Chapter 16

RELATIONSHIP PROPERTY ISSUES FOR THE ELDERLY

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16.1 Introduction

This chapter will explain when and how the Property (Relationships) Act 1976 (PRA) applies to couples when their marriage, civil union or de facto relationship ends on separation or death. Many of the issues that arise for consideration under the PRA affect all couples equally, regardless of age. Occasionally, however, certain issues may take on additional significance for the elderly. One area of vulnerability is where two people get together later in life without realising they are in a qualifying de facto relationship for the purposes of the
PRA and that, as a consequence, some or all their property is subject to equal division. A further matter of particular importance for the elderly is that the PRA applies on death and may affect long-established property succession plans in ways that the deceased or the survivor may not have anticipated.

The PRA applies instead of the rules and presumptions of common law and equity to transactions between spouses and partners.\(^1\) It is a deferred property regime that does not take effect until separation or when one of the spouses or partners dies.\(^2\) Couples in a qualifying relationship are subject to the PRA unless they contract out of it. In the absence of a valid contracting-out agreement, the PRA determines the classification, valuation and division of a couple’s assets and debts. The general rule is that a couple’s relationship property is to be shared equally unless one of the narrow exceptions applies in a particular case. The equal sharing rule reflects the presumption that a marriage, civil union or de facto relationship is a partnership of equals to which the couple has contributed equally albeit in different ways. When the relationship comes to an end the parties are therefore entitled to share equally in the fruits of the relationship. The PRA aims to reach a “clean break” between the couple at the end of the relationship so that they may achieve certainty and finality in their financial affairs.

The PRA contains a set of purposes and principles to assist with the interpretation of the Act. The purposes of the PRA are to:\(^3\)

- reform the law relating to the property of spouses and partners;
- recognise their equal contributions to the relationship partnership; and
- provide for a just division of the relationship property between them when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the relationship.

The PRA must be interpreted against the backdrop of those purposes. There are four principles to guide the achievement of the purposes. These are that:\(^4\)

- men and women have equal status, and their equality should be maintained and enhanced;
- all forms of contribution to the marriage or partnership are treated as equal;

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1 Property (Relationships) Act 1976 (PRA), s 4. Other enactments are to be read subject to the PRA unless the PRA or other enactment expressly provides to the contrary: s 4A.

2 PRA, s 19. During the relationship, each spouse or partner may continue to deal with their property as they choose.

3 PRA, s 1M.

4 PRA, s 1N.
a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their relationship; and
questions arising under the Act about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice.

The following discussion will outline the key features of the PRA highlighting, where relevant, matters of importance to the elderly. It begins with an overview of how the regime operates when a couple separates. How the PRA applies when one of the spouses or partners dies is discussed separately at the end of the chapter.

16.2 Relationships subject to the Property (Relationships) Act 1976

The PRA was enacted in 2001 and came into force on 1 February 2002. It made significant amendments to the existing Matrimonial Property Act 1976, one of the more notable being the extension of the legislation to heterosexual and same-sex de facto couples. Another major change brought about by the 2001 amendments was the extension of the law to widowed spouses and partners. The PRA was amended again in 2005 to include civil union partners. As a result of these amendments, the PRA now applies to married couples (including same-sex married couples), civil union partners and de facto couples on separation or death.

16.2.1 Marriages and civil unions

The PRA applies to all marriages and civil unions that end on separation or death. The PRA regards a de facto relationship that immediately precedes a marriage or a civil union as part of the marriage or civil union. Thus, if a couple live together in a de facto relationship for two years before marrying, and then remain together another two years before separating, the PRA deems their marriage to have lasted for a total of four years.

5 The contracting-out provisions of the PRA came into force earlier than the rest of the amendments, on 1 August 2001.
6 Prior to the enactment of the PRA, unmarried couples with property disputes had to seek redress by other means, such as arguing the existence of a constructive trust. See, for example, Gillies v Keogh [1989] 2 NZLR 327 (CA); Lasala v Rao [1995] 1 NZLR 277 (CA).
7 The Matrimonial Property Act 1976 only applied to marriages that ended during life, leaving matrimonial property division after death to be dealt with under the Matrimonial Property Act 1963 (see Matrimonial Property Act 1976, s 57(4)).
8 Civil Union Act 2004.
9 PRA, ss 2B and 2BAA.
16.2.2 De facto relationships

The PRA applies to de facto relationships of three or more years that end on separation or death. A de facto relationship ends if the de facto partners cease to live together as a couple or when one of the partners dies.\(^{10}\) The PRA sets out the criteria for a de facto relationship.\(^{11}\) The relationship must be between two people who are aged 18 years or older, who live together as a couple, and who are not married to each other or in a civil union with one another.\(^{12}\)

The most important requirement is that the parties “live together as a couple.” In determining whether two people live together as a couple, the court may take all the circumstances of the relationship into account, including:\(^{13}\)

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- the ownership, use, and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties; and
- the reputation and public aspects of the relationship.

