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

SC 7/2022

BETWEEN	**FIONA MARGARET MEAD**
	Applicant
AND	**LILACH PAUL**
	First respondent
BETWEEN	**BRETT PAUL**
	Second respondent

FIRST RESPONDENT'S AMENDED SUBMISSIONS

Dated 17 May 2022

This document is filed by:
Jack Rafiei
Doug Cowan Barristers & Solicitors
486 New North Road, Kingsland,
PO Box 60440, Titirangi, Auckland 0642
Phone: (09) 320 4616
Email: jack@cowan.net.nz

Counsel acting:
Nura Taefi /Jessica Palairet
Shortland Chambers
Levels 9-13, 70 Shortland St, Auckland
PO Box 4338, Auckland 1140
Phone: (09) 309 1769
Email: ntaefi@shortlandchambers.co.nz

CONTENTS

MAY IT PLEASE THE COURT

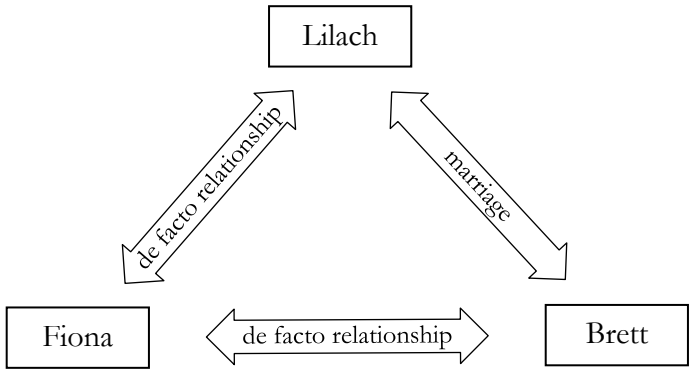
Introduction

1 For 15 years, Lilach Paul and Fiona Mead were in a committed relationship. They met, formed an attraction, and commenced a romantic relationship. They bought a family home together and ran various businesses from the property. They supported one another financially and emotionally. They shared household duties. They were open with friends and family about their love and commitment.

2 There is nothing remarkable about these facts. The reason this case is before the Court is due to the involvement of a third party – Brett Paul.

3 Throughout the 15 years that Lilach and Fiona were in a relationship, Brett was also in a relationship with Fiona and married to Lilach:

Figure 1



4 When the relationship between Lilach and Fiona ended, Fiona refused to acknowledge Lilach's interest in the family home and trespassed her from the property.

5 In February 2019, Lilach commenced a claim for the division of relationship property in the Family Court seeking a third of the relationship property pool. Fiona filed a protest to jurisdiction to the claim, on the basis the Family Court does not have jurisdiction to determine the rights between parties in a polyamorous relationship. Brett also filed a cross-claim seeking a third of the relationship property pool.

6 Lilach applied to set aside the protest to jurisdiction. In June 2019, Judge Pidwell decided to refer a case stated to the High Court for determination on the discrete legal issue of whether the Property (Relationships) Act 1976 (PRA) can apply to polyamorous relationships.[1]

7 On 31 March 2020, Hinton J held the Family Court does not have jurisdiction.[2] That decision was overturned by the Court of Appeal in its decision of 3 December 2021.[3]

8 Lilach's case is that the PRA is framed in terms of coupledom, but not exclusive coupledom. The Family Court has jurisdiction because the polyamorous relationship between Fiona, Brett and Lilach is comprised of three qualifying relationships under the PRA:

a. A de facto relationship between Fiona and Lilach;
b. A de facto relationship between Fiona and Brett;
c. A marriage between Brett and Lilach.

9 This is not a strained reading of the PRA or a re-characterisation of the relationship between the parties. It is an interpretation that is permitted by the text, supported by the statutory purpose, and required by the New Zealand Bill of Rights Act 1990 (BORA).

---

1 Minute of Judge BR Pidwell FC Waitakere FAM 2019-090-115, 7 June 2019 **[101.0012].**
2 ***Paul v Mead*** [2020] NZHC 666, (2020) 32 FRNZ 513.
3 ***Paul v Mead*** [2021] NZCA 649, [2021] NZFLR 551.

Summary of arguments

10 **Definition of de facto relationship does not exclude persons in a polyamorous relationship:** The definition of a de facto relationship in s 2D of the PRA is broad, flexible and evaluative. It is not concerned with how the parties describe themselves but with whether the relationship has the requisite characteristics. In this case, the polyamorous relationship between the parties was comprised of three qualifying relationships. This means that Lilach and Fiona were in a de facto relationship regardless of Brett's involvement.

11 **Principles of statutory interpretation support inclusion:** The principles of statutory interpretation support the application of the PRA between two qualifying individuals in a multi-partner relationship. The text, purpose and context of the PRA support the Court of Appeal's finding that coupledom need not be *exclusive* coupledom.[4] Sections 52A and 52B of the PRA contemplate a multi-partner scenario, and provide a framework for dealing with competing claims. The PRA contains no express exclusion of couples living in the context of polyamorous relationships. In this regard, the appellant is asking the Court to include a qualification in s 2D that does not exist.

