IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 7/2022

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

SUBMISSIONS OF COUNSEL FOR APPELLANT IN SUPPORT OF APPEAL TO THE SUPREME COURT

DATED 18 APRIL 2022

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MAY IT PLEASE THE COURT

Introduction

1. The appellant submits that Parliament has been specific and clear as to the types of relationship to which the Property Relationships Act 1976 ("**PRA**") applies. It applies only to:

    (1) married couples;

    (2) civil union couples; and

    (3) de facto couples.

2. The PRA does not apply to other types of intimate or domestic relationships,[1] including those containing more than two persons. That conclusion does not devalue or disrespect those other relationships. It simply means that other legal tools are to be used to regulate property issues that arise within those relationships.

Summary of arguments

3. The Court of Appeal (as had the High Court and indeed the parties themselves) correctly recognised that the PRA is premised on the notion of "coupledom"[2]. This is reflected in Parliament's explicit and pervasive use of dyadic terminology, to which statutory interpretation must have proper regard.

4. The Court of Appeal's fundamental errors were (1) to recharacterize the polyamorous three-person relationship in which the parties were actually involved and hold that it should be rendered into three contemporaneous relationships of couples living together; (2) to reason that that rendering was consistent with the objects, purposes and scheme of the PRA and supported by (a) the PRA's status as social legislation and (b) the terms of the New Zealand Bill of Rights Act 1990 ("**BORA**"); (3) to accept

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[1] Unlike legislation overseas: see the useful discussion of the Australian legislation in Margaret Briggs "Outside the Square Relationships" (paper presented to Te Kāhui Ture o Aotearoa | New Zealand Law Society PRA Intensive, October 2016) 135, see 142ff.

[2] The acceptance of this by the parties is recorded in the High Court Judgment at [3], [22] and Court of Appeal Judgment at [21]. The acceptance by the Courts is recorded in the High Court Judgment at [21]-[27], [31], [36], [56], [58] and Court of Appeal Judgment at [58] and [76].

that it was within the court's proper function and role to extend the application of the PRA to polyamorous relationships (by ignoring the fundamental nature of the relationship and rendering into something different); and (4) to fail to consider the impact of its decision on the application of the rest of the statute book to polyamorous relationships.

5. The appellant says:

5.1 The relationship the parties were actually in should be respected and should drive the statutory analysis. The Court of Appeal, in recharacterising the parties' triadic relationship in this case as three contemporaneous couple relationships, undermined and misconstrued the essential nature of their relationship, that being a threesome.

5.2 The Court of Appeal ignored the principles, objects and purpose of the PRA as enunciated in Parts 1 (s 1C in particular) and Part 2 (s 1M in particular). The PRA is premised on the notion of "coupledom". This is reflected in Parliament's explicit and pervasive use of dyadic terminology, to which statutory interpretation must have proper regard. While acknowledging the PRA's dyadic focus, the Court of Appeal's analysis essentially undermines it.

5.3 Further, its reliance on the so-called contemporaneous relationship provisions of the PRA (ss 52A and 52B) was misplaced. These are complicated provisions developed in the context of succession law, that have been regularly criticised as not fit for purpose. In any event, they only bite when two qualifying relationships are in existence; they do not answer the prior question of whether a relationship qualifies. They are not intended to apply to, and cannot be legitimately deployed as means to bring within the PRA, polyamorous relationships.

5.4 Application of the PRA to polyamorous relationships creates practical difficulties, both within the PRA itself and in relation to other areas of law. Neither of these concerns was adequately addressed by the Court of Appeal.

5.5 Extending the PRA to encompass polyamorous relationships is a matter best left to Parliament; a position is supported by the Law Commission. Research and community consultation will be required to see whether a legislative relationship property scheme should apply to polyamorous relationships and, if so, whether the scheme of the PRA is the right "fit" for the complexities that arise with polyamorous relationships.[3]

5.6 The Court of Appeal's reliance on Woodhouse J's remarks in *Reid v Reid* as to the "social" nature of the legislation was misguided. Nothing His Honour said there was designed to justify a departure from the language and scheme of the PRA as it then was (indeed, his remarks were simply a means of reinforcing the need to respect parliamentary choices – rather than a licence for judicial creativity). When dealing with social legislation it is important for the courts to respect boundaries established by Parliament, because Parliament has the legitimacy in that area of law-making that the courts do not. Parliament's choices, particularly where expressed through "crystalline drafting",[4] must be respected.

5.7 The unavailability of the PRA, pending Parliamentary reform, does not leave the parties without remedy.

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[3] In this regard, it is worth noting that the Australian relationship property statutes do not treat de facto and married couples in the same manner (see the useful discussion in Briggs above at 141-142) suggesting that in that jurisdiction at least there are material differences; and as will be noted below the PRA does not treat de facto and married/civil union couples in the same way on every issue. It is also of note that the Law Commission commented that its PRA consultation indicated many submitters felt it was wrong to treat de facto couples and married/civil union couples in exactly the same way for a range of reasons: see Law Commission, *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai* (NZLC IP 44, 2018) at ch 4 at [69].

[4] As recognised by Kos J in the ACC setting: *Murray v Accident Compensation Corp (ACC)* [2013] NZHC 2967 at [69].

5.8 The Court of Appeal's reliance on BORA was cursory and in error. No right under the BORA is breached by failing to apply the PRA to polyamorous relationships; but even if a right is implicated (1) non-application to polyamorous relationships is a justified limit (s 5 BORA); and /or (2) s 6 BORA cannot be relied upon to apply the PRA to such relationships.

Procedural background

6. In February 2019, the first respondent, Lilach Paul (**"Lilach"**), sought orders in the Family Court under 2A, 2C, 2D, 8, 11, 18B, 22, 23, 25 and 33 PRA.[5]

7. On 11 March 2019 the appellant, Fiona Mead (**"Fiona"**), filed a protest to jurisdiction.[6] The protest was that the PRA does not apply to the polyamorous relationship of which she, Lilach and Brett Paul were members.

