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Have your cake and eat it too

**The Treatment of Contemporaneous Relationships
under the Property (Relationships) Act 1976**

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October 2007

A dissertation submitted in partial fulfillment of a Bachelor of Laws (Honours) at the

University of Otago, Dunedin

Acknowledgments

I would like to thank:

My supervisor Mark Henaghan, for the time you put in reading and providing feedback on my work, and always being kind and encouraging. It was enjoyable and inspiring working with you.

Margaret Briggs and the people who came to my seminar, your questions and feedback got me moving.

My friends and family for lending me to the law library for the year and (mostly) keeping me sane whenever I escaped.

Jamie, your willing ear, practical advice and title ideas were greatly appreciated. Your constant support and weekends away kept me motivated - without you this would not be the same.

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Chapter One: Introduction

Background to sections 52A and 52B

The Property (Relationships) Act 1976 (the Act) was originally drafted to deal with problems in what was then the Matrimonial Property Act 1976. The scope of the new legislation was eventually widened to include rules for the division of relationship property following the breakdown of de facto relationships, as well as marriages.

As originally drafted, the Bill defined a de facto relationship as a “relationship in the nature of marriage”. However there were serious concerns that this definition was too vague and would lead to increased litigation. Some members of the community were also worried that such a definition was not appropriate in view of the inclusion of same-sex relationships, and did not adequately recognise the special significance and sanctity of marriage¹. The redrafted definition appears as section 2D of the current Act.

While the Act caters primarily for couples whose relationship falls into one of the conventional forms, more unusual and traditionally unconventional relationships are also recognised. This is done through the large amount of judicial discretion given in determining whether a particular relationship is a “de facto relationship” as defined in section 2D of the Act. While the parties must “live together as a couple”, a wide variety of factors may be taken into account in determining whether this is in fact the case. No

¹ Commentary to the Matrimonial Property Amendment and Supplementary Order Paper No 25

single factor is necessary or determinative and the weight that should be given to each factor will depend on the circumstances of the individual case.

This judicial discretion allows a range of relationships in different circumstances to be recognised as “de facto relationships”. The Courts have recognised that Parliament intended many types of relationships to fall within the definition of “de facto relationship” in the Act². The determination that cohabitation is not necessary for a relationship to be a “de facto” one was one of the most important steps in allowing more unconventional relationships to be recognised as nevertheless falling within the meaning of “de facto relationship”. That cohabitation is not required is evident from the definition in section 2D of the Act and also case law, such as *Scragg v Scott*³, where the relationship was found to be a de facto one even though Mr Scragg lived for most of the time in Guam while Ms Scott lived in New Zealand.

In particular, the Act recognises that certain people may be involved in more than one qualifying relationship at a time⁴. This dissertation will focus on the situation where one person is involved in two contemporaneous relationships, and the rules governing the division of relationship property in these circumstances.

²*Scragg v Scott* [2006] NZFLR 1076, at para 31

³ [2006] NZFLR 1076, also *H v S* Unreported, FC Christchurch, FAM-2005-009-4846, 12 February 2007, Judge Jackie Moran

⁴ The inclusion of rules determining the priority of claims where the relationships have been at some time contemporaneous (in sections 52A and 52B of the Act) implies that it is possible to be involved in more than one qualifying relationship at a time.

Sections 52A and 52B were inserted into the Act when the legislation was significantly amended in 2001. These sections cover both successive and contemporaneous relationships, but for the purposes of this dissertation only the parts that apply to contemporaneous relationships are considered. The relevant parts of sections 52A and 52B appear below.

52A Priority of claims where marriage or civil union and de facto relationship

- (1) This section applies in respect of relationship property if-
 - (a) competing claims are made for property orders in respect of that property, 1 claim being in respect of a marriage or civil union, as the case may be, and the other claim being in respect of a de facto relationship; and
 - (b) there is insufficient property to satisfy the property orders made under this Act.
- (2) If this section applies, the relationship property is to be divided as follows:
 - (b) if the marriage or civil union and the de facto relationship were at some time contemporaneous, then, -
 - (i) to the extent possible, the property order relating to the marriage or civil union must be satisfied from the property that is attributable to that marriage or civil union; and
 - (ii) to the extent possible, the property order relating to the de facto relationship must be satisfied from the property that is attributable to that de facto relationship; and
 - (iii) to the extent that it is not possible to attribute all or any of the property to either the marriage or civil union or the de facto relationship, the property is to be divided in accordance with the contribution of the marriage or civil union and the de facto relationship to the acquisition of property.

52B Priority of claims where 2 de facto relationships

- (1) This section applies in respect of relationship property if-
 - (a) competing claims are made for property orders in respect of that property but in relation to different de facto relationships; and
 - (b) there is insufficient property to satisfy the property orders made under this Act.
- (2) If this section applies, the relationship property is to be divided as follows:
 - (b) if the de facto relationships were at some time contemporaneous, then, -
 - (i) to the extent possible, the property orders must be satisfied from the property that is attributable to each de facto relationship; and
 - (ii) to the extent that it is not possible to attribute all or any of the property to either de facto relationship, the property is to be divided in

accordance with the contribution of each de facto relationship to the acquisition of property.

Sections 52A and 52B were based on a provision appearing in the 1997 Law Commission Report, *Succession Law: A Succession (Adjustment) Act*⁵. The substantive rule was imported directly into the Matrimonial Property Amendment Bill with some changes to the way it was expressed. This was to make the language describing relationships consistent with the rest of the Act (“marriage” and “de facto relationship” as opposed to “partnership” in the original Law Commission draft), and to make the sections applicable to relationship property rather than the estate of the deceased. The commentary which covers these provisions⁶ gives little explanation of them apart from noting the suggestions of the Law Commission in the abovementioned report. Concern was expressed by several submitters, including the then Principal Family Court Judge Patrick Mahony, that the provisions were too vague and provided inadequate guidance for the courts, particularly where clandestine relationships were involved. However the majority doubted that it would be practical to provide more detailed rules.

The Law Commission had originally formulated the rule in the context of competing claims on a deceased person’s estate. The proposed provision relevantly provided⁷:

59 Ranking of awards and orders on property division and contribution and support claims

- (2) If the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and support awards, the assets of the estate are to be applied so that

⁵ Commentary to the Matrimonial Property Amendment and Supplementary Order Paper No 25, at page 27

⁶ Commentary to the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 at page 27

⁷ 1997 Law Commission Report, *Succession Law: A Succession (Adjustment) Act*, at page 140

- (b) in the case of contemporaneous partnerships, a property division order is to be satisfied from that part of the estate of the deceased person as the court is able to attribute to the partnership concerned and, to the extent that such attribution is not practical, the court is to make an order that is proportionate to the contribution of each partnership to the acquisition of the assets.

The Law Commission formulated section 59 as it did because it considered that the property should not necessarily be shared equally between the relationships, as they may have contributed quite differently to the well-being of the different parties involved (the Law Commission referred to the difference between “an indolent, childless partnership” and “a hard-working business and family partnership”⁸). However, as the court would be put in an unenviable position if it had to compare the worth of the relationships in an abstract sense, they considered that it was better to divide the property based on the contributions of each relationship to its acquisition and maintenance.

The context in which the Law Commission formulated proposed section 59 (which was later substantially adopted as sections 52A and 52B) seems to have been disregarded by the Select Committee. While the Law Commission report had a focus on succession law, the Act covers the division of relationship property however the relationship ends, whether by death or separation.

In the context of succession law, if the deceased partner was party to two qualifying relationships contemporaneously, then there would be two competing claims on their estate. The court would not have to give as much consideration to the position of the deceased person (although it is required to consider the interests of their estate) as the

⁸ 1997 Law Commission Report *Succession Law: A Succession (Adjustment) Act*, at para C205.

position of the surviving partners. However in the case of one or both the relationships ending on separation, there will be the claims of three people to consider. The person who was involved in more than one relationship will also be claiming a share in the relationship property.

As yet, the courts have not been required to consider sections 52A and 52B. The wording of subsection (1) of sections 52A and 52B does not make it clear whether the rules in sections 52A and 52B are expected to apply to allocate the relationship property between the relationships *before* or *after* the court has decided how it should be divided between the partners to each relationship.

Further analysis of sections 52A and 52B is needed to determine when the rules contained in them will come into operation. It does not seem likely that the re-drafting of the Law Commission's proposed section was intended to alter it substantially, but it has put into doubt exactly at what stage of the process sections 52A and 52B come into consideration.

The ideas used in sections 52A and 52B, notably "property attributable to the relationship" and "contributions to the acquisition of property" are not consistent with the general principles underlying the division of relationship property as between spouses or partners earlier in the Act. Although "attributable to" is used in other contexts in the Act, it has been interpreted in different ways, each of which could give quite different results. Similarly "contributions to the relationship" is a defined term in the Act, and may affect

the meaning to be given to “contributions to the acquisition of property” in sections 52A and 52B.

Ambit of this dissertation

Although it is clear from the Act that a person can be in more than one qualifying relationship at a time, the courts have shown themselves to be reluctant to recognise contemporaneous relationships as falling within the ambit of the Act. Because of this, contemporaneous relationships will only be recognised where it is abundantly clear that the parties are living together as a couple.

