Classifying Relationship Property: A Radical Re-shaping?

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I INTRODUCTION

The New Zealand Property (Relationships) Act 1976 (“PRA”) is sometimes described as one of deferred community. It usually operates when couples separate or one of them dies, and thus its impact is “deferred” or delayed until a crystallising event.¹ A critical step is determining what constitutes the “community”, that is what property is available for division. This is the “classification” issue. Under the New Zealand Act, the distinction is drawn between “relationship property” and “separate property”, the equal division rule applying to the former and not the latter. This is simplistic because the court has power in some situations to make orders affecting separate property,² but we put that to one side for now.

The key classification rules are found in ss 8-10 plus the definition section, s 2. In many respects these provisions are opaque and confusing. They are possibly the most complex in the world. The underlying philosophy behind them is not spelt out, though it is possible to discern what it might be. While amendments made by the Property (Relationships) Amendment Act 2001 in general extended the relationship property pool, they did so modestly and were largely tacked into the pre-existing structure. Can we not do a lot better?

The rules for classification should be based on appropriate principles. This paper explores what these principles might be. Even so, the principles do not lead inexorably to just one model of classification. There is, I suggest, a spectrum of approaches to classification. The choices are stark at the edges but with a wide range of variations in between. The implications of these options are many and varied but help us understand what is at stake. In this paper, I recommend that New Zealand move to what is the left of the spectrum, as discussed later in Part III. It could be said that this involves taking the concept of partnership in the family law sense seriously.

Two sub-issues relating to the spectrum are discussed: the basic meaning of “property” for the purposes of the Act, and the question of onus of proof, a matter that is suppressed in the current Act but potentially of intense importance. It is also important for the purposes of this topic to tackle the detail of the current regime and ask very specific questions about how property is classified and why, and whether changes are justified. Even if the radical option that I propose is accepted, some detailed matters still need to be carefully examined. For instance, what should be

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¹ At certain points, the Act can operate while the parties are still together, which means that “deferred community” is not entirely accurate: A Angelo and W Atkin “A Conceptual and Structural Overview of The Matrimonial Property Act 1976” (1977) 7 NZULR 237.

² For example, in relation to post-separation events, ss 18B and 18C, debts, s 20E, and economic disparity if it comes under s 15A, but, perhaps unwisely, not if it comes under the main disparity section, s 15. See also s 33(3)(n).
considered the “family home”? What should be regarded as “family chattels”? Why do we treat inheritances as sometimes relationship property and sometimes separate?

A few assumptions are made in the course of writing this paper. First, I assume that New Zealand will have a distinct statutory regime of some kind and will not simply revert to the rules of common law and equity. To put the point another way, the basic rules of the scheme should be determined by Parliament and not left to the courts, as has in effect happened in England.3

Another assumption is that the regime will apply to the three main ways of legal coupling: marriage, civil unions and de facto relationships. The place of de facto relationships was controversial when the Act was extended to them in 2001, but arguably too much water has gone under the bridge for them now to be excluded. Such a move would sit awkwardly with the non-discrimination laws in the Human Rights Act 1993 and would belie the considerable jurisprudence that has grown in the interim. That said, I acknowledge that the inclusion of de facto relationships may have its problems at the edges, especially with an unnecessarily loose definition of the concept of “de facto relationship”.4 My proposal on classification may compound those problems rather than ease them but in a 2015 judgment, Gendall J stated that “the threshold required to establish a de facto relationship is a high one. A certain degree of rigour and some caution is required in carrying out an analysis of whether or not a de facto relationship exists”.5 If this approach is adopted more widely, there is less reason to be worried.6

Thirdly, I am assuming that the default rule for division will be equality. The discussion of classification does not depend on this, but a substantially different division regime may raise questions about classification.

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3 See for example the discussion of fairness and who should determine it in J Miles and J Scherpe “The legal consequences of dissolution: property and financial support between spouses” in J Eekelaar and R George Routledge Handbook of Family Law and Policy (Routledge, Oxford, 2014) at 138-152. They describe the decision of the House of Lords in White v White [2000] UKHL 54, [2001] 1 AC 596 as “revolutionary” in moving away from need as the basis of awards (at 143). The English Law Commission has also discussed the development of the concept of “non-matrimonial property” in English law, which had no place in the law prior to White and was “entirely developed by the judiciary”: Law Commission Matrimonial Property, Needs and Agreements (Law Com No 343, The Stationery Office, London, 2014) at [8.2].

4 The case law on the phrase “de facto relationship” has been somewhat erratic but a tendency against a finding of such a relationship is apparent in cases involving more than one coupling, eg where a person is both married and in some other kind of association. See for instance Greig v Hutchison [2015] NZHC 1309, [2015] NZFLR 587.


6 Briggs has discussed the possibility of extending the law to other domestic relationships such as family ones, but this issue is beyond the scope of this paper: M Briggs “Rethinking Relationships” (2015) 46 VUWLR 649.
Fourthly, I am assuming that New Zealand will not develop a bifurcated scheme, for instance as proposed by Goubau for de facto couples. Under this model, division rules would apply when there are children, but not otherwise. This approach has a policy justification in that it places a premium on children, but it raises questions about how long the impact of children should last, how to reflect contributions other than child care, and so forth, and in any event still relies on a classification system.

II PRINCIPLES

A useful starting point for considering the policy drivers in determining classification is the current legislative statement of purpose and principles. These are found in ss 1M and 1N.

First, s 1M refers to the parties’ equal contribution to the marriage or de facto partnership or the civil union. Section 1N expands on this by referring to the parties’ equal status and the need to maintain equality between them. Further, all forms of contribution are to be treated equally. Several points emerge from this:

• No substantial distinction is made between the three forms of relating (marriage, civil union and de facto relationship).

