Children in Relationship Property Proceedings:

Are they getting a fair share?

Sanne Berkman

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I Introduction

A Introduction

The Property (Relationships) Act 1976 (PRA) is the governing body of legislation which determines an individual's property entitlement once their marriage, civil union or de facto relationship ceases.[1] As this piece of legislation affects the everyday interests of a large, and growing, portion of New Zealanders, it is crucial that it keeps up with the ever changing social and economic landscape of society.[2] The New Zealand Law Commission is therefore prudently reviewing the effectiveness of this 40-year-old legislation. A primary issue it aims to investigate is how the interests of children are recognised and protected under the Act, and how the Act is applied to children.[3] This is an important question which needs to be addressed because the way property is divided has a marked impact on the children of the relationship. For example, the division of property often results in children having to change residence, move schools, leave behind friend groups and enjoy an overall lower standard of living due to post-divorce financial strains.[4]

However, before exploring the PRA's application to children in more depth, it is important to have a basic understanding of the legal history preceding the commencement of the PRA as this helps provide insight behind its principal foundations.

B History of children's interests in matrimonial property laws

[1] Property (Relationships) Act 1976, s 1C.
[2] According to Statistics NZ, 38% of New Zealand marriages ended in a divorce in 2016. Although the divorce rate is almost three times higher than what it was in the early 1960s, it has actually been in steady decline since 2004. This is likely related to the strong decrease in marriage rates (from 16.47 in 1996 to 10.95 in 2016 per 1,000 not-married population 16 years and over) and the later marriage age (average age in 2016 for men and women was 30.3 and 29, compared to 28.1 and 26.1 in 1996) which may indicate that those who do marry are more certain of their decision. In 2005, the proportion of divorces involving people with children was 45%. It is important to note that these statistics provided by Statistics NZ do not account for de facto relationships; an increasing group which accounted for 35% of all partnered people in 2006 aged between 15–44 years. The rate of relationship breakdown amongst this group is unknown. Statistics from the OECD database indicate that almost 50% of all babies born in New Zealand in 2014 were born out of wedlock (de facto relationships would presumably account for a large portion of this group). Accordingly, de facto relationships, many of whom have children, are a growing cohort to which the PRA now applies. See Statistics New Zealand "Marriages, Civil Unions and Divorces: year ended December 2016" (3 May 2017) <www.stats.govt.nz>; see also OECD Family Database "Share of Births Outside of Marriage" (2 April 2016) <www.oecd.org>.
[3] Law Commission "Review of the Property (Relationships) Act 1976" (24 May 2016) <www.lawcom.govt.nz>.
[4] See Chapter 3 for further discussion on how property division impacts children.

Over time, New Zealand has adopted several different property regimes. Beginning in the early 19th Century, married women had virtually no property rights as property was almost exclusively retained by their husbands. Under the common law principle of matrimonial unity, the two spouses were viewed as one person over which the husband was the controlling mind and representative.[5] The courts would respect a husband's vesting of property, even where this would leave his former wife with nothing upon marriage breakdown. Needless to say, the principle of matrimonial unity made no provision for children.

However, there was still no mention of children's interests in matrimonial property law even after the matrimonial unity principle was abolished and replaced with a separate property system under the Married Women's Property Act 1884.[6] The first significant step forward for both women and children was the enactment of the Matrimonial Property Act 1963. This Act extended the existing separate property regime by recognising that a spouse may also have an interest in property based on non-financial contributions.[7] Recognising domestic contributions to a marriage meant that more property would fall in the hands of women following divorce, and therefore indirectly benefit any children that remained in their care.

The first statute to directly refer to children's interests was the Matrimonial Proceedings Act 1963. Sections 57–59 of the Act enabled a court to make an order for the benefit of the child in relation to the matrimonial home.[8] One of the first cases to consider these provisions was *Hofman v Hofman*.[9] This case saw the Supreme Court utilise the power conferred by ss 57–59 to set aside £750 from the net proceeds of the sale of the property for the benefit of the children.[10] However, this generous precedent has not been adopted in subsequent decisions.[11] This indicates that the practical implications of the provisions relating to children under the Matrimonial Proceedings Act were limited.

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[5] RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis NZ) at [1.1.4], n 1.
[6] Nicola Peart and Mark Henaghan "Children's Interests on Division of Property on Relationship Breakdown" (forthcoming) at 2. This early separate property regime meant that women had the right to acquire, hold and dispose of property which they finically contributed towards.
[7] Matrimonial Property Act 1963, s 6(1A), inserted by Matrimonial Property Amendment Act 1968, s 6(1).
[8] Note that although the Matrimonial Property Act 1963 did not explicitly refer to children, s 7 did reference that the Matrimonial Proceedings Act 1963 provisions applied to Matrimonial Property Act orders. This includes orders under ss 57–59 of the Matrimonial Proceedings Act 1963.
[9] [1965] NZLR 795.
[10] Ibid at 802.
[11] Lin Li "Are Children's Property Interests Sufficiently Protected in Family Property Law? History, Development and Policy" (LLB (Hons) Dissertation, University of Auckland, 2015), at 24, n 55.

It was not until the introduction of the Matrimonial Property Act 1976 (MPA) that the interests of children were recognised in a more extensive manner.[12] The MPA radically reshaped matrimonial property laws as it replaced the previous discretionary separate property system with a comprehensive code. It also introduced a deferred community property system where separate property becomes community property upon the occurrence of a crystallising event such as death of a spouse or divorce.[13] Typically, the family home and chattels that had been acquired or used during the relationship (i.e., relationship property) would then be subject to a strong presumption in favour of equal division. The rationale behind this equal sharing regime was found in the Act's long title which viewed marriage as a partnership to which both spouses equally contribute towards.[14]

This recognition was carried over into the purpose provision of the current Property (Relationships) Act 1976 following the 2001 amendments.[15] Importantly, the PRA purpose which follows on from this refers to children's interests. Section 1M(c) provides that one of the Act's purposes is:

> to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, *while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship* (emphasis added).

Section 26(1) is the operative provision which gives effect to s 1M(c). It does so by stating that the court *must* have regard to the interests of any minor or dependent children of the relationship in any proceedings under the Act, and empowers the court to make an order settling all or part of the relationship property for the benefit of the children if it considers it just. This provision has been identified as having the potential to displace the equal sharing regime, and is therefore "[not] a power to be exercised lightly."[16] Section 26 also poses a potential threat to the "clean break" principle frequently emphasised by judges in relationship

[12] See for example, the reference to children in the Act's long title and the addition of s 26.
[13] Bill Atkin "Classifying Relationship Property: A Radical Reshaping?" (paper presented at a Colloquium on 40 Years of the PRA: Reflection and Reform, Auckland, 9 December 2016) at 1.
[14] Matrimonial Property Act 1976, long title.
[15] Note that under the 2013 reforms the title of the Matrimonial Property Act 1976 changed to the "Property (Relationships) Act 1976" to reflect the inclusion of de facto relationships and widows within the Act's scope.
[16] *Walker v Walker* [1983] NZLR at 565.

property cases.[17] This is largely attributable to the fact that a s 26 order may result in parties continuing in partnership in relation to property matters for longer than necessary; something this principle specifically aims to prevent.[18] Therefore, the paramount nature of the equal sharing regime and clean break principle has resulted in a general reluctance for the courts to provide an actual award for the child other than in "exceptional cases."[19] This approach has emerged despite there being nothing in the wording of the Act indicating that this ought to be the case.

C JSB v SCH

The general ineffectiveness in considering and responding to the needs of children in property disputes can be illustrated in many of the litigated s 26 cases.[20] However, *JSB v SCH* stands out as a case particularly deserving of an award being made for the child's benefit.[21]

The case involved the child of the marriage, J, being born with partial deletion of chromosome 13. Despite the substantial expenses associated with J's condition, he was not eligible for automatic funding. Upon relationship breakdown, J's mother, Ms H, assumed primary care and responsibility over J. She received a low amount of child support from J's father, Mr B, and had agreed to move out of the family home which was to be sold with the proceeds equally divided. Despite these factors, Ms H's application for a lump sum payment under s 26 to compensate her for J's current and future medical expenses was outright refused by Judge Coyle. The learned Judge put a great amount of emphasis on the fact that the award sought was in Ms H's favour and that the property would not be held in a formal trust for J.

Although the property awarded under s 26 would not have been held in an express trust for J, it would still have been used for the sole purpose of compensating Ms H for the current and future expenses arising out of J's unique special needs. Had this property been awarded to Ms

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[17] Note that the clean break principle is derived from s 1N(d) of the Property (Relationships) Act 1976 which states that property matters should be resolved in an inexpensive, simple and speedy manner. However, the clean break principle is slightly different from this principle section as it emphasises the severance of any ongoing financial connection between parties rather than the need for property matters being solved in an inexpensive, simple and speedy manner.

[18] This was emphasised in *Perry v Perry* FC Auckland FAM-1996-004-596940, 18 October 1996 where Judge Adams stated that it would be "unwise" to exercise discretion under the Act if it produced a result which would require parties to continue in partnership in property for longer than is necessary.

[19] *RN v RN* (1985) 3 NZFLR 694; *R v R* [1998] NZFLR 611 at 622.

[20] See Chapter 3 for further discussion on cases involving s 26.

[21] FC Alexandra FAM-2009-002-95, 28 September 2010.

H, it would have essentially been held on what resembles a constructive trust for J's benefit. There is nothing in the wording of s 26 which indicates that it only applies when relationship property is placed in a formal trust for children.

Judge Coyle made an additional interesting point that "neither counsel were able to point *[sic]* to any guidelines as to how the Court's discretion should be exercised."[22] This underlines the inherent lack of guidance and clarity provided by s 26; something which ultimately comes at the child's expense. It shows how the absence of guidance can influence a judge's ability to give effect to its statutory obligations under s 26, even in cases like that of J where making an order appears to be "just."

D Dissertation outline

This dissertation will begin by exploring theoretical, pragmatic and legal reasons as to why the interests of children should be accounted for in relationship property disputes. This discussion will be followed by an analysis of the current law. It will look at how the various purpose, substantive and procedural provisions of the PRA have been interpreted and applied by the courts.

The final chapter will discuss recommendations which aim to better address the interests of children in relationship property disputes. Potential ideas for reform include strengthening s 26 and introducing a set of advisory guidelines which are designed to help implement a s 26 order. These proposed reforms will not remove New Zealand's deferred community property system, nor will they displace the equal sharing regime. Rather, they simply propose that those very aspects of the PRA should be given effect only after the needs of any minor or dependent children of the relationship have been provided for.

This dissertation only considers the property consequences where the relationship ends during the joint lives of the parties, rather than where the relationship ends on death. Any reference to a child of the relationship refers to a minor or dependent child of the marriage, civil union or de facto relationship as per s 2 of the Act, unless otherwise specified. The term "minor or dependent" is not defined in the PRA. However, the Age of Majority Act 1970 applies meaning

[22] Ibid at [30].

that a person will be considered a minor until they attain the age of 20 years.[23] Furthermore, a "dependent child" in relation to a party can be understood as a child whose day-to-day care is substantially the responsibility of the party.[24]

[23] Age of Majority Act 1970, s 4(1) and (2). See for example *Babylon v Babylon* (2009) 27 FRNZ 622 at [76]–[79] where Heath J confirmed that the parties' 19 but not 21 year old daughter fell within the meaning of "minor" under the Property (Relationships) Act 1976.

[24] This is the definition adopted in the Family Proceedings Act, s 162C; Care of Children Act 2004, s 135A; and Child Support Act 1991, s 226C.

II Justifying Taking Children's Interests into Account

Children are often significantly impacted by the manner in which property is divided upon relationship breakdown. However, that does not necessarily mean that this needs to be remedied through relationship property proceedings. One could argue that children's needs upon relationship breakdown are better addressed through strengthening child support provisions; a mechanism specifically designed to deal with child maintenance.[25]

This chapter will address a variety of reasons as to *why* the interests of minor or dependent children should be accounted for in relationship property disputes.