Sections 52A and 52B are designed to divide property between *relationships*, and do not override the usual rules governing the division of relationship property between the *partners* in a relationship. Sections 52A and 52B will apply after the court finds that the relationship property of contemporaneous relationships overlap, and they will only apply to those pieces of property which are found to be relationship property of both relationships.

The first limb of the rule in sections 52A and 52B will be redundant as all property that is relationship property of a relationship is attributable to that relationship. Property which is relationship property of both relationships will be divided between the relationships in accordance with their respective contributions to its acquisition.

Sections 52A and 52B work to the advantage of the common partner, leaving them with half of the total relationship property. Because sections 52A and 52B only apply if the court has made findings in respect of each relationship, it is to the advantage of the common partner to litigate both disputes simultaneously, rather than undergo successive settlements with each partner. Sections 52A and 52B can also be used to manipulate the outcome where only one of the relationships has ended, or, in the case of the common partners' death, where one of the partners has an interest in retaining as much of the relationship property as possible between themselves and the deceased common partners estate.

Given the difficulties in applying sections 52A and 52B, and their fairly arbitrary outcome, they would be better replaced with an unambiguous provision which allocated specified shares to the relationships on a more objective basis.

Chapter Two: Establishing a qualifying relationship

To make a claim under the Act, the claimant must show that they were involved in a relationship of the type covered by the Act. Where the relationship concerned is a marriage or civil union, establishing that the relationship was covered by the Act will rarely be an issue. However major disputes can and do arise when the parties have not formalised the status of their relationship by entering into a marriage or civil union.

Meaning of ‘de facto relationship’

De facto relationship is defined in the Act. Section 2D includes a definition, and matters that should be taken into account in determining whether a particular relationship is a de facto relationship.

Meaning of de facto relationship

2D (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) 1 of the de facto partners dies.

The primary issue in determining whether 2 people are in a de facto relationship is establishing whether or not they “live together as a couple”.

“Live together as a couple”

Whether or not two persons live together as a couple is a factual matter that must be established by evidence. The onus of proof is on the party who is claiming that the parties were in a de facto relationship.

The issue most commonly arises where the parties are disputing when the de facto relationship started or ended. The length of the de facto relationship can be very important, as de facto relationships enduring for less than 3 years do not automatically qualify for the equal sharing regime⁹. The property rights of each party can be dramatically affected by this. As such, if the length of the relationship can be challenged, it will often be to the advantage of one party to argue that it was longer than 3 years, and

⁹ Section 2E defines a “relationship of short duration” as a relationship in which the partners have lived together as a couple for a period of less than three years. Sections 14, 14AA and 14A modify the usual division of relationship property sections in respect of relationships of short duration. Specifically, section 14A provides that where a de facto relationship is a relationship of short duration, the Court must not make a division of relationship property under the Act unless it is satisfied that there is a child of the relationship or the applicant has made a substantial contribution to the relationship, and that failure to make an order would result in serious injustice.

to the advantage of the other party to dispute that. Determining when a relationship became or ceased to be a de facto relationship can present serious difficulty.

This difficulty is recognised by the courts, and well expressed in the High Court decision of Gendall and Ellen France JJ in *Scragg v Scott*¹⁰. The Court recognised that Parliament intended many different types of relationship to be recognised as de facto relationships under the Act. The common factor between those diverse relationships, a special emotional bond between the partners, was very difficult for the Court to define precisely.

Although the phrase “live together” carries an ordinary meaning of cohabitation, it is important to recognise that living together as a couple in terms of the Act does not necessarily require cohabitation. This can be seen from the Act by reading subsections (2) and (3) in conjunction, as no finding in respect of the nature and extent of common residence is regarded as necessary.

Although most cases in respect of de facto relationships do involve cohabitation, this need not be permanent or continuous. For example, in *Scragg v Scott*¹¹, Mr Scragg lived and conducted his business in Guam, while Ms Scott was resident in New Zealand. They did cohabit whenever they were in the same country, and their relationship was found to be a de facto one. In *H v S*¹² the couple’s de facto relationship was found to be continuous despite there being a period of 12 months where they resided in separate houses.

¹⁰ [2006] NZFLR 1076, at paras [31] and [33]

¹¹ [2006] NZFLR 1076

¹² Unreported, FC Christchurch, FAM-2005-009-4846, 12 February 2007, Judge Jackie Moran

In most cases, the parties to a de facto relationship will be sharing accommodation.

Where there is no regular cohabitation, all the other circumstances of the relationship and the reasons that the parties do not reside together will be taken into account in determining whether a de facto relationship does in fact exist. This is how a person may be party to more than one de facto relationship simultaneously, or to a marriage and a de facto relationship.

In the case of contemporaneous relationships, it is likely that in most cases, there will be one relationship which clearly is covered by the Act, whether it is a de facto relationship or a marriage. This will usually be the relationship which has the most public aspect, and will often be the one which was entered into first in time. This relationship could be referred to as the person's "primary relationship". Where a person has a "primary relationship", there may be reluctance to recognise a second relationship as falling within the ambit of the Act¹³. Although the Law Commission's intention in drafting what would later become the basis for sections 52A and 52B was to avoid assessments as to the worth of each relationship on abstract principles, their comments indicated that some relationships are seen as more worthwhile than others. This is particularly evident from references to "an indolent, childless partnership" as compared to "a hard-working business and family partnership". It is fair to say that this is reflective of the tendency in society to frown on secondary relationships (words like "cheating husband", "other woman", "mistress", and "lover" spring to mind, with all the associated negative connotations). This tendency has been apparent in the cases involving contemporaneous

¹³ An example of this is *C v S* Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith, which is discussed in further detail below.

relationships. Although the courts have not been overtly opposed to recognising contemporaneous relationships in theory, in practice, they have been reluctant to find that a secondary relationship amounted to a de facto relationship, whether under the common law or the Act¹⁴.

Section 2D(2) provides a number of matters that may be taken into account in determining whether a de facto relationship exists. Although s2D(3) provides that no factor is necessary or determinative, it has emerged from the cases that more is required than the physical indicia of a de facto relationship. A special, mutual, emotional bond or commitment is necessary for the relationship to move from the level of friends, flatmates, or lovers to that of de facto partners.

(a) The duration of the relationship

There is no minimum duration required for a relationship to be considered a de facto one. In practical terms, the required emotional bond is unlikely to be found in relationships of very short duration. In the case of contemporaneous relationships, the duration of the relationship is likely to be seen as important. However, as the case of *C v S*¹⁵ demonstrates, a lengthy relationship will not of itself be enough. In that case, the parties' relationship lasted around 20 years, but was not found to be a de facto relationship under the Act.

(b) The nature and extent of common residence

¹⁴ *O'Connell v Muharemi* Unreported, HC Auckland, CP546-SD01, 24 October 2003, Heath J, and *C v S* Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

¹⁵ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

Cohabitation is not necessary for a de facto relationship to exist. The parties may choose not to live together for various reasons, including family needs¹⁶, work commitments¹⁷ and religious beliefs¹⁸. Equally, the nature of the common residence is relevant. If the parties do choose to live together, this must be in the context of their relationship as a couple. In *RPD v FNM*¹⁹, the parties lived under the same roof from 1995 until 2003. The Court found that a de facto relationship did not start until 2000, as during the earlier period the relationship was more in the nature of a business association between prostitute and pimp. Similarly in *S v M*²⁰, cohabitation was not evidence of a de facto relationship as the younger man was living as a boarder with the older man, not as his partner.

While cohabitation is not required for the relationship to be a de facto one, it is unusual for a de facto relationship to be held to exist where the parties do not live together. This is particularly so if their decision not to cohabit is not motivated by a reason external to their relationship. In *C v S*²¹, the Judge thought that the parties decision not to move in together even after Mr S's children had left home indicated strongly against the relationship being a de facto one, as one of the main reasons the parties had not lived together previously was no longer of concern.

¹⁶ In *H v S* (Unreported, FC Christchurch, FAM-2005-009-4846, 12 February 2007, Judge Jackie Moran) the parties lived apart to deal with issues their respective children were facing. Despite living in separate houses for 12 months, their de facto relationship was held to continue.

¹⁷ In *Scragg v Scott* [2006] NZFLR 1076, Mr Scott lived in Guam to conduct his business, while Ms Scott remained in New Zealand.

¹⁸ In *Horsfield v Giltrap* (2001) 20 FRNZ 404 the parties never lived together because of their religious beliefs, and never intended to live together, but were nevertheless a committed couple. In *Scragg v Scott* [2006] NZFLR 1076, at para [37], the High Court said there could be no doubt that the relationship in *Horsfield v Giltrap* would be recognised as a de facto relationship under s2D of the Property (Relationships) Act.

¹⁹ [2006] NZFLR 573

²⁰ Unreported, HC Wellington, CIV-2006-485-1940, 17 April 2007, Gendall J

²¹ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

(c) Whether or not a sexual relationship exists

In *Scragg v Scott*²² the High Court commented that the relationship in *Horsfield v Giltrap*²³, in which the parties did not live together or have a sexual relationship because of their religious beliefs, would be a de facto relationship under definition in section 2D. A sexual relationship is not necessary for a de facto relationship to exist, nor does a sexual relationship alone make a relationship into a de facto relationship²⁴. In the leading case of *Benseman v Ball*²⁵, this view was affirmed by the High Court when Priestly J found that the parties' de facto relationship had ended despite a continuing sexual relationship. In the context of contemporaneous relationships, it seems likely that there will be a sexual relationship. In *C v S*²⁶ the parties' sexual relationship was central to the relationship, as it developed very shortly after they met and continued even when their emotional connection had faded. While the existence of a sexual relationship will be persuasive in establishing a relationship between the parties, it is unlikely to have much weight in establishing that a de facto relationship existed.

