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WHAT'S YOURS IS MINE: REFORM OF THE PROPERTY DIVISION REGIME FOR UNMARRIED COUPLES IN NEW ZEALAND

Virginia Grainer

Abstract: In February 2002, when the Property (Relationships) Act came into force, unmarried couples in New Zealand became subject to the same legislative regime for division of property that has applied to married couples since the 1970s. The statutory regime is based on a deferred community property principle. Both partners are free to deal with their own property during the relationship, but at the end of the relationship all property is classified as either relationship property or separate property. Relationship property usually includes all property acquired by either party during the relationship. There is a presumption that this property must be divided equally between the parties when the relationship comes to an end. Separate property, typically property owned prior to the relationship, generally remains with the original owner, though this property too must be shared with the other partner in certain circumstances. Previously, property of unmarried couples was divided upon separation according to the general rules of law and equity. While other jurisdictions apply a deferred property regime to married partners, New Zealand appears to be the first to apply the regime to unmarried couples to this extent. The requirement that couples who live together but have not undertaken the commitment of marriage must share their property 50/50 raises difficult issues of both law and policy. The most obvious legal issues relate to the determination as to whether, and from what point in time, an unmarried relationship is subject to this property regime. The most important policy issue is whether, when applied to unmarried couples, the deferred property regime leads to fairer results than the traditional treatment. These and other questions are addressed in this article.

I. INTRODUCTION

Demographic and social developments place stress on the law governing personal and family relationships. One of the major issues the law must contend with concerns the division of property in “de facto,” “unmarried,” “domestic,” “in the nature of marriage,” or “cohabitation” relationships. New Zealand has recently enacted legislation regulating property division within these relationships in a way that is unique among English-speaking jurisdictions. This legislation subjects de facto couples to the same property division regime as married couples. The regime applies on an “opt out” basis. If couples do not want to be subject to the regime specified by the legislation, they must sign an agreement to that effect. This Article reviews the significance for de facto couples of the principal features of the regime, its underlying principles and historical drivers, and likely problems in its implementation.

A. *Changing Social Climate*

An increasing number of unmarried people live openly together in domestic relationships. In New Zealand, census data reveals that the number of unmarried cohabitants increased 46.1% between 1991 and 1996.¹ This corresponds with two other demographic trends: a decrease in the marriage rate from 45.5% in 1971 to 15.6% in 2000 (this is the lowest marriage rate ever recorded in New Zealand)² and an increase in the divorce rate from 5.1% in 1971 to 12.3% in 2000.³

Divorce no longer has the same stigma as it did thirty years ago. Many of the people living together outside of marriage do so because they have recently separated from their spouse and are waiting for a divorce. Under the Family Proceedings Act 1980, a marriage cannot be dissolved until the parties have been living apart for a minimum of two years.⁴ Separated people cannot remarry until their existing marriage has been dissolved. Additionally, there are many divorced people who are free to remarry but choose not to do so.

As a result of the increasing number of people living together outside of marriage, more children are now living in unmarried households.⁵ Many countries, including New Zealand, have amended their law to ensure that the legitimacy of children is not dependent on whether their parents are married to each other.⁶ Another factor affecting the marriage rate is the increased presence of women in the workforce and the resulting financial independence they have enjoyed.⁷ Yet another significant change has been

¹ In the 1991 census, 161,856 people were living in de facto relationships. This figure increased to 236,397 at the 1996 census. STATISTICS NEW ZEALAND, *NEW ZEALAND NOW: WOMEN 40* (1998) [hereinafter *NEW ZEALAND NOW*].

² Statistics New Zealand, *Marriage and Divorces Year ended December 2000* tbl.1, <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/b45013b35df34b774c2567ed00092825/4c2567ef00247c6acc256a4c000076a8?OpenDocument> (May 14, 2001).

³ *Id.* at tbl.3.

⁴ Family Proceedings Act, 1980, No. 94, § 39(2) (N.Z.).

⁵ In Great Britain in 1960, 5% of live births were outside of marriage. By 1999, this figure was just over 33%. Of these, 75% of live birth registrations were by parents living at the same address. In 1971, only 2.8% of live births outside of marriage were registered by both parents. By 1997, this figure had risen to 80%. Family Law Committee of the Law Society (UK), *Cohabitation Proposals for Reform of the Law Family*, at http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=2615&Caller_ID=NS81 (last visited Feb. 28, 2002). In New Zealand, 42% of all live births in 1998 were registered outside of marriage. Statistics New Zealand, *Vital Statistics Year Ended March 1998*, http://www.stats.govt.nz/_4c2565af000bec19.nsf/173371ce38d7627b4c25680900046f25/5509f4bac8e2ec5c4c256609000a0830?OpenDocument&Highlight=0,ex-nuptial,birth (last visited Feb. 28, 2002).

⁶ Status of Children Act, 1969, No. 18 (N.Z.).

⁷ According to the 1986 census and the 1996 census, the number of women employed full-time in New Zealand has increased from 670,002 in 1986 to 808,107 in 1996. *NEW ZEALAND NOW*, *supra* note 1, at 83.

the increase in the number of people living openly in same sex relationships. In many jurisdictions consensual sexual activity between people of the same sex has been decriminalized,⁸ and discrimination on the basis of sexual orientation and marital status has been prohibited.⁹ In New Zealand, the Human Rights Act 1993¹⁰ and the 1993 amendments to the New Zealand Bill of Rights Act 1990¹¹ have been significant in this regard. In the United States, while sodomy laws are still on the books of many states, they are rarely enforced.¹²

B. Unmarried Couples—Legal Issues

Whether people are in a married or unmarried relationship, and whether the relationship is a heterosexual or same-sex one, affects their legal rights in a number of ways.¹³ The nature of the relationship can affect property rights, succession rights, access to various employment related privileges and welfare benefits, the legality of sexual activity within the relationship, the right to visit a partner in a hospital, and rights in relation to children (including rights to legitimacy, guardianship and custody of children, the ability to adopt children or to have access to artificial birth technologies).¹⁴ This Article will focus particularly on one aspect of

⁸ Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 67-68 (2000).

⁹ Michael Kirby, *Law and Sexuality: The Contrasting Case of Australia*, 12 STAN. L. & POL'Y REV. 103 (2001); see also Waaldijk, *supra* note 8.

¹⁰ Human Rights Act, 1993, No. 82 (N.Z.).

¹¹ New Zealand Bill of Rights Act, 1990, No. 109 (N.Z.).

¹² Five states have same-sex sodomy laws; twelve states have laws that target sodomy between opposite sexes. Nancy K. Ota, "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (Lgbt) Opening Remarks: *Queer Recount*, 64 ALB. L. REV. 889, 894 (2001).

¹³ For a discussion of the situation in relation to same sex couples in Australia, see Kirby, *supra* note 9.

¹⁴ For further discussion of the rights of unmarried couples, see Victoria K. Lin, *Embracing Minority Housing and Employment Rights in the New Millennium*, 31 MCGEORGE L. REV. 211 (2000); M.R. Carrillo-Heian, *Domestic Partnership in California: Is it a Step Toward Marriage?*, 31 MCGEORGE L. REV. 475 (2000); Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19 (2000); Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991 (2000); W. Brian Burnette, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving The Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81 (1998/1999); Onofrio Ferlisi, *Commentaire: Recognizing a Fundamental Change: A Comment on Walsh, the Charter, and the Definition of Spouse*, 18 CAN. J. FAM. L. 159 (2001); Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114 (2000); Reg Graycar & Jenni Millbank, *The Bride Wore Pink . . . To the Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales*, 17 CAN. J. FAM. L. 227 (2000); Caroline Forde, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371 (2000).

unmarried couples' rights—their rights to property at the end of their relationship.

C. *Developments in the United States—Heterosexual Couples*

The law in the United States of America first took a psychophrenic view of de facto relationships. On the one hand, there was the institution of common law marriage, which accorded the de facto partner all the rights of a legally married spouse. On the other hand, fornication statutes criminalized sex and cohabitation outside of marriage.¹⁵ These laws have largely disappeared. Though common law marriage was abandoned in England with the passing of Lord Hardwicke's Act in 1753,¹⁶ it was recognized widely throughout the United States until relatively recently. Now, however, only ten states and the District of Columbia give full recognition to common law marriage.¹⁷ The decision in *Marvin v. Marvin* initiated a common law development for dealing with property rights of couples in de facto relationships.¹⁸ While some states have followed this approach to the law, other states have taken a different approach. Texas and Minnesota, for example, have passed anti-palimony laws limiting the rights of people in de facto relationships to make property claims at the end of a de facto relationship.¹⁹

¹⁵ See, e.g., VA. CODE ANN. § 18.2-344 (2001) ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor."). The Idaho Code similarly provides:

Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication, and, upon conviction thereof, shall be punished by a fine of not more than \$300 or by imprisonment for not more than six months or by both such fine and imprisonment; provided, that the sentence imposed or any part thereof may be suspended with or without probation in the discretion of the court.

IDAHO CODE § 18-6603 (Michie 1997).

¹⁶ Lord Hardwicke's Marriage Act, 1753, 26 Geo. III, c.33 (Eng.).

¹⁷ Common law marriage is currently recognized in the following jurisdictions: Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas, and the District of Columbia. Cornell University Law School, *Marriage Laws of the Fifty States, District of Columbia, and Puerto Rico*, at http://www.law.cornell.edu/topics/Table_Marriage.htm (last visited Feb. 28, 2002).

