's labour, as her domestic efforts freed up his time for economic activities (1968) 358 NZPD 3393, cited in *Matrimonial Property: Report of a Special Committee* (June 1972) at 8.

⁴⁴ Briggs, above n 25, at 10.

⁴⁵ Lord Simon of Glaisdale, "With All My Worldly Goods" (Address to Holdsworth Club, University of Birmingham, 20 March 1964) at 32.

⁴⁶ *E v E* [1971] NZLR 859 (CA). In that case, the wife was only able to prove a contribution to the matrimonial home.

⁴⁷ *Haldane v Haldane* [1976] 2 NZLR 715 at 722.

⁴⁸ *Matrimonial Property: Report of a Special Committee* (June 1972) at 24.

basis for the Act, leaving that to Parliament to determine. A new Bill was introduced in 1975, and the Matrimonial Property Act 1976 was born.

F. The Matrimonial Property Act 1976

The Matrimonial Property Act 1976 (MPA 1976) operated a fundamentally different regime to the 1963 Act. To begin with, the Act largely did away with the judicial discretion that was so central to the MPA 1963.⁴⁹ Instead, the new Act imposed a strong presumption that spouses would share equally in matrimonial property.⁵⁰ The Act was based on the concept that marriage is a partnership of equals, to which both parties are presumed to contribute equally, albeit in different ways.⁵¹ Monetary contributions were not to be presumed to be of greater value than non-monetary contributions.⁵² That in turn justified equal sharing. Rather than focusing on contributions to the property, the Act switched the focus to contributions to the marriage itself.⁵³

The MPA 1976 was typically classified as a system of deferred sharing.⁵⁴ During the marriage, spouses retained their individual property rights.⁵⁵ Rights in matrimonial property were thus said not to “crystallise” until the marriage had ended.⁵⁶ The substance of the MPA 1976 remains unchanged in the PRA; hence the PRA is also defined as a deferred scheme.⁵⁷

As Chapter Two explains, this conceptualisation is too narrow. As was the case with the MPA 1963, the Act’s provisions strongly suggest that parties have *pre-existing* interests in relationship property.

⁴⁹ Briggs, above n 25, at 12.

⁵⁰ Matrimonial Property Act 1976, ss 11 and 15. The Act distinguished between the family home and chattels (s 11) and other assets (s 15). The presumption of equal sharing in the latter category was much easier to rebut.

⁵¹ Nicola Peart “The Property (Relationships) Amendment Act 2001: A Conceptual Change”, above n 12, at 814-819. The long title of the Matrimonial Property Act 1976 referred to “the equal contribution of husband and wife to the marriage partnership.”

⁵² Matrimonial Property Act 1976, s 18(2).

⁵³ Section 18(1). See Angelo and Atkin, above n 14, at 249.

⁵⁴ Mark Henaghan and others *Family Law in New Zealand* (15th ed, LexisNexis, Wellington, 2011) at 1106-7; also Briggs in “Historical Analysis” in *Relationship Property on Death* at 12.

⁵⁵ Matrimonial Property Act 1976, s 19.

⁵⁶ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 45.

⁵⁷ RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [1.2].

The MPA 1976 only applied to inter vivos proceedings. The 1963 Act continued to govern applications on death.⁵⁸ While separated spouses could reasonably expect to share equally in matrimonial property, widowed spouses continued to bear the burden of proving individual contributions to the deceased's property. Spouses whose marriages had ended on death were often left worse off than those whose relationship ended on separation.⁵⁹ The White Paper accompanying the 1975 Bill, while recognising that the rights of widowed spouses should not be inferior to divorced or separated spouses,⁶⁰ also recognised that death was not an easy fit.

We are...committed to legislating for a just and equitable division of the matrimonial property on death. Departmental officers will be studying the problems in consultation with persons of experience in this field to determine how best they can be overcome. We intend to introduce a comprehensive measure to deal with this aspect of matrimonial property as soon as possible.⁶¹

As Chapter Three explains, the fundamental difference between death and separation underlies many of the problems with the present law. The White Paper appeared to recognise this difference, although arguably the drafters simply meant wills and other factors made death 'tricky'.⁶² Regardless, the situation remained static until the 2001 amendments.

If the drafters originally envisaged a separate solution for death, why was it included in the PRA in 2001? The answer lies partly in the conceptualisation of the MPA 1976. In *Reid v Reid*, for example, the Court of Appeal referred to the Act as "social legislation of the widest general application".⁶³ Woodhouse J commented:

⁵⁸ Section 57(4) of the Matrimonial Property Act 1976 preserved the right of surviving spouses to bring proceedings under the 1963 Act, which continued to exist for this limited purpose.

⁵⁹ In *Re Baigent (decd)* (1988) 34 FRNZ 170 (HC) for example, the widow was awarded just 20 percent of the home and other matrimonial assets. The case of *Re Mora* [1988] 1 NZLR 214 signaled a change in judicial attitudes towards claims. Chapter Two discusses *Re Mora* in further depth.

⁶⁰ Ministry of Justice "White Paper: Matrimonial Property—Comparable Sharing—an examination of the Matrimonial Property Bill 1975" [1975] at 13.

⁶¹ White Paper, above n 60, at 14.

⁶² J K McLay "The Matrimonial Property Act, 1976" (paper presented to the Legal Research Foundation Inc Seminar, February 1977) 7 at 18, reiterating the point that death raises difficult and complex issues surrounding will and inheritance rights. McLay pointed out, quite rightly, that there might be substantial interference with testamentary rights if death were included—come 2001, such concerns were set aside.

⁶³ *Reid v Reid* [1979] 1 NZLR 572 at 605.

Although the Act operates upon "property" as a subject-matter the law it lays down is not a part of the law of property in any traditional sense. Instead it is social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "wordly goods" should the marriage come to an end. In that respect it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society.⁶⁴

The notion that the Act was social legislation built to recognise "moral" undertakings, rather than a strict property rights regime, made death an easy fit. Furthermore, death had been included in the matrimonial property legislation since the MPA 1963. Come 2001, the main focus was the unfairness of having two different Acts apply to death and separation. No one seemed to question whether death belonged in the Act in the first place.

i) The Working Group's Recommendations

In 1988, the then Minister of Justice, Geoffrey Palmer, set up a Working Group to investigate whether the relationship property legislation could be extended to cover de facto relationships and relationships ending on death.⁶⁵ The members unanimously agreed that it should cover both. The 2001 amendments were largely based on the Group's recommendations. The Working Group's focus was the "injustice" suffered by widowed spouses in having to still apply under the MPA 1963.⁶⁶ As Chapter Three explains further, the Working Group's focus on the surviving spouse or partner at the expense of the estate introduces another conceptual problem.

The Working Group agreed that the MPA 1976 was a regime of "deferred participation".⁶⁷ Death was therefore the event that "crystallises" rights in matrimonial property.⁶⁸ The Working Group recommended giving surviving spouses a matrimonial property claim, based

⁶⁴ At 508.

⁶⁵ Briggs, above n 25, at 15.

⁶⁶ Working Group Report, above n 56, at 40.

⁶⁷ Working Group Report, above n 56, at 15. The Working Group toyed with the idea of changing the basis of New Zealand matrimonial property law, but concluded that the deferred participation model should be retained. At page 17, the Report concludes there is no need to change the "status quo".

⁶⁸ Working Group Report, above n 56, at 45.

on equal sharing. However, survivors should have to choose between that claim and succession rights:

A majority of the working group considers that, on death, the survivor should have a choice whether to take under the terms of the will or to receive a half share of matrimonial property pursuant to the statutory provisions.⁶⁹

The Working Group gave several reasons for its proposals. However, those reasons merely explained why the ‘choice of option’ scheme was more desirable than an automatic division of matrimonial property. They did *not* justify the exclusionary choice of option.

According to the Working Group:

- (a) The majority of New Zealanders leave their entire estate to their spouse. In most cases a compulsory allocation of matrimonial property would complicate the administration of wills unnecessarily.
- (b) Survivors should not be compelled to receive half the matrimonial property where they do not want to.
- (c) An automatic division of matrimonial property would be dramatic and inflexible.⁷⁰
(*Reworded.*)

In the late nineties, the Law Commission undertook a comprehensive review of succession law, releasing a Preliminary Paper in 1996 and a Report on Succession Law and Draft Act in 1997.⁷¹ The Commission proposed giving widowed spouses the right to apply for an equal division of matrimonial property. As with the Working Group, the Commission recommended that survivors should choose between taking what they received from deceased’s estate or from the property division.⁷²

Chapter Four discusses those proposals in more depth. At this stage, it is worth noting that the Commission saw death as being different from a separation and envisaged a surviving

⁶⁹ At 44.

⁷⁰ At 44-45.

⁷¹ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996); Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

⁷² Both the 1996 Preliminary Paper (at 87) and the 1997 Report made this recommendation. The Commission noted that its proposals generally accorded with the Working Group’s recommendations.

spouse's property rights falling under a *separate* succession Act.⁷³ While the 'choice of option' is untenable, the broader idea of a separate Act for death *is* a good model for change.

ii) The 2001 Amendments

The Working Group's recommendations were not acted on until nearly a decade later. In March 1998, the Matrimonial Property Amendment Bill 1998, and the De Facto Relationships (Property) Bill 1998 received their first reading in Parliament.⁷⁴ Both included death. Neither Bill was enacted before the general election in November 1999. The new Labour/Alliance Government combined the amendments into one Bill, introducing a Supplementary Order Paper to include heterosexual and same-sex de facto couples.⁷⁵ The extension of the matrimonial property scheme to de facto couples generated an extraordinary amount of debate. Many feared it would devalue marriage.⁷⁶ Compared to the 'de facto debate', extending the Act to cover widowed spouses appeared to be a non-issue.⁷⁷ It was enough to say that widowed spouses should not be left worse off.⁷⁸ This lack of focus, combined with the proposals of the Working Group, lead to death being included under the Act without further thought.

The Property (Relationships) Act 1976 (as it was renamed) came into force on 1 February 2002.⁷⁹ The PRA retains the scheme and principles of the previous Act, although almost all the sections were amended in some way. The death provisions were both touted and hailed as an extension of the provisions applying on separation.⁸⁰

⁷³ See the "Preface" of both Law Commission papers.

⁷⁴ Briggs, above n 25, at 15. The De Facto Relationships (Property) Bill gave de factos similar rights to married couples, but within a separate statute.

⁷⁵ At 15. The final amendments were consolidated in the Property (Relationships) Amendment Act 2001.

⁷⁶ Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109-3) (Justice and Electoral Committee Report) at 5.

⁷⁷ Although see comments by MP for the National Party Warren Kyd (6 May 1998) NZPD 62662 on the second readings of the Bill that the legislation would be "very, very difficult to sort out". Kyd predicted significant debate on the issue of testamentary freedom; his predictions did not come to light.

⁷⁸ (23 May 2000) 647 NZPD; (4 May 2000) 583 NZPD 1927.

⁷⁹ Although the provisions for contracting out of the Act came into force earlier, on 1 August 2001. The Act was renamed the "Property (Relationships) Act" to recognise the wider category of relationships now covered by the scheme. The Act was later extended to civil union partners by the Property (Relationships) Amendment Act 2005.

⁸⁰ Wendy Parker "New Zealand Property Rights Legislation" (2000) *Family Matters* 62.

Conclusion

New Zealand relationship property law has undergone some remarkable changes in a short space of time. However, the various matrimonial property statutes all have one thing in common: they have consistently been touted as social legislation, sitting outside ordinary property concepts. Furthermore, those statutes were always classified as entirely deferred schemes. That suggests that relationship property rights merely reflect the limited moral obligations owed by partners to make restitution for the other's contributions, where they would otherwise unfairly benefit from those contributions after the relationship.⁸¹

What does that mean for the 'choice of option' scheme? At the latest, relationship property rights 'crystallise' on division. At that point, it is surely unacceptable to force the survivor to choose between those rights and their inheritance. However, if relationship property rights are weak rights, with no existence during the relationship, the case against the choice of option scheme is arguably weaker. We might say that relationship property rights are merely created at the end of a relationship by virtue of the PRA's 'special nature', rather than according to strict notions of property law. If so, requiring survivors to choose between a division and inheritance might be acceptable. Their relationship property 'rights' would not yet exist.