(d) The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties

²² [2006] NZFLR 1076

²³ (2001) 20 FRNZ 404

²⁴ In *O'Connell v Muharemi* (Unreported, HC Auckland, CP546-SD01, 24 October 2003, Heath J), Ms O'Connell and Mr Muharemi had a sexual relationship for many years before their relationship in the nature of marriage started. During this earlier period the Judge described Ms O'Connell as "a long term mistress". In *RPD v FNM* [2006] NZFLR 573, the Court said that Parliament could not have intended a sexual relationship where one person used the other for their gratification to be an indicator that the parties were in a de facto relationship.

²⁵ [2007] NZFLR 127

²⁶ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

This factor does not require a total pooling of property or complete interdependence, and it has been accepted in cases that it is not unusual for couples to keep their financial affairs largely separate, even within a marriage or civil union²⁷. It is nevertheless expected that financial matters would be discussed and some mutual financial benefit would accrue from the relationship. It is anticipated that a couple who was living together within the meaning of the Act would provide at least support for each other in times of financial difficulty. This view was supported in *C v S*²⁸, where the Judge found it significant that other than exchanging occasional gifts and sharing some expenses such as meals together, there was no financial interdependence between the parties.

Generally the presence of financial support or interdependence is likely to be relatively persuasive evidence of the necessary emotional bond that is required for a de facto relationship. However its absence is not as determinative in showing that no de facto relationship existed, particularly if the parties have consciously decided to keep their financial affairs separate (as can often be the case where the relationship is the parties second or subsequent relationship).

(e) The ownership, use, and acquisition of property

Generally joint use of property, or property acquired as part of a joint enterprise is what is looked for. A couple that spends a substantial amount of time together will usually acquire chattels for their joint use. Where there is little or no property that is used or was acquired by the parties together, this can be a factor indicating against the existence of a

²⁷ *Scragg v Scott* [2006] NZFLR 1076, at [45], also *C v S* (Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith) at [95]

²⁸ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

de facto relationship. In *C v S*²⁹, the Judge found that in the context of the parties' long relationship, their lack of joint property and joint usage of property indicated against the existence of a de facto relationship.

(f) The degree of mutual commitment to a shared life

Subsection (3) of section 2D provides that no factor is necessary or determinative, and the court may place such weight on such factors that it considers appropriate in the circumstances. Despite this, the degree of mutual commitment to a shared life is one of the most important factors in determining whether the relationship has that special quality that makes it a de facto relationship. Without a finding of some degree of mutual commitment to a shared life, a court is very unlikely to find a de facto relationship existed. In many ways, the other factors listed in section 2D(2) are merely the physical indicia of a couples' mutual commitment to a shared life, or special emotional bond. Although the Judge found that the parties in *C v S*³⁰ did have a mutual commitment to a shared life for a long time, she decided that this commitment did not indicate that the parties were in a de facto relationship as it did not lead to them cohabiting.

(g) The care and support of children

Obviously, this factor is only relevant where there are children to be cared for. In *RPD v FNM*³¹, the Judge was less than impressed with the applicant's claim that he cared for and supported the respondent's children, given that the care amounted only to babysitting

²⁹ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

³⁰ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

³¹ [2006] NZFLR 573

during evenings. The Judge considered that the applicant's conviction for assault against the children indicated the true quality of his relationship with them.

It might be thought that in the case of contemporaneous relationship, where secrecy is likely to be an issue, the care and support of children by a parent's partner might be quite influential in establishing that the relationship was a de facto one. In *C v S*³², Mr S involved Ms C in his children's lives, she was a good friend to them and they knew her to be a sexual partner of Mr S (who was still married to their mother). The Judge found that Mr S's decision to involve Ms C in his children's lives was evidence of the importance of Ms C to him. However Ms C was not involved in the day-to-day care of the children or making important decisions about their upbringing. The Judge did not ultimately give much weight to this factor in deciding that the relationship was not a de facto one.

(h) The performance of household duties

The relevance of this factor will depend on the living arrangements of the parties. It is not often given a lot of weight in determining whether the parties are living together as a couple.

(i) The reputation and public aspects of the relationship

Generally, if two people are seen by their friends, family and colleagues as a committed couple, this will be a strong indicator that they are living together as a couple. The court will usually look for evidence of the couple's public appearance, which can be demonstrated by attendance at social functions, family gatherings and going on holiday

³² Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

together. The parties in *C v S*³³ were seen by others as a couple, particularly after 1990, when the relationship was less clandestine. However the Judge considered that the public aspects of the relationship were not sufficient of themselves to make the relationship a de facto one.

In the case of contemporaneous relationships, one relationship may be clandestine. In this situation, the court may take the absence of a public appearance as a couple as telling against the relationship being a de facto one. There is an argument that if the parties have a reason for keeping their relationship secret, this factor should be given little weight. This is because the factors in section 2D(2) are only the physical indicators of the special emotional bond that is required for a de facto relationship to exist. Where there is other evidence of the parties' emotional connection, the lack of a public appearance or reputation as a couple can be explained by the need for secrecy, and the usual assumptions that people in a de facto relationship will present themselves as a couple do not apply.

Application to contemporaneous relationships

The most relevant case on the interpretation of "de facto relationship" where contemporaneous relationships were involved is that of *C v S*³⁴. There the Family Court considered whether the 20 year relationship between Mr S and Ms C was a de facto relationship. Mr S was married, and lived with his wife and children. Ms C was married for the early part of the relationship but subsequently divorced her husband. The

³³ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

³⁴ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith

relationship went through different stages over the 20 years, but the parties never cohabited. From 1982 to 1998/1999, Mr S and Ms C had an intense emotional and sexual relationship. They frequently spent time together in Ms C's home and Mr S's studio. Until 1990, when Ms C separated from her husband, the relationship was only known of by close friends or confidantes, but after 1990 took on a more public character. Mr S's children were aware of the parties' relationship, as were members of Ms C's family. The parties did not share finances at all, other than occasional gifts and paying for meals and events when they were together. The Judge found that between 1982 and 1998/1999 the parties shared a close, caring, loving, emotional relationship. She found that between from 1998/1999, Mr S started to lose interest in his relationship with Ms C, as he had begun to pursue a new relationship with another woman. However during this time Mr S actively reassured Ms C about their relationship and deceived her as to his intentions towards her and the nature of his relationship with the other woman.

The Judge emphasised the quality of the relationship between Mr S and Ms C, describing it as "once beautiful, poetic, intense and passionate, fulfilling intellectually, physically and emotionally to them for so long"³⁵. However she ultimately decided that the parties were no more than "long-term lovers"³⁶ and the relationship was not a de facto one.

This case indicates that the courts will be more reluctant to find that a relationship was a de facto one in the case of contemporaneous relationships. If Mr S had not been married during throughout his relationship with Ms C, it seems likely from the Judge's factual

³⁵ at para [159]

³⁶ at para [159]

findings, that she would have found that the relationship was at some time a de facto one. The Judge accepted that in “some circumstances”³⁷ a strong mutual emotional commitment and clear public aspects to the relationship may be sufficient to establish that a relationship was a de facto one despite a lack of cohabitation or financial interdependence.

Although *C v S* is only one example of the approach taken by one Family Court Judge, a similar approach was taken in the earlier case of *O’Connell v Muharemi*³⁸. In that case, the common law definition of de facto relationship was considered, as the Act was not applicable³⁹. Heath J considered that the required relationship was “a relationship in the nature of marriage”, and that such a relationship must involve cohabitation to some degree, and companionship which showed an emotional bond between the parties. Heath J accepted that a married person could simultaneously be in a de facto relationship with another person. Ms O’Connell and Mr Muharemi had a relationship between 1979 and 2001. Mr Muharemi was married twice during the relationship, and finally separated from his second wife in 1987. Heath J found that before 1993, the parties were not living in a relationship in the nature of marriage as it lacked the necessary mutual commitment. Although he described the relationship before 1993 as “close and intimate”⁴⁰, and constant despite Mr Muharemi’s marriages, Heath J thought that Ms O’Connell was best characterised as “a long term mistress”⁴¹.

³⁷ at para [159]

³⁸ Unreported, HC Auckland, CP546-SD01, 24 October 2003, Heath J

³⁹ Although the 2001 amendments to the Property (Relationships) Act had come into force at the time of proceedings, the relationship had clearly ended by 1 February 2002.

⁴⁰ at para [43]

⁴¹ at para [43]

From 1994 to 2001, the parties were found to be living together in a de facto relationship. The judgment in *O'Connell v Muharemi* does not set out the factual evidence in as much detail as is necessary to consider whether the result would have been the same under the Act. Without criticising the final decision, it does demonstrate a tendency to see a secondary relationship as prima facie something less than a serious and committed relationship, to the point where a contemporaneous relationship is not likely to be seen as a de facto one.

