

PROPERTY (RELATIONSHIPS) AMENDMENT ACT 2001 AND RETIREMENT: ARE SEPARATED WOMEN MORE DISADVANTAGED THAN MEN?



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PROPERTY (RELATIONSHIPS) AMENDMENT ACT 2001 AND RETIREMENT: ARE SEPARATED WOMEN MORE DISADVANTAGED THAN MEN?

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1. INTRODUCTION

1.1. This report was commissioned by the Commission for Financial Literacy and Retirement Income (the “Commission”) in November 2011. It is one part of a larger project currently being undertaken by the Commission entitled “Raising Women’s Future Retirement Prospects.” The “Raising Women’s Future Retirement Prospects” project considers why women are more constrained than men in their ability to accumulate adequate wealth for their retirement over the course of their lifetimes and examines what steps can be taken to reduce this gender gap.

1.2. As part of the “Raising Women’s Future Retirement Prospects” project the Commission posed the following questions:

- What are women’s experiences of factors in the workplace that impact on their ability to save for retirement?
- What factors impact on the ease of women leaving and re-joining the workforce at different life stages, and how do those factors affect savings for retirement?

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- How does financial and non-financial support (or lack of it) from marriage/partnership, other family, friends, whanau and the community impact on women's retirement savings?
- What are the financial arrangements that women are provided with or take away from relationship breakups and how do those arrangements impact either positively or negatively on the assets they accumulate for retirement income in comparison to the assets accumulated by men?
- What are some of the cultural and ethnic factors that may ameliorate or exacerbate negative outcomes for women's income in retirement?

1.3. This report addresses one of the above questions, namely:

What are the financial arrangements that women are provided with or take away from relationship breakups and how do those arrangements impact either positively or negatively on the assets they accumulate for retirement income in comparison to the assets accumulated by men?

1.4. This report considers how New Zealand men and women fare comparatively⁶ upon separation under the Property (Relationships) Act 1976 (the "PRA") and the Family Proceedings Act 1980 (the "FPA") since 2002 - when significant reforms were made to the legislation - and examines the impact such separations may have upon their retirement income.

1.5. The report is structured in the following way: First, the report provides background information about income equality and retirement both in New Zealand and overseas. This is followed by an explanation of the relevant sections and principles of the PRA and the FPA. Third, the report sets out a detailed statistical analysis of New Zealand Supreme Court, Court of Appeal and High Court decisions concerning relationship property and spousal

⁶ Due to the male/female comparative nature of the research question this research report focuses solely on the financial position of heterosexual couples after separation. A male/female gender binary is unlikely to be appropriate for same sex couples. The authors recommend future research projects take the financial positions of same sex couples after separation into account.

maintenance over the last nine years. The report concludes with findings about the positive and negative impact of separation upon men and women in relation to retirement income and recommendations for future research.

2. INCOME INEQUALITY UPON RETIREMENT IN NEW ZEALAND AND OVERSEAS

2.1. The New Zealand position

2.2. Women are generally disadvantaged in retirement because of their lower earnings over a lifetime. In New Zealand, women still earn considerably less than men. The June 2011 Quarter New Zealand Income Survey calculated that women's average weekly income was 61.7 per cent of men's income.⁷ In 1998, when the New Zealand Income Survey began, women's average weekly income was 55.5 per cent of men's income.⁸

2.3. The 2005 "Focusing on Women" Report from Statistics New Zealand states that some of this difference can be attributed to the differing number of hours worked (women are less likely than men to be working 40 hours or more a week)⁹ as well as the different age structures of the male and female workforce. However, when these factors were controlled alongside occupation, highest qualification and ethnicity, women still received incomes equivalent to just 82 per cent of their male counterparts. Differences in men's and women's median incomes were greater for those who had attained a higher degree than for those with lower level qualifications. This is considered likely to be a result of the greater impact of child-raising on professional women's ability to work.¹⁰

2.4. As one can see from these data, while the gender pay-gap has lessened over the years, it still remains large. This earning gap disadvantages women in retirement because of their lesser ability to accumulate private savings for retirement. The effects of this can be seen in the difference between men's

⁷ Statistics New Zealand *New Zealand Income Survey: June 2011 Quarter* (2011), statistics for "Average and median weekly income for all people, aged 15 years and over".

⁸ "Weekly income for all people, from all sources" (1998) Statistics New Zealand <<http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx?ReportName=Incomes/Income%20by%20age,%20sex%20and%20labour%20force%20status>>.

⁹ Statistics New Zealand *Focusing on Women 2005* (2005) at 87. This publication was based on 2001 statistics.

¹⁰ Ibid, at 99.

and women's retirement income: in 2001, the retirement income for women aged 65 and over was equivalent to 94 per cent of their male counterparts. Additionally, 51 per cent of women aged 65 years and over who received New Zealand Superannuation had no other source of income in the same period, compared to 40 per cent of male recipients. These statistics clearly demonstrate that superannuation becomes an essential source of income in old age, especially for women.¹¹

2.5. The Commonwealth position

2.6. Gender income inequality is not just a problem in New Zealand, but is widespread throughout the Commonwealth. In Canada, women's average earnings were 68 per cent of men's earnings in 2009. This is an increase from the time at which data were first collected in 1976, when women's average earnings were 46.8 per cent of men's earnings.¹²

2.7. In Australia, statistics from May 2004 show that the average weekly total earnings of females was approximately two-thirds (68 per cent) of the average weekly total earnings of males.¹³ The gender pay-gap for full-time wage and salary employees aged 18-64 years was nine per cent in 2000, as reported by the OECD.¹⁴

2.8. In the United Kingdom, the gender pay difference based on median earnings during the 2010/2011 tax year was 19.8 per cent. This is down 27.5 per cent since 1997. These statistics cannot be accurately compared to other countries' statistics however, as they are based on *employees'* earnings, not all people's earnings. For full-time employees, the gender pay gap was 10.2 per cent in 2010, down from 17.4 per cent in 1997.

¹¹ Ibid, at 94.

¹² Statistics Canada *Distribution of earnings, by sex, 2009 constant dollars* Statcan <http://www5.statcan.gc.ca/cansim/a26.jsessionid=2A2655092858E9FAF9F867F541576BF9?lang=eng&retrLang=eng&id=2020101&pattern=202*&tabMode=dataTable&srchLan=-1&p1=1&p2=-1>.

¹³ Australian Bureau of Statistics *Employee Earnings and Hours* (Canberra, May 2004, ABS).

¹⁴ The Organisation for Economic Co-operation and Development *2002 OECD Employment Outlook* (OECD, Paris, July 2002).

2.9. Regardless of the specifics of each set of statistics, it is clear that in New Zealand, as well as in our Commonwealth counterparts, there is a disparity between men's and women's earnings throughout their lives. Fourteen years ago, women in New Zealand earned just over half the amount that men did. Now that figure has risen to 61.7 per cent. However, women are clearly still at a disadvantage, and are therefore unable to accumulate the same amount of savings over a lifetime as men are able to.

2.10. **Government policies to deal with income inequality - New Zealand**

2.11. The New Zealand state pension system has been praised for being “women-friendly” compared to other countries’ systems. Ashton and St John consider that “by de-emphasising the link between paid work and income in retirement, women's unique life cycle experiences are less of a disadvantage, while the numerous women-friendly features contribute to an environment of social inclusion and cohesion”.¹⁵ St John has also described the New Zealand state pension as “having numerous advantages compared with other public pension systems”, in that “it is remarkably simple, and entitlement is based on residency and not on joint income or contributions to the paid workforce, it copes well with social change such as divorce, separation, remarriage and widowhood. Social insurance schemes based on the contributory principle generally fare poorly in these areas.”¹⁶ While these comments were made before the advent of Kiwisaver, they are still relevant because Kiwisaver is, at present, supplementary to the state pension.

2.12. **Government policies to deal with income inequality - Commonwealth**

2.13. There are limited policies in place in other Commonwealth jurisdictions to deal with gender inequality on retirement.

¹⁵ S St John and B Gran “The world's social laboratory: Gender similarity in New Zealand pensions” in J. Ginn, D. Street, & S. Arber (eds) *Women, work and pensions* (Open University Press, London, 2001).

¹⁶ S St John “Managing the risks of ageing: the role of private pensions and annuities within a comprehensive retirement policy for New Zealand” (PhD thesis, University of Auckland, 2003) at 41.

- 2.14. In Australia, retirement income consists of payments from a compulsory employment superannuation fund (comparable to Kiwisaver), private savings, and an income and assets tested government pension. At present, women have a slightly earlier eligibility age for the pension, however in 2014 the eligibility age will become 65 for both men and women. The eligibility age will then gradually increase at the same rate.¹⁷
- 2.15. The government-provided ‘Widow Allowance’ provides a benefit for disadvantaged women, albeit one of limited scope. Only women born on or before 1 July 1955 are eligible for the allowance. A woman may qualify for a Widow Allowance if she: meets the birth-date requirement; is not in a relationship; has become widowed, divorced or separated since turning 40 years of age; and has no recent workforce experience - that is, she has not worked at least 20 hours a week for 13 weeks or more in the last year. In addition, the Widow Allowance is subject to an income and assets test.
- 2.16. In Canada, the Old Age Security and the Guaranteed Income Supplement, which is funded through the general tax revenues of the federal government, provide a basic guaranteed income. The Spouse’s Allowance program, also provided by the government, provides benefits to widows who have not remarried and to individuals aged 60-64 who are married to low-income pensioners.¹⁸ However, low-income single and divorced people aged 60-64 are not entitled to this allowance. Other sources of retirement income are the Canada Pension Plan and the parallel Quebec Pension Plan, an earnings-related social insurance program funded by contributions from workers and their employers, and private savings.
- 2.17. Retirement income in the United Kingdom is largely based on the Basic State Pension, allocated according to an individual’s national insurance contributions throughout their life, contributions which build up their pension-

¹⁷ Centrelink “Age Pension – Eligibility”
<http://www.centrelink.gov.au/internet/internet.nsf/payments/age_eligible.htm>.

¹⁸ Directgov “Getting credits towards your State Pension”
<http://www.direct.gov.uk/en/Pensionsandretirementplanning/StatePension/DG_183760>.

entitlement. Women who stay at home to look after children are especially disadvantaged by this system as they are less able to build up credits. However, in some circumstances the government will allocate credits to people who are not in paid employment. Pensioners with low incomes can claim Pension Credit, an additional state-provided income. Means-tested benefits often qualify a claimant for the full amount of local authority benefits such as the Housing Benefit and Council Tax Benefit. Retirement income also comes from employer schemes and private savings.

- 2.18. In both New Zealand and the wider Commonwealth then, women are disadvantaged relative to men upon retirement due to the gender pay-gap, and retirement policies in these jurisdictions are considered “women friendly” to differing degrees. Could the law governing distribution of property at the end of a relationship be similarly disadvantaging women in New Zealand, particularly since 2002?

3. NEW ZEALAND LEGISLATION AND PRINCIPLES

3.1. The 2002 reforms

3.2. The discussion immediately below focuses on the broad features of the Property (Relationships) Act 1976, which replaced the original Matrimonial Property Act 1976 in 2002 as a result of the Property (Relationships) Amendment Act 2001. As well as a name-change, that Act significantly changed the law concerning spousal maintenance and relationship property, in three broad ways:

- a) Couples in de facto relationships that had broken down were entitled to apply for relationship property divisions¹⁹ and spousal maintenance.²⁰
- b) The entitlement of an equal sharing of relationship property upon separation was considerably strengthened to apply to all relationship property, not just the family home and chattels.²¹
- c) Provision was made for a compensatory award – a “s 15 award”²² - to one partner when there would be an economic disparity upon separation resulting from the division of functions during the relationship. This only applied where there was a significant difference in income and living standards between the parties.
- d) Provision was also made for a compensation power if relationship property had been transferred into a trust since the relationship began and the disposition had the effect of defeating the relationship property rights of one of the parties.²³

¹⁹ See s 1C of the Property (Relationships) Act 1976 (the “PRA”). For ease of reference all relevant provisions of the PRA are contained in Appendix B at the end of this report.

²⁰ Spousal maintenance under the Family Proceedings Act 1980 (the “FPA”) for de facto couples was brought in by the Family Proceedings Amendment Act 2001 which was passed at the same time as the Property (Relationships) Amendment Act 2001. See ss 64-66 of the FPA. For ease of reference all relevant provisions of the FPA are contained in Appendix C at the end of this report.

²¹ See PRA, ss 8 and 11.

²² PRA, s 15.

²³ PRA, s 44C. A similar power was granted in s 44F for dispositions to companies, but this power is seldom used.

3.3. This widening of potential entitlements to relationship property and compensatory awards since 2002 is of particular interest in the context of the current research question. We particularly focus on these four features of the PRA in the analysis of the judgments.

3.4. **Presumption of equal sharing**

3.5. The principal New Zealand legislation on the division of property belonging to couples, formerly married couples, civil union partners and de facto partners is the PRA.

3.6. The purpose of the PRA is “to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership” and “to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death ... while taking into account the interests of any children [of the relationship]”.²⁴

3.7. The principles of the PRA, which are to guide the achievement of its purpose, are four-fold:²⁵

- a) Men and women have equal status, and their equality should be maintained and enhanced;
- b) All forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal;
- c) 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; and

²⁴ PRA, s 1M.

²⁵ PRA, s 1N.

- d) Questions arising under the Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.
- 3.8. This “just division” of relationship property is principally determined by the rules contained in the PRA. The starting point for the division of property is the equal sharing rule in s 11(1) of the PRA, which states that on the division of relationship property (ie after the break-up of the relationship) each of the spouses or partners is entitled to share equally in the family home, the family chattels and any other relationship property. The presumption of equal sharing is, however, subject to other provisions of the PRA.²⁶
- 3.9. Relationship property is a term specifically defined in the PRA.²⁷ The general position is that all of the property acquired by either spouse or partner from the commencement of the marriage, civil union or de facto relationship until its end will be considered relationship property and thus subject to the presumption in favour of equal sharing. There are, however, exceptions to this general position²⁸ – when these apply the property is considered ‘separate’,²⁹ and exempt from the equal sharing presumption. This means that the total ‘relationship property’ may be less than the property owned by the parties comprising what will be referred to for convenience as the relationship’s ‘total asset pool’.
- 3.10. Separate property is an asset, such as real property,³⁰ owned by one party before the relationship began, and not acquired in contemplation of the relationship nor intended for the parties’ common use. All property acquired out of separate property, the proceeds of its disposition, and gains derived from it are also separate property. This is so unless the increase in value or gain is attributable to the application of relationship property or the actions of

²⁶ PRA, s 11(2).

²⁷ PRA, s 8.

²⁸ See PRA, ss 8(e), 9, 9A and 10.

²⁹ PRA, s 9(1).

³⁰ Which is not the family home – PRA, s 8(1).

the non-owning party;³¹ or the property, proceeds or gains were used with the consent of the owning party to acquire or improve relationship property.³² So, in a situation where one party manages property owned pre-relationship completely removed from the relationship, it may be excluded from being ‘relationship property’, despite being part of the total asset pool. It is emphasised that this is a policy preference embedded in the PRA, rather than an unintended effect of its operation.

3.11. Excluded from the asset pool and therefore from the PRA’s sharing regime is property not beneficially owned by either of the parties. This generally excludes property held in trust, because most family trusts in New Zealand are discretionary in nature. Spouses or partners who are beneficiaries of such trusts do not own the trust assets. Until the trustees exercise their discretion in favour of the spouses or partners as beneficiaries, they merely have a hope or expectation of benefiting from the trust.³³ As New Zealand has a very large number of trusts, and substantially more per head of population than England, Canada or Australia, the detrimental effect on the PRA’s social aims is considerable.³⁴

3.12. **Exceptions to Equal Sharing of Relationship Property**

3.13. So, after identifying what amounts to separate property and relationship property, the latter is usually equally divided. There are, however, three significant departures from the equal sharing presumption in the PRA, in the following circumstances: contracting-out agreements under s 21, marriages/civil unions of short duration and de facto relationships of short duration. The detrimental effect of trusts on the PRA regime will be discussed separately. So too, awards under s 15 of the PRA to compensate for economic disparity in a relationship and maintenance awards (made under the FPA

³¹ In which case the other (non-owning) party will be entitled only to a share in the increase in its value or gains made from it – not a share in the separate property itself.

³² See PRA, ss 8 and 9A for a fuller picture.

³³ *Nation v Nation* [2005] 3 NZLR 46 (CA); *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589.

³⁴ NZLC IP 20, *Some Issues with the use of trusts in New Zealand*, chapter 2.

rather than the PRA). These mechanisms are more removed from the process of identifying, then deciding the apportionment of relationship property, although they may affect its final distribution.

3.14. **Contracting out agreements:** It is possible to avoid the usual rules relating to relationship property by entering into an agreement to do so under s 21 of the PRA, commonly known as a “section 21 agreement”. When the Bill was introduced there was widespread debate about whether the PRA should be an “opt-in” or “opt-out” regime.³⁵ In the end Parliament favoured an opt-out system. This was in part because, as Lianne Dalziel said “people's expectations are not usually focussed on the relationship breaking up at the point that they make the decision to live together”³⁶ and so a contracting out regime was “the best way to protect the weak and vulnerable” and to put “in place minimum standards to ensure justice.”³⁷ The ability to contract out has been described as “one of the pillars on which New Zealand's relationship property regime is built.”³⁸

3.15. Section 21 agreements can be formed before entering into a marriage (a pre-nuptial agreement), civil union or de facto relationship, or while the relationship is still functioning. This is an extension from the previous contracting out provision under the Matrimonial Property Act 1976,³⁹ which was limited to spouses only.

3.16. The potential scope of a s 21 PRA contracting out agreement is quite broad. A s 21 PRA agreement can decide what property is to be separate or relationship property,⁴⁰ and how any property is to be divided upon separation.⁴¹ However under s 21F(1), the PRA introduces a presumption that the agreement is

³⁵ Compare Keith Locke's speech (29 March 2001) 591 NZPD 8633 and Dr Lynda Scott's speeches (29 March 2001) 591 NZPD 8639.

³⁶ Lianne Dalziel (6 May) 567 NZPD 8267.

³⁷ Keith Locke (29 March 2001) 591 8633.

³⁸ *De Malmanche v De Malmanche* [2002] NZFLR 579 (HC) at [98].

³⁹ Matrimonial Property Act 1976, s 21.

⁴⁰ PRA, s 21D(1)(a).

⁴¹ PRA, s 21D(1).

invalid unless the agreement fulfils certain statutory requirements set out in s 21F(2)-(5). These requirements are that:

- a) the agreement is in writing and is signed by both parties;⁴²
 - b) each party has received independent advice before signing the agreement⁴³ and this signature is witnessed by a lawyer;⁴⁴ and
 - c) the lawyer certifies that they have explained the effect and implications of the agreement.⁴⁵
- 3.17. Even if an agreement satisfies the statutory requirements, the court retains the discretion to set aside an agreement if giving effect to it would cause serious injustice.⁴⁶ As well, if the requirements are not fulfilled, a court may still give effect to the agreement, in whole or part, if the Court considers that the non-compliance under has not "materially prejudiced the interests of any party to the agreement."
- 3.18. Research into s 21 agreements that has been considered by the courts is unlikely to provide a representative picture of s 21 agreements in general. Most partners with s 21 agreements would be unlikely to go to court, and it can be expected that most agreements would, if tested, be upheld as valid due to the parties having obtained legal advice. These caveats aside, a survey⁴⁷ of s 21 agreements considered by the courts up to October 2010⁴⁸ indicates the following:

⁴² PRA, s 21F(2).

⁴³ PRA, s 21F(3).

⁴⁴ PRA, s 21F(4).

⁴⁵ PRA, s 21F(5).

⁴⁶ PRA, s 21J(1).

⁴⁷ Thomas Cleary "Relationship Property Under the Property (Relationships) Act 1976: An analysis of cases since the introduction of the Property (Relationships) Act 1976" (Summer Research Paper, University of Otago, 2012). See also Margaret Briggs "Marital Agreements and Private Autonomy in New Zealand" in Jens M. Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing Ltd, Oxford, 2012) 256.

⁴⁸ As of July 2011, all cases containing consideration of s 21 agreements on the LexisNexis databases (a total of 83 cases) were identified and analysed according to whether the agreement was held valid, void (and if so, why) or no agreement was held to exist.