⁸¹ See for example 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) at 5 for a statement to that effect.

CHAPTER TWO: THE NATURE OF RELATIONSHIP PROPERTY RIGHTS

Introduction

As we saw in chapter one, the PRA and its predecessors are traditionally framed as a fully deferred matrimonial property schemes.⁸² Many view those statutes as social legislation, rather than strict property regimes. In turn, awards under those schemes are not seen as giving effect to any pre-existing property interests.

This chapter will argue the following:

- (1) That narrow conception of the PRA is wrong. In fact, the PRA *does* confer pre-existing property interests during the relationship itself. Furthermore, the PRA was not the first to do this. The drafters of the various matrimonial property statutes appear to have never fully understood the nature of those schemes. Death was included as a result of that misconception.
- (2) If relationship property rights do exist during the relationship, the ‘choice of option scheme’ is fundamentally flawed. Survivors who elect option A effectively claim what is already their property. The law cannot justifiably deny them other entitlements simply by virtue of claiming back a *debt* owed.

A. Pre-existing Rights in the MPA 1963

The Matrimonial Property Act 1963 was seen as continuing the separate property regime, subject only to adjustments at the end of the marriage. Those adjustments did not appear to give effect to pre-existing interests: they were to ensure women did not lose out.⁸³ On close

⁸² Caroline Bridge "Reallocation of Property after Marriage Breakdown: The Matrimonial Property Act 1976" in Bill Atkin and Mark Henaghan (ed) *Family Law and Policy in New Zealand* (Oxford University Press, Auckland, 1992) at 252.

⁸³ See North P's comments in *E v E*, above n 46, at 881, that the Act was simply concerned with the apportionment of matrimonial property in the event of a dispute.

inspection, however, the MPA 1963 *did* give effect to pre-existing property interests. Moreover, it did so within a conventional property rights framework.

The idea that non-financial contributions give rise to real property rights initially appears to sit outside ordinary property concepts. Certainly the courts were initially reluctant to accord real weight to domestic contributions.⁸⁴ The Privy Council in *Haldane v Haldane* rectified the narrow asset-by-asset approach of the Court of Appeal in *E v E*, stressing that awards should be made on a global basis.⁸⁵ Lord Simon of Glaisdale noted the Act's social purpose of "freeing" matrimonial property laws from the "shackles of strict legal and equitable rights".⁸⁶ Parliament's intention was to remedy the injustice suffered by many married women on separation. Hence the Act required a liberal interpretation, one that necessarily went beyond ordinary property concepts.⁸⁷ The Privy Council agreed with Woodhouse J's statements in *Hofman v Hofman*, that Parliament had specifically granted the courts the unfettered discretion to override legal and equitable title.⁸⁸ According to Lord Simon, that discretion was to ensure that a wife's "moral claim" could be vindicated.⁸⁹ Those statements appeared to classify awards under the MPA 1963 as merely meeting the deceased's moral duty to the surviving spouse.

Despite these initial statements, however, the Privy Council conceptualised the role of domestic contributions as thus:

It makes no *direct* contribution to the acquisition or enhancement in value of the matrimonial home. It is nevertheless an *indirect* contribution to its retention as an asset within the family.⁹⁰

Phrasing domestic contributions in this way, the Privy Council kept the scope of the Act within conventional concepts of property rights, while recognising the true nature of the 1963

⁸⁴ See discussion of *E v E* [1971] NZLR 859 (CA) in Chapter One, above n 46. In that case, the wife was only able to prove a contribution to the matrimonial home.

⁸⁵ *Haldane v Haldane*, above n 47, at 722.

⁸⁶ At 722 per Lord Simon of Glaisdale.

⁸⁷ At 772.

⁸⁸ *Hofman v Hofman* [1965] NZLR 795 at 800-801.

⁸⁹ *Haldane v Haldane*, above n 47, at 772.

⁹⁰ At 726.

scheme.⁹¹ The contributions scheme was analogous to the institutional constructive trust schemes later developed for de facto partners.⁹² Orders imposing a constructive trust are merely *declaratory* of an existing property interest, one that is caveatable, and hence a valuable property right.⁹³ Similarly, orders under the MPA 1963 were *declaratory* of a spouse's already existing property interest, one formed at the time of their contributions. A matrimonial property order by the Court simply transferred that interest to meet the debt owed.

Several provisions further support this conclusion. An order under the Act reduced the estate for dutiable purposes.⁹⁴ That in itself suggests Parliament viewed matrimonial property awards as payment of a debt, not a moral duty. Similarly, orders under the Act did not attract gift duty.⁹⁵ As the Court of Appeal concluded in *Re Mora*, collectively these provisions recognised that a matrimonial property award was *not* a gift.⁹⁶ It was payment of a pre-existing property right.

Re Mora confirms that in later decisions at least, the courts viewed orders under the MPA 1963 as payment of a debt.⁹⁷ The widow, Mrs Mora, was married to the deceased for 26 years. Her husband died intestate, and she received her widow's share under the intestacy rules.⁹⁸ She applied under the MPA 1963 for an order vesting a half-share of the estate in her. In the High Court, Holland J assessed Mrs Mora's matrimonial property entitlement at twenty-five per cent.⁹⁹ However, the order was made out of time, and Holland J refused to

⁹¹ Peart, "Towards a Concept of Family Property", above n 20, at 112.

⁹² See *Gillies v Keogh* [1989] 2 NZLR 327.

⁹³ See *Marshall v Bourneville* [2013] NZCA 271 for a recent example. The de facto couple separated in 2000, hence the PRA did not apply. The appellant had claimed an equitable interest based on a constructive trust over a property held in her partner's name; she subsequently registered a caveat to protect that interest. See further Shannon Lindsay *Caveats Against Dealings in Australia and New Zealand* (Federation Press Sydney, 1995) at 98-99.

⁹⁴ Matrimonial Property Act 1963, s 31A, added by the Estate and Gift Duties Amendment Act 1983. That was the widow's motive for bringing a claim in *Re Mora*: a matrimonial property award to her would reduce her husband's estate, and thereby reduce estate duty. See Somers J's comments at 216.

⁹⁵ Estate and Gift Duties Act 1968 s 31A.

⁹⁶ *Re Mora* [1988] 1 NZLR 214 at 216.

⁹⁷ *Re Mora*, above n 96, (Also reported as *Mora v Mora* (1998) 3 FRNZ 489.) *Re Mora* was a 1988 case; as Chapter One explained, the 1963 Act continued to apply to matrimonial property proceedings on death until the 2001 amendments. The scheme allowed spouses to apply under the Act without necessarily forfeiting their inheritance entitlements.

⁹⁸ Under the intestacy rules Mrs Mora was entitled to receive the personal chattels, a fixed sum of \$25,00, and one third-of the residue.

⁹⁹ *Re Mora* 11/7/85 Holland J HC Christchurch, M160/84.

grant Mrs Mora leave to bring the claim, on the grounds that she was more than adequately compensated for her contributions by her intestacy share.

The Court of Appeal overturned that decision, and awarded Mrs Mora a 40 per-cent share of the estate, based on her significant contributions to the farm and home.¹⁰⁰ Furthermore, Mrs Mora's intestacy claim *should not* have cancelled out her matrimonial property award, just as that award could not diminish her intestacy provision. As Bisson J said:

The share of a surviving spouse in the property owned by the deceased spouse...as ordered under s 5 is recognised as belonging to the surviving spouse in his or her own right and as forming no part of the dutiable estate of the deceased spouse by s 31A of the Estate and Gift Duties Act 1968. That being the case, I find it difficult to follow why, in the exercise of the Court's decision in this case, any part of what the appellant is entitled to in her own right should be denied her because of what her inheritance might happen to be from her husband's estate.¹⁰¹

...I cannot see that her inheritance impinges on the justice of what the appellant is entitled to under the Matrimonial Property Act...¹⁰²

Mrs Mora had successfully proven her contributions to the property in question, thus establishing an interest in that property. Logically she obtained that interest when she made those contributions, not when the marriage ended. The matrimonial property order merely transferred that interest.¹⁰³ The husband's duties to his widow, represented by her intestacy portion, were entirely different. As Casey J said:

A husband owes obligations to his widow going well beyond the recognition of her contributions to their matrimonial property. The interest in the estate received by [Mrs Mora] can be regarded as fulfilling Mr Mora's duty to provide for her proper maintenance and support...as well as being an acknowledgement of her loyalty and affection over a long and happy marriage.¹⁰⁴

¹⁰⁰ *Re Mora*, above n 96, at 220 and 223.

¹⁰¹ At 224.

¹⁰² At 225.

¹⁰³ At 224.

¹⁰⁴ At 223.

Re Mora confirms the difference between the *duty* of inheritance and the *debt* of relationship property. The case also reveals the unfairness of the current scheme. Under the MPA 1963, survivors were able to retain both sets of entitlements. Of course, that was subject to the court's unfettered discretion: the court might still limit the matrimonial property award in light of the widow's inheritance. Nevertheless, *Re Mora* heralded a change to that approach.¹⁰⁵

The courts were not alone in recognising the nature of the MPA 1963. The 1972 Select Committee Report, for example, said the underlying notion of the MPA 1963 was that a wife acquired "something in the nature of a property interest in the marriage assets".¹⁰⁶ Although the Report said that interest was not "*quantified*" until division, it nonetheless indicated that the interest existed during the marriage itself.¹⁰⁷ The same is true for constructive trust claims: a party's equitable interest is not quantified until they make a claim. That interest nonetheless exists from the time contributions are made.

Conclusion

Death appears to have been included in the MPA 1963 on the misunderstanding that matrimonial property orders merely adjusted title to provide a fair outcome for widowed spouses. As the above analysis reveals, the MPA 1963 did far more than that. Matrimonial property awards were declaratory of pre-existing interests, created by one spouse's contributions to the other's property.

Critically, including death had far-reaching consequences. Come 2001, death was simply tacked on by virtue of already being part of the matrimonial property scheme.

¹⁰⁵ Peart "Towards a Concept of Family Property", above n 20, at 113. After *Re Mora*, widows began to more regularly secure a half share of the matrimonial property in claims under the 1963 Act.

¹⁰⁶ *Matrimonial Property: Report of a Special Committee* (June 1972) at 16.

¹⁰⁷ *Report of a Special Committee*, above n 106, at 16.

B. Pre-existing Rights in the MPA 1976 and the PRA 1976

i) Is There a Conceptual Basis for Pre-existing Rights?

When the Matrimonial Property Act 1976 was first introduced, Tony Angelo and Bill Atkin analysed the conceptual foundation of the Act. They concluded the new Act was best described as a system of “deferred participation in a community of assets”.¹⁰⁸ However, Angelo and Atkin noted several provisions that suggested the scheme was *not* entirely deferred.¹⁰⁹ These provisions will be discussed below. First though, we must fully analyse the Act in conceptual terms, to see whether its basic scheme is consistent with the notion of pre-existing property rights.

The 1976 Act shifted the focus from contributions to property to contributions to the marriage or civil union (and since 2001, the de facto partnership). As a result, many conclude that the *relationship itself* creates property rights.¹¹⁰ Angelo and Atkin saw the Act as a return to a more traditional concept of marriage: marriage is an “institution” that confers a status.¹¹¹ The MPA 1976 imposed a set of regulations on couples based on their married status, not by virtue of any agreement between them.¹¹² Conceptually that interpretation does fit with the notion that parties acquire rights during the marriage; however, it could equally support a deferred regime.