8. Lilach applied for orders to set aside Fiona's protest and amended her application, seeking orders under ss 52A and 52B PRA.[7]

9. On 7 June 2019, Judge Pidwell stated a case to the High Court for that Court to determine the following issue:[8]

> *"Does the Family Court have jurisdiction to determine the property rights of three persons in a contemporaneous polyamorous relationship under the PRA."*

10. In her decision of 31 March 2020, Hinton J reframed and responded to the question as follows:[9]

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[5] CB 101.0001.
[6] CB 101.0004.
[7] CB 101.0009.
[8] CB 101.0012.
[9] CB 101.0022 at [3] and [59].

"The Family Court does not have jurisdiction to determine the property rights of three persons in a polyamorous relationship under the PRA, nor does it have jurisdiction to do so by dividing the polyamorous relationship into dyadic parts."

11. On appeal, the Court of Appeal reframed the question again and found in its judgment dated 3 December 2021:[10]

"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."

What is polyamory?

12. There is no one definition of polyamory that has gained unequivocal support within the existing literature.[11] For present purposes however, polyamory describes a situation in which more than two people are involved in an intimate, committed relationship with all the parties to the relationship, with the consent and knowledge of all the parties.[12] That becomes clear when the facts of this case are considered.

13. In contrast to traditional monogamous relationships, "the possible configurations of polyamorous relationships are limitless, as the number

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[10] CB 101.0038 at [106].

[11] Meg Barker "This is my partner, and this is my . . . partner's partner: Constructing a polyamorous identity in a monogamous world" (2005) 18(1) Journal of Constructivist Psychology 75; Elisabeth Sheff and Corie Hammers "The privilege of perversities: race, class and education among polyamorists and kinksters" (2011) 2(3) Psychol Sex 198 at 201.

[12] "Three's Company, Too: The Emergence of Polyamorous Partnership Ordinances" (2022) 135(5) Harvard Law Review 1441 at 1444.

of partners is theoretically unlimited".[13] "Fluidity, non-conformity, heterogeneity, formalization issues and resistance to the assimilation into a mononormative and heterocentric family model are essential features of polyamorous relationships".[14]

14. Polyamorous relationships can vary in terms of nature, exclusivity, partner arrangements and attachment styles. Some polyamorists are engaged in exclusive, long-term relationships involving more than two people, others have multiple relationships with varying degrees of commitment and duration and some have one or two "primary" partners and other "secondary" partners.[15]

What was the nature of the parties' relationship?

15. The parties arrangement in the present case is best described by the last configuration.

16. The evidence shows that Lilach, Fiona and Brett were parties to the primary relationship, committed first and foremost to one another. However, the possibility of engaging in relationships with people outside the core group was not excluded.[16] Indeed, the evidence also shows that at least some of the parties had a significant relationship with at least one other person at various stages during their polyamorous relationship.[17]

17. The important matter is that the three parties to the polyamorous relationship here regarded their relationship as a unity; a single relationship of three individual lives merged into life as one relationship.[18] Notwithstanding the possibility of secondary relationships, their primary commitment was to each other as a triad.

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[13] Francesca Miccoli "Legal Recognition of Polyamory: Notes on its feasibility" (2021) Whatever: A Transdisciplinary Journal of Queer Theories and Studies. Vol.4 at 364.

[14] Miccoli above n 13, at 364.

[15] John Paul E Boyd *"Polyamorous Relationships and Family Law in Canada"* (2017) Canadian Research Institute for Law and the Family 1 at 12; Barker, above n 10, at 75.

[16] Lilach Paul 201.0001 at [19] "we had an understanding that we were free to love others, relationship between the three of us was the main relationship"; Fiona Mead 201.0027 at [12]-[14] noting history of other relationships, and 201.0027 at [94] "our triad became a support network for each of us to explore open relationships".

[17] Fiona Mead 201.0030-0034 [12]-[14] noting history of other relationships.

[18] See uncontentious background facts recited in Judgment of Hinton J at 101.0022 at [4]-[14]. Also at 201.0027 First Respondent's Narrative Affidavit at [21] "I did not want to go down the same path as my parents, involved in a dyadic

18. It is, on its facts, the paradigm example of a polyamorous relationship.

Statutory Interpretation

19. It is submitted that the resolution of this matter comes down to statutory interpretation.[19]

20. Interpreted correctly the PRA does not apply to a polyamorous relationship. Nor does it confer on the Family Court jurisdiction to apply the Act to such relationship by enabling the Court to divide it into dyadic parts.

21. Sections 10 (1) and (2) of the Legislation Act 2019 state:

> *"(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.*
> *(2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation."*[20]

22. The inclusion of the reference to "context" in the above provision (absent from s 5 in the Interpretation Act 1999), will be unlikely to make any difference in practice, as this Court said in 2015:[21]

> *"The Court's task is to ascertain the meaning of the provisions from their language, read in context and the statute's purpose informed by any relevant background material."*

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relationship". See at [13] of the Judgment of Hinton J referencing appellant's evidence of the threesome "marriage" ceremony. In Counsel's submission a profound manifestation of the nature of the union – merger of three individual lives into life as a threesome (to eschew coupledom). See dissertation of Sally Dodds "Ménage à Trois or More – is There a Gap?: Division of Relationship Property under the Property (Relationships) Act 1976 on separation of three or more former partners" (LLB (Hons) Dissertation, University of Auckland, 2020) at 7, "Polyamorous relationships have an anti-monogamous ideology, resisting monogamous understandings that only two people can be in love and in a committed relationship at one time".