• The concept of “partnership”, although not mentioned in relation to civil unions perhaps because it is contained in the word “union”, implies a philosophical stance based on the common life or community of the couple, rather than one based on individualism. The two parties are not strangers in law or in reality but are or were partners in a common enterprise.

• The reference to contributions is designed to avoid what Woodhouse J referred to as “the hypnotic influence of money” determining outcomes. A partnership is not solely about finance but about life and family in all its various manifestations. Thus, non-financial contributions are given as much weight as financial ones. This approach gives real substance and meat to the concept of partnership.

• The use of the concept of equality provides the backdrop to the concept of economic justice and fairness in the Act: fair and just redistribution is in general secured through equal division of the relationship property.

Neither need nor vulnerability is mentioned. The Act is not based on a finding of needs and the somewhat paternalistic satisfaction of them. A person does not have to be vulnerable or needy to gain a share of property, an approach that in part arises under the English Matrimonial Causes Act 1973. The share of property is a right based on the notion of partnership, not the provision of a private form of welfare.

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7 D Goubau “Division of Family Assets and De Facto Conjugality: The Limits of a Free Choice Approach” in B Verschraegen Family Finances (Jan Sramek Verlag, Vienna, 2009) at 271.
8 Reid v Reid [1979] 1 NZLR 572 (CA) at 581. See also Reid v Reid [1982] 1 NZLR 147 (PC).
9 See for instance Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618 with its three heads of need, compensation and sharing. See also J Miles and R Probert “Sharing Lives, Dividing Assets, Legal Principles and Real
Likewise, a share of property does not depend on any particular contribution or action for which compensation should be paid (which is how s 15 and its economic disparity compensation in part operates). A share is a right flowing from the concept of partnership. Further, autonomy is absent as a concept, although it can be said to govern Part 6 with its rules for contracting out of the Act. Another concept not mentioned is fault. Most jurisdictions now relegate it to a minor element and usually require some form of financial fault for it to be relevant.

The approach just outlined is not beyond challenge. It could be argued for instance that, once the parties have separated, it is disingenuous to rely on the partnership concept for property division. Others may object more fundamentally to this concept and argue that the starting point should be two individuals whose own property interests should prevail unless a case is made out to the contrary. As we shall see, these different philosophies may well affect the issue of classification.

A second principle was added in 2001 and is found in s 1N(c):

the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship.

This is redolent of the Scottish principle:

… fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family.

The reference in particular to disadvantage could be seen as relating to hardship but this is to misunderstand the concept introduced in 2001. Behind the principle is the notion that technical equality may not necessarily produce equality in reality as it does not take into account the effect of cohabitation on earning capacity. Obviously under the PRA ss 15 and 15A represent the primary vehicle for the fulfilment of this principle. However, a classification system that leads to a small pool of relationship property will militate against an equitable sharing of property, because the disadvantaged party will receive a lesser share under the basic division of property. On the other hand, a system that classifies more property as divisible will assist the disadvantaged party.


10 Note W Pintens “Matrimonial Property Law in Europe” in K Boele-Woelki et al The Future of Family Property in Europe (Intersentia, Cambridge, 2011) at 19, who refers to the way in which various systems in Europe emphasise spousal autonomy but “also attach great importance to the solidarity of spouses towards each other” (at 42).

11 Under the PRA, see ss 18A and 18C.

12 Family Law (Scotland) Act 1985, s 9(1)(b). See also s 9(2): “‘economic advantage’ means advantage gained whether before or during the marriage and includes gains in capital, in income and in earning capacity, and ‘economic disadvantage’ shall be construed accordingly”.


A third but subdued theme in ss 1M and 1N is the position of the children. Section 1M(c) refers to a just division of the property “while taking account of the interests of any children”. This is not limited to minor children, although s 26, which empowers the court to settle property on children, states that regard must be had to the interests of minor or dependent children. Few would deny that the wellbeing of children is an important policy goal but how it is to be achieved leads to quite different responses around the world. In terms of classification, a wide pool of relationship property is ultimately more likely to benefit children than a narrow one. This is because the primary caring parent is likely to end up being in a better financial position than otherwise.

A final point about principles and policies is found in s 1N(d): “the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice”. This is in the interests of the parties but also of the children. Speedy and predictable outcomes also assist negotiations and the resolution of disputes without formal litigation. Having straightforward rules for classification, as opposed to murky ones, is consistent with this principle.

Let us pause for a moment and check some other approaches to the articulation of principles. Kórös refers to four guidelines in relation to Hungarian law:13

• protection of family relationships;
• protection of child interests;
• the principle of equality of spouses; and
• the principle of equity and protection of the weaker party.

We might hesitate to use the language of “protection”, which sounds paternalistic, and we might prefer to say “disadvantaged” instead of “weaker”. Those points aside, a moment’s reflection suggests that the New Zealand law is not too far removed from these guidelines.

A different perspective is brought by Miles and Scherpe.14 They explore a wide range of jurisdictions and discern four “key ingredients of fairness internationally”:

• sharing based on partnership;
• alleviation of need based on matrimonial obligation;
• compensation of relationship-generated losses; and
• respect for couple autonomy.