- 3.19. In most cases (61 per cent) where a s 21 agreement was alleged to exist⁴⁹ the agreement was held to be valid. However, in nearly 39 per cent of cases the agreement was deemed to be invalid. These invalidities were mostly due to deficiencies in s 21F requirements (73 per cent), but 27 per cent of these invalidities were on the grounds that the agreement would cause serious injustice. This is a significant proportion for a threshold that was intended to operate at a high level.⁵⁰
- 3.20. There does not seem to be any real difference between married couples and de facto partners utilising s 21. The cases also indicate that the courts have little sympathy towards people who do not enter into contracting out agreements yet seek to avoid equal sharing,⁵¹ a position that may be overly rigid given that it is contestable how widely known the presumption of equal sharing (after the qualifying period) is.
- 3.21. **Marriages/civil unions of short duration:** A different set of rules applies to marriages and civil unions of short duration. These are marriages and civil unions that have lasted for a period of less than three years; or for a period of three years or longer if the court, having regard to all the circumstances of the marriage/civil union, considers it just to treat it as a relationship of short duration.⁵² In such cases, the share of each spouse in the relationship property is to be determined in accordance with the contribution of each spouse to the marriage/civil union, when dividing:
- a) assets owned wholly or substantially by one spouse when the marriage/civil union began;
 - b) assets obtained through succession, survivorship, as a beneficiary of a trust or a gift from a third person; or

⁴⁹ Excluding cases where no agreement was held to exist.

⁵⁰ Parliament changed the standard from "unjust" as it was in the Matrimonial Property Act 1976 to "serious injustice" in the PRA.

⁵¹ See *Jane v Budd* HC Napier CIV-2005-441-558, 1 November 2005 at [44] for a representative viewpoint.

⁵² PRA, s 2E.

- c) where the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse.

Property that falls outside of these categories is shared equally, unless one party's contribution to the relationship has been clearly greater than the other's.

3.22. The relationship between this less-than-three-years period and the at-least three-years period relevant to de facto relationships is discussed in more detail below.

3.23. **De facto relationships of short duration:** The general position with de facto relationships of short duration (less than three years⁵³) is that *no* order can be made for the division of relationship property. 'De facto relationship' is defined by the PRA with reference to a number of indicia and a focus on taking all the circumstances of the relationship into account.⁵⁴ Generally, the PRA applies to a de facto relationship only if it has lasted at least three years.⁵⁵ However, several exceptions exist:

- a) the Court has power to consider a de facto relationship longer than three years as a relationship of short duration, if it considers it just to do so;⁵⁶
- b) the Court may make an order under s 25(3) of the PRA in relation to specific property, whether or not the relationship has lasted three years;
- c) the Court can make an order with respect to a relationship of less than three years if there was a child of the relationship and it would be seriously unjust if no order was made;⁵⁷ and
- d) the Court can make an order with respect to a relationship of less than three years if the applicant has made a substantial contribution to the relationship and it would be seriously unjust if no order was made.⁵⁸

⁵³ Defined in s 2E(1)(b) of the PRA.

⁵⁴ See s 2D of the PRA. Note that the existence of de facto relationships can be at times difficult, time consuming and expensive to prove in a court hearing.

⁵⁵ PRA, s 1C(2)(b).

⁵⁶ PRA, s 2E.

⁵⁷ PRA, s 14A.

- 3.24. The three year ‘qualifying period’ was hotly debated in Parliament during the passing of the PRA, with opposing camps favouring three or five years respectively. Those arguing for a five-year period (mainly those from the National party) claimed that, as de facto relationships are often entered into unsuspectingly, the three year period was too short;⁵⁹ and further, that making the period the same as for the equal sharing presumption based on marriage had the effect of devaluing marriage.⁶⁰ An Australian study that found 75 per cent of de facto relationships end within four years was also relied upon.⁶¹
- 3.25. A three-year period was enacted, mainly on the argument that it was consistent with marriages of short duration and that to discriminate on the basis of marital status was contrary to the Human Rights Act 1993.⁶² It is, however, noted that there is no iron-clad obligation on Parliament to ensure that there is no discrimination whatsoever between the treatment given to de facto relationships and marriages/civil unions.⁶³ This appears to have been recognised by Parliament in allowing division of relationship property in marriages of short duration to be assessed according to each party’s contributions,⁶⁴ while requiring *no* order for division of relationship property to be made in de facto relationships of short duration unless certain requirements are met.⁶⁵
- 3.26. In this light, it is worthwhile setting out the findings of research into cases involving de facto relationships from February 2002 to December 2009.⁶⁶ It

⁵⁸ Ibid.

⁵⁹ Dr Lynda Scott (29 March 2001) 591 NZPD 8632-3.

⁶⁰ Ibid.

⁶¹ Justice and Electoral Committee "Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25" [2000] Reports of Select Committees at 702 (per minority).

⁶² Ibid, at 671 (per majority).

⁶³ Section 19 of the New Zealand Bill of Rights Act 1990 may be subject to justified limitations (s 5), and in any event enactments inconsistent with that Act’s rights are not affected by reason only of such inconsistency (s 4). The Human Rights Act 1993 does not have this effect either – see Part 1A and ss 21-21A.

⁶⁴ PRA, s 14.

⁶⁵ See above at [3.23].

⁶⁶ Thomas Cleary, above n 47, who identified and analysed the 316 relevant cases available on the LexisNexis database.

was found that 44 per cent of de facto relationships coming to court with disputes about relationship property involved partnerships of less than five years. While not as high a figure as the Australian data cited in the Parliamentary debates, this is merely a snapshot of cases. The figure of 44 per cent, taken in conjunction with the PRA's aim of resolving disputes "as inexpensively, simply, and speedily as is consistent with justice",⁶⁷ might suggest that the threshold is set too low. A higher threshold would capture couples that intended to be in a relationship (which, say, five years might denote), while protecting those couples that had slipped inadvertently into the relationship. However such a proposal would leave de facto couples vulnerable especially because at the point they start living together they may not have given much thought to the relationship breaking down.⁶⁸

3.27. This research also considered cases that dealt with the question of whether a relationship was actually 'de facto'. Of all de facto cases, 42.7 per cent concerned issues as to whether the relationship was wholly or in part a de facto relationship. Only 12 per cent, though, involved questions as to whether the entire relationship had crossed the threshold to become de facto. It was concluded that the case law had developed a firm set of principles to approaching the definition and indicia in the PRA, and there was no real case for changing these. As the Justice and Electoral Committee said, "a definition should aim to capture the first group [that is, long-term relationships that have children and operate as an economic partnership], but avoid unduly covering the second [couples who live together, but are not committed to sharing their lives, remain financially independent and do not have children]"⁶⁹ The data seem to suggest that the existing definition is doing just that.

3.28. However, for relationship property purposes, the length of the de-facto relationship (start/end date issues) takes on particular importance in governing whether or not the PRA and its equal sharing presumption apply. So too do

⁶⁷ PRA, s 1N(d).

⁶⁸ Lianne Dalziel (29 March 2001) 591 NZPD 8633.

⁶⁹ Justice and Electoral Committee "Matrimonial Property Amendment Bill and Supplementary Order Paper No. 25" [2000] Reports of Select Committees at 669.

questions as to whether the relationship was continuing, or two separate relationships involving a period apart (start/stop issues). The research also noted that of all the de facto cases considered, 35.4 per cent had start/end date issues; and 25.7 per cent had start/stop issues. As cases sometimes involved both, the overall percentage of de facto relationships which had at least one of these two issues was 46.5 per cent – a large proportion. Unsurprisingly, these percentages increased in the subset of de facto cases where there was a dispute as to whether the relationship was actually ‘de facto’. Of those cases, 57.4 per cent had start/end date issues and 39.3 per cent had start/stop issues (a total of 72.1 per cent with at least one issue); compared with, for cases where there was no dispute as to the existence of a de facto relationship, 19.3 per cent, 15.7 per cent and 27.7 per cent respectively.

3.29. The amount of evidence and time it takes to establish these types of issues, combined with the fact that they feature heavily in the cases, may impose a significant practical burden on a past party to a de facto relationship seeking access to the equal sharing regime under the PRA. This is aside from the fact that the definition of de facto relationships itself seems to be operating as intended.

3.30. **Dispositions to trust**

3.31. The PRA provides two remedies where property transferred to trust has the effect of defeating a spouse or partner’s rights under the Act: ss 44 and 44C.

3.32. **Section 44:** Where property has been disposed of to defeat the relationship property rights of a spouse or partner, the Court has power to set aside the disposition or to order payment of compensation. This provision has been part of the PRA since the Act was adopted in 1976. However, it has always been of limited effect because of the difficulty of proving the fraudulent intent. Prior to the Supreme Court ruling in *Regal Castings v Lightbody*⁷⁰ in 2008, an applicant spouse or partner had to prove a fraudulent motive, a conscious

⁷⁰ *Regal Castings v Lightbody* [2009] 2 NZLR 433 (SC).

desire to defeat the rights of that spouse or partner.⁷¹ But in *Regal Castings v Lightbody* the Supreme Court held that a fraudulent intent did not require a fraudulent motive. What it required was knowledge that the likely consequence of the disposition would be to defeat the applicant's rights. Although that case was decided under the Property Law Act 2007 in the context of an insolvency, subsequent case law under the PRA has adopted the ruling.⁷² This test may make it easier to succeed under s 44.

3.33. **Section 44C:** This provision was introduced by the 2001 amendment because trusts were known to undermine the PRA's social aims by putting significant amounts of property beyond the reach of the courts.⁷³ The purpose of this provision is to compensate a spouse or partner for any unequal effect resulting from a disposition of relationship property to a trust. However, s 44C has significant shortcomings, both in terms of its jurisdictional requirements and in the compensation that can be awarded.

3.34. Section 44C applies only if one or both spouses or partner disposed of relationship property since the relationship began. If the property was transferred into trust by someone other than the parties to the relationship, for example a vendor or parent, s 44C will not apply. Nor can it be used if the property was not relationship property at the time of the disposition. For example, if a house is transferred into trust before becoming the family home. Section 44 is also of no use if the disposition occurred before the relationship began. Finally, if the disposition affects both parties equally then s 44C will not apply either. The purpose of s 44C is to remedy an unequal benefit resulting from the disposition of relationship property. *Nation v Nation*⁷⁴ is a prime example. The husband transferred the family farm into trust with a debt back. When the parties later separated the farm had substantially increased in value. The husband remained on the farm and continued to benefit from the

⁷¹ *Coles v Coles* [1987] 4 NZFLR 621 (CA).

⁷² *Ryan v Unkovich* [2010] 1 NZLR 434 (HC); *K v V* [2012] NZHC 1129.

⁷³ *Report of the Working Group on Matrimonial Property and Family Protection* published by the Ministry of Justice in 1988 at 28-31.

⁷⁴ *Nation v Nation* [2005] 3 NZLR 46 (CA).

trust, while the wife moved out and received no further benefit from the trust. Her only entitlement was to a share of a static debt back which was much less than the hearing date value of the farm. As the Court of Appeal said, this was a “paradigm case”. The wife’s rights had been defeated to the extent of the difference in value between the amount of her share of the debt and the value of the share of the equity in the farm that she would have received but for the disposition into the trust.

- 3.35. If the jurisdictional requirements are met, the Court’s power to compensate the disadvantaged spouse or partner is limited to relationship property or separate property outside the trust or, if that is insufficient, to income from the trust.⁷⁵ The Court has no power to make orders against the capital of the trust. Case law reveals the shortcomings in the compensation powers in s 44C. For example, in *Ward v Ward*⁷⁶ the only asset outside the trust was the debt back, which was insufficient to compensate the wife for the loss of relationship property, and the trust did not have any surplus income. Following the abolition of gift duty there may be no assets outside the trust from which compensation could be awarded.

3.36. **Section 182 Family Proceedings Act 1980**

- 3.37. The picture about the impact of trusts on relationship property rights and thus the asset and income position of spouses and partners post separation would be incomplete without mention of s 182 of the FPA. This provision gives the Court power to vary a nuptial settlement on divorce. This provision has a number of disadvantages. First, it cannot be used on separation or by de facto couples. Second, it is available only if the trust was a nuptial settlement, which means that it was settled to provide for a particular couple and their children. In *Kidd v Van Den Brink*⁷⁷ for example, the trust was settled by the husband’s father for the benefit of his children and their families. Although the husband and wife’s family home was held in that trust, it was not a nuptial settlement.

⁷⁵ PRA, s 44C(2).

⁷⁶ *Ward v Ward* [2009] NZSC 125; [2012] 2 NZLR 31 (SC).

⁷⁷ *Kidd v Van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009.

Nor could orders be made under the PRA and so the wife was left without remedy.

3.38. Even if the jurisdictional requirements are met, the Court's powers to vary the trust are not underpinned by the PRA's principles of equality. The Supreme Court clarified in *Ward v Ward* that the power could be used only to restore the parties' reasonable expectation of the settlement.⁷⁸ Decisions since that ruling reveal that unless the parties expected to benefit equally from the trust property the Courts will not vary the settlement to achieve equality. In *LSP v WSP*,⁷⁹ for example, the wife did not expect to share equally in the farm that her husband had settled on trust. She merely expected accommodation and an income from the trust and that was what the Court provided through s 182 of the FPA.

3.39. Trusts therefore give rise to significant problems on separation and, in many cases, the detriment is suffered mainly by women. The Courts have tried to use alternative avenues to access trust assets, but so far they have not been particularly successful.

3.40. **Section 15: Economic disparity awards**

3.41. In recognition of the fact that often one party comes out of a relationship at a disadvantage relative to the other, s 15 was introduced as part of the PRA's 2002 reforms. Section 15 gives the Court the discretionary power to adjust shares in the division of relationship property in order to compensate for economic disparity in a relationship. It recognises that while one party in a relationship, often the woman, will stay home to act as primary caregiver for children; the other party has had the chance to further their career and increase their earning capacity. This often disadvantages the former party upon the ending of the relationship.

⁷⁸ *Kidd v Van den Brink* HC Auckland CIV-2009-404-4694, 21 December 2009.

⁷⁹ *LSP v WSP* FC Gore FAM-2007-017-124, 30 May 2011.

- 3.42. In order to succeed in an application for an economic disparity award, the disadvantaged party must prove that:
- a) after the marriage/civil union/de facto relationship ends, the other party's income and living standards are likely to be significantly higher than theirs; and
 - b) this disparity is because of the effects of the division of functions within the marriage while they were living together
- 3.43. A "clear causal link"⁸⁰ is needed between the disparity and the division of functions during the marriage. If the causal link can be proved, in determining whether to make an order under section 15, 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; and
 - c) any other relevant circumstances.
- 3.44. If a claim is successful, the Court may, if it considers it just for the purposes of compensating the disadvantaged party, order the advantaged party to pay the disadvantaged party a sum of money. It is noted that awards under s 15 are compensatory. That is, they are focused on providing compensation for what has happened in the past that has led to the present situation. Compensation can be awarded for both the loss of the claimant's earning capacity, and the enhancement of the respondent's earning ability.⁸¹
- 3.45. Unfortunately, s 15 does not appear to have been as successful at achieving equality between parties to a relationship breakup as was hoped. In practice, s 15 claims face difficult evidential hurdles and an appropriate level of compensation is hard to calculate. In recent research conducted by a PhD

⁸⁰ *X v X* [2010] NZFLR 383.

⁸¹ *M v B* [2006] NZLR 660, *X v X* [2010] NZFLR 383.

student at the Faculty of Law, University of Otago,⁸² a group of legal practitioners who work in the area of relationship property were questioned about their experiences with and views about the operation of s 15.

3.46. This research found that s 15 had considerably more impact in cases settled out of court. Nine out of 16 respondents indicated that between four to nine per cent more of the relationship property had been awarded for economic disparity, and two respondents indicated that a greater level of relationship property had been awarded. Only three respondents stated that s 15 made no substantive change. In comparison with cases that went to court, s 15 has had much less of an impact, with nine out of 15 respondents considering that it made no substantive change to the result.

3.47. To the question “do you perceive any problems with the economic disparity provisions?” the overwhelming majority (17 out of 18) answered “yes.”

3.48. Perceived problems with section 15 by the respondents were:

- a) difficulties in determining whether the cause of the disparity of income and living standards was as a result of the division of functions in the relationship;
- b) similar difficulties in determining the appropriate amount of compensation;
- c) issues posed in situations where the economically disadvantaged person has not had a career (so there is no benchmark to compare what the person’s income might have been but for the relationship);
- d) the high legal costs of advancing a section 15 claim; and
- e) variation in judicial attitudes towards section 15 claims.

3.49. **Maintenance Awards**

⁸² Acknowledgments to Claire Green, PhD candidate, University of Otago for supplying us with preliminary results from her doctoral research.

- 3.50. Maintenance awards after a marriage or civil union is dissolved, or when a de facto relationship ends, are not made under the PRA; rather, under the FPA. There is nonetheless a relationship between property and maintenance as illustrated by section 32 of the PRA, which states that the Court, in proceedings under the PRA, must have regard to maintenance orders, and that the Court may make maintenance orders if it considers it just.
- 3.51. The general principle of maintenance is that neither party to a marriage, civil union, or de facto relationship is liable to maintain the other after the marriage or civil union is dissolved, or when a de facto relationship ends.⁸³ However, a party is liable to maintain the other party if and to the extent that such maintenance is necessary to meet the “reasonable needs” of the other party where they “cannot practicably meet the whole or any part of those needs”⁸⁴ because of specified circumstances (the ability of the party to become self supporting; the responsibilities of each party for care of the relationship’s children; the standard of living of the party during the relationship; and the situation where one party undertakes to train or educates themselves to increase their earning capacity, and it would be unfair to expect them to shoulder the cost themselves).⁸⁵
- 3.52. In determining an application for maintenance, then, the broad questions which the courts address⁸⁶ are:
- a) What the “reasonable needs” of the applicant are; and
 - b) Whether the specified circumstances have meant that these needs cannot be practicably met by that party.
- 3.53. The principal concern of the maintenance provisions is that the spouse whose activities have been domestically oriented might have foregone the education,

⁸³ FPA, s 64.

⁸⁴ FPA, s 64(1).

⁸⁵ FPA, s 64(2).

⁸⁶ FPA, ss 65-66. These sections set out mandatory and permissible considerations for the Courts in assessing the application/the amount of maintenance payable.

training, contacts, and experience which would otherwise have equipped him or her to earn a living independently.⁸⁷

⁸⁷ *Laws of New Zealand* Dissolution of Marriage at [42].

4. **METHODOLOGY AND DATA ANALYSIS**

4.1. In order to address these research questions, we undertook a comprehensive case review and analysis of relevant New Zealand cases. The project methodology was broken into three distinct phases. These were the initial search of the legal database ('Briefcase'⁸⁸) to ascertain relevant cases, a comprehensive review of the selected cases and extraction of relevant data, and finally data input and analysis. These three phrases are discussed in more detail in turn below.

4.2. **Phase one: Database search**

4.3. This report has analysed all Supreme Court, Court of Appeal and High Court decisions on spousal maintenance and relationship property from 2002 until the end of 2011 that are available on the New Zealand legal database Briefcase. Due to the New Zealand court hierarchy, decisions from these courts set the benchmark for the Family Court, it being bound to follow them. Accordingly, our research did not extend to Family Court decisions, except to the limited extent, discussed below, necessary to 'flesh out' the detail provided by the superior courts. A preliminary list of relevant cases was identified by running a series of searches for judicial consideration of the relevant sections in the PRA⁸⁹ and FPA.⁹⁰

4.4. These decisions were broken down as follows:

4.5. **Cases judicially considering PRA sections (639):**

- a) 15 Supreme Court decisions
- b) 79 Court of Appeal decisions

⁸⁸ Available through <www.brookersonline.co.nz>. This database does not contain every single New Zealand court decision, but is easily searchable and contains the majority of relevant decisions. To collect every single relevant court decision was too sizeable a task for the scope of this project.

⁸⁹ Any section, though specific searches were run for s 44C and s 15 of the PRA in order to get an idea of the volume of cases.

⁹⁰ These were ss 182, 64, 64A, 65 and 82 of the FPA.

c) 545 High Court decisions

4.6. **Cases judicially considering spousal maintenance (FPA) sections (105):**

a) 0 Supreme Court decisions.

b) 11 Court of Appeal decisions.

c) 94 High Court decisions.

