IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA219/2020
[2021] NZCA 649

BETWEEN	LILACH PAUL First Appellant	
	BRETT PAUL Second Appellant	
AND	FIONA MARGARET MEAD Respondent	

Hearing:	10 August 2021
Court:	French, Collins and Goddard JJ
Counsel:	N W Taefi and J E Palairet for First Appellant No appearance for Second Appellant P A Fuscic and K L Thompson for Respondent
Judgment:	3 December 2021 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the question of law as follows:

> **The Family Court has jurisdiction under the Property (Relationships) Act 1976 to determine claims to property as between two persons who were married, in a civil union, or in a de facto relationship, and also in a polyamorous relationship. That jurisdiction extends to determining claims among three people in a polyamorous relationship, where each partner in that polyamorous relationship is either married to, in a civil union with,**

or in a de facto relationship with, each of the other partners in that polyamorous relationship.

C The respondent must pay costs to the first appellant for a standard appeal on a band A basis, with usual disbursements.

D Costs in the High Court are to be determined by that Court in light of the outcome in this Court.

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REASONS OF THE COURT

(Given by Goddard J)

[1] Lilach Paul and Brett Paul were married in February 1993. In 2002, they formed a polyamorous relationship with Fiona Mead. They lived together in that

relationship for the next 15 years. Lilach separated from Fiona and Brett in November 2017. Brett and Fiona subsequently separated in early 2018.

[2] During the relationship, the three partners lived together in the same house on a four-hectare property in Kumeu. Each partner made contributions of various kinds to their joint household.

[3] What legal regime governs the division of property between the three partners, following their separation? The rules of common law and equity in relation to property interests? Or the Property (Relationships) Act 1976 (PRA), and the principle it embodies that each of the spouses or partners is entitled to share equally in the family home, family chattels, and other relationship property?

[4] When Lilach and Brett entered into a polyamorous relationship with Fiona in 2002, they did not cease to live together as a married couple for the purposes of the PRA. As between Lilach and Brett, the PRA clearly applies following their separation in 2017.

[5] Lilach says that for most of this period, her relationship with Fiona was of essentially the same nature as her relationship with Brett. If that is correct, then there is no good reason for a different legal regime to apply to division of property as between Lilach and Brett, and as between Lilach and Fiona. The PRA does not distinguish between married couples and couples in a long-term de facto relationship. It would be inconsistent and unjust if the PRA governed the division of property as between Lilach and Brett, but a different regime based on common law and equitable property rules applied as between each of Lilach and Fiona, and Brett and Fiona.

[6] We consider that the text and purpose of the PRA support its application as between the partners in each couple within a wider polyamorous relationship, if that couple is in a qualifying relationship. There may of course be different start and end dates for the application of the PRA so far as each couple is concerned. We explain the reasons for this approach, and how it would work in practice, in more detail below.

Background

[7] As already mentioned, Lilach and Brett married in 1993. Lilach met Fiona in 1999, and the three of them formed a polyamorous relationship in November 2002.

[8] Around the time Lilach, Brett and Fiona formed their polyamorous relationship, they moved into a four-hectare property in Kumeu which was purchased in Fiona's name for $533,000. She paid the deposit of $40,000. The property had a rateable value of $2,175,000 in 2017. This is the property that Lilach and Brett say is relationship property, in which they are entitled to share.

[9] For the next 15 years, the parties lived together at the Kumeu property. Their relationship continued. For the most part they shared the same bed.

[10] Fiona practised as a veterinarian throughout the relationship. Brett established a paintball business on the property. Brett and Lilach had a lawn mowing business. Lilach also practised as an artist.

[11] Each party contributed to the household and to activities which occurred on the property (being general maintenance of the property and helping each other with their respective businesses). The parties differ about the extent of those contributions.

[12] While the relationship between Lilach, Brett and Fiona was the primary relationship, there were other secondary relationships between each party and other individuals. Some of these secondary relationships were between one party and the secondary party, while others involved more than one party (again, either individually at different points of time or forming a secondary polyamorous relationship). At least one of these secondary relationships appears to have lasted for three years.

[13] Lilach's affidavit provides an overview of the relationship, which appears to be undisputed:

> For … 15 years we were in a relationship and lived together at the Property. We had an understanding that although we were free to love others, the relationship between the three of us was the main relationship. For the large majority of the relationship all three of us have been sharing the same room

> and same bed until about a year before our separation when I moved into the guest room.
>
> When we moved into the Property Fiona, Brett and I committed to a shared life with each other. In particular, soon after we moved into the Property, we had a private ceremony during which Brett and I gave a third ring to Fiona. The ring was identical to the ring Brett and I had with the exception of the stone in the middle and it was made by the same jeweller … We all wore our rings throughout our 15-year relationship, but I did lose my ring about two years ago. …

[14] Lilach separated from Fiona and Brett in November 2017.

[15] Brett and Fiona subsequently separated in early 2018. Fiona remains living in the Kumeu property.

The proceedings

[16] In February 2019 Lilach made an application to the Family Court naming Fiona and Brett as respondents. She sought orders determining the parties' respective shares in relationship property. Lilach claimed that the Kumeu property was their family home, and claimed a one-third share of that property.

[17] Fiona appeared under protest to the jurisdiction of the Family Court, on the basis that Lilach's application was founded on a relationship of three people, so did not relate to a de facto relationship as defined by the PRA.

[18] Brett filed a notice of defence and a cross-application for orders determining the parties' shares in the relationship property "arising as a consequence of the contemporaneous relationships". He sought a declaration that the parties were in three contemporaneous qualifying relationships under the PRA:

(a) Brett and Lilach as husband and wife;

(b) Brett and Fiona as de facto partners; and

(c) Fiona and Lilach as de facto partners.

[19] Lilach applied for orders setting aside Fiona's protest to jurisdiction on the grounds that the three parties were in a relationship of 15 years' duration, and her application related to three "triangular" contemporaneous relationships, as described by Brett.

[20] In June 2019 Judge Pidwell referred the case to the High Court by way of case stated. The parties could not agree on the specific terms of reference for the case stated. The Judge formulated the question for the High Court as:

> Does the Family Court have jurisdiction to determine the property rights of three persons in a contemporaneous polyamorous relationship under the [PRA]?

