IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 7/2022
[2023] NZSC 70

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

Hearing:	22 July 2022
Court:	Glazebrook, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	S R Jefferson KC, A S Butler, P A Fuscic and K L Thompson for Appellant N W Taefi and J E Palairet for First Respondent J R Duckworth for Second Respondent
Judgment:	20 June 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs of $25,000 plus usual disbursements.

REASONS

O'REGAN, WILLIAMS AND KÓS JJ
(Given by Kós J)

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Introduction

[1] Where partners in a domestic relationship acquire or contribute to the acquisition of property together, and then break up, the law requires the legal titleholder to account for the contribution made by the other. It does so in two ways. If the relationship is a qualifying relationship under the Property (Relationships) Act 1976 (the PRA), that Act applies. If not, equity may mitigate the austerity of legal title.

[2] Here the domestic relationship involved three people, one of whom—the appellant, Fiona—was the legal titleholder. She says theirs was not a qualifying relationship under the PRA, and equity alone can erode her legal title. The other two—the respondents, Lilach and Brett—say that for the purposes of property division the

overall relationship can be divided into three constituent couples, or relationships, so the PRA applies.[1]

[3] The High Court held the PRA did not apply to these parties, meaning the Family Court lacked jurisdiction to entertain the respondents' claims.[2] The Court of Appeal disagreed, finding that:[3]

> 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.

Fiona appeals to this Court. The appeal concerns only the limited question of whether the Act applies at all—a matter of jurisdiction (and therefore, statutory interpretation)—not *how* it applies in fact. If the PRA can apply, whether and how it applies to the parties will have to be decided later, by the Family Court.

Background

[4] Given the limited issue before us, we confine ourselves here to basic facts arising from the affidavits filed.

[5] Brett and Lilach married in 1993. Fiona met Brett and Lilach around 1999 or 2000. They formed a triangular polyamorous relationship in 2002. What that entailed is described in what appears to be an undisputed aspect of Lilach's affidavit evidence:[4]

> 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 … majority of the relationship all three of us have been sharing the same room and same bed until about a year[5] before our separation when I moved into the guest room.

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1 We note we have followed the Courts below, and counsel, in using the parties' first names for the avoidance of confusion.

2 *Paul v Mead* [2020] NZHC 666, [2020] NZFLR 1042 (Hinton J) [HC judgment].

3 *Paul v Mead* [2021] NZCA 649, [2022] 2 NZLR 413 (French, Collins and Goddard JJ) [CA judgment] at [106].

4 In addition, Lilach describes the fact that she and Brett gave Fiona a ring essentially identical to the one Brett and Lilach had.

5 The date Lilach moved into the guest house is disputed by Fiona.

> When we moved into the Property, Fiona, Brett and I committed to a shared life with each other.

As this passage makes clear, the nature of the triangular relationship we are dealing with is one involving three persons cohabiting and sharing mutual but non-exclusive collective and individual sexual relationships.

[6] The property referred to in the preceding passage is a four-hectare property at Kumeū. It was purchased in November 2002, shortly after the formation of their polyamorous relationship, for $533,000. Fiona paid the deposit of $40,000 and the property was registered in her name.

[7] Fiona is a veterinarian. Lilach is an artist. Brett ran lawn mowing and paintball businesses from the property with, it appears, some assistance from Lilach. As the Court of Appeal observed:

> [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.

It is unnecessary to examine differences about the extent of contribution in this judgment, concerned (as it is) with the narrower question of jurisdiction.

[8] As the passage from Lilach's affidavit quoted above indicates, each party had secondary relationships with other persons. As the Court of Appeal noted:[6]

> Some of these secondary relationships were between one party and the secondary party, while others involved more than one party … At least one of these secondary relationships appears to have lasted for three years.

[9] Material was put before us on the varied nature of polyamorous relationships.[7] It is unnecessary to traverse general social science here. Rather, we focus on triangular polyamorous relationships exhibiting the features described in the preceding

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6 CA judgment, above n 3, at [12].

7 See, for example, Meg Barker "This Is My Partner, and This Is My … Partner's Partner: Constructing a Polyamorous Identity in a Monogamous World" (2005) 18 Journal of Constructivist Psychology 75; Elisabeth Sheff and Corie Hammers "The privilege of perversities: race, class and education among polyamorists and kinksters" (2011) 2 Psychology & Sexuality 198; and "Three's Company, Too: The Emergence of Polyamorous Partnership Ordinances" (2022) 135 Harv L Rev 1441.

paragraphs, including an apparently overt nature, close cohabitation and somewhat intertwined finances, and non-exclusive collective and individual sexual relationships. When we refer in this judgment to a "triangular relationship", we refer to a relationship exhibiting those features.

[10] Lilach separated from Fiona and Brett in November 2017. At that point the property had a rateable value of $2,175,000. Fiona and Brett subsequently separated in early 2018. Fiona remains resident in the property, and it remains registered in her name.

Equitable and statutory framework

[11] It is helpful to set out the trajectory of the equitable and statutory framework for this decision in its chronological sequence. We set to one side common law remedies, which reside primarily in contract and are subject to special rules that apply to contracting out in a PRA context.[8] No relevant contract exists in the present case, and the allocative options are binary: the PRA or equity.

Equitable principles

[12] Where property is acquired (or improved) in the course of a domestic relationship outside the scope of the PRA,[9] equity may nonetheless aid a dispossessed party in recovering an interest in that property. Recourse to equity may be required to redistribute joint enterprise property acquired in many inherently domestic relationships—e.g. that of a parent and child, or of siblings—where the PRA does not reach. The PRA is focused only on intimate domestic relationships because Parliament has identified the need for presumptive equal sharing of property when such relationships fail.[10] There, it has decreed that the operating presumption should be the common acceptance of both risk and reward, and of equal contribution and division.[11] We will return to the PRA shortly.

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8 See pt 6 of the Property (Relationships) Act 1976 (the PRA).
9 Because the arrangement is not a qualifying relationship.
10 PRA, ss 1M, 1N and 11(1).
11 See, for example, the judgment of Woodhouse J in *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580–583.

[13] Ahead of the 2001 legislative reforms to the PRA, equity had already recognised institutional constructive trusts in relation to some communal property of de facto partners.[12] But there were limits. First, equity proceeded on a contributions basis to particular assets (including indirect contribution).[13] There had to be a causal connection between the acquisition, maintenance or improvement of particular assets and the applicant's contributions.[14] Secondly, there had to be a reasonable expectation of an interest in those assets.[15] Constructive trusts arise on the basis of deemed intention, "not on abstract ideas of equality".[16] Equitable principles remain important in determining property rights outside a PRA-qualifying relationship. And also within one, where the target is property owned by a third party—such as an express trust.[17]

Prior legislation

[14] The Married Woman's Property Act 1884 made "a revolutionary change" in New Zealand law, permitting married women to acquire, hold and dispose of any property.[18] But often there was little property to which the new regime could apply, and the matrimonial home was regarded as the husband's if he could show he had paid for it.[19] In the course of the twentieth century greater recognition of non-financial contributions in the division of matrimonial property was called for.