A Why the child's interests should be accounted for

1 Theoretical reasons: the children-first principle

The "children-first" principle coined by Glendon, is a compelling theoretical reason which justifies children's interests being taken into account in relationship property disputes.[26] This principle is premised on the notion that "having children impresses a lien upon all of the parents' income and property to the extent necessary to provide for the children's decent subsistence at least until those children reach the age of majority."[27] Glendon argues that this principle should be given a position of primacy in relationship property law, thereby requiring the resources of both spouses to first satisfy the needs of the child, before being divided between them.[28] The rationale underlying this principle is to alleviate some of the difficulties and relative disadvantages encountered by children following divorce.[29]

2 Pragmatic reasons based on social sciences

There are also several real-life property division implications based on social science evidence which support children's interests being taken into account in relationship property

[25] However, as the following discussion will reveal, there are a number of issues present with the New Zealand child support regime, which has only recently undergone significant reform. See the reforms introduced by the Child Support Amendment Act 2013.
[26] Mary Ann Glendon "Family Law Reform in the 1980's" (1984) 44 La L Rev 1553 at 1559.
[27] Ibid at 1559.
[28] Ibid. For an example of how the "children-first" principle can be implemented, refer to Katherine Shaw Spaht "Family as Community: Implementing the 'Children First Principle'" (1999) position paper prepared for the Communitarian Network (1999).
[29] These relative disadvantages are discussed in the second half of Chapter 2.

proceedings. The five major stressors which affect a child's post-divorce adjustment have been summarised by Amato as the absence of the non-custodial parent, the adjustment of the custodial parent, inter-parental conflict, economic hardship and stressful life changes (such as moving houses, schools and neighbourhoods).[30] The extent to which each of these stressors are present are indicative of the child's emotional, behavioural, educational and physical well-being.[31] Although it is likely that all five of these mediators play a role in a child's post-divorce adjustment, only the economic hardship and stressful life event mediators will be focused on as they have the potential to be significantly reduced through more effective property division.

(a) Implications resulting from financial consequences

Divorce often results in a significant financial setback for the parties involved. This is largely due to the increased expenses associated with running a household on a solo-income, legal costs following divorce proceedings and initial start-up costs incurred by moving somewhere new.[32] However, a large body of evidence consistently shows that this setback is a lot more damaging to divorced women than it is to divorced men, as women frequently experience a significant drop in their standard of living and economic well-being after divorce.[33] The exact reasons for this gender disparity is beyond the scope of this dissertation, however, what is relevant is how this inevitably affects the well-being of any children of the relationship.

Following divorce, children typically remain in the day-to-day care of their mother, and are therefore likely to suffer from these same financial strains.[34] Although the proportion of joint care in New Zealand has presumably increased over recent years,[35] longitudinal studies have

[30] Paul R Amato "Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support" (1993) 55(1) Journal of Marriage and Family 23 at 23.
[31] Paul R Amato "The Consequences of Divorce for Adults and Children" (2000) 62(4) Journal of Marriage and Family at 1269. Further note that these stressors represent short- or medium-term outcomes of divorce that can have additional long-term consequences for adults' and children's well-being.
[32] Bruce Smyth and Ruth Weston *Financial Living Standards After Divorce: A Recent Snapshot* (Research Paper no. 23, Australian Institute of Family Studies, Melbourne, 2000).
[33] Ibid; see also Holden and Smock "The Economic Costs of Marital Dissolution: Why do Women Bear a Disproportionate Cost?" (1991) 17(1) Annual Review of Sociology 51.
[34] Sara McLanahan and Gary Sandefur *Growing up with a Single Parent: What Hurts and What Helps* (Harvard University Press, Cambridge Massachusetts, 1994).
[35] To the author's knowledge, there are no studies showing the exact rate of joint care in New Zealand over time. Belinda Fehlberg and others *Caring for Children after Parental Separation: Would Legislation for Shared Parenting Time Help Children?* (University of Oxford Dept. of Social Policy and Intervention, Oxford, 2011) at 4, however, discusses a gradual increase in shared care arrangements in Western countries over the past decade. It can be assumed that this trend applies to New Zealand. Further note that in New Zealand joint care is defined as at least a 28/72 split between households. For further information see IRD "Types of Child Support Care: Recognised Care" (31 March 2015) Inland Revenue Department <www.ird.govt.nz>.

exposed the volatile and temporary nature of these types of shared arrangements as children often resort to living with just one parent, usually the mother, over time.[36] Furthermore, the actual rate of joint care is lower than one may think. One New Zealand study found that the amount of shared care is approximately 32%, but concedes that the 5–10% figures shown in studies with more representative samples may be more accurate.[37] Therefore, sole day-to-day care remains markedly the most common type of arrangement in New Zealand, with approximately 85% of primary caregivers being mothers.[38] A tentative conclusion to be drawn from these findings is that the post-divorce economic decline experienced by children is largely a reflection of their mother's economic decline.[39] However, what does this actually mean for a child's short- and long-term well-being?

Some research suggests that the negative consequences often experienced by children following divorce can be primarily attributed to the decline in a child's economic well-being rather than other possible stressors (such as absence of the non-custodial parent). This is supported by studies which have found that when controlling for post-divorce family income, the number of negative consequences experienced by children are significantly reduced, or even eliminated if ongoing finances are adequate.[40]

One such negative consequence attributable to post-divorce economic decline includes worse academic performance in children from divorced families, as evidenced through their overall lower math and reading scores.[41] This cognitive disadvantage has been almost exclusively attributed to the decline in economic resources following divorce rather than familial disruption.[42] A possible explanation for this finding is that limited finances may result in moving to a poorer neighbourhood with less adequate schools, as well as a reduced ability to provide children with educational materials, or additional support/tutoring when needed.[43]

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[36] B Smyth "Changes in patterns of parenting over time: Recent Australian data" (2008) 14 Journal of Family Studies 23.
[37] Jeremy Robertson and Jan Pryor *Putting the Kids First: Caring for Children After Separation* (Families Commission, Research Report 2/08, April 2008) at 23–24.
[38] This calculation is based on the results in Robertson and Pryor *Putting the Kids First: Caring for Children After Separation,* (ibid). Note that one of the families was excluded from the calculation as the children resided with neither their mother nor father due to a pre-existing CYFs arrangement.
[39] Smyth and Weston, above n 32.
[40] Amato, above n 30, at 33.
[41] Bali Ram and Feng Hou "Changes in Family Structure and Child Outcomes: Roles of Economic and Familial Resources" (2003) 31(3) Policy Studies Journal 309 at 309.
[42] Ibid at 309; see also AM McMunn and others "Children's emotional and behavioural well-being and the family environment: findings from the Health Survey for England" 53(4) Social Science Medicine 423.
[43] Ram and Hou, above n 41.

Another common consequence related to post-divorce economic decline is an increase in behavioural issues, particularly in boys. This is evident through the increased rates of conduct disorder and property offences, as well as hyperactivity to a lesser extent.[44] Other behavioural deviances include aggression, non-compliance, a lack of cooperation and anti-social behaviour.[45] There is evidence that the decline in economic circumstances is indeed a stronger determinant of behavioural problems in boys than altered parenting.[46]

Reduced physical well-being and health can also be linked to the lower finances available following a divorce.[47] Studies have found that children who have experienced divorce are at a significantly higher risk of reporting a range of health issues such as tonsillitis, repeated ear infections and pneumonia.[48] The relative risk of illness increased by up to 50% in children involved in separations before 1978.[49] That same study also found that the lack of financial resources following divorce is the most plausible explanation for these adverse health effects.[50]

These are only some of the negative consequences experienced by children which can be attributed to reduced finances following a divorce. Other consequences include worse nutrition, as well as increased emotional stress and depressive symptoms.[51] These relationships have been found even after controlling for pre-divorce socio-economic status, indicating that the negative consequences relating to economic hardships are in fact due to the divorce.[52] However, there are several protective factors, such as receiving child support, which can help shield children from these negative effects. Child support income has been positively correlated with a child's school achievements, as well as less behavioural issues[53] and poverty.[54] This highlights the

[44] Ibid.
[45] Donna Ruane Morrison and Andrew J Cherlin "The Divorce Process and Young Children's Wellbeing: A Prospective Analysis" (1995) 57(3) Journal of Marriage and the Family 800; David T Takeuchi, David R Williams and Russell K Adair "Economic stress in the family and children's emotional and behavioural problems" (1991) 53(4) Journal of Marriage and the Family 1031.
[46] Morrison and Cherlin, above n 45, at 809.
[47] Jane Mauldon "The Effect of Marital Disruption on Children's Health" (1990) 27(3) Demography 431.
[48] Ibid at 434–435.
[49] Ibid at 444.
[50] Mauldon, above n 47 at 431.
[51] Amato, above n 30 at 33.
[52] Ibid at 32.
[53] Amato, above n 31, at 1280; Valarie King "Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?" (1994) 15(1) Journal of Family Issues 78.
[54] Smyth and Weston, above n 32.

importance of financial resources in assisting children with post-divorce adjustment.[55] However, there are limits on the overall effectiveness of the New Zealand child support regime.

Firstly, the amount of child support payable to a custodial parent is often low or non-existent when the non-custodial parent lacks adequate resources.[56] This is in part due to divorces being more common amongst those in lower socio-economic surroundings.[57] Furthermore, a receiving parent on the sole-parent or unsupported child's benefit will have their child support income offset against their social security entitlements wholly or in part.[58] As highlighted by the Expert Advisory Group on Solutions to Child Poverty, this policy is a significant contributor to New Zealand's high child poverty rates as it greatly impacts children in sole-parent families who already experience the most economic hardship.[59] This policy also dis-incentivises the liable parent from paying what is owed, and is contrary to the principle that child support is a contribution to the *child's* costs, not a substitute for the social security entitlements of the ex-partner.[60]

Another issue present in the current child support regime is its lack of enforceability.[61] The IRD Managing Child Support Debt Report has revealed that the amount of outstanding child support owed to the IRD is "substantial and growing."[62] In 2009, the total child support debt amounted to $1.56 billon, of which $195 million was owed to custodial parents.[63] Therefore, under the New Zealand child support system, it is the child who misses out in situations where the liable parent does not meet their obligations. This can be contrasted to the systems present in many other OECD nations whereby the government makes advance payments to the

[55] Amato, above n 31, at 1280.
[56] Smyth and Weston, above n 32.
[57] Ibid.
[58] IRD "Child Support Payments: Receiving Child Support" (2 March 2016) Inland Revenue Department <www.ird.govt.nz>. See the example stating the following: "You're entitled to receive child support of $900 each month from the liable parent. You receive a net benefit of $700 each month. We'll pay you $200 child support when we receive it from the liable parent."
[59] *How the Child Support System Could Work to Reduce Poverty* (Working Paper no. 11, Expert Advisory Group on Solutions to Child Poverty, August 2012) at 12.
[60] Ibid at 12–13. The Working Paper also notes how New Zealand is one of the few OECD nations which offsets child support income against social security entitlements.
[61] Note that this is despite there being several enforcement provisions set out in Part 11 of the Child Support Act 1991.
[62] Report from the Controller and Auditor-General *Inland Revenue Department: Managing Child Support Debt* (September 2010) at 2.
[63] Ibid at 2. Note that the exact amount of child support currently owed is unknown, although the report estimated it would be about $7 billion by 2018.

receiving parent whenever the liable parent defaults on their payment, and takes on the burden of pursuing the non-paying parent themselves.[64]

Finally, Atkin identifies another child support criticism which concerns its adult-focused nature. These criticisms are mostly directed at the fact that the child support goes to the custodian rather than to the child or to a trust fund for the benefit of the child.[65] Atkin further notes that there is no obligation on the custodian to spend the money on the child.[66]

Therefore, it is evident that the child may be missing out because of the way the New Zealand child support regime is structured. It is thus likely that there is a significant proportion of children where child support provides little or no protection from the adverse consequences relating to post-divorce economic hardship. New Zealand has recently undergone child support reforms which have done little to directly combat the particular child support issues discussed.[67] However, child support will always remain a controversial issue as it strikes a difficult balance between the child's best interests and the taxpayers' expenses. One may therefore question whether child support is in fact the most effective and only way of mitigating the financial setback experienced by children following divorce.