[19] Justice Susan Glazebrook "Statutory Interpretation in the Supreme Court", (paper which elaborates on an address given at the Parliamentary Counsel Office, Wellington, on 4 September 2015), at p 17. She expresses that most cases before the Supreme Court have involved issues of statutory interpretation.

[20] The purpose of the PRA is to be found in the legislation itself at s 1M and reference can also be made to Part 1.

[21] *Allied Concrete Limited v Meltzer* [2015] NZSC 7, at [55].

23. However, it is submitted that the approach to interpretation taken by the Court of Appeal has not focused on the above requirements; instead the Court has seized on Woodhouse J's obiter comments in *Reid* and then says that they must guide the interpretation of the statute.

24. The principal statutory interpretation issue identified by Justice Glazebrook in her 2015 article[22], and counsel submits is the most relevant in the context of this case, is the need for a purposive approach.[23]

25. However, what the Court of Appeal has done is not a purposive interpretation but goes far beyond that by effectively "redrafting" the PRA definition of de facto relationship.[24]

26. The definition of de facto relationship for general purposes in the Interpretation Act 1999 (s 29A) of "a relationship between 2 persons … who live together as a couple in the nature of marriage or civil union" has been continued in the new Legislation Act 2019 (s 14).

27. The text of the PRA at ss 2A to 2D (meaning of marriage, civil union and de facto relationship) read in the context of the statute as a whole makes clear that the purpose of the statute is for the division of relationship property of "couples" only – the core feature, the fundamental DNA of PRA legislation.

28. There is no textual incoherence or ambiguity in respect of the relationships the PRA covers. In this case there is no need or justification for the Court to go beyond the text, for example to look at

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[22] Above n 19.

[23] At 4 "As the Supreme Court stated in *Commerce Commission v Fonterra*, under s 5, text and purpose are the two main drivers of statutory interpretation"; and at 7 "… the Supreme Court developed a clear line of jurisprudence that legislation, regardless of its context, is required to be interpreted purposively."

[24] s 2D Meaning of de facto relationship
(1) … is a relationship between 2 persons …
(b) who live together as a couple **including persons who live together in a polyamorous relationship of 3 or more persons which the Court may divide into dyadic parts having regard to the matters in subsections (2)(a) to (i) and (3)(a) and (b).**

Hansard for clarification.[25] Nor, with respect, are the comments of Woodhouse J relied on by the court below, "relevant background material". The words of the statute are clear; they mean what they say.[26]

29. Particularly important is the dyadic language contained in the provisions outlining the PRA's purpose.[27]

30. Through clear statutory language, Parliament has defined the Act's parameters of application and operation. If Parliament intended the PRA to apply to relationships of more than two people under the Act, the statutory language, and in particular, the language denoting its purpose, would reflect this.

31. The Courts do not have an open-ended discretion under the PRA. Rather they must be guided by the clear parameters Parliament had defined. Robertson J captured this important point in *M v B* thus:[28]

> *"I do not accept that the purposes and principles in ss 1N and 1M provide the Court with a generalised mandate which can avoid or obscure the structural framework which Parliament adopted."*

32. The Court of Appeal has effectively, by judicial interpretation, extended the definition of "de facto relationship" in the PRA to make the PRA applicable to polyamorous relationships. This creates a new "definition" which not only elasticises the definition in s 2D but also runs counter to the "catch all" definition of de facto relationship in s 14 of the Legislation Act 2019.

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[25] See cautionary note sounded by Winkelmann J on the use of Hansard in *Holler v Osaki* [2016] NZCA 130; [2016] 2 NZLR 811 at [34]; Burrows and Carter [2021] 6th edition at 372 and 373 - Hansard cannot be used to alter the meaning of statutory words that are clear as they stand.

[26] Glazebrook J emphasised that the words "mean what they say" in the Supreme Court's decision in *Northland Environmental Protection Society Inc v Chief Executive of the Ministry for Primary Industries (Northland)* [2018] NZSC 105; [2019] 1 NZLR 257 at [44].

[27] Sections 1C and 1M.

[28] *M v B* [2006] 3 NZLR 660 at [33].

33. Section 9 of the Legislation Act 2019 may, on its face, provide an escape route for the Court of Appeal; in effect, relying on s 9(1)(b) to say that the "context" of the PRA **"requires"** (emphasis added but note the imperative tone of that word in the provision) "a different interpretation". Counsel submits that it does not.

34. A relationship of three or more people in a polyamorous relationship does not come within any of the specific provisions of the PRA. It is a square peg in a round hole.

35. To deconstruct the polyamorous relationship and recast it into something which it is not – discrete dyadic parts -- is to make a structure or a decision which does not match reality. A slap in the face to those who chose to live life a certain way; an affront to their freedom of choice; to those who explicitly eschew coupledom.[29]

36. The consistent use of 2 persons living together as a couple in all the statutes indicates the legislature contemplates relationships of only 2 persons. Counsel refers to the language in the PRA set out at paragraph 44 below.

Social legislation

37. The Act has, correctly, been recognised as "social legislation". But just because the PRA is social legislation does not give the courts licence to ignore its scheme or language; indeed, in many instances it is vital that the courts adhere faithfully to the parliamentary choices that have been made because it is Parliament, not the Courts, that have the legitimacy to extend the reach of social legislation.

38. The Court below drew from the (obiter) comments of Woodhouse J in *Reid v Reid*[30] "five general but important considerations that should

[29] See 201.0027 First Respondent's Narrative Affidavit at [21] "I did not want to go down the same path as my parents, involved in a dyadic relationship". Also see [13] of the High Court Judgment noting appellant's evidence of the threesome "marriage" ceremony.

[30] *Reid v Reid* [1979] 1 NZLR 572 (CA).

influence the approach of the Courts to the interpretation of the legislation" (at [49]) and, after setting them at ([50]-[55]), concluded at [57] that:

> *"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."*

39. In doing so, and concluding as a result that the PRA applies to those in a polyamorous relationship, the Court strayed far beyond its mandate.