[15] This requisition found its way, imperfectly, into the Matrimonial Property Act 1963. However, as Professor Bill Atkin observes:[20]

> … the broad discretion left to judges, even after the law was amended to allow indirect non-financial contributions to property, proved problematic. Under the 1963 Act, the typical amount of property allocated to women was around one per cent of property for each year of marriage. A woman departing from

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12 The leading early case was *Lankow v Rose* [1995] 1 NZLR 277 (CA).
13 At 282 per Hardie Boys J and 294 per Tipping J.
14 At 282 per Hardie Boys J and 295 per Tipping J.
15 At 282 per Hardie Boys J, 286–289 per Gault J and 294 per Tipping J.
16 Jessica Palmer "Constructive Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at 345, discussing *Nuthall v Heslop* [1995] NZFLR 755 (HC).
17 See, for example, *Murrell v Hamilton* [2014] NZCA 377, (2014) 3 NZTR ¶24-012; *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807; and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397, (2016) 4 NZTR ¶26-019.
18 A M Finlay "Matrimonial Property—Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] II AJHR E6 at 3.
19 At 4.
20 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at [1.2].

> a 25-year marriage could hope to receive, at best, a quarter of the marital property.

[16] The Matrimonial Property Act 1976 took a different approach. It introduced a presumption of equal sharing, albeit stronger as regards the family home and chattels than other common property.[21] It also meant relative contributions were only examined where a party sought to displace the presumption of equality.[22] As Woodhouse J observed in *Reid v Reid*, the 1976 Act was:[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.

[17] Underlying the legislation was recognition of the "equal contribution of husband and wife to the marriage partnership",[24] and of a mutual commitment (unless contracted out) to a pooling of both risk and reward.[25] Woodhouse J saw the new Act as counteractive to the "hypnotic influence of money".[26] He continued:[27]

> 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.

The PRA

[18] Further substantial legislative amendment followed in 2001, along with the renaming of the 1976 Act as the PRA.[28] The most substantial change made was the inclusion of (heterosexual and same-sex) de facto couples in the legislation. They were now to receive broadly similar provision as married couples. Hitherto if a de facto couple separated, the starting point was that the partner who owned the property kept it, and the non-owner's only remedy was to "establish an interest in the

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21 Sections 11 and 15(1). Atkin, above n 20, at [1.2].
22 See at [24] below.
23 *Reid*, above n 11, at 580.
24 Matrimonial Property Act 1976, long title (as enacted).
25 *Reid*, above n 11, at 582–583.
26 At 581.
27 At 582.
28 Property (Relationships) Amendment Act 2001.

property under the general law, particularly the law of trusts".[29] The 2001 amendments corrected that anomaly. They also did rather more than that, as we shall see.

[19] As the Court of Appeal here noted, the PRA principally governs the division of relationship property when a qualifying relationship—a marriage, civil union or de facto relationship—comes to an end.[30] The purpose of the PRA is set out in s 1M:

> (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.

[20] Section 1N then sets out four principles to guide the achievement of that purpose:

> (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.

[21] "Family home" is defined in s 2 as "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". The family home here is part of the relationship property.[31]

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29 (26 March 1998) 567 NZPD 7917.

30 PRA, s 25(2). Inclusion of civil union partners was introduced by the Property (Relationships) Amendment Act 2005.

31 PRA, s 8(1)(a).

[22] "Marriage" is defined in s 2A:

> (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.

The definition is important here, because an issue we return to is whether Lilach and Brett's marriage ended for PRA purposes when, in 2002, they formed their triangular relationship with Fiona.[32] That depends on whether, at that point, Lilach and Brett ceased to live together as a married couple.

[23] Section 2C provides that "a person is another person's de facto partner if they have a de facto relationship with each other". "De facto relationship" is then defined in s 2D, a provision of central importance in this appeal:

> (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (regardless of their sex, sexual orientation, or gender identity)—
>
> (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:

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[32] See at [59] below.

(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.

[24] As we have noted, the family home, in a qualifying relationship, is relationship property. Section 11 then establishes an equal sharing principle for relationship property—the family home, family chattels and any other relationship property—as defined in s 8. Section 13 provides a limited exception to the s 11 equal sharing principle, if the Court considers there are extraordinary circumstances that make equal sharing repugnant to justice. In that case, relative shares will be determined in accordance with "the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship".[33]

[25] Section 20B provides for a protected interest in the family home against the unsecured debts of the "other spouse or partner", and the value of that interest is set out relevantly in s 20B(3). In addition s 21 provides that "[s]pouses, civil union

[33] Section 13 is subject to ss 14–17A: s 13(2).

partners, or de facto partners, or any 2 persons in contemplation of entering into a marriage, civil union, or de facto relationship" may make an agreement contracting out of the provisions of the PRA.

[26] Section 22(1) provides that applications under the PRA be heard in the Family Court. Section 23(1) provides for claims to be made by a spouse or partner, or both of them jointly, or by a person on whom spouses or partners have made conflicting claims in respect of property. Section 25 then provides for orders (1) determining the respective shares of each spouse or partner in the relationship property or any part of that property and (2) dividing the relationship property or any part of that property.[34] The jurisdiction to make these orders depends on the marriage or civil union being dissolved or the spouses or civil union partners either living apart or being separated.[35] In the case of de facto partners, jurisdiction exists when they no longer have a de facto relationship with each other.[36] Regardless of jurisdiction, the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just.[37]

[27] Sections 52A and 52B relevantly provide for the priority of claims where a person has been in more than one qualifying relationship:

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

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34 PRA, s 25(1)(a).
35 Section 25(2)(a).
36 Section 25(2)(b). The court also has jurisdiction in relation to marriages, civil unions and de facto relationships where one spouse or partner is endangering the relationship property or seriously diminishing its value, or where either spouse or partner is an undischarged bankrupt: s 25(2)(c)–(d).
37 Section 25(3).

(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.

[28] The origins of these two provisions are found in the work of Te Aka Matua o te Ture | the Law Commission on succession law in the 1990s. In a 1996 discussion paper, the Commission recognised the possibility of competing property division claims on a deceased person's estate arising from contemporaneous relationships.[38] To deal with competing property division claims on death, the Commission proposed that if a will-maker had contemporaneous relationships, the Court should determine which parts of the estate were attributable to which partnership.[39] For parts of the estate which could not practically be attributed to a partnership, "entitlements should be proportionate to the contribution of each partnership to the whole estate".[40] These general principles (and others) were articulated by the Commission in a provision in a draft Testamentary Claims Act.[41]

[29] Then, on 24 March 1998, when the De Facto Relationships (Property) Bill 1998 was introduced to Parliament, what became ss 52A and 52B were included, drawing directly on the Commission's draft, but applying it to the relationship property

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38 Law Commission | Te Aka Matua o te Ture *Succession Law: Testamentary Claims – A discussion paper* (NZLC PP24, 1996) at [161]–[165]. The Commission noted contemporaneous relationships were not "frequent" but provided the example of a person being in a "long-term intimate relationship with a de facto partner at the same time as continuing a marriage" where "[n]either spouse nor partner may know anything of the other relationship": at [162].