High Court decision

[21] Hinton J noted that the two effective claimants (Lilach and Brett Paul) appeared to accept that the PRA does not provide for polyamorous relationships as such. Rather, they sought to break their three-way relationship down into contemporaneous qualifying relationships. In those circumstances the Judge considered that the question should be restated as follows:[1]

> Does the Family Court have jurisdiction under the [PRA] to determine the property rights of three persons in a polyamorous relationship, either on the basis of that relationship or by dividing that relationship into dyadic parts?

[22] The Judge recorded that the relationships that do qualify under the PRA are marriages, de facto relationships and civil unions, each of which is defined in the Act. Each of those was, the Judge said, plainly limited to relationships between two people only.[2] The Judge identified a number of provisions in the PRA that assume there are two people in a marriage, civil union or de facto relationship.[3]

[23] For the purposes of the PRA, a de facto relationship is defined as a relationship between two persons who live together as a couple, and who are not married to or in a civil union with, one another.[4] The Judge considered that, on their own evidence

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1 *Paul v Mead* [2020] NZHC 666, [2020] NZFLR 1042 [High Court judgment] at [3].
2 At [23].
3 At [24]–[27].
4 PRA, s 2D.

and on the basis of the case stated, neither Lilach nor Brett was living with Fiona "as a couple".[5] Each was living with her as part of a threesome (or sometimes more). The Judge considered that:[6]

> While the requirement to be living together "as a couple" does not preclude another person living with the couple, nor one of the couple living with a third person, it does in my view exclude a scenario where all three are participating in the very relationship at issue. That is not living together *as a couple*.

[24] The Judge did not consider that Lilach and Brett's argument derived any support from ss 52A and 52B of the PRA, which address the priority of competing claims where there are contemporaneous relationships: either a marriage or civil union and a de facto relationship (s 52A), or two de facto relationships (s 52B). Those sections do not expand the scope of the PRA. There must be two qualifying relationships before those provisions can apply. In this case, the relationships between Lilach and Fiona, and between Brett and Fiona, were not qualifying relationships.[7]

[25] The Judge considered that Parliament had premised the PRA on the notion of "coupledom". Extension of the PRA to polyamorous relationships was a matter for Parliament: that sort of reform cannot be accomplished through the courts.[8]

[26] The Judge noted that this approach did not leave the claimants without remedy. The issues between them could be addressed at equity.[9] It might be appropriate for these areas of Judge-made law to be developed in light of the principles expressed in the PRA.[10]

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5 High Court judgment, above n 1, at [26], citing Property (Relationships) Act 1976 [PRA], ss 2C and 2D.

6 At [31] (emphasis in original).

7 At [34]–[37].

8 At [56]–[57].

9 At [61], citing *Lankow v Rose* [1995] 1 NZLR 277 (CA); and, for a more recent application of the same, *Hawkes Bay Trustee Co Ltd v Judd* [2016] NZCA 397. For a recent discussion of that case and its "aftermath", see Emily Stannard and Helen Cull "*Lankow v Rose* and its aftermath" (2019) 3 NZWLJ 93.

10 At [61].

The issue before this Court on appeal

[27] Lilach appeals to this Court from the High Court judgment on the case stated.

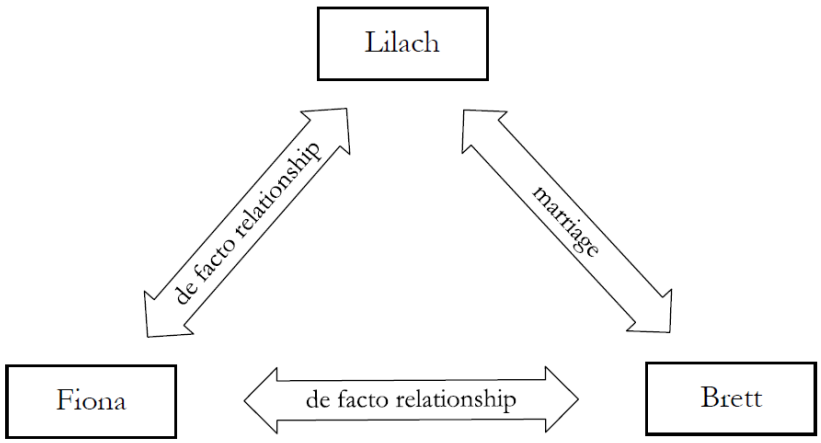
[28] The sole issue before this Court is the question of law raised by the case stated concerning the jurisdiction of the Family Court to hear claims under the PRA as between partners in a polyamorous relationship. No findings have yet been made on matters of fact relevant to whether any two or more of the participants were in a qualifying relationship for the purposes of the PRA, and no findings have been made in relation to division of property. Those are all matters that are yet to be determined by the Family Court, in the event that it has jurisdiction to entertain Lilach and Brett's claims.

Submissions on appeal

Submissions for appellant

[29] Ms Taefi, counsel for Lilach, submitted that a polyamorous relationship between three persons is effectively three triangular contemporaneous relationships. She set that approach out in diagram form as follows:

Diagram 1:



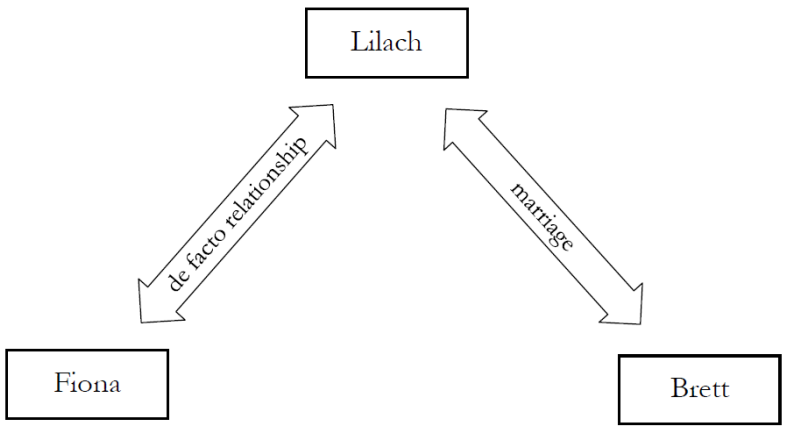
[30] Ms Taefi pointed out that when the PRA was amended in 2001 to extend the rights previously afforded to married persons to people in de facto relationships, those amendments recognised that a person may be in a relationship with two people at the

same time.[11] Clearly it was within Parliament's contemplation that the PRA might apply to non-monogamous relationships.