40. In *Reid* the Court was applying the Act (as it then stood), reiterating the significance (and primacy) of the "equal sharing principle" introduced by (then) s 11 of the Act. It sought to reinforce the Parliamentary intention, as expressed in the Act, and departing from the previously applicable common law and equitable rules in relation to the division of a couples property upon the marriage ending. Justice Woodhouse shone the judicial spotlight on the statutory provision, rebuffing a last ditch effort by a disgruntled husband to dilute the new statutory provisions. An effort described as designed to persuade the Court to construe the matrimonial property legislation in ways which would retain, as much as possible, the traditional rules (which Parliament had firmly put aside).

41. The issues to which Woodhouse J directed his attention were "within the Act". Justice Woodhouse did not (and no analysis of his articulated principles would support this) seek to extend the provision as enacted.

42. With respect, the reliance on Woodhouse J's remarks is something of a non-sequitur. They cannot deflect from the plain, and unambiguous, scheme and language of the PRA.

Coupledom and the PRA

43. It was accepted by the parties and the Courts below that the core premise of the PRA is "coupledom".[31] This is unsurprising given the clear wording of the PRA; marriage, civil union and de facto relationships are all explicitly defined by reference to two persons.

44. By way of illustration, the PRA contains the following language (emphasis added):

- Section 1C – What this Act is about – 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 divided up when they separate or when one of them dies (emphasis added).[32]
- Section 1M – Purpose of the Act – to reform the law relating to the property of married **couples** and civil union **couples** and of **couples** who live together as a de facto relationship (emphasis added).
- Section 2A (Meaning of Marriage) and Section 2AB (Meaning of Civil Union).
- Section 2B/2BAA (Marriage/Civil Union) – For the purposes of the Act where a marriage or civil union was immediately preceded by a de facto relationship between … **2** spouses/partners the de facto relationship is treated as if it were part of the marriage/civil union (if polyamory is redefined as a set of dyadic relationships this comes into effect; if not, there is no cumulative effect).
- Section 2D – Definition of de facto relationship – a relationship between **2 persons** … who live together as **a couple**.
- Section 21 – Partners may contract out of this Act – any "**2**" persons in contemplation of entering … a de facto relationship.

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[31] The acceptance of this by the parties is recorded in the High Court Judgment at [3], [22] and Court of Appeal Judgment at [21]. The acceptance by the Courts is recorded in the High Court Judgment at [21]-[27], [31], [36], [56], [58] and Court of Appeal Judgment at [58] and [76].

[32] It is accepted that s 1C appears in Part 1 of the Act which is intended only as a guide to the general scheme and effect of the Act, s 1B.

- Section 21A – Partners may settle differences by agreement – differences that have arisen between them concerning property owned by **either** or **both** of them.
- Section 23 – Who can apply – **either** partner or **both** of them jointly.

45. Concomitant legislation also reflects this:

45.1 In the Marriage Act 1955, the language is:
Section 2 – Meaning of Marriage means "the union of **2 people**, regardless of their sex, sexual orientation, or gender identity".

45.2 In the Civil Unions Act 2004, the language is:
Section 4 – Overview of Civil Union: "**2 people**, whether they are of different or the same sex, may enter into a civil union …"

46. This pervasive dyadic wording cannot be taken, even when read expansively, as applying to any number of people other than two.

47. In the High Court, Hinton J held that since coupledom was the core feature of the PRA, it would be wrong to apply the PRA to a relationship not based on coupledom, as is the case here. Her Honour treated and accepted the parties' relationship as what it was in reality; a threesome.[33] This approach is entirely correct.

48. The Court of Appeal also accepted that the PRA is premised on the notion of coupledom and acknowledged that a polyamorous relationship (or multi-partner relationship) is not a qualifying relationship under the PRA.[34] However, the Court then proceeded to shoehorn the parties' polyamorous relationship of three persons into the PRA by treating it as three individual relationships of two persons; one married couple and two individual 'de facto' couples.

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[33] At [31].
[34] Court of Appeal Judgment at [58] and [76].

49. Outside the realm of marriage and civil unions as defined by law, it ought to be the parties who define the nature of their relationship. The parties here viewed themselves as a threesome; a triad; a union of three people. This identification should be respected. To interpret their relationship in any other way is a misinterpretation of its essential nature.

50. The appellant respectfully submits that the Court of Appeal was wrong to treat the parties as a series of couples as this is simply not what the relationship was.

Contemporaneous relationships: ss 52A and 52B PRA

51. A significant aspect of the Court of Appeal's reasoning was the assistance it drew from the so-called contemporaneous relationship provisions of the PRA. It was wrong to do so. These provisions are not intended to apply to polyamorous relationships. As noted by Hinton J:[35]

> *"A more significant difficulty in the applicants' placing reliance on ss 52A and 52B is that these sections do not expand the scope of the Act. Rather they recognise the potential for conflicting claims arising out of the 2002 extension of the Act to de facto relationships and attempt to resolve that conflict. Beforehand the Act applied only to married couples. It is of course unlawful to be married to two people at once, so the possibility of competing claims under the Act did not arise. Extension of the law to de facto relationships opened up that potential. But the key point is that ss 52A and 52B still purport only to establish priority between competing claims where there are* ***two*** *discrete* ***qualifying*** *relationships."*

52. In Her Honour's Judgment, Hinton J stated that ss 52A and 52B would invariably produce a result discordant with the PRA if they were applied

[35] See the High Court Judgment at [36].

to a deconstructed polyamorous relationship, see [38] of her Judgment. Her Honour discusses the problems of ss 52A and 52B at [35]-[48].