39 At [161].

40 At [161].

41 At 186. See also Law Commission | Te Aka Matua o te Ture *Succession Law: A Succession (Adjustment) Act – Modernising the law on sharing property on death* (NZLC R39, 1997) at 140.

context, and with some linguistic changes of expression.[42] Eventually, the Justice and Electoral Committee came to review the proposed provisions, noting they were based on the Law Commission's work and that:[43]

> Clause 49B in the SOP inserts new sections 52A and 52B into the principal Act, to establish the priority of claims where there are successive or contemporaneous relationships. Where the relationships were successive, the property is divided in accordance with the chronological order of the relationships. Where the relationships were at some time contemporaneous, the respective orders must be satisfied first from the property that belongs to each relationship, then in accordance with the contribution of each relationship to the acquisition of the property.

[30] The Committee recorded that "[s]everal submitters, including the Principal Family Court Judge" were concerned about the proposed provisions.[44] The Judge believed the provisions were "unclear and too vague" and needed to provide "more guidance on how to divide property where there are clandestine relationships".[45] The majority of the Committee doubted it was "practical to provide further rules to address the situation of clandestine relationships".[46]

[31] The parliamentary debates leading up to the 2001 reforms rarely touched on the proposed provisions. When discussed by the Opposition, the main concerns raised related to how far the provisions stretched;[47] whether the provisions promoted polygamy and bigamy;[48] and the provisions' impact on the Administration Act 1969,[49]

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42 De Facto Relationships (Property) Bill 1998 (108-1), cls 194 and 195.

43 Matrimonial Property Amendment Bill and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 27.

44 At 27.

45 At 27.

46 At 27.

47 See (13 March 2001) 590 NZPD 8130, where Alec Neill observed that "[i]t could come before the courts than an individual—and a busy individual, I must conclude—could be in a marriage relationship, a same-sex de facto relationship, and an opposite-sex de facto relationship". See also (27 March 2001) 591 NZPD 8502 (Alec Neill); and (27 March 2001) 591 NZPD 8526–8527 (emphasis added) where Katherine Rich commented that: "Some people would say that it is rather extreme to be discussing the idea that one's husband, wife, or de facto partner may be having a relationship with not only one person but a *number of people*. In fact, this bill deals with two *or more* de facto partners, plus a spouse, at one time."

48 (13 March 2001) 590 NZPD 8130 (Alec Neill); and (27 March 2001) 591 NZPD 8502 (Alec Neill) and 8529 (Wayne Mapp).

49 (27 March 2001) 591 NZPD 8526–8527 (Katherine Rich).

the Family Protection Act 1955[50] (both of which were amended in the 2001 reforms) and the Wills Act 1837 (Imp).[51]

[32] The Law Commission, in its 2019 *Review of the Property (Relationships) Act 1976*, expressed concern about how ss 52A and 52B would operate in practice:[52]

> … the draft provisions on which sections 52A and 52B are based were developed in the context of succession law. They were not designed to be inserted into the PRA or to apply to situations involving three (surviving) people. As a result, several problems arise when applying sections 52A and 52B within the PRA framework …

[33] The Commission was also of the view that the PRA does not apply to single relationships between three or more people:[53]

> We also note that the provisions for contemporaneous relationships only apply where one partner is in two separate relationships with different partners. They are not designed to capture situations where one partner is in a single relationship with two or more people (multi-partner relationships). While some multi-partner relationships might fit the characteristics of contemporaneous relationships and rely on the regime under sections 52A and 52B [such as where one person has two partners and those partners are not in a relationship with each other], others will not.

Procedural history

[34] In 2019, Lilach brought an application in the Family Court in which she sought orders determining the parties' respective shares in relationship property. In her accompanying affidavit, she claimed the Kumeū property was the parties' family home for the purposes of the PRA and claimed a one-third share. Fiona objected to the Court's jurisdiction on the basis the parties did not have a qualifying relationship under the PRA. Brett's response was, in practical effect, to support Lilach. He sought a

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50 (27 March 2001) 591 NZPD 8529–8530 where Alec Neill commented that: "In the past no claim could be brought under this Act. The new Act will open a Pandora's box. It will be interesting. Whilst one may not see it at the funeral, it will definitely occur shortly thereafter when the solicitors, who are high on the ranking order of receiving payment, write the letter to the trustee of the estate, who is often the wife, indicating: 'I act for Mrs X who was Bill's lover. She intends to bring a claim under the Family Protection Act.'"

51 Wills Act 1837 (Imp) 7 Will IV & 1 Vict c 26 discussed in (27 March 2001) 591 NZPD 8529–8530 (Alec Neill).

52 Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [7.45].

53 At [7.35].

declaration that there were three contemporaneous qualifying relationships under the PRA:

(a) Lilach and Brett (married);

(b) Lilach and Fiona (de facto partners); and

(c) Fiona and Brett (de facto partners).

[35] Lilach then applied to set aside the protest to jurisdiction. The Family Court referred a question by way of case stated to the High Court:

> Does the Family Court have jurisdiction to determine the property rights of three persons in a contemporaneous polyamorous relationship under the Property (Relationships) Act 1976?

High Court decision

[36] Hinton J in the High Court recast the question referred in these terms:[54]

> Does the Family Court have jurisdiction under the Property (Relationships) Act 1976 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?

[37] The Judge considered Lilach and Brett's claims against Fiona broke down at s 2D of the PRA, the meaning of a de facto relationship. In short, neither Lilach nor Brett were living with Fiona in a de facto relationship because they did not "live together as a couple". The Judge said:[55]

> 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.*

[38] Relying on the Law Commission's view, and despite ss 52A and 52B, the Judge held the premise of the Act was "the notion of coupledom", and an extension of that policy was a matter for Parliament, not the courts.[56]

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54 HC judgment, above n 2, at [3].
55 At [31] (emphasis in original).
56 At [56]–[57].

Court of Appeal decision

[39] The Court of Appeal disagreed with the High Court's restatement of the case referred to at [36] above. The difficulty with the High Court's framing, it said, was it started with a "polyamorous relationship", a concept not defined in the PRA, and moved on to ask whether the property rights of three persons in such a relationship can be determined under that Act on the basis of that relationship or by dividing it into "dyadic parts".[57] The Court went on to say:[58]

> 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 Court concluded the Family Court had jurisdiction to determine the property rights of couples in a qualifying relationship and—in the context of a polyamorous relationship—there might be multiple such couples. The jurisdiction could then be exercised in respect of each such couple.

[40] In its analysis the Court of Appeal concluded (consistently with the High Court) a polyamorous relationship (or multi-partner relationship) "as such is not a qualifying relationship under the PRA".[59] The Act was premised on "coupledom".[60] But the question then was whether "coupledom" had to be *exclusive* for the purposes of the PRA.[61] It followed that a key issue in the appeal was whether, as between two people within a wider multi-partner relationship, there may be a qualifying relationship to which the PRA applied. And then, whether there might be multiple such qualifying relationships between couples within a broader multi-partner relationship.