¹⁸ *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

¹⁹ See TEX. FAM. CODE ANN. § 1.108 (2002); MINN. STAT. §§ 513.075-076 (2000). Minnesota's section 513.075 provides:

Cohabitation; property and financial agreements. If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of

D. Developments in the United States—Same Sex Couples

Legislative responses in the United States to the increasing visibility of same sex couples have also been varied. For example, following the Hawaii Supreme Court decision in *Baehr v. Lewin* it appeared that same-sex marriages would gain legal recognition.²⁰ The Court held that a statute denying legal recognition to same-sex marriage was unconstitutional on its face because it violated the equal protection clause of the Hawaii Constitution.²¹ On remand, the trial court likewise held that denial of same-sex marriage was unconstitutional.²² However, these decisions were quickly followed by a constitutional amendment that gave the legislature the power to reserve marriage for opposite-sex couples.²³ As a result of this amendment, denial of same-sex marriage was declared by the Hawaii Supreme Court not to violate the equal protection clause of the Hawaii Constitution.²⁴

With the possibility of same-sex marriages now ruled out in Hawaii, Vermont comes the closest to providing same-sex couples with rights similar to those of married couples. Vermont's Act Relating to Civil Unions, while not granting full legal recognition to same-sex marriages, does enable same-sex couples to enter civil unions and gain entitlement to the same benefits as married couples.²⁵ This statute was enacted following *Baker v. Vermont*,

wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if:

- (1) The contract is written and signed by the parties, and
- (2) Enforcement is sought after the termination of the relationship.

MINN. STAT. § 513.075.

Minnesota's section 513.076 provides:

Necessity of contract. Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock in this state.

MINN. STAT. § 513.076.

²⁰ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

²¹ *Id.* at 59.

²² *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *rev'd*, 994 P.2d 566 (Haw. 1999) (unpublished table decision).

²³ "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

²⁴ *Baehr v. Miike*, 994 P.2d 566 (1999).

²⁵ Act Relating to Civil Unions, VT. STAT. ANN. tit. 15 § 1204(a) (Lexis-Nexis Supp. 2001). See generally Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113 (2000); Greg Johnson, *Vermont Civil Unions:*

where the Supreme Court of Vermont held that denying benefits to same-sex couples violated the Vermont Constitution's Common Benefits Clause, and ordered the Vermont legislature to either adopt a domestic partnership statute or grant same-sex couple the right to marry.²⁶

The Vermont statute, however, is the exception rather than the rule in the United States. Some other states do have domestic partnership statutes that allow for the granting of limited rights to same-sex couples.²⁷ However, these statutes differ from Vermont's civil union statute in that the state registers, but does not sanction, the same-sex relationship.²⁸

These developments at the state level are not echoed at the federal level, where recognition of same-sex relationships is severely limited by the 1996 Federal Defense of Marriage Act.²⁹ This statute limits federal recognition of marriage to a union between one man and one woman.³⁰

E. *International Developments*

Some European countries, such as Germany and the Netherlands, have introduced laws to allow same-sex couples to marry and become subject to nearly all of the legal incidents of marriage, including marital property regimes.³¹ Other jurisdictions, such as Norway, Sweden, Iceland, and Denmark, allow same-sex and heterosexual unmarried couples to take on many of the legal incidents of marriage by registering their partnerships.³²

The New Language of Marriage, 25 VT. L. REV. 15 (2000); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075 (2001).

²⁶ Baker v. Vermont, 744 A.2d 864, 889 (Vt. 1999).

²⁷ See HAW. REV. STAT. § 572C (Lexis-Nexis Supp. 1999); S.F., CAL., ADMIN. CODE § 62 (1991).

²⁸ For further discussion, see Carrillo-Heian, *supra* note 14.

²⁹ Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (Supp. V 1999)).

³⁰ 1 U.S.C. § 7.

³¹ See, e.g., Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (Lebenspartnerschaftsgesetz) [Act on Registered Partnerships], v. 22.2.2001 (BGBl. I Nr. 9, S. 266) (Ger.), discussed in Federal Ministry of Justice, *Legislation on Same Sex Partnerships*, at <http://www.germanembassyottawa.org/cala/sasexpa.htm> (last visited Mar. 1, 2002); Wet van 21 december 2000 tot wijziging van Boek I van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk) [Same Sex Marriage Act], Stb. 2001, nr. 468 (Neth.) (discussed in Ministry of Justice, *Same Sex Marriages*, at http://www.minjust.nl:8080/a_beleid/fact/same-sexmarriages.htm (Apr. 2001)). For a general discussion, see Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053 (2000); Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371 (2000); Anne Barlow & Rebecca Probert, *Cohabitants: A Survey of European Reforms*, 149 NEW L.J. 6913, 1738 (1999).

³² Registered Partnership Act, No. 40 (1993) (Nor.); Registered Partnerships Act (1994) (Swed.); Registered Partnership Act, No. 87 (1996) (Ice.); Registered Partnership Act, No. 372 (1989) (Den.). See also Craig A. Sloane, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189 (1997) (concluding that the Danish Act is an important step, but that the

The French system of Pacte Civil de Solidarite has a similar effect.³³ Both registered relationship provisions and the Pacte Civil de Solidarite apply only to unmarried couples who choose to opt in to the regime by completing the required formalities. In Australia, various states have introduced legislation regulating the property affairs of unmarried couples.³⁴ In some states this legislation covers all types of "domestic relationships."³⁵ The property regimes established under the various state laws closely approximate the regime applicable to their married counterparts under federal law.³⁶ The Australian regimes cover qualifying couples unless they choose to opt out by mutual agreement.³⁷ In other jurisdictions, such as Britain³⁸ and Canada,³⁹ there is considerable discussion about possible reform of the property laws relating to unmarried couples. Jurisdictions contemplating legal reform can capitalize on the experience of those jurisdictions that have lead the way in this area. In this context New Zealand's novel regime, covering both married and unmarried couples, is worthy of consideration.

F. Recent New Zealand Reform Overview

The New Zealand legislature has been wrestling with the law applicable to the property rights of both married and de facto couples since the 1960s. Most recently, the legislature enacted the Property (Relationships) Amendment Act 2001, ("P(R)AA 2001"; "P(R)AA"),⁴⁰ which amended the Matrimonial Property Act 1976 ("MPA 1976";

omission of critical rights relegates registered same-sex partnerships to a less-favored position than that of registered (married) opposite-sex partnerships.

³³ CODE CIVIL [C. CIV.] tit. XII (Fr.).

³⁴ Property (Relationships) Act, 1984, No. 147 (N.S.W.), amended by Property (Relationships) Legislation Amendment Act, 1999, No. 4 (N.S.W.); Domestic Relationships Act, 1994, No. 28 (Austl. Cap. Terr.), De Facto Relationships Act, 1991 (N. Terr.), Property Law Act, 1974 (Queensl.), amended by Property Law Amendment Act, 1999 (Queensl.); De Facto Relationships Act, 1996 (S. Austl.); Property Law Act, 1958 (Vict.), amended by the Statute Law Amendment (Relationships) Act, 2001 (Vict.); De Facto Relationship Act, 1991 (Tas.).

³⁵ See Property (Relationships) Act, 1984, No. 147 (N.S.W.), amended by the Property (Relationships) Legislation Amendment Act, 1999, No. 4 (N.S.W.); Domestic Relationships Act, 1994, No. 28 (Austl. Cap. Terr.); Property Law Act, 1958 (Vict.), amended by Statute Law Amendment (Relationships) Act, 2001 (Vict.). See generally, Jenni Millbank, *Domestic Rifts: Who is Using the Domestic Relationships Act 1994 (ACT)?*, 14 AUSTL. J. FAM. L. 1 (2000).

³⁶ Family Law Act, 1975 (Austl.).

³⁷ See, e.g., Property (Relationships) Act, 1984, No. 147, pt. IV (N.S.W.), De Facto Relationships Act, 1991, pt. III (N. Terr.).

³⁸ See Family Law Committee of the Law Society (UK), *supra* note 5; Anne Johnson, *Strange Bedfellows*, 149 NEW L.J. 6906, 1432 (1999).

³⁹ For a discussion of the current situation in Canada, see Holland, *supra* note 14.

⁴⁰ Property (Relationships) Amendment Act, 2001, No. 5 (N.Z.).

“MPA”⁴¹ and renamed it the Property (Relationships) Act 1976 (“P(R)A 1976”; “P(R)A”).⁴² Three additional associated amendment acts have been enacted concurrently.⁴³ All four acts came into force on February 1, 2002.

As a result of the changes introduced by this legislative package, New Zealand now has a unique relationship property regime. The regime applies to all married couples, as well as both heterosexual and same-sex unmarried couples who have lived together as a couple for a minimum of three years. If married or unmarried couples do not wish to be subject to the regime, they must opt out by entering an agreement that complies with proscribed formalities. Under the new regime, if the marriage or de facto relationship ends, the couple’s property is designated as either separate property or relationship property. Separate property is generally retained by its owner, while relationship property is divided between the parties. The P(R)A 1976 provides that the relationship property is to be divided equally, except in extraordinary circumstances, or when an unequal division is necessary to correct for economic disparity, at the end of the marriage or relationship.

G. Starting Point for New Zealand Development—The Situation Before 1963

The Matrimonial Property Act of 1963 was the first legislation in New Zealand to deal comprehensively with the division of the property of married couples.⁴⁴ Prior to 1963, the New Zealand courts, unlike those in Britain, took a conservative approach and resolved property disputes between spouses on the basis of legal and equitable title.⁴⁵ Where financial contributions had been made to the purchase of property, the courts were prepared to find that a resulting trust existed.⁴⁶ While women were able to own property,⁴⁷ most did not work outside the home and, therefore, were less likely than their husbands to accumulate property. Accordingly, under this regime women often left the marriage with few or no assets. They could, however, be awarded a share in the value of the matrimonial home⁴⁸

⁴¹ Matrimonial Property Act, 1976, No. 166 (N.Z.).