12 **Rights consistent interpretation necessary:** BORA supports a reading of the PRA that is consistent with the right to freedom from discrimination on the ground of family status. Where a rights-consistent interpretation is possible, the Court should adopt it.

13 **Workability and mechanics of dividing property in a multi-partner scenario:** There is no practical impediment to dividing property in a multi-partner scenario. Provided there is a qualifying relationship, the presumption of equal sharing applies. Where there

---

4 ***Paul v Mead*** [2021] NZCA 649 at [63], [65] and [76].

are competing claims, ss 52A and 52B provide a framework for division.

14 Applying the PRA to polyamorous relationships creates no difficulty so fundamental that it justifies adopting the appellant's interpretation. To the contrary, excluding multi-partnered relationships from the definition of a de facto relationship would have serious implications, such as inadvertently ending a marriage once there is involvement of a third party.[5]

Background facts

15 Lilach and Brett met in 1991 and married in 1993.

16 In 1999, Lilach met Fiona.

17 In 2002, Lilach, Fiona and Brett commenced a relationship they referred to as "polyamorous" – a committed, loving multi-partner relationship that was also non-exclusive. As Lilach explains:[6]

> We had an understanding that although we were free to love others, the relationship between the three of us was the main relationship. For the large majority of the relationship all three of us have been sharing the same room and same bed until about a year before our separation when I moved into the guest room.

18 In 2003, the parties searched for a farm to buy together and purchased the property at (the property). Fiona provided the $40,000 deposit and is the registered owner.[7] Lilach and Brett contributed to the mortgage and made non-financial contributions to the property.

---

5 Property (Relationships) Act 1976 [PRA], **s 2A(2).**
6 Lilach's narrative affidavit at [19] **[201.0004].**
7 Lilach's narrative affidavit at [27] **[201.0005].**

19 Fiona practiced as a veterinarian. Brett established a paintball business at the property and had a lawn mowing business. Lilach had a workshop on the property from which she practiced as an artist. She sold carvings through private galleries, and has works in Te Papa's permanent collection.[8] Lilach also assisted Brett and Fiona with their endeavours.[9]

20 In November 2017, Lilach separated from Fiona and Brett.

21 In early 2018, Brett and Fiona also separated.

22 Fiona remains living in the property.

The issue

23 The issue before the Court is whether the Court of Appeal was wrong to find that 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.

The statutory context

24 The PRA governs division of relationship property when a marriage, civil union or de facto relationship comes to an end.

25 The PRA as initially enacted (the Matrimonial Property Act 1976) applied only to married couples. In March 1988, the Minister of Justice established a Working Group to consider the law of matrimonial property, family protection and de facto relationships. The resulting amendments modernised the law, created flexibility,

---

8 Second affidavit of Lilach Paul affirmed 17 May 2019 at [27] **[201.0074]**, exhibit "A" **[301.0145]**.

9 Second affidavit of Lilach Paul at [22]–[31]**[201.0073].**

and included many who were previously outside the scheme of the legislation.[10]

26 The most significant amendment was to extend the rights previously afforded to married persons to persons in de facto relationships. An early draft of the legislation defined a de facto relationship as a relationship "in the nature of marriage". The Justice and Electoral Committee recommended removing the expression "in the nature of marriage" and focusing instead on criteria for determining whether a de facto relationship exists. Parliament agreed with this recommendation and the Bill was passed into law.[11]

Section 2D

27 This change resulted in the enactment of s 2D of the PRA, which is the focus of this appeal:

> **2D Meaning of a de facto relationship**
>
> (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
> (b) who live together as a couple; and
> (c) who are not married to, or in 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:

---

10 See Nicola Peart **"The Property (Relationships) Amendment Act 2002: A Conceptual Change"** (2008) 39 VUWLR 813.

11 See also *Scragg v Scott* [2006] NZFLR 1076 (HC) **at [26]–[30].**

(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.

…

28 The test in s 2D is evaluative and enables the Court to adopt a fact specific approach to a variety of human relationships. In *Scragg v Scott,* Gendall and France JJ acknowledged that: "The complexity and diversity of human nature and behaviour is such that many types of associations may properly fall into the category of a de facto relationship as envisaged by Parliament."[12]

29 Unlike marriages and civil unions, there is no public record of de facto relationships. It is a matter of evidence and degree. In the High Court, Miller J observed: "Marriage and civil unions are opt-in relationships in which the commencement date is known, but the law may impose the legal status of a de facto relationship retrospectively upon parties whose relationship gradually and without conscious election assumed that character." [13]

12 *Scragg v Scott*, above n 11, **at [31].**

13 *DM v MP* [2012] NZHC 503, [2012] NZFLR 385 **at [23].**

30 The Courts have determined that a diverse range of relationships meet the definition of de facto relationship, including non-traditional relationships. This includes:

a. Relationships where the parties do not live together in a common residence.[14]

b. Relationships that are intermittent.[15]

c. Relationships devoid of a sexual element.[16]

d. Relationships that are not monogamous.[17]

e. Relationships that begin in the context of a boarding or flatmate arrangement.[18]

f. Relationships which begin as a business relationship.[19]