4.7. All of these decisions were scanned for relevant substantive content. That is, cases which actually dealt with identification and distribution of relationship property or spousal maintenance. The preliminary search criteria were intentionally wide, meaning that many of the judgments, despite mentioning relevant sections, were actually limited to procedural matters irrelevant to the research question or otherwise irrelevant. No further work was undertaken on those cases. Cases that were relevant however, were read through in order to identify certain variables (as far as possible - this process and its inherent difficulties, is covered in more detail below). These variables were then used in statistical analysis. All in all, 69 division of relationship property and 23 spousal maintenance cases were identified and had data extracted from them.

4.8. **Phase two: File review and data extraction**

4.9. We collected a range of data from these cases. In the following section we detail the specific details of the variables that we collected data on, and discuss the relevance of these variables to our overall project goals. Finally, while our methodology and subsequent analysis has provided some interesting insights, we discuss some of the limitations inherent in our sample.

4.10. As spousal maintenance and relationship property cases are quite distinct legal proceedings, the information provided in the judgments (and therefore the information we were able to extract) varies. As such, there are variables (such as the length of the spousal maintenance award) that are specific to one legal action only. We have, therefore, detailed the variables we collected for these two categories of cases separately.

- 4.11. We first provide information on the variables we collected data on for the division of relationship property cases.

Background information (relationship property cases):

- **Which partner was the applicant (who filed):** This data was collected primarily as background information, with a view to considering it as a proxy for the party most aggrieved who would arguably be more likely to commence litigation. We were, therefore, interested in examining whether the party who commenced the proceedings was more likely to be successful in gaining a greater percentage of the relationship property.
- **Date of separation:** This information was collected as background information, primarily as an aid to working out the length of the relationship (detailed below). Often judgments were silent on the length of the relationship, and by collecting this information we were able to ascertain the overall length of the relationship for the bulk of our sample. The specific information on the date of separation, therefore, is not analysed as a separate variable in the analysis.
- **Date of proceedings (hearing):** We collected this data in order to help us establish the length of the relationship for the reasons detailed above. We also used this data to examine whether there have been changes in judicial approaches from 2002 through to 2011 (that is, have Judges been applying the principles of the legislation consistently across this time period according to gender?)
- **Age of parties:** This variable was collected as we considered it extremely relevant to the question of disadvantage upon retirement. In particular, we collected this data to examine whether Judges were taking the age of the parties (and, therefore, the assets each party was likely to accumulate for retirement) into consideration in deciding the percentage of relationship property each party received.
- **Length of relationship:** For similar reasons as above, we collected data on this variable to assess whether the length of the relationship was given any consideration in regard to the percentage of relationship property each

party received. Parties that had been in longer relationships would be less likely to have longer working lives post-separation, and hence a reduced ability to save for their retirement.

- **Nature of relationship (ie marriage, civil union, or de facto):** We selected this variable given that a major part of the 2002 reforms was to treat these different relationship types more equally. We examined whether the 2002 reforms are in fact treating women (and men) more equally, and that a woman is not more disadvantaged than another woman on division of relationship property (and hence the money available for retirement) simply because she had been in a de facto relationship rather than a marriage.⁹¹
- **Children of the relationship:** We collected this data to examine whether relationships with children (likely longer term relationships) were treated differently to relationships without children. Given that as a very broad generalisation, women tend to have more of the proportion of the care of children (particularly very young children) we wished to investigate whether this variable impacted upon the percentage of relationship property each party received. In order to analyse this variable we collected data on:
 - Whether or not there were children of the relationship;
 - If so, how many children there were; and
 - The age of the children.
- **Any incapacity of either party:** Data on this variable was collected to analyse whether or not severe incapacity (for example disability or inability to work) affected the percentage of relationship property each party received (and hence the assets available for the party to draw upon in retirement).

Financial information (relationship property cases):

⁹¹

All the cases analysed for this report involved the financial position of heterosexual couples after separation due to the male/female comparative nature of the research question. Such a male/female gender binary is unlikely to be appropriate for same sex couples.

- **Who legally ‘owns’ the assets:** We collected data on this variable in order to establish the assets that were deemed relationship property versus those deemed separate property. This variable in itself, therefore, is not analysed separately.
- **The total asset pool:** For the same reasons as above, we collected this data in order to establish the assets that were considered relationship property versus those considered separate property. We were particularly interested in examining whether there was a gender difference in the assets deemed to be separate property (and hence more assets to draw upon in retirement).
- **Any ‘non-accessible’ assets/income in trusts:** The nature of our data set meant we considered a case to involve non-accessible income/assets in a trust to cases where there was a dispute as to that property considered in the judgment, often involving valuation of trust assets. We were interested to see whether disputes over trust assets were resolved in favour of one gender over the other.
- **Each party’s income:** Data on this variable was collected to consider how far relationship property awards take into account (lack of) earning capacity, particularly given the gender pay-gap. The following two variables were selected for similar reasons.
 - **Each party’s qualifications**
 - **Each party’s likely earning capacity if known.**
- **Any s 21 agreements:** Recall that s 21 agreements allow parties to contract out of the provisions of the PRA. As such we gathered this data to see whether these agreements operated to benefit one gender, particularly given the gender pay-gap.
- **Any s 15 awards:** Information on this variable was collated to examine the impact of one of the major reforms in 2002, and one which, on its face, might be a useful mechanism to reduce inequality heading into retirement. Other adjustments to the share of relationship property may be

made under other sections,⁹² but they either have predecessors in the pre-2002 legislation, or are more general provisions that ought to be passed over in favour of more specific ones.

- **Percentage of relationship property ultimately obtained by each party:** This data was collected as it is the primary variable on which the others are considered against. We also collected the total dollar amount that each party ultimately received where it could be ascertained. However, given that in many cases the judgments were silent on these dollar amounts (or the property was yet to be sold), the overall percentage awarded by the Judge proved to be a more reliable and stable variable.
- **Costs awards:** We gathered this information to see whether costs awards particularly disadvantage one gender, affecting the end-value of the relationship property distribution (and hence property available upon retirement).

4.12. We now turn to discuss the variables we collected for the spousal maintenance cases and the reasons why we chose to examine these specific variables.

4.13. The maintenance cases have been analysed to yield the following information:

- **Which party applied for spousal maintenance:** This data was collected with a view to considering it as a proxy for the party most aggrieved – arguably more likely to commence litigation. It was also gathered to assess whether women successfully applied for maintenance (and therefore were deemed to be unable to support their own reasonable needs) more than men.
- **How much spousal maintenance applied for:** We gathered this data to examine the amount of financial support the applicant believed he or she required in order for their reasonable needs to be met (and hence their perspective on their overall financial situation). This is particularly relevant to women who separated from their partners later in life and are therefore closer to retirement.

⁹² See PRA, Part 4 – “Other provisions relating to division of relationship property”.

- **Any spousal maintenance awarded:** For reasons similar to above, this data was collected to examine whether the Judge thought the applicant's reasonable needs were being met.
- **Amount of spousal maintenance awarded:** This data serves as an important variable in determining the level of financial support received. Again, this variable is of particular interest for these cases involving woman closer to retirement, with limited time to accumulate more assets.
- **Length of time of spousal maintenance award:** As for the reasons given above, we collated this information to examine the financial impact of these awards when given. This once again is of particular interest to those closer to retirement.

4.14. In selecting the appropriate cases to be analysed (condensing down the initial high numbers of cases identified to those that yielded enough meaningful data to be included in our ultimate sample) and then extracting information on the above variables involved extensive close analysis of the judgments. Judgments tended to be lengthy, often traversing complicated family and property arrangements. When decisions of lower courts (including the Family Court) were available on the Briefcase database,⁹³ these too were read, in order to ascertain whether they contained further detail concerning any of the variables above.

4.15. During the above process, we found that the desired data were not consistently available or presented across the cases. The fact that judgments deal with only the issue at hand meant that the amount of background information not strictly relevant to the dispute (but useful for research purposes) varied significantly, essentially according to the practice and predilections of the individual judge. This was particularly noticeable, for example, in the data available as to the age, qualifications and income per annum of the parties.

⁹³ That is, when they were linked to as part of the cases earlier 'litigation history' in that database. Tracking down every single earlier Family Court decision, while possible, would have involved significantly more work for, likely, little gain.

- 4.16. There were comparable issues as to the value of the relationship property. Often out-dated valuations, say for the family home, were mentioned by giving a ‘ballpark’ figure, but the final award was expressed in terms such as “half of the value of the family home”, providing only an unreliable figure (which is why percentages have been preferred in the analysis). Detailed values only tended to be provided for relationship property that was in dispute, though it could be clear that other relationship property, of unknown value, existed alongside agreements for its apportionment.
- 4.17. The same problem arose in relation to separate property. It could be clear from the judgment that some of the relationship’s total asset pool had been categorised as separate property, but with no value, or a dated, unreliable one, being given for it – usually because it was irrelevant to the dispute at hand. Accordingly, while best endeavours have been made to provide figures which reflect the values explicitly discussed in the judgments, they ought not to be taken as iron-clad, particularly so in relation to issues of separate property versus relationship property (and the impact this may have on retirement savings according to gender). This is because it is unlikely that a judgment would ever need to set out a complete, comprehensive list of all a couple’s separate property, and its value.
- 4.18. A final point to emphasise is that the data considered – cases that have proceeded to court – may not be representative of the results in relationship property disputes that are simply settled out of court. We consider that we have gleaned sufficient and reliable enough data from the cases to support our conclusions, but it is important to understand the inherent limitations of this dataset.
- 4.19. **Phase three: Data entry and analysis**
- 4.20. For the maintenance cases we employed a qualitative methodology to analyse the data. Specifically, we extracted the general themes that emerged across the 23 cases analysed, and provide some case summaries to contextualise these themes. We chose a qualitative analysis rather than a quantitative analysis for

this sample of cases due to restrictions inherent in the data. Specifically, given the nature of maintenance proceedings, many of the variables listed above were not reported in the written judgments. This lack of reporting is a consequence of the short-term nature of maintenance awards. Factors such as age are often peripheral factors to the main issue at hand and, therefore, are rarely reported. Consequently, a quantitative analysis analysing the statistical impact of our variables of interest on maintenance awards was not possible.

- 4.21. For the division of relationship property cases, we had sufficient data to enable a quantitative statistical analysis of the impact of the variables listed above on the division of property to be conducted. For these cases, once the data was extracted from the judgments, it was then entered into a Statistical Programme called SPSS ('Statistical Package for the Social Sciences'). This statistical programme was developed in 1968 and is used by researchers across many disciplines. The SPSS programme is a robust statistical package, and is widely recognised and used throughout the world.
- 4.22. The data was manually entered from the summary data provided by phase two in the methodology. The spread sheet contained 43 fields in total (resulting in a total of 2,967 potential data points – 69 cases x 43 data fields). It is important to note however, in the end that some cases did not provide data on each variable (such as age of the parties) so our total number of data points was approximately half of this number. Furthermore, in order to run the analyses we had to create fields to categorise the data used in the analysis. Hence, the total number of variables of interest listed in the phase two of the methodology above and those we created in SPSS are not equal. Once the data was entered we ran analyses appropriate for the data, and these are detailed in the results section.
- 4.23. Below is the qualitative analysis on the maintenance cases, and in the next section we detail the quantitative analysis on the division of relationship property cases.

5. SPOUSAL MAINTENANCE RESULTS

5.1. In this section we first provide descriptive data about our sample. We then move on to describe some trends apparent in the dataset. Finally, we provide some case summaries to illustrate these trends.

5.2. Gender of partner seeking maintenance:

5.3. In all of the 23 cases (100 per cent) the female partner was the partner seeking a maintenance award.

5.4. Types of relationships:

- a) Marriages: 21 cases (91 per cent)
- b) De facto relationships: 2 cases (9 per cent)
- c) Civil Unions: 0 cases (0 per cent)

5.5. Number of maintenance awards made:

5.6. Interim and final maintenance awards were made or upheld in 21 of the 23 cases (91 per cent of cases analysed). Thus, the percentage of successful maintenance cases in this sample is high. However, as this is a small sample size the percentage of successful maintenance awards must be interpreted cautiously. Anecdotal evidence would suggest that generally maintenance awards are unlikely to be successful in 91 per cent of all cases where maintenance is applied for.

5.7. It is also important to note that maintenance is not as frequently applied for as divisions of relationship property are. This is illustrated by the significant difference between the total amount of relationship property cases considered (639) and the spousal maintenance cases (105) during the same period of time.

5.8. Amount of maintenance awarded:

5.9. The amount of maintenance awarded varied significantly between cases. Successful maintenance awards ranged from \$125.00 to \$2,312.50 per week. The average periodic maintenance award was \$557.52 per week.⁹⁴ In two cases the maintenance award included two different amounts to be paid for different circumstance specific periods.⁹⁵ In two cases lump sum maintenance awards were made instead of periodic payments.⁹⁶ In one case the Court did not specify the amount to be awarded but rather remitted it back to counsel to agree upon the claimant's reasonable needs.⁹⁷ In one case the maintenance award included child support.⁹⁸

5.10. **Duration of maintenance award:**

5.11. Likewise, the duration of maintenance awards varied significantly, ranging from three to 99 months. The most common duration for maintenance was six months, which was awarded in six of the 21 successful maintenance cases.⁹⁹ The average duration of maintenance was for a total of 24 months.¹⁰⁰ Three

⁹⁴ This average is based on the 15 cases where a periodic maintenance award was made. These cases were: *C v G* [2010] NZCA 128, [2010] NZFLR 497; *Hodson v Hodson* [2012] NZFLR 252; *B v B* HC Dunedin CIV-2011-412-328, 26 September 2011; *WRD v JHD* HC Hamilton CIV-2010-419-902, 5 November 2010; *PFJL v LL* HC Auckland CIV-2010-404-4356, 18 October 2010; *Eggers v Eggers* HC New Plymouth CIV-2008-443-8, 10 April 2008; *Lavas v Taliano* [2008] NZFLR 975; *Day v Weldon-Day* HC Hamilton CIV-2007-419-1291, 3 December 2007; *Wallace v Wallace* HC Auckland CIV-2006-404-7975, 1 June 2007; *S v C* [2007] NZFLR 472; *Monks v Monks* [2006] NZFLR 161; *Yagobie v Wilson* [2005] NZFLR 647; *Beran v Beran* [2005] NZFLR 204; *Phillips v Phillips* HC New Plymouth CIV-2004-443-33, 2 April 2004; and *Nolan v Doyle* HC Rotorua AP66A/01, 19 September 2002.

⁹⁵ These cases were: *RK v DK* [2011] NZFLR 468; and *Tsoi v Hua* [2006] NZFLR 560.

⁹⁶ These cases were: *G v G* HC Wellington AP319/02, 4 August 2003; and *B v B* HC Auckland CIV-2001-404-4028, 26 June 2003.

⁹⁷ *Rawlings v Rawlings* [2009] NZFLR 643.

⁹⁸ This case was: *V v V* HC Wellington CIV-2006-485-764, 8 December 2006.

⁹⁹ The cases where maintenance orders of six months in duration were awarded were all interim maintenance decisions. These cases were: *Hodson v Hodson* [2012] NZFLR 252; *WRD v JHD* HC Hamilton CIV-2010-419-902, 5 November 2010; *PFJL v LL* HC Auckland CIV-2010-404-4356, 18 October 2010; *Rawlings v Rawlings* [2009] NZFLR 643; *Lavas v Taliano* [2008] NZFLR 975; and *Tsoi v Hua* [2006] NZFLR 560. Interim maintenance is awarded under s 82 of the FPA and can only be awarded for up to six months. Interim maintenance is intended as a stopgap measure until the substantive maintenance application can be heard. A successful interim maintenance award does not guarantee a substantive maintenance order will be awarded.

¹⁰⁰ This average is based on the 16 cases where a maintenance award was made for a specified duration. These cases were: *C v G* [2010] NZCA 128, [2010] NZFLR 497; *Hodson v Hodson* [2012] NZFLR 252; *B v B* HC Dunedin CIV-2011-412-328, 26 September 2011; *WRD v JHD* HC Hamilton CIV-2010-419-902, 5 November 2010; *PFJL v LL* HC Auckland CIV-2010-

successful maintenance cases did not specify a temporal duration, as the duration was dependant on events such as rehearings and relationship property matters.¹⁰¹

5.12. Length of relationships:

5.13. The length of relationships involved in the successful maintenance cases analysed also varied greatly ranging from four year to 25 years. The average length of the relationships was just over 13 ½ years.¹⁰²

5.14. Spousal maintenance case studies:

5.15. A more contextual illustration of the evaluation of maintenance cases can be provided from the following three case studies.

5.16. Long-term relationship maintenance award case study:

5.17. *S v C*¹⁰³ illustrates a relatively typical long-term relationship maintenance award. In *S v C* the parties had been married for 17 years and had three children together. The parties had been “locked in litigation” about property

404-4356, 18 October 2010; *RK v DK* [2011] NZFLR 468; *Rawlings v Rawlings* [2009] NZFLR 643; *Eggers v Eggers* HC New Plymouth CIV-2008-443-8, 10 April 2008; *Lavas v Taliano* [2008] NZFLR 975; *V v V* HC Wellington CIV-2006-485-764, 8 December 2006; *S v C* [2007] NZFLR 472; *Tsoi v Hua* [2006] NZFLR 560; *Monks v Monks* [2006] NZFLR 161; *Yagobie v Wilson* [2005] NZFLR 647; *Beran v Beran* [2005] NZFLR 204; and *Nolan v Doyle* HC Rotorua AP66A/01, 19 September 2002.

¹⁰¹ These cases were: *Day v Weldon-Day* HC Hamilton CIV-2007-419-1291, 3 December 2007; *Wallace v Wallace* HC Auckland CIV-2006-404-7975, 1 June 2007; and *Phillips v Phillips* HC New Plymouth CIV-2004-443-33, 2 April 2004.

¹⁰² This average is based on the 20 successful maintenance cases where the length of the couples’ relationship was specified. These cases were: *C v G* [2010] NZCA 128, [2010] NZFLR 497; *Hodson v Hodson* [2012] NZFLR 252; *B v B* HC Dunedin CIV-2011-412-328, 26 September 2011; *WRD v JHD* HC Hamilton CIV-2010-419-902, 5 November 2010; *PFJL v LL* HC Auckland CIV-2010-404-4356, 18 October 2010; *RK v DK* [2011] NZFLR 468; *Rawlings v Rawlings* [2009] NZFLR 643; *Eggers v Eggers* HC New Plymouth CIV-2008-443-8, 10 April 2008; *Lavas v Taliano* [2008] NZFLR 975; *Wallace v Wallace* HC Auckland CIV-2006-404-7975, 1 June 2007; *V v V* HC Wellington CIV-2006-485-764, 8 December 2006; *S v C* [2007] NZFLR 472; *Tsoi v Hua* [2006] NZFLR 560; *Monks v Monks* [2006] NZFLR 161; *Yagobie v Wilson* [2005] NZFLR 647; *Beran v Beran* [2005] NZFLR 204; *Phillips v Phillips* HC New Plymouth CIV-2004-443-33, 2 April 2004; *G v G* HC Wellington AP319/02, 4 August 2003; *B v B* HC Auckland CIV-2001-404-4028, 26 June 2003, and *Nolan v Doyle* HC Rotorua AP66A/01, 19 September 2002.

¹⁰³ *S v C* [2007] NZFLR 472.

relationship and spousal maintenance for four years.¹⁰⁴ Mr C was an orthopedic surgeon while Mrs S (who trained as a teacher during their marriage) cared for their children.¹⁰⁵ Mr C currently earns over \$400,000 per year as an orthopedic surgeon.¹⁰⁶ Mrs S currently works part-time as a teacher and earns \$20,000 per annum.¹⁰⁷

5.18. The Family Court originally awarded Mrs S spousal maintenance of \$620 per week for a period of five years and then a further \$400 per week for a further five-year period.¹⁰⁸ Mr C appealed that decision to the High Court.

5.19. In the High Court Miller J held that Judge Ellis in the Family Court:¹⁰⁹

[O]mitted to apply the principle that [Mrs S] is obliged to take responsibility for meeting her own needs within a reasonable period of time, having regard to the division of functions within the marriage. The clean break principle is now somewhat attenuated but remains an important consideration in what remains a no-fault dissolution regime; to discount it is to risk compensating a spouse for loss of the marriage.