Because of this, it is likely that contemporaneous de facto relationships will only be recognised in circumstances where it is abundantly clear that the parties were in fact living together as a couple. One example of this is likely to be when a person has several families or partners who do not know about each other because the person provides a plausible reason for his or her absence. This situation occurred in the Australian case of *Green v Green*⁴². Mr Green (deceased) had kept 3 simultaneous but separate households with his legal wife and two de facto wives, who were apparently not aware of one another's existence due to Mr Green's plausible explanations for his absences (which, the Court noted, were consistent with his apparent success as a used car salesman). The issue to be decided by the Court was whether to allow Mr Green's third "wife" (who he had brought over from Thailand when she was around 13 or 14 years of age) a proprietary interest in some of his real property. While it was not the main question before the Court, it was accepted that the respondent's relationship with Mr Green was a de facto relationship.

⁴² (1989) 17 NSWLR 343 (CA, NSW)

The other type of situation where the courts are likely to recognise contemporaneous relationships as being qualifying relationships is where the parties are in a polygamous relationship. In this situation, where a man (usually) is living with more than one “wife” in the same or connected household(s), the man’s relationship with each of the women is likely to be recognised as a qualifying one under the Act. If the man is purporting to be married to all of the women, each marriage will still be covered by the Act because the definition of marriage⁴³ includes a void marriage. If there is no purported marriage, it is nevertheless likely to be clear that the man and each woman were living together as a couple within the meaning of the Act. The courts are likely to feel more comfortable with finding that the relationships in this situation were qualifying ones under the Act as the clear intention is to enter into a committed and serious relationship.

⁴³ in section 2A

Chapter Three: Procedural Analysis

What is the function of sections 52A and 52B?

Sections 52A and 52B were intended to divide relationship property between the different *relationships*, rather than between the *partners of each relationship*. Subsection (1)(b) provides that sections 52A and 52B apply when there is insufficient property to satisfy the property orders *made under this Act*. Property orders *made under this Act* must be referring to orders made under the usual division of relationship property sections, and this indicates that sections 52A and 52B are not to determine the substance of the orders dividing the property between the partners of each relationship.

Subsection 2(b) of sections 52A and 52B provides the substantive rules for the distribution of relationship property and is clearly directed to how the property orders in respect of each relationship will be satisfied, rather than the substance of the property orders themselves. The titles of sections 52A and 52B (“Priority of claims where marriage or civil union and de facto relationship” and “Priority of claims where 2 de facto relationships”) also indicate their purpose of allocating property between the relationships. This is consistent with the Law Commission’s idea⁴⁴ that although equal sharing could be appropriate as between the partners to a relationship, it could not be assumed that each relationship contributed equally to the interests of all the parties involved.

⁴⁴ 1997 Law Commission Report, *Succession Law: A Succession (Adjustment) Act*

The intended function of sections 52A and 52B is to provide a mechanism for prioritising property orders made under the usual principles of the Act in respect of different relationships.

At what stage of the proceedings do sections 52A and 52B apply?

The Law Commissions' proposed section 59⁴⁵ was intended to apply once "property division orders and support awards" had already been made. This is evident from the words "[i]f the estate of a deceased has insufficient assets available after satisfaction of liabilities to fully satisfy property division orders and support awards...". This suggests that the orders and awards would have already been made, as the court would need to know the quantum of the awards to determine that the estate would have insufficient assets to satisfy them. As there was little commentary⁴⁶ on the intended purpose of sections 52A and 52B, it is difficult to know when the Select Committee thought they would apply.

Subsection (1) of sections 52A and 52B provides when the sections will apply. It provides, in substance, that the sections will apply to relationship property if competing claims are made for property orders in respect of the property but in relation to different relationships, and there is insufficient property to satisfy the property orders made under the Act.

⁴⁵ 1997 Law Commission Report, *Succession Law: A Succession (Adjustment) Act*

⁴⁶ Commentary to the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 at page 27

The question that arises when considering sections 52A and 52B is whether they dictate what relationship property is available to be divided between the parties to each relationship, or whether property orders are made under the usual division of relationship property sections of the Act, and sections 52A and 52B only apply to rank the property orders made if there is insufficient property to satisfy them.

A considered reading of subsection (1) reveals that it is quite contradictory. The first part provides that sections 52A and 52B apply to relationship property if competing *claims* are made for property orders in respect of that property, but in relation to different relationships. This indicates that wherever there are competing claims for property orders, in relation to different relationships, sections 52A and 52B will apply to allocate the property that is available to each relationship.

Subsection (1)(b), however, adds the proviso that there must be insufficient property to satisfy the property orders *made under this Act*. If the relationship property is to be divided between the relationships in accordance with sections 52A and 52B before property orders are made, as subsection (1)(a) suggests, then the required insufficiency of property to satisfy the property orders will never arise. Subsection (1)(b) must indicate that the property orders are to be made in accordance with the sections of the Act that are normally applicable.

Subsection (2)(b) of sections 52A and 52B provides the substantive rules for how the relationship property should be divided. Subsection (2)(b) is clearly directed at the

distribution of property between the two relationships *after* the Court has decided how it should be divided between the partners. Therefore, it would seem to make sense that sections 52A and 52B will apply following the making of property orders determining the division of relationship property between each of the partners to each relationship under the usual principles of the Act .

There are a couple of problems with the interpretation of sections 52A and 52B that requires them to apply *after* property orders dividing the relationship property between the partners have been made. The relationship property of one relationship will have been distributed when the property orders in respect of that relationship dispute were made, and the relationship property that was allocated to the non-common partner will no longer be available to the other relationship. Also, subsection (1)(a) of sections 52A and 52B specifically uses the words competing *claims*, rather than competing property orders.

The solution to these problems is found by considering the proper meaning to be given to the word “claim”. Given the strong indications from the history and wording of sections 52A and 52B that they were expected to apply after the Court had determined how the relationship property would be divided between the parties to each relationship, it would be strange if “claim” was to be interpreted in its widest sense. Although “claim” can in some circumstances mean a request or demand, in this context it must instead mean an entitlement or right, as determined by the Court under the applicable provisions of the Act, to a share of the property. On this interpretation, sections 52A and 52B would only apply when the Court had determined that some property was relationship property of

both relationships, and there were competing entitlements to shares in the property. It would be unusual if sections 52A and 52B apply merely because parties from different contemporaneous relationships make an application for the same property, without the Court first determining what is relationship property for each relationship, and how it should be divided between the partners to each relationship.

The difference between the two approaches is best demonstrated by an example. Sara lives part of the time with her husband James and part of the time with her de facto partner Jay. She owns two houses which were purchased with money she earned during her relationship with her husband James, one of which is their family home and the other which is a rental property. Sara and Jay live in the rental property as their family home. If both of the relationships ended, James and Jay could both claim a share in both of the properties. Under the approach which requires sections 52A and 52B to apply *before* the court makes its findings about the division of relationship property in respect of each relationship, the court would have to determine which relationship each of the properties was attributable to, or the respective contribution of each relationship to the acquisition of the properties, without even considering whether both of the properties were relationship property for each relationship. Under the second approach, where sections 52A and 52B apply *after* the court has already made its findings in respect of the classification and division of relationship property for each relationship, the court would have found that only the rental property occupied by Sara and Jay was relationship property of both

relationships⁴⁷, and that because Sara and James were entitled to share equally, and Sara and Jay were entitled to share equally, there would be insufficient property to satisfy the property orders that would be made.

It is more in keeping with the general principles of the Act for the Court to consider each relationship separately to determine how the relationship property should be divided between the partners, before considering how the findings it has come to should be implemented. Parliament has decided that the parties to all relationships of more than three years duration falling within the ambit of the Act should share the relationship property equally. For this rule to be fairly applied, the classification and division of relationship property between the partners to each relationship should be decided independently.

Which pieces of property do sections 52A and 52B apply to?

Subsection (1)(a) of section 52B (which is essentially the same as subsection (1)(a) of section 52A) provides that sections 52A and 52B apply as follows (emphasis added):

52B Priority of claims where 2 de facto relationships

(1) This section applies in respect of *relationship property* if-

- (a) competing claims are made for property orders in respect of *that property* but in relation to different de facto relationships;

Given that subsection (1)(a) refers only to *that* property in respect of which there are competing claims for property orders, it appears that sections 52A and 52B apply only to the particular pieces of property that are found to be relationship property of *both*

⁴⁷ The rental property is relationship property of the de facto relationship between Sara and Jay because they live in it as their family home, and relationship property of Sara and James' marriage because it was purchased with income earned during their relationship, which is included as relationship property.

relationships. This interpretation is consistent with sections 52A and 52B applying *after* the court has made findings in respect of the classification and division of relationship property in respect of each relationship. In the example of Sara, James and Jay, the rental property is considered relationship property of both the marriage and the de facto relationship. It is relationship property of the marriage because it was purchased out of property acquired during the marriage, and relationship property of the de facto relationship because it is the family home. Under this interpretation sections 52A and 52B would only apply to the rental property, while the house occupied by Sara and James would simply be divided between the two of them.

There is another possible interpretation, which would mean that where there are competing claims for property orders, sections 52A and 52B apply to all the relationship property of both of the relationships. This would involve pooling all the relationship property, and satisfying the property orders that were made under the ordinary principles of the Act out of the general pool, in accordance with the rules in sections 52A and 52B. This interpretation would result in both the rental property and the house occupied by Sara and James being subject to sections 52A and 52B.