31 The appellant's focus on the meaning of polyamory is unnecessary. Likewise, the attempts to contrast traditional monogamous relationships with polyamorous relationships are misguided. The test for a de facto relationship is not concerned with nomenclature or how the parties describe their relationship. The test is concerned with the characteristics of the relationship. Parties in de facto

---

14 In ***Sew Hoy v Young*** FC Dunedin FP012/287/98, 11 August 2004 the parties were found to be living a de facto relationship from the date of their engagement despite having separate residences. They demonstrated commitment to a shared life by purchasing a family home and a business, and became financially interdependent. See also ***Moon v Public Trust*** [2018] NZHC 1169, [2018] NZFLR 491; and *G v B* [2006] NZFLR 1047 (HC).

15 ***A v A*** FC Dunedin FAM-2005-012-424, 8 May 2006. See also PRA, s 2E(2).

16 ***Horsfield v Giltrap*** (2001) 20 FRNZ 404 (CA) in which the partners maintained a separate residence and refrained from engaging in a sexual relationship. This case was decided prior to the 2001 amendments to the PRA, but cited in *Scragg v Scott* above n 11, by Gendall and France JJ as an example of a relationship that would now qualify as a de facto relationship.

17 ***Scott v Scragg*** [2005] NZFLR 577 (FC) upheld on appeal in *Scragg v Scott*, above n 11. A de facto relationship was found where the parties were in a non-monogamous relationship.

18 ***Coll v West*** FC Morrinsville FAM-2009-039-160, 26 April 2010; and ***MA-S v AT*** [2012] NZFC 1702.

19 In ***RPD v FNM*** [2006] NZFLR 573 (HC), the applicant met the respondent while working as a prostitute. The applicant moved in with the respondent to provide protection and management for her work. The Court found that desrapite a common residence the lack of commitment, intimacy and emotional support their relationship did not meet the features of a de facto relationship, apart from during an undisputed 2.5 year period in which they had 3 children together. See also ***Chapman v P*** HC Wellington CIV-2007-485-1372/1871/1887, 2 July 2009.

relationships may describe their partner as a flatmate,[20] boarder,[21] "friend with fringe benefits",[22] or "much devoted lifelong friend",[23] but nevertheless find themselves in a qualifying de facto relationship.

Statutory interpretation

32 The question before the Court in this case is one of statutory interpretation. The Court must ascertain the meaning of the legislation by reference to its text and in light of its purpose and context.[24]

The text of s 2D (de facto relationships)

33 The key provision is the definition of de facto relationship as set out in s 2D.

34 The definition of a de facto relationship is flexible by design, and applies to a range of human relationships, many of which fall outside traditional norms. There are nine matters to take into account when determining if two persons live together as a couple. No factor is essential or more important than the others.[25]

---

20 In ***MA-S v AT***, above n 18, there was no evidence of a sexual relationship and a 24 year age gap. The applicant argued the parties' relationship was more in the nature of mother and son, flatmates or a friendship. Judge Ryan determined the relationship was more than one of convenience and involved a mutual commitment to living together.

21 In ***Coll v West***, above n 18, the respondent said the applicant was a boarder. Judge Brown found it was a de facto relationship, that the parties lived in a committed relationship which was initially sexual, and there was emotional commitment throughout.

22 In ***Garard v Roberts*** [2013] NZHC 89, [2014] NZFLR 563 Mackenzie J upheld a decision of the Family Court that the couple were in a de facto relationship despite the appellant describing them as friends with "fringe benefits."

23 In ***Moon v Public Trust***, above n 14, despite evidence that the deceased considered herself "single" and referred to the applicant as "a much devoted lifelong friend," "companion" and "friend", Powell J held the parties were in a de facto relationship.

24 Legislation Act 2019, **s 10(1).**

25 Section **2D(3)(a).**

35 Although the term "couple" is used throughout the PRA, there is nothing in the definition of s 2D that says coupledom must be *exclusive* coupledom. There is no express exclusion of couples living in the context of polyamorous relationships. Counsel for the appellant is asking the Court to include a qualification in s 2D that does not exist.

36 In *Williams v Secretary of the Department of Social Services*,[26] the Australian Administrative Appeals Tribunal considered the meaning of the word "couple" in the Social Security (Administration) Act 1999, and how it applied to a person in a polyamorous relationship. The Tribunal found that Ms Williams was living with Mr Moore as a couple, despite the involvement of a third person in the relationship.

37 Lilach is not asking the Court to re-write the definition of a de facto relationship, but to accept that there can be a qualifying de facto couple within a wider multi-partner relationship. This is not a strained interpretation of the law, and is supported by *Williams* and academic commentary.[27] It is an application of the legislation on its terms.