Professor Nicola Peart offers a different explanation. The relationship itself does not create property rights. Rather, the rights *do* spring from an implied contract between the parties.¹¹³ The Act simply gives effect to the parties’ presumed intentions to share resources. The Act therefore represents a return to a much older concept of marriage, as a property arrangement between two parties.¹¹⁴ Of course, couples rarely discuss the property implications of their relationship. Peart suggests that the Act presumes that couples intend the ‘normal terms’ to

¹⁰⁸ Angelo and Atkin, above n 14, at 256-258.

¹⁰⁹ At 252-255.

¹¹⁰ Peart “Towards a Concept of Family Property”, above n 20, at 120.

¹¹¹ Angelo and Atkin, above n 14, at 248.

¹¹² At 247.

¹¹³ Peart “Towards a Concept of Family Property” above n 20, at 120.

¹¹⁴ At 120-121. See also Lawrence Stone *The Family, Sex and Marriage in England 1500-1800* (Weidenfield and Nicolson, London, 1977) at 30-41.

apply; that is, that marriage (or variations of marriage) is a partnership.¹¹⁵ Those who do not intend the normal terms of a marriage to apply are free to contract out of the regime.¹¹⁶ This theory accords with the Act's characterisation of marriage as a 'partnership of equals'.

The concept of marriage itself conferring property rights sits outside ordinary property concepts. Conversely, the concept of giving effect to parties' intentions or expectations to share, based on contributions, is well known in property law.¹¹⁷ As we saw earlier, that formed the basis of institutional constructive trust claims for de facto relationships.¹¹⁸ Before 2001, New Zealand courts went as far as presuming that de facto couples in a stable and enduring relationship intended to share their assets.¹¹⁹ Arguably the 'contract theory' provides a stronger basis for asserting that parties have property interests during the relationship itself, as it implies couples agree to share their resources from day one.

Both readings fit with the Act's characterisation of the relationship as a 'partnership of equals'. The term 'partnership' implies co-operation, mutual rights and responsibilities, and sharing of gains and losses.¹²⁰ That inevitably creates some sort of community of property. Logically, referring to the relationship as a 'partnership' also means that community is not entirely deferred.¹²¹ In a partnership, profits are distributed annually. Parties contribute year on year.¹²² By classifying the relationship as a partnership, the PRA's scheme implies that parties begin to accrue interests in relationship property from day one.

It is worth noting that the 2001 amendments strengthened the Act's community regime in several respects, including expanding the pool of relationship property assets and strengthening the contracting out provisions.¹²³ These amendments bring the scheme more in line with true community property systems, where rights are *not* deferred.¹²⁴ While this shift

¹¹⁵ Peart "Towards a Concept of Family Property" above n 20, at 120.

¹¹⁶ At 121.

¹¹⁷ At 121.

¹¹⁸ See *Gillies v Keogh* [1989] 2NZLR 327 and *Lankow v Rose* [1995] 1 NZLR 277.

¹¹⁹ *Gillies v Keogh*, above n 118, at 347.

¹²⁰ Atkin and Angelo, above n 14, at 246-247.

¹²¹ At 246-247.

¹²² See definition of 'partnership' in the Partnership Act 1908, s 4(1): "Partnership is the relation which subsists between persons carrying on a business in common with a view to profit."

¹²³ Peart, "A Conceptual Change", above n 12, at 824. See sections 11 and 21J.

¹²⁴ Peart, "A Conceptual Change", above n 12, at 825-6.

does not indicate pre-existing rights per se, it suggests that the PRA aligns more closely with systems where relationship property rights exist during the relationship.

ii) Evidence in the Provisions

A conceptual analysis of the PRA suggests that relationship property rights are not entirely deferred. However, that just provides a good foundation. The real evidence lies in the provisions themselves.

The PRA's deferred nature is said to be one of the cornerstones of the Act. That is confirmed by s 19, which states that the Act shall not affect the power of either partner to acquire, deal with or dispose of property normally during the relationship.¹²⁵ On a strict reading of s 19, rights do not 'crystallise' until the relationship comes to an end.¹²⁶ Until then, common legal title determines the parties' rights to the property.

However, several of the PRA's provisions suggest rights are *not* deferred to the end of the relationship. Some provisions even directly constrict the partners' rights to deal with property freely.¹²⁷ These provisions will be discussed in turn.

(a) Section 25

Section 25(1) sets out orders the Court may make regarding relationship property or separate property. Generally the relationship must have ended before the Court can make orders; that supports the deferred scheme.¹²⁸ However, s 25(2) also offers protection where the relationship has *not* ended. Where one of the partners is endangering or diminishing the relationship property, the Court may make any order, including a division or determining shares.¹²⁹ Section 25(2) does not refer the need to ensure a just division. Rather, the aim is to

¹²⁵ Property (Relationships) Act 1976, s 19.

¹²⁶ See *Reid v CIR* (1990) 6 FRNZ 410 (HC), at 420-421, in which Tipping J sets out the effect of s 19.

¹²⁷ See discussion below of sections 42, 43 and 44.

¹²⁸ Property (Relationships) Act, s 25(1)(a) and (b).

¹²⁹ Section 25(2).

protect the relationship property itself.¹³⁰ That suggests rights pre-exist *during* the relationship.

Furthermore, s 25(3) creates a significant exception to the general rules. Regardless of s 25(2), the court may at *any* time make orders relating to *any* specific property as it considers just.¹³¹ As the Court of Appeal noted in *Public Trust v Whyman*, this could conceivably amount to a full interim distribution of relationship property, item by item.¹³² Such provisions are inconsistent with the notion that the PRA has no effect on property rights before parties apply for a division. Instead, they strongly point to pre-existing rights.

(b) Section 11: Protected interest in the family home

One clear example of a pre-existing interest is the “protected interest” in the family home.¹³³ That interest endures where the family home is sold, where there is no family home, or where the family home is a homestead. The protected interest of one spouse or partner is not liable for the unsecured debts of the other partner.¹³⁴ Essentially both parties have a fixed interest in the family home, one that clearly pre-dates division.¹³⁵ That is strengthened by s 42, as discussed below.

(c) Protection of Rights: Sections 42, 43 and 44

Sections 42, 43 and 44 of the Act are perhaps the strongest indicators that parties have pre-existing interests in relationship property. They provide valuable protective mechanisms *before* division.

¹³⁰ *CRA v APP* [2013] NZFC 2831.

¹³¹ Section 25(3).

¹³² *Public Trust v Whyman* [2005] NZLR 696 at [21]. While the estate requires leave to apply for orders under s 25(1), that does not apply to orders under s 25(3). See Chapter Three for further discussion of the estate’s rights on death.

¹³³ Section 20B(1).

¹³⁴ Property (Relationships) Act 1976, s 20B(2).

¹³⁵ Angelo and Atkin, above n 14, at 252.

Section 42

Section 42 provides a mechanism for protecting a “claim to an interest” in land under the PRA via a notice registered against the title itself.¹³⁶ The notice operates in the same manner as a caveat.¹³⁷ Section 42 equates a claim of interest under the PRA with a registrable interest under the Land Transfer Act.¹³⁸ That prevents any dealings with the land *and* gives third parties notice of an unregistered interest in the land. In their 1976 article, Angelo and Atkin noted that this “claim to an interest” likely referred to any “likely future interest”, namely, a half-share in the family home.¹³⁹ In turn, this means the family home is a shared asset during the relationship.¹⁴⁰

The courts have since confirmed this wider approach, saying the “interest” should not be defined narrowly or strictly.¹⁴¹ The “interest” may amount to substantive rights, a potential interest, or even just a potential claim.¹⁴² In *Coxhead v Coxhead*, for example, the wife lodged a s 42 notice pending a finding that the s 21 agreement between husband and wife was invalid.¹⁴³ The notice simply protected what the wife hoped to claim as relationship property if the agreement was set aside.¹⁴⁴ Parties may simply lodge a s 42 notice as a precautionary measure. In *Yeoh v Xu*, for example, the High Court held that the estate could lodge a s 42 claim, irrespective of leave not yet being granted under s 88(2) to apply for a division.¹⁴⁵ Section 42 strongly suggests that parties have valuable pre-existing interests in relationship property, interests capable of being protected by a “weapon” based firmly in property law.¹⁴⁶

Section 43

Section 43 gives the Court powers to restrain dispositions of property, when it appears such a disposition is about to be made in order to defeat the claim or rights of any other person

¹³⁶ Property (Relationships) Act 1976, s 42.

¹³⁷ Section 42(3).

¹³⁸ Section 42(1).

¹³⁹ Angelo and Atkin, above n 14, at 252.

¹⁴⁰ At 252.

¹⁴¹ *Arrow Farms Ltd v Jackson* (1991) 7 FRNZ 561 at 565.

¹⁴² Nicola Peart (ed) *Family Property* (online looseleaf ed, Westlaw), at [PR42.03].

¹⁴³ *Coxhead v Coxhead* (1989) 5 NZFLR 398 (HC).

¹⁴⁴ *Coxhead v Coxhead*, above n 143, at 133-134.

¹⁴⁵ *Yeoh v Xu* [2004] BCL 89. As Chapter Three explains, the personal representative of the estate requires leave from the Court to apply for a division of relationship property, under s 88(2).

¹⁴⁶ *Moriarty v Roman Catholic Bishop of Auckland* (1982) 1 NZFLR 144 at 146.

under the PRA.¹⁴⁷ Once that order is made, any subsequent disposition will generally be treated as void.¹⁴⁸ Section 43 is prospective in nature. The Court may make orders *before* the division of relationship property, potentially where the parties are not separated. That order may even be made *ex parte*, if there is sufficient urgency to protect the rights from being defeated.¹⁴⁹ Section 43 therefore suggests that parties have valuable relationship property rights *during* the relationship, rights capable of being protected.

Section 44

Section 44 operates in similar circumstances to s 43, but retrospectively. It grants the Court power to set aside dispositions of property already made in order to defeat the other party's claim or rights under the Act.¹⁵⁰ Following the Supreme Court's approach to intention in *Regal Castings v Lightbody*,¹⁵¹ French J in *Ryan v Unkovich* held that "in order to defeat" merely requires knowledge of the consequences.¹⁵² The High Court in *Gray v Gray* endorsed this ruling.¹⁵³ In that case, the absence of a qualifying relationship at the time of the disposition did not preclude jurisdiction.¹⁵⁴ It is enough that the individual appreciates that the disposition *could* defeat their partner's future claims. That standard applies to s 43 as well.¹⁵⁵ As a result, both sections will likely be used more widely than in the past.

Once jurisdiction is established, s 44(2) uses a *proprietary* remedy to claw assets back: tracing. The Court can trace dispositions to third parties, and make orders against them to restore the property.¹⁵⁶ Equitable tracing principles also enable the Court to trace to

¹⁴⁷ Property (Relationships) Act 1976, s 43.

¹⁴⁸ Section 43(3).

¹⁴⁹ See the High Court's comments in *S v S [Relationship property]* [2008] NZFLR 227 (HC). Although there was not sufficient urgency in that case to warrant an order being made without notice, the Court recognised that some situations may call for an *ex parte* order.

¹⁵⁰ Property (Relationships) Act 1976, s 44.

¹⁵¹ *Regal Castings v Lightbody* [2008] NZSC 87 at [54].

¹⁵² *Ryan v Unkovich* [2010] 1 NZLR 434 at [33].

¹⁵³ *Gray v Gray* [2013] NZHC 2890.

¹⁵⁴ *Gray v Gray*, above n 153, at [34]-[38].

¹⁵⁵ *Patterson v Davison* [2012] NZHC 2757; *Perriam v Wilkes* HC Auckland CIV-2009-425-284, 18 August 2011.

¹⁵⁶ Property (Relationships) Act, s 44(2).

substituted assets.¹⁵⁷ The tracing mechanism in s 44 is perhaps the strongest indicator of all that parties have strong pre-existing *property* interests.