[31] Ms Taefi submitted that the test for a de facto relationship in s 2D of the PRA is evaluative, enabling the court to adopt a fact-specific approach to a variety of human relationships. The PRA is social legislation, which should be interpreted in a manner consistent with changing social mores and the diverse forms of relationships in our society. A purposive approach to the PRA recognises that it is intended to apply flexibly to a range of human relationships. The legislation does not make any judgement about the nature of the relationship in question: it simply seeks to achieve a fair division of property once the relationship has ended.

[32] Ms Taefi submitted that it would be anomalous, and contrary to the intention of Parliament, to deprive Lilach of the rights of a de facto partner under the PRA where her relationship with Fiona met the test set out in s 2D, solely on the basis that she and Fiona were also in committed relationships with Brett. Likewise, it would be anomalous if ss 52A and 52B applied to a relationship where Lilach was in separate contemporaneous relationships with Fiona and Brett (as shown in Diagram 2 below), but did not apply because Brett and Fiona were also in a contemporaneous relationship with one another (as in Diagram 1 above).

Diagram 2:



[11] PRA, ss 52A and 52B.

[33] Ms Taefi submitted that the Court should adopt an interpretation of the PRA which is consistent with the New Zealand Bill of Rights Act 1990 (NZBORA), and in particular the right to freedom from discrimination on the grounds of family status.[12] Family status means, among other things, being married to, or being in a civil union or de facto relationship with, a particular person. The interpretation adopted by the High Court discriminated against Lilach because she was in a de facto relationship with a person who was also in a de facto relationship with her husband. Lilach should not be denied the protections provided by the PRA — an equitable and efficient mechanism for dividing relationship property — merely because she was in a non-traditional relationship structure.

Submissions for respondent

[34] Mr Fuscic, counsel for Fiona, supported the approach adopted by the Judge. He submitted that the language of the PRA clearly confined de facto relationships to relationships between two people forming a couple. The PRA did not apply to three or more persons in a polyamorous relationship. Section 52B did not extend the scope of the PRA to other forms of relationship.

[35] Mr Fuscic drew our attention to the many respects in which the language of the PRA reflects a focus on relationships between two people.[13] He submitted that it is for Parliament to change the law to give statutory recognition to relationships of three or more persons as a "relationship" which has the same rights or responsibilities as married couples, civil union couples and de facto couples, which are the basic framework of the family unit. That did not mean that a partner in a polyamorous relationship was left without legal remedies on separation. They might have a constructive trust claim in equity, or a quantum meruit claim.[14]

[36] Mr Fuscic submitted that ss 52A and 52B are problematic in themselves, but in any event cannot extend the scope of the PRA. Those provisions apply only if there is a relevant qualifying marriage, civil union or de facto relationship. Attempting to

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12 New Zealand Bill of Rights Act 1990 [NZBORA], s 19(1); and Human Rights Act 1993, s 21(1)(l)(iii).

13 Including PRA, ss 2D, 11, 13, 21, 21A, 23 and 25.

14 *Lankow v Rose*, above n 9; and *Buysers v Dean* [2002] NZFLR 1 (HC).

apply ss 52A and 52B in this context would be unworkable and would produce unsatisfactory results.

[37] The approach adopted by the High Court did not involve discrimination against Lilach under the Human Rights Act 1993, so did not involve any inconsistency with NZBORA. She was not in a de facto relationship with Fiona, so was not being discriminated against on the basis of such a relationship. And in any event, the language of the legislation is clear. Clear statutory language cannot be overridden by reference to NZBORA.[15]

Relevant PRA provisions

[38] The PRA governs division of relationship property when a marriage, civil union or de facto relationship comes to an end. It applies only where the parties have been in one of these qualifying relationships. The PRA is a code: it applies instead of the rules and presumptions of the common law and equity to the extent that they apply to transactions between spouses or partners in respect of property.[16]

[39] The purpose of the PRA is set out in s 1M:

> **1M Purpose of this Act**
>
> The purpose of this Act is—
>
> (a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:
>
> (b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:
>
> (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

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15 NZBORA, s 6.
16 PRA, s 4.

[40] Section 1N sets out four principles to guide the achievement of the purpose of the PRA:

> (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
>
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
>
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
>
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[41] The terms "marriage" and "civil union" are defined in ss 2A and 2AB:

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

(c) is ended by the death of one of the civil union partners, whether within or outside New Zealand.

(2) For the purposes of this Act, the civil union of 2 civil union partners ends if—

(a) they cease to live together as civil union partners; or

(b) their civil union is dissolved; or

(c) one of them dies.

[42] Section 2C provides that a person is another person's de facto partner if they have a de facto relationship with each other. At the heart of this appeal is the definition of the term "de facto relationship" in s 2D:

2D Meaning of de facto relationship

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

(a) who are both aged 18 years or older; and

(b) who live together as a couple; and

(c) who are not married to, or in a civil union with, one another.

(2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

(a) the duration of the relationship:

(b) the nature and extent of common residence:

(c) whether or not a sexual relationship exists:

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

(e) the ownership, use, and acquisition of property:

(f) the degree of mutual commitment to a shared life:

(g) the care and support of children:

(h) the performance of household duties:

(i) the reputation and public aspects of the relationship.

(3) In determining whether 2 persons live together as a couple,—

(a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and

(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if—

(a) the de facto partners cease to live together as a couple; or

(b) one of the de facto partners dies.

[43] The relationship property of spouses or partners in a qualifying relationship is defined to include the family home, whenever acquired; family chattels, whenever acquired; and property owned jointly or in common in equal shares by the married couple or by the partners. It also includes (with certain exceptions) all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began.[17] All property of either spouse or partner that is not relationship property is separate property.[18]

[44] At the heart of PRA is the equal sharing principle in s 11:

11 Division of relationship property

(1) On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in—

(a) the family home; and

(b) the family chattels; and

(c) any other relationship property.

(2) This section is subject to the other provisions of this Part.

[45] There is a very limited exception to the equal sharing principle, where extraordinary circumstances make equal sharing of property or money repugnant to justice. In those circumstances the share of each spouse or partner in the relevant property is determined in accordance with "the contribution of each spouse to the

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17 PRA, s 8(1).

