

CONTENTS

1. INTRODUCTION AND SUMMARY		1
2. FACTUAL BACKGROUND.....		5
3. STATUTORY FRAMEWORK		7
The current regime – PRA		7
Contracting out.....		8
Division on death.....		9
Default intestacy provisions.....		9
Historical legislative development and purpose of PRA regime ..		10
Parliament's intent when enacting the Amendment Act		12
<i>Default regime subordinate to contract</i>		12
<i>Preventing "double recovery"</i>		13
4. THE APPELLANTS' POSITION: CONTRACTUAL PRIMACY.....		14
Partners <i>can</i> contract out of intestacy entitlements		15
<i>The position in New Zealand</i>		15
<i>Position is confirmed by other common law jurisdictions</i>		18
<i>Section 81 disclaimers</i>		19
<i>Conclusion</i>		19
Mr Rimmer and Ms Wilton <i>did</i> contract out		19
<i>Contractual interpretation</i>		19
<i>Construction of the Agreement</i>		20
Cross-check – what if Ms Wilton had died first, intestate?		24
What if Mr Rimmer had left a will?.....		25
Application of the PRA death provisions – Choice of Option A or Option B		26
<i>Option A</i>		26
<i>Option B</i>		26
<i>Alignment with statutory scheme and purpose</i>		27
5. SUBSIDIARY CONSTRUCTION ARGUMENTS – INTERPRETATION OF CLAUSES 4.2 AND 4.4		28
6. ORDERS SOUGHT		29

MAY IT PLEASE THE COURT:

1. INTRODUCTION AND SUMMARY

- 1.1 This hearing is to take place on 17 March 2026, a decade after the passing of David Rimmer ("**Mr Rimmer**"), bar one day. The appellants, his two adult children, Nigel and Nicola Rimmer, have not received the benefit of a cent from his estate.
- 1.2 In contrast, his surviving de facto partner, Ms Wilton, the respondent, having obtained the grant of administration, has dealt with his estate to her maximum advantage and depleted the estate with her legal costs, without the agreement of the appellants or sanction of the Court.
- 1.3 The fundamental questions in this appeal are:
- (a) how contracts entered into under Part 6 (s 21) of the Property (Relationships) Act 1976 ("**PRA**" or the "**Act**") "fit" with the choice of option given to a surviving partner under Part 8 (s 61);
 - (b) whether it is possible for a surviving partner to contract out of their default rights on intestacy by a s 21 agreement; and
 - (c) whether the parties did so here.
- 1.4 These issues are important both to the parties in this case and the public generally. The interrelationship between Part 6 and Part 8 of the PRA is complex where a domestic relationship ends by death and there is the overlay of a s 21 agreement.¹ That complexity is only increased where the deceased had no will. It is estimated that around half of those aged 18 or over do not have a will.²
- 1.5 Leave to appeal has been granted in general terms. However, counsel have been asked to focus on the question of the interplay between the s 21 agreement and Ms Wilton's entitlements under the intestacy provisions of the Administration Act 1969, and to address whether, if Option B under s 61 of the PRA is elected, the surviving partner may receive their entitlements under a will or on intestacy while also relying on a s 21 agreement.³

¹ See Nicola Peart "The Election" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) at [3.1] on the tension between relationship property and succession law principles in this context.

² Law Commission *He arotake i te āheinga ki ngā rewā a te tangata ka mate ana* | *Review of Succession Law: Rights to a person's property on death* (NZLC R 145, November 2021) at [31].

³ *Rimmer v Wilton* [2025] NZSC 150 at [1] [05.0621].

- 1.6 Put simply, the appellant's case is one of contractual primacy.⁴ This is the only interpretation that vindicates the statutory purposes of respecting freedom of contract and otherwise prohibiting "double recovery" on death.
- 1.7 The appellants' advance three key propositions.
- 1.8 First, in any particular case, how the s 21 agreement "fits" with the s 61 choice of options will depend on the correct construction of the agreement (and will, if there is one), considering:
- (a) usual principles of contractual interpretation; and
 - (b) Parliament's confirmation that partners can contract out of the PRA and reach their own agreements for the classification and division of separate and relationship property.⁵
- 1.9 Second, it is possible for surviving partners to contract out of their default rights on intestacy by a s 21 agreement.⁶
- 1.10 Third, a survivor cannot receive both their relationship property entitlements and their succession (ie will or intestacy) entitlements unless expressly provided for by the s 21 agreement and / or will. If such "double dipping" were allowed, the result would be the precise outcome that s 61 was designed to prevent, with the survivor achieving potential asymmetric gains at the expense of other beneficiaries of the deceased's estate. That would be a commercially absurd outcome and should not be countenanced.
- 1.11 Therefore, the appellants submit that 21 agreements apply according to their terms following death *irrespective* of the choice made by the survivor. The selection of Option A will normally have little practical benefit and it is unlikely to be chosen by the survivor unless: (i) that is provided for in the agreement; (ii) the surviving partner seeks to have the agreement declared void under s 21F, or set aside for serious injustice under s 21J; or (iii) the s 21 agreement only captures some of the partners' property (in which case the relationship property that falls outside of the agreement may still be divided under the Act).