Neither s 43 nor s 44 refers specifically to “relationship property”. As Wylie J observed in *SMW v MC*, by using the term “any disposition of property”, Parliament clearly intended s 44 (and s 43) to have a wide application.¹⁵⁸ In practice, both sections require individuals to appreciate what assets could form part of the relationship property pool at a much earlier stage than division. Sections 43 and 44 directly contradict the rule in s 19 that during the relationship parties are free to deal with their property as they see fit. Collectively, these provisions strongly point to parties having pre-existing property interests in relationship property.

(d) Compensatory Provisions

Sections 44C and 44F provide that where one party has disposed of relationship property to a trust or a company, the Court may order compensation be paid to the other party.¹⁵⁹ That recognises that one party will continue to derive unequal benefit from the disposition when the relationship ends, while the other will not.¹⁶⁰ The focus is on the end of the relationship; hence the sections do not strictly point to pre-existing rights. Nonetheless, they contradict s 19: parties are *not* completely free to deal with their property during the relationship. Furthermore, the sections only apply to assets that were “relationship property” at the time of the disposition, not assets that later attain that status.¹⁶¹ The focus is therefore on the partners’ interests in the property *at the time* of disposition.

Similarly, under s 20E the Court may order compensation for one party where the other has used relationship property to satisfy a personal debt during the relationship.¹⁶² Again, that contradicts s 19. In effect, s 20E says that a partner who uses his or her income to pay debts

¹⁵⁷ *Herbst v Herbst* [2013] NZHC 3535. The usual equitable rules apply: persons who receive the property in good faith and for valuable consideration, and who have altered their position in reliance of that interest are exempt (s 44(4)).

¹⁵⁸ *SMW v MC* [2013] NZHC 396 at [62].

¹⁵⁹ Property (Relationships) Act, ss 44C and 44F.

¹⁶⁰ *Nation v Nation* [2005] 3 NZLR 46 (CA).

¹⁶¹ Andrew Belcher and Nicola Peart “Protecting Relationship Property Interests” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 263 at 287.

¹⁶² Property Relationships Act, s 20E.

during the relationship actually uses half of what does not belong to them. Section 47, which protects the rights of creditors, envisages couples making agreements “with respect to their relationship property” to defeat creditors rights’ during the relationship.¹⁶³ Logically the section contemplates both parties having control over the property during the relationship. Creditors often bring claims while the relationship still exists.¹⁶⁴

(e) Estate and Gift Duty

As was the case under the MPA 1963, orders under the 1976 Acts did not attract gift duty.¹⁶⁵ Again, Parliament clearly saw those orders as payment of a property debt. Nor would such orders have attracted estate duty: the Working Group confirmed that it would be “unacceptable” to levy estate duty on what is regarded as “already being the survivor’s legitimate property”.¹⁶⁶ In turn, the Group thought that should extend to any matrimonial property received by the survivor under the will, as that would still be the survivor’s rightful property. As it was, estate duty was abolished for deaths after 17 December 1992.¹⁶⁷

Incredibly, the Working Group’s statements recognised that spouses or partners do have pre-existing interests during the relationship, interests tantamount to ownership. Yet they had no problem saying survivors cannot take those rights and their inheritance.

(f) Separation Agreements: Accrued Rights?

The right to contract out of the PRA is a fundamental cornerstone of the Act.¹⁶⁸ Spouses or partners are free to opt-out of the PRA’s equal sharing regime via a “contracting-out

¹⁶³ Section 47.

¹⁶⁴ *Felton v Johnson* (2004) 24 FRNZ 83.

¹⁶⁵ Estate and Gift Duties Act 1968 s 31A. Gift duty was abolished in October 2011, but it is significant that until then, the law continued to recognise that matrimonial property divisions simply represented payment of property already belonging to the other spouse.

¹⁶⁶ Working Group Report, above n 56, at 47. As it was, estate duty was abolished in 1993 by the Estate Duty Abolition Act 1993. Nonetheless, it is significant that before this, the Working Group did not think a inheritance representing the share of relationship property should attract estate duty.

¹⁶⁷ Section 31A: repealed, on 24 May 1999 (but continuing to apply to the estate of any person who died before 17 December 1992), by s 5 of the Estate Duty Repeal Act 1999 (1999 No 64).

¹⁶⁸ Nicola Peart and Leona McWilliam “Relationship Property and Adult Maintenance—Introduction” in Nicola Peart (ed) *Relationship Property and Adult Maintenance: Acts and Analysis* (Thomson Reuters, Wellington, 2013) 3-44 at 9.

agreement”, before or during the relationship.¹⁶⁹ Settlement agreements, on the other hand, are signed after the relationship ends, in order to settle the division of property.¹⁷⁰

Judicial interpretations of settlement agreements lend further support to the idea that parties acquire pre-existing property interests during the relationship itself. In *Harrison v Harrison*,¹⁷¹ the Court of Appeal noted that while contracting out agreements may significantly vary the equal sharing regime, settlement agreements should more closely reflect PRA entitlements:

It may be different for settlement agreements, as such agreements are entered into in respect of **entitlements already accrued** and should usually reflect the reality of those entitlements.¹⁷²

Following the Court of Appeal’s reasoning, parties clearly have interests in relationship property during the relationship itself: they “accrue” rights from the day the relationship begins. This accords with the ‘contractual’ theory: if the partners do not initially sign a s 21 agreement, they are taken to have agreed to share their resources during the relationship.¹⁷³ Hence when partners sign settlement agreements, they are dealing with pre-existing property rights; the agreement should not derogate those rights too far.¹⁷⁴

C. The Case for Change

Contrary to the narrow conception of the matrimonial property schemes hinted at in Chapter One, the PRA and its predecessors *do* grant pre-existing property interests over relationship property before separation or death. Both the conceptual basis of the Act, and its substantive provisions support that conclusion. Death appears to have been included in both the MPA 1963 and the PRA due to a failure to appreciate the true nature of those schemes. There were essentially two stages to that misunderstanding:

¹⁶⁹ Property (Relationships) Act 1976, s 21.

¹⁷⁰ Sections 21A-C.

¹⁷¹ *Harrison v Harrison* [2005] 2 NZLR 349 (CA).

¹⁷² *Harrison v Harrison*, above n 171, at [112].

¹⁷³ Peart, “Towards a Concept of Family Property”, above n 20, at 120.

¹⁷⁴ See also *Wells v Wells* [2006] NZFLR 870 (HC) at [37], where Simon France J comments that disparity between the agreement and the PRA is more important in “compromise” cases than contracting-out cases.

(1) The inclusion of death in the MPA 1963, to ensure widowed spouses were adequately provided for on death.

(2) The inclusion of death in the PRA by extension, to rectify the unfairness of two different Acts applying to death and separation.

If death was included due to a misunderstanding, there is a strong case for removing it from the PRA altogether.

i) Revisiting the Choice of Option: The Unfairness Explained

In Chapter One, we touched on the notion that the scheme conflates ‘debt’ with ‘duty’. Now we have established that survivors have pre-existing interests in relationship property, we can *truly* say that when survivors opt for a division, they claim the ‘debt’ of what is already their property. That interest has already crystallised and can be quantified. The choice of option scheme is therefore entirely flawed. Claiming a debt should not disentitle the survivor from retaining their inheritance rights.¹⁷⁵ Nor should a survivor who chooses ‘option B’ be excluded from claiming their share of relationship property, a share that is theirs already.¹⁷⁶ The scheme essentially treats the survivor as adequately provided for by one set of rights.

Furthermore, the ‘choice of option’ only applies when the relationship ends on death. If spouses separate and divide their relationship property between them, and then one dies, the survivor may still inherit from the deceased. This anomaly reveals the inherent unfairness in the ‘choice of option’ scheme. The fact that separation occurs before death somehow changes everything. Widowed spouses are still left worse off than those who separate, albeit in more limited circumstances.¹⁷⁷

Moreover, other areas of family law do *not* confuse debt and duty. The PRA itself preserves the rights of surviving spouse or partners to apply under the Family Protection Act,¹⁷⁸ thereby

¹⁷⁵ Peart “Property (Relationships) Act 1976” in *Relationship Property on Death* above n 13, at 26.

¹⁷⁶ At 26.

¹⁷⁷ At 26.

¹⁷⁸ Property (Relationships) Act, s 57.

implying that a relationship property division does *not* represent the same thing as an inheritance.

The case of *Re Hilton* reiterates this point. Dr Hilton and his wife had separated 18 months before his death.¹⁷⁹ The couple had already settled their matrimonial property entitlements.¹⁸⁰ Dr Hilton's will made no provision for his widow; as they remained legally married, his widow successfully brought a family protection claim against Dr Hilton's estate. As Anderson J noted, Dr Hilton's *moral duty* to provide his wife with proper maintenance and support was clearly separate to his statutory duty to share the matrimonial property:

A moral obligation as a testator cannot be automatically satisfied by having previously met an irresistible legal obligation as a spouse. Upon a property division spouses take not by dint of charity or bounty but by right, and moral obligations are not in issue. Some moral obligations or entitlements capable of being met by monetary compensation can remain unsatisfied even though the Matrimonial Property Act 1976 regime may have been punctiliously applied because the benefit or value of the obligation or entitlement, whether economic or moral, does not fall into or cannot be adequately satisfied by the pool of matrimonial property available for division.¹⁸¹

This statement identifies the different philosophies behind the Family Protection Act and the matrimonial property legislation.¹⁸² Each took their share of matrimonial property to pay the debt of pre-existing rights. Payment of that debt did *not* relieve Dr Hilton of his moral duty to provide for his wife;¹⁸³ the two concepts are completely separate.

ii) Disrupting Succession Law

By denying survivors who elect option A their rights to inherit, the PRA strays unacceptably into succession law. That works two ways: the scheme also interferes with the deceased's testamentary freedom. Commentators have long regarded the right to distribute property on

¹⁷⁹ *Re Hilton* [1997] 2 NZLR 735 at 736.

¹⁸⁰ *Re Hilton*, above n 179, at 738.

¹⁸¹ At 743.

¹⁸² Nicola Peart "Other Claims Against the Estate" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 419 at 422.

¹⁸³ *Re Hilton*, above n 179, at 742.

death as integral to the right to hold private property.¹⁸⁴ During his lifetime, the individual is free to dispose of his property as he pleases; the same applies on death.¹⁸⁵ The option A or B scheme therefore subverts the deceased's private property rights. Yet New Zealand has always adhered to the principle of testamentary freedom. The new Wills Act 2007 aims to give better effect to testamentary wishes.¹⁸⁶ The PRA, on the other hand, destroys testamentary freedom, by allowing those wishes to be completely disregarded.¹⁸⁷

Conclusion

Could we simply amend the choice of option scheme, by allowing survivors to take both sets of entitlements? The answer is no. As the next chapter shows, the entire scheme of Part 8 conflates debt and duty. Amending the death provisions in a piece-meal fashion will not resolve the overall tension of succession and relationship property law.

¹⁸⁴ Nicola Peart "The Direction of the Family Protection Act" [1994] *NZ Recent Law Review* 193 at 211-215.

¹⁸⁵ John Stuart Mill *Principles of Political Economy Book II* (1885, eBook ed, eBooks by Project Gutenberg, 2009) Chapter 1 at 172-174. Mill in particular equated the individual's power to make bequests on death with the power to gift property while living.

¹⁸⁶ Wills Act 2007, ss 11 and 14. See N Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 C.L.W.R 356 at 377.

¹⁸⁷ Bill Patterson and Nicola Peart, "Testamentary Freedom" [2006] NZLJ 46 at 49.

CHAPTER THREE: DEATH v SEPARATION

Introduction

The death provisions were portrayed as a mere extension of the inter vivos provisions. But death is not like a separation, neither practically, nor conceptually speaking. In fact the PRA does *not* treat couples whose relationship ends on death in the same way as those whose relationship ends on separation. As this chapter will explain, death differs in terms of:

- (a) The application process for electing a division;
- (b) The effect of choosing a division, and the rules that apply to a division.