18 Section 9(1). Section 9A sets out certain circumstances in which separate property becomes relationship property.

marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship".[19]

[46] The concept of contribution to a marriage, civil union or de facto relationship is defined broadly in s 18, in accordance with the principle set out in s 1N(b):

> **18 Contributions of spouses or partners**
>
> (1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:
>
> (a) the care of—
>
> (i) any child of the marriage, civil union, or de facto relationship:
>
> (ii) any aged or infirm relative or dependant of either spouse or partner:
>
> (b) the management of the household and the performance of household duties:
>
> (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:
>
> (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
>
> (e) the payment of money to maintain or increase the value of—
>
> (i) the relationship property or any part of that property; or
>
> (ii) the separate property of the other spouse or partner or any part of that property:
>
> (f) the performance of work or services in respect of—
>
> (i) the relationship property or any part of that property; or
>
> (ii) the separate property of the other spouse or partner or any part of that property:
>
> (g) the forgoing of a higher standard of living than would otherwise have been available:

[19] Section 13(1).

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i) enables the other spouse or partner to acquire qualifications; or

(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

[47] Section 22(1) provides for applications under the PRA to be heard and determined in the Family Court. Section 23(1) provides for claims to be made under the PRA by a spouse or partner, or by a person on whom spouses or partners have made conflicting claims. Section 25 provides for the court to make orders determining the respective shares of each spouse or partner in the relationship property. The court may also make orders dividing the relationship property or any part of it between the spouses or partners, and may make orders relating to the status, ownership, vesting or possession of specific property. The court's jurisdiction to make such orders is (with certain limited exceptions) exercisable only after the spouses or civil union partners have separated, or after de facto partners no longer have a de facto relationship with each other.[20] A wide range of ancillary orders may be made under s 33.

[48] Sections 52A and 52B make express provision for claims where a person is in more than one relevant qualifying relationship. They provide as follows:

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, one 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.

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20 Section 25(2).

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

(a) if the marriage or civil union and the de facto relationship are successive (regardless of the order in which they occur), then in accordance with the chronological order of the marriage or civil union and the de facto relationship:

(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 the property.

(3) For the purposes of this section, a marriage and a de facto relationship are successive if the de facto relationship begins during the marriage, but after the spouses cease to live together as a married couple.

(3A) For the purposes of this section, a civil union and a de facto relationship are successive if the de facto relationship begins during the civil union, but after the civil union partners cease to live together as civil union partners.

(4) In this section, and in section 52B, **property order**—

(a) means an order made under any of sections 25 to 31, and 33; and

(b) includes a declaration made under section 25(3).

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:
>
> (a) if the de facto relationships are successive, then in accordance with the chronological order of the de facto relationships:
>
> (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 the property.

[49] When the PRA was first enacted in 1976 (as the Matrimonial Property Act),[21] it applied only to the division of property of a married couple following separation. But it was rightly recognised as important social legislation because it introduced the equal sharing principle set out in s 11, rather than applying common law and equitable property rules to the division of the couple's property. When the Matrimonial Property Act came before this Court in 1979 in *Reid v Reid*, Woodhouse J identified five general but important considerations that should influence the approach of the courts to the interpretation of the legislation.[22] Those considerations remain relevant today.

[50] The first consideration was that although the Matrimonial Property Act operates upon "property" as a subject matter, the law it lays down is not a part of the law of property in any traditional sense. Instead it is:[23]

> … social legislation aimed at supporting the ethical and moral undertakings exchanged by men and women who marry by providing a fair and practical formula for resolving the obligations that will be due from one to the other in respect of their "worldly goods" should the marriage come to an end. In that respect it could be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society.

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21 The Matrimonial Property Act was renamed the Property (Relationships) Act in 2001.
22 *Reid v Reid* [1979] 1 NZLR 572 (CA).
23 At 580.

[51] Woodhouse J continued, in a passage that still resonates today:[24]

> Thus the theme of the Act is not the technical, legal adjustment of the kind of property rights that protect the arms-length interests of strangers but, in terms of the explicit statement in its long title, the recognition in New Zealand society of "the equal contribution of husband and wife to the marriage partnership". While that partnership is in being there is rarely any question about individual rights in property which has been acquired as a single aspect of the marriage; but should things go wrong solutions are needed. There is then a situation which neither spouse had prepared for. Against that risk the Act can serve a double purpose. On the one hand it will support a marriage during a period of uncertainty by offering its statutory assurance that efforts to sustain the relationship need not be abandoned in order to avoid being left finally at a disadvantage. Its second more direct purpose is to declare in advance the basis upon which matrimonial property will be divided at the end of a marriage.

[52] The second consideration was the abandonment of a broad discretion, in favour of a strong bias in favour of equality.[25]

[53] The third consideration was that:[26]

> For practical reasons if for no other the statutory formula should be interpreted and identified in order to achieve substantial justice and in a sufficiently clear-cut way to avoid uncertainty or results that will vary in cases that are really the same.

[54] The fourth consideration also resonates in the present context:[27]

> The fourth consideration concerns the hypnotic influence of money in all these matters. The 1976 Act is described as "an Act to reform the law of matrimonial property". It is not difficult to see why. As I have mentioned, under the earlier legislation there was a wide judicial discretion to achieve justice between husband and wife. But it was usually exercised to give an entirely disproportionate weight to monetary contributions, particularly when they had been provided by the husband. …
>
> Social legislation which affects everybody is not always the comfortable environment of lawyers whose usual preserve is the conventional structure of property and contractual rights which have grown up around the interests of a relatively small and rather more affluent section of the community. So perhaps it is not surprising that a continuing effort is made to persuade the Courts to construe the matrimonial property legislation in ways which will retain as much as possible of the traditional rules. But it cannot be right to allow modern attitudes to marriage and the true importance of contributions of spouses to their marriage partnership to be estimated against the curious

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24 At 580–581.
25 At 581.
26 At 581.
27 At 581–582.

> medium of money. It is no more possible or sensible to put money values on achievements in a marriage partnership in the hope of producing neat commercial balance sheets than it is sensible or possible to assess in money the environmental quality of a sea-view against the need for a factory that would block it out.

[55] The fifth consideration, which Woodhouse J described as "of real significance in these cases", is that problems about dividing property occur at the end of a marriage:[28]

> Perhaps for that reason it is usually overlooked that at its beginning personal aspirations are necessarily given away in favour of a commitment on both sides to a common future that is quite uncertain. It is therefore a commitment which involves not only the pooling of resources but the sharing of risks. If, for example, a commercial enterprise turns out to produce hardship rather than wealth the husband and the wife are obliged to face up to their resultant problems equally and together. Usually that is exactly what they do. In my opinion that common acceptance of risks and the continuing chance of misfortune throughout the period of a marriage is a potent reason for keeping proper limits on claims by one spouse at the end of it that he or she alone is entitled to all or the major credit for property or commercial acquisitions, whether they be great or small. And there is the associated reason that the other partner to the marriage has forgone an equal opportunity of directly achieving equal fame or fortune.