Importantly, none of these factors is essential to a court finding the existence of a de facto relationship.\(^{14}\) For example, a sexual relationship is not a pre-condition,\(^{15}\) and neither is living together under the same roof.\(^{16}\)

Unlike a marriage or a civil union, a de facto relationship has no formal start date and there is no public record of its existence. Many de facto relationships develop gradually and the couple’s individual views on whether they are in fact in such a relationship, or how long it lasted, often differ markedly. Indeed, some individuals may not even be aware that they are subject to the PRA until the other party brings property proceedings against them. In DM v MP, Miller J aptly observed:\(^{17}\)

\(^{10}\) PRA, s 2D(4). The PRA applies to de facto relationships that end on separation or death after the date on which the PRA came into force (1 February 2002), but does not apply to de facto relationships that ended before the PRA came into force see PRA, s 4C.

\(^{11}\) For the meaning of “de facto relationship” see PRA, s 2D.

\(^{12}\) PRA, s 2D(1).

\(^{13}\) PRA, s 2D(2).

\(^{14}\) PRA, s 2D(3).

\(^{15}\) See, for example, Horsfield v Giltrap (2001) 20 FRNZ 404 (CA).

\(^{16}\) See, for example, G v B (2006) 26 FRNZ 28 (HC). However the requirement that the two people “live together as a couple” excludes other domestic arrangements such as family members living together: see B Atkin and W Parker Relationship Property in New Zealand (2nd ed, LexisNexis, Wellington, 2009) at 247.
"Marriage and civil unions are opt-in relationships in which the commencement date is known, but the law may impose the legal status of a de facto relationship retrospectively upon parties whose relationship gradually and without conscious election assumed that character."

It is therefore a question of fact and degree for the court to decide whether a couple is in a de facto relationship and, if so, how long it lasted. A result of the retrospective aspect of the court's decision-making may mean that an individual may not have been able to take proactive steps to protect his or her property from the PRA's equal sharing regime. If people do not know that they are subject to the PRA, they are not in a position to protect themselves from it by, for example, contracting out of its provisions. Legal disputes over the existence, starting date and duration of de facto relationships are very common.

The vast body of case law on what it means to "live together as a couple" reveals that couples' living arrangements may differ markedly and that the evaluation of the existence of a de facto relationship must remain flexible and case-specific. Nonetheless, courts generally require evidence of physical sharing and an emotional commitment by the couple to participate in a shared life.

16.2.3 De facto relationships and issues for the elderly

There is a tendency to assume that couples in de facto relationships will belong to a younger rather than older age bracket. Contrary to that common perception, people often enter new relationships later in life, and for a very wide variety of reasons, including the desire for companionship through to physical or financial necessity. These types of relationships may become de facto relationships for the purposes of the PRA, with the result that after three years both partners are entitled to share equally in all the relationship property.

In Coll v West, the couple lived together in Mrs West's home for just short of six years. At the end of that time Mr Coll argued that he was entitled to half a share in Mrs West's home. The Court agreed, rejecting Mrs West's claim that Mr Coll was no more than a boarder whom she took in out of financial need. The Court found that they lived in a committed relationship which was, at least initially, sexual and that there was emotional commitment throughout. The fact that the respondent did not pay board for the first eight months or for the last 10 months suggested something more than a landlady-boarder type of arrangement. Moreover when the applicant eventually began paying board, the Judge took that as representing "their having thrown their lot in together".

18 Public Trust v Cornish (2009) NZFLR 514 (HC) at [37].
19 See, for example, String v Steat (2006) 25 FRNZ 942 (HC).
21 Coll v West FC Morrinsville FAM 2009-039-160, 26 April 2010 at [20].
The parties in that case were not elderly (they were only in their 50s) but, significantly, Mrs West was unlikely to ever recover financially from the Court’s ruling that she pay half the value of her home (her only asset of any significance) to Mr Coll. Indeed, it appeared that she would have to sell the home in order to satisfy the court order. The case serves as a good reminder of the potentially costly consequences of inviting someone into one’s home without being aware of the potential property implications in the future.