Why does the PRA treat death so differently? Clearly the drafters did recognise that a different set of considerations apply on death. The death provisions are therefore drafted with the fundamental objectives of succession law in mind. In particular, Part 8 seeks to enhance efficient estate management, and to ensure estates are wound up in a timely manner. But the PRA was not designed as a succession Act. The death provisions fill an awkward halfway position, trying to meet the demands of succession law within an Act designed for living persons.

This chapter contends that the death provisions can never fully achieve either succession law objectives, or the PRA's own objectives. Furthermore, in many places the Act treats parties in death cases more harshly than those who are separating. On that basis, death should be removed from the PRA altogether.

A. The Application Process

Couples whose relationship ends on death face extra formalities and strict time limits that do not apply to separating couples. This part examines those differences, why those differences exist, and shows how they prejudice couples whose relationships end on death.

i) Time

The option A or B choice is a formal one. The survivor must make that election within a period of six months;¹⁸⁸ if they fail to make an election, they are deemed to have chosen option B.¹⁸⁹ Parties may apply for an extension of time, but this will usually be very short.¹⁹⁰ In contrast, couples whose marriage has been legally dissolved have one year to apply from the date the dissolution order takes effect.¹⁹¹ Dissolution itself can only occur after a two-year period of separation; of course, it may be years before couples decide to formally dissolve their union.¹⁹² So they have a minimum of three years in which to apply. De facto couples must apply within three years from the date of separation.¹⁹³ In reality, negotiations may continue for many years. The PRA allows the parties time to try to reach their own property arrangements in that time; the Act provides a ‘back-up’ where those arrangements fail.¹⁹⁴

Why does such a tight timeframe apply on death? The six-month time limit is strongly driven by the need to wind up the estate. Until that period ends, the administrator of the estate cannot distribute any part of the estate, unless the survivor formally elects one of the options at an earlier date.¹⁹⁵ That distribution is precisely what makes death fundamentally different: a longer delay might unjustly prevent those with an interest in the estate from receiving that interest. The courts clearly take the need to prevent prejudice to third parties seriously. For example, the Court in *Green v Robertson* agreed that one of the considerations for approving an extension of time must be whether the delay will cause prejudice to the estate.¹⁹⁶

¹⁸⁸ Property (Relationships) Act, s 62. The survivor must lodge a formal notice within 6 months of the date of death or the grant of administration, whichever occurs later.

¹⁸⁹ Section 68.

¹⁹⁰ In *K v K* FC Porirua FAM-2006-091-725, 24 August 2007, for example, the widow’s application to have the default choice of option B set aside was accompanied by an application for an extension of time. The Court granted the widow just one extra month from the judgment date to make a new choice.

¹⁹¹ Section 24(1)(a).

¹⁹² Family Proceedings Act 1980, s 39(2).

¹⁹³ Property (Relationships) Act, s 24(1)(c).

¹⁹⁴ Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 20-25.

¹⁹⁵ Property (Relationships) Act, s 71. Section 71(2) contains several exceptions to this general rule: the administrator may distribute if the survivor consents to the distribution in writing, if the court orders distribution, or if the administrator is protected by a s 47(2) Administration Act 1969 order.

¹⁹⁶ *Green v Robertson* [2003] NZFLR 593 at 594.

In the context of succession law, therefore, six months is a reasonable limit.¹⁹⁷ In the context of relationship property law, however, six months may be inadequate to deal with the intricacies of an election for property division.¹⁹⁸ The death provisions do modify many of the inter vivos provisions to ease the process for death cases.¹⁹⁹ Nevertheless, placing death within a complex property rights framework demands a high standard. In *Green v Robertson*, the Court recognised that six months is not long in the context of general property litigation, which requires complicated valuations and ascertaining various interests.²⁰⁰

Here we see the first of many clashes between succession law principles and relationship property principles. Ensuring a timely division comes at the cost of the PRA's purpose of providing for a "just division" of relationship property.²⁰¹ Furthermore, by imposing different time limits on death, the PRA fails to achieve its purported aim of treating death and separation alike.

ii) Formalities

On separation, either party may apply under the PRA as of right, potentially with a bare level of legal advice.²⁰² Other than correctly completing the forms and filing affidavits, the parties need do very little. In contrast, s 65 requires surviving spouses or partners who apply under the PRA to complete and sign a written notice indicating their preferred choice.²⁰³ That notice must be in the prescribed form,²⁰⁴ and must be accompanied by a certificate signed by a lawyer, certifying that the lawyer has "explained to the surviving spouse or partner the effect

¹⁹⁷ It is worth noting that the Law Commission's Draft Succession (Adjustment) Act proposed a longer period for claims: 18 months after the date of death, or 12 months after the grant of administration, whichever occurred earlier. See 62(1) of the Draft Act. However, the Commission agreed distributions could not be disturbed.

¹⁹⁸ Peart, "Part 8: The Election", above n 11, at 86-87.

¹⁹⁹ See discussion below under "The Effect of Applying for a Division".

²⁰⁰ *Green v Robertson*, above n 196, at 594, see also *Sanders v Trustees Executor and Agency Co of NZ Ltd* (2004) 26 FRNZ 202.

²⁰¹ Property (Relationships) Act s 1M(c).

²⁰² Section 23.

²⁰³ Section 65(1).

²⁰⁴ Section 65(2)(a). The form is contained in Schedule 2 of the Property (Relationships) Forms Regulations 2001.

and implications of the notice”.²⁰⁵ The survivor must lodge the notice with the administrator of the estate, or if there is no administrator, in the High Court registry.²⁰⁶

Again, these procedural requirements were drafted with the unique situation of death in mind. On death, the competition is no longer between the parties to the relationship, but between the survivor and persons with an interest in the deceased’s estate.²⁰⁷ Hence the formality required: the administrator needs to know whether the survivor’s PRA claim will affect other beneficiaries to the estate. Throughout, in the background, is the administrator’s duty to wind up the administration efficiently. There is a constant threat that the administrator will distribute the estate, putting the assets beyond the survivor’s reach, a threat that does not exist on separation.

Section 65 also protects the survivor. On separation, parties presumably commence proceedings because they cannot agree.²⁰⁸ A surviving spouse or partner, in contrast, makes a *unilateral* choice to bring claim. Section 65 requires the survivor to be legally advised to ensure they fully understand the implications of that choice. The wording of s 65 is almost substantively identical to that in s 21F, which sets out the formalities required when parties contract out of the PRA.²⁰⁹ Section 21J provides a protective framework to ensure that parties who sign a s 21 agreement fully understand the consequences of opting out of the equal sharing regime, based on the notion that “adequate legal advice is a crucial element in the concept of free and informed consent”.²¹⁰ Section 65 purports to play a similar role.

Given the similarity between s 21F and s 65, case law on s 21F helps to establish the level of advice required.²¹¹ In the leading Court of Appeal decision, *Coxhead v Coxhead*, Hardie Boys J stressed that the explanation by the lawyer is “no mere formalism”.²¹² Rather:

²⁰⁵ Property (Relationships) Act, s 65(2)(b)(ii).

²⁰⁶ Section 65(2)(c)(i) and (ii). If there is no administrator, the survivor must also notify certain persons listed in s 66 who may be affected by the claim; for example, directors of any company in which the deceased held shares.

²⁰⁷ Peart and McWilliam “Relationship Property and Adult Maintenance—Introduction”, above n 168, at 38.

²⁰⁸ Robert Fisher “Relationship Property Arbitration” (2014) 8 NZFLJ 15 at 15-17.

²⁰⁹ Under s 21F(5) the lawyer who witnesses a party’s signature must certify that the lawyer “explained to that party the effect and implications of the agreement”.

²¹⁰ *Warder v Warder* (2001) 21 FRNZ 593, at [37], approving the author’s comments in *Fisher on Matrimonial Property* at [5.74].

²¹¹ Peart “Part 8: The Election” above n 11, at 85.

Each party must receive professional opinion as to the fairness and appropriateness of the agreement at least as it affects the party's interests. The touchstone will be the entitlement that the Act gives, and the requisite advice will involve an assessment of that entitlement, and a weighing of it against any other considerations that are said to justify a departure from it. Advice is thus more than an explanation of the meaning of the terms of the agreement. Their implications must be explained as well.²¹³

In the context of s 65, that means the lawyer must do more than explain what each option entails. The advice must be specific. The lawyer should compare the survivor's entitlements under option A and option B: this means classifying and assessing the value of all relevant assets. The survivor is entitled to receive advice about the wisdom of choosing either option. The lawyer should also advise the client on the possibility of claims on behalf or, or against the estate.²¹⁴

Section 65 exists to ensure survivors understand the consequences of their choice. Yet it also places a high burden on survivors *before* they even apply. Again, the Act treats survivors more harshly than separating couples. The legal advice requirement also sits at odds with the strict time limit in s 62. As noted above, six months may be insufficient for the lawyer to get an accurate picture of all the relevant property interests.²¹⁵

Furthermore, the protective function of s 65 is conceptually flawed. The legal advice requirement only applies when the survivor makes a formal election. Where they fail to make a choice, option B applies automatically.²¹⁶ The survivor might receive no advice at all. Of course, couples generally need advice in relationship property disputes; many people potentially fall through the cracks. However where a section like s 65 *appears* to provide a protective standard of advice, surely that should be met.

²¹² *Coxhead v Coxhead* [1993] 2 NZLR 397 at 403. Section 21F is identical to the old s 21 of the Matrimonial Property Act 1976; hence case law on that section remains relevant to s 21F. The *Coxhead* test has been approved post-2001.

²¹³ *Coxhead v Coxhead*, above n 212, at 404.

²¹⁴ Nicola Peart (ed) *Family Property* (online looseleaf ed, Westlaw), at [PR65.03].

²¹⁵ Peart "Part 8: The Election", above n 11, at 86-87.

²¹⁶ Property (Relationships) Act, s 68.

iii) *The Irrevocable Choice*

Once a surviving spouse or partner chooses option A or B, that choice cannot be revoked.²¹⁷ That rule applies even the survivor is deemed to have chosen option B.²¹⁸ Section 69 provides limited grounds for the Court to set aside the choice of option where:

- (i) The choice of option was not freely made,
- (ii) The survivor did not fully understand the effect and implications of the choice
- (iii) Since making the election, they have become aware of relevant information
- (iv) Another person has since applied under the Family Protection Act or Law Reform (Testamentary Promises) Act in relation to the estate.²¹⁹

Additionally, it must be unjust to enforce the choice of option.²²⁰

In *K v K* the widow successfully applied to have her choice of option B set aside, on the grounds that she did not fully understand the effect and implications of her choice. The widow was Polish and had a limited understanding of English.²²¹ The executor came to the home to remove her husband's personal documents the day her husband died. The will was read to her that same day. She was still in shock, and felt under pressure to elect option B.²²² The Court set aside that choice, holding that no matter how well the will was explained to the widow, her grief and limited understanding of English meant she could not have understood fully.²²³

In contrast, in *Mulder*, the de facto partner applicant failed to establish any of the four qualifying grounds to set aside option B.²²⁴ She was fully advised. She chose freely, and there was no indication that she did not understand implications of her choice.²²⁵ Rather,

²¹⁷ Section 67.

²¹⁸ Section 68.

²¹⁹ Section 69(2)(a).

²²⁰ Section 69(2)(b).

²²¹ *K v K* above n 190, at [25]-[27].

²²² At [15]-[17].

²²³ At [27].

²²⁴ *Mulder v Mulder* [2009] NZFLR 727 (FC) at [36].