[56] In 2001 the Matrimonial Property Act was renamed and amended to recognise that the same important considerations apply as between de facto partners in a long-term relationship. Whether or not the partners are married, relationships founded on mutual commitment and love cannot be measured by reference to "the curious medium of money".[29] An attempt to produce "neat commercial balance sheets" in the context of such relationships is neither sensible nor achievable.[30] Rather, it is appropriate to deal with separation — a situation which no partner had prepared for — by applying the principles set out in this important social legislation in order to achieve substantial justice as between the parties.

[57] It is against this backdrop — a backdrop of legislation designed to apply in circumstances where a relationship founded on mutual commitment has ended, and justice cannot be done by reference to neat commercial balance sheets — that the PRA must be interpreted and applied.

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28 At 582–583.
29 At 582.
30 At 582.

Discussion

The PRA does not apply to polyamorous relationships as such

[58] We agree with the Judge that the PRA is concerned with relationships between two people, and that a polyamorous relationship (or multi-partner relationship — we use the terms interchangeably) as such is not a qualifying relationship under the PRA.[31] There are numerous indications in the text of the PRA that it applies as between two spouses or partners. It is, as the Judge said, premised on "coupledom".[32]

[59] But is coupledom — for the purposes of the PRA — *exclusive* coupledom? It seems to us that the key issue in this appeal is whether, as between two people in a wider multi-partner relationship, there may be a qualifying relationship to which the PRA applies. And whether, if so, there may be multiple qualifying relationships between couples within that broader multi-partner relationship.

Does the PRA apply to a married couple in a polyamorous relationship?

[60] It is helpful to begin by considering the position of a married couple such as Lilach and Brett who subsequently enter into a multi-partner relationship. As already mentioned, they were married in February 1993. From that time onwards they were in a qualifying relationship for the purposes of the PRA: in the event that they separated in (say) 2000, the property consequences of the relationship and the separation would have been determined under the PRA.

[61] Did the PRA cease to govern the property consequences of the relationship between Lilach and Brett, in the event that they subsequently separated, once they entered into a multi-partner relationship with Fiona in 2002? The answer to that question turns on whether their marriage ended at that time for the purposes of the PRA. Section 2A(2), set out above at [41], provides that for the purposes of the PRA a marriage ends if "they cease to live together as a married couple", or the marriage is dissolved, or one of them dies.

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31 High Court judgment, above n 1, at [58] and [21]–[27].
32 At [56].

[62] The marriage was not dissolved, and no one died. So the marriage ended in 2002 only if Lilach and Brett ceased to *live together as a married couple*. Certainly, they were not living apart: they shared a home and a bed, and remained in a committed relationship. They had a continuing sexual relationship. It appears they were financially interdependent. They were living together, and they were married.

[63] Were they, however, a married *couple*? At one level, plainly they were: they were a couple who had married, and remained married. But does the use of the term "couple" require that the parties live together as a couple exclusive of others?

[64] The meaning of an enactment must be ascertained from its text and in the light of its purpose and its context.[33] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[34]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[65] Looked at in isolation, the word "couple" might be seen as conveying a flavour of exclusivity. But there are clear contextual indications in the PRA that it is possible for two people to live together as a married couple at the same time that one of them is in another committed relationship that qualifies as a de facto relationship for the purposes of the PRA. The scenario of a contemporaneous marriage and de facto relationship is expressly contemplated by, and provided for in, s 52A. It is clear from s 52A that "coupledom" for the purposes of the PRA is not dependent upon the exclusivity of the relationship between that couple.

[66] Logically, that must also be the position where both spouses in a marriage have a qualifying contemporaneous de facto relationship with some other person. And it is

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33 Legislation Act 2019, s 10(1), formerly Interpretation Act 1999, s 5(1).

34 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

difficult to see why a different result should follow merely because the person with whom each spouse is in a de facto relationship is the same (third) person.

[67] Another important element of the statutory context is the broad approach to the term "marriage" contemplated by s 2A(1). It extends to void marriages.[35] And it would in our view extend to any relationship recognised as a marriage as a matter of common law.[36] Consider, for example, the position of person A who enters into a polygamous marriage outside New Zealand with B, and subsequently with C. If A, B and C subsequently come to live in New Zealand it is clear that the marriages between A and B, and A and C, would each be recognised as marriages for the purposes of the Family Proceedings Act 1980. Section 2 of that Act expressly defines "marriage" to include a union in the nature of marriage that is entered into outside New Zealand, and is at any time polygamous, where the law of the country in which each of the parties is domiciled at the time of the union then permits polygamy. So in this scenario it would be possible for C to seek a dissolution of her marriage with A in New Zealand. It would be odd if C could not also seek division of relationship property under the PRA. We consider that her marriage to A would qualify as a marriage for the purposes of the PRA,[37] as well as for the purposes of the FPA. She would not be deprived of the protection of the PRA merely because the marriage she entered into outside New Zealand was polygamous. And when applying the PRA, the duration of C's marriage to A would in our view include periods both inside and outside New Zealand in which the marriage was in fact polygamous and A, B and C all lived together in the same household.

[68] It is also consistent with the purpose of the PRA to treat a married couple as continuing to live together as a married couple during any period in which they are living together in the context of a broader multi-partner relationship. Where a married couple continue to live together in a committed relationship which involves sharing a home, pooling resources, and planning for a shared future, all the considerations

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35 See PRA, s 2A(1)(a).

36 For the recognition of relationships as marriages under New Zealand law, even though such relationships are unknown to New Zealand law, see Hook and Wass *The Conflict of Laws in New Zealand* (LexisNexis NZ Ltd, Wellington, 2020) at [9.39]–[9.43]. Polygamous marriages will be recognised as marriages for most purposes: see [9.41].