⁴² Property (Relationships) Amendment Act, § 5.

⁴³ Family Protection Amendment Act, 2001, No. 8 (N.Z.); Administration Amendment Act, 2001, No. 6 (N.Z.); Family Proceedings Amendment Act, 2001, No. 7 (N.Z.).

⁴⁴ Matrimonial Property Act, 1963, No. 72 (N.Z.).

⁴⁵ *Simpson v. Simpson* [1952] N.Z.L.R. 278; *Masters v. Masters* [1954] N.Z.L.R. 82; *Barrow v. Barrow* [1946] N.Z.L.R. 438.

⁴⁶ *Hendry v. Hendry* [1960] N.Z.L.R. 48.

⁴⁷ Married Women’s Property Act, 1952, No. 53 (N.Z.).

⁴⁸ Matrimonial Property Act, 1963, No. 72, § 5 (N.Z.).

or be awarded maintenance.⁴⁹ New Zealand has never recognized common law marriage and, until the enactment of the P(R)A, has had no legislation regulating the property and support issues of de facto couples. Accordingly, disputes arising at the end of de facto relationships were previously dealt with under the general rules of law and equity.

H. Matrimonial Property Act 1963

In the early 1960s concerns about the financial plight of divorced women lead to the enactment of the Matrimonial Property Act 1963 ("MPA 1963"), which dealt with the division of property,⁵⁰ and the Matrimonial Proceedings Act 1963,⁵¹ which dealt with the award of spousal maintenance.⁵² Under this regime, judges were authorized to make discretionary orders regarding the ownership of matrimonial property. Such orders could be made "as appears just," irrespective of legal title. Judges were required to consider the spouses' contributions to the matrimonial home and could, but were not required to, consider the spouses' contributions in relation to the other property in question.⁵³ The MPA 1963 specified that contributions could be "in the form of money payments, services, prudent management, or otherwise howsoever."⁵⁴ The MPA 1963 was amended in 1968 to emphasize that an order could be made in favour of a spouse "notwithstanding that he or she made no contribution to the property in the form of money payments or that his or her contribution in any other form was of a usual and not an extraordinary character."⁵⁵ Despite the 1968 amendment, women usually left the marriage with fewer assets than their husbands. This was due to the difficulty of establishing a direct connection between women's domestic contributions and the property in question.⁵⁶ In some instances wives were awarded spousal maintenance under the Matrimonial Proceedings Act 1963. However, concern about the

⁴⁹ Matrimonial Proceedings Act, 1963, No. 71, pt. IV (N.Z.); Domestic Proceedings Act, 1968, No. 62, pt. IV (N.Z.).

⁵⁰ Matrimonial Property Act 1963, No. 72 (N.Z.).

⁵¹ Matrimonial Proceedings Act 1963, No. 71 (N.Z.).

⁵² See the discussion of the regime in *E v. E* [1971] N.Z.L.R. 859.

⁵³ Matrimonial Property Act 1963, § 6(1).

⁵⁴ *Id.*

⁵⁵ Matrimonial Property Amendment Act, 1968, No. 61, § 6(1) (N.Z.).

⁵⁶ Caroline Bridge, *Reallocation of Property after Marriage Breakdown: The Matrimonial Act 1976*, in *FAMILY LAW POLICY IN NEW ZEALAND* 234 (M. Henaghan & B. Atkin eds., 1992) ("Wives were consistently awarded one third or less of the home.").

inequality of the financial situations of men and women at the end of a marriage persisted, eventually leading to the enactment of the MPA 1976.⁵⁷

I. Matrimonial Property Act 1976—Deferred Community Property

The MPA 1976 established a deferred community property regime. Although the MPA applied from the date of marriage, the spouses were largely free to deal with their property as they wished until they separated or until matrimonial property proceedings were commenced in court.⁵⁸ At this stage all their property was classified as either separate or matrimonial property, and subject to the rules of division specified in the Act. Separate property comprised property that the parties brought to the marriage, or which an individual party received by gift or inheritance during the marriage.⁵⁹ Matrimonial property comprised all property acquired by either spouse during the marriage, irrespective of legal title. On division, each party retained their separate property while the matrimonial property was subject to a presumptive rule of equal division described below. A couple could “contract out” of the MPA 1976 by completing an agreement that complied with the following requirements:

1. The agreement had to be in writing and signed by both spouses;
2. The spouses were required to receive independent legal advice before signing the agreement;
3. The agreement had to be signed by the lawyer for each spouse; and
4. The lawyers were required to certify that they had explained the effect and implications of the agreement to their clients before the clients had signed the agreement.⁶⁰

The court was authorized to declare a “contracting out” agreement void if the court considered it would be unjust to give effect to an agreement in light of factors specified in the statute.⁶¹

⁵⁷ Matrimonial Property Act, 1976, No. 166 (N.Z.).

⁵⁸ *Id.* § 21. Under sections 43 and 44 of the Matrimonial Property Act, 1976, spouses were, however, unable to transfer their property to defeat the matrimonial property claims of the other spouse. Matrimonial Property Act, §§ 43-44.

⁵⁹ *Id.* §§ 9-10.

⁶⁰ *Id.* § 21.

⁶¹ *Id.* § 21(8).

J. Division of Matrimonial Property Under MPA 1976

Under MPA 1976, matrimonial property was divided into two classes, the first comprising the home and family chattels, and the second comprising the balance of the matrimonial property, or "balance property."⁶² Both classes of property were subject to a presumption of equal division.⁶³ The presumption was considerably stronger, however, in relation to the home and chattels than in relation to the balance of the matrimonial property.⁶⁴ The presumption of equal division did not apply if the marriage was of short duration (less than three years),⁶⁵ or if extraordinary circumstances made equal sharing repugnant to justice.⁶⁶ In these cases the property was divided according to each party's "contribution to the marriage partnership."⁶⁷ Under the previous statute, division was made by reference to "contributions . . . to the property."⁶⁸ The new terminology recognized non-financial domestic contributions. The MPA 1976 specified what acts constituted contributions to the relationship.⁶⁹ Management of the household and performance of household duties were included.⁷⁰ Under the statute there was no presumption that a financial contribution was of greater value than a contribution of services.⁷¹ Separate property remained the property of the owner unless the other spouse had sustained or diminished the separate property, in which case the court was authorized to make an order in the other spouse's favour.⁷² Furthermore, if any increase in value of separate property was attributable to the other spouse or the application of matrimonial property, the increase in value became matrimonial property subject to the equal sharing rule.⁷³

⁶² *Id.* §§ 8-9.

⁶³ *Id.* §§ 11, 15.

⁶⁴ *See id.*

⁶⁵ *Id.* § 13.

⁶⁶ *Id.* § 14.

⁶⁷ *Id.* §§ 13(2), 14.

⁶⁸ *Id.* § 6(1).

⁶⁹ *Id.* § 18(1).

⁷⁰ *Id.* § 18(1)(b).

⁷¹ *Id.* § 18(2).

⁷² *Id.* § 17, 1976.

⁷³ *Id.* § 9(3).

II. PROBLEMS DRIVING FURTHER REFORM

A. *Continuing Disadvantage for Women*

The MPA 1976 corrected some shortcomings of the MPA 1963. But, rightly or wrongly, the perception persisted that women were left in a severely disadvantaged position at the end of a marriage. To what extent this was so is open to question. However, in New Zealand, as elsewhere, it was accepted as “an article of faith.”⁷⁴ Most of the dissatisfaction with the MPA 1976 focused on the division of property on death, the treatment of earning capacity, and the treatment of unmarried couples.

B. *Division at Death*

The MPA 1976 only applied while both spouses were alive.⁷⁵ In the event of the death of one or both spouses, the remaining spouse, or a legal personal representative of either spouse, could make a claim under the MPA 1963.⁷⁶ This claim could be made against property held in the deceased spouse’s name⁷⁷ if the surviving spouse was not satisfied with the bequest he or she received under the deceased spouse’s will, or, in the case of intestacy, their entitlement under the intestate distribution rules of the Administration Act 1969. Because the MPA 1963 controlled the division of assets in death cases even after the enactment of the MPA 1976, the division was on the basis of contributions to the property rather than the relationship. As a result, women usually fared better when the marriage was terminated by divorce rather than by death. This was an anomalous result given the relative needs of the parties in the two situations and it weighed heavily on women due to their longer life span.

A surviving spouse could make a claim under both the MPA 1963 and the Family Protection Act 1955.⁷⁸ Sometimes women received an additional share of their deceased husband’s estate under the Family Protection Act 1952. Various family members, including spouses, could apply for an order against the deceased’s estate under this statute if, in terms of the deceased’s

⁷⁴ Sanford L. Braver, *The Gender Gap in Standard of Living after Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111, 113 (1999).

⁷⁵ Matrimonial Property Act, 1976, No. 166, § 5 (N.Z.).

⁷⁶ Matrimonial Property Act, 1963, No. 72 (N.Z.).

⁷⁷ Matrimonial Property Act, 1963, § 5.