(b) Implications resulting from relocation consequences

Stressful life events such as relocating homes, schools and neighbourhoods, has been identified by Amato as one of the five major stressors contributing to the negative consequences experienced by children post-divorce.[68] Several studies have found that the change associated with relocation increased behaviour pathology amongst children in divorced families but not of children in intact families.[69] The different reactions between the two groups towards

[64] *How the Child Support System Could Work to Reduce Poverty* (Working Paper no. 11) above n 59, at 14–15. However, note that the Government is looking at introducing an initiative whereby child support payments are automatically deducted from the liable parents' income. If this proposal is implemented, it will help reduce the debt owed. See Isaac Davison "Child support payments to be automatically deducted, and all parents' income opened up to Inland Revenue" (17 July 2017) New Zealand Herald <www.nzherald.co.nz>.
[65] Bill Atkin "Children and financial aspects of family breakdown" (paper presented at Proceedings of Social Policy Forum, Palmerston North, February 2003) at 79.
[66] Ibid at 79.
[67] This is because the amendments have focused on reforming other aspects of the child support regime such as the formula assessment which now takes into account the income of both parents and reduces the minimum level of shared care. See the Child Support Amendment Act 2013.
[68] Amato, above n 30.
[69] Arnold L Stolberg and James M Anker "Cognitive and Behavioural Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes" (1984) 7(2) Journal of Divorce 23.

relocation may be attributable to the fact that divorced children have already undergone a significant amount of divorce related stress, and because relocation following divorce is often involuntary which is associated with downward mobility.[70]

Typical post-divorce *voluntary* relocation cases present a situation whereby the primary caregiver wishes to relocate with the children somewhere a significant distance away from their current locality out of choice.[71] Disputes concerning voluntary relocation are determined under the Care of Children Act 2004 by looking at what would be in the child's welfare and best interests. However, there is also an increasing amount of *involuntary* relocation cases where, contrary to the primary caregiver's wishes, they are prevented from remaining in the family home with the children due to being unable to afford it. In such cases, relocating to a poorer neighbourhood is often an inevitable and undesirable result.[72] The effects of this type of involuntary relocation caused by financial necessity will be the current focus, as this is an issue which property division can ameliorate the effects of.[73]

Relocating and changing schools has been negatively associated with children's academic achievements, behavioural issues and educational attainment.[74] The reasons for this are two-fold. Firstly, relocating and changing schools are disruptive processes for children in their own right.[75] Children of divorced families are more likely to experience this disruption because relocating is significantly more prevalent and frequent amongst divorced families than it is amongst intact families.[76]

Secondly, the typical drop in housing standards and move to poorer neighbourhoods also contributes towards the negative effects experienced by children following post-divorce involuntary relocation.[77]

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[70] Nicola Taylor, Megan Gollop and Mark Henaghan *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (Centre for Research on Children and Families and Faculty of Law, Research Report, University of Otago, Dunedin, June 2010) at 10.
[71] Ibid at 7.
[72] Amato, above n 31.
[73] Compare with voluntary relocation which is governed by the Care of Children Act 2004, as discussed above.
[74] Scott J South, Kyle D Crowder and Katherine Trent "Children's Residential Mobility and Neighbourhood Environment following Parental Divorce and Remarriage" (1998) 77(2) Social Forces 667 at 669.
[75] Amato, above n 31, at 1280.
[76] South, Crowder and Trent, above n 74, at 668; see also Lenore J Weitzman "The Economics of Divorce: Social and Economic consequences of Property, Alimony and Child Support Awards" (1981) 28 UCLA L Rev1181 at 1262, n 227, where it was observed that almost two-thirds of divorced children changed their place of residence, with many having relocated three or more times.
[77] Taylor, Gollop and Henaghan, above n 70, at 10; and South, Crowder and Trent, above n 74.

Research by South, Crowder and Trent confirms a body of literature which suggests that childhood exposure to poorer neighbourhood conditions reduces educational attainment, school performance, cognitive development, and maternal warmth, while increasing the risk of early sexual activity, teenage childbearing and delinquent behaviour.[78] Exposure to poorer neighbourhoods and housing is likely to be one of the reasons why children of divorced families react worse to relocation compared to children of intact families, as relocation in intact families is typically associated with upward neighbourhood mobility and housing.[79]

To help mitigate the negative effects involuntary relocation has on children, Parliament included several provisions in the PRA which enable children to remain in the family home. This can be done by issuing an occupation order (s 27), a general order for the benefit of the child (s 26) or by postponing the vesting of relationship property (s 26A). However, as discussed in the following chapter, these provisions are rarely used to their full potential.[80] The importance of allowing children to remain in the family home following divorce was also recognised in the report released by the Royal Commission on Social Policy in 1988.[81] The Report stated that:[82]

> ... the living standards of the children themselves should receive major consideration under the Act. Child maintenance will not normally have a marked impact on the child's standard of living. Rather that standard of living will be derived from the home.

This view was further reflected in its recommendations for the family home not to be sold where there are minor or dependent children of the relationship.[83] Despite being in the child's best interests, these recommendations were discounted by the Working Group reviewing the Matrimonial Property Act due to a number of pragmatic difficulties it posed.[84]

3 Other legal reasons

[78] South, Crowder and Trent, above n 74, at 670.
[79] Ibid at 688.
[80] Chapter 3 specifies the exact number of orders which have been issued under each of these provisions.
[81] Royal Commission *Report of the Royal Commission on Social Policy, Te Komihana ATe Karauna Mo Nga Ahuatanga-A-Iwi* (April 1988). Note that the Royal Commission on Social Policy was set up in 1986 to review the direction of New Zealand social policy.
[82] Ibid at 225.
[83] Ibid at 225–226.
[84] Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, October 1988) at 38; see also Anna-Marie Skellern "Children and the Property (Relationships) Act 1976" (LLM Dissertation, Victoria University of Wellington, 2012) at 26–27.

The law has responded to the above justifications by carving out various legal routes allowing the interests of children to be accounted for in relationship property disputes. This section will focus on the legal avenues found outside of the PRA.

(a) United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC was signed by New Zealand's executive branch in 1989 and ratified in 1993. The purpose of this human rights treaty has been summarised in part as a recognition of the need to protect and nurture children, but also as an acknowledgement that children are individuals with views to be considered as a part of the decision-making process in matters which concern them.[85] However, before looking at how the UNCRC affects children in relationship property matters, one must first look at whether it is enforceable in New Zealand.

Given New Zealand's dualist approach towards treaty adoption, ratification of an international treaty does not automatically give it statutory force. A treaty will only become binding after Parliament incorporates it into domestic law in the form of statute. To date, Parliament has not comprehensively incorporated the UNCRC into New Zealand's domestic legislation, meaning that a breach of one of its provisions will not be actionable *per se*.[86] However, this is not to say that the UNCRC can be ignored. As the Court of Appeal in *Tavita v Minister of Immigration* held, ignoring the UNCRC (or any other international instrument) would be "implying that New Zealand's adherence to international instruments has been at least partly window-dressing."[87] Accordingly, *Tavita* has been used as authority for the proposition that New Zealand's domestic laws should be interpreted in a manner which is consistent with its international obligations.[88]

Articles 3, 12 and 27 are the articles which have potential direct application to relationship property division. In broad terms, Article 3 provides that "in all actions concerning children […] the best interests of the child shall be a primary consideration."[89] Proceedings under the PRA can be interpreted as "concerning children" because "concerning" in this context is

[85] Ibid at 6.
[86] Skellern, above n 84 at 8, notes that the Children's Commissioner Act 2003 is the only piece of New Zealand legislation which extensively refers to the UNCRC. However, s 36 of the Act provides that the inclusion of the UNCRC in its text "does not affect the legal status of the Convention."
[87] [1994] 2 NZLR 257 (CA) at 266.
[88] *Takamore v Clarke and Takamore* [2011] NZCA 587 at [241], n 232.
[89] Article 3.1.

commonly understood as "affecting"[90] or "in connection with"[91] children. Therefore, the best interests of children must be taken into account in relationship property proceedings as per Article 3. It is contended that this obligation does not erode the equal sharing regime as the need to consider children's interests is *a* primary consideration, not *the* primary consideration.

Article 12 sets out that children who are capable of forming their own views have the right to express these views and for these views to be given due weight in accordance with their age and maturity in all matters affecting them. This especially relates to the opportunity for the child to be heard in judicial proceedings affecting them.[92] Therefore there is an obligation for children to be heard and involved in relationship property proceedings to the extent that the proceedings affect them. Research has consistently shown that matters which are of considerable importance to children when parents separate include their family home and neighbourhood.[93] Despite this, children's views are rarely considered in relation to these, or any other relationship property matters.[94]

Finally, Article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The obligation to achieve these conditions necessary for the child's development rests on their parents within their parents' abilities and financial capabilities.[95] This article relates to relationship property matters as it applies to the child's living conditions, for example, the ability for them to remain in the family home.

The UNCRC provides a legal justification for the best interests of children to be taken into account by Parliament when creating relationship property legislation and by the courts when construing it. However, it is worth noting the persuasive evidence found in the commentaries which indicate that the PRA does not satisfy New Zealand's obligations under the UNCRC, and that even where there is uncertainty or room for discretion in the legislation, the courts will

[90] Li, above n 11, at 14, n 22.
[91] Skellern, above n 84, at 14.
[92] Article 12.2.
[93] P Tapp, N Taylor and M Henaghan "Agents or dependants: Children and the family law system" in J Dewar and S Parker (eds) *Family Law processes, practices and pressures* (Hart Publishers, Oxford, 2003) at 311, n 12.
[94] Ibid at 311.
[95] Article 27.2.

rarely refer to the Convention because relationship property is traditionally considered an "adult matter."[96]

(b) Guardianship provisions under the Care of Children Act 2004 (COCA)

Another potential legal justification requiring the interests of children to be accounted for in relationship property proceedings can be found in the guardianship provisions of the COCA. Sections 15 and 16 provide guardians with responsibility over their child's care, development and upbringing. These responsibilities and decisions must be exercised in a manner which gives effect to the child's welfare and best interests, even in proceedings not under the COCA, so long as the proceedings involve matters relating to the guardianship of a child.[97] Therefore, guardianship issues influenced by property disputes, such as the level of finances available for the child's upbringing, their standard of living and place of residence, must be resolved with the child's welfare and best interests in mind in accordance with the COCA.[98]

B Chapter summary

In conclusion, children are significantly affected by the manner in which property is divided upon relationship breakdown. Consequently, there are a number of theoretical, empirical and legal reasons which justify taking children's best interests into account in property disputes. However, as discussed in the following chapter, these justifications have minimal impact as children's interests are continuously overlooked in relationship property proceedings.

[96] Skellern, above n 84, at 7 and 10. However, *DPC v PMB* [2013] NZFC 1105 is an exception whereby the judge used the Convention to help justify an order for the children's benefit relating to the family home.
[97] Care of Children Act 2004, s 4.
[98] Ibid.

III How are Children's Interests Accounted for in Relationship Property Disputes?

A Provisions referring to children's interests and how the Courts have subsequently construed them

1 Purpose and principle sections 1M and 1N

The purpose provisions are essential in ascertaining the meaning of any enactment.[99] Therefore s 1M broadly sets the tone of the PRA and enables the courts to construe the meaning of specific provisions against this more general policy background. The manner and degree of reference to children in this section, along with the principles section will thus shed light on the extent that Parliament intended to account for children's interests.

Section 1M states that the purpose of the PRA is (emphasis added):

> (a) […]
> (b) […]
> (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends […], *while taking account of the interests of any children of the* […] *relationship*.

Atkin correctly identifies that "at first sight, [s 1M(c)] might sound pretty good for children."[100] This is because acknowledgement of their interests in the purpose section should mean that the courts will liberally construe the wording of any subsequent provision to give effect to this purpose.[101] However, s 1M(c) has largely been overshadowed by the Act's preceding purposes which have been given far greater weight. For example, the purpose in s 1M(b) recognises the equal contributions made by each partner of the relationship and lays down the foundations for the Act's equal sharing regime. In many instances, this equal sharing presumption clashes with the need for a just division that takes children's interests into account because a just division will often be unequal. Section 1M(c) is easily overshadowed due to the words "taking account of" being inherently weak and vague.

[99] Interpretation Act 1999, s 5.
[100] Atkin, above n 65, at 72.
[101] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 201.

Furthermore, the omission of reference to children in the Act's principles section additionally contributes to their lack of recognition. This is because the principles are included to "guide the achievement of the purpose."[102] However, how can the purpose relating to children set out in s 1M(c) be achieved when there is no accompanying principle? The principles in s 1N instead emphasise the importance of maintaining and enhancing equality between men and women (1N(a)), that all contributions to the relationship be treated as equal (1N(b)) and that all disputes under the Act are settled in an expedient manner (1N(d)). This again reinforces the strong focus on equal sharing and the need for a clean break. The principle in s1N(c) relating to a just division merely has regard to the economic hardships arising from the relationship, or relationship breakdown, and makes no reference to children. In fact, as a group, children of a relationship are not entitled to apply for an order under the Act as this right is reserved for only the partners of the relationship, or anyone on whom the partners have made conflicting claims in respect of property.[103] When children as a class are essentially barred from applying under the Act, and when there is no principle explaining how their interests can be accounted for despite this, it is hard to envisage how Parliament intended for children to be heard and protected in property disputes.

Babylon v Babylon summarises the courts' general approach towards interpreting a "just" division under s 1M(c).[104] Here the judge turned to the purpose provisions to help determine whether the orders under s 26 and s 26A sought by the two children of the marriage should be granted. The judge found that the purpose relating to children's interests "can be seen as subsidiary to that of recognising the equal contributions of parties to a relationship partnership and ensuring a just division of property when the relationship ends."[105] Perhaps unsurprisingly, the applications under s 26 and s 26A were unsuccessful.

2 Substantive sections

(a) Sections 15 and 15A

The first substantive provision in the PRA that refers to children is s 15 which is concerned with redressing economic disparity between parties. This section applies when, upon post-separation property division, the income and living standards of one partner is likely to be

[102] Property (Relationships) Act 1976, s 1N.
[103] Atkin, above n 65, at 72; see also Property (Relationships) Act 1976, s 23.
[104] *Babylon v Babylon,* above n 23.
[105] Ibid at 624.

significantly higher than the other partner because of the division of functions during their relationship.[106] One of the factors which the court may have regard to when making an order under s 15 is the responsibilities of each partner for the ongoing daily care of any minor or dependent children of the relationship.[107] Therefore the parent with primary day-to-day care over the children may receive a compensatory award due to the negative impact this childcare arrangement will have on their earning capacity. Thus, despite this provision not directly considering children's interests, it may indirectly benefit them because an award improving the living standards of their primary caregiver will have a secondary effect on them.