38 To approach a polyamorous relationship couple-by-couple when dividing relationship property is not artificial, even if the parties consider themselves to be part of a polyamorous relationship. It is the best way to deal with property rights in a multi-partner scenario. This is for a range of reasons, including:

---

26 ***Williams v Secretary, Department of Social Services*** [2017] AATA 414, [2017] 158 ALD 311.

27 Nicola Peart, Margaret Briggs and Mark Henaghan et al *Relationship Property on Death* (Brookers, Wellington, 2004) **at [12.3.3]** (Henaghan contemplates that the most likely classification for polyamorous relationships is to treat them as contemporaneous relationships); Bill Atkin **"The Legal World of Unmarried Couples" (2008) 39 VUWLR 793** (Atkin suggests that a ménage à trois could be a triangular set of three relationships); and *Family Law Service* (LexisNexis, online ed, February 2019) **at [7.309.02]** (the authors advise that "[p]erhaps the correct analysis of the ménage à trois is that there are three de facto relationships, not one".) This commentary predates this litigation.

a. Each relationship will have different characteristics that need to be examined to determine whether it is a qualifying relationship under the PRA;
b. Each relationship will have its own beginning and end date;
c. Each relationship may have different relationship property pools.

The text of ss 52A and 52B (contemporaneous relationships)

39 Sections 52A and 52B of the PRA expressly allow for people to be in multiple de facto relationships at the same time.[28] Sections 52A and 52B were introduced to deal with the division of relationship property in such a scenario.

40 The appellant submits sections 52A and 52B are a shaky basis on which to extend the application of the PRA.[29] This misunderstands the respondent's position. The respondent does not rely on these provisions as the basis for division, but as an aid for statutory interpretation. These provisions indicate that Parliament did not intend the PRA to apply only to exclusive de facto relationships – it contemplated one person having multiple relationships contemporaneously.

41 The respondent also relies on ss 52A and 52B as an example of how property may be divided amongst polyamorous couples in the unlikely case of competing claims, as discussed in the section on mechanics at [85]–[90] below.

42 The text of ss 52A and 52B is set out below:

---

28 See Commentary to Matrimonial Property Amendment and Supplementary Order Paper No 25 at 27 and Law Commission *Succession Law: A Succession (Adjustment) Act: Modernising the law on sharing property on death* (NZLC R39, 1997) **at 141.**

29 Appellant's submissions **at [56].**

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:

(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.

43 These provisions were introduced following a Law Commission Report concerning the law of succession. The Report recognised that following the enactment of the PRA, it would be possible for one person to have two contemporaneous relationships which give rise to claims.[30]

44 Parliamentary debate during the third reading of the proposed 2001 amendments included a concern that the amendments promoted non-monogamous relationships:[31]

> "…[T]he fact is we are promoting bigamy and polygamy. Yes we are. Although we are not changing the Crimes Act, we are definitely saying that if a man has a wife and a lover, and has relationship property with the two of them, then they both have absolutely equal status." (Alec Neill, National Party).

45 The Supplementary Order Paper likewise records the concern by many submitters that the Act would devalue the status of marriage. The Justice and Electoral Committee, however, emphasised that the legislation was not about marriage, but about the division of property when a relationship ends.[32]

46 The final form of the PRA was not amended to assuage concerns about the Act's applicability to non-monogamous relationships. Clearly, it was within Parliament's contemplation that the PRA might apply to such relationships.

---

30 Law Commission, above n 28, **at 141.**.

31 (27 March 2001) **591 NZPD 243**. See also the comments of Katherine Rich at (27 March 2001) **591 NZPD 253.**

32 Matrimonial Property Amendment and Supplementary Order Paper No 25 **at 5.**

47 It would be anomalous and contrary to the intentions of Parliament if ss 52A and 52B applied to a relationship where Lilach was in contemporaneous relationships with Fiona and Brett, maintaining two separate households and spending time equally with both (refer figure 2 below), but did not apply simply because Brett and Fiona were also in a contemporaneous relationship with one another (refer figure 1 below).

Figure 2:

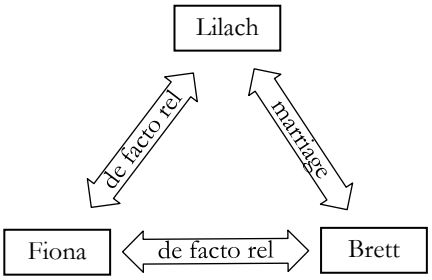
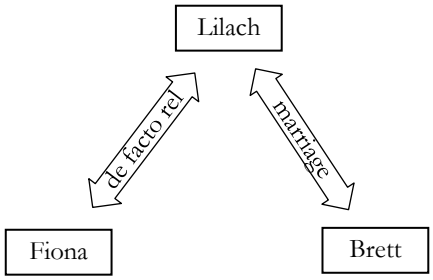


Figure 1 (repeated):



Purpose

48 Text and purpose are the drivers of statutory interpretation. The Supreme Court held in *Commerce Commission v Fonterra* that even if the meaning of a text appears plain in isolation of purpose, that meaning should be cross checked against purpose.[33]