[41] Approaching those questions, the Court began by considering the position of Lilach and Brett. It asked whether it could be said their marriage had ended upon

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57 CA judgment, above n 3, at [100].
58 At [100].
59 At [58].
60 At [58].
61 At [59].

entry into the multi-partner relationship with Fiona in 2002. As we have seen, s 2A(2) provides that a marriage ends (for the purposes of the PRA) if the participants "cease to live together as a married couple" or (irrelevantly for present purposes) the marriage is dissolved or one of the participants dies. Brett and Lilach remained together, but non-exclusively. The Court said the scenario of a contemporaneous marriage and a de facto relationship was "expressly contemplated" in s 52A:

> [65] … 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 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.

It followed that the PRA continued to govern the division of Lilach and Brett's relationship property in the event of death or separation.[62]

[42] The question then arose as to whether there could be a de facto relationship for PRA purposes within the context of a wider multi-partner relationship. The critical question here was whether the two persons "live[d] together as a couple" within that wider polyamorous relationship. The Court said the focus should be on the nature of the relationship between those two people. It was not a necessary element of living together as a couple that the relationship be exclusive, and a person could be in more than one de facto relationship at the same time.[63] The purpose of the PRA was engaged wherever there was a qualifying de facto relationship between two people, regardless of whether one or both of those persons was in a relationship with another person. The Court said:[64]

> 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.

[43] The couple upon whom the analysis was focused would still need to meet the tests in s 2D. The Court said, in the context of a long-term, committed, multi-partner

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62 At [70].
63 At [71].
64 At [72].

relationship, many of those factors were likely to be present as between any two persons in that relationship. If so, then each such pair would be living together as a couple, notwithstanding the wider context. Some judicial decisions had suggested difficulties in practice in establishing a second contemporaneous de facto relationship, but ultimately that was a matter of fact. And it might be easier to establish it where all three persons were living in the same household as opposed to two separate and parallel relationships.[65]

[44] The Court contrasted the position of Fiona and Brett before and after Lilach departed in November 2017. If Fiona and Brett met the tests in s 2D for a de facto relationship at the point of Lilach's departure, it "seem[ed] odd to suggest" the relationship only began at the moment Lilach left.[66] Lilach's departure did not itself affect any of the specific factors in s 2D as between Fiona and Brett, and it would be "illogical" to describe theirs as a relationship of short duration when they separated in 2018.[67]

[45] The Court considered the New Zealand Bill of Rights Act 1990 supported the adoption of an interpretation that did not distinguish between married and de facto partners in this context. Section 2D of the PRA could be given a meaning consistent with the right to freedom from discrimination on the grounds of family status (for the purposes of s 19(1) of the Bill of Rights Act and s 21(1)(l)(iii) of the Human Rights Act 1993) by adopting a consistent approach as to whether two people were living together as a couple, "regardless of whether they [were] married, or unmarried but otherwise in an equivalent (de facto) relationship".[68]

[46] Finally, the Court undertook a workability analysis by reference to a number of examples, concluding its approach would work in practice, in a manner consistent with the text and purpose of the PRA.[69]

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65 At [74].
66 At [75].
67 At [75].
68 At [79].
69 At [80]–[97].

Issues on appeal

[47] The fundamental question we must decide is whether the PRA may govern the parties' relationship property rights. We answer this question by addressing two issues:

(a) Issue 1: Can a triangular relationship itself be a qualifying de facto relationship?

(b) Issue 2: Can a triangular relationship be subdivided into two or more qualifying relationships (as the Court of Appeal thought)?

Another way of framing the second issue is to ask whether the statutory phrase "liv[ing] together as a couple" (as provided in s 2D—see [23] above) means individuals who live together in a triangular relationship *cannot* obtain the benefits or attract the responsibilities of the PRA.[70] We will address counsel's submissions, as necessary, as we analyse these issues. We record that Mr Duckworth (for Brett) simply supported the written and oral submissions of Ms Taefi and Ms Palairet (for Lilach).

[48] These issues raise important questions of statutory interpretation. The meaning and application of the PRA must be determined from its text, in light of its purpose and context.[71] Both are critical here to the determination of meaning. In particular, the second issue can be answered by posing a series of sub-questions, the answers to which make Parliament's purpose regarding the potential application of the PRA in the present case tolerably clear. What becomes apparent from that process is that Parliament contemplated some diversity, contemporaneity (or overlap of relationships) and non-exclusivity as nonetheless consistent with the PRA premise of "liv[ing] together as a couple".

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70 Since it is not lawful to marry or unite civilly with more than one partner (subject to limited exceptions such as the void marriage exception in s 2A(1)(a)), the focus is on the definition of a de facto relationship in s 2D.

71 Legislation Act 2019, s 10(1).

Issue 1: Can a triangular relationship itself be a qualifying de facto relationship?

[49] A triangular relationship is not itself a qualifying relationship under the PRA. Specifically, it is incapable of falling within the definition of "de facto relationship" under that Act. The Court of Appeal reached that view, and Ms Taefi did not seek to argue otherwise before us.[72] We are satisfied neither the text nor parliamentary purpose militates a different conclusion. Three people cannot constitute "a relationship between 2 persons" who "live together as a couple". Further, there is no foundation for finding Parliament intended a more expansive approach to be taken to the text it enacted. It is unnecessary to say any more on the subject.

[50] The answer to Issue 1 is therefore "No". The triangular relationship between Fiona, Lilach and Brett cannot constitute a single qualifying relationship under the PRA. The question must then be whether that triangular relationship may be subdivided, with the relevant property-owner, Fiona, in a qualifying de facto relationship with Lilach and in another qualifying de facto relationship with Brett.[73] This we consider in the next section.

Issue 2: Can a triangular relationship be subdivided into two or more qualifying relationships?

[51] It is logical to approach this, the ultimate issue, by first considering two general sub-issues (concerning whether exclusivity is necessary in a qualifying de facto relationship and what Parliament meant by "liv[ing] together as a couple") and analysing the clearer legal position concerning *non-triangular* multi-partner arrangements. The non-triangular arrangement we address here is sometimes called a "vee": it involves A being in distinct relationships with B and C (who are not in a relationship with each other and may not know about each other). We will use that expression, i.e. "vee arrangement", in contradistinction to the triangular relationship we ultimately are concerned with. Two visual examples of vee arrangements are given at [56] and [57] below. After considering these sub-issues, we will turn to triangular relationships and consider how they may differ as a matter of law.

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72 CA judgment, above n 3, at [58]. See above at [40].

73 And Lilach and Brett in a third qualifying relationship—one of marriage.

[52] Reasoning iteratively in this way, we address the following five sub-questions:

(a) Must a de facto relationship be *exclusive* to qualify?

(b) What did Parliament mean by "liv[ing] together as a *couple*"?

(c) Can a vee arrangement (where A is in distinct relationships with B and C, not here involving mutual cohabitation) be subdivided into two qualifying relationships?[74]

(d) Can a vee arrangement (this time involving mutual cohabitation) be subdivided into two qualifying relationships?

(e) Can a triangular relationship (with mutual cohabitation and sexual relations) be subdivided into three qualifying relationships?

1. Must a de facto relationship be exclusive *to qualify?*

[53] Whether a de facto relationship has to be exclusive to qualify is a necessary preliminary question: if exclusivity *is* required, the appeal would have to be allowed on that basis alone.