A further issue relates to older people who employ others – sometimes much younger than themselves – to come into their home to care or keep house for them. While such arrangements will usually operate solely on a business footing, the possibility exists for a disingenuous individual to take advantage of the elderly person, perhaps by developing the relationship to a point where it bears the hallmarks of a de facto relationship. The existence of a de facto relationship and how long it lasted is often a case of one party’s word against that of the other party. An elderly person entangled in such a situation may have neither the health nor the strength to resist the claim made by their younger counterpart. Elderly people without family to keep watch on developments may be especially vulnerable.

There are certain legal mechanisms that may be used to avoid the equal sharing provisions of the PRA applying in the types of circumstances described above. For example, a couple may contract out of the PRA. The contracting-out provisions are discussed later in this chapter. Another method commonly used is to settle property on a trust. The implications of trusts are discussed in ch 17. As noted above, however, an added complication in the context of de facto relationships is that people may not know that they are in a qualifying relationship and therefore subject to the PRA.

16.3 Property covered by the PRA

The PRA divides a couple’s relationship property equally. Before division can take place, however, it is first necessary to ascertain what property is relationship property and what is separate property. “Property” is defined broadly as including real and personal property, any estate or interest in any real or personal property, any debt or any thing in action and any other right or interest. The PRA applies to immovable property situated in New Zealand and movable property situated in New Zealand or elsewhere, but not to immovable property situated outside New Zealand. The PRA does not apply to Māori land.23

The PRA defines an “owner, in respect of any property” as the person who, apart from the PRA, is the beneficial owner of the property under any enactment or rule of common law or equity.24 The requirement of beneficial ownership

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22 PRA, s 7.
23 PRA, s 6.

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raises a question whether property held in trust is subject to the PRA. The answer depends on the nature and terms of the trust, an issue that is discussed fully in ch 17.

16.3.1 Relationship property

The PRA defines “relationship property” exhaustively. The family home and the family chattels are accorded special status and are deemed to be relationship property whenever acquired. It does not matter that the home or chattels may have been acquired by one of the parties many years before their relationship began. For example, in De Malmanche v De Malmanche, it was irrelevant to classification that the husband had purchased the family home many years before marriage, and repaid the mortgage with a gift from his mother.

The family home is the couple’s only or principal residence. A property’s status as the family home is determined by the use to which the spouses or partners were putting the property before the relationship ended. The family chattels include the usual trappings of life such as furniture, appliances, tools, garden equipment and the like, as well as household pets. Also included are motor vehicles, caravans, and trailers or boats that are used wholly or principally for family purposes. Heirlooms and taonga are specifically excluded from the definition of family chattels. Neither term is itself defined, which has given rise to judicial debate. It has been held, for example, that the concept of taonga may be relied upon in relation to non-Māori assets provided that particular requirements are met.

In addition to the family home and family chattels, relationship property includes:

- all property jointly owned by the partners;
- property owned immediately before the relationship began, if the property was acquired in contemplation of the relationship and was intended for the common use or benefit of both partners;
- property acquired after the relationship began, unless it falls within the separate property provisions of the PRA, or was acquired from a third person by succession, survivorship, gift or trust settled by a third party;
- the proportion of the value of any life insurance policy or superannuation scheme entitlement that is attributable to the relationship;

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24 PRA, s 2.
25 PRA, s 8.
26 PRA, s 2.
27 PRA, s 2.
28 De Malmanche v De Malmanche [2002] 2 NZLR 838 (HC).
29 PRA, s 2H.
31 PRA, s 8.
relationship property under an agreement made under pt 6 of the PRA;
• an increase in value of one spouse’s or partner’s separate property,
  provided that the increase in value is attributable to the application of
  relationship property or the direct or indirect actions of the other spouse
  or partner;33 and
• an increase or gain in relationship property.

16.3.2 Separate property

Property that is not relationship property is separate property.35 The following
categories are separate property:

• property acquired out of separate property;
• increases in the value of separate property (unless the increase is
  attributable to the application of relationship property or the direct or
  indirect actions of the other spouse or partner);
• property acquired by either spouse or partner while they are not living
  together, or property acquired by the survivor after the death of the other
  spouse or partner;
• property acquired from a third person by way of succession, survivorship,
  gift or trust settled by a third party, unless such property is, with the
  consent of the spouse or partner who received it, so intermingled with
  other relationship property that it is unreasonable or impracticable to
  regard it as separate property (although the family home and family
  chattels are excluded from this rule);34 and
• gifts between partners unless used for the benefit of both partners (the
  family home and family chattels are excluded from this rule).36