37 PRA, s 2A(1)(a).

identified by Woodhouse J in *Reid v Reid* continue to apply.[38] It would be odd to decline to apply the principles established by the PRA, and revert to property law concepts (legal and equitable), when dividing their property following a separation. Neat commercial balance sheets remain both unachievable and irrelevant in this context, as between those two partners. The many forms of contribution that characterise a committed intimate relationship are no less relevant in this scenario: they should all be taken into account, and treated as equal. The "curious medium of money" cannot, and should not, be the lens through which their disparate contributions are analysed. The formation of a multi-partner relationship does not provide any rational basis for reverting to an approach focused on money and property rights as between the spouses if and when things go wrong, they separate, and solutions are required. The equitable principles developed by the courts in cases such as *Lankow v Rose* go some way to addressing the unsatisfactory consequences of an approach focused on money and property rights. But as this Court explained in *Lankow v Rose*, a claim based on a constructive trust remains a proprietary claim. It is necessary to show a causal relationship between the claimant's contributions and the acquisition, preservation, or enhancement of the assets of the defendant, and a reasonable expectation of an interest in the claimed property.[39] The frame remains much narrower than under the PRA.

[69] Put another way, the protection that the PRA provides to each spouse does not become less relevant or less necessary in circumstances where the spouses continue in their relationship, and also form a multi-partner relationship with a third person. It remains just as important to recognise the equal contribution of both spouses, and to provide for a just division between them of any relationship property.

[70] When s 2A(2) is read in its wider statutory context, and in the light of the purpose of the PRA, it is in our view clear that the marriage of Lilach and Brett did not end in 2002 when the multi-partner relationship with Fiona began. They continued to live together as a married couple for the purposes of the PRA. The PRA would govern the division of their property in the event of death or separation.

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38 *Reid v Reid*, above n 22, at 580–583; and see above [50]–[55].

39 *Lankow v Rose*, above n 9, esp at 282 and 286 per Hardie Boys J and 294–295 per Tipping J.

Can there be a de facto relationship for PRA purposes in the context of a wider polyamorous relationship?

[71] Against that backdrop, we turn to the question whether two people who are in a multi-partner relationship may also be in a qualifying de facto relationship for the purposes of the PRA. The critical question is whether the two persons "live together as a couple": s 2D(1)(b). It follows from our analysis above that the focus should be on the nature of the relationship between those two people. It is not a necessary element of living together as a couple that the relationship be exclusive. The statutory context confirms that a person can be in more than one de facto relationship at the same time: s 52B(2)(b) expressly contemplates the possibility of contemporaneous de facto relationships. As Miller J observed in *DM v MP*, the legislation:[40]

> … establishes that a de facto couple need not "live together" to the exclusion of others. More than that, a person may live in more than one de facto relationship at any given time, so the idea of a relationship in which two people "live together as a couple" must accommodate that possibility.

[72] Likewise, the purpose of the PRA is engaged whenever there is a qualifying de facto relationship between two people, regardless of whether one or both of those persons is in a relationship with some other person. It would be inconsistent with the purpose of the PRA to focus on money and property rights, and decline to apply the equal sharing principle as between two de facto partners, merely because one or both are in qualifying relationships with another person for some or all of the relevant period.

[73] It is of course the case that the PRA will apply as between two participants in a multi-partner relationship (who are not married and not in a civil union) only if their relationship meets the test in s 2D of the PRA. It is necessary to take all the circumstances of the relationship between those two persons into account, including the specific matters referred to in s 2D(2). In the context of a long-term committed multi-partner relationship, many of those factors are likely to be present as between any two persons in that relationship. If that is the case, the conclusion may be reached that each pair of individuals in the relationship is living together as a couple.

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40 *DM v MP* [2012] NZHC 503, [2012] NZFLR 385 at [19].

[74] The courts have observed that where A and B are married, or are in a qualifying de facto relationship, it may be difficult in practice to establish that B is also in a contemporaneous de facto relationship with C.[41] But ultimately that is a question of fact. And it may be easier to establish that B is also in a contemporaneous de facto relationship with C, applying the s 2D test, where A, B and C are all living together in the same household, in a multi-partner relationship, than it would be if A and B live together and B's relationship with C is separate and parallel.

[75] Our conclusion is reinforced by considering the position of Fiona and Brett after Lilach's departure in November 2017. If the relationship between Fiona and Brett satisfied the test in s 2D at that time, then plainly they would be in a de facto relationship for the purposes of the PRA at that time. It seems odd to suggest that this de facto relationship began at the moment Lilach left. As between Fiona and Brett, nothing material changed in 2017 that has a bearing on the appropriateness of the PRA applying to determine their entitlements to property in the event that they separate at some later date. Lilach's departure would not of itself affect any of the specific factors listed in s 2D as between Fiona and Brett. It would be illogical and unfair if the PRA did not apply as between Fiona and Brett when they separated in 2018, because their de facto relationship was treated as having lasted less than three years.

[76] In its recent review of the PRA the Law Commission expressed the view that the Act does not apply to relationships between three or more people. The Commission describes the PRA as "premised on the notion of 'coupledom'".[42] We agree that the PRA is premised on the notion of coupledom. But as explained above, we do not consider that that notion is in turn premised on exclusivity. As that notion is used in the context of the PRA, a multi-partner relationship may include one or more couples, with the PRA applying as between the members of each couple.

[77] The Law Commission went on to observe that excluding multi-partner relationships that are functionally similar to qualifying relationships from the PRA "may … be difficult to justify".[43] We agree. As explained above, we consider that the

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41 See *Ngavaevae v Harrison* [2017] NZHC 2788 at [50]; and *DM v MP*, above n 40, at [26]–[29].

42 Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC, R143, 2019) at [7.62].

43 At [7.65].

PRA can be read in a way which ensures its application as between two individuals in a multi-partner relationship, in circumstances where the purposes of that very important social legislation are engaged.

[78] We add that it would be unsatisfactory if a different conclusion were to be reached in relation to the qualifying element of living "as a couple" as between married partners and de facto partners. One of the central objectives of the 2001 amendments to the PRA was to ensure that married and de facto couples would be placed on the same footing.[44] There would need to be a compelling reason to conclude that the PRA can apply to a married couple in a wider multi-partner relationship, but not to an unmarried couple whose relationship was in all other respects equivalent and who were in that same multi-partner relationship.

[79] We also consider that NZBORA supports the adoption of an interpretation that does not distinguish between married and de facto partners in this context. Section 6 of NZBORA provides that an available interpretation that is consistent with NZBORA should be preferred to any other meaning.[45] Section 19(1) of NZBORA provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act. The prohibited grounds of discrimination identified in the Human Rights Act include "family status", which includes being married to, or being in a civil union or de facto relationship with, a particular person.[46] Section 2D of the PRA can be given a meaning consistent with the right to freedom from discrimination on the grounds of family status by adopting a consistent approach to whether two people are living together as a couple, regardless of whether they are married, or unmarried but otherwise in an equivalent (de facto) relationship. So it must be given that rights-consistent meaning.