[54] A de facto relationship (for the purposes of the PRA) must involve two persons "who live together as a couple".[75] Mr Jefferson KC, for Fiona, saw the term "couple" in purely mathematical terms: two people living together intimately, to the exclusion of others. He also provided a helpful survey of the use of the word "couple", and other dyadic language, in the PRA. Inherent in this was a proposition that a qualifying relationship under the PRA must be exclusive.

[55] The fundamental difficulty for Mr Jefferson's argument is that when Parliament enacted ss 52A and 52B in 2001, it expressly contemplated that complex arrangements involving more than two persons might then be subdivided into constituent qualifying relationships. "Contemporaneous" was the word Parliament

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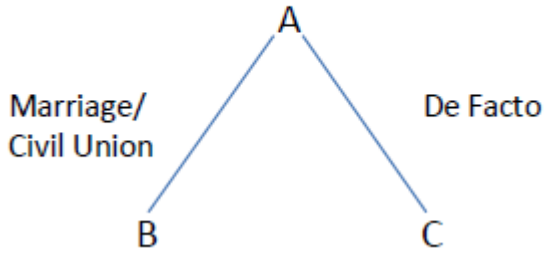
74 See below at [56]–[57].
75 PRA, s 2D(1)(b).

used. By doing so, it effectively and definitively answered the first sub-question (qualifying relationships need not be exclusive), and assisted in answering the second. Ms Taefi placed substantial emphasis on these provisions, and for good reason.

[56] Section 52A applies to a vee arrangement where A is or was married to (or in a civil union with) B, and A is or was also in a de facto relationship with C:

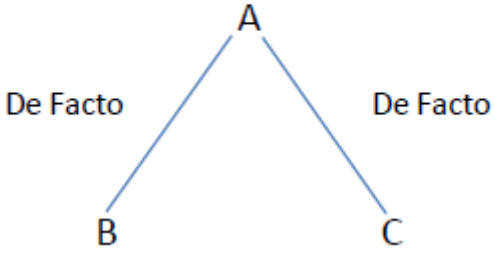
Marriage/Civil Union + De Facto (s 52A(2)(b))



B and C are not in a relationship with each other. B and C may or may not know about each other. B or C may or may not live with A in the same residence. The two relationships may, according to the words of the section, be "successive" or "contemporaneous". That is, either consecutive or concurrent (in whole or in part). As we note in the next section of this judgment, the PRA may apply to each of them, so both may qualify under the Act.

[57] Section 52B is essentially the same, but concerns two successive or contemporaneous de facto relationships:

De Facto + De Facto (s 52B(2)(b))



[58] By enacting those provisions and allowing for contemporaneous relationships, Parliament made it patently clear that a qualifying de facto relationship need not be exclusive. Person A might be in a qualifying marriage, civil union or de facto relationship with B, while at the same time being in a qualifying de facto relationship with C. Parliament has said so, and that is that.

[59] Were that not the case, a question would then arise as to the continued status of Brett and Lilach's qualifying relationship of marriage—commenced in 1993—once Fiona joined them in 2002. If the appellant's argument is correct, the marriage ended (for PRA purposes at least) at that point. Indeed, that was the submission made by Mr Jefferson. But, for the same reasons identified by the Court of Appeal, we are unable to conclude it did.[76] Section 2A(2)—which deems a marriage at an end for the purposes of the PRA—would apply only if they had "cease[d] to live together as a married couple". As the Court of Appeal observed:[77]

> 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.

Furthermore, as we have seen, the whole premise of s 52A is that a marriage between A and B, and a de facto relationship between A and C may subsist contemporaneously. The facts of cohabitation and a significant sexual relationship with a third person do not bring a marriage to an end for the purposes of the PRA.

[60] By enacting ss 52A and 52B, Parliament directed that a person who participates in a non-exclusive relationship will not, for that reason alone, lose their statutory claim to relationship property when that relationship comes to an end. By deploying the presumptive rights of the PRA regime instead of leaving it to the contributory approach of equity, Parliament made an important policy choice. The reach of the PRA must be construed from the relevant statutory language and with that policy choice in mind.

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76 CA judgment, above n 3, at [60]–[70].
77 At [62].

2. What did Parliament mean by "liv[ing] together as a couple*"?*

[61] Many domestic relationships involve cohabitation with other persons. Typical family relationships will involve a couple cohabiting with other family members—children perhaps, or siblings. Likewise many flats involve a mixed cohabitation of married persons, persons in a civil union, or de facto partners together with other persons not part of those relationships. Further, an elderly mother and her adult son, for example, may live together and acquire assets collectively, but they do not live together as a couple for PRA purposes. The PRA will apply only to relationships of two persons that meet one of the qualifying tests in the PRA—status-based tests that are relatively simple, save for de facto relationships.

[62] Underlying all of this is the point that all multilateral relationship are, inherently, also collections of bilateral relationships. A family collective will also, and necessarily, involve multiple bilateral relationships between parents, between each of the children as siblings, and between the children and their respective parents. Recognising this does not undermine the collective unity of the "family".

[63] As noted already, what is also apparent from careful reading of ss 52A and 52B is that Parliament clearly had in mind that, in the multi-partner vee arrangements those sections cover, each constituent relationship within the arrangement *can* be a qualifying relationship. That is clear from the text in ss 52A(1) and (2), and 52B(1) and (2). In particular, the operational provisions in ss 52A(2)(b) and 52B(2)(b) provide for the property allocation in contemporaneous qualifying relationships to be governed by the PRA.

[64] Parliament's recognition that ss 52A and 52B might apply to *both* constituent relationships suggests exact numbers and mechanics are less important for the PRA than the fact the people comprising the relationship live together (albeit neither exclusively nor full time) in a marriage or civil union, or in a de facto relationship that exhibits sufficient s 2D(2) indicia to command the division of property under the PRA regime rather than by equitable principles. It is plain from the legislative scheme that two people may live together as a couple for the purposes of the PRA while cohabiting with others and enjoying sexual relations with others. It is worth emphasising that the

question here is simply confined to the division of property. It is not concerned with the wider legal status or relative moral standing of the relationship(s).

[65] What has to be examined, therefore, is whether the constituent relationship at issue meets the indicia for a qualifying relationship under s 2D. What emerges from the legislative scheme is a need for a mutual commitment to living together in an intimate domestic relationship, in which risk and reward are so intertwined that it would be unjust for one partner to fall back on equitable principles to obtain an advantageous proprietary entitlement.

[66] In such a context, the question really becomes why the statutory regime for property allocation upon termination of an intimate domestic relationship ought *not* apply. That question cannot be answered by an arid arithmetical exercise, involving counting to two. As Professor Mark Henaghan has noted, the case law under s 2D demonstrates that "liv[ing] together as a couple" does "not require a monogamous relationship in the sense of cohabitation to the exclusion of all others".[78]

3. Can a vee arrangement (not involving mutual cohabitation) be subdivided into two qualifying relationships?

[67] As we have just demonstrated, vee arrangements of the kind described at [56]–[57] above can indeed be subdivided into two constituent relationships. Whether they are qualifying relationships is another matter. Exclusivity is not essential, but the two participants in each limb must still "live together as a married couple", or "as civil union partners" or as de facto partners.[79]

[68] The example given above at [56] involves a marriage and a potentially qualifying contemporaneous de facto relationship. In determining whether two people "live together as a couple", s 2D(2) sets out nine considerations—duration, common residence, sexual dimension, financial intermingling, acquisition/ownership/use of property, "the degree of mutual commitment to a shared life", care/support of children, household duties and reputation/publicity. So, the togetherness question is purely

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78 Mark Henaghan "Multiple Relationships on Death" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 347 at 358.