As noted above, increases in the value of separate property become relationship
property if the increase was attributable wholly or in part to the application of
relationship property or the direct or indirect actions of the non-owner spouse
or partner. If the increase in value is attributable to the application of
relationship property (even a small amount), the whole increase becomes
relationship property and is divided equally between the spouses or partners.
However, if the increase is attributable to the actions of the non-owner, such as
domestic activities that free up the owner to put more time and effort into the
separate property, then the increase in value is divided according to the
contributions of each spouse or partner to the increase in value.36 The different

32 PRA, s 9A.
33 PRA, s 9.
34 PRA, s 10(1), (2) and (4).
35 PRA, s 10(3) and (4).
36 For a comprehensive discussion of s 9A, see Rast v Rast [2009] NZSC 46, [2009] 3 NZLR 1;
 M Briggs and N Pear “Sharing the Increase in Value of Separate Property Under the
treatment of these two forms of contribution is arguably inconsistent with the PRA's rationale that monetary and non-monetary contributions are to be treated equally.37

16.3.3 Debts

Just as it is necessary to ascertain which assets are relationship property and which are separate property, a similar exercise must be undertaken in respect of any debts owed by one or both of the spouses or partners. Relationship debts are deducted from the total value of the relationship property in order to calculate the net value of the relationship property available for division.38 Personal debts do not affect the relationship property pool and are the responsibility of the debtor.

A relationship debt is one that has been incurred:

- by the partners jointly;
- in the course of a common enterprise carried on by the partners;
- for the purpose of acquiring, improving or maintaining relationship property;
- for the benefit of both partners in the course of managing the affairs of the household; or
- for the purpose of bringing up any child of the relationship.39

A personal debt is a debt that is not a relationship debt.40 A debt may be partly relationship and partly personal. For example, a student loan used to cover not only course fees but also the living expenses of the couple would be a combination of both personal debt (the course fee component) and relationship debt (the joint living expenses component).41

One situation in which the elderly may be caught up in debt issues under the PRA is where they provide money to enable a child to purchase, for example, a home or a business. If the child is in a marriage, civil union or de facto relationship that later breaks down, he or she may try to describe the money provided as a loan and thus seek to have it deducted from the net pool of relationship assets. However, in family contexts, it is often difficult to distinguish debts owed to other family members from outright gifts. The answer generally comes down to a question of the evidence brought by each party. In Geater v Geater,42 there was a difficulty in proving the extent of the relationship debts because the husband's father, who had provided large sums of money to his son

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37 PRA, s 18(2).
38 PRA, s 20D.
39 PRA, s 20.
40 PRA, s 20.
41 CTS v IMA [2012] NZFC 4050.
and daughter-in-law, suffered ill health prior to his death and had destroyed much of the documentation in his possession relating to the loans. Thus if the family member providing the money wants it to be treated as a loan rather than a gift, it is important to make and keep precise written records including details of the agreement, schedule of repayments, arrangements regarding interest and all relevant dates.

Lastly, it should be noted that third-party creditors who have dealings with either or both spouses or partners have significant although not blanket protection under the PRA.\(^{43}\)

16.3.4 Valuation

The date for determining the value of the property is the date of the hearing of first instance, unless the court in its discretion decides that the value is to be determined at another date.\(^{44}\) There is a question as to when the court should exercise that discretion. It should not be used where one spouse or partner has made post-separation contributions to the property or dissipated the property. In both those situations the PRA makes specific provision for compensation to be made to the disadvantaged spouse or partner.\(^{45}\) Where, however, a change in the value of the property is attributable to external forces such as the natural depreciation of an asset, the court may choose to exercise its discretion to alter the valuation date to, for instance, the separation date value.

16.4 Property division under the Property (Relationships) Act 1976

The PRA is an equal sharing regime. The concept of equal sharing is premised on the understanding that each spouse or partner has contributed equally albeit perhaps in different ways to the relationship and that each is therefore entitled to share equally in the fruits of the relationship. All forms of contribution\(^ {46}\) to the marriage or relationship are to be treated equally.\(^ {47}\) There is no presumption that monetary contributions are of greater value than non-monetary contributions.\(^ {48}\)

All of the couple’s relationship property is divided equally\(^ {49}\) unless one of the exceptions to equal sharing or one of the compensation provisions applies in the particular case. The only other way to avoid the equal sharing regime is to


\(^{44}\) PRA, s 2G.

\(^{45}\) PRA, ss 18B and 18C.

\(^{46}\) PRA, s 18.

\(^{47}\) PRA, s 1N(b).

\(^{48}\) PRA, s 18(2).

\(^{49}\) PRA, s 11.
contract out of the PRA. The main exceptions to equal sharing are discussed below.