5.20. Miller J found that Mrs S could work full-time as a teacher and the maintenance she was awarded “ought to have been confined to a transitional period sufficient to allow her to find full-time work and adjust to independent living.”¹¹⁰ Thus, Miller J reduced Mrs S’s maintenance to \$620 per week for a period of five years, overturning the order of the lower Court for a further five year extension of \$400 per week.

5.21. **Short-term relationship maintenance award case study:**

¹⁰⁴ *S v C* [2007] NZFLR 472 at [1].

¹⁰⁵ *S v C* [2007] NZFLR 472 at [6].

¹⁰⁶ *S v C* [2007] NZFLR 472 at [37].

¹⁰⁷ *S v C* [2007] NZFLR 472 at [44].

¹⁰⁸ *S v C* [2007] NZFLR 472 at [42].

¹⁰⁹ *S v C* [2007] NZFLR 472 at [51].

¹¹⁰ *S v C* [2007] NZFLR 472 at [53].

- 5.22. It is not just long relationships that attract significant spousal maintenance awards. For example in *RK v DK*¹¹¹ the parties were together for less than four years,¹¹² however, Mrs RK was still awarded a large amount of spousal maintenance.
- 5.23. The parties were aged 59 and 45 respectively when they met.¹¹³ Mr DK was already established as a very successful businessman.¹¹⁴ Mrs RK previously worked as a sales manager earning \$85,000 per annum. However, she did not work after the parties got married (four months after they met).¹¹⁵
- 5.24. The parties lived a very luxurious lifestyle including significant amounts of first class overseas travel staying in five star hotels.¹¹⁶ During their marriage the parties also bought a luxury yacht which cost \$US2.6 million.¹¹⁷ Mrs RK had a clothing allowance of €20,000 per year,¹¹⁸ and a credit card spending limit of NZ\$10,000 per month.¹¹⁹
- 5.25. The Family Court awarded Mrs RK \$4,352 a month for four months which increased to \$6,952 a month for the following eight months.¹²⁰ Mrs RK appealed this decision claiming that this maintenance award was insufficient to meet her reasonable needs.
- 5.26. The High Court indeed increased Mrs RK's maintenance payments to \$6,650 a month for four months and then further to \$9,250 a month for the following eight months.¹²¹

¹¹¹ *RK v DK* [2011] NZFLR 468.

¹¹² *RK v DK* [2011] NZFLR 468 at [3].

¹¹³ *RK v DK* [2011] NZFLR 468 at [3].

¹¹⁴ *RK v DK* [2011] NZFLR 468 at [4].

¹¹⁵ *RK v DK* [2011] NZFLR 468 at [7].

¹¹⁶ *RK v DK* [2011] NZFLR 468 at [5].

¹¹⁷ *RK v DK* [2011] NZFLR 468 at [5].

¹¹⁸ This is approximately equivalent to NZ\$30,324 based on current 2012 currency rates.

¹¹⁹ *RK v DK* [2011] NZFLR 468 at [5].

¹²⁰ *RK v DK* [2011] NZFLR 468 at [1].

¹²¹ *RK v DK* [2011] NZFLR 468 at [59].

5.27. **Interim maintenance award case study:**¹²²

5.28. *Hodson v Hodson*¹²³ provides a case study of a straightforward case for interim maintenance. In *Hodson v Hodson* the parties had been in a relationship for 11 years,¹²⁴ and had two children together aged nine and seven.¹²⁵ They separated in August 2010.¹²⁶ Mr Hodson has the capacity to earn significantly more money than Mrs Hodson. Mr Hodson is a successful businessman with a minority interest in a number of companies, whereas Mrs Hodson (who has the day to day care of their two children) is on a domestic purposes benefit and has limited work experience skills.¹²⁷

5.29. During their marriage the parties had a “lavish” lifestyle.¹²⁸ However, since separation Mrs Hodson no longer enjoys her previously lavish lifestyle. She lives in rented accommodation and has had to borrow a car. Mrs Hodson’s “pared-back” living expenses are \$1,310 per week, however her total income (made up of the domestic purposes benefit, tax credits and part-time work) is just \$773 per week.¹²⁹ As Kós J states Mrs Hodson’s new budget “is the antithesis of a ‘lavish’ budget. It is chalk to the cheese of the lifestyle Mrs Hodson used to enjoy during the marriage.”¹³⁰

¹²² Seven of the 21 successful maintenance cases analysed concerned interim maintenance cases. These cases were: *Hodson v Hodson* [2012] NZFLR 252; *WRD v JHD* HC Hamilton CIV-2010-419-902, 5 November 2010; *PFJL v LL* HC Auckland CIV-2010-404-4356, 18 October 2010; *Rawlings v Rawlings* [2009] NZFLR 643; *Eggers v Eggers* HC New Plymouth CIV-2008-443-8, 10 April 2008; *Lavas v Taliano* [2008] NZFLR 975; and *Tsoi v Hua* [2006] NZFLR 560.

¹²³ *Hodson v Hodson* [2012] NZFLR 252.

¹²⁴ Mr and Mrs Hodson were married for nine years of the total 11 years they were together.

¹²⁵ *Hodson v Hodson* [2012] NZFLR 252, at [3].

¹²⁶ *Hodson v Hodson* [2012] NZFLR 252, at [1].

¹²⁷ *Hodson v Hodson* [2012] NZFLR 252, at [1].

¹²⁸ *Hodson v Hodson* [2012] NZFLR 252, at [3]. According to the judgment Mrs Hodson had an annual clothing budget of at least \$15,000 and spent \$4,000 on her hair and beauty needs. The parties jointly spent \$10,000 per annum on gym and health club members and \$20,000 on entertainment.

¹²⁹ *Hodson v Hodson* [2012] NZFLR 252, at [4] and [5].

¹³⁰ *Hodson v Hodson* [2012] NZFLR 252, at [5].

- 5.30. Mr Hodson claims he currently only draws \$400 per week from the business interests he runs and does not have a substantial income stream. However, as Kós J points out:¹³¹

[W]hereas Mrs Hodson has to borrow a car from her daughter, Mr Hodson has the use of a new \$137,000 Audi Q7 motor vehicle supplied by one of the family trust-owned companies. So to that extent at least, Mr Hodson's vantage point in [the] middle of road is somewhat better than Mrs Hodson's.

- 5.31. Regardless of Mr Hodson's actual income stream, he derives significant benefit from family trusts and companies owned by those trusts. For example one trust owns the house he lives in and another trust recently paid for the house to be renovated.¹³² Kós J found that Mr Hodson did not provide sufficient evidence to the Family Court that he was unable to pay interim maintenance to Mrs Hodson.¹³³

- 5.32. The High Court ultimately upheld the Family Court's award of interim maintenance to Mrs Hodson of \$770 per week for six months. In upholding the Family Court decision Kós J discussed the principles behind interim maintenance awards and states:¹³⁴

The purpose of this provision has been said by the Court of Appeal to be 'obvious enough'; that is, to protect the position of an applicant who may have inadequate means to meet current needs pending determination of the proceedings, so far as is reasonable in all the circumstances.

¹³¹ *Hodson v Hodson* [2012] NZFLR 252, at [6].

¹³² *Hodson v Hodson* [2012] NZFLR 252, at [55].

¹³³ *Hodson v Hodson* [2012] NZFLR 252, at [57].

¹³⁴ *Hodson v Hodson* [2012] NZFLR 252, at [24].

- 5.33. In dismissing Mr Hodson’s appeal Kós J paid particular attention to the lifestyle Mr and Mrs Hodson enjoyed during their marriage and states:¹³⁵

Close reference should be made to the lifestyles the parties enjoyed during their marriage. As Judge Callinicos noted, the reasonable needs of the applicant are not to be so diminished as to create a ‘sudden and traumatic end to that lifestyle, regardless of what the respondent might wish’. It also seems logical, in assessing what is reasonable, to consider and compare the *continuing* lifestyle of the respondent. If he is living in comparative luxury, it hardly lies in his mouth to say that the applicant should cut her cloth more closely than he is prepared to do.

5.34. **Spousal Maintenance Results Summary**

- 5.35. In summary, our examination of maintenance cases revealed that the individual circumstances of each case had a significant impact on the amount of maintenance awarded and the duration of the maintenance orders.
- 5.36. Where parties enjoyed a high standard of living while in a relationship, higher maintenance awards are likely upon the breakdown of that relationship. This is not surprising given the FPA’s focus on the reasonable needs of the individual applying for maintenance, which involves the Court making an individualised assessment of factors. These factors include the effects of the division of functions within the relationship in question, the likely earning capacity of each party, the parties’ respective child care responsibilities, and other relevant circumstances.
- 5.37. Successful interim maintenance cases made up one third of the maintenance case sample, which tends to suggest that interim maintenance orders are frequently awarded.

¹³⁵ *Hodson v Hodson* [2012] NZFLR 252, at [28].

5.38. The most significant finding when considering women's retirement income is that in every case in our sample it was the female ex-partner seeking maintenance from the male ex-partner. A total of 91 per cent of those women were successful. This means that a substantial number of women are unable to meet their own reasonable needs upon the breakdown of their relationships. This inability to meet one's own reasonable needs could ultimately (depending on the age and circumstances of the individual woman) negatively affect her income upon retirement.

6. RELATIONSHIP PROPERTY RESULTS

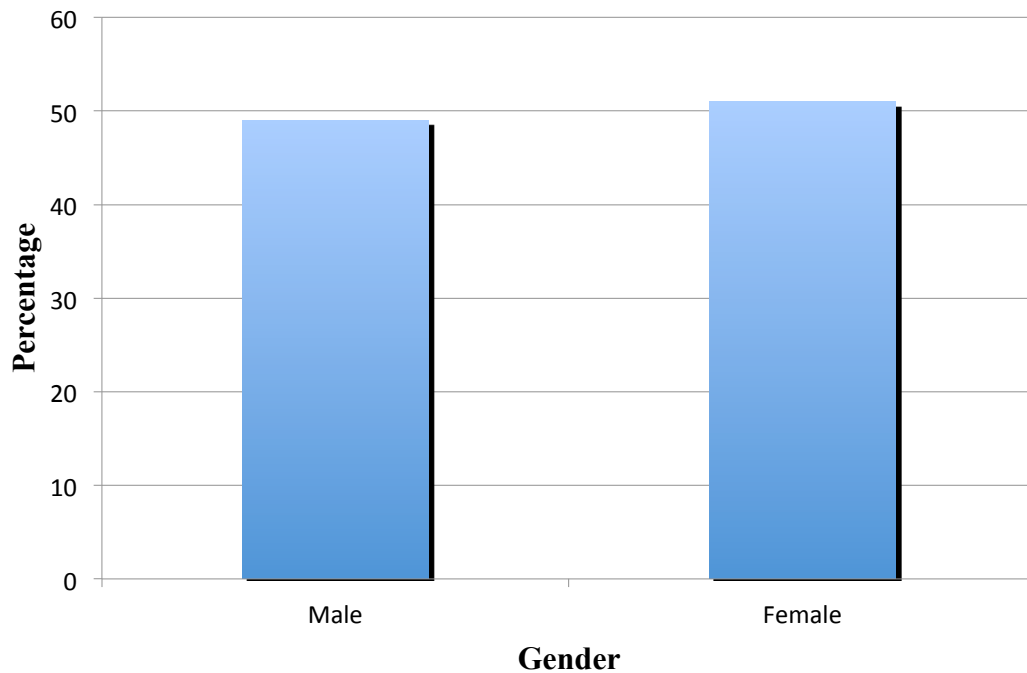
- 6.1. The analysis of the data collated on division of relationship property according to gender is presented below. First, an analysis of the overall division of property is outlined. The results of the correlation between ultimate percentage awarded and each of the relevant variables¹³⁶ is then presented and discussed.
- 6.2. **Amount of relationship property awarded in relation to gender – Court by court**
- 6.3. The following charts illustrate the percentage of relationship property awarded overall and broken down by each of the three Courts we analysed.¹³⁷ We also provide data in figures 5 and 6 of the percentage of property awarded as a function of whether the relationship was of short duration or long duration. As division of property for short duration relationships (less than three years) are, broadly speaking, based on contributions¹³⁸ and long relationships (greater than three years) are based on the presumption of equal sharing, differences between these groups may occur. Interpretations of these data with references to the substantive details of the cases considered are also provided where relevant.

Figure 1: Overall percentage of relationship property awarded by gender (69 cases)

¹³⁶ These are fewer in number than all the variables for which information was gleaned from the cases. Those discussed below are: who filed; the parties age; the length of the relationship; the type of the relationship; whether there were children of the relationship; any incapacity of either party; who legally ‘owns’ the assets; the existence of a trust; each party’s income; each party’s qualifications; any s 21 agreements; any s 15 awards; and costs awards.

¹³⁷ The data on the total dollar amount awarded to each party was collated as part of this project. However, there was a significant amount of variability in these data according to each couple’s financial circumstances. As such, in this section we present the percentage awarded to each party, as it is a more meaningful and stable measure.

¹³⁸ For de facto short term relationships the situation is slightly different – see above at [3.23] and PRA, s 14A.

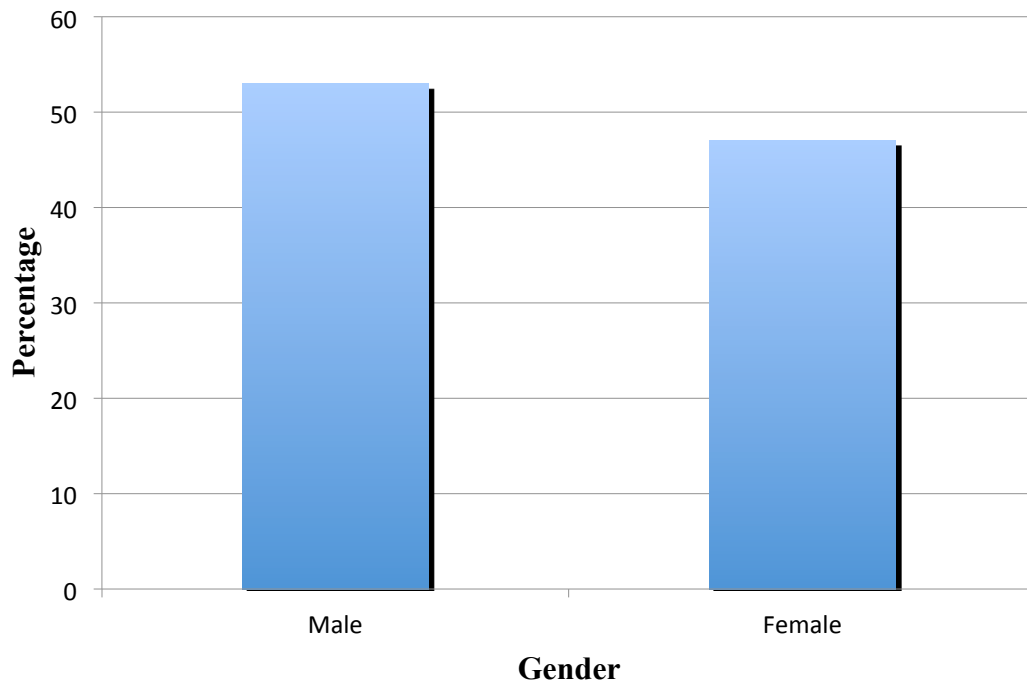


- 6.4. The above figure reveals that across our whole sample a very slight difference was observed in the percentage of relationship property awarded, with females obtaining 51 per cent of the relationship property and males obtaining 49 per cent. A paired samples *t*-test reveals no significant difference in the percentage awarded according to gender, $t(68) = -.76$, *ns*.¹³⁹ This result reflects the fact that the PRA appears to be delivering on its purpose to divide relationship property evenly between partners. In this sample 47 of the 69 decisions awarded an exact 50/50 split to the couples. In the remaining cases, the variability was due to factors such as awards for economic disparity (s 15 awards) and contributions such as mortgage payments and house improvements after one partner left the house. A further nine cases in our sample were short duration relationships where the presumption of equal sharing does not apply (it is instead usually contributions based) so an even split is not expected in these cases.

¹³⁹

A paired sample *t*-test is a commonly used statistical measure to assess whether there is a significant difference between two groups of data. In order for the difference between the two groups to be deemed a statistically significant difference, a *p*-value must be .05 or below (that is, the probability of “noise” or an error is less than 5 per cent). Where a result is not significant, we have written ‘ns’ after the *t*-value reported.

Figure 2: Percentage of relationship property awarded in Supreme Court cases (2 cases)



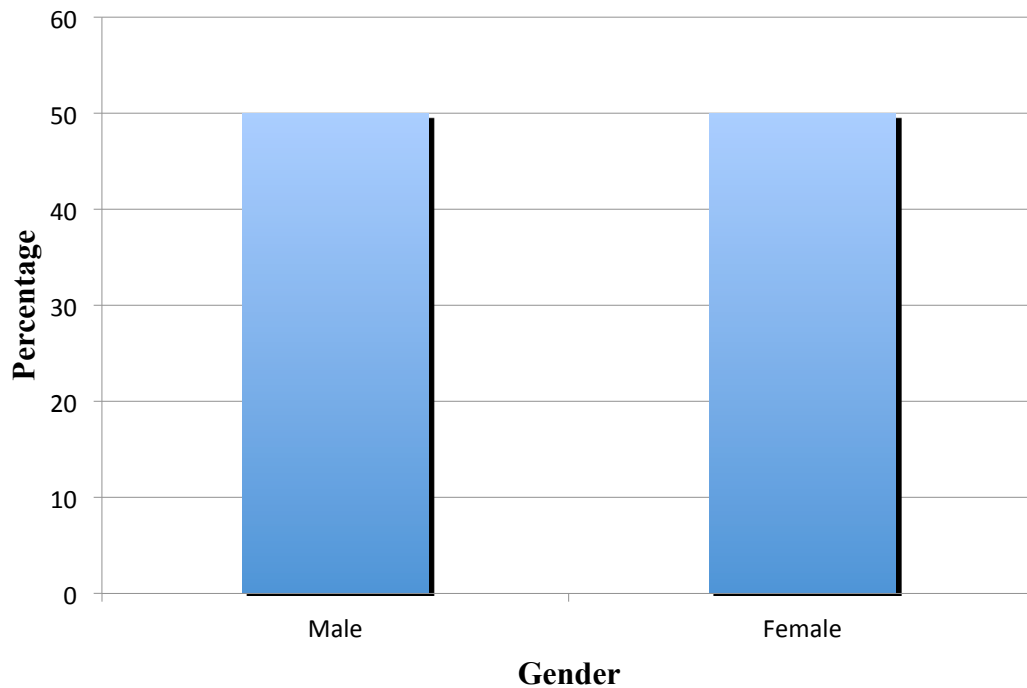
- 6.5. The above figure shows that in the two Supreme Court cases analysed, women obtained a slightly smaller overall share of relationship property on average (47 per cent), with men obtaining an average of 53 per cent. A paired samples *t*-test revealed no significant difference in the percentage awarded according to gender, $t(1) = 1.0$, *ns*. The slight difference observed in the above figure is a reflection that one of the cases deviated from the 50/50 presumption. While in the case of *Ward v Ward*¹⁴⁰ the court divided the property equally, in *Rose v Rose*¹⁴¹ the woman was awarded a slightly lower percentage of the increase in the value of shares owned by her ex-husband prior to marriage. The shares were deemed to be separate property, however, under s 9A of the Act, there is provision for the *increase* in value to be considered relationship property and divided based on the parties' contributions. In that case the woman's contributions (including domestic work) only entitled her to 40 per cent,

¹⁴⁰ *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

¹⁴¹ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

though the owner's contributions were considered to be greater by the Court, entitling him to 60 per cent of the increase.