The approach which involves applying sections 52A and 52B only to those pieces of property that have been found to be relationship property of both relationships has some advantages. It is probably less time consuming to apply, because less property will have to be considered. It is also probable that any property which is categorised as relationship property of only one of the relationships is “attributable” to that relationship, and

therefore the property orders in respect of that relationship would be satisfied out of that property anyway under the rules in sections 52A and 52B. This would leave only the property which was classified as relationship property of both relationships to be distributed between the relationships under the rules in sections 52A and 52B. The property in effect would be divided in proportion to the contributions of each relationship to its acquisition.

There are also problems with the approach applying sections 52A and 52B only to those items of property which are classified as relationship property of both relationships. Although the meaning of attributable will be discussed in detail later in this dissertation, the ordinary meaning of attributable to is belonging to or ascribed to. The narrower approach makes redundant the first limb of the rule, which requires the property orders relating to each relationship to be satisfied out of the property that is attributable to each relationship to the extent possible. This clearly envisages that most of the property to be divided by sections 52A and 52B will be attributable to only one of the relationships, but some property will not be clearly attributable to only one relationship (such as the rental property which was purchased by Sara with relationship property from her marriage but occupied by her partner).

In most cases the result will probably be much the same whether sections 52A and 52B are applied to only those items of property which are found to be relationship property of both relationships, or the whole pool of relationship property from both of the relationships. This is because the items of relationship property which are only

relationship property of *one* relationship are very likely to be seen as attributable to that relationship. Therefore it is only really the items of relationship property which are attributable to *both* relationships (i.e. those pieces of property which found to be relationship property for both relationships) which will be distributed between the relationships in accordance with each relationships' contribution to the acquisition of the property. Nevertheless, the wording of sections 52A and 52B is quite clear that they only apply to *that property* in respect of which there are competing claims.

What does “to the extent possible” mean?

Section 52B(2)(b) provides (taken as representative of this part of sections 52A and 52B):

(2) If this section applies, the relationship property is to be divided as follows:

(b) if the de facto relationships were at some time contemporaneous, then, -

(i) to the extent possible, the property orders must be satisfied from the property that is attributable to each de facto relationship; and

(ii) to the extent that it is not possible to attribute all or any of the property to either de facto relationship, the property is to be divided in accordance with the contribution of each de facto relationship to the acquisition of property.

The meaning of “to the extent possible” in subsection (2)(b)(i) must be determined by reference to subparagraph (ii). Reading the two limbs of subsection (2)(b) together, it seems that subparagraph (i) means that where it is possible to attribute all or any of the property to either one of the relationships, the property orders in respect of that relationship must be satisfied out of the relationship property attributable to that relationship. Subparagraph (ii) seems to mean that the remaining property which is not able to be attributed to either of the relationships because it is attributable to both relationships shall be divided in accordance with the contribution of each relationship to the acquisition of the property.

The wording of subparagraph (ii) *prima facie* also covers the situation where all or some of the property is not attributable to either relationship (i.e. does not belong to either relationship). In the context of the legislation, this cannot be the meaning that was intended when sections 52A and 52B were drafted. Given that sections 52A and 52B apply to *relationship* property, it would be inconsistent to say that something could be relationship property, but at the same time not attributable to that relationship. This must be so no matter what meaning is given to “attributable” if the provisions are to make sense. The words “to the extent that it is not possible to attribute all or any of the property to either relationship” should be read as meaning “to the extent that all or any of the property is attributable to both relationships”. This does not create the absurdity that the opposite reading would, as there are situations where all of the property could be attributable to both relationships⁴⁸.

How will competing claims from different relationships arise?

Where both relationships have ended

In some instances of contemporaneous relationships, both relationships will end at or around the same time. However this does not mean that the relationship property issues of both relationships will be litigated simultaneously (or even at all). If findings are not made in respect of both the relationships, sections 52A and 52B cannot apply. This means

⁴⁸ While New Zealand law does not allow polygamous marriage or bigamy, the definition of marriage in section 2A of the Property (Relationships) Act 1976 provides that marriage includes a void marriage. Therefore an illegal polygamous marriage could give rise to a situation where section 52A or 52B applies, and all the relationship property is attributable to both relationships. Alternatively, parties to a void marriage would almost undoubtedly be considered to be in a *de facto* relationship, which could equally give rise to such a claim.

that sections 52A and 52B do not apply where one or both of the divisions of relationship property is settled out of court. The Act only applies to property which is owned by one or both of the spouses or partners⁴⁹. The division of the relationship property of one relationship through litigation or settlement by agreement will affect the property rights of the person who is party to both relationships. This will in turn affect the amount of relationship property that is available for division in respect of the other relationship.

This can be illustrated by the example of Gary, Rachel and Julia. Gary and Rachel have been married for 20 years. Gary was a high income earner, while Rachel stayed at home to look after their 3 children and their small white dog. Gary bought their family home in Wellington 10 years ago and he, Rachel and the children have been living in it since. During the last 12 years of the marriage, Gary has also been having a relationship with Julia. It started when Gary bought an investment property in Petone 14 years ago and Julia moved in as a tenant. She is still living in the property that Gary owns, although she no longer pays rent, and she and Gary spend a couple of nights a week together in the house.

In this situation, Gary owns both of the houses. Both women could claim a half share in both of the houses as they are both classified as relationship property for each relationship⁵⁰. Gary and Rachel decide to get divorced. The break up is amicable. In the

⁴⁹ This is implicit in the definition of relationship property in section 8 of the Property (Relationships) Act.

⁵⁰ Under section 8(1)(a) of the Property (Relationships) Act, the family home whenever acquired is relationship property. So Rachel has a claim to the Wellington house as the family home, and Julia has a claim to the Petone house as the family home. Property acquired by either party after the marriage or de facto relationship began is also relationship property under section 8(1)(e). On this basis, Rachel has a claim to the Petone house as Gary bought it during their marriage. Julia has a claim to the Wellington house as Gary bought it after the beginning of their relationship.

relationship property settlement Gary gives Rachel the house in Wellington. She was entitled to a half share anyway, and the other half share is in exchange for her half share in the Petone house. The title to the house is registered in Rachel's name. Gary tells Julia what he has done. She is not impressed. She tells Gary that their relationship is over. As Gary no longer owns the Wellington house, Julia can only claim a half share in their family home in Petone. If Gary and Julia had settled their relationship property division before Gary's settlement with Rachel, Julia would have been better off as she would have been able to claim a half share of both houses. Gary is also worse off, as he used to own two houses, and is now left with only a half share in one.

If both disputes had been litigated, the outcome might have been quite different. The court would have found that Gary, Rachel and Julia each have a half share in both of the houses. Sections 52A and 52B would apply as there is insufficient property to satisfy the property orders. As discussed in detail below, property that is relationship property of a relationship is attributable to that relationship. Both the Wellington house and the Petone house are attributable to both relationships. They will be divided in accordance with the contributions of each relationship to their acquisition. As Gary and Julia's relationship had not started when Gary bought the Petone house, all of the contributions to its acquisition must have come from Gary and Rachel's marriage. The contributions of each relationship to the Wellington house are more difficult to determine, but it is sufficient to say that Gary will retain half of all of the relationship property, while both Rachel and Julia are likely to receive significantly less than they would have if there had not been competing claims from the other relationship.

This demonstrates that for a person whose spouse or partner is involved in another relationship that qualifies under the Act, it is likely to be advantageous to resolve the division of relationship property out of Court, before the other division of relationship property is settled or a claim is made by the other partner. This example also demonstrates that it will almost always be to the advantage of the common partner (the person who is involved in more than one relationship) to litigate the matter. This is because sections 52A and 52B leave the common partner with half of all the relationship property (however the property is divided between the relationships, the common partner will still receive half of each part, which amounts to half of the total), but only apply when the court has made findings in respect of both relationships, whereas successive settlements (either both out of court or one settled through litigation and one settled out of court) will generally leave the common partner with significantly less than half of all the relationship property of both the relationships.

The Act does not provide any procedure to be followed when disputes involving contemporaneous relationships are litigated. For sections 52A and 52B to apply, the court must find that some property is relationship property of *both* relationships, and for practical reasons the Court must be aware of the competing claims before final orders are made vesting the property in the various parties.

If one claim is lodged before the other and set down for an earlier hearing, there should be some procedure by which the Court is notified that contemporaneous relationships are

involved and that final vesting of property should be delayed until both hearings are complete. If the final orders are made and the property is transferred or the money paid out following the resolution of the first hearing, there will be less relationship property to be divided by the Court at the second hearing. Alternatively, if one of the parties notified the Court that a case involved contemporaneous relationships, the Court could decide to hear the disputes together. One advantage of this would be that the Judge who eventually applied sections 52A and 52B would be very familiar with the facts surrounding each relationship and therefore may be in a better position to decide which property is attributable to each relationship or the contribution of each relationship to the acquisition of the property. This would be advantageous for all parties as evidence would not have to be repeated and less time could be spent on dividing the property between the relationships in accordance with sections 52A and 52B. Suggestions for amendment with regard to procedure are included later in this dissertation.