16.4.1 Relationships of short duration

The PRA defines marriages and civil unions of less than three years as being of "short duration". In such cases the shares of each spouse or partner are determined in accordance with the contribution of each spouse or partner to the relationship. The reason for departing from equal sharing in short-term relationships is that there is often a significant disparity in the parties' contributions to the relationship in their early years together.

De facto relationships of less than three years are not covered by the PRA unless certain conditions are satisfied. There must either be a child of the relationship or the applicant must have made substantial contributions to the relationship. If either of those conditions is met, the court must be satisfied that a failure to make an order would result in serious injustice. De facto relationships of less than three years that do not satisfy these criteria fall outside the PRA, and disgruntled ex-partners must seek the property remedies under the ordinary rules of common law and equity. It is not clear why the PRA treats the different relationships in different ways. However, given the casual nature of many de facto relationships and the uncertainty surrounding the starting dates, it might be assumed that the drafters thought that relationships of less than three years may well not satisfy the degree of commitment and shared life necessary to engage the PRA's equal sharing rules.

16.4.2 Extraordinary circumstances

Where there are extraordinary circumstances that would make equal sharing repugnant to justice, the share of each spouse or partner is to be determined in accordance with the contribution of each spouse or partner to the relationship. However this exception is applied very sparingly. The "repugnant to justice" requirement sets a very strict test and is a difficult way of establishing unequal sharing.

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50 A valid trust is another way to put property out of arm's reach of a spouse or partner. See ch 17 for a discussion of trusts.
51 PRA, s 14.
52 PRA, s 14A.
53 PRA, s 2E.
54 PRA, s 14A.
55 The term "child of the relationship" is given a very broad definition: s 2.
56 For example, under a constructive trust as in Gillies v Keogh [1989] 2 NZLR 327 (CA) and Lunsen v Ross [1995] 1 NZLR 277 (CA).
57 PRA, s 13.
58 Nor is misconduct a ground for departing from equal sharing unless it was gross and palpable and significantly affected the extent or value of the relationship property: PRA, s 18A.
16.4.3 Economic disparity

The court may compensate a spouse or partner for post-separation economic disparity that has been caused by the division of functions during the relationship. The inquiry into economic disparity occurs following the division of the relationship property, by which time the spouses or partners know how much property they will take away from the relationship. Economic disparity may occur where one spouse or partner (typically, although not exclusively, the woman) has sacrificed a career by assuming the domestic role in the relationship, looking after the home and the children. At the end of the relationship, that spouse or partner may seek compensation for reduced earning capacity that was caused by the division of functions during the relationship. Alternatively, one spouse or partner may have supported the other to gain certain qualifications that have enabled the other to boost his or her future earning capacity. The effect of the division of functions during the relationship on post-separation outcomes may have a significant impact on the elderly (or, at least, those approaching retirement) where the disadvantaged partner has reduced opportunities to retrain for future employment.

The PRA requires a significant disparity between the parties’ post-separation incomes and living standards caused by the effects of the division of functions within the relationship. The causal nexus is often difficult to establish. In *De Malmanche v De Malmanche*, the couple decided that the husband, who was significantly older than his wife, would assume the domestic and parenting roles in the marriage. However, the Court concluded that the division of functions had not caused the post-separation disparity. Rather, at the time the couple made their decision, the husband was already nearing the end of his career.

Even if a claimant can satisfy the requirements set out above, the next step for the court is to determine appropriate compensation. The court, if it considers it just, may award the disadvantaged spouse or partner compensation, the result of which is that the shares in the relationship property are adjusted to provide the disadvantaged spouse or partner with a greater percentage of the property pool. To date, however, the awards have generally been relatively low and therefore probably inadequate to truly redress the disparity. To this end, some people have opted instead to apply for post-separation spousal maintenance. This issue is discussed below.

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59 PRA, ss 15 and 15A.
60 *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC).
16.4.4 Maintenance

Spouses or partners may seek financial support after their marriage or relationship ends by making a claim for post-separation maintenance. Liability for maintenance is regulated by the Family Proceedings Act 1980 (FPA). After a marriage or civil union is dissolved, or a de facto relationship has ended, one party may be required to maintain the other to the extent necessary to meet the "reasonable needs" of the other party.\(^{62}\) The emphasis is on the ability of the disadvantaged spouse or partner to become self-supporting, having regard to a number of factors including the effects of the division of functions within the relationship and the likely earning capacity of each party.\(^{63}\) While these factors bear a close resemblance to the requirements of \(s\) 15 of the PRA, the purpose of maintenance is not the same as that of economic disparity. Whereas \(s\) 15 is designed to compensate a spouse or partner for post-separation economic disparity that has been caused by the division of functions during the relationship, maintenance is aimed at meeting the reasonable needs of the party to enable the person to get back on his or her feet and become self-supporting after the relationship has ended. The court assesses the quantum of maintenance to be awarded by having regard to factors including the potential earning capacity of the parties and the means they may already have derived from a division of property pursuant to the PRA.\(^{64}\)