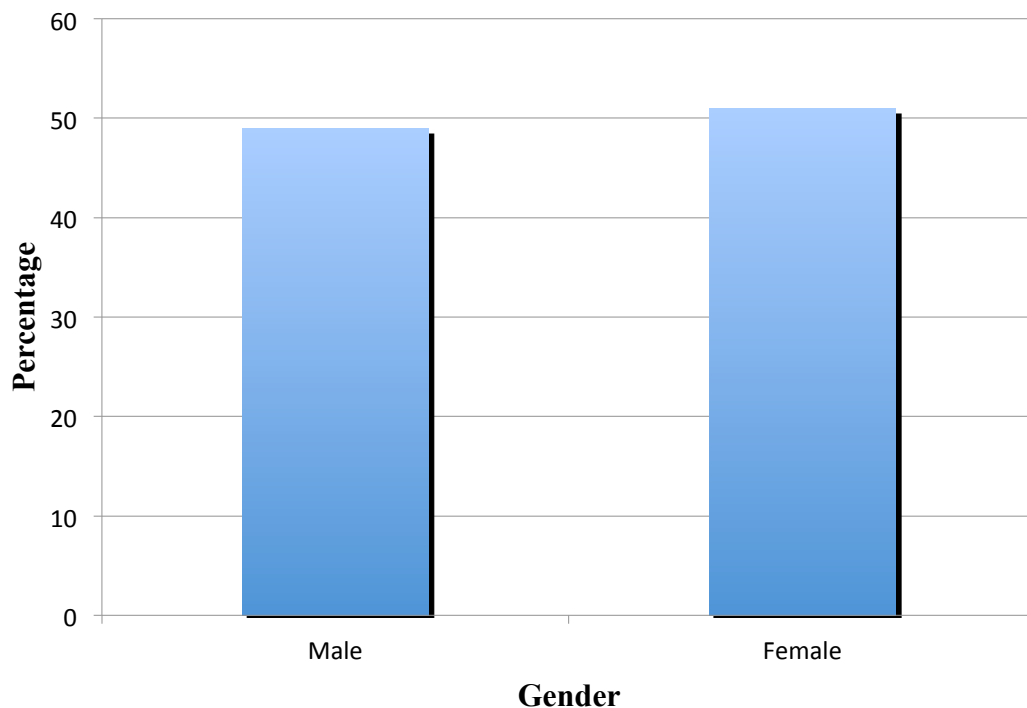
Figure 3: Percentage of relationship property awarded in Court of Appeal cases (9 cases)



6.6. As figure 3 reveals, the nine Court of Appeal cases we analysed overall revealed a 50/50 split of relationship property. The overall percentage of relationship property awarded tallies with what one might expect based on the PRA's policy preference towards equal sharing (with the averages being exactly 50 per cent for each gender; as such a paired samples *t*-test was not conducted). The above results are not surprising, as eight of these cases were long duration relationships where the division is based on the presumption of equal sharing. An analysis of these nine cases revealed that adjustments away from equal sharing for s 15 reasons were modest relative to the total relationship property.¹⁴²

¹⁴² See *X v X* [2010] NZCA 239 (about three per cent of relationship property) and *M v B* [2006] 3 NZLR 660 (CA) (about nine per cent). See also the discussion of s 15 in practice above, from [3.41].

Figure 4: Percentage of relationship property awarded in High Court cases (58 cases)



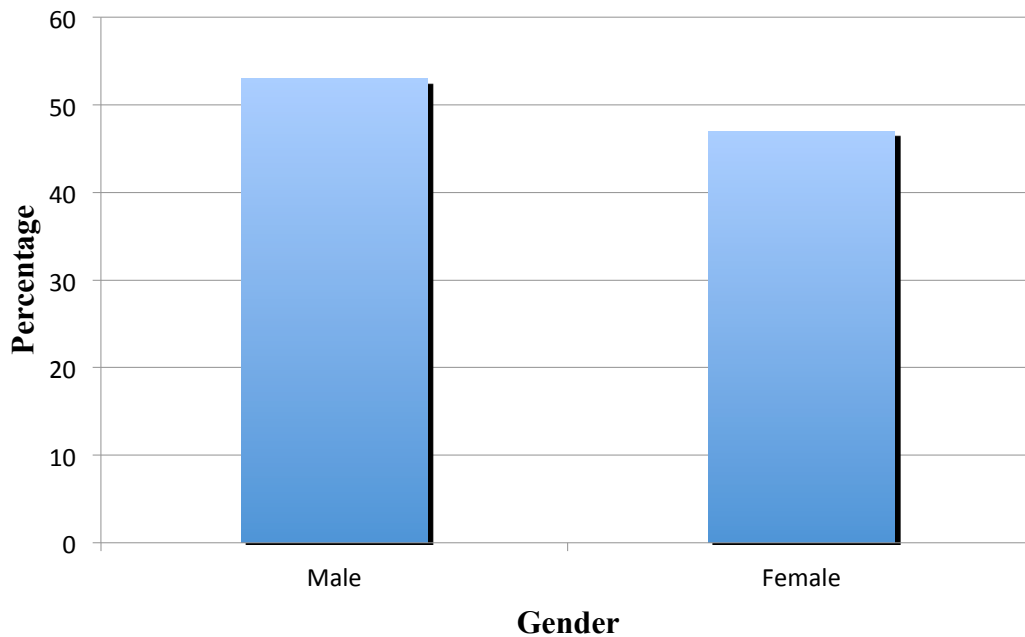
6.7. Figure 4 reveals, once again, a fairly even overall distribution of relationship property according to gender. Males on average received 49 per cent and females received 51 per cent. A paired samples *t*-test revealed no significant differences between the percentage awarded according to gender across the sample, $t(57) = -.85$, *ns*. Again, the averages displayed above are very close to the 50/50 division that one might expect (43 of the 58 cases, 74 per cent, were divided equally), and disparate awards (15 of the 58 cases) were due to relationships being of short duration¹⁴³ (hence divided according to the parties' contributions); and in one case there was significant economic disparity coupled with an effort to materially diminish the pool of property available for distribution.¹⁴⁴ As a consequence, in that case, the High Court awarded the

¹⁴³ *Lynskey v Donovan* HC Blenheim CIV-2006-406-293, 2 November 2010; *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 15 December 2008; *C v L* HC Auckland CIV-2007-404-588, 9 April 2008; and *Lawson v Perkins* [2008] NZFLR 401 (HC).

¹⁴⁴ *Freeman v Abrie* HC Tauranga CIV-2007-470-1048, 8 July 2009.

female 75 per cent of the available relationship property to redress some of the imbalance.

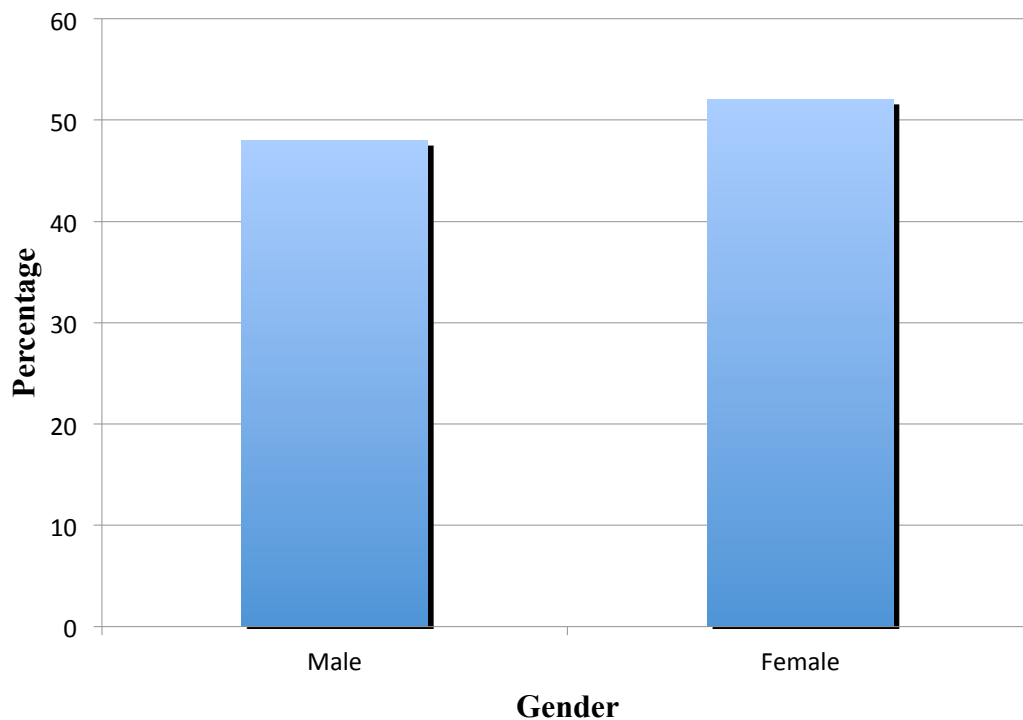
Figure 5: Percentage of relationship property awarded in short duration relationships of less than three years (9 cases)



- 6.8. The above figure reveals a small overall difference in the mean percentage that was awarded in short duration relationships. Men received an average of 53 per cent, whereas women received an average of 47 per cent. A slight difference was not unexpected as awards for relationships less than three years are not based on the presumption of equal sharing. For example in *Lynsky v Donovan*¹⁴⁵ the male owned the homestead and other substantial assets before the commencement of his two year relationship. The court awarded the female 25 per cent of the assets due to her contribution during the relationship (working on the vineyard and improvements to the house). A paired samples t-test, however, revealed no significant difference in the overall percentage of relationship property awarded according to gender when relationship property is divided according to gender, $t(8) = .45, ns$.

¹⁴⁵ *Lynsky v Donovan* HC Blenheim CIV-2006-406-293, 2 November 2010.

Figure 6: Percentage of relationship property awarded in long duration relationships of more than three years (57 cases)



6.9. Finally, figure 6 reveals that when we analyse just the cases that attract the presumption of equal sharing, that males received a slightly smaller overall share of the property (48 per cent) and the females received an average of 52 per cent. A paired samples *t*-test revealed no significant difference between males and females, $t(56) = -1.60$, *ns*. The few cases where there were deviations from an equal 50/50 division (15 cases or 26 per cent of the cases) can be explained by factors such as contributions to assets after the breakdown of the relationship and 15 awards for economic disparity (see [6.6] above under figure 3).¹⁴⁶

6.10. Division of relationship property – Correlations with variables of interest

¹⁴⁶ While our overall sample was 69 cases, for three cases we were missing the data on relationship length so were unable to categorise them according to whether the equal sharing presumption applied. Consequently in the correlation analyses that follow later in this section, the total number of data points reported will add up to 66.

- 6.11. In this following section we present the results on the correlation between the variables outlined above and the percentage of relationship property each party was ultimately awarded. All correlations have been conducted using Pearson's correlation coefficient (r),¹⁴⁷ with a p -value of 0.05 or lower meaning there is significant correlation between the two variables. Where the correlation is not significant, we have reported a ' ns ' after the r -value. We have separated these analyses by gender so that we can assess whether the specific variable analysed has a different impact on relationship property awarded for males and females. We have also conducted separate analyses on short and long duration relationships separately as division in short relationships is usually based on contributions, and in long duration relationships there is a presumption of equal sharing. Consequently, differences may be observed according to the nature of the relationship (long or short duration). All analyses were run against the percentage of relationship property each party received rather than the dollar value received. As the total value of relationship property varied greatly between the cases (ranging from -\$115,474 to \$9,700,000), the percentage awarded is a more stable and meaningful variable to run these analyses on.
- 6.12. In total, 69 cases selected from the High Court (58), Court of Appeal (9) and Supreme Court (2) have been analysed. All the following analyses are collapsed across the Courts, as there were too few cases in the Court of Appeal and Supreme Courts to render separate analyses viable. Furthermore, in some judgments there was scant information available on some of the variables of interest. This was particularly the case with age of the parties, qualifications, and independent income earnings per annum. The lack of data on these variables is unfortunate, as these variables will impact greatly on individuals' future ability to save for retirement. Nonetheless, there was enough data available across the 69 cases to run correlations against the percentage of

¹⁴⁷ Pearson's Correlation Coefficient (r) is a commonly used statistical measure of the correlation (or relationship) between two variables. The r -value can range from -1.0 to 1.0. A negative correlation between two variables means that while one variable increases in value the other decreases in value (e.g. the faster you run the less time it will take you to finish a half marathon). Conversely, a positive correlation means that both variables increase in value together (e.g. the more hours spent playing the piano the better your performance).

relationship property awarded on the above variables, but these analyses need to be interpreted with caution given the small number and inconsistent reporting of these variables across the cases.

6.13. Section 21 agreements

6.14. The numbers of s 21 agreements are as follows:

- a) No = 61
- b) Yes = 7
- c) Unknown = 1

6.15. Our analyses revealed that there was no significant correlation on the existence of a s 21 agreement and the percentage males were awarded ($r = -.17$, *ns*). As well, there was no significant correlation on the existence of a s 21 agreement and the percentage females were awarded ($r = .17$, *ns*). When we analyse this variable as a function of long versus short duration relationships, no significant differences are observed in either short duration (males – $r = -.06$, *ns*; females – $r = -.06$, *ns*) or long duration relationships (males – $r = -.24$, *ns*; females – $r = .24$, *ns*).

6.16. This means that those who were in relationships where there was a s 21 agreement received the same percentage as those who were in relationships without such agreements. However, recall that s 21 agreements are a mechanism to contracting out of the provisions of the PRA. As such, only contested s 21 agreements go to court (and only a small number in our sample did), and it could well be that individuals, on the whole, are disadvantaged financially by these agreements.¹⁴⁸

6.17. Section 15 awards

6.18. The number of s 15 awards are as follows:

- a) No = 63

¹⁴⁸ See also the discussion above at [3.18].

- b) Yes = 5 (always to the female)¹⁴⁹
- c) Unknown = 1

6.19. The range of these awards was from \$15,000 to \$240,000, with the median amount awarded being \$30,000. There was no significant correlation on the existence of a s 15 award and the percentage males were awarded ($r = -.09$, *ns*). There was also no significant correlation on the existence of a s 15 award and the percentage females were awarded ($r = .09$, *ns*). While in the five cases where there were awards, these impacted on the percentage of relationship property each party received. Given s 15 awards are infrequent, when this data is analysed over the whole sample no discernable differences emerged. Given that s 15 awards are a mechanism to attempt to reduce economic disparity between the couples (for instance if one has foregone their career to raise the children), all the data available came from long duration relationships. An analysis, therefore, comparing the effect of a s 15 award by relationship duration was not conducted. Furthermore, a s 15 award in a short duration (generally contributions based) relationship would be unexpected.

6.20. Overall, those who received an award received the same overall percentage as those who were in relationships without awards. This, despite being drawn from a small sample, is consistent with the initial indications from the research on s 15 awards referred to earlier.¹⁵⁰

6.21. Relationship type

6.22. Total numbers in each classification of relationship type are:

- a) Marriage = 41
- b) De facto = 25
- c) Civil Union = 1
- d) Unknown = 2

¹⁴⁹ These cases were: *X v X* [2009] NZCA 399, [2010] 1 NZLR 601; *M v B* [2006] 3 NZLR 660 (CA); *Trotter v Trotter* [2008] NZFLR 286 (HC); *V v V* HC Wellington CIV-2006-485-764, 8 December 2006; and *Cunningham v Cunningham* HC Auckland CIV2003-404-2392, 28 November 2003.

¹⁵⁰ See above from [3.45].

6.23. When we analysed the percentage of relationship property that men were awarded with the type of relationship they were in, no significant correlation was observed ($r = .17$, *ns*). Similarly, there was no correlation on relationship type and the percentage females were awarded ($r = -.17$, *ns*).

6.24. In other words, the type of relationship a person was in did not impact on the percentage of relationship property that they were awarded. This result was anticipated and is consistent with the provisions of the PRA. The PRA contains provisions for all types of relationships - marriage, de facto or civil union, and tends to, particularly in long-term relationships, treat them equally.¹⁵¹ However, recall that equal sharing is not the presumption in short duration relationships. As division of property in short duration relationships is not based on the presumption of equal sharing, we identified these cases and ran separate analyses to assess whether there was any differences in the percentage of relationship property awarded and the type of relationship in question.

6.25. **Short duration relationships**

6.26. Total numbers in each classification of relationship type are:

- a) Marriage = 2
- b) De facto = 6
- c) Civil Union = 1

6.27. No correlations were observed between relationship type and percentage awarded for either the males ($r = -.17$, *ns*) or females ($r = .17$, *ns*). Again this finding is consistent with the provisions of the PRA. Distribution of relationship property for short duration relationships is usually contributions-based, not based on the presumption of equal sharing, regardless of whether the individuals were married, de facto or in a civil union.

6.28. **Long duration relationships**

¹⁵¹ See above from [3.21] and [3.23].

- 6.29. Total numbers in each classification of relationship type are:
- a) Marriage = 37
 - b) De facto = 19
 - c) Unknown = 1
- 6.30. Finally, we ran an analysis on the data for long duration relationships. In contrast to the above findings, correlations were observed between the percentage of relationship property awarded and relationship type for males ($r = .29, p < .05$) and females ($r = -.29, p < .05$). While at first glance this result may seem peculiar given the presumption in the PRA of equal sharing regardless of (long term) relationship type, a closer analysis revealed the underlying cause.
- 6.31. Specifically, women who were married received 53.7 per cent of the relationship property as opposed to males who received 46.3 per cent. In contrast, women in de facto relationships received an average of 48.3 per cent and males received 51.3 per cent. The fact that, overall, women who were married received a greater percentage of relationship property than those in de facto relationships is likely due to compensatory awards available under s 15. Recall that if one party has been disadvantaged, for example foregoing a career to raise children, the courts have the discretion to order a payment from, or transfer of, relationship property. In our data set, all five of the s 15 awards were made to those who had been married. One of the factors the Court will take into account is the length of time the woman was away for work, and the ensuing impact it had on her career. In our married sample, the bulk (83.8 per cent) had been married for 10 years or more, with 32 per cent married for 20 years and over (range: three to 35 years). In contrast, the length of the relationship for those in de facto relationships was considerably shorter with the majority (68.4 per cent) lasting 10 years or less, and only one case (5.3 per cent) lasting for 20 years or more (range: three to 25 years).
- 6.32. **Existence of a trust dispute**

- 6.33. The breakdown of cases as to whether there was a dispute over trust assets or income discussed in the judgment was:
- a) Trust dispute = 9
 - b) No trust dispute = 60
- 6.34. No significant correlation on the existence of a trust and the percentage males were awarded was observed ($r = -.112, ns$). Similarly, there was no significant correlation on the existence of a trust and the percentage females were awarded ($r = .112, ns$).
- 6.35. The fact that a trust existed, then, did not impact on the percentage of relationship property awarded. These results are likely to be explained by the complicated character of relationship property issues and awards when trusts are involved,¹⁵² and the small number of cases. What was more interesting, for the purposes of the research question, was the gender of the party who initiated the dispute over the trust. This would be, we would expect, the party aggrieved by the impact of the trust. Of the nine (all male/female) disputes, eight were initiated by the woman.¹⁵³ This suggests that in these situations, women are much more likely than men to feel disadvantaged by the operation of trusts. We also noted substantial disparities between the value of total assets (including the trust value) and what the Court decided was relationship property and able to be divided.¹⁵⁴
- 6.36. *Short duration/long duration relationships*

¹⁵² See above at [3.30]-[3.39].

¹⁵³ The ninth case, *Cooper v Cooper* HC Nelson CIV-2007-442-241, 13 July 2007, dealt with a situation where the Family Court decided to exercise its discretion under s 182 of the FPA (removing the family home from a trust), which was later opposed by the woman on the grounds that the parties had together embarked on a programme of estate/financial planning, and should be held to it.

¹⁵⁴ See *Rabson v Gallagher* [2011] NZCA 459; *R v R* [2010] NZFLR 82 (HC); and *Nation v Nation* [2005] 3 NZLR 46 (though compensation under s 44C was considered to be available there, though to be determined by the Family Court); *R v R* [2010] NZFLR 82. Cases unsuccessfully invoking s 44C were *P v B* [2009] NZFLR 773; and *Genc v Genc* [2006] NZFLR 1119.

6.37. As all the cases considering trust disputes involved relationships of long duration, there was no need to run any further analyses. The results above ought to be read in this light.

6.38. **Length of relationship**¹⁵⁵

6.39. We have data from 66 cases. The range was from five months to 35 years, with the median length of a relationship being 11 years. Naturally, the length of short duration relationships was much shorter than long duration relationships. Short duration relationships had a median of two years and a range of five months to two years, eight months. Long duration relationships had a median of 12 years, and a range of three to 35 years.

6.40. There was no significant relationship between the overall length of a relationship and the percentage males were awarded, ($r = .03$, *ns*) Similarly, no relation between the length of a relationship and the percentage females were awarded ($r = .03$) was observed. Accordingly, for example, a married couple of five years received, overall, the same percentage of relationship property each as a couple married for 10 years did. There were, however, some trends apparent from the data. Specifically, as mentioned earlier, s 15 awards for disparity were only awarded to women in long duration relationships. Given the small number of s 15 awards, however, when analysed across the whole sample, the length of the relationship did not impact significantly on the overall percentage of property awarded to each party.