79 PRA, ss 2A(2)(a), 2AB(2)(a) and 2D(1)(b).

factual and always a matter of degree, bearing in mind that de facto relationships do not (usually) involve a single opt in (or opt out) event and that togetherness may develop or devolve over time.

[69] Important also is s 2D(3)(b) which is broad and allows the court to have regard not just to the listed factors but to *all* the circumstances of the relationship. The relevance and weight of any matter is for the court. All the circumstances of the case, unusual or otherwise, can be taken into account and given weight. The fact the "couple" was part of a wider arrangement or relationship will likely be a relevant circumstance in terms of s 2D(3)(b).

[70] The s 2D(2) factors interrogate the prominence and permanence of the relationship, but without requiring that it exclude other relationships, including other qualifying relationships. The existence of such other relationships makes it harder, but not impossible, to qualify under the PRA. As Professor Atkin has observed, "a person would be fairly busy sustaining the requirements of 'living together as a couple' across more than one household; but it is possible: see the Australian case of *Green v Green*".[80] And as Miller J noted in *DM v MP*:[81]

> … a contemporaneous de facto relationship with a different partner tends to show that the relationship before the court lacks the character of a life lived as a couple. The legislation governs division of the property of a relationship between two people[,] and there must be natural limits to one's capacity to spend the only life that one has in contemporaneous bilateral relationships with more than one person. Sometimes neither relationship qualifies as a de facto relationship. Contemporaneous de facto relationships may be most likely when A cohabits intermittently with each of B and C, maintaining two households on an indefinite basis. Each such relationship might be so substantive that the legislative objective would be defeated were A permitted to escape legal obligations to B and C by pleading that neither relationship was sufficiently exclusive.

[71] This passage reflects an important reality: where a substantial intimate domestic relationship has subsisted for many years, involving mutual commitment to living together and sharing risk and reward, it will more likely be consonant with the principles and purposes of the PRA that allocation of communal property on termination of that relationship be undertaken in accordance with the PRA, rather than

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80 Atkin, above n 20, at [2.6.4] citing *Green v Green* (1989) 17 NSWLR 343 (CA).

81 *DM v MP* [2012] NZHC 503, [2012] NZFLR 385 at [29] (footnote omitted).

the principles of equity as they presently stand. As the Court of Appeal observed, 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.[82]

[72] Ultimately, Mr Jefferson was constrained to accept that vee arrangements of the nature depicted at [56]–[57] above could involve two qualifying relationships for the purposes of the PRA. He also accepted that would remain the case even if the two couples cohabited within the same house. We turn to that now.

4. Can a vee arrangement (involving mutual cohabitation) be subdivided into two qualifying relationships?

[73] This sub-question concerns what is sometimes called a ménage à trois, although that expression has a variety of meanings. As noted above, Mr Jefferson had to accept such an arrangement could have comprised two qualifying relationships for PRA purposes. The same conclusion was reached by Professor Henaghan back in 2004 when he said, "[t]he most likely practical classification for such relationships is to treat them as two contemporaneous relationships".[83] We emphasise again that what is being assessed is whether the PRA is, in light of its text and purpose, capable of governing property division in such a case.

[74] So, if in 2002 Lilach and Brett had moved into the house Fiona bought, but Brett had not formed an intimate relationship with Fiona (and had instead just been her housemate), s 52A of the PRA would apply to the de facto relationship between Lilach and Fiona (assuming it had prominence and permanence sufficient to meet s 2D(2)), and also to the marital relationship between Lilach and Brett. But Brett would likely have had no PRA claim against Fiona.

[75] Legal consideration of such arrangements is comparatively rare. But the Australian Administrative Appeals Tribunal's decision in *Williams v Department of Social Services* did involve a vee arrangement of just this form.[84] Mr Moore lived

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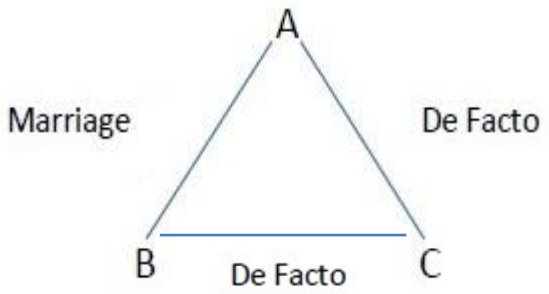
82 CA judgment, above n 3, at [72]. See also the quote above at [42].
83 Henaghan, above n 78, at [12.3.3].
84 *Williams v Department of Social Services* [2017] AATA 414, (2017) 158 ALD 311.

with Ms Williams (and their children) and Ms C (and their children) in a single residence. Ms Williams received a family tax benefit payment. Eligibility depended on the combined income of "member[s] of a couple". If Mr Moore's whole income was combined with Ms Williams', she was ineligible. If, however, his income was split between the two relationships, she remained eligible. The factors to be taken into account in assessing coupledom were similar to those in s 2D: financial aspects, nature of household, social aspects, sexual dimension and the nature of the commitment to each other. There was no dispute by either party that Ms Williams was part of a couple (with Mr Moore).[85] The Tribunal recognised that but refused to divide his income, meaning Ms Williams lost her entitlement.

[76] The example in this sub-question involved three persons, cohabitating in a single dwelling, but not a triangular sexual relationship. It remains now to see whether the addition of a triangular sexual relationship makes a legal difference.

5. Can a triangular relationship (with mutual cohabitation and sexual relations) be subdivided into three qualifying relationships?

[77] The question now becomes whether triangularity makes a difference to that analysis. In practical terms (in the context of these facts) it adds one additional material factor to the relationship structure described at [73] above: a sexual relationship between all three.



[78] So, had the arrangements in this case evolved from the hypothetical situation described at [74] above to the state of complete triangularity that in fact occurred, the parties might be surprised to find they had now taken themselves outside the PRA

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85 At [21]–[22].

should they break up. They might reasonably ask why that should be so. And whether that exclusion would be consistent with Parliament's purpose in enacting the PRA.

[79] Is it because they are not "liv[ing] together as a couple"? We have already seen that a purely arithmetical approach is not consistent with Parliament's purpose: vee arrangements of the kind described at [56]–[57] can give rise to two qualifying relationships under the PRA. And while the three participants in the more structured arrangement described at [74] above might likewise be said not to be living together as a couple, the two constituent relationships are clearly capable of being treated by the law as amounting to two couples, and as two qualifying relationships.