Although no time limits are specified in the FPA,\(^ {65}\) maintenance is generally regarded as a short-term measure, and parties are expected to assume responsibility for their own needs within a reasonable time.\(^ {66}\) However, the circumstances in which a party may seek maintenance on a longer-term basis include consideration of the ages of the parties and the duration of the relationship.\(^ {67}\) For example, if a party has reached an age where it is impracticable to expect the party to become fully self-supporting, the court may consider awarding maintenance for a longer period of time.

16.5 Avoiding the Property (Relationships) Act 1976

16.5.1 Opting out of the Property (Relationships) Act 1976

For those who do not want to be bound by the PRA's equal sharing regime, there is the option of contracting out of it. The PRA is an opt-out scheme, which means that it applies unless the couple has made their own property arrangements. Common reasons for contracting out of the PRA include a

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\(^{62}\) FPA, \(s\) 64.

\(^{63}\) FPA, \(s\) 64A.

\(^{64}\) FPA, \(s\) 65.

\(^{65}\) But see FPA, \(s\) 82 "Interim maintenance".

\(^{66}\) FPA, \(s\) 64A. See \(C v G\) [2010] NZCA 128, [2010] NZFLR 497.

\(^{67}\) FPA, \(s\) 64A(3).
disparity in the spouses’ or partners’ assets at the start of the relationship, as well as preserving property for children of an earlier relationship. A couple may enter an agreement before the relationship begins (a contracting-out agreement) or after separation to settle their property rights (a settlement agreement). The couple’s agreement must relate to the status, ownership and division of their property. While there is no public record of the number of people who opt out of the PRA, they are in the minority rather than the majority.

In order to be valid, an agreement must comply with certain formalities:

- The agreement must be in writing and signed by both parties.
- Each party must have independent legal advice before signing the agreement.
- The signatures of each party must be witnessed by a lawyer.
- The lawyer who witnesses the signature must certify that, before the party signed the agreement, the lawyer explained to them the effect and implications of the agreement.

The requirements are designed to ensure the parties are fully informed and have received independent legal advice about the implications of entering the agreement, including the advantages and disadvantages for them of entering the agreement and opting out of the PRA’s equal sharing regime.

An agreement that complies with the formalities outlined above may be set aside only if the court is satisfied that it would be “seriously unjust” to give effect to the agreement. The courts have applied a high threshold to the test for serious injustice, particularly in the case of contracting-out agreements. Thus a significant economic disparity between the rights the applicant would have had under the PRA as opposed to the applicant’s actual rights under the agreement is unlikely to be sufficient to set aside a contracting-out agreement, given that the very purpose of most agreements is to avoid the equal sharing regime. However, in the case of a settlement agreement made on separation, the parties have already acquired rights under the PRA. Thus a settlement agreement that departs markedly from the PRA may be open to dispute.

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68 PRA, s 21. Other matters such as maintenance or child support agreements should be dealt with in separate agreements.
69 PRA, s 21F. An agreement that does not comply with the requirements is void. However, the court may give effect to an agreement that does not comply with the requirements if neither party is materially prejudiced by the lack of compliance: s 21H.
70 PRA, s 21J.
71 See, for example, Harrison v Harrison [2005] 2 NZLR 349 (CA).
16.5.2 Trusts

Another way to avoid the equal sharing regime of the PRA is to settle property on a trust. The advantages and disadvantages of divesting oneself of property in this manner are considered in ch 17.

16.6 Relationship property issues on death

Statistics show that more than 30,000 people die in New Zealand every year. A large proportion of those people, many of them elderly, will have been in a relationship covered by the PRA when they died. Perhaps more so than separation during life, it is the death of one of the spouses or partners that many couples must face in their later years. Therefore the death provisions in pt 8 of the PRA will be of direct relevance to many elderly surviving spouses and partners.

The surviving spouse or partner has two options: (i) to apply for a division of the relationship property (option A); or (ii) or not to proceed under the PRA, but instead to inherit from the deceased spouse or partner under the will or on intestacy (option B). The survivor must choose either option A or option B.