53. The scheme of the contemporaneous provisions (ss 52A(2)(b) and 52B(2)(b)) indicate that they were addressed to the phenomenon of partially overlapping dyadic relationships, not to an ongoing multi-partner relationship: that is particularly apparent from the phrase "were **at some time** contemporaneous" in both provisions.

54. Nor can the provisions be seen as a general 'tick' to the application of the PRA to a polyamorous relationship; ss 52A and 52B only apply where certain prerequisites are met, including that "there is insufficient property to satisfy the property orders made under this Act" (ss 52A(1)(b) and 52(1)(b)). That of course begs the very question as to whether property orders can be made in respect of a polyamorous relationship.

55. To bring the parties within the ambit of these sections by recasting their relationship as three bilateral relationships is a strained and unnatural interpretation application of the PRA, that Parliament did not intend.[36]

56. Not only were these sections not intended for polyamorous relationships, but also the sections in themselves are problematic and flawed.[37] They are a shaky foundation upon which to base support for the Court of Appeal's reasoning.

57. Several submissions on the provisions prior to their enactment, including a submission by the former Principal Family Court Judge, Patrick

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[36] The application of these sections to polyamorous relationships is also discussed in Sally Dodds *"Ménage à Trois or More – is There a Gap?"* (2020) at 27 where she comments "Contemporaneous in general refers to one partner in two separate relationships with different partners. This definition is not an adequate summary of polyamorous relationships as they are not separate relationships, rather one bigger relationship." At 28, "In summary, ss 52A and 52B are inappropriate to apply to polyamorous relationships as they were written primarily to fill a void in succession law. The rules are flawed and have never produced success in practice. In conclusion, to apply this legislation to a polyamorous relationship is actually a misrepresentation of the type of relationship polyamory actually is and thus will require a gross oversimplification of the facts."

[37] 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 [7.30-7.61], 10 at [35].

Mahony, expressed that the provisions were too vague and lacked guidance as to their applicability.[38] However, the practicality of providing more detailed rules was doubted so the provisions were enacted without further clarification.[39]

58. The narrow scope of ss 52A and 52B and the significant problems attending their application is reflected in a clear judicial reluctance to apply these provisions:

58.1 In *DM v MP* the court accepted that contemporaneous de facto relationships can exist, but noted they are not likely merely because the legislation admits the theoretical possibility of their existence.[40]

58.2 In *Ngavaevae v Harrison* the Judge noted:[41]

> *"It would be fair to say that to establish a contemporaneous de facto relationship is likely to be difficult in practice. On my reading of recent authorities, assumptions of exclusivity still linger on in judicial interpretations of a "qualifying relationship" under the Act."*

59. A further issue with the provisions is the succession context from which they derived. As noted by the Law Commission:[42]

> *"The draft provisions on which ss 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."*

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[38] (Commentary of) Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-3) at 27.
[39] Above n 38; for further detail on the problems with ss 52A and 52B see Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 263 – 265.
[40] *DM v MP* [2012] NZHC 503 at [29].
[41] *Ngavaevae v Harrison* [2017] NZHC 2788 at [50].
[42] Law Commission, n 37 at [7.45] 176.

60. In the context of succession law, if a person engaged in two qualifying contemporaneous relationships died, there would be two competing claims on his or her estate. However, if those relationships ended by separation there would be three competing claims. The provisions were not drafted with the latter instance in mind, nor were they modified to account for this possibility.[43]

61. The provisions, even in the context of succession law, were inconsistent with the principle of equal sharing. As noted by the Law Commission, assessing the extent to which property is attributable to each relationship must either assume the partners contribute equally between themselves or courts must inquire into a comparison of the partnerships, which is clearly undesirable.[44] In the context of relationships ending on separation, with the addition of a third property interest to consider, applying the PRA's 50/50 sharing regime becomes even more complex.[45]

62. In its report on the PRA, the Law Commission commented on the provisions in blunt fashion: "these rules are flawed and do not appear to have ever been successfully applied in practice."[46] It is hard to see why this Court would wish to place any weight on "flawed" provisions as a 'solution' to the phenomenon of polyamorous relationships, when they haven't worked successfully even within their intended (limited) sphere of application.

63. The contemporaneous relationship provisions' roots in succession law, their complex nature and challenging application does not encourage a broad interpretation of the PRA in reliance on these provisions.[47]

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[43] Adrianne Reid *"Have Your Cake And Eat It Too: The Treatment of Contemporaneous Relationships under the Property (Relationships) Act 1976"* (LLB (Hons) Dissertation, University of Otago, 2007) at 60.
[44] Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at 140 – 143, in particular [C205].
[45] See Hinton J's discussion of these problems in the High Court Judgment at [38]-[48].
[46] Law Commission, above n 37 at 10 [35].
[47] See Hinton J's High Court Judgment at [41].

64. Applying these sections to polyamorous relationships does not provide the polyamorous community with a clear and concise understanding of their property entitlements. This is best achieved by Parliament.

The Law Commission

65. The appellant's approach is supported by that of the Law Commission (and counsel notes that the Law Commission's conclusions were reached prior to the decision of Hinton J): (1) the PRA does not apply to polyamorous relationships; and (2) polyamorous relationships are a phenomenon that family law will need to grapple with, but Parliament needs to take the lead.