Where only one of the relationships has ended

In some instances of contemporaneous relationships, only one relationship will end, while the other will continue. This is what happened in *C v S*⁵¹. Mr S and Ms C had a relationship that lasted over 20 years. Ms C was married for the first few years of the relationship, and Mr S remained married throughout. When the relationship ended, Ms C sought a division of relationship property. While Mr S's wife was aware to some degree (and was certainly made fully aware when Court proceedings commenced) of the relationship between her husband and Ms C, she chose to stay with Mr S and there was no suggestion that they would end their marriage. The issue of Mrs. S's rights never had

⁵¹ Unreported, FC Dunedin, FAM-2005-012-157, 28 September 2006, Judge Emma Smith)

to be dealt with because the Judge found that the relationship between Mr S and Ms C did not amount to a de facto relationship in terms of the definition in the Act. However the case raises the question – what can a person whose relationship continues but whose relationship property rights are potentially being eroded by a claim by their spouse or partner’s other partner do?

Part 7 of the Act governs proceedings under the Act. Section 23 provides that either spouse or partner, or both of them jointly, or any person on whom the spouses or partners have made conflicting claims in respect of property can apply for an order under section 25(1)(a) or (b) or a declaration under section 25(3).

Section 25(1)(a) allows the Court to make any order it considers just determining the respective shares of each spouse or partner in the relationship property or dividing the relationship property between the spouses or partners. Section 25(2) prevents the Court from making an order under section 25(1) unless, in the case of a marriage or civil union, the parties are no longer living together as husband and wife or civil union partners, or the marriage or civil union has been dissolved, or in the case of a de facto relationship, the partners no longer have a de facto relationship with each other. This would seem to indicate that if only one of multiple contemporaneous relationships had ended, the Court would only be able to determine the rights of the parties to that relationship, without having regard to the rights of other partners or spouses. However section 25(3) provides that regardless of subsection (2), the Court may make at any time make any order or

declaration relating to the status, ownership, vesting or possession or any specific property as it considers just.

One option that is open to a person whose spouse or partner is facing a relationship property claim by their other partner is to seek a declaration under section 25(3). This would be seen as a competing claim under sections 52A and 52B if the property that was affected by the order under section 25(3) was also the property in respect of which the other partner was seeking a division. Under section 37 of the Act, the Court must, before it makes any property order, give notice and an opportunity to appear and be heard to any person having an interest in the property which would be affected by the order. This is another avenue by which a person whose partner is subject to a division of relationship property claim may be heard by the Court.

Another option would be for the couple that is staying together to collude against the other person. For example, if Gary decided to leave Rachel and live just with Julia, they could collude to minimise the amount of relationship property that will go to Rachel. If Gary and Julia happened to break up at around the same time that Gary broke up with Rachel, the relationship property would have to be distributed according to sections 52A and 52B because of the competing claims. Rachel would almost certainly end up with a smaller amount of relationship property than she would have had there not been a competing claim. If Gary and Julia happened to get back together following the resolution of the relationship property dispute, between them they would have retained the majority of the total amount of relationship property, as Gary would have retained

half and Julia would have received a portion of the other half. While giving advice to this effect would be unethical, a client who had the legal situation thoroughly explained to them could well come to their own conclusions about the best course of action for them to take in their particular circumstances.

The disadvantage to both of these options is that the couple who are staying together will have to incur increased litigation costs and the inconvenience and stress of Court proceedings are likely to be amplified.

Where the relationships end because of the death of the common partner

In some instances of contemporaneous relationships, both relationships will end because the common partner has died. Part 8 of the Act covers the division of property where one of the spouses or partners has died. Section 61 provides that if one of the spouses or partners has died, the surviving spouse or partner may choose either to make an application under the Act for a division of the relationship property (option A), or succeed under the deceased person's will or the intestacy rules (option B).

If both partners choose option B, then what they will receive depends on what provision is made for them in the deceased person's will. The situation where the deceased person has made a valid will which their surviving spouse and/or de facto partner(s) are content to succeed under needs no further discussion. If there is no will, or the will is invalid, the intestacy rules in sections 77 to 77C of the Administration Act 1969 apply.

Section 2 of the Administration Act defines de facto relationship by reference to the definition in section 2 of the Property (Relationships) Act⁵², but makes it clear that only a de facto partner who was living with the deceased at their time of his or her death is entitled to succeed to the deceased person's estate on intestacy⁵³. Under section 77, the division of the intestate's estate depends on which members of their family survive them. Generally, if the intestate is survived by a spouse, civil union partner or surviving de facto partner, and other family members who are entitled to succeed on intestacy, then the spouse or partner will receive the intestate's personal chattels, the prescribed amount⁵⁴ and a portion of the residue of the estate. Section 77C applies if the intestate dies leaving a spouse, civil union partner and a surviving de facto partner who is entitled to succeed on the intestacy, or more than one surviving de facto partner who is entitled to succeed on the intestacy. In that situation, the estate is divided under section 77 as if the intestate died leaving only one spouse or partner entitled to succeed on the intestacy, and the share that would have been distributed to the spouse or partner is divided equally between the surviving partners.

If both partners choose option A, then competing claims to the relationship property will arise. It is likely that the claims of the surviving partners will overlap more if the relationships end by death rather than separation, as section 81 of the Act will apply.

Section 81(1) provides that all the property that was owned by the deceased spouse or

⁵² "De facto relationship" has the meaning given to it by section 2 of the Property (Relationships) Act 1976 (Section 2(1) of the Administration Act 1969)

⁵³ "Surviving de facto partner", in relation to a deceased person, means a person who was living in a de facto relationship with the deceased person at the date of his or her death. (Section 2(1) of the Administration Act 1969)

⁵⁴ Section 82A provides that the Governor-General may from time to time, by Order in Council, make regulations prescribing amounts that are required to be prescribed for the purposes of section 77.

partner at his or her death is presumed, in the absence of evidence of the contrary, to be relationship property. The burden of proving that that property to which section 81(1) applies is not relationship property lies on the person making that assertion⁵⁵. This is probably the most obvious example of the application of sections 52A and 52B. The history of sections 52A and 52B shows that they were drafted with this situation in mind. A surviving spouse or partner who is not provided for in the deceased's will, will almost always choose option A.

The most complex situation will arise where one spouse or partner wishes to choose option A, and one wishes to choose option B. This situation is likely to arise where the testator's will leaves everything (which is not uncommon) to their named spouse or partner. If a surviving spouse or partner chooses option A, once the relationship property has been divided, the surviving spouse or partner is treated as if they had predeceased the deceased person and the deceased person's half of the relationship property will be distributed in accordance with their will or intestacy⁵⁶. There is no specific provision in the Act which stipulates what should happen when there is more than one surviving spouse or partner who is eligible to choose option A or option B. It could be argued that section 78 gives the entitlement of the surviving spouse or partner who chooses option A priority over the entitlements of the surviving spouse or partner who chooses option B. Section 78 gives the entitlement of a surviving spouse or partner under the Act priority over any other person's interests under the will, the intestacy or other succession

⁵⁵ Section 81(2) of the Property (Relationships) Act

⁵⁶ Section 76 of the Property (Relationships) Act

legislation⁵⁷. Looking at the section as a whole, the purpose seems not to be to prioritise claims between competing surviving spouses or partners, but to protect the interest of the surviving spouse or partner from claims against the deceased's estate by other people. Despite this, it is likely that where the deceased leaves more than one surviving spouse or partner, the effect of section 78 is to allow the division of relationship property to proceed first, followed then by the distribution of the deceased's estate in accordance with the will or intestacy.

The problem that could face a partner who is left the entire estate by the deceased's will is their vulnerability to Family Protection Act 1980 and Law Reform (Testamentary Promises) Act 1949 claims. Only the share awarded to a surviving spouse or partner under the Act is given priority over awards made under these Acts⁵⁸, whereas a surviving spouse or partners share of the estate under the deceased's will can be depleted by such claims. If there is a high risk that such claims will be made against the deceased's estate after the relationship property is distributed to the spouse or partner who chooses option

⁵⁷ **78 Priority of entitlement of surviving spouse or partner**

(1) The entitlement of a surviving spouse or partner to any property or payment under an order or agreement made under this Act has priority over –

(a) any beneficial interest to which any person is entitled under the will (if any) of the deceased spouse or partner; and

(b) any beneficial interest to which any person is entitled under the intestacy or partial intestacy of the deceased spouse or partner; and

(c) any order made in respect of the estate of the deceased spouse or partner under the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949; and

(d) all duties and fees payable in respect of the estate of the deceased spouse or partner under any Act imposing or charging duties or fees on the estate of the deceased person.

(2) Despite subsection (1), the following have priority over the entitlement of a surviving spouse or partner under this Act to any property or payment:

(a) all debts properly incurred by the personal representative of the deceased spouse or partner in the ordinary course of administration of the estate of the deceased spouse or partner:

(b) the reasonable funeral expenses of the deceased spouse or partner.

⁵⁸ By section 78 of the Property (Relationships) Act

A, the other surviving spouse or partner may wish to also choose option A to ensure that payment of their share of the relationship property has priority over other claims.

A partner who is emotionally connected to the other beneficiaries under the deceased's will or intestacy may wish to choose option A. This is similar to the possibility of collusion discussed previously. It is likely that if the relationship property must be distributed between the relationships in accordance with sections 52A and 52B, the estate and the partner who wishes to benefit the estate will end up with the majority of the property between them.