⁴ This is in substance the "new argument" as referred to in the Court of Appeal's decision, albeit with some refinement.

⁵ A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 10; and Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at ii.

⁶ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [6] and [18]–[20]; and *O'Donoghue v Comia* [2023] NZHC 2735 at [33].

- 1.12 Therefore, in most cases involving a s 21 agreement, Option B will be selected. Under this option, the survivor will receive their entitlements under the s 21 agreement. The survivor may also benefit under the deceased's will (in accordance with its terms) or from default intestacy entitlements, where the correct construction of the s 21 agreement makes clear that this is what the parties intended.⁷ Such "package deals" are perfectly permissible, and uphold the agreed bargain made by partners. However, partners may also, through a s 21 agreement, contract out of default rights on intestacy,⁸ with the effect that their selection of Option B will provide no entitlements beyond those set out in the s 21 agreement itself.⁹
- 1.13 Here, on the correct construction of Mr Rimmer and Ms Wilton's s 21 agreement ("**Agreement**"),¹⁰ the parties contracted out of their default rights on the other's intestacy. They did so by clearly prescribing the complete package of property the survivor was to receive on the other's death.¹¹ Given the terms of the Agreement, the respondent's entitlements are limited to her share of the relationship property as set out in the Agreement (including the right to occupy under cl 4.4, and in addition, of course, to retaining her separate property). It also follows that the respondent was not entitled to apply for letters of administration because she gave up her beneficial interest in the deceased's estate.
- 1.14 In contrast, the decisions of the lower courts have allowed Ms Wilton to over-recover by:
- (a) receiving all of Mr Rimmer's cash and bonus bonds worth about \$147,000 (preserved as his separate property under the Agreement), and one third of his half share of the proceeds of the relationship property home (being relationship property under the Agreement), plus other adjustments in her favour; and

⁷ See for example *Chambers v Chambers* [2016] NZHC 583 at [59]; and *Thurston v Thurston* [2014] NZHC 2267 at [73]–[74].

⁸ On the paramountcy of the power to contract out of the PRA, see Nicola Peart "Contracting Out of the Act" in Nicola Peart, Margaret Briggs and Mark Henaghan *Relationship Property on Death* (Brookers, Wellington, 2004) at [11.1] and [11.2]; R L Fisher *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.19] and [5.34]; and Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [34.44] ("**Law Commission Report 2017**").

⁹ Noting that s 61(3)(c) (ie Option B) provides that the survivor is only entitled to receive a beneficial interest on intestacy if they are entitled to such an interest. See also Property Relationships Forms Regulations 2001, sch 2 (Notice of choice of Option A or Option B). This notice requires the survivor to agree, if they elect Option B, to receive "any property to which [they are] entitled as a *beneficiary*", indicating Parliament recognised the survivor may not always have such an entitlement.

¹⁰ Agreement between Caroline Mary Wilton and David Robert Rimmer dated 6 June 2002 ("**Agreement**") **[[301.001]]**.

¹¹ Agreement, cls 4.1 and 4.4 **[[301.001]]** at **[[301.004]]**.

(b) preserving for her own benefit all her contractual entitlements, while the protections for Mr Rimmer / his estate are undone.

1.15 This gives Ms Wilton far more than she would have been entitled to had inter vivos separation and division in accordance with the Agreement (or the Act) occurred (which would have resulted in preservation of her separate property, and her share of the relationship home, according to capital contributions (cl 4.2)).

1.16 The outcome for the respondent on the Court of Appeal's approach, as against the appellants' position, is as follows:

Approach	Outcome for the respondent
<p>Court of Appeal decision</p>	<p>What does the respondent receive / retain per the Agreement?¹²</p> <ul style="list-style-type: none"> • Her separate (incl pre-relationship) property. • Her half share of the Hunua Property (50% of sale proceeds is \$599,335.21), plus adjustments claimed by the respondent for greater capital contributions (cl 4.2). • The right of occupancy of the Hunua Property from date of death (18 March 2016) until sale (31 May 2021), she then claims an occupancy right in the estate's share of sale proceeds (cl 4.4). <p>What are the default intestacy entitlements for the respondent?¹³</p> <ul style="list-style-type: none"> • Chattels, etc. • \$155,000. • One-third of the residue estate (\$199,778.40). <p>Total: \$954,113.61 to the respondent in addition to separate property plus value attributable to the right of occupancy plus chattels, and her claimed cl 4.2 adjustments.</p> <p><u>In contrast</u>, the appellants receive \$199,778.40 each.¹⁴</p>
<p>Appellants' position</p>	<p>Respondent receives / retains <i>only</i> per the Agreement.</p> <p>Total: \$599,335.21 to the respondent in addition to her separate property plus value attributable to the right of occupancy.¹⁵</p> <p><u>In contrast</u>, the appellants receive \$368,783.64 each,¹⁶ without the respondent's claimed cl 4.2 adjustments.¹⁷</p>