66. It has expressed that: [48]

> *7.62 The PRA is premised on the notion of "coupledom".[49] It applies only to marriages, civil unions and de facto relationships that are intimate relationships between two people. The PRA does not apply to intimate relationships between three or more people (multi-partner relationships).*

67. The Law Commission expressly looked at the issue of whether polyamorous relationships should be regulated by the PRA[50] and by succession laws.[51] It concluded that the current legislation was inapt to apply to polyamorous relationships and concluded that bespoke legislation was required.[52]

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[48] Law Commission, above n 37 at 181. See also [R35] at 183 and paragraphs [7.30]-[7.77]. See also, Sally Dodd *"Ménage à Trois or More - Is There a Gap?"* (2020) says at 48 "it is inappropriate for Judicial interpretations, however favourable to diversity and change, to extend the existing definition of de facto to include three or more partners to the relationship. The legislation, albeit intended to be social, with the words used cannot possibly have intended to contemplate or provide for polyamory". See also Megan McGhie in *"Loving More and Receiving Less: the Challenges of Property Division for People in Polyamorous Relationships"* (2021) 10 NZFLJ 130 at 134 where she comments that the plain meaning of the Act cannot be taken to infer anything other than a couple or two persons, "this is supported by the social climate during the PRA's formation, and 2001 and 2005 amendments. Given that polyamorous relationships have only gained traction in recent years, it is highly unlikely that Parliament contemplated their inclusion under the Act".

[49] See discussion in Margaret Briggs *"Outside the Square Relationships"* (paper presented to New Zealand Law Society PRA Intensive, October 2016) 135.

[50] Law Commission, above n 37.

[51] Law Commission Review of Succession Law: Rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana (NZLC IP46, 2021).

[52] Law Commission, above n 37 at [7.55]; Law Commission, above n 51 at [3.42] and [18.22]-[18.25].

68. Specifically, the Commission expressed the view that:[53]

> *"7.75 We do not recommend extending the property sharing regime to multi-partner relationships at this time. 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.*
>
> *7.76 Extending the property sharing regime to multi-partner relationships would also be a complex exercise. Careful consideration would need to be given to determining when and how multi-partner relationships should attract property consequences and what those property consequences should be.*
>
> *7.77 We anticipate this is an area that will call for greater attention in the future as multi-partner relationship structures are likely to become more prevalent. Presently, little is known about different types of multi-partner relationships, how they are formed and function and their property sharing expectations. We recommend the Government consider undertaking research in this area to support any future law reform relating to multi-partner relationships."*

69. In its report on Review of Succession Law: Rights to a Person's Property on Death, the Commission repeated its position taken in the PRA review and added:[54]

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[53] Law Commission, above n 37 at 183.
[54] Law Commission, above n 51 at [18.23]-[18.25].

"18.24 Our preliminary view is to repeat the recommendations from the PRA review in the final report in this review. The new Act should be premised on an intimate relationship between two people. We observed in the PRA review that it is likely multi-partner relationships will become more prevalent in the future.[55] *The Government should consider undertaking research in this area to support any future law reform relating to multi-partner relationships.*

18.25 Lastly, we note that partners to a multi-partner relationship can make wills and contracts through which they can arrange how property is to be distributed on a partner's death. As discussed above, public education may be useful."

Why applying the PRA to polyamorous relationships does not work with the scheme of the PRA

70. If the PRA applies to polyamorous relationships, without Parliamentary input, this will create a number of practical challenges and complexities relating to the operation of the PRA. By way of example the following provisions of the PRA would be difficult to operate:

70.1 **Section 21 agreements**

Section 21 agreements are a fundamental feature of the PRA through which couples can construct their own bespoke arrangements.[56] How would section 21 work, in practice, if the Act were to apply to polyamorous relationships?

How can polyamorous partners contract out of the PRA? What happens when two partners of a polyamorous triad successfully sign a Section 21 Agreement but the remaining partner does not? What happens when one party to a triad wishes to exit?

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[55] Law Commission, above n 37, at [7.66] and [7.77].
[56] *Sutton v Bell* [2021] NZFLR 610 (CA).

How would practitioners advise clients who belong to a polyamorous relationship about their rights under the PRA – using the Court of Appeal judgment is there a presumption of equal sharing that needs to be signed away?

70.2 **How would ss 13 and 15 operate?**

How would one calibrate for extraordinary circumstances and economic disparity across three (or more) individuals within a polyamorous relationship?

70.3 **Section 20B – Protecting Interest in the Family Home**

Does every partner within a polyamorous relationship have a protected interest in the family home equivalent to the sum under s 53A?

70.4 **Section 25 – When Court can make Orders**

Under s 25(3), the PRA can apply to couples that are not separated and also under s 25(2)(b) if they are considered to no longer have a de facto relationship with each other. In the case of a polyamorous relationship when does that point occur; when one party leaves the polyamorous unit or when all individuals go their separate ways?

70.5 **Section 61 – Surviving partner may elect Option A or B**

Partner A dies, leaving Partner B and C. Which of the surviving partners gets to choose between Options A and B?

If one surviving partner chose Option A, would the presumption of equal sharing equivalent to the number of partners within the relationship apply, and then this divided pro rata? What would happen if there were insufficient assets to satisfy all claims. How would it work if one wished to choose Option A and the other wished to choose Option B?

71. The application of the PRA to polyamorous relationships was presented by the Court below as natural and obvious. With respect it is not. Other provisions on the statute book demonstrate that Parliament has not chosen to treat married/civil union couples and de facto couples the same. For example:

71.1 **Sections 14 and 14A PRA**

Parliament has distinguished between short term de facto relationships and short term marriages in the PRA by making separate provisions for each different type of relationship in certain circumstances.

The presumption of equal sharing applies under s 14 unless:

> The assets came to one spouse through succession, survivorship, trust beneficiary entitlement, by gift or where the contributions of one spouse has been clearly disproportionately greater than the contribution of the other spouse.

There is no presumption of equal sharing under s 14A unless:

> There is a child of the relationship or the applicant has made a substantial contribution to the relationships and there will be serious injustice if an order is not made.

71.2 **Section 182 Family Proceedings Act 1980 ("FPA")**

Section 182 was retained when the Property (Relationships) Amendment Act 2001 was enacted. "That must also have been a conscious decision by the Legislature, though the section is not referred to in the parliamentary debates or the Select Committee reports despite obvious questions about its relationship to s 44C

of the Property (Relationships) Act 1976 and Parliament's policy in regard to trust-busting."[57]

Section 182 does not include de facto couples. It expressly refers only to marriages or civil unions. In 2019, the Law Commission recommended the repeal of s 182 and amendment to s 44C PRA[58], to ensure one set of rules governs access to trust assets upon breakdown of a relationship. Whether Parliament will accept that recommendation remains to be seen; the important point for this appeal is that it demonstrates that it cannot be presumed that Parliament would treat all intimate relationships in the same manner.