An example of a situation like this would be if Gary died leaving all of his property to Rachel if she was still alive when he died, or to his and Rachel's children if Rachel predeceased him. As Julia is not named in Gary's will, she will choose option A and make a division of relationship property claim. Because of section 81, all of Gary's property is prima facie presumed to be relationship property, and Rachel has the onus of proving any assertions she makes that any property of Gary's is not relationship property. If Rachel chose option B, the relationship property would simply be divided equally between Julia and Gary's estate, and Rachel would succeed under Gary's will. However if Rachel chose option A, Gary's estate would still receive half of the relationship property of both of the relationships, but Rachel will also receive some of the other half of the relationship property (the final proportion depending on how it is divided under sections 52A and 52B). As Rachel is treated as predeceasing Gary if she chooses option A, his estate would be distributed amongst their children. Rachel and her children would

receive more than the half that Rachel alone would have received if she had chosen option B.

Chapter Four: Interpretation of the Substantive Rules

What does “attributable to” mean?

The first limb of the rule in sections 52A and 52B provides that the property orders relating to each relationship should be satisfied out of the property that is *attributable to* that relationship. “Attributable to” is not defined in the Act. It bears an ordinary meaning of belonging to or caused by. The first limb of the rule could therefore be read as covering that property which belongs to one or other of the relationships, or that property which has some causal connection with one or other of the relationships. Some assistance in determining the appropriate meaning to be given to “attributable to” in sections 52A and 52B can be derived from its use and interpretation in other sections of the Act.

“Attributable to” is used in sections 8(1)(g), 8(1)(i) and 9A of the Act.

Sections 8(1)(g) and 8(1)(i) respectively provide that the proportion of the value of any life insurance policy (as defined in section 2) that is attributable to the relationship, and the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the relationship, are relationship property. The meaning of “attributable to the relationship” in this context has not received any significant discussion in the case law, presumably because it is self-evident. The authors of *Fisher on Matrimonial Property and Relationship Property*⁵⁹ have suggested that in relation to superannuation scheme entitlements, a time based approach will be taken to determining what proportion of the value is attributable to the relationship (i.e. the length of time that

⁵⁹ Fisher, R. L., Atkin, W. R., Karunaharan, N., Tate, Raewyn, and Sage, Shelley, *Fisher on Matrimonial Property and Relationship Property*, (LexisNexis Butterworths, 2002), at para 11.32.

contributions were made during the relationship compared to the total length of time that contributions were made to the scheme). This approach was taken in *Rivers v Rivers*⁶⁰, where the proportion of the value attributable to the relationship was held to be the same as the proportion of the duration of the relationship compared to the whole period of contributions to the scheme. Although the authors of *Fisher on Matrimonial Property and Relationship Property*⁶¹ suggest that a different approach which focuses more on the causal connection between the relationship and the increase in value of a life insurance policy will be taken in respect of determining the proportion of the value of a life insurance policy which is attributable to the relationship, the time based approach has been taken in the Family Court and approved by the High Court in *M v A*⁶². There Gendall J approved the Family Court Judge's approach of apportioning the value of the life insurance policy by reference to the duration of the relationship compared to the total period of contributions.

The approach taken with respect to determining what proportion of the value of life insurance policies and superannuation scheme entitlements are attributable to the relationship shows that a wide meaning of attributable to the relationship has been preferred. No causal connection between the relationship and the value of the property is required other than that payments to the scheme have been made during the

⁶⁰ [2005] NZFLR 372

⁶¹ Fisher, R. L., Atkin, W. R., Karunaharan, N., Tate, Raewyn, and Sage, Shelley, *Fisher on Matrimonial Property and Relationship Property*, (LexisNexis Butterworths, 2002), at para 11.26

⁶² Unreported, HC Wellington, CIV-2006-485-1868, 5 April 2007, Gendall J

relationship⁶³. There is no requirement that the payments were made *because* of the relationship.

The approach taken with respect to sections 8(1)(g) and 8(1)(i) contrasts with the approach taken with respect to section 9A. In *Hartley v Hartley*⁶⁴, Somers J was considering the predecessor of section 9A, section 9(3) of the Matrimonial Property Act. He said “the word ‘attributable’ means owing to or produced by and thus it is only the increase in value or gains wholly or in part owing to or produced by one or other or both of the factors mentioned in s9(3) which become matrimonial property”. In the latest Court of Appeal decision considering section 9A, *M v B*⁶⁵, the Court affirmed its own decision in *Nation v Nation*⁶⁶, that “a causal connection which is more than trivial is required” for the increase in the value, income or gains of separate property to be attributable to one of the factors referred to in sections 9A(1) and 9A(2). The causal connection has to be proved by the non-owning party⁶⁷. It can be seen that it is more difficult for a claimant to establish that an increase in value of separate property is attributable to the application of relationship property or their own actions under section 9A than it is for a claimant to establish that a proportion of the value of a life insurance

⁶³ This qualification is implicit in the definitions of life insurance policy and superannuation scheme entitlement in section 2 of the Property (Relationships) Act. The definition of life insurance policy excludes a policy that was fully paid up at the time the marriage, civil union or de facto relationship began, and the definition of superannuation scheme entitlement includes only entitlements derived from contributions made after the marriage, civil union or de facto relationship began or derived from employment or office held since the marriage, civil union or de facto relationship began.

⁶⁴ [1986] 2 NZLR 64; (1986) 4 NZFLR 201 (CA)

⁶⁵ [2006] 3 NZLR 660; (2006) 25 FRNZ 171; [2006] NZFLR 641

⁶⁶ [2005] 3 NZLR 46 (CA)

⁶⁷ *Nation v Nation* [2005] 3 NZLR 46 (CA), and *M v B* [2006] 3 NZLR 660; (2006) 25 FRNZ 171; [2006] NZFLR 641.

policy or superannuation scheme entitlement is attributable to the relationship under sections 8(1)(g) and 8(1)(i).

The meaning of “attributable to the relationship” in sections 52A and 52B is similar to the meaning given under sections 8(1)(g) and 8(1)(i). This is because the words themselves are very similar⁶⁸, and the way in which they are used is similar. In section 9A, the increase in value must be attributable to the *actions* of the spouse or partner or the *application* of relationship property. In essence, it must be caused by some positive action. In sections 8(1)(g), 8(1)(i), 52A and 52B, the property or the value of the property must be attributable to the *relationship*. In this sense, the value of the property or the property is not caused by the relationship, but belongs to it.

To take meaning which requires a causal connection which is not trivial would seem to defeat the purpose of the rules defining what is and what is not relationship property. It would require the Court to reconsider every piece of relationship property again to determine whether there was a causal connection between the relationship and the property. This could not have been the intention of Parliament when it enacted sections 52A and 52B, nor would it be consistent with the principles of the Act⁶⁹. Parliament has clearly identified which property it considers attributable to the relationship in the comprehensive and detailed definition of relationship property in the Act.

⁶⁸ In sections 8(1)(g) and 8(1)(i) the words are “attributable to the marriage, civil union or de facto relationship. In section 52A, the words “attributable to that marriage or civil union” and “attributable to that de facto relationship” are used, while in section 52B the words are “attributable to each de facto relationship”.

⁶⁹ Particularly section 1M(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.

It is suggested that the correct interpretation of sections 52A and 52B is that all relationship property is attributable to the relationship in respect of which it is classified as relationship property. This is consistent with a reading of the second limb of the rule as applying to the extent which all or any of the property is attributable to both relationships.

This approach is to be preferred because it creates less uncertainty once issues of classification have been resolved than would a whole new reconsideration of whether there was a causal connection between the relationship and the particular items of property. Given that the second limb of the rules under sections 52A and 52B, which only applies after the first test has been attempted, looks at contributions to the acquisition of the property, it would be strange if the test under the first limb of the rule required a stronger causal connection. Although such an interpretation makes the first limb of the rule in sections 52A and 52B redundant, because any property to which the sections apply will be attributable to both relationships, it is still preferred because it makes more sense in the context of the Act, will be easier for the courts to apply, and require less re-litigation of issues.

What amounts to “contributions to the acquisition of property”?

What kind of contributions will be taken into account?

Section 18 of the Act defines “contributions to the relationship” very widely to include direct financial contributions as well as indirect contributions such as care of dependents, performance of household duties, and assistance and support given to enable to other

partner to acquire qualifications or carry on their occupation or business. Section 18(2) precludes any presumption that a monetary contribution is of greater value than a contribution of a non-monetary nature. The meaning of “contributions to the acquisition of property” in the second limb of the rule in sections 52A and 52B must include both direct and indirect contributions. However, section 18(1) provides (emphasis added):

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 any or all of the following:

The meaning to be given to “contributions to the acquisition of the property” is not necessarily the same as the meaning given to “contributions to the relationship” in section 18.

Restricting the inquiry of the Court solely to contributions to the specific property seems to have been the Law Commission’s intention when proposed section 59 was drafted⁷⁰.

The Law Commission was concerned that evaluating the relative merits of each relationship in an abstract way was not ideal. They decided that “[i]t is simpler and safer to enquire only into their respective contributions to asset formation and maintenance”.

The Select Committee Report on the amendments to the Matrimonial Property Act makes it quite clear⁷¹ that a distinction was drawn between contributions to the relationship and contributions to the property.