⁷⁸ Family Protection Act, 1955, No. 88, § 5 (N.Z.).

will or as a result of intestacy, the deceased's estate did not adequately provide for their proper maintenance and support.⁷⁹

C. *Earning Capacity as Matrimonial Property*

Earning capacity was not recognized as matrimonial property under the MPA 1976,⁸⁰ although the "breadwinner's" earning capacity was often the couple's most valuable asset. This put women at a great disadvantage. The earning capacity of women was often considerably lower than that of their husbands as a result of the division of functions within the marriage. Accordingly, divorced women often faced a bleaker financial future than their ex-husbands. Some women were assisted by an award of maintenance under the Family Proceedings Act 1980.⁸¹ However, maintenance was only intended to be a short-term measure to assist the applicant spouse to meet her reasonable needs until she was able to do so for herself. Hence, in duration and quantum, an award of maintenance did not usually compensate the applicant spouse, usually the wife, for any long-term disadvantage caused by having been the homemaker during the marriage. Because the underlying policy of the MPA 1976 and the Family Proceedings Act 1980 was that a divorce should be a "clean break," maintenance awards were both minimal and infrequent.

D. *De Facto Couples*

De facto couples were not covered by the MPA 1976, although it had been originally proposed that they should be.⁸² Generally, at the end of a de facto relationship, the property was divided according to legal title. The only relief from this division was the remedy of constructive trust. To succeed in a constructive trust claim the claimant had to prove that:⁸³

1. The claimant had made contributions, direct or indirect, to the specific property;
2. The claimant had an expectation of an interest in the property;
3. Such an expectation was reasonable; and

⁷⁹ See, e.g., *In re Delaney* [1978] NZ Recent Law 366; *Re Snow* [1976] NZ Recent Law 13; *Olausen v. Olausen* [1977] NZ Recent Law 109; *Clemence v. Clemence* (1980) 3 M.P.C. 35.

⁸⁰ *Z v. Z* [1997] 2 N.Z.L.R. 258.

⁸¹ Family Proceedings Act, 1980, No. 94, § 64 (N.Z.). This act repealed both the Matrimonial Proceedings Act, 1963, No. 71 (N.Z.), and the Domestic Proceedings Act, 1968, No. 62 (N.Z.).

⁸² Matrimonial Property Bill, 1975, cl. 49.

⁸³ *Lankow v. Rose* [1995] 1 N.Z.L.R. 277, 294.

4. The defendant should reasonably expect to yield an interest to the claimant.

Awards were limited to the extent of the claimant's direct or indirect contribution to the relevant property. There was no presumption of equal sharing for unmarried partners, as there was for married spouses under the MPA 1976.⁸⁴ Consequently, even as abetted by the relief of constructive trust, a de facto partner's share was likely to be less than that received by a married spouse. In the leading case of *Lankow v. Rose*,⁸⁵ for example, Ms. Rose was awarded a half share of the family home, but was not awarded a share of her partner's business, even though she had assisted him with it.

Other Acts were similarly limited. Under the Family Proceedings Act 1980, unmarried partners could only be awarded maintenance if a child had been born of the relationship.⁸⁶ There was no provision for unmarried partners to claim against their deceased partner's estate under either the MPA 1963 or the Family Protection Act 1955.

E. The 2001 Legislative Reform

The 2001 legislative reform sought to address these problems in the following ways:

1. Continuing disadvantage for women. The P(R)AA removes the distinction between balance and matrimonial property. Both classes of property are combined into one class, relationship property. Under the P(R)AA all relationship property is subject to the same equal sharing requirement. The three following changes also redress the disadvantaged position of women in respect of property matters.
2. Division at death. The P(R)AA applies both before and after the death of one or both spouses.
3. Earning capacity as matrimonial property. Under the P(R)AA, the court is authorized to adjust property awards on the basis of economic disparity arising from the division of functions within the marriage.
4. De facto couples. The P(R)AA applies with only minor differences to both married and de facto couples. The inclusion of

⁸⁴ *Id.* at 295.

⁸⁵ *Id.*

⁸⁶ Family Proceedings Act, 1980, §§ 79-80.

married and de facto couples under the same regime is particularly noteworthy.

III. THE 2001 REFORM AND DE FACTO COUPLES

A. *The History of the 2001 Reform*

Further reform was under discussion for more than ten years prior to the enactment of the P(R)AA 2001⁸⁷ and the associated amendment acts.⁸⁸ Calls to improve the MPA 1976 were heard as early as 1988 when the Working Group on Matrimonial Property and Family Protection established by the Minister of Justice made recommendations for reform of the property law relating to both married and de facto couples. The Working Group proposed that the property of de facto couples be divided according to the equal division rules of the MPA 1976. If the relationship did not resemble a marriage, the property would be divided according to the contribution of each partner to the relationship.⁸⁹ The Court of Appeal added to the momentum for reform by noting in several decisions the need for legislative action in this respect.⁹⁰

In 1998, two reform bills, the Matrimonial Property Amendment Bill and the De Facto Relationships (Property) Bill, were introduced into Parliament. Despite the change of government in 1999, the bills proceeded through the parliamentary process. The two bills proposed separate regimes for the division of the property of married and unmarried couples. However, the regimes were very similar. Accordingly, when these bills came before the Parliament in 2000, the Associate Minister of Justice proposed that the legislation for both married and unmarried couples be incorporated in one statute.⁹¹ This proposal was accepted, but only after heated debates.⁹² The Associate Minister of Justice also proposed that the legislation should apply

⁸⁷ Property (Relationships) Amendment Act, 2002, No. 5 (N.Z.), available at <http://rangiknowledge-basket.co.nz/gpacts/public/text/2001/an/005.html> (last visited Mar. 9, 2002).

⁸⁸ See *supra* notes 40-43 and accompanying text.

⁸⁹ N.Z. DEP'T OF JUSTICE, REPORT OF WORKING GROUP ON MATRIMONIAL PROPERTY AND FAMILY PROTECTION 71 (1988).

⁹⁰ See, e.g., *Z v. Z* [1997] 2 N.Z.L.R. 258.

⁹¹ *Property (Relationship) Amendment Bill: Hearing before the Committee* (Nov. 21, 2000) (statement of Hon. M. Wilson, Associate Minister of Justice), http://rangiknowledge-basket.co.nz/hansard/han/text/2000/11/21_021.html.

⁹² The question of whether or not to include de facto opposite-sex couples in the same regime as married couples was passed sixty-two to fifty-eight. See *Property (Relationship) Amendment Bill: Hearing before the Committee* (Nov. 21, 2000), http://rangiknowledge-basket.co.nz/hansard/han/text/2000/11/21_086.html, http://rangiknowledge-basket.co.nz/hansard/han/text/2000/11/21_087.html.

to both heterosexual and same-sex couples.⁹³ This proposal was accepted with somewhat less opposition.⁹⁴ Finally, the call for reform bore fruit with the passing of the P(R)AA 2001⁹⁵ and the associated amendment acts.⁹⁶

B. *The Rationale for the 2001 Reform in Relation to De Facto Couples*

As amended by the P(R)AA, the Property (Relationships) Act 1976 (“P(R)A”) applies an equal sharing rule to the division of relationship property between ex-spouses and former de facto partners. To appreciate the ultimately problematic impact of this reform in relation to de facto couples, it is important to identify at the outset the rationale for the reform. In statements made by those introducing and supporting the legislation during its passage through the parliamentary process, the emphasis was largely on fairness, which was equated with the same treatment for both married and de facto couples.⁹⁷ The fact that the provisions that applied to

⁹³ *Property (Relationship) Amendment Bill: Hearing before the Committee* (Nov. 21, 2000) (statement of Hon. M. Wilson, Associate Minister of Justice), http://rangiknowledgebasket.co.nz/hansard/han/text/2000/11/21_021.html.

⁹⁴ The question of including same-sex couples within the same regime as married and opposite-sex de facto couples passed eighty to thirty-nine. See *Property (Relationship) Amendment Bill: Hearing before the Committee* (Nov. 21, 2000), http://rangiknowledgebasket.co.nz/hansard/han/text/2000/11/21_087.html; http://rangiknowledgebasket.co.nz/hansard/han/text/2000/11/21_088.html

⁹⁵ Property (Relationships) Amendment Act, 2001, No. 5 (N.Z.). As noted *supra* in Part I.F, this Act amended the Matrimonial Property Act, 1976, No. 166 (N.Z.), and renamed it Property (Relationships) Act 1976. See Property (Relationships) Amendment Act, § 5(1) (“After the commencement of this section, the principal Act is called the Property (Relationships) Act 1976.”). When discussing the 2001 law, this Article will hereinafter refer to it as Property (Relationships) Act 1976 and will use section numbers as they appear in the Property (Relationships) Act 1976.

⁹⁶ Family Protection Amendment Act, 2001, No. 8 (N.Z.); Administration Amendment Act, 2001, No. 6 (N.Z.); Family Proceedings Amendment Act, 2001, No. 7 (N.Z.).

⁹⁷ “It is great that the bill proposes the same advantages for same-sex couples as married and de facto couples . . .” *Matrimonial Property Amendment Bill: Report of Select Committee* (May 4, 2000) (statement of K. Locke), http://rangiknowledgebasket.co.nz/hansard/han/text/2000/05/04_027.html. “In our view the time has long since passed when marriage itself is seen as something different, for most couples, from the decision to live together, share chattels and houses, and in particular bring up children together. This legislation will fill a long-left gap in the law.” *Id.* (statement of Hon. L. Harre), http://rangiknowledgebasket.co.nz/hansard/han/text/2000/05/04_029.html.