6.41. For short duration relationships (nine cases), a similar result was observed. No significant correlation between the length of the relationship and percentage of relationship property awarded was found for either the males ($p = .17$, *ns*) or females ($p = -.17$, *ns*). Likewise for long duration relationships (57 cases),

¹⁵⁵ We collected information on the date of separation in order to ascertain the length of the relationship. As such, even though this variable is listed as one of the variables of interest in the methodology, we have not run separate analyses on it per se.

relationship length was unrelated to the overall percentage of relationship property that parties were awarded (males: $r = .07$, *ns*; females: $r = -.07$, *ns*).¹⁵⁶

6.42. **Who filed the legal action**

6.43. Which party filed the legal action:

- a) Male = 27
- b) Female = 35
- c) Unknown = 7

6.44. No significant relationship was observed between who filed the legal action and the percentage of relationship property that males ($r = -.08$, *ns*) and females ($r = .08$, *ns*) were awarded. That is, males' and females' overall percentages of relationship property awarded was unrelated to whether they themselves filed or their ex-partner did. This finding is consistent with the law in this area. Judges are required to decide cases on their merits according to guiding legal principles rather than other peripheral factors.

6.45. *Long duration relationships*

6.46. Which party filed the legal action:

- a) Male = 22
- b) Female = 30
- c) Unknown = 5

6.47. When we analysed long relationship data only, consistent with the above finding, no significant correlations were observed between which party filed and the percentage of relationship property awarded for either gender (males - $r = .03$, *ns*; females - $r = -.03$, *ns*).

¹⁵⁶ For example, *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 15 December 2008; *K v K* HC Nelson CIV-2005-442-310, 22 August 2006; and *IAK v SAG* [2011] NZCA 514 (where the female received the greater share); and *Lynskey v Donovan* HC Blenheim CIV-2006-406-293, 2 November 2010; *C v L* HC Auckland CIV-2007-404-588, 9 April 2008; *H v O* HC Auckland CIV-2008-404-1891, 9 June 2008; and *Lawson v Perkins* [2008] NZFLR 401 (HC) (where the male received the greater share).

6.48. *Short duration relationships*

6.49. Which party filed the legal action:

- a) Male = 4
- b) Female = 4
- c) Unknown = 1

6.50. When we analysed the data from short duration relationships, unsurprisingly no correlation was observed for either gender on the percentage of relationship property awarded and which party (male or female) filed the action (male – $r = -.39$, *ns*; female – $r = .39$, *ns*).

6.51. **Date of proceedings**

6.52. In all 69 cases we were able to ascertain the date of the hearing. Our date range extends from 26 February 2003 to 4 November 2011. The number of cases in our sample according to the year they were decided in is as follows:

- 2003 = 3 cases
- 2004 = 5 cases
- 2005 = 6 cases
- 2006 = 10 cases
- 2007 = 8 cases
- 2008 = 10 cases
- 2009 = 13 cases
- 2010 = 8 cases
- 2011 = 6 cases

6.53. When we analyse this variable as a function of the percentage of relationship property awarded, no significant correlation was observed for the percentage males were awarded ($r = -.06$, *ns*). Nor was there any significant correlation between date of the hearing and the percentage females were awarded ($r = .06$, *ns*). The same finding was observed when we analysed this variable according to whether the relationship was classified according to duration. Specifically, for relationships of short duration, date of hearing did not impact on the

percentage of relationships property males ($r = .19, ns$) or females ($r = -.19, ns$) received. For relationships of long duration, the correlation between date of proceedings and percentage of relationship property males ($r = -.17, ns$) and females ($r = .17, ns$) were awarded was not significant.

- 6.54. That is, date of hearing was unrelated to the percentage of relationship property that males and females received irrespective of whether they were in a short or long duration relationship. This finding is expected, and shows that Judges in New Zealand have been applying the principles in the PRA in an even and consistent way across gender since 2002.

6.55. Children of the relationship

- 6.56. Number of cases where there was children of the relationship:

- a) Children of the relationship = 31
- b) No children of the relationship = 37
- c) Unknown = 1

- 6.57. There was no significant correlation on whether there were children and the percentage males were awarded ($r = -.07, ns$). Nor was there any significant correlation on whether there were children and the percentage females were awarded ($r = .07, ns$).

- 6.58. Age of children at hearing time

- a) Under 18 years = 16
- b) Over 18 years = 10
- c) Unknown = 5

- 6.59. We next analysed whether the age of the children at the time of the hearing impacted upon the percentage of relationship property awarded to each party. No correlation was found between the age of the child (under 18 verses over 18) and the percentage of relationship property awarded for each gender (male – $r = .08, ns$; female – $r = -.08, ns$).

6.60. *Long duration relationships*

6.61. Number of cases where there was children of the relationship:

- a) Children of the relationship = 31
- b) No children of the relationship = 37

6.62. Consistent with the above analyses, when we separated out the long duration relationships no correlation was observed between whether or not there were any children and the overall percentage of relationship property awarded according to gender (males – $r = .04$, *ns*; females – $r = -.04$, *ns*).

6.63. *Short Duration Relationships*

6.64. Number of cases where there was children of the relationship:

- a) Children of the relationship = 1
- b) No children of the relationship = 8

6.65. Finally, we analysed whether there was any correlation between whether or not there were children of the relationship; and the percentage of relationship property males and females received for short duration relationships. Consistent with the above analyses, no correlation between these two variables was observed (males – $r = -.31$, *ns*; females – $r = .31$, *ns*).

6.66. While there is provision in the PRA under s 32 for child support arrangements to be considered when dividing relationship property, anecdotal evidence suggests this provision is rarely used. This section was not employed in any of the cases we analysed.

6.67. The existence of children of the relationship had no impact on the percentage of relationship property awarded by gender. This may be because, although one of the overarching purposes of the PRA is to ensure a just division of relationship property taking into account children's interests, this will often be achieved through 50/50 sharing. Furthermore, there are other regimes (such as

the child support scheme) available for orders to be made in relation to supporting children.

6.68. **Further variables**

6.69. For the following variables (age of the parties, qualifications of the parties, income of the parties, and costs awards) the data was not easily obtainable from the reported cases. There was, however, a enough data to run analyses, but given the small sample sizes the following analyses must be interpreted cautiously.

6.70. **Age of the male:** Data were only available for this variable in 10 of the 69 cases. The median age was 56 years, and the range 48 to 85 years.

6.71. There was no significant correlation on the age of the male and the percentage males were awarded, ($r = .01$, *ns*). As well, there was no significant correlation on the age of the male and the percentage females were awarded ($r = -.01$, *ns*). We were unable to run separate analyses on short versus long duration relationships as all the data that was available came from long duration relationships. However, based on the PRA, we do not anticipate that there would be any correlation between age and percentage awarded as a function of whether the relationship was of short or long duration.

6.72. So, women received the same percentage regardless of the age of their ex-partner, and younger and older males were just as likely to receive the same percentage as younger males. Once more, this is consistent with the provisions of the PRA, which does not discriminate in the division of relationship property exercise based on age.

6.73. **Age of the female:** Data was available from only nine cases of 71 total cases. The median age was 49 years, the range 39 to 71 years.

6.74. No significant correlation on the age of the female and the percentage males were awarded was observed ($r = -.12$, *ns*). There was also no significant

correlation on the age of the female and the percentage females were awarded ($r = .12$, ns).

- 6.75. Similar to the position detailed in the analyses on whether the age of the male was related to percentage of the relationship property awarded by gender, and likely for the same reason, men received the same percentage no matter the age of their ex-partner. Older women were also just as likely to receive the same percentage as younger women.
- 6.76. **Incapacity:** In the cases we analysed, there were no indications of severe incapacity (e.g. disability preventing a party from working) observed. Consequently, no analyses could be conducted on this variable.
- 6.77. **Income of males:** Data was available for 10 cases only. The range was from \$38,000 to \$1.3 million. The median was \$89,500.
- 6.78. There was no significant correlation on the income of males and the percentage males were awarded ($r = -.08$, ns). There was also no significant correlation on the income of males and the percentage females were awarded ($r = .08$, ns). As all the data that was available came from long duration relationships, analysis on whether the male's income impacted upon the overall percentage of relationship property awarded could not be conducted.
- 6.79. Accordingly, women with higher earning ex-partners received the same percentage as women with lower earning ex-partners. Higher income earning men also received the same percentage as lower earning men. This result is consistent with the PRA's presumption in favour of equal sharing. This result also appears to be consistent with the research on s 15 awards demonstrating their general lack of impact as a mechanism to reduce the economic disparity between couples' earning potential at the end of a relationship.
- 6.80. **Income of females:** Data were available for only 11 cases. The range is \$19,000 to \$150,000. The median is \$44,500.

- 6.81. No significant correlation on the income of females and the percentage males were awarded was found ($r = -.01$, *ns*). Similarly there was no significant correlation on the income of females and the percentage females were awarded, ($r = .01$, *ns*). As all the data available in the cases came from long duration relationships, an analysis on whether the percentage of relationship property differed as a function of relationship duration could not be conducted.
- 6.82. Similar to the position detailed immediately above, and likely for the same reason, males with higher earning ex-partners received the same percentage as those with lower earning ex-partners; and higher earning females received the same percentage as lower earning females.
- 6.83. **Qualification of males:** Data was only available from five cases. The qualifications were as follows:
- a) University Undergraduate = 2
 - b) Postgraduate = 3
- 6.84. There was no significant correlation on the qualifications of males and the percentage males were awarded ($r = -.51$, *ns*). Nor was there any significant correlation on the qualifications of males and the percentage females were awarded ($r = .51$, *ns*). As in the previous sections, all the available data came from long duration relationships. Consequently, we could not conduct analyses to assess whether the education level of males (and hence their potential earning power) impacted upon the percentage awarded by each party as a function of whether their relationship property was divided according to contributions or presumption of equal sharing. However, for the same reasons given in the section detailing the analyses on income level and percentage awarded, we suspect that there would not be a difference between these two groups.
- 6.85. That is, it appears that well-educated males received the same percentage as less educated males; and those with well-educated ex-partners received the same percentage as those with less educated ex-partners. However, given our very small sample size this conclusion must be interpreted cautiously.

- 6.86. **Qualifications of females:** Only three cases were available to analyse, and as such the following data should be treated in a preliminary manner. The qualifications were as follows:
- a) University Undergraduate = 2
 - b) Postgraduate = 1
- 6.87. There was no significant correlation on the qualifications of females and the percentage males were awarded ($r = .59$, *ns*). Nor was there a significant correlation on the qualifications of females and the percentage females were awarded ($r = -.59$, *ns*). As in the above section, we could not run analyses on whether the education level of the female impacted on percentage of property awarded as a function of whether the property was divided according to contribution or equal sharing.
- 6.88. So, well-educated females received the same percentage as less educated females; and those with well-educated ex-partners received the same percentage as those with less educated ex-partners. Furthermore, we did not have any data on those who did not have a tertiary qualification (likewise in the male sample). However, we anticipate given the ethos of the PRA and the concerns that s 15 awards for disparity are not used effectively, that there would be no significant difference between a tertiary educated and non-tertiary educated woman (or man) in the percentage of relationship property they were ultimately awarded.
- 6.89. **Costs awards:** There were only two costs awards to males (one for \$1,500, the other for \$6,325). There were eight costs awards to females:
- a) The range was \$6,000-\$40,000,
 - b) The median was \$11,000.
- 6.90. For the rest of the judgments the position as to costs is unknown or costs were left to lie where they fall. A correlation on the impact that costs awards to males (that is, they received money from the females) had on the percentage of relationship property awarded by gender could not be performed in SPSS on two data points.

- 6.91. For the data on costs awards to females no significant correlation on females receiving costs and the percentage males were awarded was observed ($r = -.83$, *ns*). Nor was there a significant correlation on females receiving costs and the percentage females were awarded ($r = .83$, *ns*).
- 6.92. Accordingly, those males who had to pay costs received the same overall percentage as those who did not have to pay costs. And females who received a cost award received the same overall percentage as those who did not receive costs. This is likely because the PRA's sections dealing with division of relationship property do not require off-setting based on costs awards, and costs awards serve a different purpose than division of relationship property.
- 6.93. **Total asset pool versus relationship property available for division:
Where gender inequality may lie**
- 6.94. Under the PRA, only property that is classified as relationship property is open to division between the parties. Consequently, assets that are deemed to be separate property (such as shares owned before a marriage, a family farm in trust) are not open to the ex-partner to make a claim on. In our sample we noticed many examples, at least 30 per cent of our sample, where the judge either commented on the existence (and sometimes value) of a party's separate property, or the status of specific property was in dispute before the court. In theory, one party may be disadvantaged by the operation of the PRA. Specifically, they may have fewer financial resources than they expected to draw upon at the end of the relationship and consequently retirement.
- 6.95. Due to difficulties with getting accurate figures for the values of the property mentioned in this manner, running quantitative analyses was considered inappropriate. Nonetheless, while extracting the data, it became clear that this feature of the PRA could have the effect of drastically diminishing the amount of relationship property available, relative to the total asset pool. For example, restricting ourselves to consideration of cases where there was only one major item (or group of items) in dispute or under consideration, which were held to be separate property. We identified 14 cases where there was sufficient data

available¹⁵⁷ to ascertain the percentage difference between the total asset pool and relationship property.

6.96. Of these cases, men were held to own the separate property in 12. The percentage difference between what was deemed relationship property compared to the total net worth of the individual ranged from 0.6 per cent to 77.6 per cent, with a median percentage difference of 51 per cent (that is, the median relationship property available for distribution reflected a mere 51 per cent of the total net worth). In the two cases where females were judged to have separate property, one was for a debt of \$10,000 (with no assets, only debt being divided under the PRA)¹⁵⁸ and the other was for \$9,298 (with the vast percentage, 98 per cent, of property deemed to be relationship property).¹⁵⁹ We emphasise that this reflects the cases we considered had sufficient data to present these results, rather than a representative sample.

6.97. **Impact of who ‘legally’ owns the assets, and to what amount**

6.98. These data were essentially collected in order to ensure we obtained accurate figures for separate property values. They were subject to similar collection difficulties and accordingly, we did not consider quantitative analyses appropriate. Overall, the data that were available suggested that males owned approximately 70 per cent of the total asset pool, and females 30 per cent – though see the limitations of these figures as discussed above.¹⁶⁰ This tends to support the proposition that there may be some gender inequality in the total asset pool as opposed to the relationship property available for division.

¹⁵⁷ It was very difficult in several cases to accurately measure the value of the relationship property and separate property. For example, a house price might be listed in the judgment but since it was not yet sold at the time this represented the best estimate as to the value. The data we used represent our best efforts to accurately measure these variables. This, data, however needs to be interpreted with some caution.

¹⁵⁸ *Tapuae v Mawson* HC Napier CIV-2009-441-464, 10 December 2009.

¹⁵⁹ *A v A* [2008] NZFLR 297 (HC).

¹⁶⁰ Round figures are used because data was difficult to gather on this variable from the cases. Often we had to infer ownership on the basis of what the court said in general about particular assets. Consequently, this section needs to be interpreted with caution. Generally see the discussion above from [4.14].

6.99. **Relationship property analysis summary:**

6.100. *Percentage of relationship property awarded by gender*

6.101. In summary, our analysis revealed that overall females received 51 per cent of the property deemed to be relationship property, and males received 49 per cent (figure 1). A statistical analysis revealed that there were no significant differences in the percentage of relationship property received according to gender. When we analysed the data separately according to the Court that heard the case, no significant differences according to gender emerged.

6.102. Further, and similarly, when we analysed this data as a function of whether the relationship was of short or long duration, no significant differences emerged. Taken together, this data suggests that the PRA is treating women and men equally, regardless of whether the relationship property is divided according to the presumption of equal sharing (relationships of three years and over) or based on contributions (relationships lasting less than three years).

6.103. *Do the Courts consider demographic factors such as age, qualifications and income level when dividing relationship property?*

6.104. While the above results show that men and women are treated evenly under the law, the question arises as to whether the courts take factors such as age and qualifications into account when dividing the relationship property. Given that we know there is pay inequality between men and women in New Zealand, a separated woman, in common with women generally, is consequently going to earn less overall than her male ex-partner during her working life. This inequality could be particularly problematic for a woman who separates later in her life and has been out of the workforce for many years.

6.105. To address this issue, s 15 awards can be ordered by the Court to compensate women who have supported their ex-partners in their careers and foregone their own - to raise the children for example. On separation, therefore, these

women are likely to command a lower earning potential than their ex-partners. Research, however, shows that s 15 awards are rarely given. While our sample is not a representative sample of all relationship property disputes, our findings mirror that found in the research. In our sample there were only five awards (seven per cent of cases), with a fairly low overall median award of \$30,000 (compared to the earning potential of the ex-partner and career sacrifices made during the relationship).

6.106. When we analysed the factors such as age, income level, and qualifications according to gender no significant correlations with percentage of relationship property awarded as a function of gender were observed. That is, older women received the same percentage as younger women, higher earning females received the same percentage as lower earning females, and having a tertiary level qualification did not increase or decrease the percentage of property females received. While our data on these variables was very scant and is not a representative sample, this is the result that would be expected given the concerns that s 15 is not redressing the inequality between parties adequately.

6.107. Taken together, while our data does reflect that relationship property is divided evenly, it does indicate that some women will be disadvantaged on separation in terms of their ability to save for retirement. This is particularly the case for women who separate later in life and have a low earning potential. Further research is clearly needed to establish the extent of this concern, and the mechanisms by which this can be legally redressed.

6.108. *Separate property versus relationship property – Inequality?*

6.109. Our analysis revealed that 28 per cent of the cases in our sample referred to and placed at least some value on assets that were deemed to be separate property and, therefore, not open for the other party to make a claim on. It is likely that a higher percentage of the situations that came before the court involved separate property, given its definition, but did not warrant judicial comment. Males owned the vast majority of the assets deemed to be separate property (90 per cent) which in some cases were significant amounts (more

than double the value deemed to be relationship property). While again, our sample does not represent all cases, it does again give rise to some concerns in relation to women's position upon retirement. Specifically, the legislation understandably works to protect individual property rights, especially when there was never any intention that property acquired prior to the relationship would be relationship property. If a woman believes, however, that the property is relationship property (as in some of these contested cases in our sample) she may make detrimental financial decisions in reliance on that. In turn, she may not be in the position she thought she would be on retirement. While it is beyond the scope of the present research to analyse this issue in any depth, this is an important avenue for future research to explore.

7. CONCLUSIONS AND FUTURE RECOMMENDATIONS

7.1. The overarching goal of the present research was to assist the “Raising Women’s Future Retirement Prospects” project being undertaken by the Commission, by investigating the legal framework governing the division of assets on separation. Recall that the specific question this project sought to address was:

- What are the financial arrangements that women are provided with or take away from relationship breakups and how do those arrangements impact either positively or negatively on the assets they accumulate for retirement income in comparison to the assets accumulated by men?

7.2. In order to answer this question, we conducted a review of a selected number of cases decided under the two main pieces of legislation governing this area. Specifically the Property (Relationships) Act 1976 (the “PRA”) (the legislation governing the division of assets on separation) and the Family Proceedings Act 1980 (the “FPA”) (the legislation governing maintenance awards). As discussed earlier in the report, there is a general presumption in the PRA of equal sharing of relationship property for relationships in excess of three years. For those of short duration, property is usually divided based on contributions to the relationship unless one of the exemptions applies (for example there are children of the relationship). In contrast, the FPA is a mechanism to provide short-term financial relief where it is deemed that one of the parties’ financial needs are not being met immediately following separation.

7.3. We identified specific variables of interest (such as the percentage of relationship property ultimately awarded, age of parties, length of the relationship) and collected data on these variables for 69 relationship property division cases; and 23 maintenance awards cases.