¹² Agreement, cl 4.4 **[[301.001]]** at **[[301.005]]**. Ms Wilton in fact appears to intend to retain 68 per cent of the proceeds of the Property (\$818,691.61), despite the proportional division of relationship property under cl 4.2 only applying on separation, not death **[[301.004]]**.

¹³ Administration Act 1969, s 77; and Administration (Prescribed Amounts) Regulations 2009, r 5.

¹⁴ Administration Act 1969, s 77. The total value of the residue estate is 50 per cent of the Hunua property sale proceeds (\$599,335.21) plus the cash distributions of \$138,232.06 (*Rimmer v Wilton* [2025] NZCA 374 at [12] **[[05.001]]** at **[[05.005]]**), minus the prescribed amount the survivor is entitled to under r 5 of the Administration (Prescribed Amounts) Regulations 2009 (\$155,000), which comes to \$582,567.27 (or \$199,778.40 for each of the Appellants, following division into thirds).

¹⁵ This figure assumes the Supreme Court agrees with the appellants' position that cl 4.2 adjustments apply on inter vivos separation only, not on death.

¹⁶ This comprises of 50 per cent of the Hunua Property sale proceeds (\$599,335.21) plus the cash distribution of \$138,232.06 and is divided equally between the appellants under s 77 of the Administration Act 1969 because, on the terms of the Agreement, the respondent does not have a beneficial interest in the deceased's estate **[[301.001]]** at **[[301.005]]**.

¹⁷ At trial, after these adjustments, the respondent claimed the appellants were to receive just \$120,070 each (Letter from Insight Legal to Mr Rimmer's estate regarding "Distribution Statement Nigel Rimmer" dated 22 July 2021 **[[301.035]]**), later increased to \$166,751 each (Letter from Insight Legal to RMF Lawyers regarding "Estate of David Rimmer" dated 2 December 2021 **[[301.038]]** at **[[301.041]]**).

- 1.17 It is submitted that the subsidiary construction arguments arising under cl 4 of the Agreement should also be addressed in this Court, in the interests of saving the parties the time and cost of achieving final resolution.
- 1.18 The remainder of these submissions is structured as follows:
- (a) section two – the factual background;
 - (b) section three – the statutory framework;
 - (c) section four – the appellants' principal submissions;
 - (d) section five – subsidiary construction arguments arising under cl 4 of the Agreement; and
 - (e) section six – the orders sought.

2. FACTUAL BACKGROUND

- 2.1 The parties proceeded in the High Court on the basis of an agreed statement of facts.¹⁸ The appellants, Nigel and Nicola Rimmer, are the adult children of Mr Rimmer. Mr Rimmer and the respondent, Ms Wilton, commenced living together in a de facto relationship in September 2000.¹⁹ They purchased 99 Moumoukai Road, Hunua ("**Hunua Property**") on 18 January 2002 as tenants in common in equal shares. On 6 June 2002, Mr Rimmer and Ms Wilton entered into the Agreement pursuant to s 21 of the PRA.²⁰
- 2.2 The Agreement covers all of the parties' property, including future property.²¹ It specifies certain property (effectively everything save for the Hunua Property) to be, respectively, the separate property of Ms Wilton or Mr Rimmer (listed in Schedule A and Schedule B). The Hunua Property is specified as relationship property.²² Provision is made for the division of relationship property, including the Hunua Property, on separation (cls 4.2 and 4.3) and death (cl 4.4). On death, the survivor is granted the "right to lifetime occupancy and use of all relationship property" (cl 4.4). A standard "full and final" settlement clause is included, covering claims that either party might have against the other "under any statute whatsoever or at common law or equity" (cl 5.1). The parties also agree to make "no demand" on the other's separate property

¹⁸ Statement of facts agreed upon by the parties pursuant to r 9.57 of the High Court Rules 2016 dated 18 May 2023 ("**Statement of Agreed Facts**") **[[201.001]]**.

¹⁹ Statement of Agreed Facts at [1] **[[201.001]]** at **[[201.002]]**.

²⁰ Statement of Agreed Facts at [2] **[[201.001]]** at **[[201.002]]**.

²¹ Agreement, Background E and cls 2 and 4 **[[301.001]]** at **[[301.002]]**.

²² Which, as the family home, it would have been even without the Agreement.

(cl 2.1). The Agreement is binding on the parties' executors, administrators and personal representatives (cl 6.1).