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These points have all been touched upon. Various jurisdictions tend to emphasise one of the ingredients ahead of others. In New Zealand, the first predominates but the others also have their place, more particularly when we include the needs-based rules of maintenance found in the Family Proceedings Act 1980 (Part 6). When it comes to classification, Miles and Scherpe conclude that there are considerable differences between jurisdictions but the trend is towards treating the “fruits of joint labour” as being divisible.\textsuperscript{15} This is consistent with the most common approach in Europe and South America, the community of “acquests”. As in Germany for example, accrued gains, that is, the difference between initial assets and accrued assets, lead to a monetary claim.\textsuperscript{16} This looks relatively simple at first sight but determining what are acquests or community assets is “often easier said than done”.\textsuperscript{17} Wise counsel may be to keep detailed records of who owns what property when people start living together but the practicality of this is surely doubtful (even more so for de facto partners). It is also worth noting that in some jurisdictions a system based on acquests is secondary. For example, in South Africa the default regime is community of property, with parties having the ability to contract “out of community” in favour of alternatives such as division based on accruals or separate property.\textsuperscript{18}

The principles that we choose to guide us are the DNA of law reform. So, with this discussion of principles in mind, what is the range of options for classification of property?

III THE CLASSIFICATION SPECTRUM

A The Spectrum

The discussion of principles indicates that the question of classification can be tackled in different ways. It is useful to consider this with the help of a spectrum. This spectrum is inevitably simplistic and many variations are possible. However, it may help to put the choices into sharp contrast. At one end of the spectrum, all assets owned by the parties will be “relationship property”; at the other end none will be. Here is the spectrum containing four steps:

- All assets – all core assets and gains – gains – no assets

(i) “All assets”

The “all assets” approach means that it is not necessary to have a sophisticated set of rules about classification, as “all” property is assumed to be relationship

\textsuperscript{15} At 152.


\textsuperscript{17} J Scherpe \textit{European Family Law} (Edward Elgar, Cheltenham, 2016) Vol III, ch 5 at 146.

\textsuperscript{18} J Heaton (ed) \textit{The Law of Divorce and Dissolution of Life Partnerships in South Africa} (Juta, Cape Town, 2014) ch 2. The law in the Netherlands is similar in having a full community property system.
property. This is simplicity writ-large. It could nevertheless be accompanied by a power to exclude certain categories of assets if a case was made out to do so. These could include such things as inheritances that have nothing at all to do with family life.

This model is based on a high view of the family and cohabitation, and allows less scope for autonomy. “Contracting out” might however be permitted, an issue ultimately beyond the scope of this paper.\textsuperscript{19} In some jurisdictions that use this model, division of the property may be on a more discretionary basis and may be combined with maintenance – this is not an accurate picture of the English and Australian systems\textsuperscript{20} but they could be seen loosely fitting in here. However, a discretionary system is not the inevitable corollary. In Ontario for example, the system is one of equalisation of the value of all assets, but with a number of exclusions and deductions.\textsuperscript{21}

(ii) Core assets and gains

The idea is not novel that certain assets are so central to family life that, irrespective of their source, they should be part of the common property available for division. In New Zealand and Scotland,\textsuperscript{22} this applies to the home and furniture. Other property is divisible if it can be shown to be related in some way to the period of cohabitation. This system therefore resembles “acquests plus”. However, what about taking this concept to another level? Family life is not solely dependent on the home. It is also dependent on the financial wherewithal for daily life. So, this model could be seen as going much further than those currently in place in New Zealand and Scotland: it would for instance include the family farm and the family business, irrespective of their source. If a family trust provided funds for the family’s existence, it would be included in the divisible pool.

\textsuperscript{19} See J Scherpe Marital Agreements and Private Autonomy in Comparative Perspective (Hart, Oxford, 2012).

\textsuperscript{20} It may be a misnomer to refer to the English and Australian laws as “systems”. Fehlberg, commenting on the Australian law, refers to “... lack of conceptual clarity and coherence that continues to exist in this area, reflective of a broader lack of social consensus on these issues”: B Fehlberg et al Family Law The Contemporary Context (2nd ed, OUP, Melbourne, 2015) at 492.


\textsuperscript{22} Family Law (Scotland) Act 1985. See K Norrie “Marital Agreements and Private Autonomy in Scotland” in J Scherpe Marital Agreements and Private Autonomy in Comparative Perspective (Hart, Oxford, 2012) at 289 and following. See also Law Commission Law Com No 343 Matrimonial Property, Needs and Agreements (The Stationery Office, London, 2014) at [8.32] where it is stated that treating the home as non-matrimonial property undermines the purpose of the home as being for the parties and their children. It was also thought to be discriminatory against women and a contradiction in terms.
As with the first model, this one has a strong view of the family and of relationships. Because of the basis in family life, the interests of children are at least indirectly taken into account. However, it does not rely on the existence of dependent children or indeed of any children. Where the children have grown up and left home, the notion of family life still makes sense over the course of a period of cohabitation because of its ongoing effects. Where there have never been children, it is disingenuous to say that the parties did not share a family life. “Family” is a wide term, ranging from a couple to whānau (and possibly beyond). The presence of children alters the dynamics but not, it is suggested, the basic nature of family.

(iii) Gains – “fruit of joint labour”

The third model is the system of gains or acquests. The theory behind this is that cohabitation involves joint labour, which produces wealth for both parties. Labour is of course not limited to paid employment – the precise actions of each of the parties are not as such to be examined but it is assumed that the differing efforts of both parties have helped to create the gains of the partnership. Because of the emphasis on the causal effect of cohabitation, gifts and inheritances are usually excluded as they are not the result of “joint labour” but are a windfall.

This model takes relationships seriously but with more of an emphasis on the adults that the first two models. It raises issues about proof of what is a gain, and ancillary issues may be how to factor in contributions to non-acquests. It sets a high premium on individual rights to pre-relationship property. In this sense, it is a mixture of autonomy and common life.