71.3 Both of these examples show that Parliament has not fully equated de facto relationships and marriages / civil unions. They show that it cannot be assumed that all relationship types will be, or indeed ought to be, treated the same. Parliament does distinguish. Yet the effect of the decision under appeal is to assume equivalence. That is an error.

Why applying the PRA to polyamorous relationships may create difficulties with other areas of law

72. If the PRA is expansively interpreted to encapsulate polyamorous relationships, this could have implications for other areas of law. Counsel's research shows at least 160 pieces of legislation contain the phrase "de facto" and many of these define de facto explicitly in terms of a couple.

73. The logic of the Court of Appeal's approach means that its decision potentially affects how a myriad of other statutes both within the family law canon and more widely apply to polyamorous relationships.[59]

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[57] Westlaw Commentary (online, Thomson Reuters) at FA182.02.
[58] Law Commission, above n 37 at ch 11, in particular, see [R66], [11.50]-[11.64].
[59] Megan McGhie *"Loving More and Receiving Less: the Challenges of Property Division for People in Polyamorous Relationships"* (2021) 10 NZFLJ 130 at 137.

74. Examples include the following Acts: Family Proceedings Act 1980 (the spousal maintenance provisions in particular), Child Support Act 1991, Status of Children Act 1969, Administration Act 1969, Citizenship Act 1977, Immigration Act 2009, Social Security Act 2018, Student Allowances Regulations 1998, Parental Leave and Employment Protection Act 1987 and Holidays Act 2003.[60] The implications of the application of these statutes to polyamorous relationships and to the children (including step-children) of these relationships is significant: benefits may be lost through abatement or asset testing; employment entitlements against employers may be increased beyond what is fair; immigration and citizenship issues will arise. None of this was addressed by the Court below. Had it been, it would have been appreciated that it is quite wrong for the Courts to be using the definition of de facto relationship to extend the reach of the PRA. When the treatment of de facto relationships (including same-sex relationships) was largely addressed through the Relationships (Statutory References) Act 2005, it was preceded by extensive Law Commission, Human Rights Commission, and other public consultation and wide-ranging policy work, including Consistency 2000 and Compliance 2001.[61] The same is required for polyamorous couples and it is not for the courts to pre-empt that work.

A matter for Parliament

75. As illustrated in the above analyses, providing for polyamorous relationships under the PRA is a complex issue, which the appellant submits, Parliament is best placed to handle.

76. The Court of Appeal's interpretation not only poses practical challenges within the PRA and other areas of law, but also creates future uncertainty on matters such as determining what constitutes a qualifying

[60] That 160 statutes are affected by the Court of Appeal Judgment, and that the above Acts are materially changed, indicates that the change of the definition "de facto" was a big advance, a step for Parliament not the Court to take.

[61] Some of this history is traced in Margaret Wilson, *"Policy and law in the development of relationship property legislation in New Zealand"* [2017] 5 OtaLawRw 89.

polyamorous relationship when more parties are involved and how many parties can be privy to these relationships.

77. The appellant recognises that the PRA is social legislation. However, judicial interpretation is not an appropriate means to bring polyamorous relationships within the ambit of the Act. Courts cannot engage in reform or "modernisation" of law in the same manner as Parliament. They are not equipped with the necessary information gathering, research and policy development tools to which Parliament has access. To engage in law reform by case law is a piecemeal approach, takes too long and creates uncertainty in the meantime. It is far better for legislators to get on the front foot by introducing amending laws to keep pace with changing social trends, norms and in particular rights of cohabitees; that is a top down solution (as happened post *Quilter's* case) and is better than "landmark" judgments at the very base level that create more problems, rather than provide solutions. For this reason, complex matters and matters of significant social importance, like the present case, should be addressed by Parliament. [62]

Alternative relief available - favouring the appellant's approach would not mean that members of a polyamorous relationship are devoid of relief

78. A polyamorous partner is not left without potential legal remedies on a breakup on proof of appropriate evidence:

Equity – Constructive Trust eg *Lawkow v Rose*[63]

Quantum Meruit – eg *Buysers v Dean*[64]

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[62] Megan McGhie *"Loving More and Receiving Less: the Challenges of Property Division for People in Polyamorous Relationships"* (2021) 10 NZFLJ 130 at 132 comments on the interdependence between the Judiciary and the Legislature, "The Judiciary's mindfulness not to encroach into Parliament's role is a valid and necessary circumscription required by New Zealand's institutional framework. As discussed in Burrows and Carter Statute Law in New Zealand, the Courts engaging in institutional reform in the same manner as Parliament is incompetent. Courts lack the benefit of public submissions, information gathering and policy development mechanisms that Parliament have access to. Therefore, matters of significant social and economic importance, or changes requiring complex transitional regimes, are often best left to Parliament."

[63] *Lankow v Rose* [1995] 1 NZLR 277 (CA).

[64] *Buysers v Dean* (2001) 21 FRNZ 431 (Smellie J).

Relevance of the New Zealand Bill of Rights Act 1990

79. In support of its approach, the Court of Appeal invoked BORA. This was done in a cursory way and, on analysis, was erroneous:

79.1 No relevant right under the BORA has been breached. In particular, polyamorous relationships do not fall within any of the grounds of prohibited discrimination for the purposes of s 21(1) Human Rights Act 1993 ("HRA"). In particular, they do not fit within the definitions of sexual orientation, family status, or marital status.