However, the effect this provision has on children may not be as far-reaching as it seems. This is because s 15 itself is difficult to interpret and often fails to accomplish what it set out to.[108] This is largely a result of the high jurisdictional threshold for satisfying the s 15 requirements, the lack of guidance on how to quantify a s 15 award, the large deductions from any award made to account for future contingencies, and its ineffectiveness where there is a small pool of relationship property.[109] Furthermore, the leading s 15 case *X v X*, has interpreted "the ongoing daily care of any minor or dependent children" in a narrow manner.[110] Robertson J notes that when considering an award under s 15, one must have regard to each parties' "current obligations in respect of any children of the partnership…"[111] However, interpreting "ongoing" as "current" shows a lack of regard for future childcare obligations; something which is likely to result in a lower s 15 award. This narrow interpretation of "ongoing," in conjunction with the more general s 15 difficulties, is likely to seriously hinder its "potential to improve the living standards of children after relationship breakdown of their parents."[112]

Section 15A also intends to remedy future economic disparity between the parties resulting from the division of functions within the relationship. It aims to compensate the economically disadvantaged party where there has been an increase in value of their partner's separate property while they were living together. Again, this provision enables the court to take into

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[106] Property (Relationships) Act 1976, s 15(1).
[107] Ibid s 15(2)(b).
[108] Mark Henaghan "Exceptions to 50/50 sharing of relationship property" (forthcoming); see also Heidi Gray "Inequality in Equal Division: Embracing a Canadian Approach to Remedy Economic Inequality Upon Relationship Breakdown" (LLB (Hons) Dissertation, University of Otago, 2009).
[109] Gray, above n 108, at 26–27.
[110] [2009] NZCA 399.
[111] Ibid at [115].
[112] Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at 11.

account the responsibilities of each partner for the ongoing daily care of the children of the relationship. However, because there has not yet been a successful application under s 15A, this provision has had little opportunity to indirectly benefit children.[113]

(b) Sections 18, 18A and 18B

Section 18 looks at the relevant contributions made by partners of the relationship for the purposes of the Act. The care of any child of the relationship is listed as the first contribution in s 18(1)(a)(i). "All" or "any" of the contributions set out in s 18 are relevant considerations which influence how property is divided. This can benefit children in situations where their primary caregiver is awarded more property in recognition of their post-separation childcare contributions under s 18B.[114] However, post-separation childcare contributions are often offset against other contributions such as occupational rent for the retention of the family home.[115] In other, more controversial situations, the courts have offset post-separation childcare against that spouse's enhanced relationship with the child.[116] In fact, there are only a limited range of circumstances where the court does compensate for post-separation childcare as this jurisdiction is to be used sparingly.[117] Therefore, in reality, it is seldom that the child benefits through the courts recognising pre- or post-separation childcare contributions under s 18.

Section 18A sets out that the effects of spousal misconduct are an irrelevant consideration under the Act unless the conduct was gross, palpable and significantly affected the value of the relationship property. This type of misconduct is relevant in determining contributions made under s 18, and in determining orders under ss 26–28 and 33. However, the 1986 amendments made it difficult to use misconduct as a relevant consideration in determining orders affecting children. This is because it changed the previous position where the court could "have regard to [any] misconduct in determining what order it should make under […] sections 26, 27, 28,

[113] Skellern, above n 84, at 41; see also Nicola Peart (ed) *Brookers Family Law: Family Property* (online looseleaf ed, Brookers) at [PR15A.04].
[114] *I A T v S J G* [2013] NZHC 297; and *Tarr v Tarr* [2014] NZHC 1450 are examples of appeals upholding post-separation childcare contribution awards in favour of the primary caregiver.
[115] Nicola Peart "Protecting Children's Interests in Relationship Property Proceedings" (2013) 2 Otago LR 27 at 48.
[116] See for example *Loader v Loader* [2003] NZFLR 553 at [55].
[117] *G v B* FC New Plymouth FAM-2002-043-245, 1 December 2004 at [49]–[53]. This case held that examples of circumstances where post-separation childcare may be taken into account include situations where one parent has abandoned the childcare responsibilities to the other parent, or has avoided child support payments through manipulating their financial circumstances.

and 33 of this Act" and not need to consider whether it affected the value of relationship property, or whether the misconduct was gross and palpable.[118]

E v W is a case illustrating the undesirable effects these amendments have had on children.[119] The facts involved the two children being sexually abused by their mother's partner; something which clearly constitutes "gross and palpable" conduct. However, the judge believed that this misconduct could not be taken into account when considering the issues raised by the mother, presumably because the misconduct did not affect the extent or value of relationship property.[120]

(c) Section 26

Section 26 is the principal substantive provision dealing with children's interests and gives effect to the purpose set out in s 1M(c). It states that:

> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the […] relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the […] relationship or of any of them.

It is therefore evident that s 26 has a dual purpose. Its first purpose is a general obligation to have to regard to the interests of any minor or dependent children of the relationship in any proceedings under the Act. This suggests that Parliament understands that property division can significantly impact minor and dependent children, and thus requires their interests to be in the background of all relationship property matters. The broad mandate enables children's interests to influence the classification, valuation and overall division of property.[121] For example, children may influence whether property will be classified as relationship or separate property under ss 8–10, the date of property valuation under s 2G, or whether a contracting out agreement should be set aside under s 21J, despite none of these provisions explicitly referring to children.[122] The duty also applies to sections that already expressly refer to children's interests such as compensation awards under ss 15, 15A and 44C, contributions under ss 18

[118] Matrimonial Property Act 1976 (1976 No 166), s 18(3), *2160*.
[119] [2006] NZFLR 1140.
[120] Ibid at [10].
[121] Peart, above n 115, at 43.
[122] For example, in *M-LA v AVW* [2012] NZFC 8640, the unexpected birth of a child provided grounds for setting aside the parties' contracting out agreement under s 21J.

and 18B, and occupation orders under s 27. However, as highlighted by Atkin, s 26 only indirectly applies to these provisions, meaning that the obligation to have regard to children's interests has minimal impact.[123]

The second purpose of s 26 allows the court to make an order settling the relationship property for the benefit of the children of the relationship if it considers it "just" to do so. Interestingly, this latter part of s 26 is not restricted to "minor or dependent" children, and may therefore include independent adult children.[124] The importance of giving effect to children's interests can be highlighted through the 2001 amendments which prevent one from contracting out of s 26 orders by way of an agreement made under Part 6 of the Act.[125]

Section 26 is potentially extremely powerful, and as Cooke J noted, has the ability to "totally displace" the property rights and statutory interests or claims of the spouses under the current relationship property system.[126] Perhaps this fear of displacing the equal sharing regime is what has led to the courts' cautious approach towards s 26 and the view that s 26 "cannot be authority for simply reducing the proper entitlement of one spouse and increasing that of the other."[127] Consequently, the courts will only exercise the discretion to make an order under s 26 in an "exceptional case"[128] or where the circumstances are "somewhat out of the ordinary."[129] This restrictive interpretation is typically adopted by the courts in practice despite the presence of some conflicting case law, and the fact that there is nothing in the wording of the provision indicating that such a narrow approach is appropriate.[130] Examples of successful s 26 orders have been summarised by Priestly J as those involving "parental disappearance or death; sexual abuse; or some form of physical or mental disability on the part of the child."[131]

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[123] Atkin, above n 65, at 73. Note that the indirect application of s 26 goes against the mandatory nature of the word "must" included in the s 26 provision itself.
[124] See for example *Re Roberts* [1994] 1 NZLR 200; *Lockie v Lockie* (1993) 11 FRNZ 81 (FC). However, there is conflicting case law on this point. See *Babylon v Babylon,* above n 23, at [76] where Heath J construes the second purpose of s 26 to mean "minor or dependent children only."
[125] Property (Relationships) Act 1976, s 26(3).
[126] *Walker v Walker,* above n 16, at 565.
[127] *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA) at 408.
[128] *R v R,* above n 19, at 622.
[129] *Hammond v Hardy* [2007] NZFLR 177 (HC) at [106].
[130] *Babylon v Babylon,* above n 23, is one of the few cases which held that the Court should look at whether there is a need to provide for the interests of the minor or dependent children, rather than whether "exceptional circumstances" have been made out.
[131] *Hammond v Hardy,* above n 129, at [106–110]; and RL Fisher (ed) *Fisher on Matrimonial and Relationship Property,* above n 5, at [18.84]; see also *RN v RN* (1985) 3 NZFLR 694 (FC) where the home was vested in the children after their father was accused of murdering their mother; and *S v C* [1988] NZFLR 734 where a portion

The general unwillingness of the courts to expropriate property from the adult parties for the benefit of children, even where the need to protect them has been made out, has meant that s 26 orders are a "last resort" measure which are only made in limited circumstances.[132] This view is supported by one author's observation that only 14 out of a total of 45 cases between 1976 and 2013 resulted in an order settling property on the child.[133] Instead of granting s 26 orders, the courts prefer to employ less drastic short-term measures such as postponing the vesting of relationship property (s 26A), or issuing an occupation order until the children are no longer minor or dependent (s 27).[134] A general trend in the case law has shown that even in the rare situations where a s 26 order is made, the amount awarded tends to be small.[135]

Overall, s 26 is a provision with strong potential to protect the interests of minor or dependent children in relationship property disputes. However, the considerable impact this provision could have on property entitlements explains the strong adult focus on what is, in fact, a child-oriented provision. It is uncertain whether Parliament planned or anticipated the courts endorsing such a restrictive approach. On the one hand, the discretionary and powerful nature of s 26 indicates that it was intended to be used to its full potential– why else give it such broad powers? Conversely, the fact that Parliament did not amend the section, even after ratifying the UNCRC, perhaps indicates that it is content with the subsidiary role the courts have assigned to children in property proceedings. In fact, as one author notes, it has become more difficult to reach the threshold for a s 26 order than prior to the 2001 reforms.[136]

(d) Section 26A

Section 26A introduced by the 2001 amendments is another substantive provision referring to the interests of children. This section empowers the court to make an order postponing the vesting of any share in the relationship property, either wholly or in part, until a specified future

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of the available relationship property was settled on the children after the father was admitted as a mental patient after killing a relative in the presence of one of the children.

[132] Fisher (ed) *Fisher on Matrimonial and Relationship Property,* above n 5, at [18.83].

[133] Peart, above n 115, at 50. Further note that a search on the Westlaw database has revealed that for the period after this study (between 2014 and 2017), there have been two out of three successful s 26 orders. However, the two successful cases presented unusual facts involving a child suffering from a degenerative neurological disease warranting 24-hour care (see *Bryant v Bryant* [2015] NZFC 9464*),* and a terminally ill mother's life insurance policy (see *Hader v Hader* [2015] NZFC 4376*)*.

[134] Ibid at 51.

[135] Nicola Peart (ed) *Brookers Family Law: Family Property,* above n 113, at [PR26.04].

[136] Skellern, above n 84, at 44.

date or until the occurrence of a specified event. However, the court can only do so if it is satisfied that immediate vesting would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for any minor or dependent children of the relationship.

Some commentators have noted that this strict criterion is interesting considering that the s 26A powers are limited, especially when compared to s 26.[137] Unlike s 26, the powers under s 26A are only available where there are minor or dependent children. Furthermore, only the principal caregiver of these children can apply for an order under s 26A. Therefore, as evidenced in *De Malmanche v De Malmanche,* there is no jurisdiction to make an order under s 26A in situations where parties share the childcare arrangements.[138] The applicant then bears the onus of proof to show that the postponement of vesting relationship property is necessary for them to avoid undue hardship. This is generally determined by looking at the applicant's income, outgoings or ability to meet their own needs, as well as the effect on the children's schooling and social environment.[139] The respondent's lack of immediate need to access relationship property due to a period of absence may also be a relevant factor.[140] Finally, subsection (2) of the provision further limits the use of s 26A by providing that the postponement of vesting can only be for as long as necessary, and to the extent necessary to alleviate the undue hardship.