(iv) No assets

The fourth model starts with the assumption that assets should normally be held according to legal and beneficial interests. In other words, no property is classified as “relationship” because it is not necessary. Like the first model, this simplifies the law considerably but for very different reasons. Arguments could abound over beneficial interests, in particular about the constructive trusts that at one stage were endemic in de facto relationship cases prior to the 2001 amendments that brought such relationships under the PRA umbrella.\(^{23}\) This model could permit a claim to be made for departure from ordinary title on specified grounds, for instance based on contributions that do not give rise to a beneficial interest.\(^{24}\) Contracting into a scheme similar to the PRA could be provided for, the opposite of the contracting out that would apply to other models.

This model has a low view of families and relationships, but a high view of the individual and autonomy. Arguably it is in this sense consistent with neo-liberal thinking. It would leave interests in companies and trusts to be determined according to the relevant common law and statutory rules. It has the virtue therefore of minimally upsetting the operation of businesses and, in particular in the New Zealand environment, farms.

B Onus


\(^{24}\) The repealed Matrimonial Property Act 1963 could be seen as an example of this.
Two subsidiary issues relate to the spectrum, but they are not unimportant. First, the operation of a classification system may turn to a certain extent on who has the burden of proof. The PRA does not, in general, expressly state who bears the onus, and the New Zealand courts have sometimes counselled against any onus of proof in family laws cases.\textsuperscript{25} Compare this for example with s 4(3) of the Ontario Family Law Act 1990, which expressly lays the onus on the person arguing for a deduction or exclusion from the equalisation regime.\textsuperscript{26} Contrariwise, in Norway the onus is on the party claiming that pre-marital property, inheritances or gifts should not be exempt from division, while in Germany the onus is on the spouse endeavouring to prove that assets are “initial”, ie owned by that spouse at the date of marriage.\textsuperscript{27}

It is surely wise as a matter of policy for a statute to spell out who has to prove what. The terms of the onus may depend on where on the spectrum a system sits and policy choices about the balance between autonomy and collectivity. At the universal end of the spectrum, the claimant for a departure from the statutory rules should have to prove the case. At the traditional property end of the spectrum, the onus would rest on the person seeking a departure from legal and beneficial title. Elsewhere on the spectrum, the decision about onus could vary but most likely, the presumption would lie in favour of having a tolerably large pool of assets to divide, with the onus therefore being on the party attempting to reduce this pool.

Who has the onus of proof can significantly affect the outcome of any scheme. The party with the onus is on the back foot. We therefore need to be clear about our principles and policy stances before determining this issue.

C The Meaning of “Property”

Undergirding any system of classification is the concept of property itself. Typically, only “property” can be classified, although the more discretionary approaches may follow a different path. For example, in Australia, the court can take account of “the income, property and financial resources of each of the parties”, and so the outcome of proceedings does not turn entirely on the existence of “property”.\textsuperscript{28} Nevertheless, for most regimes a definition of “property” is

\textsuperscript{25} M v B [2006] 3 NZLR 660 at [45] and [50] (“onus seldom a relevant consideration”), Hyde v Hyde [2010] 1 NZLR 224 (CA) at [45] (“The Court does not necessarily sit back as if this was a pure forensic joust in the traditional common law style”) and X v X [Economic disparity] [2010] 1 NZLR 601 at [95] and following.

\textsuperscript{26} For another example, see s 85(2) of the British Columbia Family Law Act 2011: “A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property”.

\textsuperscript{27} J Scherpe European Family Law (Edward Elgar, Cheltenham, 2016) Vol III, ch 5 at 157-158.

\textsuperscript{28} See Family Law Act 1975 (Aust), ss 79(4)(e) and 75(2)(b). Financial resources cannot themselves be divided but can be taken into account in the exercise of the discretion: B Fehlberg et al Family Law The Contemporary Context (2nd ed, OUP, Melbourne, 2015) at 510. The definition of “property” in s 4(1) is potentially narrow, although a case such as Kennon v Spry [2008] HCA 56, (2008) 238 CLR 366 has taken a broad view of interests in trusts: “[property] means property to
necessary. How broad or narrow it is may be crucial. The left hand end of the spectrum would prefer a broad definition in order to meet its policy goals, while the right hand end of the spectrum would prefer the opposite, again for policy reasons though of a rather different kind.

The PRA defines “property” widely and in a rather open-ended way:

- **property** includes—
  - (a) real property:
  - (b) personal property:
  - (c) any estate or interest in any real property or personal property:
  - (d) any debt or any thing in action:
  - (e) any other right or interest.

The Supreme Court in *Clayton v Clayton (Vaughan Road Property Trust)*\(^\text{29}\) held that this should be interpreted in the light of the legislative aims and the Court thus reinforced the apparent width of the definition by including powers of appointment within its scope.

In Ontario, we find an even broader and more extensive definition:\(^\text{30}\)

- “property” means any interest, present or future, vested or contingent, in real or personal property and includes,
  - (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
  - (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
  - (c) in the case of a spouse’s rights under a pension plan, the imputed value, for family law purposes, of the spouse’s interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date; (“bien”).

The references to powers of appointment and revocation are of special interest in the light of *Clayton*.

Whatever approach to classification is taken, it would be helpful to have a

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\(^\text{30}\) Family Law Act 1990 (Ont), s 4(1).
reasonably comprehensive definition of “property”, possibly either including or excluding some of the issues that have arisen in relation to trusts (the detail of which is addressed in other papers).

IV WHICH MODEL?