49 The purpose of the PRA is to provide for the just division of relationship property between spouses or partners when their relationship ends.[34] The PRA is a code, which displaces the rules of common law and equity when relationship property is concerned.[35]

---

33 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 **at [22].**

34 PRA, **s 1M(c).**

35 PRA, **s 4.**

50 In *Reid v Reid*, Woodhouse J sets out five considerations when interpreting the PRA, which acknowledges its unique purpose and context.[36]

a. The PRA is designed to enable the just division of property when a relationship based on mutual love and commitment has ended.

b. The abandonment of a broad discretion, in favour of a presumption of equal division.

c. To achieve substantive justice and avoid uncertainty or results that will vary in cases that are really the same.

d. To move away from the emphasis on financial contributions, and acknowledge justice cannot be done by reference to "neat commercial balance sheets."

e. To acknowledge the sharing of risk and opportunity.

51 It was appropriate for the Court of Appeal to have regard to these factors as a guide for statutory interpretation. The factors support an interpretation that acknowledges the relationship of love and commitment between the parties, divides property equally between them, and provides them with the same outcome partners in a traditional contemporaneous de facto relationship would achieve, which acknowledges the non-financial contributions of the parties, and their sharing of risk and opportunity over 15 years.

52 If the appellant is successful with the appeal, the purpose of the PRA will be undermined. A person in a qualifying de facto relationship or marriage will be excluded from the PRA should they

---

36 *Reid v Reid* [1979] 1 NZLR 572 (CA) **at 580–582.**

add a third party to the relationship. He or she will be unable to make an application for division of relationship property under the PRA.

53 It would be contrary to the purpose of the PRA to deprive Lilach from the rights of a de facto partner under the PRA where her relationship with Fiona meets the test set out in 2D, solely on the basis that she and Fiona were also in a committed relationship with Brett.

54 It would also be contrary to the purpose of the PRA if the marriage between Lilach and Brett is considered to have ended when Fiona entered their relationship. That would be artificial and unjust because they did not separate.

Wider context

55 The PRA is social legislation. It should reflect contemporary social mores and be responsive to developments in society,[37] just as legislation always applies to circumstances as they arise.[38]

56 Changing social mores have properly influenced (and should continue to influence) judicial readings of the test in s 2D.[39] Relationships are becoming more diverse and this diversification is expected to continue.[40]

57 Fiona is asking the Court to adopt a restrictive and traditional view of relationships, which runs counter to the societal context in which courts are operating.

---

37 *Reid v Reid*, above n 36, **at 580**; and *Ngavaevae v Harrison* [2017] NZHC 2788 **at [45].** See also Law Commission *Dividing Relationship Property: time for a change? Te matatoha rawa tokorau – Kua eke te wa* (NZLC, SP41, 2017) **at [2.43].**

38 Legislation Act 2019, **s 11**.

39 For example, separate financial arrangements are a common feature of settled de facto or married couples: *W v L* [2017] NZHC 388, [2017] NZFLR 299 **at [31].**

40 Law Commission, above n 37, **at [4.23].**

58 The appellant's interpretation also runs into difficulty with the wider context of the PRA and relationship property legislation. One potential scenario is that a person may lawfully enter into a bigamous marriage overseas and move to New Zealand with their two wives and children. It would be possible for one party to seek a dissolution of their marriage under existing law. [41] Under the appellant's interpretation, that same party could not also seek a division of property under the PRA.

Application of New Zealand Bill of Rights Act 1990

59 Section 6 of the BORA states that wherever an enactment can be given a meaning that is consistent with rights and freedoms contained in BORA, that meaning shall be preferred to any other meaning.

60 No textual ambiguity is required.[42] The Court must interpret the PRA in a manner that is rights-consistent, unless the language of a provision is clear enough to exclude the possibility of a rights-consistent meaning. [43]

61 In the present case, there is no express exclusion of a rights-consistent meaning such as a reference to exclusive coupledom or an express exclusion of multi-partner relationships.

Unlawful discrimination

62 Section 19 of BORA provides that "everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."

---

41 If the parties were married in a country where bigamy is lawful, the New Zealand law would recognise both those marriages, refer **Family Proceedings Act 1980, s 2 definition of "marriage."**

42 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 **at [13].**

43 See also *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 **at [49].**

63 The interpretation supported by the appellants is discriminatory because:[44]

a. it creates a distinction based on a prohibited ground; and

b. the distinction causes a disadvantage.

Distinction on the ground of family status

64 The relevant prohibited ground in this case is family status, which includes:[45]

a. being married to, or being in a civil union or de facto relationship with, a particular person (s 21(l)(iii)(c)); and

b. being a relative of a particular person (s 21(l)(iii)(d)).

65 "Relative" is defined in the HRA as:[46]

> "in relation to any person, means any other person who –
>
> a. Is related to the person by blood, marriage, civil union, de facto relationship, affinity, or adoption; or
>
> b. Is wholly or mainly dependent on the person; or
>
> c. Is a member of the person's household.