Given the high threshold necessary to prove "undue hardship," in conjunction with the s 26A(2) proviso, it is hardly surprising that s 26A orders are rarely applied for or granted.[141] As at May 2013, only four out of a total of 13 applications resulted in successful s 26A orders; a figure which has not changed since.[142] Priestley J attempts to attribute these low figures to the changing social environment where geographic relocation and relatively rapid re-partnering are common, thereby essentially rendering s 26A orders redundant in the modern age.[143] However, Peart raises a strong counterargument to this proposition. Peart contends that the 2008 global financial crisis and economic recession have created a new social change which is

[137] Peart, above n 115, at 52.
[138] [2002] NZLR 838. Note that joint care is defined as at least a 28/72 split between households as per IRD, above n 35.
[139] *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009.
[140] See for example *RH v AF* FC Auckland FAM-2005-004-1312, 27 January 2006 where immediate access to relationship property was not necessary as the respondent was a mental in-patient, or *E v W,* above n 119 where the respondent was incarcerated.
[141] *Hammond v Hardy,* above n 129, at [114].
[142] Peart, above n 115, at 53. A search on the Westlaw database indicates that this figure has remained the same.
[143] *Hammond v Hardy,* above n 129.

likely to affect the primary caregiver's capacity to look after their children, and thus justify the postponement of vesting relationship property.[144]

(e) Section 28

Section 27(1) enables the court to grant either partner the right to personally occupy the family home for a period according to terms and conditions the court thinks fit. Section 28A sets out that when contemplating an occupation order, the court "shall have *particular regard* to the need to provide a home for any minor or dependent child of the […] relationship, and may also have regard to all other relevant circumstances."[145]

The requirement to have "particular regard" to providing accommodation for minor or dependent children has been interpreted in several cases as "the first and most important consideration" when making an occupation order.[146] However, later cases such as *Gordon v Gordon* have disregarded the view that this consideration is paramount, and instead reiterated that the statutory language is merely to have "particular regard" to children.[147]

Furthermore, there is a conflict between granting occupation orders, and the Courts' desire to achieve an expedient post-separation clean break. This is one of the reasons why the courts exercise restraint in making s 27 orders, despite the fact that occupation orders are relatively minor encroachments which only temporarily deprive one party of their property entitlements.[148] Other reasons contra to awarding occupation orders for the benefit of children is the general shift towards shared parenting and the accommodation needs of new relationships.[149] Even where occupation orders are granted to provide a home for the children, these orders do not tend to last for more than one to two years on average.[150] This means that unless the child becomes an independent adult in those two years, occupation orders will merely defer the date for minor or dependent children to uproot their lives and relocate.

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[144] Peart, above n 115, at 53. However, note that the global financial crisis is likely to have negatively affected the non-custodial parent also.
[145] Property (Relationships) Act 1976, s 28A(1).
[146] *Wheeler v Wheeler* (1984) 2 NZFLR 385 (FC) at 390. This interpretation was subsequently followed by *Canning v Canning* (1985) 3 NZFLR 739 (FC); *Sweeny v Sweeny* [1985] 2 NZLR 673 (HC); and *Nelson v Nelson* (1985) 3 NZFLR 766 (HC).
[147] (1998) 3 FRNZ 665 (HC).
[148] See for example *JFSM v DJLM* [2012] NZFC 7113 where an application for an occupation order involving children of the relationship failed, in part due to the effect this would have on the clean break principle.
[149] Atkin and Parker, above n 112, at 254.
[150] Peart, above n 115, at 54, n 120.

3 Procedural sections 37 and 37A

Section 37 allows any person who has an interest in property affected by a PRA order to appear and be heard in the matter as a party to the application. Therefore, this provision prima facie includes children where they can show an interest in the property affected by an order. However, commentaries suggest that it is "doubtful whether children can take advantage of this."[151] This is partially due to the difficultly for children to obtain legal representation enabling them to be heard. Section 37A empowers the court to appoint a lawyer to represent any minor or dependent children of the relationship, but only if special circumstances make this appointment necessary or desirable.

The "special circumstances" requirement creates quite a high threshold, especially when compared with other legislation where the appointment of a lawyer for child is mandatory[152] or at the court's discretion.[153] A review of PRA cases has revealed that s 37A orders tend to only be granted in situations where "children are particularly likely to be affected *and* the assets at stake are unusually high, or where there are grounds for believing that a settlement on the children pursuant to s 26 is a possibility."[154]

In the vast majority of relationship property cases, children will not be represented by legal counsel despite the outcome of the proceedings almost always affecting them. This is partially due to the difficulty in showing "special circumstances" which make appointment necessary or desirable. Furthermore, legal representation is perhaps less necessary because, unlike in the Care of Children Act 2004, there is no requirement in the PRA to obtain and take into account children's views. The lack of legal representation for children can also be attributed to the repeal of s 37A(3) which enabled the child's legal expenses to be paid out of public money in situations where the court thought proper.[155] Removal of this section means that the lawyer for child fees must be paid by one or more of the parties to the proceedings.[156] This is likely to disincline the courts from ordering legal representation for the child.

[151] Atkin, above n 65, at 72, n 5.
[152] Children's and Young People's Well-being Act 1989, s 159(1).
[153] Care of Children Act 2004, s 7.
[154] Fisher (ed) *Fisher on Matrimonial and Relationship Property,* above n 5, at [18.82].
[155] Property (Relationships) Amendment Act 2013.
[156] Property (Relationships) Act 1976, s 37A(2)(b).

Consequently, if a child fails to obtain legal representation, it means that they are unlikely able to fall under s 37 of the Act, and thus forgo the opportunity to be heard despite potentially having a property interest. Declining legal representation has the additional effect of breaching Article 12 of the UNCRC which confers upon children the right to express their views in all matters affecting them, and for these views to be given due weight.[157]

4 Relevant sections in other statutes

(a) Section 105 of the Child Support Act 1991 (CSA)

Section 104 of the CSA allows the child support formula assessment to be departed from in special circumstances set out in s 105. The grounds for departure which may be affected by the PRA are situations where there has been a transfer or settlement of property for the benefit of the child (s 105(2)(c)(ii)), and situations where the primary caregiver is granted continued occupancy of any joint property (s 105(2)(c)(iii)). These provisions therefore have the ability to offset a favourable property or housing outcome for the child against their child support entitlements.

Although this provision appears unfavourable towards children, there is a high threshold in place making it relatively difficult to apply in practice. First a party must show that one of the grounds for departure exists (s 105(1)(a)). In this case that means demonstrating that because of special circumstances, the formula assessment would result in an unjust and inequitable level of financial support to be provided by the liable parent for the child because of any transfer or settlement of property for the child's benefit (s 105(2)(c)(ii)), or because of the primary caregiver's occupancy of the family home (s 105(2)(c)(iii)). The second element requires the applicant to show that departure from the formula assessment is just and equitable in regard to the child, the receiving carer, and the liable parent (s 105(1)(b)(i)). Finally, the applicant has to show that the departure is "otherwise proper" (s 105(1)(b)(ii)).

Satisfying the grounds for departure alone can prove to be difficult. This is highlighted in *Re P,* the leading case considering s 105(2)(c)(ii).[158] Heron J held that a more favourable property

[157] Peart, above n 115, at 54.
[158] [1994] NZFLR 223. For application of the law as stated in *Re P* see *Parry v Parry* DC Upper Hutt CP57/800/21, 24 November 1995 where departure from the formula assessment was rejected due to the lack of special circumstances as well as the fact that it did not seem to be an application on which the result would be a proper order.

settlement for the custodial parent and child does not automatically equate to a lump sum of child maintenance paid in advance. The learned judge went on to cite *Roderick v Social Security Commission* where Hillyer J stated that "I would not like it thought that whenever a husband makes a generous matrimonial property settlement on his wife he is exempt from contribution under the liable parent's scheme. Each case must depend on its own facts."[159] There is an equally high bar in satisfying grounds for departure under s 105(2)(c)(iii). Cases such as *Verrall v Verrall* and *Flynn v Flynn* held that paying some or all of the outgoings on a joint property occupied by the primary caregiver and children did not provide grounds for departure.[160] Even where such grounds have been made out, departure from the formula assessment must still be just and equitable towards the child and parents, as well as "otherwise proper." Some cases such as *CIR v Cutbush* satisfy the first two elements, but fail the "otherwise proper" requirement due to departure going against the public interest.[161]

However, there are some successful applications under s 105(2)(c) despite the high threshold. *Wallis v Everett* is one such example.[162] In this case the child support payable by the liable parent was reduced to the statutory minimum because there had already been a lump sum property payment. Another example of a successful departure is the case *D v D* where the liable parent allowed the receiving parent and children to remain in the mortgage-free family home.[163] These cases show how s 105(2)(c) has the potential to undermine PRA orders favourable towards children by reducing any child support payable.

Furthermore, even where a liable parent is refused a departure order, they may use this as grounds to oppose a PRA order benefitting the child. *Ludwig v Ludwig* is an example of one such case where non-departure from the formula assessment meant that there could be no additional liability on the liable parent by way of a s 27 order.[164] This meant that the wife and two children could not continue occupancy of the family home.

(b) Section 182 Family Proceedings Act 1980 (FPA)

[159] Ibid at 228–229; see also *Roderick v Social Security Commission* (1984) 3 NZFLR 7 at 10.
[160] FC Whakatane CS0873/92, 17 December 1992; 10/8/92, Judge Strettell, FC Christchurch FP009/692/92.
[161] [1994] NZFLR 598 (HC) at 604–605.
[162] [2013] NZFC 5055.
[163] (1992) 9 FRNZ 442 (FC).
[164] [1996] NZFLR 707 (FC) at 709–710.

Section 182 of the FPA is another provision which can affect children. It provides the court with a broad mandate to vary a nuptial settlement for the benefit of the parties to a marriage or civil union, and their children.[165] *Ward v Ward* held that s 182 should be used to give effect to the reasonable expectations held by the parties at the time of settlement.[166] This is possible due to the FPA not being constrained by the same equal sharing principles as the PRA. Consequently, children's interests will be protected in cases where the nuptial settlement (such as a trust) was reasonably expected to benefit the children.[167] Section 182 can also be used to transfer a portion of the trust property to a separate trust for the child in situations where doing so is in the child's best interests.[168] The Supreme Court in *Clayton v Clayton* confirmed the importance of children when exercising discretion under s 182 and held that "particular attention must be paid to the interests of dependent children."[169]

B How are children's interests accounted for in out-of-court relationship property settlements?

One author correctly observes that the majority of relationship property cases do not reach the courts and are settled amongst parties privately.[170] However, the PRA and cases determined under it are highly influential in establishing a baseline expectation of property entitlements in an out-of-court environment.[171] Generally parties agree to settlement terms similar to what they would be expected to receive if the case were to be litigated in court. Therefore, it is hardly surprising that children play a minor role in out-of-court property settlements as this is a reflection of how they are generally treated in litigated PRA cases.

The general consensus amongst family law practitioners interviewed for this dissertation was that s 26 is rarely used in out-of-court settlements.[172] One Auckland QC appropriately attributed this to the fact that one "negotiates in the shadow of the law." Therefore, because the courts give little effect to s 26, the provision is rarely taken seriously in settlement negotiations. Many

[165] Note that the Family Proceedings Act 1980 does not apply to de facto relationships. Section 182 therefore does not apply to children of de facto relationships.
[166] [2010] NZLR 31.
[167] See for example *DAM V PRM* FC Masterton FAM-2008-035-512, 30 March 2011; *LSP v WSP* FC Gore FAM-2007-017-124, 30 May 2011.
[168] *Williams v Williams* HC Christchurch CIV-2006-409-2948, 1 May 2009; *Ord v Ord* HC Auckland AP66-SW02, 28 March 2003; *MEF v J-APM* [2012] NZFC 7705.
[169] [2016] NZSC 30, at [58].
[170] Skellern, above n 84, at 53.
[171] Ibid.
[172] A total of seven family lawyers contributed to the study. Refer to Appendix 1 for methodology.

of the lawyers also stated that children rarely remain in the family home due to the financial difficulties associated with buying-out the other parties' share in the home.

Based on the discussions with family law practitioners, it is evident that there is significant room for improvement in the way children are taken into account in out-of-court relationship property disputes. In order for change to occur, there needs to be direction from the courts as this is an imperative step in redefining property expectations and clarifying how children's interests fit into the overall picture. However, as discussed earlier in this chapter, the subsidiary nature of children's interests in relationship property cases is relatively settled. Therefore, the author contends that any real change must stem from Parliament.

C Chapter summary

There are multiple provisions throughout the PRA which refer to children and have the potential to safeguard their interests. However, a trend in the case law has revealed that these provisions are often narrowly construed or overlooked entirely. The subordinate status of children's interests in relationship property proceedings is similarly reflected in an out-of-court environment when negotiating property settlements.

IV Recommendations and Options for Reform

A Proposed options for reform

1 Amending PRA provisions which indirectly benefit children

(a) Sections 1M and 1N

Amending the principle and purpose provisions of the PRA is crucial to ensure that children's interests are adequately protected and form part of the Act's overall theme. Currently children's interests are to be taken into account when achieving a just division between partners as per s 1M(c). However, for children's interests to be properly accounted for, this needs to be a purpose in its own right. This means that there should be an individual subsection which states that children's best interests should be a primary consideration in any matters concerning them under the PRA.