A Taking the Principles Seriously – A Radical Solution

The position taken in this paper is that New Zealand should embrace the family law goals of the current PRA and enshrine them more deeply into the rules about classification. This means that the starting point would be that all property owned by the parties is relationship property. Exemptions should be narrowly crafted, with the onus on the party seeking such an exemption. This approach recognises the partnership nature of relationships, the interests of children (though indirectly), and economic disadvantage by bolstering the share of the disadvantaged party. It provides for greater predictability. It is assumed that the primary rule of equal division will remain but the approach is not incompatible with other sharing rules so long as they do not end up whittling away the share that a non-owner (in some situations the main child carer) would otherwise get, thus negativing the effects of the wide reach of the new classification rule. It is also compatible with a narrow exception from equal sharing where equalisation leads to serious injustice, a provision similar to s 13 of the PRA. As s 13 has been interpreted very strictly from the earliest days of the 1976 Act, the objective behind using the “all property” model would not be prejudiced. The continuation of economic disparity provisions (maybe amended to give more clarity) is not inconsistent with the model, although a larger pool of relationship property may ameliorate the need for compensation in some cases.

Without limiting the universal nature of the central rule, the statutory framework could nevertheless spell out in detail what is included. The British Columbia Family Law Act 2011 does this in s 83 and explicitly includes an interest in a corporation, partnership, association, organisation, business or venture, and various superannuation entitlements. Trusts are addressed, but in New Zealand we may want to spell the interests in these out in ways that relate to our own jurisprudence.

The model would allow a party to argue that certain property should be excluded from the pool. That party would have the onus of proof. This of course could be an invitation for challenges and litigation, and could eat away at the whole point of the “all assets” approach. British Columbia has a list of exclusions including pre-relationship acquisitions, inheritances, gifts, personal injury compensation, life insurance pay-outs, certain trust holdings, and property derived from excluded property. These exclusions are not so very different from the current law in the PRA, though the PRA makes no mention of personal injury compensation, doubtless because of the accident compensation scheme. It could even be argued that, subject to the onus, British Columbia ends up much further towards the middle of the spectrum. Similarly, Ontario, which starts with an all assets approach, has a deduction for pre-acquired property other than the home, and exclusions for gifts

31 Family Law Act 2011 (BC), s 85(1).
and inheritances other than the home. The rationale is of course that things like inheritances are not as such the product of cohabitation but are often a matter of luck and good fortune for the recipient. How do we make sure that the impact of the exclusion provisions does not undermine the goal of benefiting the partners and the family?

In order for the proposed classification system to work, it is suggested that the test for exclusions should be a negative one. For pre-cohabitation property, gifts or inheritances to be excluded, it would be necessary to prove that the item had nothing to do with the life of the partnership or family. The home and chattels would by definition not be excluded. Commercial assets would generally be seen as helping to maintain the living standards of the family and so would typically not be excluded. On the other hand, a purely passive investment would likely be excluded. So, a bequest of shares in a company that has nothing to do with the life of the family - left to linger - would not form part of the relationship property pool. This does not rule out the possibility of a court order affecting, at least indirectly, such property - for example, an order under s 15A, s 18B or 18C for compensation to be paid. Such orders do not however depend on classification for their efficacy.

My proposal is at the far left end of the spectrum. Is it unpalatable as representing too great an inroad into autonomy and ordinary title-holding? Will it be an incentive for people to find new ways of evading the system or contracting out? The latter is not inimical to the proposal: indeed, if both parties freely decide on an alternative approach that suits their circumstances, then that should be possible. Evasion on the other hand would defeat the policy objectives, and mechanisms stronger than those currently in the PRA (such as ss 42-44F) may need to be crafted.

What about the family farm that has been in the owner’s family for generations? A property order may upset family traditions (invoking here a different sense of family from that used elsewhere in this paper). A party may be forced to sell the farm, especially if there is insufficient cash to “buy out” the other party’s share. This type of situation actually goes to the heart of the policy question: partnership/collectivity v individuals. Do we accept that marriages, civil unions and de facto relationships are genuinely about the coupling of people’s lives and loves, or not? Or are they a little bit of this and a little bit of that? Can we talk about a marriage as a half-partnership, which is not as embracing as the policy suggests? “One size does not fit all”? Our relationships are indeed many and varied, and this is part of their beauty (and their vice when they run into difficulties). We are not however talking about the psychology of relationships or how people can be counselled through difficult patches. We are asking what is a principled and fair basis for the division of property. As Carol Rogerson has said in the context of maintenance but applicable here, a formulaic legal model may offer systemic

33 There is an argument for extending the principal economic disparity provision, s 15, to enable payments to be made out of separate property, not solely out of relationship property, but that is beyond the scope of this paper.
advantages over individualised justice and may be worth the sacrifice of “a Rolls Royce service offered by strong judicial discretion”. More than that, are there not sufficient commonalities and sufficiently clear principles with respect to relationship property that a scheme with classification rules as proposed in this paper can well be regarded as acceptable as a matter of policy? Principle may thus trump the tradition of the family farm, something that can happen of course even under the current PRA.

What about the proverbial gold digger who links up with a wealthy person only to leave shortly afterwards much enriched? This situation is in truth the antithesis of the principles outlined above. There is no real partnership because it is based on deception or abuse. Likewise any family life was inherently false. It is possible to build into the classification rules an exclusion based on unconscionability. The more sensible approach however is to deal with this question in the context of the division of the property, ostensibly as an exception to equal division. Under the present law, as noted above, s 13 allows for a departure from equal sharing when extraordinary circumstances lead to the conclusion that such sharing would be repugnant to justice. A classic case that illustrates this is *Banda v Hart*, whereby Judge Inglis QC denied a violent rogue, who took complete advantage of his wife, any share of the property.

In relation to the gold digger, we also have ss 14-14A, which deal with marriages, civil unions and de facto relationships of short duration. The rules here awkwardly differ as between marriages and civil unions on the one hand and de facto relationships on the other but in brief they enable the court to deal with couples whose association did not really get off the ground. There are policy questions about these sections – should they be retained at all and what form should they take? Is a s 13 equivalent enough to deal with short relationships? – but they do represent an acknowledgement that some situations fall so far outside the standard pattern envisaged by the principles that a different template is justified. The case of the gold digger does not mean that an “all assets” model is doomed. Quite the contrary – the overall scheme can accommodate special exceptions.