79.2 If, contrary to the above, polyamorous relationships are within the prohibited grounds of discrimination, confining the reach of the PRA to married couples, civil union couples and de facto couples and excluding other intimate and domestic relationships (such as polyamorous, parent-child, grandparent-grandchild, sibling etc relationships) does not amount to discrimination for the purposes of s 19 BORA or, in the alternative, is a justified limit on that right. As to the first, an important aspect of the test of discrimination is the existence of detriment. It is not obvious that the non-application of the PRA is a detriment in the relevant sense. It all depends on the particular party's perspective and cannot be assumed. In addition, it is not quite clear what the detriment would be, when for the reasons advanced earlier the application of the PRA (as opposed to some other property sharing scheme) to polyamorous relationships would be very difficult indeed. As to the second, Parliament's decision to limit the PRA to certain relationships and exclude others is consistent with the general approach of Parliament to follow, rather than lead, social shifts in respect of new relationship types and to carefully consider whether and how to extend pre-existing legislation to them (with whatever modifications to that legislation might be required to accommodate the new relationship type). That is a reasonable approach for a

democratic legislature to take and is the approach endorsed by the majority in *Quilter's* case. Moreover, the PRA is a response to well-known historical phenomenon under which, at a general level, (married) women contributed significantly to a relationship and wealth creation during it, but were financially disadvantaged upon marriage breakdown. It is not apparent that the same historical phenomenon is at play in polyamorous relationships; that would be one of the areas of research that would no doubt be undertaken by the Law Commission / Ministry of Justice as part of a law reform exercise, particularly since the effect of orders under the PRA is to interfere in what would otherwise be the parties' property rights under common law.

79.3 Finally, and in any event, even if the exclusion of polyamorous relationships from the PRA amounts to an unjustified limit on the rights of members of a polyamorous relationship, it would be improper to rely on s 6 BORA, as the Court of Appeal did, to avoid that outcome. As in *Quilter* case (which concerned whether the Marriage Act 1955 could be read as extending to same sex marriage), the application of social legislation of the type that the PRA is to polyamorous relationships is one which Parliament, not the Courts, should make, with the benefit of input from officials, civil society and technical experts, and the polyamorous community. A declaration of inconsistency by this Court, which could be sought in separate proceedings, would, no doubt, be a factor which might see priority being given to law reform in this field. But s 6 would not justify the Court shoehorning polyamorous relationships into the scheme of the PRA, in circumstances where, for reasons already outlined, the scheme of the PRA is not suited to polyamorous relationships.

79.4 Put another way, for BORA purposes, this is a case about the absence of bespoke legislation to provide property protections to members of a polyamorous relationship; it is a case of legislative

omission, that should be responded to by way of declaration of inconsistency, rather than a case of legislative oversight, that can be remedied through shoehorning polyamorous relationships the PRA. In that regard it is important to note that it is not obvious that the PRA is the right response to the phenomenon of committed multi-partner relationships; the nature of polyamorous relationships is such that consultation with civil society may result in a legislative scheme for dealing with property issues upon relationship breakdown / death that may look quite different to the scheme found in the PRA.

80. The approach advocated for by the appellant is consistent with persuasive overseas authority.[65] In *Bellinger v Bellinger* [2003] UKHL 21, Mrs B, a transgender female, born male, was denied the right to marry on the ground that s 11(c) Matrimonial Causes Act 1973 stipulated that marriage was between a man and a woman. Before the House of Lords, she sought (1) a declaration that the proposed marriage would be lawful as the expressions 'male' and 'female' in s 11(c) could be interpreted to include transgender persons pursuant to s 3 Human Rights Act 1998 (UK) ("UKHRA"); or, in the alternative, (2) a declaration of incompatibility with article 12 ECHR under s 4 UKHRA. The House declined the first, but made the second, declaration.

81. Of relevance to this appeal, all judges agreed that s 3 UKHRA could not be relied upon for the first declaration. Lord Nicholls of Birkenhead stated:

81.1 Recognition of Mrs Bellinger as female for the purposes of s 11(c) would necessitate giving the expressions 'male' and

[65] In addition to *Bellinger*, see also *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993 at [36]-[39] and *In re Z (a child) (No 2)* [2016] EWHC 1191 (Fam) holding that surrogacy applications could only be made by two person and a single person could not make them; declining to read provision to achieve ECHR compatibility, and making instead a declaration of incompatibility. Note also the discussion in the second decision at [30] of why it would be improper for the Court to indicate how the incompatibility could be remedied: these reasons overlap to a considerable extent with the reasons why s 3 UKHRA / s 6 BORA is not appropriately applied in the instant case.

'female' in the [1973] Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite set: [37]

81.2 Such an interpretation could not be adopted for several reasons: [38]-[49] including:

(a) The House of Lords is not in a position to decide where the demarcation line between male and female could sensibly or reasonably be drawn: [43]

(b) "The recognition of gender reassignment has an effect on many different areas of law and thus should be dealt with by 'a clear coherent policy' rather than in a 'piecemeal fashion'": [45]

(c) It would involve a "fundamental change in the traditional concept of marriage … which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people": [48]

(d) Thus the change in law sought by B "must be a matter for deliberation and decision by Parliament when the forthcoming Bill is introduced": [49]

82. In his speech, Lord Hope of Craighead stated:

82.1 The words "male" and "female" in s 11(c) of the 1973 Act are not technical terms and must be given their ordinary, everyday meaning: [62]

82.2 No evidence was placed before the House to suggest that in contemporary usage in this country, on whichever date one might wish to select, that the words "male" and "female" meant anything other than one's sex at birth: [62]

82.3 "In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by means of the interpretative obligation in section 3(1) of the 1988 Act.": [69]

Counsel's certificate

84. Counsel certifies that these Submissions are suitable for publication.

DATED 18 MAY 2022

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(Counsel for Appellant)