16.6.1 Time limits for choosing an option

The time constraints for electing an option can be rather tight, particularly so at such an unhappy time when the surviving spouse or partner is unlikely to be in the best frame of mind to make important property decisions. The PRA requires the election to be made within six months of death or grant of administration, whichever is later. Moreover, once made, the choice of option cannot be revoked, and the court has limited powers to set aside an option.

A surviving partner who does not make an election within the prescribed time limit is deemed to have elected option B. Thus although the PRA is generally described as an “opt-out” scheme, in cases where one of the partners dies it is effectively an “opt-in” scheme. Option B applies by default unless the survivor elects option A.

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72 Statistics New Zealand “Births and Deaths: Year ended December 2013" (19 February 2014) <www.stats.govt.nz>. In the year ended December 2012, 29,568 deaths were registered in New Zealand.
73 PRA, s 55.
74 For a comprehensive analysis of the property issues that arise in relation to the death of a spouse or partner see N Peart, M Briggs and M Henaghan (eds) Relationship Property on Death (Brokers, Wellington, 2004).
75 PRA, s 61.
76 PRA, ss 62 and 65.
77 PRA, s 67.
78 PRA, s 69.
79 PRA, s 68.
16.6.2 Choosing the option

Making the correct choice of option is very important. To reach the optimum decision, the surviving spouse or partner needs to be aware of the property implications of choosing one option over the other. To make an informed decision, it is prudent to draw up a comparative table or list of the entitlements under both options A and B.

(1) **Option A – dividing the relationship property**

By electing option A, the surviving spouse or partner “opts in” to the PRA’s equal sharing regime. They will take priority over other claimants or beneficiaries under the will, the intestacy rules, the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949 (LRTPA). However, if the survivor chooses option A, he or she cannot normally also take under the deceased’s will or on intestacy. The survivor loses the right to inherit from the deceased spouse or partner unless the will expresses a contrary intention or the court agrees to reinstate the gifts to avoid injustice. The deceased’s estate is divided as if the survivor had in fact died before the deceased. Under option A the surviving spouse or partner may nonetheless bring a claim under the Family Protection Act or the LRTPA. If successful, these claims result in the surviving spouse or partner gaining an additional part of the deceased’s estate.

The same rules that apply to the classification and division of property on separation apply on death, subject to some modifications. These modifications are designed to benefit the surviving partner. For example, the PRA presumes that the deceased’s estate, including anything acquired by it after death, is relationship property. By contrast, property acquired by the survivor after the deceased’s death is subject to the reverse presumption — that is, it is presumed to be the separate property of the survivor. These presumptions place the onus on the person seeking to rebut the presumption. It may be difficult to rebut the presumption, because the onus is on a person who was not a party to the

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80 In some situations the survivor will have no choice as to option. For example, where a de facto relationship ends prior to the death of one of the partners, and the deceased did not leave a will, the survivor is not regarded as a “de facto partner” because s 2 of the Administration Act 1969 defines a surviving de facto partner as the person living with the deceased when the deceased died. In that situation, the surviving partner cannot choose option B, but must proceed under option A.

81 Subject to certain modifications to the provisions that apply on separation to take into account the special circumstance of death: PRA s 75.

82 PRA, s 78.

83 PRA, ss 76 and 77.

84 PRA, s 76(1)(b).

85 PRA, s 57. The Family Protection Act and the LRTPA are discussed in ch 19.

86 PRA, ss 81 and 82.

87 PRA, s 84.
relationship and is likely to have less information about the circumstances of the acquisition of the property.

The PRA also modifies some of the rules about relationships of short duration. If a short-duration marriage or civil union ends on separation, the property shares are determined in accordance with the spouses’ or partners’ contributions to the relationship. But where one of these relationships ends on the death of one of the spouses or partners, the relationship property is divided equally unless to do so would be unjust.\textsuperscript{88} The reason for the more sympathetic treatment in the death cases is because the relationship is not terminated through choice.\textsuperscript{89} In contrast, short-duration de facto relationships that end on death are not accorded similarly generous treatment.\textsuperscript{90} Instead, they are treated the same as those that end on separation and are thus not covered by the PRA unless there is a child of the relationship or the applicant has made substantial contributions to the relationship and the court is satisfied that a failure to make an order would result in serious injustice.\textsuperscript{91} If a short-duration relationship is not covered by the PRA, option B will govern the property rights of the survivor.

Another factor to be taken into consideration is whether the couple held any of their property as “joint tenants”. The general rule of joint tenancy is that when one party dies the survivor acquires the whole property by “survivorship”. Property held as joint tenants passes by survivorship irrespective of the terms of the deceased’s will. However, option A affects the operation of the survivorship rule. Property that would otherwise pass to a surviving spouse or partner has the status it would have had if the deceased had not died, unless the court regards that result as unjust.\textsuperscript{92} Option A thus disregards the survivorship rule and treats such property as if it were relationship property. Therefore the survivor may be worse off by electing option A in cases where the couple held the property as joint tenants.