**B A Fall-back Position?**

This paper argues for a radical revision of the classification rules. It has been suggested that, subject to narrow exceptions, all assets owned by the parties at the relevant date should be presumed to be relationship property and be divided accordingly. This is consistent with the key principles and should simplify the statutory framework. A fallback position is the “core” assets model. It is not unlike the PRA as presently drafted but with an enhanced vision of what the core family assets are. The law in British Columbia at one stage distinguished between family

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35 *Banda v Hart* [1998] NZFLR 930 (FC).
and business assets, but later effectively removed this distinction, thus enhancing the core.\textsuperscript{36} An alternative new model for New Zealand could retain in part its rules that treat pre-acquired property as separate property. However, the home, chattels and family business would be relationship property no matter when or how acquired. What is meant by “business” would have to be defined. This is not necessarily straightforward and is a downside of the model. What if there is more than one business? What if both parties have businesses?

V MICRO ISSUES

Despite the major debate above leading to the recommendation that New Zealand should adopt a radical “all assets” approach to classification, a number of subsidiary issues of detail remain. This Part examines several of them in turn.

A Immovable Property Situated Overseas

The conflict of laws issues relating to relationship property deserve full-scale treatment in themselves. Here I can only touch on certain aspects. Sections 7 and 7A of the PRA set out the current rules. They are based on a conventional conflicts approach to property issues under which the distinction between immovable and movable property is crucial. In short, according to s 7(1) a New Zealand court has jurisdiction over immovables that are situated in New Zealand – the lex situs. The implication usually drawn from this is that jurisdiction does not exist over immovables situated outside New Zealand.\textsuperscript{37} In contrast, jurisdiction over movables turns not on location but on domicile, a technical legal term that is not necessarily the same as a person’s actual place of residence.\textsuperscript{38} In essence, one of the parties must have been domiciled in New Zealand at the time of an application or of death, in which case movables, no matter where they are situated, are within the jurisdiction of the court and the PRA can be applied.\textsuperscript{39}

The Act does not expressly address the choice of law issues – that is, which country’s laws should apply – but it is usually assumed that the rules relate only to the operation of the PRA.\textsuperscript{40} Nevertheless, s 7A affects jurisdiction, and arguably choice of law as well, where there is an agreement. First, the New Zealand court has jurisdiction if the parties so agree, that is, they both submit to the jurisdiction of the New Zealand court. More importantly, the parties can agree that the law of some other country will apply to their situation but only if they do so at the time that their marriage, civil union or de facto relationship began. This rule reflects the position in a number of European or European former colonies, whereby on

\textsuperscript{36} See the repealed Family Relations Act 1996 (BC), replaced by the Family Law Act 2011. A similar movement occurred in Ontario when the former distinction between “family assets” and “non-family assets” was eliminated: see JD Payne and MA Payne Canadian Family Law (4th ed, Irwin Law, Toronto, 2011) at 589.

\textsuperscript{37} See for example Samarawickrema v Samarawickrema [1994] NZFLR 913 (CA).

\textsuperscript{38} See inter alia the Domicile Act 1975.

\textsuperscript{39} PRA, s 7(2).

\textsuperscript{40} In contrast, see for example the British Columbia Family Law Act 2011, s 108 headed “Choice of law rules”.
marriage parties may opt for an alternative property regime.\footnote{Eg W Pintens “Matrimonial Property Law in Europe” in K Boele-Woelki et al The Future of Family Property in Europe (Intersentia, Cambridge, 2011) at 37.}

One case illustrates a modern-day problem with the New Zealand rule. In *Herbst v Herbst*,\footnote{*Herbst v Herbst [2014] NZHC 3535, [2014] NZFLR 460 per Brown J.} on their marriage in South Africa, the parties contracted out of the standard regime applicable in that country. However, they did not expressly state which country’s laws were to apply and thus, under the terms of s 7A, their antenuptial agreement was ineffective in New Zealand. Besides this, their timing was wrong. They had lived together in a de facto relationship before getting married, common practice today, but s 7A required them to enter into their agreement when they first started cohabiting, not on marriage. This interpretation may strictly speaking be correct but it no longer makes sense in the light of contemporary living arrangements and needs to be amended.

A more fundamental question about the New Zealand rules arises. They treat relationship property as if it were ordinary property similar to that which is the subject of transactions between strangers. Given the principles and policy goals outlined above, is this still a sound basis or do we need to re-think? What if we think of relationship property questions more as personal family law matters rather than conventional property ones? In Ontario, marital property rights “are governed by the internal law of the place where both spouses had their last habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario”.\footnote{Family Law Act 1990 (Ont), s 15. In South Africa, the main rule is that the lex domicilii governs both movables and immovables in the absence of an antenuptial contract to the contrary: J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta, Cape Town, 2014) at [4.3].} British Columbia has a much more detailed regime but the “proper law of the relationship” is prima facie “the internal law of the jurisdiction in which the spouses had their most recent common habitual residence”.\footnote{Family Law Act 2011 (BC), s 107(a).} The concept of habitual residence, rather than domicile or lex situs, is used in a lot of Hague conventions\footnote{Including one on matrimonial property of 1978, which only three states have ratified. See generally M Baker and M Groff “The impact of Hague Conventions on European family law” in J Scherpe *European Family Law* (Edward Elgar, Cheltenham, 2016) Vol I at 143 and following, D Martiny in J Scherpe *European Family Law* (Edward Elgar, Cheltenham, 2016) Vol I, ch 7, at 272 and following, and W Pintens “Matrimonial Property Law in Europe” in K Boele-Woelki et al *The Future of Family Property in Europe* (Intersentia, Cambridge, 2011) at 45-46.} and proposals in Europe are to the effect that, in the absence of an agreement, the law of habitual residence will apply.\footnote{COM (2011) 126 16/3/11.} The advantage of using habitual residence is that some potentially significant items of property do not slip out of the hands of the New Zealand court and thus evade the statute’s policy goals. On the other hand, the usual justification for the lex situs approach is the inappropriateness of making orders with respect to land in another
country, with the issues of enforceability and comity of nations surfacing. There are two answers to this problem: first, the New Zealand court can take account of foreign immovables without actually making an order directly affecting them. British Columbia expressly covers this by stating that, instead of dividing extra-provincial property, the court can order the substitution of property in British Columbia or the payment of compensation.\(^{47}\) Secondly, the doctrine of forum non conveniens empowers the court to decline jurisdiction where it would be improper or against the public interest to exercise it. Section 7(3) with respect to movables is a somewhat pale reflection of this. There is no reason why this doctrine could not continue to operate where it is more appropriate for the courts of another country to determine the dispute.