²²⁵ At [19]-[24].

her decision was hampered by the grief of losing her partner of 37 years. She did not want to question her late partner's wishes expressed in the will.²²⁶

Mulder clearly demonstrates the limited scope of s 69: the applicant must meet one of the four grounds. Even then, the Court must also be satisfied that it would be unjust to enforce that option.²²⁷ As the recent case of *Thurston v Thurston* demonstrates, that is not simply a rubber-stamping exercise. While the widow, Mrs Thurston, was not fully advised about option B, the Court was not satisfied that enforcing that choice would cause injustice.²²⁸ That finding turned on Mrs Thurston's application to have a s 21 agreement set aside, which failed. Her relationship property entitlements under option A were not great, and it was inevitable that she would elect to receive her benefits under the will.²²⁹

Once the estate has been finally distributed the Court cannot set aside a choice of option, even where there are grounds under s 69.²³⁰ That makes death completely different. If one of the parties disposes of property post-separation, sections 44 or 44C may be used to remedy the loss. On death, if assets are distributed, the survivor has no remedy.²³¹

"Final distribution" under the PRA occurs once the administrator completes administration of the estate and holds the assets on trust for the beneficiaries.²³² In *IER v GJD*, final distribution was fatal to the applicant widow's claim. The widow was never advised about her options; after six months she was deemed to have chosen option B.²³³ The widow formed an agreement with the executors regarding her life interest in the family home. That was held

²²⁶ At [20].

²²⁷ Section 69(3). In assessing whether there would be injustice, the Court must have regard to the circumstances in which the choice was made, the length of time since that choice was made, and any other matters.

²²⁸ *Thurston v Thurston* [2014] NZHC 2267 at [75].

²²⁹ At [74]-[75].

²³⁰ Property (Relationships) Act, s 70; see also s 74.

²³¹ That is true in general terms, say if the will is challenged on other grounds. See for example *Bozich v Bozich* 26/5/04, Judge Adams, FC Manukau FAM-2003-092-1945, where the widow intended to challenge her late husband's will, but went no further. The administrator distributed the estate a year later. That distribution could not be disturbed.

²³² Peart "Part 8: The Election", above n 11, at 82-83. See *Re Magson* [1983] NZLR 592 (CA) and *Lilley v Public Trustee* [1978] 2 NZLR 605 (CA). In the absence of a statutory definition for "final distribution", the Courts have concluded that the ordinary equitable meaning applies.

²³³ *IER v GJD* FC Rotorua FAM-2008-063-123, 16 February 2009 at [3]-[4].

to be the last stage of administration; therefore the estate was finally distributed.²³⁴ The Court “regrettably” had no power to set option B aside.²³⁵

As these examples reveal, the choice of option will be irrevocable in all but limited circumstances. Clearly that is driven by policy concerns: the administrator needs to distribute the assets, and those distributions should not be disturbed.²³⁶ Making the choice of option irrevocable therefore reflects good succession law objectives. However, it also treats survivors harshly. The survivor may lose their relationship property rights, despite never receiving legal advice, as in *IER*. That injustice is enhanced by the fact that “final distribution” under the PRA occurs earlier than under related legislation, including the Family Protection Act. Section 2(4) of the Family Protection Act provides that the estate is not finally distributed until the assets have been transferred to the beneficiaries, making those assets available for a claim.²³⁷ Yet the FPA deals with *moral* claims, not property claims.

Furthermore, as *Mulder* reveals, grief alone is not enough to set the option aside. Yet grief is an undeniable feature of death. We must view these harsh limits within the context of a scheme that *already* unjustifiably forces the surviving spouse or partner to choose between two sets of rights. That in itself means death is different to separation; making that choice irrevocable only enhances the unfairness.

iv) Who can apply?

The process for death cases differs most obviously in terms of *who* can apply. Only the surviving spouse or partner can apply for relationship property division as of right.²³⁸ The estate has no such corresponding right: the personal representative must apply for leave to apply for a division under s 88(2).²³⁹ The Court will only grant leave where there would be “serious injustice” otherwise.²⁴⁰

²³⁴ *IER*, above n 233, [33]-[33].

²³⁵ At [35].

²³⁶ Peart “Part 8: The Election”, above n 11, at 81.

²³⁷ Family Protection Act, s 2(4).

²³⁸ Property (Relationships) Act, s 61.

²³⁹ Property (Relationships) Act, s 88(2).

²⁴⁰ Section 88(2).

The leave requirement is not a necessary component of good succession law. Rather, it stems directly from the emphasis that the Working Group Report placed on the surviving spouse or partner.²⁴¹ The members of the Working Group unanimously agreed that the estate should not be able to claim a division at all:

The broad object of the reform is to ensure that the survivor is no worse off than a spouse whose marriage has come to an end during the joint lives. It does not follow that the estate should be able to sue the survivor to ensure that the survivor is left with no more than his or her share of the matrimonial property...

...The contest is no longer between two partners who take their share and then go their different ways. It is between the survivor of a marriage and the beneficiaries under a will or on an intestacy, or potential family protection claimants.²⁴²

The Working Group dismissed these third parties as undeserving volunteers. That was a radical change from the approach under the MPA 1963.²⁴³ Under that Act, the personal representative of an estate commonly applied for orders to recover assets for the estate, in the interests of beneficiaries or third party claimants.²⁴⁴ Initial drafts of the Bill followed the Working Group's recommendation. However, the Justice and Electoral Committee inserted the current s 88(2) into the Bill, possibly after receiving submissions that the imbalance would deny meritorious family protection claims.²⁴⁵

As the leading case *Public Trust v Whyman* demonstrates, in many cases there *will* be deserving claimants to the estate.²⁴⁶ The deceased's surviving de facto partner, Ms Whyman, had elected option B, and would receive her partner's estate under the intestacy rules. Most of

²⁴¹ Working Group Report, above n 56, at 40.

²⁴² Working Group Report, above n 56, at 46.

²⁴³ Matrimonial Property Act 1963, s 5(7).

²⁴⁴ See for example *Re Welch* [1989] 2 NZLR 1, where the personal representative of the deceased's estate on behalf of the deceased's son. The bulk of the mother's assets had passed to her husband (the stepfather) by survivorship, and there was little in the estate for the son to enforce his testamentary benefit. In the High Court, the mother's estate was awarded 50% of the matrimonial property. See also *Irvine v Public Trustee* [1989] 1 NZLR 67 (CA).

²⁴⁵ Peart "Relationship Property on Death" [2004] NZLJ 269 at 270. See Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109-3) (Justice and Electoral Committee Report) at 86(1A).

²⁴⁶ *Public Trust v Whyman* [2005] NZLR 696.

the deceased's assets had already passed to her by survivorship.²⁴⁷ That left the estate largely devoid of assets. As things were, the deceased's young children from his previous marriage stood to receive nothing from their father's estate.²⁴⁸ The children likely had a substantial claim under the Family Protection Act, but no corresponding assets to enforce that against.²⁴⁹

The Public Trust applied to be appointed as administrator, in order to apply for leave under s 88(2). A division would bring assets back into the estate for the children to claim. The Court of Appeal appointed the Public Trust. The Court held that leave likely be granted under s 88(2), as there would otherwise be a "serious injustice". The Court strongly criticised the High Court's approach in *Kinniburgh v Williams*, where Heath J interpreted "serious injustice" as an injustice that the Court could not, in good conscience, countenance.²⁵⁰ The Court of Appeal disagreed, holding that "serious injustice" will surely always refer to a injustice suffered by a third party.²⁵¹ In that context, it would be a "serious injustice" to not grant leave where it would deprive a party of the ability to enforce a claim against the estate. That was presumably Parliament's primary reason for including s 88(2).²⁵²

The Court of Appeal's generous reading of "serious injustice" opens up the circumstances in which leave will be granted.²⁵³ However, that does not address the initial unfairness. The starting presumption is that the personal representative has no right to apply.²⁵⁴ Parliament's intention was surely to restrict claims by the estate; hence the threshold of "serious injustice".²⁵⁵ Leave may not be granted even where a third party has a meritorious claim.

²⁴⁷ *Public Trust v Whyman*, above n 246, at [11].

²⁴⁸ At [12].

²⁴⁹ At [14].

²⁵⁰ *Kinniburgh v Williams* [2004] 2 NZLR 132, at [52].

²⁵¹ *Public Trust v Whyman*, above n 246, at [47].

²⁵² At [48].

²⁵³ Patterson and Peart "Testamentary Freedom", above n 187, at 49.

²⁵⁴ Peart "Part 8: The Election" above n 11, at 75-6.

²⁵⁵ Nicola Peart "Death and Relationship Property: *Public Trust v Whyman*" [2005] NZLJ 49 at 51. "Serious injustice" is also the threshold for setting aside a s 21 agreement. The Court of Appeal in *Harrison v Harrison* [2005] 2 NZLR 349 confirms that the "serious injustice" test imposes a high threshold. Yet in *Public Trust v Whyman*, the Court of Appeal suggested the test should be applied differently depending on where it appears in the statute. Whether that was Parliament's intention is questionable.

Ruocco v Wright confirms that conclusion. In that case, an application to appoint the Public Trust as executor was incorrectly brought under s 19 of the Administration Act 1969.²⁵⁶ The Court denied leave on that basis. Chisholm J commented that in any case, he would not have granted leave under s 88(2).²⁵⁷ The estate was limited by the widow's paramount claim, and could only provide for her and her young children.²⁵⁸ The children of the deceased's first marriage would likely have little success with a Family Protection Act claim; hence Chisholm J saw it as "futile" to appoint the Public Trustee so it could apply for a division.²⁵⁹

Section 88(2) most pertinently reveals the difference between death and separation. On separation, both parties apply as of right.²⁶⁰ Giving only the survivor the right to apply contradicts PRA's emphasis on equality between spouses or partners.²⁶¹ Both partners have a pre-existing interest in relationship property. The estate should be equally entitled to claim that debt. Payment of that debt then allows the estate to perform its legal and moral duties to third parties.

The Law Commission's proposals preserved the right of the estate to apply for a division.²⁶² As the Commission's 1996 Paper noted:

In theory, if property is held unequally between husband and wife, either should be able to able to reclaim their own property. It does not matter who dies first.²⁶³

Chapter Four discusses this point in further detail.

The surviving spouse or partner might be the administrator of the estate. In that case, a third party must apply for leave to be appointed the personal representative. Yet third parties may

²⁵⁶ *Ruocco v Wright* [2009] BCL 119 at [19] and [25].

²⁵⁷ *Ruocco v Wright*, above n 256, at [15].

²⁵⁸ At [30].

²⁵⁹ At [15].

²⁶⁰ Property (Relationships) Act, s 23.

²⁶¹ Sections 1M and 1N.

²⁶² Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997), above n 71, at s 10.

²⁶³ Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996), above n 71, at [107].

be unwilling to take on that arduous burden.²⁶⁴ That creates a further barrier for the estate's claim.

B. The Effect of Applying for a Division

i) General Provisions

Where the surviving spouse or partner chooses option A, s 75 provides that the ordinary rules apply, although they are “modified or affected” by sections 79 to 94.²⁶⁵ Again, the Act purports to treat death and separation alike. In fact, the death provisions *significantly* modify the inter vivos provisions.

Most obviously, the death provisions treat widowed spouses or partners differently by virtue of the basic scheme: s 76 provides that every gift left to the survivor in the will is revoked, unless the will expresses a contrary intention.²⁶⁶ As the first two chapters argue, that provision cannot be justified.

Part 8 also contains several evidentiary presumptions that favour the surviving spouse or partner. Section 81, for example, presumes all the deceased's property to be relationship property, unless there is evidence to the contrary.²⁶⁷ The same presumption extends to property acquired by the deceased's estate.²⁶⁸ Anyone who contradicts those presumptions bears the burden of proving them wrong; that will likely be the personal representative of the estate.²⁶⁹ In practice then, the evidentiary presumptions significantly favour the survivor, who likely has superior evidence about the parties' use of the property during their joint lives. The personal representative, on the other hand, will have far less evidence than the deceased would have to be able to rebut the presumption.²⁷⁰

²⁶⁴ The Public Trust was initially uncertain about taking on the role of personal representative in both *Public Trust v Whyman*, above n 246, and *Kinniburgh v Williams*, above n 250.

²⁶⁵ Property (Relationships) Act, s 75.

²⁶⁶ Section 76.

²⁶⁷ Section 81.

²⁶⁸ Section 82.

²⁶⁹ Margaret Briggs “Classifying Property” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 133 at 135.

²⁷⁰ Briggs, above n 269, at 134-135.