Hon. M. Wilson stated:

Why should people in de facto or same-sex relationships be treated differently from married couples? They are a very large and important part of New Zealand society. They accrue assets during their relationships in the same manner as their married counterparts, and therefore have a right to the same legal protection. Fundamentally, they have a right to a fair deal, too.

Property (Relationship) Amendment Bill: Third Reading (Mar. 29, 2001) (statement of Hon. M. Wilson, Associate Minister of Justice), http://rangiknowledgebasket.co.nz/hansard/han/text/2001/03/29_023.html. “[The legislation] focuses on the division of property. It does not say anything about the nature of relationships . . . [i]t is about fairness; it is about looking after people’s rights.” *Id.* (statement of C. Carter), http://rangiknowledgebasket.co.nz/hansard/han/text/2001/03/29_027.html. “Just because someone is in a

the property division of married couples under the MPA 1976 did not also apply to de facto couples was characterized as discriminatory.⁹⁸ This concern with equality and fairness is reflected in the following clauses in the statement of purposes in section 1M:

- (b) To recognise the equal contribution of husband and wife to the marriage partnership, and of de facto partners to the de facto relationship; [and]
- (c) To provide for a just division of the relationship property between the spouses or de facto partners when their relationship ends⁹⁹

This concern is also reflected in the statement of principles found in section 1N. For example:

- (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, or the de facto 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 de facto partners arising from their marriage or de facto relationship or from the ending of their marriage or de facto relationship¹⁰⁰

Where two property situations, such as a marriage and a de facto relationship, are alike, it is obviously fair to accord them equal treatment. Where, however, they are not alike, equal treatment can be distinctly unfair. The legislative reform proceeded on the assumption, largely untested by reference to factual data, that the property situations of persons in de facto relationships were identical to those in marriages.

de facto relationship . . . does not mean to say that person's rights, in terms of property division, should be any less than those who are formally married." *Id.* (statement of K. Locke), http://rangi.knowledge-basket.co.nz/hansard/han/text/2001/03/29_030.html.

⁹⁸ "[I]t is time we stopped discriminating in our legislation against these de facto and same sex couples." *Property (Relationship) Amendment Bill: Report of Select Committee* (May 4, 2000) (statement of Hon. M. Wilson, Associate Minister of Justice), http://rangi.knowledge-basket.co.nz/hansard/han/text/2000/05/04_025.html.

⁹⁹ Property (Relationships) Act, 1976, § 1M (N.Z.).

¹⁰⁰ *Id.* § 1N.

C. *Meaning of “De Facto Relationship”*

The most important definition regarding the scope of the reform is that of “de facto relationship,” set out in the Property (Relationships) Act as follows:

[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 one another.¹⁰¹

The P(R)A also specifies the matters to be taken into account in determining whether two persons are in a de facto relationship. These include the duration of the relationship, any sexual relationship, the financial interdependence of the parties, and the responsibility for the care and support of children.¹⁰²

D. *Features of the Definition of De Facto Relationship*

The definition has the following four features:

1. *Opt Out Characteristic*

A de facto relationship for the purposes of the P(R)AA 2001 is not a relationship, such as a contract, a marriage or a registered partnership, which parties consciously opt into by means of a single voluntary act. Rather, it is a categorization triggered by a state of affairs (that is, living together as a couple) over an extended period.¹⁰³ It is this feature that gives the statute its opt out characteristic as opposed to the opt in pattern adopted in other jurisdictions.

¹⁰¹ *Id.* § 2D(1).

¹⁰² *Id.* § 2D.

¹⁰³ *Id.* § 2D.

2. *Lack of Detail in Definition*

The definition does very little to usefully define the meaning of the key term in the definition, "relationship." The operative phrase "living together as a couple" is hardly less vague than the term "de facto relationship."¹⁰⁴ Nor is the matter significantly clarified by the enumerated factors. Taken together, they cover virtually every aspect of human interaction.

3. *Time Limitation*

To qualify as a de facto relationship under section 2D of the P(R)A, the relationship must last at least three years.¹⁰⁵ Accordingly, determining exactly when a de facto relationship begins and ends can be crucial.

4. *De Facto Status but no Marriage for Same-Sex Couples*

Although the Marriage Act 1955 does not state that the parties to a marriage must be a man and a woman, the New Zealand Court of Appeal has held that same-sex couples cannot marry.¹⁰⁶ However, the definition of de facto relationship in the P(R)A is not limited to heterosexual couples. Accordingly, a de facto relationship will come into existence between same-sex couples under the same conditions that apply to heterosexual couples and will be subject to the same equal sharing rule.

E. *Scope of the Australian Legislation Compared*

There is little doubt that Australian law served, in part, as a model for the reform act. This is apparent from the footnoted reference to the equivalent New South Wales legislation in the P(R)A.¹⁰⁷ Both the Australian and New Zealand legislation establish very similar property division regimes for people in de facto relationships and marriages. Some of the Australian statutes are applicable to "domestic relationships" and include

¹⁰⁴ See Property (Relationships) Act, § 2D.

¹⁰⁵ *Id.* § 2E. Under section 14, different rules also apply to marriages of short duration (marriages of less than three years). *Id.* § 14. Note also the provision for tacking: if a marriage is immediately preceded by a de facto relationship between the two parties, the de facto relationship will be included along with the marriage in establishing the length of the marriage. *Id.* § 2B.

¹⁰⁶ *Quilter v. Attorney-General* [1998] 1 N.Z.L.R. 523.

¹⁰⁷ A footnote to section 2D of the Property (Relationships) Act refers to the Property (Relationships) Act, 1984, No. 147, §§ 4(1)–4(3) (N.S.W.).

within their ambit relationships between an adult child living with an ailing parent, or two siblings living together.¹⁰⁸ Such a relationship would not be covered by the New Zealand legislation. However, the factors to be considered by a court in determining the existence of a de facto relationship under the P(R)A echo those of a leading Australian decision.¹⁰⁹ This is so despite the fact that those factors were set out to apply in the context of property division rules, which were significantly different from the New Zealand counterparts discussed in more detail below.

F. Property Rules of the Reform Legislation

One of the numerous features of the MPA 1976 perpetuated by the P(R)A is the deferred community property scheme. Until separation or the commencement of proceedings, spouses or de facto partners are largely free to deal with property according to legal title.¹¹⁰ For instance, if a house or bank balance is titled in the name of one partner or spouse, that person is free to dispose of the property without regard to the wishes of the other partner or spouse.

Once the parties are separated, or an application is made to the court to determine the respective shares of each spouse or de facto partner, or to divide the property between them, all property is classified by operation of the law as either separate or relationship property.¹¹¹ Relationship property includes the property that was formerly known as “balance matrimonial property” under the MPA 1976¹¹² and encompasses all property acquired by either spouse during marriage.¹¹³

Relationship property is prima facie divided equally between the parties.¹¹⁴ Under the MPA 1976, the equal sharing rule applied with greater force to the matrimonial home than to other matrimonial property.¹¹⁵ Under the P(R)A, the more stringent version of the rule applies to all relationship property. Property not qualifying as relationship property is separate property and is divided according to legal title.¹¹⁶ The P(R)A generally

¹⁰⁸ Property (Relationships) Act, 1984, No. 147 (N.S.W.); Domestic Relationships Act, 1994, No. 28 (Austl. Cap. Terr.), Statute Law Amendment (Relationships) Act, 2001, No. 27 (Vic.).

¹⁰⁹ Roy v. Sturgeon (1986) 11 Fam. L.R. 271 (Austl.). See also D v. McA (1986) NSW LEXIS 7001, at *1 (N.S.W. June 27, 1986).

¹¹⁰ Property (Relationships) Act, 1976, § 21 (N.Z.).

¹¹¹ *Id.* §§ 8–9.

¹¹² Matrimonial Property Act, 1976, No. 166, § 15.

¹¹³ Property (Relationships) Act, § 8.

¹¹⁴ *Id.* § 11.

¹¹⁵ Matrimonial Property Act, §§ 11, 15.

¹¹⁶ Property (Relationships) Act, § 9.

carries forward the special rules for converting separate property into relationship property. For instance, any increase in the value of separate property, or any income or gains derived from separate property which are attributable wholly or in part to the application of relationship property, qualifies as relationship property.¹¹⁷

G. *Departure from Equal Division*

The P(R)A presumption of equal division of relationship property¹¹⁸ is subject to several other provisions of the Act which rely on discretionary judgment to achieve the purpose of a just division. Under the MPA 1976, any division that departed from the equal sharing rule was required to be determined strictly on the basis of contribution to the marriage.¹¹⁹ This is also true of division under some, but not all, sections of the P(R)A. For instance, section 13 of the P(R)A, (previously section 14 of the MPA 1976), provides for a departure from equal sharing where there are “extraordinary circumstances” that make equal sharing “repugnant to justice.” This requires the determination of the parties’ shares to be made in accordance with their respective contributions to the marriage or the de facto relationship.¹²⁰ The courts established under the MPA 1976 that both “extraordinary circumstances” and “repugnant to justice” are required to satisfy this section.¹²¹ The courts also established a high threshold necessary to satisfy section 14 of the MPA, met only in relatively few cases.¹²² Under the P(R)A, the significance of section 13 is heightened given that balance matrimonial property can now only be divided on that basis if this section applies, and not, as was possible under the MPA 1976,¹²³ as a matter of course if one spouse’s contribution had been clearly greater.

¹¹⁷ *Id.* § 9A(1).

¹¹⁸ Property (Relationships) Act, § 11(1).