66 The definition of family status is broadly cast and covers a range of human relationships.[47]

67 The focus of s 21(l)(iii)(c) and (d) is on being in a relationship with a "particular person" – whether that is a de facto relationship, an affinity, or being a member of the person's household.[48]

---

44 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 **at [55].**

45 Human Rights Act 1993 [HRA], **s 21(l)(iii).**

46 **Section 2** definition of "relative".

47 *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC) **at [152].**

48 Andrew Butler (ed) *The New Zealand Bill of Rights Act: A commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at **[17.8.33-36].** See ***Winther v Housing New Zealand Corporation* [2011] NZHRRT 18** in which the plaintiffs alleged Housing New Zealand (HNZ) unlawfully discriminated against them by serving notices requiring

68 The appellant's interpretation discriminates on the basis of family status, because it discriminates against people who are in polyamorous relationships. It excludes Lilach because she is married to a particular person (Brett), who is also in a relationship with Fiona, who is also in a relationship with Lilach.

Material disadvantage resulting from discrimination

69 This differential treatment is discriminatory as it imposes a material disadvantage or detriment to people in polyamorous relationships.[49]

70 Although equitable remedies may be available to people in polyamorous relationships, those remedies are difficult to access and less favourable than those under the PRA.

71 Prior to the 2001 amendment, although Courts had applied existing legal concepts to relationship property disputes between de facto partners, it was difficult for de facto partners to access remedies. Their entitlement to the relationship property was uncertain and awards unpredictable.[50] As the Law Commission noted:[51]

> An analysis of de facto property cases between 1986 and 1990 had found that the average division of property for women in opposite-sex de facto relationships of between three and 10 years' duration ranged from 10–40 per cent. Obtaining more than a 20–30 per cent division under this

---

them to vacate their homes on the basis of family status, being their intimate relationships with gang members. The claim did not succeed for lack of causation – the Tribunal found that any familial association between the plaintiffs and the men was not the reason (or even a material ingredient in the reason) for HNZ's decision to issue the 90 day notices. The Tribunal held the nature of the relationship was not material, rather the action was taken to terminate the connection between the men and the properties. See also ***Mikolajcyk v Plus Packaging*** (Employment Relations Authority, AA 56/10, 5136231, 10 February 2010) in which the Employment Relations Authority found the applicant was discriminated against on the grounds of family status, being that her husband was employed by a competitor of the applicant's employer.

49 See *Ministry of Health v Atkinson*, above n 44, **at [109].**

50 See for instance Peart, above n 10, **at 820.**

51 Law Commission "Dividing Relationship Property – Time for a Change?" (NZLC IP46, 2017) **at [5.11]** (footnotes omitted).

approach was described as "extremely difficult", and predicting outcomes as "somewhat of a lottery".

72 For a claim based on a constructive trust, claimants do not start from a presumptive half-share in the relationship property, "but rather from nothing".[52] Claimants must show a causal relationship between their contribution and the acquisition, preservation or enhancement of assets, and a reasonable expectation of an interest.[53] Equitable claims are focused on financial and non-financial contributions to property, whereas the PRA considers wider contributions to the relationship. These differences place a higher burden on claimants asserting entitlements under equity as compared to the PRA.

No justified or proportionate basis for infringing on rights

73 There is no justified or proportionate basis for infringing on the right to be free from discrimination on the grounds of family status. The appellant does not suggest any such basis exists, but focuses on the argument that it is the role of Parliament to recognise new relationship types.

74 In doing so, the appellant relies heavily on *Bellinger v Bellinger*.[54] In *Bellinger*, the applicant sought a declaration that s 11(c) of the Matrimonial Causes Act 1972 (UK), which provided that parties to a marriage must be "respectively male and female", could be interpreted to include transgender people under s 3 of the Human Rights Act 1998 (UK), or that s 11(c) was incompatible with articles 8 and 12 of the ECHR.

75 Not every case decided in the United Kingdom will be a useful precedent for what is possible in New Zealand for the purposes of

---

52 *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 295.
53 At 282 and 286.
54 ***Bellinger v Bellinger (Lord Chancellor Intervening)*** [2003] UKHL 21, [2003] 2 AC 467.

the s 6 exercise.[55] *Bellinger* has also been subject to criticism, in part because the House of Lords arguably showed too much deference to Parliament at the expense of individual rights, particularly where the House of Lords recognised that the statute *was* discriminatory.[56]

76 In *Bellinger,* the Court was reluctant to draw the line between male and female genders, a complex task with scientific, medical, ethical and political dimensions.[57] The recognition of non-exclusive coupledom under the PRA does not raise such complex and far-reaching issues. This is different to recognising different types of relationships. For example, in *Ghaidan v Mendoza*,[58] the House of Lords held that a same-sex partner was entitled to succeed a statutory tenancy in the name of his deceased partner under the Rent Act 1977 as if he were the husband or wife of the deceased, despite the seemingly gendered language of the relevant provision.

77 Finally, it is important to recognise that the Court should presume a statutory purpose that the application of the PRA does not breach the right to freedom from discrimination on the grounds of family status. A rights-consistent interpretation is entirely possible here, and should be adopted.