In summary, the law on immovables should be reconsidered with the thought of replacing lex situs with habitual residence.

B Home and Chattels

Words such as “family home”, “dwellinghouse”, and “homestead” are defined in s 2, PRA. One issue is the extent to which the home can be stretched to cover much more than the close surroundings when it is in effect a lifestyle block. Given the resolution of this kind of issue in the Hyde litigation,\(^{48}\) it is suggested that it may be unwise to tinker with the definitions. One other issue however is why the classification rules limit the parties to just one home. Many people who work in the city have a base there but a getaway place for extended weekends. Under the PRA, a decision has to be made as to which one is the family home when in reality there are two of them. Why not change the rules to allow for this? If the “all assets” approach is adopted, this may not be crucial, but it could be important for some form of “core assets” approach.

“Family chattels” are also defined in s 2. Apart from the linguistic inappropriateness of treating things like pets as “chattels”, one issue is the exclusion of taonga and heirlooms, which occurred with the 2001 reforms. The policy reason for taonga is no doubt tied up with tikanga Māori and the impropriety of dividing cultural treasures. Oddly, the main cases on taonga have involved pākehā,\(^{49}\) and one wonders how useful the concept really is. On an “all assets” approach, taonga will ostensibly be relationship property whether or not they are chattels. The same would apply to heirlooms. Under other approaches, there may well be arguments for reversing the 2001 changes.

C Superannuation and Insurance

The current law on the classification of superannuation and insurance is found in s 8, with definitions in the interpretation section (s 2) and provisions on the kinds of

\(^{48}\) Hyde v Hyde [2010] 1 NZLR 224 (CA).
\(^{49}\) For example, Perry v West [2004] NZFLR 515 (HC) and HES v GCS [2012] NZFC 2685 (FC).
orders that can be made in ss 30 and 31. Superannuation and other retirement schemes are the most critical as the future contingent benefits are taken into account. From the early Court of Appeal judgment in Haldane v Haldane,50 it has been clear that the true value of schemes, not their current sell-up value, is relationship property. The reason for this is that the period of cohabitation will have added to the ultimate value to the policy and this should be reflected in the classification. Appropriate discounts for contingencies and the early payment of a future sum take account of the non-cohabitation contributions to the scheme.

In 2001 the legislation was changed to exclude contributions made to the policy prior to cohabitation. Was this change justified? Under the acquests/gains model, the answer is yes – the value added before and after cohabitation should be excluded from what is classified as the relationship property gain. In many respects this makes sense. However, under the “all assets” approach, a reversal of the 2001 changes may be merited. Retirement planning is a major contemporary exercise for families, with those in paid employment encouraged to “plan”. It has now become an important part of “family life” when that is assessed long-term – planning for retirement is an overall part of the present life of the partnership/family. Even the children benefit, because, while there may be less to spend on them in the present, the need to support parents in their older age is reduced (the issue of the intergenerational transfer of wealth).

D Joint Property and Property Acquired in Contemplation

Section 8(1)(c) states that co-owned property is relationship property and this has given rise to little controversy. Arguably, all models on the spectrum would agree with the current law. Section 8(1)(d) treats property pre-acquired in contemplation of cohabitation and intended for common use or common benefit as relationship property. The “all assets” approach is comfortable with this rule but it fits in far less easily to the other approaches. It is not a gain of the relationship as by definition it is a pre-acquired asset. Its inclusion may be justified on the basis that it was intended to be part of the core, along with the home and chattels. The “use or benefit” language certainly implies that the PRA has this kind of subsidiary goal. What to do with s 8(1)(d) may depend on where we place our new scheme on the spectrum. If we move to the right, we may conclude that it should be deleted. If we are on the left of the spectrum, we are likely to want it kept.

E Gifts, Inheritances, and Trust Distributions

The exclusionary provisions in s 10 of the PRA that relate to these items ostensibly fit into the gains/acquests model because they are not “gains” as such of cohabitation. This is consistent with the vast majority of jurisdictions world-wide. The different treatment of the home and chattels in the PRA flows from a model that combines gains and core assets, and, as seen above, New Zealand is not unique in doing this.

Under the “all assets” approach, these items are prima facie part of the property

50 Haldane v Haldane [1981] 1 NZLR 554 (CA).
pool available for division. Apart from the general reasons already given for this model, we can ask why gifts and bequests are necessarily separate from family life (home and chattels aside). In some instances, the reasons for, say, a bequest may be tied up with the personal connection of the beneficiary with the deceased. The will-maker is likely to have been well aware of the beneficiary’s domestic situation and recognised that a legacy would assist the whole family while nevertheless identifying only one party as a beneficiary. Father is left a beach house – the will-maker will surely in most such situations expect that the mother and children will use the beach house, not solely the father. Thus, on examination the explanation for the legacy may be more complex than at first appears.\textsuperscript{51} In the light of this, it is argued that the s 10 items should be presumed to be relationship property. The party challenging this would then have the onus of proving that the bequest (etc) was purely personal and had no connection to the common life of the parties.