¹¹⁹ *See, e.g.*, Property (Relationships) Act, §§ 14, 14A (marriages and de facto relationships of short duration); § 16 (adjustment when each spouse owned a home when the relationship began), §§ 17, 17A (adjustment when one party sustained or diminished the separate property of the other party).

¹²⁰ *Id.* § 13(1).

¹²¹ *See, e.g.*, *Martin v. Martin* [1979] 1 N.Z.L.R. 97; *Wilson v. Wilson* [1991] 1 N.Z.L.R. 687; *Williams v. Williams*, [2000] N.Z.L.R. 122.

¹²² *See, e.g.*, *Martin* [1979] 1 N.Z.L.R. 97; *Williams* [1979] 1 N.Z.L.R. 122; *Dalton v. Dalton* [1979] 1 N.Z.L.R. 113; *McLaren v. McLaren* [1982] 1 N.Z.F.L.R. 273; *Ubels v. Barrett* [2000] N.Z.F.L.R. 666; *Kauwhata v. Kauwhata* [2000] N.Z.F.L.R. 755. *See also Wilson* [1991] 1 N.Z.L.R. at 697 (comment by Judge Richardson stating, “It is difficult to envisage any stronger use of language than is reflected in ‘extraordinary circumstances’ and ‘repugnant to justice’ to emphasize the stringency of the test which has to be satisfied in order to justify departure from the equal sharing regime.”).

¹²³ Matrimonial Property Act, 1976, No. 166, § 15(1).

H. Adjustment for Economic Disparity

A new principle has been included in the P(R)A in an attempt to address the significant economic disparity between spouses or de facto partners at the end of a marriage or relationship. This principle requires the court to consider the economic advantages or disadvantages to the parties when dividing property.¹²⁴ In accordance with this new principle, section 15 of the P(R)A authorizes the court to order a lump sum payment or the transfer of property. This is authorized if the income and living standards of one party are likely to be significantly higher than those of the other party because of the effects of the division of functions while the parties were living together.¹²⁵

Orders under this section can only be made regarding relationship property. This section will presumably apply, for example, when separation occurs shortly after one spouse or partner has completed professional training and the other spouse has been caring for children or undertaking menial work to support the spouse undertaking the training. Orders adjusting for economic disparity can also be made under section 15A. These orders can be made with regard to separate property if any increase in the value of the separate property of the party with the higher income or living standard was attributable, wholly or in part, directly or indirectly, to the actions of the party with the lower income or living standard, while the parties were living together.

New Zealand courts have been required to consider economic disparity arising from marriage in relation to claims for spousal maintenance under the Family Proceedings Act 1980.¹²⁶ In cases considered under the Family Proceedings Act 1980 provision, the courts have set a high threshold of proof for claimants.¹²⁷ If this approach is taken in respect to the P(R)A, departure from equal sharing is likely to be rare.

¹²⁴ Property (Relationships) Act, 1976, § 1N(c) (N.Z.).

¹²⁵ Section 15(2) of the Property (Relationships) Act provides that, in determining whether or not to make an order under this section, the court may have regard for the likely earning capacity of each party, the responsibilities of each party to the ongoing daily care of any minor or dependent children of the relationship or marriage, and any other relevant circumstances.

¹²⁶ Family Proceedings Act, 1980, No. 94, § 64(1)(a) (N.Z.).

¹²⁷ Slater v. Slater [1983] N.Z.L.R. 166; Mackie v. Mackie [1993] N.Z.F.L.R. 213; Wederell v. Wederell, [1994] N.Z.F.L.R. 928; G v. G [2000] N.Z.F.L.R. 1117.

I. Property Rules of Australian Legislation Compared

There are significant differences between the property division rules of New Zealand and Australia. The Australian federal statute, the Family Law Act 1975, which regulates the division of property of married couples, authorizes the court to make an order altering the property interests between the couple if it is “just and equitable” to do so. The court is required to consider such factors as direct and indirect contributions, including those contributions made in the capacity of homemaker, to the acquisition, preservation, or improvement of the property.¹²⁸ The court is also required to consider, when relevant, the financial needs and obligations of the parties, the responsibility for child care, or support of other people.¹²⁹ These rules are echoed in the state statutes regulating the division of property in de facto and domestic relationships.

These rules are in contrast to the New Zealand rules distinguishing between separate property and relationship property, and requiring a presumption of equal sharing of relationship property. Unlike the P(R)A, the Australian statutes do not refer specifically to economic disparity. However, under the Family Law Act 1975, the court can consider the future needs of the applicant and adjust the order accordingly. In the past when making orders altering property interests, the state courts have limited their consideration to contributions. However, more recently, at least one state court has held that the property division principles of the state statute were similar to those of the Family Law Act in purpose and in operation, and applied cases decided under that statute that considered the future needs of the applicant.¹³⁰

J. Opting Out of the P(R)A

Under the P(R)A, spouses or de facto partners can opt out of the regime by contract.¹³¹ However, the court is authorized to set aside such an agreement if “having regard to all the circumstances, it satisfied that giving effect to the agreement would cause serious injustice.”¹³² This “serious injustice requirement” has replaced the presumably lesser MPA requirement that it would be “unjust” to give effect to such an agreement. The court, in

¹²⁸ Family Law Act, 1975, § 79(4) (Austl.).

¹²⁹ *Id.* § 79(4)(e) (referring to section 75(2)).

¹³⁰ *Ferris v. Winslade* (1998) 22 Fam. L.R. 725, 732 (Austl.).

¹³¹ Property (Relationships) Act, 1976, § 21. These rules are carried forward from the Matrimonial Property Act 1976. See Matrimonial Property Act, 1976, No. 166, § 21.

¹³² Property (Relationships) Act, 1976, § 21J(1).

deciding whether giving effect to the agreement would cause “serious injustice,” is required to consider the following factors identified in section 21J(4):

- (a) The provisions of the agreement;
- (b) The length of time since the agreement was made;
- (c) Whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;
- (d) Whether the agreement has become unfair or unreasonable in light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties);
- (e) The fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement; and
- (f) Any other matters the court considers relevant.¹³³

These factors are the same as those the court was required to consider when deciding whether an agreement was void under the MPA,¹³⁴ with the exception of the requirement in subsection (e), which is a new addition. In the past there has been some concern that the courts have been too ready to overturn agreements made in accordance with the MPA 1976.¹³⁵ Presumably the changes introduced in section 21 of the P(R)A are intended to address these concerns.

IV. IMPLEMENTATION DIFFICULTIES

A. *The Importance of Certainty in Determining the Existence of a De Facto Relationship*

The P(R)A may have far reaching implications for personal property rights when relationships qualify as de facto relationships under the Act. Accordingly, it is important that people know with certainty if, and when, they are subject to the Act.

Historically, certainty in relation to the ownership of property has been considered to be crucial.¹³⁶ Estates in land have long been explicitly

¹³³ Matrimonial Property Act, § 21J(4).

¹³⁴ *Id.* § 21(10).

¹³⁵ *See, e.g.*, Wood v. Wood [1998] 3 N.Z.L.R. 234, 235; Lowry v. Lowry [1994] N.Z.F.L.R. 529.

¹³⁶ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 372 (1981) (certainty of title as controlling remedy of specific performance); RESTATEMENT OF PROPERTY § 157 cmt. m (1936) (certainty as controlling classification of remainder interest).

defined and clearly identifiable.¹³⁷ The transfer of interests in real property usually requires compliance with writing and registration requirements.¹³⁸ The MPA 1976 itself included a writing requirement: a marriage conforming to the Marriage Act 1955.¹³⁹ Conversely, rules regarding adverse possession show the preference for a written conveyance of property.

In contrast, no such certainty attends the rearrangement of property under the P(R)A. People are not required to complete any formalities before their relationship becomes a de facto relationship for the purposes of the Act. Therefore, it will invariably be difficult for people to know with certainty when and if their relationship qualifies as a de facto relationship for the purposes of the P(R)A. Yet, at some point in time, with or without their realizing it, a reordering of their property rights may occur.

B. Difficulties in Determining the Existence of a De Facto Relationship

The difficulty in identifying a de facto relationship surfaces in a number of contexts outside of the P(R)A. The uncertainty of the meaning of the term “de facto relationship” was acknowledged by the New Zealand High Court in *Lichtenstein v. Lichtenstein*,¹⁴⁰ a case involving a condition in a will. The condition provided for certain payments to be made from the deceased’s estate to the widow. These payments were to be made “for so long as she remains my widow and for so long as she shall not enter into a de facto relationship (whether or not my said wife has entered into a de facto relationship shall be at the sole and absolute discretion in decision of my trustee . . .).”¹⁴¹ The court found that the condition was void on the basis that the trustee would not necessarily be able to ascertain when the widow had entered into a de facto relationship, and the widow, herself, would not know with certainty when the trustee would consider that she, the widow, had entered into a de facto relationship. These problems arose because of the “difficulty in determining what are the characteristics of a de facto marriage relationship as well as in determining when or at what stage that relationship has been entered into.”¹⁴²

¹³⁷ See RESTATEMENT OF PROPERTY §§ 4-22 (classification of estates); Thomas W. Merrill & Henry E. Smith, *Optional Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

¹³⁸ RESTATEMENT (SECOND) OF CONTRACTS § 125 (writing requirements for contracts for transfer of interests in real property).

¹³⁹ Marriage Act, 1955, No. 92, § 24 (marriage in prescribed form) (N.Z.).

¹⁴⁰ *Lichtenstein v. Lichtenstein* [1986] 4 N.Z.F.L.R. 25.