Mechanics and workability

78 Applying the PRA to multiple qualifying de facto relationships in the context of polyamorous relationship is straightforward.

---

55 *Fitzgerald*, above n 43, **at [72].**

56 Tom Hickman ***Public Law after the Human Rights Act*** (1st ed, Hart Publishing, Oxford, 2010) at 91; and Gavin Phillipson "Deference, Discretion and Democracy in the Human Rights Act Era" in *Current Legal Problems* (Oxford University Press, Oxford, 2007) at 66. Of particular importance in *Bellinger* was the fact the Government had "announced its intention to introduce comprehensive primary legislation on this difficult and sensitive topic": at [26]. Tom Hickman has postured the House of Lord's position may have been different "if the indications had been that the Government supported the law as it stood (at 94).

57 *Bellinger*, above n 54, **at [43]-[45].**

58 ***Ghaidan v Mendoza*** [2004] 2 AC 557 (HL).

79 Although the appellants challenge the workability of applying the PRA to polyamorous relationships, they do not provide examples of where it cannot be applied.

80 The starting point is that the Court has broad powers under s 25 to do justice between the parties:[59]

> **25 When Court may make orders**
>
> (1) On application under section 23, the court may—
>
> (a) make any order it considers just—
>
> (i) determining the respective shares of each spouse or partner in the relationship property or any part of that property; or
>
> (ii) dividing the relationship property or any part of that property between the spouses or partners:
>
> (b) make any other order that it is empowered to make by any provision of this Act.
>
> (2) The court may not make an order under subsection (1) unless it is satisfied,—
>
> (a) in the case of a marriage or civil union,—
>
> (i) that the spouses or civil union partners are living apart (whether or not they have continued to live in the same residence) or are separated; or
>
> (ii) that the marriage or civil union has been dissolved; or
>
> (b) in the case of a de facto relationship, that the de facto partners no longer have a de facto relationship with each other; or

---

59 W Atkin (ed) *Fisher on Matrimonial and Relationship Property* (online ed, Lexis Advance, February 2022) **at [18.12]** refers to this provision as "the primary source of jurisdiction for a global division of property between spouses and partners."

(c) that 1 spouse or partner is endangering the relationship property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings; or

(d) that either spouse or partner is an undischarged bankrupt.

(3) Regardless of subsection (2), 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.

…

81 The equal sharing presumption in s 11 provides that on the division of relationship property, each of the spouses or partners is entitled to share relationship property equally, subject to the other provisions of the PRA.

82 In a polyamorous relationship comprised of three qualifying relationships with a shared relationship property pool, s 11 gives rise to a presumption that each partner would be entitled to a 33 per cent share of relationship property.

83 As with a dyadic relationship, the presumption of equal sharing can be displaced if there is a finding of economic disparity,[60] extraordinary circumstances that make equal sharing repugnant to justice,[61] a relationship of short duration,[62] or lack of a family home.[63]

84 In the case of a s 21 agreement, there is nothing preventing parties to a polyamorous relationship entering into such agreements – and one would expect this is already taking place. Where an agreement

60 PRA, s 15.
61 PRA, s 13.
62 PRA, ss 14, 14AA, and 14A.
63 PRA, s 11B.

exists between only two of the three parties, and results in a serious injustice, the court can set aside the agreement under s 21J.[64]

Sections 52A and 52B – priority of competing claims

85 Sections 52A and 52B are designed to deal with circumstances where there are competing claims for the same items of relationship property.[65]

86 The appellants say that ss 52A and 52B are so problematic and flawed, they cannot be relied upon. Such a submission runs counter to the long-standing interpretative presumption that Courts should strive to give meaning to provisions. A conclusion that Parliament was in error must be a last resort.[66]

87 Sections 52A(2)(b) and 52B(2)(b) set out a two-step approach for dividing relationship property in contemporaneous qualifying relationships.

a. The first step (set out in ss 52A(2)(b)(i) and 52B(2)(b)(i)) requires the Court to identify which property is attributable to each partnership (but not to both), and satisfy the claims to these separate items first.

b. The second step (set out in ss 52A(2)(b)(ii) and 52B(2)(b)(ii)) is to deal with the residual property in respect of which there are competing claims. That property must be divided in accordance with "the contribution of **each de facto relationship/marriage** to the acquisition of the property" (as opposed to the contribution of *each person in the relationship* to the acquisition of the property). This will involve a judicial

64 PRA, **s 21J.**
65 As the Court of Appeal recognised at [87] and [88].
66 *R (on the application of N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin) **at [65].**

assessment of to what extent the property in question was acquired for the purpose of either relationship.