The workability of this approach

[80] We do not accept the argument that this approach would be unworkable in practice. It can be applied in relation to any couple who is married or in a civil union

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44 *Bourneville v Bourneville* [2008] NZCA 520, [2009] NZFLR 69 at [21].

45 For a recent discussion by the Supreme Court of s 6, and when a rights-consistent meaning is available, see *Fitzgerald v R* [2021] NZSC 131.

46 Human Rights Act, s 21(1)(l)(iii).

or de facto relationship, in order to determine their mutual rights as against each other. The starting point will be the equal sharing presumption in s 11 of the PRA. It is of course always necessary to determine the scope of the relevant relationship property, and identify any other claims on that property, when applying the equal sharing principle as between a couple.

[81] Some examples may be helpful. First, suppose that three people A, B and C are in a committed polyamorous relationship. They live together in a single household. Each pair of individuals in the relationship is in a qualifying relationship: either they are married or in a civil union, or they are in a de facto relationship as defined in s 2D. The property at which they live is owned by A.

[82] The term "family home" is defined in s 2 of the PRA to mean:

> … the dwellinghouse that either or both of the spouses or partners use habitually or from time to time as the only or principal family residence, together with any land, buildings or improvements appurtenant to that dwellinghouse and used wholly or principally for the purposes of that household …

[83] If the property is the family home of each of the three partners, then it is the family home for each couple. If all three separate, and C brings a claim under the PRA against A and B, it follows from s 11 of the PRA that each is entitled to share *equally* in that family home. So:

(a) As between C and A, each is entitled to share equally in the home.

(b) In determining the practical implications of that right to equal sharing, and the orders to be made, the court needs to bear in mind that each of A and B are entitled to share equally in that home vis-à-vis C.

(c) The appropriate order to make on C's application is thus an order granting C a one-third share in the family home.[47] That achieves equality as between the partners in each relevant couple.

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[47] Putting to one side any claim a partner may have for unequal division of property, such as a claim based on economic disparity under s 15 of the PRA.

[84] The same applies if C leaves the polyamorous relationship, so ceases to be in a qualifying relationship with A and B, but A and B continue in their qualifying relationship. In those circumstances also, an application by C against A and B will result in an order giving C a one-third share in the property.[48]

[85] The power of the court to make orders under ss 25 and 33 of the PRA is expressed in broad terms that would enable appropriate orders to be made to give effect to this equal division. The court might require a payment to be made by A and/or B to C, or require the sale of the property and equal division of the proceeds.

[86] The presumption of equal division does not mean that each partner is entitled to 50 per cent of the property as a whole, as the Judge suggested below.[49] Rather, it means that neither is entitled to more or less than the other. There is no difficulty applying that presumption of equal division in the manner set out above, and concluding that each is entitled to a one-third share. This outcome is consistent with the general policy of the PRA. We do not share the view expressed by the Judge that each partner obtaining a 33 per cent share is "materially at odds" with that policy.[50]

[87] Nor do we consider that ss 52A and 52B give rise to significant concerns about workability. In circumstances where A, B and C have separated, and B and C each bring a claim against A for one-third of a family home, the better view is that s 52A is not engaged. That provision only applies where there are *competing* claims for property orders in respect of certain property, and there is *insufficient* property to satisfy the relevant orders. But as the examples above illustrate, the court can make orders which give effect to the parties' mutual rights in a manner which does not involve competition between claims: there is sufficient property to satisfy the claims of both B and C, and to satisfy the orders that would be made in their favour. The difficulties that some commentators have identified in relation to s 52A do not arise in this scenario.[51]

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48 Again, putting to one side any claim a partner may have for unequal division of property.
49 High Court judgment, above n 1, at [44].
50 At [45].
51 See for example Law Commission, above n 42, at [7.45]–[7.48].

[88] We agree with the Judge that there are "acknowledged difficulties" with the application of ss 52A and 52B.[52] But we do not see those difficulties as a barrier to the application of the PRA to couples in the context of a multi-partner relationship. Indeed it seems to us that these difficulties are less likely to arise in the context of a single contemporaneous multi-partner relationship than in the context of two contemporaneous two-partner relationships, where one individual may face competing claims from two former partners in respect of the same relationship property, with each former partner claiming an entitlement to a 50 per cent share of that property. In many cases involving polyamorous relationships, there will be no competing claims, the property will be sufficient to satisfy each participant's claim to share equally with each other participant, and ss 52A and 52B will not be reached.

[89] It is possible that in some cases involving multi-partner relationships there will be competing claims, and insufficient property to satisfy the orders that would otherwise be made. In those cases the courts will need to strive to make ss 52A and 52B work in a manner consistent with the purposes of the PRA, just as the courts would need to do in cases concerning two contemporaneous two-partner relationships. But we do not see the likelihood of such cases, or the difficulty of resolving them, as a sufficient reason to depart from the approach to the PRA that we have outlined above.

[90] The approach we have described above, applying the PRA as between each couple, is also workable when it comes to addressing other issues that arise under the PRA. It is neither feasible nor appropriate for us to work through every conceivable issue that might arise. But it may be helpful to outline how this approach would work in three scenarios: one involving property other than the family home, one involving s 9A (where separate property becomes relationship property), and one involving s 13 (exceptional circumstances leading to unequal sharing).

[91] First, property other than the family home. Suppose X is married to Y and lives with her much of the time. But he is also in a de facto relationship with Z, with whom he spends several days most weeks. Y and Z are not in a relationship (indeed,

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[52] High Court judgment at [41].

they have not met). X has a good job and is saving regularly. During the overlap in the relationships he saves $200,000 from his wages.

[92] X's relationships both come to an end. Y and Z each bring claims against X under the PRA. The savings are relationship property for the purpose of each of X's relationships: s 8(1)(e). (The savings are not relationship property as between Y and Z: they are not in a relationship.) Section 52A applies to X's two contemporaneous relationships, but provides no meaningful guidance in this scenario. The answer appears to lie in an application of s 11 — the entitlement to share equally in this property, on a basis that takes into account the three claims to that property. If the court awards each of Y and Z one third of the savings, then Y shares equally with X (each receives the same, neither more nor less) and Z shares equally with X. It would make no sense to award each of Y and Z 50 per cent of the savings, leaving X with nothing — that would not reflect equal sharing as between each claimant and X.