Furthermore, there should be an accompanying principle provision in s 1N which reflects the purpose that children's interests are a primary consideration. This will help implement that purpose, while clearly setting out the important role children have in relationship property proceedings from an early point in the Act.[173]

(b) Sections 15 and 15A

Section 15, which looks at post-divorce economic disparity, can be strengthened by replacing "may" with "must" in subsection (2). This means that the court must have regard to the matters listed when determining whether to make a s 15 award. There should also be a fourth consideration added under s 15(2) which states that the court "must have regard to the interests of any minor or dependent children of the marriage, civil union or de facto relationship." These changes should also be reflected in s 15A.

(c) Section 28A

Section 28A states that a court shall have "particular regard" to the need to provide a home for any minor or dependent children of the relationship when determining whether to make an

[173] See Skellern, above n 84, at 70–71 for an example of what an amended purpose and principle section may look like.

occupation order and the form of such an order. However, occupation orders are rarely granted, and tend to be of short duration whenever they are successful. Therefore, this provision should be amended to state that the need to provide a home for any minor or dependent children of the relationship should be the *primary consideration* when determining whether to make an occupation order and the form of such an order. The additional guidance will hopefully remove any confusion over the meaning of "particular regard," and ensure that more occupation orders are granted in cases involving minor or dependent children.

(d) Weighing up options for reform

The above options for reform operate as a constant reminder throughout the Act for the courts to consider children's interests. It is likely that children will indirectly benefit from some of the proposed changes to ss 15 and 28A despite these provisions ultimately intending to benefit the parties to the proceedings. This is because orders mitigating post-divorce economic disparity and occupation orders are typically awarded to the primary caregiver, meaning that the children in their care may also enjoy some of the benefits.

However, the trouble with amending provisions aimed at indirectly benefitting children is that the potential benefits are not guaranteed. For example, a primary caregiver who is awarded a lump-sum to compensate for any economic disparity may not choose to spend this money in a manner which will positively impact the child. Therefore, one cannot assume that an order which has the potential to benefit the child will in fact benefit the child.

Furthermore, because the above provisions are ultimately aimed at the parties to the proceedings, an accompanying order will be tailored to suit that respective party, not their child. This means that even where an order does benefit the child, it may not be done in the most effective or appropriate way. An effective order for the child can only be achieved where children's interests are at the heart of a provision so that no conflict of interest exists.

Finally, the indirect benefit such orders may have on children is vague and uncertain, meaning that the liable parent may be inclined to view the order as benefitting the other parent rather than the child.[174] It is thus likely that the paying parent would be more cooperative and perhaps

[174] Note that this is fine where the order is indeed intended to benefit the former spouse and not the child.

more generous if they could clearly see that any property transferred to benefit their child is done in a direct manner specifically for that purpose.[175]

Therefore, the above amendments in isolation do not sufficiently protect the interests of children. In fact, a s 15 or 28A order could even be used to undermine s 26 if it was used to show that children's interests have already been accounted for. This runs contrary to the child's best interests because as we know, the indirect benefits from these provisions are uncertain and not as effective as an order specifically tailored to benefit the child. In order for these provisions to not have a damaging effect, s 26 needs to become the overriding provision because it directly benefits children. This means that children may only be benefitted indirectly through ss 15 and 28A after s 26 has been satisfied. However, s 26 as it currently stands, is rarely used to its full potential and should therefore be amended also.

2 Amending s 26 and s 26A

The most efficacious way of remedying the s 26 shortfalls is by including more certainty and guidance as to when children's interests ought to be accounted for. It is further suggested that s 26 should only apply to minor or dependent children of the relationship as accounting for the interests of independent adult children will make this provision unduly wide and unattainable.[176]

(a) The proposed s 26 and 26A amendments

An amended s 26 may resemble the following:[177]

Section 26

(1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and must make an order for the benefit of any minor or dependent children unless the court is satisfied that their needs have been adequately met, or where making an order would be impracticable in the given circumstances.
(2) For the purposes of subsection (1), the needs of any minor or dependent children of the marriage, civil union, or de facto relationship are to be measured against their pre-divorce needs to ensure a comparable post-divorce standard of living and a minimal change in Deprivation Index score.
(3) An order under subsection (1) may be deemed impracticable where it would be unduly burdensome or unconscionable towards one or both of the parties.

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[175] Skellern, above n 84, at 73.
[176] Skellern, above n 84, at 72. Refer to Chapter 1 to see what is meant by the term "minor or dependent child."
[177] Refer to Appendix 2 for the current s 26.

A new s 26A might follow on to read:[178]

Section 26A

(1) The court—
  (a) in determining whether to make an order under section 26(1); and
  (b) in determining, in relation to an order made under s26(1), the terms (if any), and the conditions (if any) of the order,—

(2) shall, without limitation, have particular regard to the following:
  (a) The child's financial needs;
  (b) Provision of a home for the child;
  (c) The child's education requirements;
  (d) Maintaining the child's relationships with both parties, whanau and extended family members;
  (e) Any special needs of the child arising from any physical or mental impairment;
  (f) The financial resources available to each party and the children;
  (g) The parties' own financial needs; and
  (h) Any other circumstances relevant to the reasonable needs of the child.

(3) Depending on the circumstances, an order made under s 26(1) may be in the form of settling the relationship property or any part of that property for the benefit of the child, and/or in the form of a housing arrangement[179] for the benefit of the child.

(4) In determining an order under s 26(1) of this Act, the court is not limited by any provision in the Child Support Act 1991.

(5) An order under s 26(1) will not provide special circumstances forming grounds for departure from the formula assessment of child support under s 105(2)(c)(ii) and (iii) of the Child Support Act 1991 unless the court considers that there are extraordinary circumstances that make non-departure from the formula assessment repugnant to justice.[180]

The child's needs referred to in s 26(1) should be measured against their pre-divorce needs to ensure that their post-divorce standard of living is comparable. However, an objective "bottom-line" measure may be included to unequivocally set out a child's absolute minimum needs. An appropriate gauge of this "bottom-line" is a score of 7 or higher on the Deprivation Index (DEP) as this indicates material hardship.[181] A score of 7+ means that a child lacks 7 or more of the 17 essentials set out in the DEP-17 index, such as warm housing, suitable clothing and a separate bed.[182] Therefore, a judge must make an order for the child's benefit in situations where the child's needs have not been adequately met by ensuring that there is minimal or no increase in DEP-17 score when measured against their pre-divorce standard of living.

[178] Refer to Appendix 2 for the current s 26A.
[179] A housing arrangement refers to a type of arrangement whereby the child can remain living in the family home.
[180] Child Support Act 1991 s 105(2)(c)(ii) and (iii) should be amended to reflect these changes accordingly.
[181] For the full DEP-17 index, as well as other measures of poverty, see J Simpson and others *Child Poverty Monitor: Technical Report 2016* (New Zealand Child and Youth Epidemiology Service, National Report, December 2016).
[182] Ibid.

However, the proposed s 26(2) sets out an important caveat to the general obligation to make an order for the benefit of the child in situations where doing this would be "impracticable in the given circumstances." To avoid confusion, "impracticable" would be defined as situations where a s 26 order would be "unduly burdensome or unconscionable towards one or both parties." This may cover cases where the relationship has little or no assets available for division, or where one or both parties need full and immediate access to capital to avoid undue burden.[183]

Section 26A(2) then goes on to set out a list of factors which assist the court in adopting a consistent, yet individual-focused approach when determining whether to make a s 26 order. In situations where it appears that the child's needs can be adequately met through relationship property, the court will be empowered to make an order for the child's benefit by way of property settlement and/or a housing arrangement enabling the child to remain in the family home.

The final subsection of 26A clarifies how the provision relates to the CSA. As discussed in Chapter 3, s 105(2)(c)(ii) and (iii) of the CSA empowers the court to depart from the formula assessment in special circumstances, namely, where there has been a transfer or settlement of property for the benefit of the child, or where the primary caregiver is granted continued occupancy of any joint property. Although the threshold to depart from the formula assessment in these situations is high, it is important to address this issue provided that s 26 orders would become more common under the new reforms. This is largely because offsetting a s 26 award against child support would be counterproductive. Child support provides for the child's day-to-day costs and is therefore necessary in every individual case. Conversely, access to capital or being able to remain in the family home are additional requirements which may be necessary to adequately provide for the child's "deeper" needs in some cases.[184] Therefore, child support income and access to capital have two very different functions meaning that they should operate in a largely independent manner. Accordingly, s 26A(6) specifically states that an order under s 26(1) will not provide special circumstances forming grounds for departure from the

[183] See for example *WMM v SJM* [2012] NZFC 5019 at 54. In this case a s 26 order for the child of the relationship was refused because the relationship property pool was modest, and "[it was] simply insufficient to apply funds to [the child]."
[184] "Deeper needs" include the ability to remain in the family home and providing for medical or educational expenses.

formula assessment under s 105(2)(c)(ii) and (iii) of the CSA.[185] This change should similarly be reflected in s 105(2)(c)(ii) and (iii) of the CSA.

(b) Weighing up options for reform

A more formulated approach to s 26 will achieve consistency amongst cases and provide judges with the confidence necessary to temporarily displace the equal sharing and clean break principles in situations where the needs of the child have not been adequately met. This will help children attain a standard of living comparable to what they had prior to the divorce, and therefore reduce some of the negative consequences attributable to post-divorce financial setback and involuntary relocation.[186]

However, it would be naïve to claim that these proposals do not present flaws of their own. To form a balanced approach, it is important to identify the issues associated with reform and to consider whether there are ways to overcome any shortfalls.

One of the main issues present with awarding a s 26 order (under both the proposed and current s 26), is that it may result in a more favourable financial or property outcome for the primary caregiver. This could be through, for example, awarding the custodial parent with a greater share of relationship property or by allowing them to remain in the family home for less than market value. Although this would ultimately be aimed at benefitting the child, it could be viewed by the non-custodial parent as an arrangement which unfairly advantages the custodial parent. If property settlement included a financial consequence which depended on childcare arrangements, it could result in more parenting litigation whereby parents use their children as mere "pawns" to obtain the better property outcome. This undesirable situation directly conflicts with the important notion that the child's best interests are the paramount consideration when determining their care arrangements.[187]

Another risk with predicating property settlement on childcare arrangements under both the current and proposed s 26, is that care arrangements are subject to change over time, whereas property settlements are finite. This may prove to be a problem in situations where the custodial

[185] The legislators may choose to include some exceptions to this bright-line rule when drafting the provision.
[186] See Chapter 2 for further discussion on post-divorce negative consequences.
[187] Care of Children Act 2004, s 4.

parent is awarded with a greater share of property, but then subsequently loses primary care of the child. This would not only be unjust towards the other parent, but result in a worse overall outcome for the child than if there had been no s 26 order awarded in the first place.[188]

Finally, a problem unique to the proposed s 26 is that in some cases the child would be denied a s 26 order if such an order would be "impracticable" in the given circumstances, even in situations where their needs have not been adequately met. Arguably, it is these types of cases where a s 26 order will be most beneficial as the children in this cohort are likely to be worst off financially.[189]

3 Introducing additional advisory guidelines

The above risks can be addressed, at least in part, through introducing a set of advisory guidelines. Accompanying guidelines would be concerned with what a s 26 order would look like, while the statute deals with a child's entitlement to an order.[190] The guidelines would aim to assist judges and negotiating lawyers in implementing a s 26 order by setting out various approaches, formulas and examples of how this can be achieved.[191] The decision-maker would then select the implementation method which best suits the individual facts of the particular case, or resort to using their own discretion where no appropriate approach appears to exist in the guidelines. The flexible nature of the guidelines would have the ability to overcome some of the issues posed by s 26 orders.

(a) Proposed guidelines

The advisory guidelines would comprise a comprehensive document requiring extensive thought and deliberation. However, examples of approaches which the guidelines may include can be broadly outlined as resembling the following:

(i) Awarding property to the child

[188] Note that solutions for this will be discussed in the proposed guidelines.
[189] However, note that this is usually the point when the State becomes involved.
[190] This is similar to the Canadian position on spousal support whereby Spousal Support Advisory Guidelines deal with the amount and duration of spousal maintenance, whereas the Canadian Divorce Act, R.S.C. 1985, c.3. deals with entitlement to spousal maintenance. See Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines* (Department of Justice, Ontario, July 2008) at vii; and Divorce Act, R.S.C. 1985, c.3. s 15(2).
[191] The ideas set out in the proposed guidelines are based on suggestions made by the interviewed family law practitioners, the author's supervisor and scholarly articles.