7.4. **Relationship property conclusions**

- 7.5. In our quantitative analysis on the selected division of relationship property cases, we found that, overall, women seem to be receiving the same percentage of relationship property as men do at the end of the relationship. This suggests that the equal sharing presumption in the PRA is operating effectively in practice. It also suggests that in cases of unequal sharing (where the presumption does not apply or has been rebutted), that, on the whole, unequal awards even themselves out between men and women.
- 7.6. We observed no correlations between the selected variables and the percentage of relationship property ultimately awarded to the parties. This is in keeping with the scheme of the PRA, under which the court makes decisions based on the legal criteria provided by the Act and excludes peripheral factors. The correlation observed between long duration relationships and the percentage awarded also appeared explicable based on s 15, and the fact that this was more likely to be met in the case of long duration relationships. Our results did, however, support the proposition that s 15 has not had a great practical effect, likely due to the reasons identified by practitioners, set out above.¹⁶¹
- 7.7. The fact that the PRA appears to be operating broadly as designed is not complete protection against women being disadvantaged by its operation as they enter retirement. It was clear from the cases considered that the PRA's exclusion of separate property from the equal sharing regime meant that one party to the relationship could be entitled to a much smaller amount of property under the PRA than they would have enjoyed the benefit of during the relationship. This is not to suggest that classification of property as 'separate' is unsound – the law should protect individual property rights when there has been no intention that they be relationship property. But the fact that women may be unaware of the effects of this regime (and thus not engage in estate planning or financial management accordingly), combined with the broader gender pay-gap identified earlier in the report,¹⁶² may contribute to the inequality women experience in retirement. The difficulties in establishing the

¹⁶¹ See Claire Green's PhD research into s 15 awards above at [3.45]-[3.48].

¹⁶² See above at [2.1]-[2.18].

length of a de facto relationship might also operate to disadvantage one gender in a similar manner,¹⁶³ though those questions are somewhat outside the scope of this report.

7.8. Unfortunately for the quantitative analysis, there was sparse availability of some of the more interesting variables in respect of the research question and the effect on retirement. The major ones here were age, income level and qualifications, all of which tended not to be mentioned in judgments. Obtaining this type of data in conjunction with relationship property distribution, through future research, would be worth pursuing.

7.9. **Spousal maintenance conclusions**

7.10. Our examination of the limited selected spousal maintenance cases available found a wide variety of different individual circumstances from which statistical patterns were hard to garner. The distinct circumstances of each case greatly affected both the amount of maintenance awarded and the duration of the maintenance orders. This is not surprising when one considers ss 64, 64A and 65 of the FPA which set out a long list of individualised factors the Court may take into account when deciding whether to award maintenance and to what quantum.

7.11. The individual nature of maintenance awards means that women who have been in relationships where each party takes on more traditional roles will find it easier to show they are unable to meet their reasonable needs than women who work fulltime in a successful career of their own. Long-term relationships were also more apt to attract substantial maintenance awards than shorter relationships. However, in some cases the length of the relationships were much less significant than the living standard the parties shared while in their relationship.

7.12. The single most significant finding was that in each of the 23 maintenance cases analysed it was the female ex-partner who sought maintenance from

¹⁶³ See above n 54.

their male ex-partner. Ultimately, 91 per cent of these women were successful in gaining interim or final spousal maintenance. This means that a substantial number of women are unable to meet their own needs upon the breakdown of their relationship. This inability to meet one's own reasonable needs has the potential to negatively affect women's income upon retirement.

- 7.13. Spousal maintenance awards may warrant further investigation to see whether substantial maintenance awards make a difference long term in helping women get back on their feet financially which may ultimately increase their income upon retirement.

7.14. **Future research recommendations**

- 7.15. Our results are too preliminary at this stage to advocate for concrete reform, especially of a legislative nature. However, it does seem that many separated women could indeed be disadvantaged upon retirement as compared with men despite the 50/50 relationship property sharing scheme under the PRA. Accordingly, this area warrants further detailed research, possibly with a view to making specific social policy and legal reform recommendations.

- 7.16. The kind of research envisaged would be a robust large-scale longitudinal examination of how separation affects the accumulation of assets for retirement income. It would involve structured interviews with separated couples of a variety of ages across the socio-economic spectrum to see what effects separation has on their future retirement income. These interviews would help overcome the lack of information about the effects of specific variables such as age, qualifications and employment income upon the division of relationship property and maintenance, which this report was unable to quantify.¹⁶⁴ One would need to try and grasp what is happening not just with relationship breakups that come before the court (as in this research report), but also the private and lawyer-negotiated division of relationship property and spousal maintenance agreements separated couples reach. The

¹⁶⁴

A census question about the connection between retirement income and separation may be both a practical and efficient way of gathering data on this issue.

research could also contain interviews with specialist legal practitioners and judges who work in this field.

- 7.17. As far as potential remedies are concerned, this research suggests that it is social reform, rather than legal reform, that is required. For all intents and purposes the PRA and the FPA are operating evenly and within their legal parameters. Relationship property is, by and large, being divided equally between men and women and parties who are unable to meet their reasonable needs after separation can seek spousal maintenance. Perceived inequality after the operation of the PRA and the FPA may actually in fact be due to wider societal causes such as the pay disparity between men and women and the traditionally greater effects of child bearing and rearing upon women. The current legislation may merely reflect or exacerbate existing inequalities between men and women, rather than creating them.
- 7.18. If this is the case then social reform as opposed to legal reform is the best way to redress this inequality. Possible ideas for helping separated women increase their retirement income include providing newly separated women with educational opportunities, budgetary assistance, retirement planning advice and subsidised childcare. Of course, the most effective remedy (for all women, not just separated women) would be a broad government policy aimed at reducing the pay disparity between men and women.
- 7.19. The one area where legal reform may be appropriate in the future (after further substantive research and consultation) involves s 15 of the PRA.¹⁶⁵ As this report has highlighted, relationship property is generally being divided equally under the PRA. Nevertheless, in many of the cases analysed men and women actually walked away from their relationships with vastly disparate amounts of capital.¹⁶⁶ Section 15 of the PRA has the potential to ease some of this disparity. However, s 15 awards are notoriously difficult to obtain, and even those who manage to succeed in obtaining one do not generally receive a substantial amount of money for their efforts. If s 15 awards were made

¹⁶⁵ See above at [3.40]-[3.48].

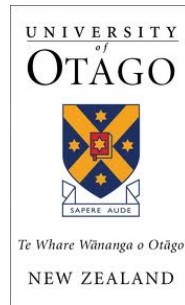
¹⁶⁶ This is not to say that New Zealand's separate property regime is invalid. See above at [7.7].

slightly easier to successfully obtain, or even if awards under s 15 became more generous some financial inequality may be balanced out. This may help women increase their retirement income and/or savings. However, legislative change would be much too premature at this stage. Such far-reaching changes should only be considered after an extensive research and consultation process.

- 7.20. Ultimately, as mentioned above, the financial effects of relationship breakdowns are likely to be just one part of the wider root causes of the economic disparity between men and women upon retirement. We need to ask not just what we can do to balance out this disparity for separated women, but for all New Zealand women.

APPENDICES

APPENDIX A: SCOPING DOCUMENT



30 January 2012

Dr Malcolm Menzies
Commission for Financial Literacy and Retirement Income Research Manager
PO Box 12-148
Wellington 6144

Via email: Malcolm.menzies@cflri.org.nz

Dear Dr Menzies,

Please find below the required scoping document.

COMMISSION FOR FINANCIAL LITERACY AND RETIREMENT INCOME RESEARCH: Scoping Document

Research Question:

“What are the financial arrangements that women are provided with or take away from relationship breakups and how do those arrangements impact either positively or negatively on the assets they accumulate for retirement income in comparison to the assets accumulated by men?”

Background:

In 2002 the law changed significantly with regard to spousal maintenance and relationship property:

1. Couples in de facto relationships that had broken down were entitled to claim for spousal maintenance and relationship property.
2. The entitlement of an equal sharing of relationship property upon separation was considerably strengthened to apply to all relationship property, not just the family home and chattels.
3. Provision was made for a compensatory award to one partner when there would be an economic disparity upon separation. This only applied where there was a significant difference in income and living standards between the parties. (This

provision has been applied conservatively by the Courts and will be the subject of a separate section in the final report).

Project Methodology:

The project will analyse all Supreme Court, Court of Appeal and High Court decisions on spousal maintenance and relationship property since 2002.

There are approximately 744 Supreme Court, Court of Appeal and High Court decisions available on spousal maintenance and relationship property on the New Zealand legal database “Briefcase” (**Note:** This database does not contain every single New Zealand court decision, but is easily searchable and contains the majority of relevant decisions. To collect every single relevant court decision is too sizeable a task for the scope of this project).

The 744 decisions can be broken down as follows:

Relationship Property Decisions

- 15 Supreme Court decisions
- 79 Court of Appeal decisions
- 545 High Court decisions (a number of these cases will be procedural and not directly relevant, but all cases will be scanned for relevant substantive material)

Spousal Maintenance

- 0 Supreme Court decisions
- 11 Court of Appeal decisions
- 94 High Court decisions

Supreme Court, Court of Appeal and High Court cases set the benchmark for the Family Court, thus the Family Court decisions should follow these cases.

The cases will be analysed under the following headings:

Background information

- Which partner was the applicant
- Date of separation
- Date of proceedings
- Age of parties
- Length of relationship
- Nature of relationship i.e. marriage, civil union or de facto
- Children of the relationship
- How many children
- Age of children
- Any incapacity of either party

Financial information

- Who legally ‘owns’ the assets
- The total asset pool
- Any “non-accessible” assets/income i.e. trust property
- Each parties’ income
- Each parties’ qualifications
- Each parties’ likely earning capacity if known
- Any s 21 agreements
- Any s 15 awards
- Percentage of relationship property each party ultimately got
- Costs awards

Maintenance

- Which party applied for spousal maintenance
- How much spousal maintenance applied for
- Any spousal maintenance
- Amount of spousal maintenance
- Length of time of spousal maintenance award

Once all the data has been gathered on each case (which is already well underway), we will enter the data through a computer analysis program. This will isolate the data under each heading so that we are able to see the patterns of property and income outcomes over a number of cases and a period of time.

We have already discovered that not all cases provide exactly the same amount data, with some cases providing more background about the income and property situations of both parties, and others providing less.

We believe there is sufficient information from the cases to be able to form a picture that will answer the research question asked.

Ideally if there was more funding and time available we would follow up our case analysis with an empirical analysis, but this has a major set up cost which is not able to be pursued for this study.

Proposed Outputs:

1. An analysis of the patterns of income and property distribution between men and women at the end of a relationship (whether married, civil union or de facto)
2. A separate analysis of whether or not the economic disparity provision is making a difference where there is a significant difference in income and living standards, even after the property has been divided 50/50

3. Analysis of whether section 21 contracting out agreements and the placement significant assets in trusts have an impact on the distribution of assets and finances at the end of relationships. This will be based on the case law to date.

Please do not hesitate to contact me if you need any further information.

Best wishes,

Professor Mark Henaghan

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Faculty of Law
University of Otago
P O Box 56 Dunedin
Phone: 03 479 8856

**APPENDIX B: RELEVANT PROVISIONS OF THE PROPERTY
(RELATIONSHIPS) ACT 1976**

1C What this Act is about

- (1) This Act is mainly about how the property of married couples and civil union couples and couples who have lived in a de facto relationship is to be divided up when they separate or one of them dies.
- (2) This Act applies differently depending on the length of the marriage between the husband and wife or the civil union between the civil union partners or the de facto relationship between the de facto partners:
 - (a) in the case of marriages and civil unions, special rules apply to marriages and civil unions of less than 3 years:
 - (b) in the case of de facto relationships, this Act usually applies only when the de facto partners have lived together for at least 3 years, but it may apply to shorter de facto relationships in certain circumstances.
- (3) In general, the couple's property is to be divided equally between the couple.

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 husband and wife 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.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

- (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
- (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

- (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:
- (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.

2A Meaning of marriage

- (1) In this Act, marriage includes a marriage that—
 - (a) is void; or
 - (b) is ended while both spouses are alive by a legal process that occurs within or outside New Zealand; or
 - (c) is ended by the death of one of the spouses, whether within or outside New Zealand;—
 and husband, spouse, and wife each has a corresponding meaning.
- (2) For the purposes of this Act, the marriage of a husband and wife ends if—
 - (a) they cease to live together as husband and wife; or
 - (b) their marriage is dissolved; or
 - (c) one of them dies.

2AB Meaning of civil union

- (1) In this Act, civil union includes a civil union that—
 - (a) is void; or
 - (b) is ended while both civil union partners are alive by a legal process that occurs within New Zealand; or
 - (c) is ended by the death of one of the civil union partners, whether within or outside New Zealand.
- (2) For the purposes of this Act, the civil union of 2 civil union partners ends if—
 - (a) they cease to live together as civil union partners; or
 - (b) their civil union is dissolved; or
 - (c) one of them dies.

2D Meaning of de facto relationship

- (1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—

- (a) who are both aged 18 years or older; and
 - (b) who live together as a couple; and
 - (c) who are not married to, or in a civil union with, one another.
- (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
- (a) the duration of the relationship:
 - (b) the nature and extent of common residence:
 - (c) whether or not a sexual relationship exists:
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
 - (e) the ownership, use, and acquisition of property:
 - (f) the degree of mutual commitment to a shared life:
 - (g) the care and support of children:
 - (h) the performance of household duties:
 - (i) the reputation and public aspects of the relationship.
- (3) In determining whether 2 persons live together as a couple,—
- (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
 - (b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (4) For the purposes of this Act, a de facto relationship ends if—
- (a) the de facto partners cease to live together as a couple; or
 - (b) one of the de facto partners dies.

2E Meaning of relationship of short duration

- (1) In this Act, relationship of short duration means,—
- (a) in relation to a marriage, a marriage in which the husband and wife have lived together as husband and wife—
 - (i) for a period of less than 3 years; or
 - (ii) for a period of 3 years or longer, if the court, having regard to all the circumstances of the marriage, considers it just to treat the marriage as a relationship of short duration:
 - (ab) in relation to a civil union, a civil union in which the civil union partners have lived together as civil union partners—

- (i) for a period of less than 3 years; or
 - (ii) for a period of 3 years or longer, if the court, having regard to all the circumstances of the civil union, considers it just to treat the civil union as a relationship of short duration:
- (b) in relation to a de facto relationship, a de facto relationship in which the de facto partners have lived together as de facto partners—
 - (i) for a period of less than 3 years; or
 - (ii) for a period of 3 years or longer, if the court, having regard to all the circumstances of the de facto relationship, considers it just to treat the de facto relationship as a relationship of short duration.
- (2) For the purposes of paragraphs (a)(i), (ab)(i), and (b)(i) of subsection (1), in computing the period for which the parties have lived together as husband and wife, civil union partners, or as de facto partners, the court may exclude a period of resumed cohabitation that has the motive of reconciliation and is no longer than 3 months.

8 Relationship property defined

- (1) Relationship property shall consist of—
 - (a) the family home whenever acquired; and
 - (b) the family chattels whenever acquired; and
 - (c) all property owned jointly or in common in equal shares by the husband and the wife or by the partners; and
 - (d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—
 - (i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and
 - (ii) the property was intended for the common use or common benefit of both spouses or partners; and
 - (e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and
 - (ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—
 - (i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or

- (ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and
 - (f) *[Repealed]*
 - (g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and
 - (h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and
 - (i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and
 - (j) all other property that is relationship property under an agreement made under Part 6; and
 - (k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and
 - (l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).
- (2) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 83.

9 Separate property defined

- (1) All property of either spouse or partner that is not relationship property is separate property.
- (2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.
- (3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.
- (4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:
 - (a) all property acquired by either spouse or partner while they are not living together as husband and wife or as civil union partners or as de facto partners:
 - (b) all property acquired, after the death of one spouse or partner, by the surviving spouse or partner, as provided in section 84.
- (5) Subject to subsection (6), all property acquired by either spouse or partner after an order of the court (other than an order made under

section 25(3)) has been made defining the respective interests of the spouses or partners in the relationship property, or dividing or providing for the division of that property, is separate property.

- (6) However, where relationship property has been divided on the bankruptcy of a spouse or partner,—
 - (a) the family home and any family chattels acquired after that division may be relationship property; and
 - (b) any other property acquired by either spouse or partner after the discharge of that spouse or partner from bankruptcy may be relationship property.

9A When separate property becomes relationship property

- (1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.
- (2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—
 - (a) the increase in value or (as the case requires) the income or gains are relationship property; but
 - (b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.
- (3) Any separate property, or any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property, is relationship property if that separate property or (as the case requires) those proceeds or the increase in value or the income or gains are used—
 - (a) with the express or implied consent of the spouse or partner that owns, receives, or is entitled to them; and
 - (b) for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either spouse or partner in, any property referred to in section 8(1).
- (4) Subsection (3) is subject to section 10.

10 Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift

- (1) Subsection (2) applies to the following property:
 - (a) property that a spouse or partner acquires from a third person—

- (i) by succession; or
 - (ii) by survivorship; or
 - (iii) by gift; or
 - (iv) because the spouse or partner is a beneficiary under a trust settled by a third person:
- (b) the proceeds of a disposition of property to which paragraph (a) applies:
- (c) property acquired out of property to which paragraph (a) applies.
- (2) Property to which this subsection applies is not relationship property unless, with the express or implied consent of the spouse or partner who received it, the property or the proceeds of any disposition of it have been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.
- (3) Property that one spouse or partner acquires by gift from the other spouse or partner is not relationship property unless the gift is used for the benefit of both spouses or partners.
- (4) Regardless of subsections (2) and (3) and section 9(4), both the family home and the family chattels are relationship property, unless designated separate property by an agreement made in accordance with Part 6.

Part 4

Division of relationship property

Division of relationship property: General

11 Division of relationship property

- (1) On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in—
 - (a) the family home; and
 - (b) the family chattels; and
 - (c) any other relationship property.
- (2) This section is subject to the other provisions of this Part.

11A Where family home sold

- (1) If the family home has been sold, each spouse or partner is entitled to share equally in the proceeds of the sale as if they were the family home, if the following conditions are satisfied:
 - (a) either spouse or partner or both of them have sold the family home with the intention of applying all or part of the proceeds

of the sale towards the acquisition of another home as a family home:

- (b) that home has not been acquired:
 - (c) at the date of the application to the court, not more than 2 years have elapsed since the date when those proceeds were received or became payable, whichever is the later.
- (2) This section is subject to sections 12 to 17A.

11B Compensation for absence of interest in family home

- (1) This section applies where—
- (a) section 11A does not apply; and
 - (b) either—
 - (i) there is no family home; or
 - (ii) the family home is not owned by one of the spouses or partners or both of them.
- (2) Where this section applies, the court must award each spouse or partner an equal share in such part of the relationship property as it thinks just in order to compensate for the absence of an interest in the family home.
- (3) This section is subject to sections 12 to 17A.

Homesteads

12 Homesteads

- (1) If the family home is a homestead that is owned by either spouse or partner or both of them, section 11(1)(a) does not apply.
- (2) Instead, each spouse or partner is entitled to share equally in a sum of money equal to the equity of either spouse or partner or both of them in the homestead.
- (3) If a spouse or partner does not have a beneficial interest in the land on which the homestead is situated, that spouse or partner is deemed to be beneficially interested in that land until his or her share of that sum is paid or otherwise satisfied.
- (4) This section is subject to sections 13 to 17A.

12A Valuation of homestead

For the purposes of section 12, a homestead's value is to be determined by ascertaining the capital value of the land on which the homestead is situated, and apportioning that value between the homestead and the remainder of that land.

Exception to equal sharing

13 Exception to equal sharing

- (1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.
- (2) This section is subject to sections 14 to 17A.

Relationships of short duration

14 Marriages of short duration

- (1) This section applies if a marriage is a relationship of short duration (as defined in section 2E).
- (2) If this section applies, sections 11(1)(a), 11(1)(b), 11A, 11B, and 12 do not apply—
 - (a) to any asset owned wholly or substantially by one spouse at the date on which the marriage began; or
 - (b) to any asset that has come to one spouse, after the date on which the marriage began,—
 - (i) by succession; or
 - (ii) by survivorship; or
 - (iii) as the beneficiary under a trust; or
 - (iv) by gift from a third person; or
 - (c) where the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse.
- (3) In every case to which subsection (2) applies,—
 - (a) the share of each spouse in the relationship property is to be determined in accordance with the contribution of each spouse to the marriage; and
 - (b) the share of each spouse in any other relationship property that falls for division under sections 11(1)(a), 11(1)(b), 11A, 11B, and 12, and is not determined in accordance with paragraph (a), is to be determined in accordance with sections 11(1)(a), 11(1)(b), 11A, 11B, and 12.
- (4) If this section applies, each spouse is entitled to share equally in any relationship property that falls for division under section 11(1)(c), unless his or her contribution to the marriage has been clearly greater than that of the other spouse.