In contrast, the rules governing classification of relationship property on separation are far more complex.²⁷¹ Case law reveals the difficulty of determining what is relationship or separate property.²⁷² The blanket classification of all property as relationship property potentially denies the deceased their separate property rights, while extending the survivor's share far beyond what they would receive on separation. The Working Group justified the presumptions as a pragmatic choice, one that helps avoid the difficulties of classification.²⁷³ Certainly the presumptions assist a timely distribution. Yet again, meeting good succession law means the Act treats death very differently to separation.

The Act is not consistent. The effect of s 88(2) was clearly not thought through, most likely due to its late inclusion.²⁷⁴ There is no equivalent of s 75 where the estate applies for a division. Nor is it clear whether the evidentiary presumptions in favour of the survivor still apply. This uncertainty reinforces how poorly the death provisions were thought out.

ii) Section 77: A relief?

Section 77 provides a limited relief to the effect of s 76. Under s 77, the Court may reinstate all or any of the survivor's succession entitlements, if satisfied it is "necessary to avoid injustice".²⁷⁵ Section 77 does not confer a broad discretion to redistribute the estate: the Court may only reinstate what was *already* granted under the will or intestacy.²⁷⁶ While commentators note that s 77 appears to have been enacted to address concerns about the effect of s 76 on specific gifts, it potentially stretches much wider.²⁷⁷

²⁷¹ Property (Relationships) Act, ss 8, 9, 9A and 10.

²⁷² See for example *Sydney v Sydney* [2012] NZFC 2685, *S B v DC* HC Auckland CIV-2011-404-1005, 4 October 2011. See generally Nicola Peart (ed) *Family Property* online looseleaf ed, Westlaw), at [PR8].

²⁷³ Working Group Report, above n 56, at 42.

²⁷⁴ Peart "Death and Relationship Property: *Public Trust v Whyman*", above n 255, at 51.

²⁷⁵ Section 77.

²⁷⁶ That may account for the limited number of cases on s 77. In *EM v SL* [2005] NZFLR 281, for example, the widow elected option A, thereby increasing her assets but losing the life interest in the home left to her by her husband's will. The widow did not apply under s 77 in conjunction with her Family Protection Act application. A s 77 order would only have reinstated the life interest in the home; she wanted the whole house.

²⁷⁷ R L Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [17.21]. In contrast to the definition of family chattels in s 2, which specifically excludes taonga and heirlooms, section 76 applies to all property. This may be a hint from Parliament that s 77 was *not* meant to protect gifts. If it was, Parliament surely could have chosen an easier route.

Section 77 appears to mitigate the unfairness of the strict ‘choice of option’ scheme. Yet here we see succession and relationship property principles most obviously blurred.²⁷⁸ Section 77 introduces a rare discretionary element into the Act, with a lack of guidance as to how that discretion should be exercised.²⁷⁹ As a result, the Court may consider a wide range of factors usually relevant in Family Protection Act cases, including support obligations.²⁸⁰ Yet such factors have no place in strict property rights regime.²⁸¹ Furthermore, a claim under s 77 is treated as part of the survivor’s relationship property entitlement, and thus takes priority over other claims to the estate, despite resting on succession principles.²⁸² Nor do third party claimants have the right to be heard, unless the Court considers it necessary.²⁸³ That gives the survivor a significant advantage.

The limited case law on s 77 confirms its odd status. In both *OPS v Est LNS* and *B v Adams*, s 77 was invoked in conjunction with a Family Protection Act claim.²⁸⁴ In *B v Adams*, the deceased, Mr E, made his will before the 2001 amendments extended the Act to death cases. The Court reinstated the provision under the will, holding it would be completely unjust to override Mr E’s wishes, as when he drafted his will he could not have realised that his partner might later defeat those wishes with a PRA claim.²⁸⁵ To do otherwise would fail to recognise the “close and committed” relationship between the partners.²⁸⁶ The Court also upheld the Family Protection Act claim, again relying on the close relationship of the partners.²⁸⁷

In *OPS*, the husband died intestate, leaving only his widow and his estranged parents.²⁸⁸ The widow opted for a division under option A. She then applied have her intestacy rights re-established under s 77, along with bringing a family protection claim. Again, the Court reinstated the full intestacy provision, holding that a serious injustice would occur

²⁷⁸ Peart “Effect of Option A” in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Thomson Brookers, Wellington, 2004) 97 at 110.

²⁷⁹ Peart “Effect of Option A” above n 278, at 111.

²⁸⁰ At 111.

²⁸¹ Peart, “Property (Relationships) Act 1976”, in *Relationship Property on Death*, above n 13, at 25 and “Effect of Option A”, above n 278, at 110.

²⁸² Property (Relationships) Act, s 78.

²⁸³ Section 92.

²⁸⁴ *OPS v Est LNS* (2005) and *B v Adams* (2005) 25 FRNZ 778.

²⁸⁵ *B v Adams*, above n 284, at [80].

²⁸⁶ At [80].

²⁸⁷ At [106].

²⁸⁸ *OPS*, above n 284, at [2].

otherwise.²⁸⁹ The Court also granted the family protection order, holding that the husband had breached his moral duty to his widow. To remedy that breach, the Court granted all the remaining assets to the widow.²⁹⁰ Essentially s 77 was used to remedy the situation as far as the intestacy rules would allow. The FPA claim then made up the shortfall. The Court appeared to equate the widow's family protection claim with the s 77 claim, considering the two in one breath.²⁹¹

The approach in *B v Adams* and *OPS* suggests that the test of "injustice" will be met in any case where option A defeats the clear intentions of the deceased, or where the partners had a close, committed relationship. Of course, it *is* unjust that the testator's wishes are so easily set aside in such cases. However, that was probably not the intended purpose of s 77.²⁹² The courts are apparently willing to skirt around s 76 to ensure a just result for the survivor potentially at the expense of third parties with an interest in the estate. Section 77 deals with succession law; therefore claims under that section should be heard alongside other claims to the estate.²⁹³

Conclusion

As this chapter shows, the Act treats surviving spouses or partners very differently to separating partners. Those differences arise because the death provisions seek to achieve the objectives of good succession law. Furthering the aims of succession law *is* both necessary and desirable. Within the PRA, however, this approach causes major problems. In trying to provide for a timely distribution, the death provisions treat survivors more harshly than separating couples.

²⁸⁹ *OPS*, above n 284, at [7].

²⁹⁰ At [6]-[7].

²⁹¹ At [5] and [7].

²⁹² Fisher (ed) *Fisher on Matrimonial Property* (online looseleaf ed, LexisNexis) at [17.21].

²⁹³ Peart "Effect of Option A", above n 278, at 110.

The Act fails to achieve its purported aim of treating all couples alike; in turn, that contradicts the PRA's foundational principle of equality.²⁹⁴ Furthermore, the provisions are poorly drafted, as the examples of s 88(2) and s 77 show.

Realistically, death can never be an equal event. Death can therefore never sit comfortably in an Act founded on equality.

²⁹⁴ Sections 1M(b), 1N(a)-(b). See also the comment by the Working Group Report, page 3, that equality is a principle underpinning New Zealand family law. Hence the law should reinforce and endorse that equality. While that equality generally relates to equality between the spouses or partners/their equal contributions, it is nonetheless a foundational principle in the Act.

CHAPTER FOUR: OPTIONS FOR CHANGE

Introduction

Throughout this paper, we have been heading towards an inevitable conclusion: death does not belong in the PRA. The case for change can be summarised as follows:

- (1) Death was included in the relationship property scheme due to a failure to understand that scheme's true nature. That was partly on the basis of a misconception that there are no pre-existing property rights in relationship property.
- (2) As a result, the current scheme confuses debt with duty. Most obviously, the basic scheme forces the surviving spouse or partner to choose between these sets of rights. The death provisions are drafted to meet the objectives of succession law, at the cost of the PRA's own objectives. The Act fails in its purported aim to treat death and separation alike.
- (3) The death provisions are poorly drafted. In particular, the effect of the estate being granted leave to apply for a division was not thought through.
- (4) Removing death from the PRA will allow the PRA to fully achieve its purpose and principles of equality.

These factors all strongly support the case for removing death from the PRA altogether. Amending the Act in a piecemeal fashion to deal with individual problems is not a desirable solution.

A. A Separate Act for Death?

It is one thing to remove death from the PRA. But could we go one step further, and incorporate related legislation under a single 'death' or 'succession' Act? As Chapter Three noted, the Law Commission's 1997 Report proposed *one* Act to cover property claims on

death. The Commission's "Draft Succession (Adjustment) Act" incorporated existing succession law contained in the Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949.²⁹⁵ Taking those proposals as a starting point, this chapter will assess the desirability of a separate Act, as well as considering the potential form of the Act.

A separate Act covering all succession law could achieve the following:

- (1) Conformity with international regimes
- (2) Conformity within New Zealand succession law, including:
 - (a) Consolidating the aims of succession law, and curing inconsistencies in the current law;
 - (b) Efficient machinery: one set of rules, claims could be considered together.

Each factor will be discussed in turn.

i) Conformity with International Regimes

New Zealand is almost alone in mixing matrimonial property and succession together. Most countries maintain a sharp division between the two, precisely because they involve fundamentally different principles.²⁹⁶ Community of property systems in civil law jurisdictions deal solely with matrimonial property law. As spouses have clear property rights over the community, those rights dictate matters *before* succession.²⁹⁷ For example, in the Netherlands when one spouse dies, the survivor takes his or her share of the community automatically; that share never forms part of the estate.²⁹⁸ The deceased's half is then distributed according to the will or intestacy rules.²⁹⁹

²⁹⁵ Law Commission *Succession Law: A Succession (Adjustment) Act*, above n 71.

²⁹⁶ Nicola Peart, "New Zealand Report on New Developments in Succession Law", vol. 14.2 EJCL (October 2010), <<http://www.ejcl.org/142/art142-3.pdf>> at 23.

²⁹⁷ See B.E. Reinhartz "Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?" (2007) EJCL 11.1 <<http://www.ejcl.org/111/art111-17.pdf>>

²⁹⁸ Dutch Civil Code, Book 1. Masha Antokolskaia and Katharina Boele-Woelki "Dutch Family Law in the 21st Century: Trend-Setting and Stragglings behind at the Same Time" (2002) EJCL 6.4 <<http://www.ejcl.org/64/art64-5.html>> at 3.1.

²⁹⁹ Dutch Civil Code, Book 4.

Common law countries also keep succession separate. The jurisdictions most closely aligned with New Zealand—England, Canada and Australia—all have discretionary matrimonial property systems, which apply only on separation or divorce.³⁰⁰ Where one spouse dies, that is simply covered by the law of wills and intestacy, supplemented by family provision legislation.³⁰¹

Separating succession and relationship property into two statutes would bring New Zealand into line with international regimes. New Zealand has close economic ties with Australia, and legislative developments in both countries accord with each other, particularly in succession law.³⁰² Harmonization itself is a desirable objective. More importantly, the fact that New Zealand is nearly alone in mixing succession law and relationship property further supports the case for change: other jurisdictions keep the two areas separate precisely because they are so different.

ii) Conformity within New Zealand Succession Law

(a) Curing Inconsistencies and Meeting Succession Objectives

New Zealand succession law is in a tenuous, patchwork state. The Property (Relationships) Act 1976, Family Protection Act 1955, Law Reform (Testamentary Promises) Act 1949, Administration Act 1969 and Wills Act 2007 each apply to different situations, and each Act is driven by different, inconsistent policy concerns.³⁰³ It was this lack of coherency, even before the 2001 and 2007 amendments, that led the Law Commission to propose one Act to replace the existing law.³⁰⁴

The death provisions clash with related legislation in many ways. Section 77 uses criteria usually relevant for a family protection claim, but within a property-based claim. The very

³⁰⁰ Peart “New Zealand Report”, above n 296, at The English Matrimonial Causes Act 1973 grants the courts full discretion to adjust property title at the end of a marriage, following the general touchstone of “fairness”. Australia’s Family Law Act 1975 takes a similar approach.