Associating childcare arrangements with favourable property and financial consequences for one parent is unlikely to be in the child's best interests as it may lead to inflamed custody litigation driven by financial motivations. It may also be problematic if childcare arrangements subsequently change. One way of overcoming these issues is by awarding property to the child and having this property held on trust for their benefit. This ensures that there is no financial advantage for either parent, and that any change in care arrangements will not detriment the child. Independent trustees would administer the trust and owe a fiduciary obligation towards the child. Currently this option is often opted for in successful s 26 cases.[192]

However, in practice, trusts can prove to be expensive and ineffective mechanisms. The creation of a trust, transfer of assets, and ongoing administration are significant costs paid out of the trust which would otherwise be spent on the child beneficiary. One way of reducing these administration costs is by allowing the primary caregiver to be the trustee. To ensure that the caregiver complies with their fiduciary obligations and does not act in their own self-interest, the trust may appoint and pay for a "trust protector" to act as a watchdog.[193] A protector's powers are diverse and far-reaching, although typically include the ability to direct or veto trustee decisions to ensure that the trust is being administered in accordance with its specific purpose.[194] In this case, the trust deed would specify exactly what powers are owed by the protector, as well an agreed disputes resolution process to be used if the protector and trustees were to disagree.[195] Importantly, a protector merely oversees the trust administration, thereby making it a viable economical alternative to independent trustees who are involved in the trusts' day-to-day management.[196] To further avoid unnecessary expenses, the trust deed could specify that protector approval is only necessary for decisions involving large capital expenditures (for example $1,000 or more), and other significant decisions such as adding and removing trustees or beneficiaries. Therefore, the more clarity as to the protector's specific role, and the more limited that role is, the less expensive the trust administration will be.

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[192] See for example *Bryant v Bryant,* above n 133, at [148].
[193] Note that a trust protector can be an organisation or individual such as a lawyer or accountant. However, it would be recommendable that the protector is a professional. See Philip J Ruce "The Trustee and the Trust protector: A Question of Fiduciary Power. Should a Trust Protector be held to the same Fiduciary Standard?" (2011) 59 Drake L Rev 67 at 68.
[194] Ibid at 73–74; and Law Commission *Some Problems in the Law of Trusts* (NZLC E3179, Wellington, 2002) at [20] and [23] for discussion on how a trust protector differs from an advisory trustee.
[195] An appropriate disputes resolution process may be some form of mediation or arbitration. This will be more expedient and less costly than going to the High Court.
[196] Ruce, above n 193; and Helmore Ayers "Trusts" <www.helmores.co.nz>.

Traditionally, the uncertainty of the exact obligations owed by protectors cast doubt as to their effectiveness. However, the recent High Court case *Kea v Pugachev* clarified this issue.[197] Heath J held that the first port of call when determining the duties of a protector will be derived from the words of the trust instrument and the objects of the trust.[198] However, the learned judge went on to conclude that regardless of whether a protector exercised a fiduciary or personal power, a duty to exercise this power for "proper purposes" to "promote the objects of the trust" exists.[199] Therefore, appointing a protector to oversee the primary caregivers' administration of the trust is a relatively effective and inexpensive way in which property for the child can be managed reliably.

An additional way in which trust administration costs can be reduced is by introducing a "standard parental trust."[200] An easily accessible standard-form trust deed would clearly spell out the obligations and duties owed by a caregiver trustee to ensure that the trust is administered in a way which adequately provides for the child's needs.

Another inexpensive way in which the child's property can be managed is through an "in trust for" (ITF) bank account. An ITF account is essentially a restricted bank account which can only be used for specific purposes. When implementing a s 26 order, a court would stipulate that an ITF account owned by the child can only be used for the child's benefit and cover specific costs such as those relating to their health, education and overall maintenance. There are various ways ITF accounts can be managed to ensure that the available funds get used for their given purpose. In some cases it may be enough for the custodial parent to have unrestricted access to the ITF account provided they periodically report back to the court and show their account activity.[201] In situations involving shared care, a judge may find it appropriate to grant both parents access.[202] It is hoped that each parent will monitor the spending of the other, therefore making it unnecessary to report back to the court unless a dispute arises between

[197] [2015] NZHC 2412.
[198] Ibid at [46].
[199] Ibid at [48] and [52].
[200] Spaht, above n 28, at 28.
[201] This can be though showing account statements, receipts and disbursements. There may also be a clause in the agreement requiring that this information gets sent to the non-custodial parent at the non-custodial parents' request.
[202] *Lenardi v Lenardi* [2011] FamCA 266 at [307]; and *Calkins v Calkins* [2010] FMCA fam 284 at [65] are examples of cases involving joint ITF account management.

them. In situations where there is reason to believe that a parent has, or is likely to misappropriate ITF funds, a judge may stipulate that no money may be withdrawn from a bank account without first receiving the court's permission. Branch staff have to abide by this and only allow the court approved amount to be withdrawn at any given time.

(ii) Allowing the child to remain in the family home

In many situations, a court may find that a child's needs will be adequately met by simply allowing them to remain in the family home. Doing so will prevent additional post-divorce disruption and therefore assist with the child's adjustment.[203] However, as previously discussed, there are undesirable consequences associated with allowing the custodial parent to remain in the family home for less than market value. The guidelines will thus aim to overcome this issue.

One of the options which the guidelines may propose is an approach whereby the primary caregiver buys-out the other parent's share in the family home. This approach should be encouraged by the court wherever possible because it gives effect to the equal sharing regime and clean break principle, while allowing the child to remain in the family home. Neither parent will be financially advantaged as they will both be awarded with equal financial value.

However, in practice the family home is generally sold with the capital divided between spouses.[204] This is because many divorced parties cannot afford to buy-out the other parties' share of the family home as paying off a substantial mortgage on a solo-income is often untenable, particularly given New Zealand's current housing climate. Therefore, the guidelines suggest a number of alternative ways for the child to remain in the family home where an immediate buy-out is not possible.

One way of overcoming this would be through suggesting an arrangement whereby the primary caregiver buys-out the other parties' share in the family home through regular instalments paid over time.[205] However, this option is unlikely to be appropriate where there is an existing mortgage on the house as the outgoings would be too financially burdensome.

[203] See Chapter 2 for further discussion on the effects of involuntary relocation.
[204] See Chapter 3 Part B.
[205] This would be permitted through Property (Relationships) Act 1976, s 33(4).

In situations where there is a mortgage, the primary caregiver could remain in the family home through both parties retaining their share of equity in the house.[206] An agreement drafted at the inception of property division would stipulate that the family home will be divided and vested once the child of the relationship is no longer minor or dependent (or at an earlier point in time if the primary caregiver is able to buy-out the other party before this).[207] In the meantime, the primary caregiver would pay the family home outgoings which would be offset against the other parents' alternative accommodation expenses. In this scenario, having primary care over the child would not be associated with the better financial outcome assuming that the outgoings of each parent would essentially cancel each other out. Furthermore, equal sharing amongst parties would still occur, albeit at a later point in time. However, even though a settlement agreement would be drafted relatively early on in the proceedings, a clean break will not be fully achieved until the child is no longer minor or dependent. Whether this is an appropriate option depends on the circumstances of the case and the non-custodial parents' need to access their share of equity. It is interesting to note that because of New Zealand's recent housing bubble, some non-custodial parents actually prefer this option as it means they will get a share of the capital gains which they may not otherwise have been able to obtain.[208]

However, in many cases the non-custodial spouse may want or need their share of equity sooner. Where immediate buying-out is not possible, the guidelines may suggest selling and renting back the family home from a "private sale and rent back firm," or from an appropriate government agency established for this purpose. This scenario would involve each spouse being paid their share of equity, and the primary caregiver remaining in the home with the child

[206] One can use a standard mortgage payment calculator to see the effect increased equity in the family home has on mortgage repayments. For example, the Westpac mortgage payment calculator indicates that the minimum fortnightly repayments on a $1 million house with a $500,000 mortgage would be $1,646 with an interest rate of 6% per annum and a 20-year loan term. With half the equity in the family home ($250,000) the minimum fortnightly repayments increase to $2,470 at the same interest rate and loan term. This $824 saved fortnightly by retaining double the equity in the family home could make the difference between the custodial parent being able to remain in family home with the children or not. See Westpac New Zealand Limited "Mortgage Payment Calculator– How much would my repayments be?" <www.westpac.co.nz>.

[207] Note, however, that in unusual circumstances where the child is believed to always remain dependent, vesting can instead be agreed to occur as soon as this is financially possible.

[208] In places like Auckland in recent years, immediate buying-out has resulted in a huge wealth disparity between the spouse remaining in the family home and the bought-out spouse in situations where the bought-out spouse is unable to afford buying again. Rob Stock "Housing Boom makes Divorce Harder" (9 August 2015) Stuff <www.stuff.co.nz> uses the example of a how the median house price in Devonport increased $473,000 over a one year period between June 2014 and June 2015 and how that "is a lot of fresh equity to fight over."

as a long-term tenant. The lease would provide that the tenancy agreement lasts until the child is no longer minor or dependent.

Another potential way of allowing the child to remain in the family home while achieving a clean break would be through a special type of "reverse mortgage" arrangement. Typically, a reverse mortgage is for people aged 60+ enabling them to borrow money for retirement using the house as security. The bank will get repaid once the house is sold (typically once the elderly borrower has passed away or moves to a care facility). This concept could be extended to divorcing couples with minor or dependent children. As with any reverse mortgage, there would have to be complete or almost complete ownership of the family home. Upon separation, the non-custodial spouse would receive a lump sum loan payment equating to just under half of the family home value (this figure would be accounting for interest payable). The custodial spouse, on the other hand, would remain living in the family home until the child reaches the age of majority and receives no such payment. Therefore, the custodial parent and the bank would each own a half share of the house. Once the child reaches adulthood, the family home will be sold, and the bank will retain the principal of the non-custodial parents' loan.[209] The custodial parent, however, will receive their share of the family home equity at this point.

(iii) Awarding the primary caregiver a greater share of relationship property

Awarding the primary caregiver with a greater share of relationship property prima facie links children with a more beneficial property outcome. However, this greater share of property can be offset against the time and financial resources expended on childcare. Therefore, this approach, if implemented properly, will not actually result in a better financial outcome. This is the approach often opted for in Australia under the Family Law Act 1975.[210] The commentary suggests that in Australia, the primary caregiver of a minor child typically receives between 5 and 20 percent more of the joint capital assets.[211] The guidelines may suggest that this approach is not recommended in joint parenting situations, and that the other approaches suggested above should remain the norm.[212]

[209] Note that the interest would already have been repaid as this amount would have been subtracted off the initial loan value agreed upon at time of separation.
[210] Family Law Act 1975, s 79.
[211] Peart and Henaghan, above n 6, at 7, n 69.
[212] Although joint care is generally defined as at least a 28/72 split between households, for present purposes it will mean at least a 40/60 split between households.

(iv) Access to parents' future income

Another potential issue is that a s 26 order will not be awarded where impracticable. However, the guidelines may suggest that before rendering a s 26 order impracticable, a judge must consider whether it is possible to award the child a share of their parents' future income. Currently future earnings will only be classified as relationship property if it contains an element of super-profit.[213] However, the PRA could be amended to include all types of future earnings as relationship property where access to future earnings is necessary to adequately provide for the child.[214] Bringing future income within the mandate of s 26 will provide a way for the child's needs to be met in situations where there is insufficient property available for a more orthodox s 26 order.[215]

4 Amending s 37A

Although the proposed reforms and guidelines greatly further children's interests, these amendments will not have full effect unless there is independent counsel advocating on behalf of the child. Without legal representation, it is likely that children will yet again be overshadowed in property proceedings because it is generally unrealistic to expect parents to prioritise the interests of their children over their own.[216] Furthermore, absence of an independent opinion from a lawyer for the child will make it very difficult for a judge to determine whether the child's needs have been adequately met under the proposed s 26, and what type of order should be issued.

As discussed in Chapter 3, children are only granted legal representation under s 37A if "special circumstances make the appointment necessary or desirable."[217] Due to this high threshold, as well as the courts' inability to charge legal fees to the State, children are very rarely granted legal representation under the PRA. It is therefore proposed that the "special circumstances" requirement be removed to lower the threshold for legal representation. It is further suggested that the repealed subsection (3) be reintroduced, thereby allowing the child's legal expenses to

[213] Peart (ed) *Brookers Family Law: Family Property,* above n 113, at [PR2G.07(5)]; see also *Garty v Garty* [1997] 3 NZLR 66; *M v B* [2006] 3 NZLR 660.
[214] This would involve major amendments to the Property (Relationships) Act 1976, the details of which fall outside of the scope of this dissertation. However, see Henaghan, above n 108, for discussion on how this could be implemented.
[215] Note that the s 26 limitation of "impracticability" will apply when deciding whether to access future income.
[216] Skellern, above n 84, at 51.
[217] Property (Relationships) Act 1976, s 37A(1).

be paid out of public money where the court believes this to be proper.[218] The likely effect of these changes is that children will obtain legal representation in most property cases since representation will almost always be considered "necessary or desirable" to further children's interests.

B JSB v SCH outcome under the proposed reforms

If *JSB v SCH* were to be re-decided under the proposed reforms, the outcome for J would be dramatically different.[219] In the actual case, a lump-sum award to help cover J's past and future medical expenses under s 26 was refused by the presiding judge. Furthermore, it had been prearranged that the family home where J lived was to be sold and divided equally between J's parents, Ms H and Mr B.