¹⁴¹ *Id.* at 26.

¹⁴² *Id.* at 30.

C. *Terms Such as "De Facto Relationship" Used in Other Legislation*

Since *Lichtenstein*, the New Zealand courts have considered such terms as "de facto relationship," "de facto spouse,"¹⁴³ "relationship in the nature of marriage,"¹⁴⁴ and "living together as husband and wife, although not legally married to each other,"¹⁴⁵ on a number of occasions.¹⁴⁶ Most of these cases involved the distribution of state funding. The relevant legislation provides for reduced payments to recipients that are married or in marriage-like relationships.¹⁴⁷

In *Ruka v. Department of Social Welfare*, the Court of Appeal reversed a finding that a woman was living in "a relationship in the nature of marriage" and fraudulently receiving a domestic purposes benefit under the Social Security Act 1964.¹⁴⁸ The court considered it significant that there was an absence of the mental and emotional commitment and the financial interdependence necessary for a relationship to be "in the nature of marriage" for the purposes of that Act.¹⁴⁹ The judges stressed the importance of considering the meaning of the phrase "a relationship in the nature of marriage" in the context of the legislative history, policy, and objectives or purposes of the Act.¹⁵⁰ As was noted in the decision of Blanchard J and Richardson P, "other statutes use the same expression but for different legislative purposes. What is or is not such a relationship may be viewed differently for different purposes."¹⁵¹ In light of this approach, it is important to consider the history, policy, and purposes of the P(R)A in determining the existence of a de facto relationship.

¹⁴³ The term "de facto spouse" appears in section 102 of the Friendly Societies and Credit Unions Act, 1982, No. 118, section 2 of the Coroners Act, 1988, No. 111, and section 2 of the Evidence Amendment Act, 1994, No. 31.

¹⁴⁴ This term appears in section 2 of the Status of Children Amendment Act, 1987, No. 132.

¹⁴⁵ This term appears in section 7A of the Family Proceedings Act, 1980, No. 94. This section was inserted by section 3 of the Family Proceedings Amendment Act, 1986, and applied from November 6, 1986.

¹⁴⁶ See, e.g., *Furmage v. Social Security Commission* Decision No 284 [1977] 1 N.Z.A.R. 218. See also *Excell v. Department of Social Welfare* [1991] N.Z.F.L.R. 241, *Thompson v. Department of Social Welfare* [1994] 2 N.Z.L.R. 369; *Ruka v. Department of Social Welfare* [1997] 1 N.Z.L.R. 154. For a useful summary of early case law in this area, see W.R. ATKIN, *LIVING TOGETHER WITHOUT MARRIAGE—THE LAW IN NEW ZEALAND* 13-29 (1991).

¹⁴⁷ Social Security Act, 1963, No. 136, § 63(b) & scheds.

¹⁴⁸ *Ruka v. Department of Social Welfare* [1997] 1 N.Z.L.R. 154.

¹⁴⁹ *Id.* at 162.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

D. *Difficulties in Determining When a De Facto Relationship Ends*

Difficulty also arises in determining when a de facto relationship ends. The P(R)A provides that a de facto relationship ends if the partners cease to live together as a couple or if one of the partners dies.¹⁵² Again this calls for an assessment of what constitutes “living together as a couple.” Ironically, even determining when a marriage ended for the purposes of the Matrimonial Property Act 1976 has proven difficult.¹⁵³ The provisions in the Family Proceedings Act allow for a separation agreement or order to be used as evidence to determine when a marriage ended, providing one way to avoid this problem.¹⁵⁴ No equivalent means of proof is available to determine the end of a de facto relationship under the P(R)A.

The determination of the end of a de facto relationship was considered by the Supreme Court of New South Wales under the De Facto Relationships Act 1984, (the New South Wales equivalent of the P(R)A),¹⁵⁵ in the unreported case of *Theodossiou v. Cui*.¹⁵⁶ The court held that “both intention and behaviour will be necessary under the De Facto Relationships Act to prevent secretive mental terminations being used as a fraudulent device upon a naive partner.”¹⁵⁷ This approach is consistent with Henry J’s statements in the New Zealand Court of Appeal in *Ruka v. Department of Social Welfare*, that a desire or intention to terminate a relationship, or an absence of desire to continue the relationship, is not in itself sufficient to bring about its termination, and is preparatory to, rather than indicative of, termination.¹⁵⁸ Some “outward and objectively discernible manifestation” that the relationship is over is required.¹⁵⁹

E. *Difficulties in Determining the Significance of a Sexual Relationship*

The P(R)A, like the De Facto Relationships Act 1984 (New South Wales), states that no finding in relation to certain listed matters, or any combination of them, is necessary to determine whether two people live together as a couple.¹⁶⁰ The P(R)A directs the court to consider such matters

¹⁵² Property (Relationships) Amendment Act, 2001, § 2D(4).

¹⁵³ See, e.g., *Edwards v. Edwards* [1979] 2 M.P.C. 51; *Dorf v. Dorf* [1982] 1 N.Z.F.L.R. 331.

¹⁵⁴ Family Proceedings Act, 1980, No. 94, § 39(3) (N.Z.).

¹⁵⁵ De Facto Relationships Act, 1984 (Austl.).

¹⁵⁶ *Theodossiou v. Cui*, 1997 NSW LEXIS 2259 (N.S.W. Dec. 3, 1997).

¹⁵⁷ *Theodossiou*, 1997 NSW LEXIS, at *21.

¹⁵⁸ *Ruka v. Department of Social Welfare* [1997] 1 N.Z.L.R. 154, 166.

¹⁵⁹ *Id.*

¹⁶⁰ See De Facto Relationships Act, 1984, § 4(3) (Austl.); Property (Relationships) Act 1976, § 2D(3)(a).

and attach such weight as may seem appropriate in the circumstances.¹⁶¹ However, the question remains as to whether any of the listed factors should be more or less determinative. While “whether or not a sexual relationship exists” is only one of the nine listed matters, it may be difficult for a Court not to place particular significance on this aspect.

For example, this factor was dispositive in the New South Wales Supreme Court’s decision in *Sim v. Powell*.¹⁶² The court determined the duration, nature, and extent of the relationship by reference to the existence of a sexual relationship rather than a relationship “in the broader sense.”¹⁶³ While undoubtedly many marriages are maintained despite the lack of a sexual relationship, the reasoning in *Sim v. Powell* suggests that it may be more difficult to convince a court that a de facto relationship (as compared to a marriage) exists if the sexual relationship is “intermittent”:

There are many very real distinctions between marriage and a de facto relationship. For the present purposes, the most significant is that people remain in the state of marriage despite long absences. The essence of a de facto relationship is that the parties are continually treating the other as if he or she were a husband or wife.¹⁶⁴

F. *Distractions*

In determining the scope of a de facto relationship, the court will have to consider a wealth of personal information about the parties. There is a danger that this will lead to the examination of the kind of intimate details that used to be paraded before the court in the days of fault-based divorce. In this exercise, the courts risk becoming bogged down by the discussion of vindictive, irrelevant, or voyeuristic details. It is difficult for the judiciary to stop counsel from straying in this direction, and sometimes, as is suggested by the Australian experience, it is difficult for judges themselves not to exacerbate the problem.¹⁶⁵

¹⁶¹ Property (Relationships) Act, § 2D(3)(a).

¹⁶² *Sim v. Powell* (1997) 22 Fam. L.R. 243 (Austl.).

¹⁶³ *Id.* at 245.

¹⁶⁴ *Sim* (1997) 22 Fam. L.R. at 245; *Hibberson v. George* (1989) 12 Fam. L.R. 725, 740 (Austl.). *But see* *Thompson v. Badger* (1989) 13 Fam. L.R. 559 (Austl.).

¹⁶⁵ For example, in one Australian case, it was arguably necessary for the judge to record in the judgment that the couple had sex in one of the parties’ cars, but probably unnecessary for the judge to conclude that this showed “a lack of dignity.” *Davies v. Sparkes* (1989) 13 Fam. L.R. 575, 578. Equally, it was probably unnecessary for a judge to note in one case that the plaintiff was “an attractive woman.” *D v. McA*, 1986 NSW LEXIS 7001, at *1 (N.S.W. June 27, 1986). So too was it probably unnecessary

G. *Difficulties in Determining the Significance of Financial Interdependence*

The court may also consider “financial interdependence” in its determination of whether a de facto relationship exists. Bearing in mind the Court of Appeal’s approach in *Ruka*, in the context of social welfare legislation, if the partners in a relationship are not financially interdependent, it may be difficult for the court to conclude that the relationship is a de facto one for the purposes of the P(R)A. This may be so even though “the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties”¹⁶⁶ is only one of the factors the Act specifies.

The P(R)A requirement that a couple divide their relationship property equally at the end of the relationship is based on the assumption that they were financially interdependent during marriage. Given that “getting married” is a public declaration by two people that they have undertaken certain obligations (including mutual support obligations) to one another, it is defensible to assume that there is financial interdependence in marriages, and to legislate for married people on this basis. This assumption may not be equally defensible in relation to people in de facto relationships.