Given that the Court will only take into account contributions to the acquisition of the property, is it possible for indirect contributions to be considered? The inclusion of

⁷⁰ 1997 Law Commission Report, *Succession Law: A Succession (Adjustment) Act*

⁷¹ Commentary to the Matrimonial Property Amendment and Supplementary Order Paper No 25 (at page 27)

indirect contributions would be in accordance with the general tenor of the Act. However as contributions made by the *relationships* are being considered, a different approach to that taken in the rest of the Act may be warranted. This is because a relationship has no separate personality, and therefore cannot perform actions that would amount to indirect contributions. For example, a person can look after children, do household duties or perform maintenance on real property, all of which can be seen as indirect contributions. However, it would be difficult to say that a *relationship* was doing these things. However, if the parties used money which was relationship property to acquire or maintain the property, this could be seen as the *relationship* contributing. This view would mean that only direct financial contributions to the acquisition of the property could be taken into account.

Before the Act was amended in 2001 to include de facto relationships, constructive trusts were commonly used to allow a person to make a claim to their de facto partner's property to which they had contributed⁷². In *Lankow v Rose*⁷³, Tipping J in the Court of Appeal specifically addressed the type of contributions to be taken into account. He could not see any reason why indirect contributions to the property should not qualify, as the worth of indirect contributions, while harder to quantify, is no less real than that of direct contributions.

Given that it would be in accordance with both the spirit of the Act, which emphasises that all forms of contribution are to be treated equally, and the approach taken to

⁷² For example *Gillies v Keogh* [1989] 2 NZLR 327, *Lankow v Rose* [1995] 1 NZLR 277

⁷³ [1995] 1 NZLR 277

contributions by the Courts in constructive trust cases, it seems very likely that indirect contributions to the specific property will be included as well as direct financial contributions.

What does “acquisition of the property” mean?

The second limb of the rule in sections 52A and 52B specifies that the property shall be divided in accordance with the contribution of each relationship to the *acquisition* of the property. When property is acquired can be important in determining whether or not it is relationship property. In this context, it has generally been held that property is acquired when a beneficial interest in the property arises in favour of the person who is acquiring the property. In *Gallagher v Gallagher*⁷⁴ it was held that property is acquired when the purchaser receives an equitable interest in it, irrespective of any securities against the property. In *Plimmer v Plimmer*⁷⁵, a similar approach was taken and property was held to be acquired when the agreement for sale and purchase was unconditional.

This is in accordance with the concept of acquiring property in the ordinary sense, which includes a wide range of situations, the common element being possession of the property with some kind of ownership right. As the Act is of wide application, words within it should be interpreted in accordance with the way they are used by ordinary people.

There is likely to be some temptation to stretch the meaning of acquisition to avoid injustice. For example, the situation could foreseeably arise where one relationship

⁷⁴ (1980) 3 MPC 59

⁷⁵ (1979) 2 MPC 59

clearly made all or most of the contributions to the acquisition of property, but the other relationship subsequently made contributions which substantially increased its value. Using the example of Gary, Rachel and Julia, it can be seen that Gary and Rachel's marriage made all the contributions to the acquisition of the house, because Julia was not yet on the scene. However if Gary and Julia had put time, effort and money into renovating or improving the property, which increased the value of the house, it seems unfair that their contributions are not taken into account when the property is divided between the relationships. However the clear statutory language of sections 52A and 52B must produce this result. Although it could be argued that the acquisition of the property actually means the acquisition of the value of the property, allowing later contributions to be taken into account, this is a strained interpretation, which is not necessary for the sections to make sense, and as such is unlikely to be accepted.

Under the second limb of the rule in sections 52A and 52B, it is likely that both direct and indirect contributions to the property will be accepted. It is also likely that only contributions to the acquisition of the property will be considered, and that later contributions, after the property has already been acquired, will not be taken into account.

How can a relationship make contributions to the acquisition of property?

Where only one relationship was in existence at the time property is acquired, it is clear that that relationship must have made all the contributions to the acquisition of that property. However, when property is acquired at a time when the common partner is

involved in more than one relationship, how can the respective contributions of each relationship be determined?

One interpretation is that the length of the relationships will determine their respective contributions. For example, in the case of Gary, Rachel and Julia, Gary and Rachel had been married for 10 years, and Gary and Julia had been in a relationship for 4 years, when the Wellington house was purchased. The property would be divided with 4/14 shares going to Gary and Julia's relationship, and 10/14 shares going to Gary and Rachel's marriage.

Given that income derived by the common partner will be relationship property of both relationships, it could be argued that where property is acquired out of this income, the relationships contributed equally to its acquisition. The property would be divided equally between the relationships. However, if Parliament had intended such property to be divided equally between the relationships, it could easily have specified this.

Another option is that where a non-common partner has made contributions to the acquisition of property, those contributions will be seen as coming from their relationship with the common partner. The remainder which was contributed by the common partner will be seen as equal contributions from each relationship. So, for example, if Rachel had contributed half of the purchase price of the Wellington house from her inheritance, her and Gary's marriage would receive three quarters of the Wellington house (all of

Rachel's contribution and half of Gary's contribution) and Julia and Gary's relationship would receive one quarter.

Indirect contributions of the non-common partner could also be included. As Rachel stayed at home to look after the children while Gary worked, she could argue that these contributions allowed him to earn more than he otherwise would have, and that therefore their relationship should receive a greater share of the relationship property. While determining the proportion of indirect contributions is likely to be somewhat arbitrary, this approach is likely to appeal to judges as it will give them the ability to award property to the partner they feel is more deserving.

A combination of the last two approaches mentioned is likely to be preferred by judges depending on the factual situation as it will give them the greatest flexibility to give a "fair" outcome. However it does not give the parties much certainty as to the final distribution of property.

Chapter Five: Recommendations

The main problem with sections 52A and 52B is their lack of clarity for parties who are attempting to determine how their dispute will be resolved under them. Under the Administration Act the problem of contemporaneous relationships is dealt with by splitting the spouse or partners share equally between all the partners⁷⁶. A similarly clear and unambiguous provision might be better to replace sections 52A and 52B. Although the result is somewhat harsh, there is no uncertainty about the positions of the parties. If the provision did not allow for judicial discretion in its interpretation, Judges would not have to compare the worth of different relationships, even if in an indirect way.

Another example of Parliament choosing a clear and unambiguous rule is the way that claims are prioritised when relationships were successive⁷⁷. This is also contained in sections 52A and 52B and simply provides that the relationship property is to be divided in accordance with the chronological order of the relationships⁷⁸.

However, it is also arguable that all relationships are not equal, and Judges should be left with the discretion to find a solution that is fair in all of the circumstances, which cannot be provided for with a simple rule. A compromise between certainty and fairness could be reached by a clear rule which prima facie applies unless it would cause serious

⁷⁶ Section 77 of the Administration Act 1969

⁷⁷ Sections 52A(3) and (3A) provide that relationships are successive if the de facto relationship begins during the marriage or civil union, but after the spouse or civil union partners have ceased to live together as husband and wife or civil union partners.

⁷⁸ This means that property orders in relation to the first relationship are satisfied first, and the property orders in respect of the second relationship will be satisfied out of the remaining property.

injustice. This would allow the courts to mitigate the harshness that can be caused by a strict rule.

Sections 52A and 52B do not fit well with the general spirit and aims of the Act. The rules about the classification and division of relationship property show that certainty is to be preferred. Sections 52A and 52B allow the common partner to retain half of all the relationship property, while the non-common partners are left in a state of doubt as to how they will share the remainder. It would be better if sections 52A and 52B were completely rewritten, to provide that where property is found to be relationship property of more than one relationship contemporaneously, that property will be divided equally between all the partners who are entitled to a share in it. This is clear, unambiguous, and no harsher than section 77 of the Administration Act or the rule in respect of successive relationships.

Procedural provisions allowing the court to delay the making of final property orders where there are competing claims should also be inserted, as currently the practical operation of sections 52A and 52B is not provided for in the Act at all. A suggestion for a procedural provision follows.

52C Procedure where contemporaneous relationships

(1) This section applies where applications for property orders under this Act, in respect of relationships that were at any time contemporaneous, have been lodged.

(2) When this section applies, any party to any of the proceedings may give notice to the Court that the relationships were contemporaneous, and the Court -

(a) must not make property orders vesting property in any person until both proceedings have been heard and findings made in respect of each, and if applicable sections 52A and 52B applied;

(b) may, if it sees fit, hear the proceedings together.

(3) The failure of any party to give notice to the Court will not invalidate or otherwise affect any property orders made by the Court.

Chapter Six: Conclusion

Sections 52A and 52B were designed specifically for succession cases. They were inserted into the Act to cover relationships ending on death *and* separation without any modification to take account of this expanded territory. Drafted before the Act was amended in 2001, at which time there was a significant change in approach to the division of relationship property particularly with respect to de facto relationships, sections 52A and 52B are not consistent with the emphasis on certainty and equal treatment of different relationships that features so strongly in the Act.

There was obviously little thought put into how sections 52A and 52B would correspond with the rest of the Act. Currently interpreting sections 52A and 52B is like fitting a right shoe onto a left foot – it can be done but it is not a comfortable fit. Similarly, sections 52A and 52B inevitably bring a result that is incongruous with the rest of the Act, with the common partner retaining half of the property while the other partners share the remainder in a way that is hard to predict. It seems that the common partner is allowed to have their cake and eat it too, while the others must fight over the crumbs.

Sections 52A and 52B should be amended to better reflect the spirit of the legislation and provide greater certainty for parties. Particularly urgent is the addition of procedural rules to make sections 52A and 52B operative in a practical sense.

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