88 This two-step approach is supported by the New Zealand Law Commission Report, which is the genesis of ss 52A and 52B.

89 The draft Succession (Adjustment) Act included a provision to deal with contemporaneous partnerships. The draft provision (s 59) and its accompanying commentary confirm the approach advocated for in this submission.[67]

90 Notably, s 52A(4) clarifies that a "property order" in ss 52A and 52B means an order under ss 25–31 of the PRA, and includes a declaration under s 25(3). Thus, if only one of two contemporaneous de facto relationships has ended, and/or only one application has been made, the Court can still make orders that take into account the share of the third party. The reference to s 25(3) in s 52A demonstrates this scenario was within the contemplation of the legislature.

Why ss 52A and 52B have not been applied to date

91 The Courts are yet to apply ss 52A and 52B. But in cases where ss 52A and 52B have been considered, the case for a de facto relationship was not proven on the facts.[68] Claims under ss 52A and 52B often fail because the secondary relationship lacks the necessary level of commitment or public aspect required for a de facto relationship.

92 For example, in *Greig v Hutchison*, the issue was whether Mr Hutchinson and Ms Greig were in a qualifying de facto

---

67 Law Commission, above n 28, **at 143, [C205].**

68 See *DM v MP* [2012] NZHC 503, [2012] NZFLR 385; *Ngavaevae v Harrison*, above n 37; *Llamas v Massaar* [2017] NZHC 357, [2018] NZFLR 341; *Greig v Hutchinson* [2015] NZHC 1309, [2015] NZFLR 587.

relationship contemporaneous with the marriage of Mr and Mrs Hutchison.[69] Gendall J agreed with the Family Court that although Mr Hutchsion and Ms Greig had a longstanding business relationship and intimate relationship there was no mutual commitment to a shared life. They did not cohabit, share household duties, or present themselves outwardly as a couple.[70]

93 In *DM v MP* the Court concluded that DM had a de facto relationship with MP, while cohabiting with Ms X.[71] The Court held there was no contemporaneous relationship between DM and Ms X who did not merge their financial affairs or have the requisite mutual commitment to a shared life. Miller J commented that:[72]

> The Act contemplates, albeit indirectly, that a person may live in more than one de facto relationship at any given time. Section 52B addresses the priority of competing de facto claims, distinguishing between those cases where relationships were successive and those where they were "at some time contemporaneous". The legislation thus establishes that a couple need not "live together" to the exclusion of others. More than that, a person may live in more than one de facto relationship at any given time, so the idea of relationship in which two people "live together as a couple" must accommodate that possibility.

94 In *Ngavaevae v Harrison*, the High Court considered (in the context of an application to sustain a notice of claim) whether the applicant had an arguable case she was in a de facto relationship with the respondent, while he was married to two other women (consecutively).[73] Associate Judge Sargisson held that despite an emphasis on exclusivity in some of the case law, the PRA clearly provided for contemporaneous relationships in principle. Her

---

69 ***Greig v Hutchinson***, above n 68.

70 Mr Hutchison and Ms Greig's applied for leave to appeal to the Court of Appeal, which was refused *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905.

71 ***DM v MP,*** above n 68.

72 At [19].

73 ***Ngavaevae v Harrison***, above n 37.

Honour concluded that there was "enough flexibility in the Act and sufficient pointers to the potential future trajectory of judicial interpretation for me to be satisfied [the applicant] has an arguable case at law".[74]

Wider implications

95 The appellant overstates the wider implications of applying the PRA to qualifying polyamorous relationships.

96 The reach of the present case is limited to the relationship property context. The definition of a de facto relationship under the PRA applies to the Family Proceedings Act 1980, Administration Act 1969 and the Family Protection Act 1944, but not to most other legislation.

97 The Legislation Act 2019 contains a general definition of de facto relationship which is context specific. [75] The test requires that the parties "live together as a couple in a relationship in the nature of marriage or civil union" and states that the court determining such a question must have regard to "the context and the purpose of the law, in or for which the question is to be determined."[76]

98 The alleged difficulties referred to by the appellant do not arise solely in the context of a polyamorous relationship, but in any contemporaneous relationship (for example, where a person has a wife and a mistress) or where there is a bigamous relationship entered into overseas.

99 In any event, the difficulties are not insurmountable, particularly because the courts would be applying legislation under the rubric of coupledom. A good example of a court applying social security

74 At [61].
75 **Section 14.**
76 Section 14(1) and 14(3)(a).

legislation to a polyamorous relationship is *Williams v Secretary of the Department of Social Services*[77] in which the Australian Administrative Appeals Tribunal found that two parties in a multi-partner relationship (where all three were living in the same family home) were nevertheless living together as a couple.

100 The consequences of excluding persons in polyamorous relationships from the definition of a de facto relationship are undesirable. It would be discriminatory on the grounds of family status to exclude persons in polyamorous relationships from entitlements to post-separation maintenance, benefits, or parental leave. It would also result in a situation where the law does not reflect the reality of the relationships concerned.

Conclusion

101 Counsel for the First Respondent respectfully requests the Court dismiss the appeal.

102 Counsel certifies that these submissions are suitable for publication.

Dated 17 May 2022

N W Taefi/J E Palairet
Counsel for the first respondent

77 *Williams v Secretary, Department of Social Services* [2017] 158 ALD 311, [2017] AATA 414.