The remaining issue concerning s 10 is the test for determining whether separate property under this head has become relationship by later events – the “intermingling” test. This test has not been all that satisfactory – what do all the words, including “unreasonable” and “impracticable”, really mean? Furthermore, why have a different test under s 10 from the one that applies to property falling under ss 8-9A? It is suggested under the next heading that there should be a composite test for all these categories.

F Tracing into Subsequent Purchases – Use of Proceeds

The PRA law on subsequent acquisitions out of separate property is needlessly convoluted. Under s 8(1)(e), acquisitions during cohabitation are prima facie relationship property, but this is subject to s 9(2), which states that property acquired out of separate property remains separate property. This in turn is subject to s 8(1)(ee), which treats the acquisition as relationship property if it was for common use or common benefit of the parties.\textsuperscript{52} Section 10 property (gifts etc) is not part of this picture.

If the “all assets” approach were adopted, all acquisitions would be relationship property. This is subject to exclusions if the party claiming one can satisfy the court that the acquisition had nothing to do with the common partnership or family life. This test is not unlike the “common use or common benefit” one, but potentially slightly broader, with the onus clearly stated. This approach removes the need for the awkward dance between ss 8-10.

If another approach to classification is adopted, a new version of s 8(1)(e) should state the basic rule that property acquired while the parties were living together is relationship property, subject to an exception where the property can be traced to

\textsuperscript{51} The point is made by the English Law Commission: Law Commission Law Com No 343 Matrimonial Property, Needs and Agreements (The Stationery Office, London, 2014) at [8.18].

\textsuperscript{52} Changes made in 1980 partly reversed the judgment in Reid v Reid [1979] 1 NZLR 572 (CA), [1982] 1 NZLR 147 (PC), which treated all acquisitions as “matrimonial property” irrespective of source.
pre-acquired, inherited or gifted assets or a trust payment, and can also be proved to have no connection with the common family life. This would obviate the need for ss 8(1)(ee) or 9(2), and also incorporates s 10 property.

An allied rule would have to cover the situation where separate property is retained but its use is changed. If the new use is connected to the common family life, then its classification should switch from separate to relationship property. The awkward intermingling test in s 10 is abandoned.

G Increases in Value, Gains and Income from Separate Property

Section 9(3) of the PRA treats the income and gains from separate property and increases in value as separate property. Section 9A on the other hand provides for exceptions to this default rule, so that increases, gains and income attributable to an application of relationship property or to the actions of the other party become relationship property. However, rather anomalously where the other party’s actions are the causative factor, division is according to contributions to the increase rather than the usual equalisation rule. Amendments in 2001 widened the scope of s 9A and this was reinforced by the important Supreme Court judgment in *Rose v Rose*.\(^{53}\) The latter however left passive or inflationary increases out of account, thus undercutting the policy objectives of the Act.

Under an “all assets” approach, a s 9A type of provision would be unnecessary. The items concerned – often something like the family farm – would be included in the pool anyway and it would be hard to argue for an exemption. Increases in value would therefore have already been dealt with. Under other approaches on the spectrum, the issue of increases in value would likely have to be addressed. Under the gains/acquests model, an increase in value could well be regarded as a product of living together but policy decisions would have to be made about the basis for clawing the increase back into the separate property category and who would bear the onus. Rather than the awkward distinctions currently found in s 9A, would it not be better to require that party claiming that the increase is separate to satisfy the court that it has no connection to the common family life?

H Miscellaneous

Any revision of classification would need to deal with some miscellaneous provisions. For example, s 9(4) usefully enables the court to treat property acquired after the parties’ separation as relationship property, if for example it can be traced back to the proceeds of other relationship assets. Section 9(5) directs that acquisitions made after a court order are separate. This makes sense but whether a rule in the Act is actually necessary is debatable. I do not go further into these kinds of provisions.

VI RADICAL RECLASSIFICATION

The current rules on classification under the PRA are an uneasy mélange of convoluted provisions. It is possible to discern a pattern: assets that can be described as the fruits of living together are categorised as relationship property and are thus divisible. In addition and very significantly, the home and chattels are regarded as so central to the common life that they are relationship property regardless of whether they are the product of joint efforts. As we delve further into the provisions in ss 8-10, we find departures from this pattern, so that it is hard to do other than generalise about the current framework.

This paper has examined the relevant principles and policy factors that may impact on a revised system of classification. In short, the current principle that treats couples as a partnership of equals should be maintained and reinforced. Other principles such as the importance of common family life and the interests of children (if any) are aspects of the partnership philosophy. Addressing economic disadvantage at the end of the common life fits comfortably with this philosophy.

If we are to take the principles seriously, how should we devise our classification rules? A spectrum of models is apparent but the conclusion drawn in this paper is that a radical revision, not tinkering, is needed. The best approach for New Zealand is to start with all assets being subject to division. Some narrow exceptions would focus on the connection, whether direct or indirect, with the partnership or family life. If no such connection exists, then the property would be separate but the onus of proof would be expressly on the party seeking the exception. Under this model, the pool of property available for division or equalisation would be expanded, thus undergirding the partnership concept of relationships. This in turn assists the economically disadvantaged party, often the woman and mother, and has a positive knock-on for children. The model is thus based on appropriate policies, which should find favour with the community and policy-makers.