- (5) If, under subsection (4), the spouses do not share equally in any relationship property, the share of each spouse in that relationship property is to be determined in accordance with the contribution of each spouse to the marriage.
- (6) This section is subject to sections 15 to 17A.
- (7) In proceedings commenced after the death of one of the spouses, this section is modified by section 85.

14AA Civil unions of short duration

- (1) This section applies if a civil union is a relationship of short duration (as defined in section 2E).
- (2) If this section applies, sections 11(1)(a), 11(1)(b), 11A, 11B, and 12 do not apply—
 - (a) to any asset owned wholly or substantially by one civil union partner at the date on which the civil union began; or
 - (b) to any asset that has come to one civil union partner, after the date on which the civil union began,—
 - (i) by succession; or
 - (ii) by survivorship; or
 - (iii) as the beneficiary under a trust; or
 - (iv) by gift from a third person; or
 - (c) where the contribution of one civil union partner to the civil union has clearly been disproportionately greater than the contribution of the other civil union partner.
- (3) In every case to which subsection (2) applies,—
 - (a) the share of each civil union partner in the relationship property is to be determined in accordance with the contribution of each civil union partner to the civil union; and
 - (b) the share of each civil union partner in any other relationship property that falls for division under sections 11(1)(a), 11(1)(b), 11A, 11B, and 12, and is not determined in accordance with paragraph (a), is to be determined in accordance with sections 11(1)(a), 11(1)(b), 11A, 11B, and 12.
- (4) If this section applies, each civil union partner is entitled to share equally in any relationship property that falls for division under section 11(1)(c), unless his or her contribution to the civil union has been clearly greater than that of the other civil union partner.
- (5) If, under subsection (4), the civil union partners do not share equally in any relationship property, the share of each civil union partner in that relationship property is to be determined in accordance with the contribution of each civil union partner to the civil union.
- (6) This section is subject to sections 15 to 17A.

- (7) In proceedings commenced after the death of one of the civil union partners, this section is modified by section 85.

14A De facto relationships of short duration

- (1) This section applies if a de facto relationship is a relationship of short duration (as defined in section 2E).
- (2) If this section applies, an order cannot be made under this Act for the division of relationship property unless—
- (a) the court is satisfied—
 - (i) that there is a child of the de facto relationship; or
 - (ii) that the applicant has made a substantial contribution to the de facto relationship; and
 - (b) the court is satisfied that failure to make the order would result in serious injustice.
- (3) If this section applies, and the court is satisfied that the grounds specified in subsection (2) for making an order on an application under this Act are made out, the share of each de facto partner in the relationship property is to be determined in accordance with the contribution of each de facto partner to the de facto relationship.
- (4) Nothing in this section prevents a court from making a declaration or an order under section 25(3), even though the de facto partners have lived in a de facto relationship for less than 3 years.
- (5) This section is subject to sections 15 to 17A.

Court may make orders to redress economic disparities

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.

15A Orders where spouse or partner has contributed to increase in value of separate property

- (1) This section applies if, on the division of relationship property, the court is satisfied—
 - (a) 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 spouses or partners were living together; and
 - (b) that any increase in the value of party B's separate property was attributable, wholly or in part, and whether directly or indirectly, to the actions of party B while the spouses or partners 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 for the increase in value of party B's separate property,—
 - (a) order party B to pay party A a sum of money, whether out of relationship property or separate property:
 - (b) order party B to transfer to party A any other property, whether the property is relationship property or separate property.
- (4) This section does not limit section 15, but overrides sections 11 to 14A.

Other provisions relating to division of relationship property

16 Adjustment when each spouse or partner owned home at date relationship began

- (1) This section applies if,—
 - (a) at the date the marriage, civil union, or de facto relationship began, each spouse or partner owned a home; and
 - (b) each of those homes was capable of becoming a family home; but
 - (c) at the time when the relationship property is to be divided, the home (or the proceeds of the sale of the home) of only one spouse or partner is included in the relationship property.
- (2) This section also applies if,—
 - (a) before the marriage, civil union, or de facto relationship began, each spouse or partner owned a home; and
 - (b) each of those homes was capable of becoming a family home; and
 - (c) one of the spouses or partners (party A) sold his or her home in contemplation of the marriage, civil union, or de facto relationship; and
 - (d) at the time when the relationship property is to be divided,—
 - (i) the home (or the proceeds of the sale of the home) of the other spouse or partner (party B) is included in the relationship property; but
 - (ii) the proceeds of the sale of party A's home are not included in the relationship property.
- (3) If this section applies, the court may adjust the shares of the spouses or partners in any of the relationship property (including the family home and the family chattels) according to what it considers just to compensate for the inclusion of the home of only one spouse or partner in the relationship property.
- (4) This section overrides sections 11 to 14A.

17 Sustenance of separate property

- (1) This section applies if the separate property of one spouse or partner (party A) has been sustained by—
 - (a) the application of relationship property; or
 - (b) the actions of the other spouse or partner (party B).
- (2) If this section applies, the court may—
 - (a) increase the share to which party B would otherwise be entitled in the relationship property; or
 - (b) order party A to pay party B a sum of money as compensation.
- (3) This section overrides sections 11 to 14A.

17A Diminution of separate property

- (1) If the separate property of one spouse or partner has been materially diminished in value by the deliberate action or inaction of the other spouse or partner, the court may, to such extent as it thinks just, diminish the share to which the other spouse or partner would otherwise be entitled in the relationship property.
- (2) 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.

18C Compensation for dissipation of relationship property after separation

- (1) In this section, relevant period has the same meaning as in section 18B.
- (2) If, during the relevant period, the relationship property has been materially diminished in value by the deliberate action or inaction of

one spouse or partner (party B), the court may, for the purposes of compensating the other spouse or partner (party A),—

- (a) order 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.

20D Calculation of net value of relationship property

The value of the relationship property that may be divided between the spouses or partners under this Act must be calculated by—

- (a) ascertaining the total value of the relationship property; and then
- (b) deducting from that total any secured or unsecured relationship debts owed by either or both spouses or partners.

21 Spouses or partners may contract out of this Act

- (1) A husband and wife, civil union partners, or de facto partners, or any 2 persons in contemplation of entering into a marriage, civil union, or de facto relationship, may, for the purpose of contracting out of the provisions of this Act, make any agreement they think fit with respect to the status, ownership, and division of their property (including future property).
- (2) An agreement made under this section may relate to the status, ownership, and division of property in either or both of the following circumstances:
 - (a) during the joint lives of the spouses or partners;
 - (b) when one of the spouses or partners dies.
- (3) This section is subject to section 47.

21D Subject matter of agreement

- (1) An agreement under section 21 or section 21A or section 21B may do all or any of the following:
 - (a) provide that any property, or any class of property, is to be relationship property or is to be separate property;
 - (b) define the share of the relationship property, or of any part of the relationship property, that each spouse or partner is to be entitled to when the marriage, civil union, or de facto relationship ends;
 - (c) define the share of the relationship property, or of any part of the relationship property, that the surviving spouse or partner

and the estate of the deceased spouse or partner is to be entitled to on the death of one of the spouses or partners:

- (d) provide for the calculation of those shares:
 - (e) prescribe the method by which the relationship property, or any part of the relationship property, is to be divided.
- (2) This section does not limit the generality of sections 21 to 21B.

21F Agreement void unless complies with certain requirements

- (1) Subject to section 21H, an agreement entered into under section 21 or section 21A or section 21B is void unless the requirements set out in subsections (2) to (5) are complied with.
- (2) The agreement must be in writing and signed by both parties.
- (3) Each party to the agreement must have independent legal advice before signing the agreement.
- (4) The signature of each party to the agreement must be witnessed by a lawyer.
- (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

25 When court may make orders

- (1) On an application under section 23, the court may—
 - (a) make any order it considers just—
 - (i) determining the respective shares of each spouse or partner in the relationship property or any part of that property; or
 - (ii) dividing the relationship property or any part of that property between the spouses or partners:
 - (b) make any other order that it is empowered to make by any provision of this Act.
- (2) The court may not make an order under subsection (1) unless it is satisfied,—
 - (a) in the case of a marriage or civil union,—
 - (i) that the husband and wife or civil union partners are living apart (whether or not they have continued to live in the same residence) or are separated; or
 - (ii) that the marriage or civil union has been dissolved; or
 - (b) in the case of a de facto relationship, that the de facto partners no longer have a de facto relationship with each other; or

- (c) that one spouse or partner is endangering the relationship property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings; or
 - (d) that either spouse or partner is an undischarged bankrupt.
- (3) Regardless of subsection (2), the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just.
 - (4) To avoid any doubt, but without limiting subsection (3), if proceedings under this Act are pending, the court, if it considers it appropriate in the circumstances, may make an interim order under that subsection for the sale of any relationship property, and may give any directions it thinks fit with respect to the proceeds.
 - (5) This section is subject to the other provisions of this Act.
 - (6) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 91.

32 Orders relating to maintenance and child support

- (1) In any proceedings, the court must have regard to—
 - (a) any order made under the Family Proceedings Act 1980 for the maintenance of a spouse or partner; and
 - (b) any child support payable by one spouse or partner, under a formula assessment under the Child Support Act 1991, for a child of the marriage, civil union, or de facto relationship; and
 - (c) any voluntary agreement, whether or not the agreement has been accepted under Part 3 of the Child Support Act 1991.
- (2) In any proceedings, the court, if it considers it just, may—
 - (a) make an order under the Family Proceedings Act 1980 for the maintenance of a spouse or partner:
 - (b) discharge, vary, extend, or suspend an order made under the Family Proceedings Act 1980 for the maintenance of a spouse or partner:
 - (c) make any order in relation to child support that may be made under section 106 or section 109 or section 112 of the Child Support Act 1991, as if an application had been made under section 104 or (as the case requires) section 108 or section 112 of that Act:
 - (d) cancel, vary, extend, or suspend a voluntary agreement.

44A Application of sections 44B and 44C

Sections 44B and 44C do not apply to a trust under a will or other testamentary disposition.

44B Court may require party to disclose information about dispositions of property to trust

- (1) In any proceedings for an order under section 25(1)(a), the court may make an order requiring a spouse or partner to disclose to the court such information as the court specifies relating to the disposition of relationship property by either or both spouses or partners to a trust since the marriage, the civil union, or the de facto relationship began.
- (2) The court may make an order under this section on the application of either party to the proceedings or on its own initiative.

44C Compensation for property disposed of to trust

- (1) This section applies if the court is satisfied—
 - (a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and
 - (b) that the disposition has the effect of defeating the claim or rights of one of the spouses or partners; and
 - (c) that the disposition is not one to which section 44 applies.
- (2) If this section applies, the court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:
 - (a) an order requiring one spouse or partner to pay to the other spouse or partner a sum of money, whether out of relationship property or separate property;
 - (b) an order requiring one spouse or partner to transfer to the other spouse or partner any property, whether the property is relationship property or separate property;
 - (c) an order requiring the trustees of the trust to pay to one spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid.
- (3) The court must not make an order under subsection (2)(c) if—
 - (a) an order under subsection (2)(a) or (b) would compensate the spouse or partner; or
 - (b) a third person has in good faith altered that person's position—
 - (i) in reliance on the ability of the trustees to distribute the income of the trust in terms of the instrument creating the trust; and
 - (ii) in such a way that it would be unjust to make the order.
- (4) The court may make 1 or more orders under subsection (2) if it considers it just to do so, having regard to—

- (a) the value of the relationship property disposed of to the trust:
 - (b) the value of the relationship property available for division:
 - (c) the date or dates on which relationship property was disposed of to the trust:
 - (d) whether the trust gave consideration for the property, and if so, the amount of the consideration:
 - (e) whether the spouses or partners, or either of them, or any child of the marriage, civil union, or de facto relationship, is or has been a beneficiary of the trust:
 - (f) any other relevant matter.
- (3) An order made under this Act in respect of relationship property is not sufficient by itself to support—
- (a) an application under section 99 of the Family Proceedings Act 1980 for the discharge, variation, extension, or suspension of an order for the maintenance of a spouse or partner; or
 - (b) an application for an order under Part 7 of the Child Support Act 1991; or
 - (c) the cancellation, variation, extension, or suspension of a voluntary agreement.

52 Minors may apply without guardian ad litem

Notwithstanding any enactment or rule of law, a minor who is or has been married or in a civil union may bring, institute, or defend proceedings under this Act without a guardian ad litem or next friend, and every judgment or order of the court under this Act shall be binding upon and may be enforced against such a minor as if he or she were of full age.

**APPENDIX C: RELEVANT PROVISIONS OF THE FAMILY
PROCEEDINGS ACT 1980**

63 Maintenance during marriage or civil union

- (1) During a marriage or civil union, each party is liable to maintain the other party to the extent that such maintenance is necessary to meet the reasonable needs of the other party, where the other party cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).
- (2) The circumstances referred to in subsection (1) are as follows:
 - (a) the ability of the parties to be or to become self-supporting, having regard to—
 - (i) the effects of the division of functions within the marriage or civil union while the parties are living together or lived together:
 - (ii) the likely earning capacity of each party:
 - (iii) any other relevant circumstances:
 - (b) the responsibilities of each party for the ongoing daily care of any minor or dependent children of the marriage or civil union after the parties ceased to live together:
 - (c) the standard of living of the parties while they are living together or lived together:
 - (d) any physical or mental disability:
 - (e) any inability of a party to obtain work that—
 - (i) it is reasonable in all the circumstances for that party to do; and
 - (ii) is adequate to provide for that party:
 - (f) the undertaking by a party of a reasonable period of education or training designed to increase that party's earning capacity or to reduce or eliminate that party's need for maintenance from the other party, where it would be unfair, in all the circumstances, for the reasonable needs of the party undertaking that education or training to be met immediately by that party—
 - (i) because of the effects of any of the matters set out in paragraphs (a)(i) and (b) on the potential earning capacity of that party; or
 - (ii) because that party has previously maintained or contributed to the maintenance of the other party during a period of education or training.
- (3) Except as provided in this section, neither party to a marriage or civil union is liable to maintain the other party during the marriage or civil

union.

64 Maintenance after marriage or civil union dissolved or de facto relationship ends

- (1) Subject to section 64A, after the dissolution of a marriage or civil union or, in the case of a de facto relationship, after the de facto partners cease to live together, each spouse, civil union partner, or de facto partner is liable to maintain the other spouse, civil union partner, or de facto partner to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, civil union partner, or de facto partner, where the other spouse, civil union partner, or de facto partner cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).
- (2) The circumstances referred to in subsection (1) are as follows:
 - (a) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—
 - (i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners lived together:
 - (ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:
 - (iii) any other relevant circumstances:
 - (b) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) the de facto partners ceased to live together:
 - (c) the standard of living of the spouses, civil union partners, or de facto partners while they lived together:
 - (d) the undertaking by a spouse, civil union partner, or de facto partner of a reasonable period of education or training designed to increase the earning capacity of that spouse, civil union partner, or de facto partner or to reduce or eliminate the need of that spouse, civil union partner, or de facto partner for maintenance from the other spouse, civil union partner, or de facto partner if it would be unfair, in all the circumstances, for the reasonable needs of the spouse, civil union partner, or de facto partner undertaking that education or training to be met immediately by that spouse, civil union partner, or de facto partner—
 - (i) because of the effects of any of the matters set out in

paragraphs (a)(i) and (b) on the potential earning capacity of that spouse, civil union partner, or de facto partner; or

- (ii) because that spouse, civil union partner, or de facto partner has previously maintained or contributed to the maintenance of the other spouse, civil union partner, or de facto partner during a period of education or training.

- (3) For the purposes of subsection (2)(a)(i), if the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship. (4) Except as provided in this section and section 64A,—

- (a) neither party to a marriage or civil union is liable to maintain the other party after the dissolution of the marriage or civil union;
- (b) neither party to a de facto relationship is liable to maintain the other de facto partner after the de facto partners cease to live together.

64A Spouses, civil union partners, or de facto partners must assume responsibility for own needs within reasonable time

- (1) If a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together,—
 - (a) each spouse, civil union partner, or de facto partner must assume responsibility, within a period of time that is reasonable in all the circumstances of the particular case, for meeting his or her own needs; and
 - (b) on the expiry of that period of time, neither spouse, civil union partner, or de facto partner is liable to maintain the other under section 64.
- (2) Regardless of subsection (1), if a marriage or civil union is dissolved or, in the case of a de facto relationship, the de facto partners cease to live together, one spouse, civil union partner, or de facto partner (**party A**) is liable to maintain the other spouse, civil union partner, or de facto partner (**party B**) under section 64, to the extent that such maintenance is necessary to meet the reasonable needs of party B if, having regard to the matters referred to in subsection (3),—
 - (a) it is unreasonable to require party B to do without maintenance from party A; and
 - (b) it is reasonable to require party A to provide maintenance to party B.
- (3) The matters referred to in subsection (2) are as follows:
 - (a) the ages of the spouses, civil union partners, or de facto

partners:

- (b) the duration of the marriage or civil union or de facto relationship:
- (c) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—
 - (i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners were living together:
 - (ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:
 - (iii) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) after the de facto partners ceased to live together:
 - (iv) any other relevant circumstances.
- (4) If the marriage or civil union was immediately preceded by a de facto relationship between the husband and wife,—
 - (a) for the purposes of subsection (3)(b), the de facto relationship must be treated as if it were part of the marriage or civil union; and
 - (b) for the purposes of subsection (3)(c)(i), the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.

65 Assessment of maintenance payable to spouse, civil union partner, or de facto partner

- (1) This section sets out the matters that a court must have regard to in determining the amount payable,—
 - (a) in the case of a marriage or civil union, by one spouse or civil union partner for the maintenance of the other spouse or civil union partner (whether during the marriage or civil union or after its dissolution):
 - (b) in the case of a de facto relationship, by one de facto partner for the maintenance of the other de facto partner after the de facto partners cease to live together.
- (2) The matters that the court must have regard to are as follows:
 - (a) the means of each spouse, civil union partner, or de facto partner, including—

- (i) potential earning capacity:
 - (ii) means derived from any division of property between the spouses or de facto partners under the Property (Relationships) Act 1976:
- (b) the reasonable needs of each spouse, civil union partner, or de facto partner:
- (c) the fact that the spouse, civil union partner, or de facto partner by whom maintenance is payable is supporting any other person:
- (d) the financial and other responsibilities of each spouse, civil union partner, or de facto partner:
- (e) any other circumstances that make one spouse, civil union partner, or de facto partner liable to maintain the other.
- (3) In considering the potential earning capacity of each spouse, civil union partner, or de facto partner under subsection (2)(a)(i), the court must have regard to the effects of the division of functions within the marriage or civil union or the de facto relationship while the spouses, civil union partners, or de facto partners were living together.
- (4) For the purposes of subsection (3), where the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.
- (5) In considering the reasonable needs of each spouse, civil union partner, or de facto partner under subsection (2)(b), the court may have regard to the standard of living of the spouses, civil union partners, or de facto partners while they were living together.

66 Relevance of conduct to maintenance of spouses, civil union partners, or de facto partners

- (1) The court may have regard to the matters set out in subsection (2) in considering,—
 - (a) in the case of a marriage or civil union, the liability of one spouse or civil union partner to maintain the other spouse or civil union partner, and the amount of the maintenance, whether during the marriage or civil union or after its dissolution:
 - (b) in the case of a de facto relationship, the liability of one de facto partner to maintain the other de facto partner, and the amount of the maintenance, after the de facto partners cease to live together.
- (2) The matters referred to in subsection (1) are as follows:

- (a) conduct of the spouse, civil union partner, or de facto partner seeking to be maintained that amounts to a device to prolong his or her inability to meet his or her reasonable needs:
- (b) misconduct of the spouse, civil union partner, or de facto partner seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other spouse, civil union partner, or de facto partner to pay maintenance.

82 Interim maintenance

- (1) Where an application for a maintenance order or for the variation, extension, suspension, or discharge of a maintenance order has been filed, any District Court Judge may make an order directing the respondent to pay such periodical sum as the District Court Judge thinks reasonable towards the future maintenance of the respondent's spouse, civil union partner, or de facto partner until the final determination of the proceedings or until the order sooner ceases to be in force.
- (2) *[Repealed]*
- (3) *[Repealed]*
- (4) No order made under this section shall continue in force for more than 6 months after the date on which it is made.
- (5) An order made under this section may be varied, suspended, discharged, or enforced in the same manner as if it were a final order of a Family Court.

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, a 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, a Family Court may 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.