[93] Now suppose that the facts are as above but X, Y and Z are in a multi-partner relationship, and Y and Z satisfy the s 2D test for a de facto relationship. The same analysis leads to the same conclusion: each receives one third of the savings. (In this scenario, as in the scenario above, the savings are not relationship property as between Y and Z. Although Y and Z are in a relationship in this scenario, X's savings are not property acquired by either Y or Z during their relationship).[53]

[94] Next, we turn to s 9A. The facts are as [93] above, with X, Y and Z in a multi-partner relationship. X uses his savings to improve a rental property he owned before he met either Y or Z. The rental property is separate property. Any increase in value of the rental property as a result of this application of X's savings (which are relationship property in each of X's relationships, as above) becomes relationship property by virtue of s 9A(1) for the purpose of each of X's relationships. That gain is shared in the same way as the savings would have been shared. X must share this gain equally with each of Y and Z. That result can be achieved if and only if each receives one third of the gain.[54]

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53 PRA, s 8(1)(e).

54 The same result would presumably be reached if X was in contemporaneous two-partner relationships with Y and Z, as with the savings.

[95] Now suppose that Y does work on X's rental property, and that work increases the value of the rental property. That increase in value is relationship property as between X and Y by virtue of s 9A(2). But s 9A(2) does not apply to this value increase as between X and Z. If X was in contemporaneous two-partner relationships with each of Y and Z, the gain in the value of the rental property would be divided between X and Y, with their shares determined in accordance with their respective contributions to the increase in value. Z would have no claim against X in respect of this gain. If all three are in a multi-partner relationship, the same result would be reached: s 9A(2) does not enable Z to claim that the increase in value is relationship property, nor has Z made any contribution to that increase in value.[55]

[96] Finally, consider the scenario where X, Y and Z are in a multi-partner relationship, the relationship between each couple is a qualifying relationship, and a few months before separation X applies an inheritance of $1 million to clear the mortgage on the family home valued at $2.5 million. Following separation, X claims that s 13 applies as between himself and each of Y and Z. If the Family Court accepts that as between X and Y this amounts to extraordinary circumstances that make equal sharing between them repugnant to justice, then the shares of X and Y must be determined in accordance with their respective contributions to the relationship. Likewise, as between X and Z. But there are no extraordinary circumstances as between Y and Z, so they will continue to share equally (that is, as between them neither receives more nor less than the other). Putting to one side all other relevant factors, and all other relationship property, one response might be that X's share reflects what he would have received if the inheritance had not been applied to the house ($500,000) plus the inheritance amount, giving him a total share of $1.5 million, while each of Y and Z receive $500,000. As between X and Y, and X and Z equal sharing is departed from and X's share adjusted, to the extent necessary to reflect the relevant exceptional circumstance. Y and Z share equally as between themselves.

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[55] It might be argued that this is unfair to Z, as if Y had done similar work on another property for payment, the payment would have been relationship property as between Y and Z. But the same unfairness arises if X does work on his own separate property, which produces a gain for X: that does not become relationship property, although payment for similar work by X on a third party's property would have. These anomalies between the treatment of paid and unpaid work are already present in the PRA and are not peculiar to the multi-partner context.

[97] These and other scenarios will need to be worked through by the courts if and when they arise. We are confident that the courts can arrive at workable solutions that are consistent with the text and the purpose of the PRA, by applying the PRA as between each couple while having regard to any other claims to the relevant property. We have not identified any difficulties with this approach which are so fundamental that they would justify adopting a different approach that would be less consistent with the policy objectives and principles that underpin the PRA.

Conclusion

[98] For the reasons set out above, the appeal must be allowed.

[99] The Judge restated the question referred to the High Court by way of case stated as follows:[56]

> Does the Family Court have jurisdiction under the [PRA] to determine the property rights of three persons in a polyamorous relationship, either on the basis of that relationship or by dividing that relationship into dyadic parts?

[100] The difficulty with the way this question is framed is that it starts with a "polyamorous relationship", a concept that is not defined under the PRA, and moves on to ask whether property rights of three persons in such a relationship can be determined under the PRA on the basis of that relationship, or by dividing it into "dyadic parts". We think it is more consistent with the scheme of the PRA to ask whether, as between person A who brings a claim under the PRA against persons B and C, A was in a qualifying relationship (a marriage, civil union or de facto relationship) with either or both of B and C. If A was in a qualifying relationship with B, the PRA applies as between A and B. If A was in a qualifying relationship with C, the PRA applies as between A and C. The Family Court has jurisdiction to determine property rights of couples in a qualifying relationship. In the context of a polyamorous relationship, there may be multiple such couples. The jurisdiction can be exercised in respect of each such couple.

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[56] High Court judgment, above n 1, at [3].

[101] We therefore answer the question as follows:

> The Family Court has jurisdiction under the PRA to determine claims to property as between two persons who were married, in a civil union, or in a de facto relationship, and also in a polyamorous relationship. That jurisdiction extends to determining claims among three people in a polyamorous relationship, where each partner in that polyamorous relationship is either married to, in a civil union with, or in a de facto relationship with, each of the other partners in that polyamorous relationship.

[102] Costs in this Court should follow the event in the ordinary way. Although this appeal raises a novel issue, the proceedings seek to vindicate private interests.

[103] Costs in the High Court were reserved. Costs in that Court should be determined by that Court, in light of this decision.

[104] The proceedings brought by each of Lilach and Brett can now be heard by the Family Court. That Court will need to determine whether each of them was in fact in a de facto relationship with Fiona for the purposes of the PRA, and the duration of each of those relationships. If the claimed relationships are established, the Court will then need to go on to identify the relevant relationship property, and determine the claims to that property, as between the relevant couple(s) in the normal way.

Result

[105] The appeal is allowed.

[106] We answer the question of law referred to the High Court as follows:

> The Family Court has jurisdiction under the Property (Relationships) Act 1976 to determine claims to property as between two persons who were married, in a civil union, or in a de facto relationship, and also in a polyamorous relationship. That jurisdiction extends to determining claims among three people in a polyamorous relationship, where each partner in that polyamorous

relationship is either married to, in a civil union with, or in a de facto relationship with, each of the other partners in that polyamorous relationship.

[107] The respondent must pay costs to the first appellant for a standard appeal on a band A basis, with usual disbursements.

[108] Costs in the High Court are to be determined by that Court in light of the outcome in this Court.

Solicitors:
Doug Cowan, Auckland for Appellants
McVeagh Fleming, Auckland for Respondent