³⁰¹ For example, the English Inheritance (Provision for Family and Dependants) Act 1975. New Zealand’s Testator’s Family Maintenance Act 1900 was the first of its kind. England, Australia and Canada have since followed suit, but none of those countries apply their legislation so liberally as New Zealand does.

³⁰² Peart “New Zealand Report”, above n 296, at 23.

³⁰³ N Peart “New Zealand’s Succession Law: Subverting Reasonable Expectations”, above n 186, at 377.

³⁰⁴ Law Commission *Succession Law: Testamentary Claims*, above n 71, [7]-[11] and “Preface”.

structure of the ‘choice of option’ scheme contradicts the emphasis placed on upholding testamentary wishes in the Wills Acts 2007.³⁰⁵ Placing death in one Act would allow Parliament to consider such inconsistencies: the new Act would be drafted *specifically* with death in mind. Parliament could consider what objectives New Zealand succession law should strive to fulfil.

The Law Commission’s 1996 preliminary discussion paper stated that good succession law should:

- (a) Promote the cohesion of New Zealand families
- (b) Sustain property rights and expectations, and
- (c) Assist efficient estate administration and dispute resolution.³⁰⁶

The Report also identified two “questionable” objectives of succession law:

- (d) To enforce will-makers’ “moral duties” to family
- (e) To protect the welfare purse.³⁰⁷

While these last two objectives underlie current Family Protection law, the Commission argued they were not appropriate considerations.³⁰⁸ The loose concept of “moral duties” in particular has bent the Family Protection Act well beyond its original form, and many agree it has gone too far.³⁰⁹ The Commission proposed a radical rethinking of family protection claims, removing the grounds of “adequate maintenance and support”, and replacing that with a very narrow set of claims for genuine need.³¹⁰ Those proposals did not find support in the judiciary or the wider legal community. In *Williams v Aucutt*, Blanchard J commented that the Commission had taken a “rather extreme position”.³¹¹ Despite introducing a more conservative approach to family protection awards, the Court of Appeal in *Williams* would not endorse such a radical departure from settled family protection law.

³⁰⁵ At [17]-[18].

³⁰⁶ At [18].

³⁰⁷ At [19].

³⁰⁸ At [18]-[58].

³⁰⁹ Bill Patterson *Law of Family Protection and Testamentary Promises* (4th ed, LexisNexis, Wellington, 2013) at 13-43.

³¹⁰ Law Commission *A Succession (Adjustment Act)*, above n 71, at [77].

³¹¹ *Williams v Aucutt* [2000] 2 NZLR 479 at [68].

Unfortunately, these objections overshadowed the Commission's sound proposals for a separate succession Act based on principles (a)-(c). Despite no objections being voiced to that aspect, the proposals went nowhere.

It is beyond the scope of this dissertation to discuss these objectives in depth, or to decide whether these are indeed "good" aspects of succession law.³¹² Some commentators place weight on different principles.³¹³ The point is that one succession Act would allow Parliament to consider these matters in one go. That aspect of the Law Commission's proposals should not have been left dead in the water.

(b) Efficient Machinery

Placing the rules for adjusting succession in one Act would make the law easier to find, understand and apply.³¹⁴ The Law Commission noted that estate administration would be more efficient if all claims were heard in a single proceeding.³¹⁵ The Act could also address the priority of claims: placing succession law under one comprehensive statute would allow the courts to consider the estate as a whole. The Commission envisaged more non-court resolutions and settlements between parties as a result.³¹⁶

Chapter Three also contained examples of cases where spouses or partners did not know the PRA applied on death.³¹⁷ Arguably these cases are just the tip of the iceberg. Placing various aspects of succession law in a single Act would likely increase awareness in the wider community.

³¹² See Patterson and Peart "Testamentary Freedom", above n 187, at 46, where the authors recognise that various legal commentators see the three purposes of inheritance law as (1) upholding the wishes of the deceased, (2) preservation and security of the family and (3) the welfare of society in general. See further Richard T Ely "The Inheritance of Property" (1891) 153 North American Review 54, at 56-58.

³¹³ Ely "The Inheritance of Property", above n 312, at 56-58; James Morton "The Theory of Inheritance of Property" (1894) 8 Harv. L. Rev. 161 (online ed by JSTOR) <<http://www.jstor.org/stable/10.2307/1321715>> at 163-164.

³¹⁴ Law Commission *A Succession (Adjustment) Act*, above n 71, at [45].

³¹⁵ At [45].

³¹⁶ At [45].

³¹⁷ See discussion of *K v K*, *IER v GJD* in Chapter Three. See further *OHA v ATA* [2012] NZFC 5630.

B. What Form Should the Succession Act Take?

As chapter one explained, the Law Commission's proposal for survivor's claims took two forms:

- (a) A property division, based on the claimant's contribution to the marriage (presumed to be equal to the will-makers). The division would follow the established rules of matrimonial property law.
- (b) A support claim to compensate for financial disadvantage resulting from the relationship, which prevents the claimant from enjoying a reasonable, independent standard of living.³¹⁸

Under the proposed scheme, survivors would have the chance to elect a property division alone, or to elect for a division along with a support claim. If the Court made a ruling on the division, the survivor would have to choose between the division and the existing provision under the will.³¹⁹ Neither the support claim nor the division could be used to "top-up" the survivor's pre-existing entitlements under the will.³²⁰ As was the case with the 1988 Working Group, the Law Commission viewed the unpredictability of outcomes under the 1963 Act as unacceptable.³²¹ In contrast, giving survivors the choice of options would ensure predictability.

This paper has made it clear from the outset that survivors should not have to choose between two sets of entitlements. The Commission argued that testators do *not* have strict moral duties to leave their property to their spouse or partner.³²² Such bequests were merely gifts. On that basis, requiring the survivor to choose between their inheritance and the property-based claim was less problematic; the Commission viewed the *property* claim alone as right. Yet the Commission placed significant weight on testamentary freedom and upholding the deceased's private property rights.³²³ Clearly a scheme that forces survivors to forfeit their

³¹⁸ Law Commission *A Succession (Adjustment) Act*, above n 71, at [53].

³¹⁹ At s 11 of the Draft Act [C36].

³²⁰ At s 11 [C36].

³²¹ Law Commission *Succession Law: Testamentary Claims*, above n 71, at [95].

³²² Law Commission *Succession Law: Testamentary Claims*, above n 71, at [47]-[51].

³²³ At [36]-[39].

entitlements under the will overrides the deceased's testamentary wishes. The choice of option scheme is still not a desirable one.

There are two alternatives, still loosely based on the choice of option scheme:

Option 1: Automatic division of relationship property

Arguably if spouses or partners have pre-existing rights over relationship property, these rights could vest immediately on the death of one of the partners, by way of an automatic division. If this division were to follow existing relationship property principles that would typically mean an equal division.³²⁴ As Chapter One explained, this is the system commonly found in community of property regimes. A minority member of the 1988 Working Group preferred this option, saying that if partners had rights over the relationship property there was no reason why they could not claim those rights automatically.³²⁵ The analysis in Chapter Two partly supports this approach.

However, this option is not a desirable solution, because:

- (i) It would force a division where spouses or partner might not want one. Regardless of pre-existing property rights, the law should respect the autonomy of parties to make their own arrangements.
- (ii) An automatic division would be inconsistent with the current approach to inter vivos cases, where parties are free to choose whether to opt for a division under the PRA.
- (iii) The PRA is still in essence a deferred scheme, even if rights do pre-exist. Our system has not come fully into line with community of property regimes.

Reason (i) was part of the Working Group's justification for preferring a 'choice of option' scheme, rather than a compulsory division.³²⁶ It does not, of course, justify making that choice of option an exclusionary one. Nevertheless, these reasons suggest that an automatic division would not be preferable.

³²⁴ Property (Relationships) Act, s 11.

³²⁵ Working Group Report, above n 56, at 44.

³²⁶ Working Group Report, above n 56, at 44-45.

Option 2: Property division and succession rights

A simpler model would allow survivors to apply for a property division on top of their inheritance entitlements. The estate would be given equal rights to apply. The new scheme should retain the s 78 of the PRA, which means the survivor's property entitlement would take priority over other claims to the estate, and would be heard first.³²⁷ The remaining half left in the estate would be distributed according to the will or intestacy. Only that half would be available for beneficiaries or claims by third parties.

This is a desirable option because:

- (i) It separates debt and duty: survivors could take *both* entitlements;
- (ii) It removes the bias against the estate;
- (iii) It gives parties the autonomy to choose to bring a claim.

There are further considerations. What time limits should apply? Should there be evidentiary presumptions that apply on death? Clearly these matters need further work. But we could deal with issues *in the context of succession*, without the illusion that death and separation are the same.

One last issue remains. Under current family protection law, the surviving spouse or partner has a paramount claim over the deceased's estate.³²⁸ People often leave the bulk of their assets to their spouse or partner. In practice, if the survivor retains their inheritance *and* takes half the relationship property, that might leave the estate with limited assets. Conceptually speaking, that is perfectly sound. But what if the deceased leaves children, whose inheritance is limited by the survivor's property claim?³²⁹ Can the estate deal with their claims?

At first sight, this seems problematic. However, the widow's paramount status is not absolute.³³⁰ As the Court of Appeal's decision in *Wylie v Wylie* demonstrates, the survivor

³²⁷ Property (Relationships) Act, s 78.

³²⁸ Peart "The Direction of the Family Protection Act", above n 184, at 199. See *Re Guest* [1993] BCL 971, in which Hammond J sets out the "hierarchy of needs". The widow ranks first, then the children; *Re Cockery (dec'd)* (1991) 8 FRNZ 584 (HC) at 589.

³²⁹ See the Court of Appeal's statement in *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [32] that the law should recognise the "primacy" of the relationship between parent and child.

³³⁰ Bill Patterson *Law of Family Protection*, above n 309, at 153-154.

spouse or partner's claim will not necessarily rank ahead of the children's claims.³³¹ In *Black v Black* too, the Court reduced the widow's inheritance to make greater provision for the children.³³² The paramount status of the widow was *not* a rule of law, but merely a guide.³³³ The Court might also take the survivor's relationship property share into account, and reduce their inheritance accordingly. That is essentially the opposite of *Re Mora*.³³⁴ Concerns that survivors will 'take it all' are perhaps unfounded.

Conclusion

The second option for change provides a clear, workable formula for death cases. Both the survivor and the estate can claim what is rightfully their property, without forfeiting inheritance rights. That rectifies the anomaly of the exclusionary choice of option scheme, and some of the bias against the estate. Placing that scheme within a separate succession Act could further rectify other anomalies; the Act would be designed to fully achieve good succession law objectives.

³³¹ *Wylie v Wylie* (2003) FRNZ 156, see particularly [22]-[24].

³³² *TB v JB (Black v Black)* [2014] NZHC 1478.

³³³ At [50]-[52].

³³⁴ *Re Mora*, above n 96, at 255.

Conclusion

This paper is far from the first to criticise the death provisions of the Property (Relationships) Act. From the start, commentators clearly recognised that the provisions unacceptably mixed succession and relationship property principles.³³⁵ Thirteen years of case law have confirmed those initial concerns, as well as revealing further inconsistencies in the scheme. Without extensive reform, the Act will continue to disadvantage couples whose relationships end on death.

As this paper makes clear, death should never have been included in the PRA in the first place. The death provisions currently achieve neither good relationship property law, nor good succession law. The only solution is to place death in an Act designed with succession objectives in mind. That Act should give survivors and the estate the equal right apply for a property division, without removing their inheritance entitlements. The Act could further deal with issues surrounding the priority of claims, time limits and evidentiary presumptions, without pretending that death is the same as separation.

Quite simply, the law should achieve what it sets out to achieve. Death—and by extension, the laws surrounding death—affects us all. On that basis alone, there is a strong case for change.

³³⁵ See *Relationship Property on Death*, above n 10.

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