The PRA includes rules about who may apply to the court for an order and in what circumstances the court may make an order.\textsuperscript{93} When a relationship ends because the parties separate, either party may apply to the court to exercise its powers under the PRA. On death, the general rule is that only the surviving spouse or partner may apply for a division of the property.\textsuperscript{94} However, in some

\textsuperscript{88} PRA, s 85.
\textsuperscript{89} Unless, of course, the survivor is responsible for killing the deceased.
\textsuperscript{90} PRA, s 85(3).
\textsuperscript{91} In \textit{PH v GH} [2013] NZHC 443, [2013] NZFLR 387, the appellant’s claim failed because her contributions to the relationship were not “substantial” in the sense of going beyond what might be expected in such a relationship, and no serious injustice would result if no order were made.
\textsuperscript{92} PRA s 83.
\textsuperscript{93} PRA, ss 23 and 25.
\textsuperscript{94} PRA, s 88(1).
circumstances it may be fair to allow the estate to apply for a division of the property. For example, an application might be justified where children from the deceased’s earlier marriage or relationship were dependent on the deceased for support and are now unlikely to inherit in due course from the surviving step-parent. To address these potential inequities, the PRA provides an exception to the general rule that only the surviving spouse or partner may apply. The personal representative of the estate may make an application for division of the property, but only with leave from the court on the ground that “serious injustice” would otherwise result.\(^{95}\) The meaning of “serious injustice” has come under the scrutiny of the courts. The current view is that the term does not require a particularly high threshold. In \textit{Public Trust v Whyman} the Court of Appeal held that leave should normally be granted whenever a meritorious claim would otherwise fail.\(^{96}\)

(2) \textit{Option B – taking under the deceased’s will or on intestacy}

If the surviving spouse or partner chooses option B, the PRA does not apply.\(^ {97}\) Instead, the survivor chooses the status quo and accepts whatever provision is available to them under the will or the intestacy rules, or any award under the Family Protection Act or the LRTPA.\(^ {98}\) In practice many survivors will be content with option B, especially where the testator has made generous provision for them in his or her will.\(^ {99}\)

As discussed above under option A, an important factor is whether the couple held any of their property as joint tenants. Under option B, property held as joint tenants passes by survivorship irrespective of the terms of the deceased’s will. Option B is often the preferable option for the surviving spouse or partner, especially if the main asset such as the family home was held as a joint tenancy. For example, if the surviving spouse or partner takes the family home by survivorship and the testator has also left all or the bulk of the remaining assets to the survivor, there is little to be achieved by choosing option A, which would require a full assessment of the property rights of each party pursuant to the PRA and normally results in the survivor and the estate sharing the relationship property equally. Indeed, as discussed under option A, the survivor would in fact be worse off by electing option A in the above example. However, where other family members mount a challenge against the estate distribution, as often occurs when the deceased has children from an earlier relationship, a surviving spouse

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\(^ {95}\) PRA, s 88(2).
\(^ {96}\) \textit{Public Trust v Whyman} [2005] 2 NZLR 696 (CA). See further N Peart (ed) \textit{Brokers Family Law} – \textit{Family Property} at [PR.88].
\(^ {97}\) PRA, s 95. See ch 19 for a discussion of wills.
\(^ {98}\) PRA, s 61(3).
\(^ {99}\) The intestacy rules in the Administration Act 1969 provide for a generous distribution to the surviving partner. See ch 19.
or partner may feel compelled to elect option A to safeguard their relationship property entitlement.100

16.7 Conclusion

The PRA is important social legislation. It applies an inflexible code of rules encompassing a wide range of relationships and a wide pool of property. It imposes a uniform equal sharing regime on all couples who do not contract out. The “one size fits all” system works well for many people. However, it may operate to the detriment of others and, as noted throughout this chapter, it may have certain implications for the elderly. The PRA applies retrospectively at the end of the relationship, with the result that people may not realise that decisions they make before or during their marriage or relationship may be affected years later by the PRA. Indeed some people are not even aware that they are covered by the PRA until they seek legal advice at the end of their relationship. While there is no single solution to these problems, legal advisers have a valuable proactive role in forewarning and forearming clients, including elderly clients, about the relevance of the PRA to their unique personal circumstances.

100 See, for example, Re Fiathang (2002) 22 FRNZ 430 (HC).