[80] Is the fact B and C have now also formed a relationship material? For a start, it might be too casual to amount to a qualifying relationship in its own right—in which case nothing changes so long as the other relationships continue to qualify. Legally, it would be no different to a situation in which B formed an intermittent attachment to D, and C likewise to E. But if B and C's relationship might qualify by dint of its degree of commitment, why does that development compel exclusion from the statutory regime? That outcome seems entirely counterintuitive. It may be noted that in both the vee arrangement involving mutual cohabitation and the vee arrangement not involving mutual cohabitation, A has two sexual relationships (and is in a couple) with each of B and C. Does the fact B and C now join A in sharing that dual relationship status justify exclusion from the statutory regime so that, on break-up, equity must be resorted to instead?

[81] As discussed, the Court of Appeal noted that if the relationship between Fiona and Brett in fact satisfied the test in s 2D(2) before Lilach left, it would be odd and unfair to suggest that the relationship only began for PRA purposes the moment Lilach left:[86]

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[86] CA judgment, above n 3, at [75].

> 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.

[82] Approaching the matter logically and iteratively in this way, we are unable to conclude there is a material distinction between vee arrangements (with and without mutual cohabitation)—the constituent parts of which are capable of being qualifying relationships—and triangular relationships, for the purposes of the PRA. If the constituent relationships each meet the requirements of mutual (but not exclusive) commitment to qualify under the PRA, contemporaneity (and triangularity) does not take them beyond the Act.[87] These additional circumstances are not necessarily disqualifying.

[83] The statutory use of "couple" does not make it inappropriate to draw the plural curtain to one side so as to recognise the bilateral relationships that make up triangular polyamorous cohabiting families. Whether any two people are "liv[ing] together as a couple" and are doing so despite one or both of them living with another or others is a direct, but not always simple, question of fact based on the factors in s 2D. Sometimes qualifying couples will emerge, as for example in *Williams* where both female adult members had children with the male adult member of the household.[88] But sometimes, for other reasons, they will not: for example, where someone is only intermittently part of a relationship, has made no financial commitment, has not publicly committed and so on. In contrast, it is difficult to imagine circumstances where three people have so merged into a unity that functioning couples cannot still be discerned within it. In any event, that is a matter of fact, not jurisdiction.

[84] We make four final points.

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87 The same conclusion appears also to have been reached in 2008 by Professor Bill Atkin, when he contemplated PRA-based property division arising from a "triangular set of three relationships": Bill Atkin "The Legal World of Unmarried Couples: Reflections on 'De Facto Relationships' in Recent New Zealand Legislation" (2009) 39 VUWLR 793 at 799.

88 *Williams*, above n 84.

[85] First, given the conclusion we have reached on the meaning of the PRA, it is unnecessary for us to consider the further argument that such construction is also confirmed by the Bill of Rights Act. It was not suggested by Mr Butler that the Bill of Rights Act militates against this construction; just that it did not support it. Whether that is so, or not, is now beside the point.

[86] Secondly, as in the Court of Appeal, we were tendered a number of examples which, Mr Jefferson suggested, showed the PRA was unworkable in the context of triangular relationships. We are unpersuaded. It is premature to examine these examples with any exactitude. As Ms Taefi submitted, the examples merely demonstrate application of the Act is difficult where there are overlapping relationships of any kind. But Parliament knew that and provided for qualifying contemporaneous relationships notwithstanding. And, further, the presumption of equal sharing can yet be displaced if there is a finding of economic disparity, extraordinary circumstances that make equal sharing repugnant to justice, a relationship of short duration, or there is no family home.[89]

[87] Thirdly, we also heard submissions that dismissing the appeal could create difficulties with other areas of law. We agree with Ms Taefi that this overstates the effect of allowing the appeal.[90] Very similar difficulties arise from giving legal recognition to vee arrangements, but Parliament still enacted ss 52A and 52B. In any event, the difficulties are not insurmountable; our reasons are grounded in the rubric of coupledom, which is the context in which much of the legislation referred to by Mr Jefferson operates.

[88] Fourthly, we do not see our approach as gap-filling. Parliament saw fit to provide that each axis in a vee arrangement could be a qualifying relationship, and the same may be true of each axis where the arrangement takes triangular form. Where a qualifying relationship of marriage is altered by the formation of a triangular relationship with a third person, the married couple do not thereupon cease to be

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89 PRA, ss 11B and 13–15.

90 We note that s 14(1) of the Legislation Act defines a de facto relationship as "2 people … who … live together as a couple in a relationship in the nature of marriage or civil union". This definition applies to all legislation unless the legislation provides otherwise or the context of the legislation requires a different interpretation: s 9(1).

married for the purposes of the PRA, and that Act may continue to apply to each part of the triangular relationship, just as it may to each part of a vee arrangement. Nor are we persuaded that potential, but unexplored, complexities in the operation of the PRA and other legislation are so substantial as to imply a contrary, excluding intention on Parliament's part.

Conclusion

[89] The answer to Issue 2 is "Yes". A triangular relationship is capable of being subdivided into two or more qualifying de facto relationships under the PRA, just as is the case for a non-triangular vee arrangement.

Result

[90] The appeal is dismissed.

[91] The appellant must pay the first respondent costs of $25,000 plus usual disbursements.

GLAZEBROOK AND ELLEN FRANCE JJ
(Given by Ellen France J)

[92] We would allow the appeal. We consider the High Court was correct to conclude that the Family Court had no jurisdiction to consider the parties' claims.[91] As we explain, there are two main reasons for adopting that view. First, we are concerned at the artificiality of treating the parties' relationship as subdivisible in order to be able to qualify under the Property (Relationships) Act 1976. Second, we consider the practical ramifications of applying the Act, which is premised on coupledom, to the parties' polyamorous relationship are such that it should be left to Parliament to decide whether to extend the Act and how to address the practical issues arising from an extension.

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91 *Paul v Mead* [2020] NZHC 666, [2020] NZFLR 1042 (Hinton J) [HC judgment].

An artificial construct

[93] The judgment of the majority begins by establishing that the relationship involving Fiona, Lilach and Brett is not itself a qualifying relationship under the Act.[92] There is no real dispute about that. And appropriately so, given the text and purpose of the Act. We need refer only to some key sections to illustrate the point. Section 1C(1) states that the Act "is mainly about how the property of married couples and civil union couples and couples who have lived in a de facto relationship" is to be treated on separation or when "one of them" dies.[93] A similar focus on "couples" is apparent from the definitions of a marriage, civil union, and de facto relationship in ss 2A, 2AB and 2D.[94]

[94] From that starting point, that is, coupledom, the majority conclude that the parties' relationship can be subdivided into two or more relationships, each of which may be a qualifying relationship under the Act.

[95] We accept that familial arrangements may well involve multiple relationships and that the extent to which any of these relationships are qualifying relationships under the Act raises factual questions of an evaluative nature. That said, the end result here ignores the way in which these parties in fact conducted their lives and how they saw their relationship. We say that because the only basis on which there can be one or more qualifying relationship(s) is by effectively ignoring the fact there was a third person in the relationship and, instead, shoehorning the parties' relationship into the coupledom paradigm.