When reviewing this decision, one would start off by looking at s 26 to determine whether J's needs have been adequately met. As previously discussed, J has unique special needs arising from a rare chromosomal condition. The fact that the substantial medical expenses associated with these special needs were not covered by automatic funding made it especially difficult for Ms H to provide for J as his primary caregiver. Furthermore, the amount of child support received by Ms H has been described as minimal. Therefore, J is prima facie entitled to a s 26 order to help provide for his medical needs. However, before conclusively determining this, a judge must consider whether a s 26 order is practicable in the given circumstances. Here a s 26 order does not appear to be impracticable as it would not be unduly burdensome or unconscionable towards either parent because there are enough assets available for division. Therefore, J would be entitled to an order for the benefit of the child under s 26.

Next a judge would turn to the guidelines to see whether there are any recommended approaches for implementing a s 26 order in this type of situation. Here it is likely that a judge would opt to set aside a portion of the relationship property on trust for J to help cover his medical expenses.[220] To avoid excessive legal fees, it is likely that the trust would be administered by Ms H and supervised by an independent trust protector. Ms H may be required to sign a standard-form parental trust deed which clearly sets out her fiduciary obligations.

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[218] Skellern, above n 84, at 52, notes that situations where the court may not find it proper to pay for a lawyer for child out of public money are during times of economic recession.
[219] *JSB v SCH*, above n 21.
[220] See approach (i) discussed above.

Alternatively, a judge may opt for the property to be managed through an IFT bank account set up for J's benefit.

A judge may also make a housing order enabling J to remain in the family home as this will help ensure that J enjoys a standard of living comparable to what he had prior to the divorce. Because J will never become independent, Ms H buying-out Mr B's share in the family home is the only viable way of achieving this.[221] Preferably Ms H would be able to buy-out Mr B immediately.[222] However, if Ms H is unable to afford this, a judge may award her a greater share of the family home so that buying-out then becomes possible,[223] or may postpone the sharing of the family home until a future date when vesting would be financially possible.[224]

It is highly likely that a judge would appoint a lawyer for the child under s 37A to represent J's interests in the above matter. This appears to be particularly important given J's disability and vulnerability.

C Chapter summary

To properly account for children's interests in relationship property proceedings, legislative change is necessary. It is believed that the proposed amendments to s 26 and the introduction of advisory guidelines will be an effective way of doing this without completely displacing the equal sharing regime and clean break principle. Amending other provisions which relate to children is also recommended as this will help act as a continuous reminder for the courts to consider children's interests.

[221] Therefore, a reverse mortgage arrangement or selling and renting back the family home from a "private sale and rent back firm" would not be appropriate in this case as these options rely on the child becoming an independent adult.
[222] See the first suggestion under approach (ii) discussed above.
[223] See approach (iii) discussed above.
[224] See the second suggestion under approach (ii). However, because J will never become independent, vesting should occur at the date when Ms H is able to afford buying-out Mr B, rather than the date J reaches the age of majority.

V Conclusion

This dissertation aims to combat the entrenched view that property division is a purely "adult matter." Children, those who are most vulnerable, are rarely heard in relationship property proceedings despite the outcome having a significant impact on their lives. Many of the disproportionately poor outcomes manifest in children from divorced backgrounds can be attributed, at least in part, to the economic decline and involuntary relocation commonly experienced following divorce. These two post-divorce consequences can be heavily influenced, and thus abated, through the way in which property is divided. There are several routes found in various legal domains, primarily the PRA, which recognise this potential, and thus allow the interests of children to be taken into account. Nevertheless, the key provisions for children are commonly overshadowed or narrowly construed. Nowhere is this disregard more pronounced than with s 26, a provision specifically designed to protect the interests of children. The restricted interpretation of this provision has meant that a s 26 order is only granted in "exceptional cases" rather than in any case where this seems appropriate or beneficial in light of the circumstances. This interpretation is possible as a result of the discretion and lack of guidance present in s 26, enabling it to easily give way to the Act's other principles focusing on equal sharing and a clean break.

In order for children's interests to be sufficiently protected, there needs to legislative change which strengthens provisions affecting children, particularly s 26. The proposed amendments aim to achieve this by requiring a judge to make an order for the child's benefit in situations where their needs have not been adequately met, unless doing so would be impracticable.[225] The provision goes on to spell out numerous factors which the court should have particular regard to when determining whether to make an order, and the terms of such an order. Therefore, the statute dealing with the question of *when* to make an order will involve little discretion. However, the judge will still exercise discretion when determining *what* the particular order should look like. This decision will be aided by the proposed advisory guidelines.

The proposed reforms which help children access capital and/or remain in the family home will go a long way in minimising the negative consequences frequently experienced by children

[225] See the proposed s 26(1).

following a divorce. Furthermore, the reforms recognise the "lien" that exists upon parents' income and property to the extent necessary to provide for the child's needs.[226] This simple, yet crucial notion is something which needs to be reflected in New Zealand property laws.

[226] Glendon, above n 26, at 1559.

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APPENDIX 1: RESEARCH METHODOLOGY

To obtain a level of insight as to how children are treated in out-of-court settlements, I contacted several family law practitioners from around New Zealand. As expected, many of the family lawyers believed that children were given little regard in out-of-court relationship property negotiations (see Chapter 3).

Participants and methodology:

I sent out an email to 15 family law practitioners from around New Zealand asking if they were willing to anonymously comment on how children's interests are taken into account in out-of-court property settlements based on their personal experiences. More specifically, the following three questions were asked:

1. Based on your experience, how would you describe the extent to which the interests of children are considered and accounted for in relationship property disputes? Do their interests play a significant role (or any sort of role) in negotiations?
2. How often, and to what extent, do you tend to look at and use s 26 in property disputes involving children? For example, do you ever use the s 26 broad mandate to set aside a portion of the property for the benefit of the child? And if so, in what type of circumstances does this tend to be done? Do you ever use s 26 as authority to enable the child to remain in the family home until they reach the age of majority? Or are occupation orders the preferable approach?
3. Finally, I would really appreciate any other (more general) comments relating to the overall effectiveness and desirability of the current relationship property regime and how it affects the interests of children?

Seven family lawyers responded to this email and provided answers based on their practical experience in the field. The lawyers that participated had varying backgrounds. Some came from small provincial firms, whereas other practiced in big cities such as Auckland. There were also three Queens Counsel members and one lawyer who had practiced as a mediator. This diverse background may have helped provide a more "full" picture.

The common themes present in the responses from the family lawyers were then discussed in Chapter 3. However, it is important to mention that while there was a general consensus that children's interests only played a minor role in out-of-court settlements, there were two lawyers who believed that this approach was largely justified. Furthermore, there may have been a sample selection bias based on who chose to respond to the email sent out. Therefore,

it is advised that discussion based on this research is interpreted in a broad manner rather than as a comprehensive truth.

APPENDIX 2: STATUTES

Property (Relationships) Act 1976

1M Purpose of this Act

The purpose of this Act is—

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

15 Court may award lump sum payments or order transfer of property

(1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the court may have regard to—

(a) the likely earning capacity of each spouse or partner:

(b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

18 Contributions of spouses or partners

(1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:

(a) the care of—

(i) any child of the marriage, civil union, or de facto relationship:

(ii) any aged or infirm relative or dependant of either spouse or partner:

(b) the management of the household and the performance of household duties:

(c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

(d) the acquisition or creation of relationship property, including the payment of money for those purposes:
(e) the payment of money to maintain or increase the value of—
(i) the relationship property or any part of that property; or
(ii) the separate property of the other spouse or partner or any part of that property:
(f) the performance of work or services in respect of—
(i) the relationship property or any part of that property; or
(ii) the separate property of the other spouse or partner or any part of that property:
(g) the forgoing of a higher standard of living than would otherwise have been available:
(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
(i) enables the other spouse or partner to acquire qualifications; or
(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

18A Effect of misconduct of spouses or partners

(1) Except as permitted by subsections (2) and (3), a court may not take any misconduct of a spouse or partner into account in proceedings under this Act, whether to diminish or detract from the positive contribution of that spouse or partner or otherwise.
(2) Subject to subsection (3), the court may take into account any misconduct of a spouse or partner—
(a) in determining the contribution of a spouse to the marriage, or of a civil union partner to the civil union, or of a de facto partner to the de facto relationship; or
(b) in determining what order it should make under any of sections 26, 26A, 27, 28, 28B, 28C, and 33.
(3) For conduct to be taken into account under subsection (2), the conduct must have been gross and palpable and must have significantly affected the extent or value of the relationship property.

18B Compensation for contributions made after separation

(1) In this section, relevant period, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.
(2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—
(a) order the other spouse or partner (party B) to pay party A a sum of money:
(b) order party B to transfer to party A any property, whether the property is relationship property or separate property.
(3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

26 Orders for benefit of children of marriage, civil union, or de facto relationship

(1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.

(2) If the court makes an order under subsection (1), the court may reserve such interest (if any) of either spouse or partner, or of both of them, in the relationship property as the court considers just.

(3) An order under this section may be made and has effect regardless of any agreement under Part 6.

26A Postponement of sharing

(1) On the division of relationship property under this Act, the court may make an order postponing the vesting of any share in the relationship property, either wholly or in part, until a specified future date or until the occurrence of a specified event if the court is satisfied that immediate vesting would cause undue hardship for a spouse or partner who is the principal provider of ongoing daily care for 1 or more minor or dependent children of the marriage, civil union, or de facto relationship.

(2) The court may order postponement of vesting under this section only for as long as necessary, and only to the extent necessary, to alleviate the undue hardship.

(3) Nothing in this section limits section 33.

28A Factors affecting occupation orders and orders with respect to tenancy

(1) The court—

(a) in determining whether to make an order under section 27(1) or section 28(1); and

(b) in determining, in relation to an order made under section 27(1), the period or periods, the terms (if any), and the conditions (if any) of the order,—

shall have particular regard to the need to provide a home for any minor or dependent child of the marriage, civil union, or de facto relationship, and may also have regard to all other relevant circumstances.

(2) Nothing in this section shall limit the generality of section 26(1).

(3) In proceedings commenced after the death of one of the spouses or partners, this section is affected by section 91.

37A Court may appoint lawyer for children

(1) The court may appoint a lawyer to represent any minor or dependent children of the marriage or, as the case requires, any minor or dependent children of the civil union or de facto relationship in any proceedings under this Act if, in the opinion of the court, special circumstances make the appointment necessary or desirable.

(2) Fees payable to a lawyer appointed under subsection (1), and reasonable expenses incurred,—

(a) must be determined in accordance with regulations made under section 16D of the Family Court Act 1980 or, if no such regulations are made, by the Registrar of the court; and

(b) must be paid by 1 or more of the parties to the proceedings as ordered by the court.

Child Support Act 1991

105 Matters as to which court must be satisfied before making order

(1) Where an application is made to the Family Court under section 104 for an order in relation to a child and the court is satisfied that—

(a) 1 or more of the grounds for departure mentioned in subsection (2) exists or exist; and

(b) it would be—

(i) just and equitable as regards the child, the receiving carer, and the liable parent; and

(ii) otherwise proper,—

to make a particular order of the type specified in section 106,—

the court may make the order.

(2) For the purposes of subsection (1)(a), the grounds for departure are as follows:

(a) that, by virtue of special circumstances, the capacity of either parent to provide financial support for the child is significantly reduced because of—

(i) the duty of the parent to maintain any other child or another person; or

(ii) special needs of any other child or another person that the parent has a duty to maintain; or

(iii) commitments of the parent necessary to enable the parent to support—

A. himself or herself; or

B. any other child or another person whom the parent has a duty to maintain; or

(b) that, in the special circumstances of the case, the costs of maintaining the child are significantly affected because—

(i) of high costs incurred by a parent or a receiving carer in enabling a parent or receiving carer to have contact with the child; or

(ii) of special needs of the child; or

(iii) the child is being cared for, educated, or trained in the manner that was expected by either of his or her parents; or

(c) that, by virtue of special circumstances, application in relation to the child of the provisions of this Act relating to formula assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of—

(i) the income, earning capacity, property, and financial resources of either parent or the child; or

(ii) any payments, and any transfer or settlement of property, previously made (whether under this Act, the Property (Relationships) Act 1976 or otherwise) by the liable parent or a receiving carer to the child, to a liable parent or a receiving carer, or to any other person for the benefit of the child; or

(iii) an entitlement of the liable parent or receiving carer to the continued occupancy of a property in which the liable parent or receiving carer has a financial interest; or […]

Family Proceedings Act 1980

182 Court may make orders as to settled property, etc

(1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, the Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.

(2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, the Family Courtmay at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.

(3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.

(4) The court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.

(5) An order made under this section may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.

(6) Notwithstanding subsections (1) to (5), the court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.