H. *New Zealand Statistics*

Statistics in New Zealand show that financial independence is possible for more people in de facto relationships than in marriages. Many people in de facto relationships are comparatively young and have comparatively fewer children than their married counterparts. In the 1996 census, 62% of women and 73% of men, aged between twenty to twenty-four years, in relationships, were in de facto relationships. In the 1996 census 49.0% of women in de facto relationships did not have children, compared to 12.1% of married women. According to the 1996 census 87.3% of children in New Zealand had married parents. These figures indicate that, in more de facto relationships than marriages, both parties were

(although amusing) for another judge to record that “(t)he evidence was that Australian men are not very keen on flowers and it may be necessary for a flower seller, if her overall sales on a night are poor, to bring down the price of a rose from \$12 to \$5 in order to sell it to an Australian. Chinese men are not keen on flowers. Lebanese men find that flowers get in the way of their festivities and so are only interested in arrangements like lets, which can be worn. Greek men, however, are particularly keen on flowers and will give them to wives, girlfriends, singers, or even a wider group of ladies.” *Theodosiou v. Cui*, 1997 NSW LEXIS 2259, at *26 (N.S.W. Dec. 3, 1997).

¹⁶⁶ Property (Relationships) Act 1976, § 2D(2)(d).

likely to be working in paid employment thus having the potential to be financially independent of each other.

Statistics from other countries also suggest that women in de facto relationships are less likely to be financially dependent on their partners than married women. Census data from the United States, for example, indicates that both men and women in de facto relationships are more likely to be in paid employment than their married counterparts.¹⁶⁷ De facto couples are less likely than married couples to have children under eighteen living with them.¹⁶⁸ Women in de facto relationships are more likely than married women to be older than their partners, have higher educational qualifications than their partners, and earn more than their partners.¹⁶⁹ They are also less likely to be in a traditional homemaking role.¹⁷⁰

I. Difficulties in Attributing the Cause(s) of Economic Disparity

Under the P(R)A, a court may adjust the parties' shares in the relationship property if the living standards of one spouse or de facto partner are significantly higher because of the effects of the division of functions within the marriage or de facto relationship. This rule presents some difficulties. Identifying the extent to which any economic disparity at the end of a relationship is a result of the effects of this as opposed to other factors is difficult. Personal factors, such as individual talents, abilities, motivation, and initiative may significantly affect what they are able to achieve in the way of their living standards. The P(R)A is not intended to compensate for personal inadequacies.

Systemic factors may also significantly affect people's living standards. One such factor is the differential in average income between men and women. Given that women's incomes in New Zealand are on average 87.2% of men's incomes,¹⁷¹ there will be economic disparity in many cases where a heterosexual couple separates. However, the P(R)A is not designed to correct for such systemic factors. The P(R)A's stated principle that "men and women have equal status, and their equality should

¹⁶⁷ Jason Fields & Lynne M. Casper, *America's Families and Living Arrangements*, in CURRENT POPULATION REPORTS 13 tbl.7 (U.S. Census Bureau ed., 2000).

¹⁶⁸ *Id.* at 13.

¹⁶⁹ *Id.* at 14.

¹⁷⁰ *Id.*

¹⁷¹ Statistics New Zealand, *New Zealand Income Survey June 2001*, <http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/7cf46ae26dcb6800cc256a62000a2248/4c2567ef00247c6acc256ad8007839c3?OpenDocument> (June 2001).

be maintained and enhanced”¹⁷² is a clear indication that the statute does not countenance affirmative action.

J. Difficulties with Contracting out of the P(R)A

Prior to the enactment of the P(R)A, de facto couples in New Zealand were free to contract with each other regarding their joint property interests. These contracts were subject to the normal rules of contract law. However, since August 1, 2001, contracts between de facto partners regarding property matters are subject to the P(R)A. The court has authority under section 21J to set aside an agreement if enforcing it would result in serious injustice.¹⁷³ The court is authorized to do this despite the fact that before signing a section 21 agreement the parties are to have received independent legal advice.¹⁷⁴ Furthermore, section 26 empowers the Court to settle property for the benefit of the children of the marriage or de facto relationship, regardless of any agreement made under section 21.¹⁷⁵ As a result of these provisions in the P(R)A, people in de facto relationships have lost a significant amount of their freedom to contract with respect to their property.

K. Failure to Opt Out

The P(R)A applies retroactively to de facto relationships that were commenced before the legislation was enacted.¹⁷⁶ The only way for people in established de facto relationships to avoid the newly imposed property division rules is to contract out of the Act.

The opt out nature of this regime is problematic. Some couples, for whom it would be preferable to contract out, may not do so because of ignorance of the need or desirability to do so. Others may be unrealistically optimistic about the chances of the success of their relationship, or may be uncomfortable about raising and addressing issues about property with their partners. The opt out nature of the regime means that coverage by the provisions of the Act is the default position for people in de facto relationships who do not enter a section 21 agreement. Proponents of the Act no doubt consider this to be the optimum way to ensure fair outcomes

¹⁷² Property (Relationships) Act, 1976, § 1N(a).

¹⁷³ *Id.* § 21J.

¹⁷⁴ *Id.* § 21F(3) (“Each party to the agreement must have independent legal advice before signing the agreement.”).

¹⁷⁵ *Id.* § 26.

¹⁷⁶ *See id.* § 2D.

for all involved. Whether this is so depends on the appropriateness of the regime for de facto couples.

L. Difficulties in Achieving Fairness Under the P(R)A

Those introducing the P(R)A 1976 to Parliament included de facto couples under the regime on the basis that fairness required that people in de facto relationships be subject to the same property division rules as their married counterparts. Undoubtedly the identical rules will achieve the same degree of fairness for de facto couples when their relationships are effectively identical to marriages. However, the P(R)A is a blunt instrument and it does not easily accommodate the individual circumstances of people in de facto relationships who, unlike their married spouses, have chosen not to be subject to the legal incidents of marriage. Once it is determined that their relationship qualifies as a de facto relationship for the purposes of the P(R)A, the particular circumstances of their relationship will not be considered in the division of their relationship property, unless one of the exceptions applies that allows for the departure from equal sharing. As discussed earlier, courts are likely to find that the exceptions apply only in very few cases. This imposition of the equal sharing presumption on de facto couples is in stark contrast to the previous situation under constructive trust jurisprudence, and to the situation in Australia where the “just and equitable” requirement provides for the consideration of the particular circumstances of the relationship as a matter of course.

M. Equality May Be Unfair if Financial Independence Maintained—An Example

If a de facto relationship has been characterized by financial independence, the equal sharing presumption may produce an unfair result. For instance, consider the situation of two people who start living together “as a couple” when they first leave university. They spend so much time together that it makes sense to have just one apartment. At this stage they have not given much thought to whether or not their relationship is long term. Neither of them have any assets. It does not occur to them that they will still be together six years later, or that by then their financial situations will be quite different. They do not think to contract out of the P(R)A. During their six-year relationship they both contribute equally to the rent for their apartment and other living expenses. They both work full-time. One partner, however, chooses to work extremely hard, is promoted a number of

times, and, by the end of the relationship, is earning a large salary. This partner saves diligently during the relationship and manages to accumulate a sizeable share portfolio, an expensive car, and money in the bank. The other partner prefers a more relaxed lifestyle with plenty of spare time to pursue leisure activities. He is content to receive a minimal wage for a job that requires a minimal amount of effort. At the end of the relationship, the second partner has minimal savings. It is likely that at the end of the relationship under the P(R)A their property would be divided equally.

The circumstances of this relationship are unlikely to be regarded as extraordinary circumstances for the purposes of the section 13 exception to equal sharing. If their relationship property is divided equally, the second partner would receive property that was earned and saved by the first partner, while the second partner pursued a leisurely lifestyle. In this situation, equal sharing would not be a fair outcome. Although they satisfied all the other factors for "living together as a couple" for the purposes of the P(R)A, there was no element of financial interdependence during the relationship.

The number of people in New Zealand in *de facto* relationships characterized by financial independence is not known. If indeed most *de facto* relationships are characterised by financial independence, the net result of the 2001 reform will be unfairness.

V. CONCLUSION

New Zealand's relationship property regime, established by the recent reforms, is unique because of the interplay between its scope provisions and its property division rules. Accordingly, the New Zealand experience provides the following useful insights for other jurisdictions considering reform of their property division regimes for couples, particularly unmarried couples. First, the inclusion of *de facto* couples under the same regime as married couples, without any positive act by *de facto* couples to submit themselves to the regime, places a great deal of importance on the need to clearly identify if, and when, relationships will qualify as *de facto* relationships. The automatic inclusion of *de facto* couples in the property division regime is particularly significant because, once subject to the regime, the presumption of equal division of relationship property applies in all but extraordinary circumstances.

Second, there is a danger in implementing in one jurisdiction parts of legislation from another, where other facets of the regime are significantly different. The inclusion in the P(R)A of *de facto* couples under the same

relationship property regime as married couples was clearly inspired by the scope provisions of the New South Wales legislation of the same name (Property (Relationships) Act 1984 (NSW)). However, under this Australian legislation the court is required to adjust the property allocation to achieve a result that is "just and equitable." Under the P(R)A, in most cases the court does not have the discretion to consider the individual circumstances of each case and make adjustments to the property division to achieve a just and equitable result. Thus a New Zealand court has little opportunity to remedy any unfairness that may occur when equal sharing is not appropriate.

Finally, before enacting reforms with far-reaching implications for personal property rights, rigorous research should be conducted to ensure the appropriate regime is established. The New Zealand reforms were intended to result in fairness in property division for de facto couples at the end of their relationships. However, a lack of detailed knowledge of the circumstances within which the majority of de facto relationships are conducted raises questions as to whether fairness will result. In some cases, particularly those involving financial interdependence between the parties, the reforms may result in fairness. In other cases, particularly those involving financial independence of the parties, this will not be so. Now, only time will tell whether New Zealand's unique relationship property regime will achieve its desired objectives.