[96] Characterising the parties' relationship by, as the majority says, "subdividing" that relationship is to treat individuals as though their relationship is other than what it has been.[95] As Lilach put it in the passage from her affidavit cited by Hinton J, when she, Fiona and Brett moved into the Kumeū property, they "committed to a shared life with each other".[96] Their shared life persisted over a 15-year period.

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92 See above at [50].

93 See also Property (Relationships) Act 1976, s 1C(3) [the 1976 Act], which expresses the general proposition of equal division "between the couple".

94 See also s 21(1), the contracting out provision, which refers, amongst other matters, to "2 persons in contemplation of entering into a marriage, civil union, or de facto relationship".

95 See above at [51]–[83].

96 HC judgment, above n 91, at [13].

[97] Whether or not a de facto relationship has to be exclusive to qualify under the Act is not the issue.[97] Rather, the focus must be on the orthodox use of the term "couple". Nor does it follow from the fact that the Act makes some provision in ss 52A and 52B for contemporaneous relationships that a relationship involving three persons can be re-characterised as two or more separate relationships between "couples".[98] We accept that ss 52A and 52B contemplate complex relationships, but the focus of the sections is still on couples.

[98] Similarly, the point is not that a qualifying relationship need not be monogamous.[99] Rather, what matters is that the Act is based on the notion of coupledom, and these parties can only meet that qualifying characteristic if their relationship is dissected in what we see as an artificial manner. We add that we do not see the New Zealand Bill of Rights Act 1990 as extending the scope of the Act to cover the parties' relationship.[100]

The practical implications

[99] We also differ from the majority in the extent to which we consider the Court can be confident the many and varied ramifications of dissecting such a relationship can be addressed under the current law. The position of the majority is, essentially, to say that these ramifications are factual issues and that, ultimately, the courts will simply work their way through them.

[100] We agree there may be ways of working through a number of the issues arising in practice. But we see a danger in the courts attempting to do so when we do not know what the implications of that course are. The exercise goes well beyond one of legitimate gap-filling.

[101] In the hearing, we were taken through some potential implications for other legislation of treating a polyamorous relationship as one in which the parties live together as couples in what would be qualifying relationships under the Act. The

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97 See above at [53]–[60].
98 See above at [58].
99 See above at [66].
100 HC judgment, above n 91, at [55], n 20. Compare *Paul v Mead* [2021] NZCA 649, [2022] 2 NZLR 413 (French, Collins and Goddard JJ) at [79].

examples discussed included the Holidays Act 2003 (s 65(1)(b) dealing with entitlements to sick leave where the employee's spouse or partner is sick); the Parental Leave and Employment Protection Act 1987 (s 17 dealing with partner's leave); the Family Proceedings Act 1980 (ss 64 and 65 dealing with maintenance obligations after the dissolution of a marriage or civil union or when a de facto relationship ends); and the Administration Act 1969 (s 77C addressing the situation where a person dies intestate leaving more than one surviving eligible partner).[101] It may be that the application of at least some of these provisions will not create difficulties on the majority's approach. But we do not know that.

[102] We draw support for our concern about the workability of the majority approach from the Law Commission's view in its review of the Act. In a passage cited by the High Court in this case, the Commission said this:[102]

> [7.67] There are … a number of practical considerations that would need to be addressed if a property regime were to be extended to multi-partner relationships. Policy would need to be developed on which relationships should be captured, whether the regime should be opt in or opt out and what the property entitlements should be. Careful consideration would also need to be given to the implications of recognising multi-partner relationships for other areas of the law.
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> …
>
> [7.75] … The PRA is premised on an intimate relationship between two people, and we consider that this should also be the premise of the new Act. Extending the regime to multi-partner relationships would be a fundamental shift in policy and should be considered within a broader context involving more extensive consultation about how family law should recognise and provide for adult relationships that do not fit the mould of an intimate relationship between two people.

[103] We consider the relative simplicity of the current case, involving just the one property, belies the potential complexities and uncertainties that may result from the

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101 Some of the legislation to which we were referred does not include a definition of a de facto relationship. The Holidays Act 2003 is in that category. Other Acts, such as the Family Proceedings Act 1980, explicitly incorporate the definition from the 1976 Act. We add that s 14(1) of the Legislation Act 2019 provides that "[i]n any legislation, de facto relationship means a relationship between 2 people … who … live together as a couple in a relationship in the nature of marriage or civil union" (unless the legislation provides otherwise, or the context of the legislation requires a different interpretation: s 9(1)). See also s 14(3) of the Legislation Act for the factors relevant to determining whether that definition is met.

102 Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976* | *Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019).

majority's approach. In our view, it is not at all clear how that approach will play out generally in terms of other more complex or varied relationships than the present case. Or, how the interests of the parties will be affected where there are a number of properties and where property was acquired at varying points in time.

[104] For example, in this case, Lilach and Brett married in 1993. Lilach, Fiona and Brett formed a polyamorous relationship in 2002. Lilach separated from Fiona and Brett in November 2017. Fiona and Brett subsequently separated in early 2018. The parties lived together in a property purchased in November 2002 in Fiona's name. That is the only significant property connected to the relationship. If the factual position was even slightly different, for example, if the case involved property from an earlier period prior to 2002 or if there were serial breakups along the way, we see the practical issues arising as much more difficult and such that we cannot be confident they can just be worked through by the courts.

[105] The majority assumes that outcomes will be more generous under the Act than equity, but it is not clear to us that this will necessarily be so, depending on the many variables that may be in issue. It is true that if the Act does not apply, the respondents will need to fall back on an equitable claim, for example, one based on a constructive trust as discussed in *Lankow v Rose*.[103] There are uncertainties associated with that route,[104] we accept, and there is no presumption of an equal split.[105] That said, in terms of assessing what comprises contributions, we endorse the observations of Hinton J in respect of this case that:[106]

> … it would be appropriate [for the Court] to pay regard to the principles expressed in the Act … Development of the law informed by the principles of the Act may help those in polyamorous relationships and afford them some clarity as to their property arrangements pending any future legislative review.

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103 *Lankow v Rose* [1995] 1 NZLR 277 (CA). See also *Gillies v Keogh* [1989] 2 NZLR 327 (CA).

104 Which is not to say that the situation would necessarily be any more certain under the 1976 Act in more complicated cases, as we have discussed above.

105 See, for example, *Lankow*, above n 103, at 286 per Hardie Boys J and 295 per Tipping J; and *Phillips v Phillips* [1993] 3 NZLR 159 (CA) at 170–171.

106 HC judgment, above n 91, at [61]. McKay J in *Lankow*, above n 103, at 290 noted that while the Matrimonial Property Act 1976 was not applicable in that case, it was "part of the background of modern law and modern social attitudes by which people are influenced. The fact that spouses are entitled generally to share equally in the matrimonial home and family chattels, and in other property accumulated during the marriage, inevitably has an influence on the expectations which the parties to a de facto relationship may have. It also has an influence on society's attitude to what is reasonable in a de facto situation." Compare at 286 per Hardie Boys J and 295 per Tipping J.

[106] The majority approach also assumes an answer to the policy debate about whether to treat polyamorous relationships as qualifying relationships under the Act.

[107] We see the various matters we have identified as indicating Parliament is better placed to address the question of the extension of the Act to polyamorous relationships.

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