- 2.3 The terms of the Agreement are returned to in greater detail below, but it largely tracks with what would have been the default division of property under the PRA, save for preventing claims for the increase of value of separate property and commingling claims, the (non-PRA) creation of the right to occupy per cl 4.4, and the cl 4.2 capital contribution adjustments.
- 2.4 Mr Rimmer died intestate on 18 March 2016. On 28 April 2016, the respondent elected Option B under s 61.²³
- 2.5 On 25 May 2016, the respondent was appointed administrator of Mr Rimmer's estate.²⁴ She transferred Mr Rimmer's half share of the Hunua Property to herself as administrator on 17 June 2016.²⁵
- 2.6 After covering expenses, the respondent had, as at the date of the High Court hearing, paid herself a total of \$138,232.06.²⁶ This is understood to be payment towards the default entitlements for surviving partners under the Administration Act (those entitlements being a payment of \$155,000, plus a third of the residual estate). Ms Wilton has also taken distribution of all of Mr Rimmer's personal chattels.²⁷
- 2.7 The extent to which Ms Wilton has made further payments to herself from the proceeds of the sale of the Hunua Property, which occurred on 31 May 2021, is not presently known by the appellants. Until the date of that sale, Ms Wilton relied on the right to occupy to live at the Hunua Property rent free.²⁸
- 2.8 From documents provided by Insight Legal on 3 December 2025, it appears that Ms Wilton / her lawyers have paid all their fees from the estate funds held without any consultation with the appellants or their lawyers, or a *Beddoe* order. Their accounting is unclear and difficult to follow, but it appears that, on their calculations, the estate was worth:
- (a) cash, bonus bonds, interest (to 29 June 2016):
\$147,444.16;²⁹

²³ Respondent's notice of choice by surviving de facto partner dated 28 April 2016 **[[301.011]]**; and *Rimmer v Wilton* [2025] NZCA 374 at [10] **[[05.001]]** at **[[05.004]]**.

²⁴ Statement of Agreed Facts at [8] **[[201.001]]** at **[[201.003]]**.

²⁵ *Rimmer v Wilton* [2025] NZCA 374 at [12(b)] **[[05.001]]** at **[[05.005]]**.

²⁶ Statement of Agreed Facts at [10(c)(i)] and [10(d)] **[[201.001]]** at **[[201.003]]**.

²⁷ Statement of Agreed Facts at [10(a)] **[[201.001]]** at **[[201.003]]**.

²⁸ *Rimmer v Wilton* [2025] NZCA 374 at [12(c)] **[[05.001]]** at **[[05.005]]**.

²⁹ Letter from Insight Legal to Mr Rimmer's Estate regarding "IBD Transaction Statement" dated 3 December 2025 **[[301.068]]**.

(b) sale proceeds (adjusted per cl 4.2 (disputed)): \$522,020.96;³⁰ and

(c) total: \$669,465.13,

(or \$147,444.16 + \$599,335.21 (if Moumoukai is unadjusted, ie at 50%) = \$746,779.37).

2.9 On these calculations the appellants were to receive \$166,751 each.³¹ According to an administration statement dated 3 December 2025, after anticipated Supreme Court costs, the estate balance available for division between the beneficiaries is down to \$369,805.83 – or just \$123,268.61 for each of Mr Rimmer's two children.³² This is against the appellants' calculation of their entitlements as \$373,389.65 each, less estate administration costs. Clearly, if this appeal succeeds, there will need to be consequential orders for accounting and reimbursement by Ms Wilton.

3. STATUTORY FRAMEWORK

The current regime – PRA

3.1 The PRA governs how the property of married couples, civil union couples and couples who have lived in a de facto relationship is divided upon their separation or one partner's death.³³ The word "partner" is used for all relationship types in these submissions for ease of reference.

3.2 The starting position under the PRA is that all property set out in ss 8 and 9A, being the property most closely connected to the partnership, is "relationship property".³⁴ Given a key principle underlying the Act is that all forms of contribution to a partnership are to be treated as equal,³⁵ the Act provides for relationship property to normally be divided equally between the partners (or between the survivor and the deceased's estate) on separation or death.³⁶ The paradigm example of relationship property is the family home.³⁷

³⁰ Insight Legal "reconciliation as to accrued interest and \$142,042.16 journalled back" document (undated) **[[301.070]]**.

³¹ Letter from Insight Legal to RMF lawyers re "Estate of David Rimmer" dated 2 December 2021 **[[301.038]]** at **[[301.040–031.041]]**; and Statement of Capital Contributions to Property at 99 Moumoukai Road, Hunua **[[301.042]]**.

³² Letter from Insight Legal to Mr Rimmer's Estate regarding "Administrative Statement" dated 3 December 2025 **[[301.066]]**.

³³ Property (Relationships) Act 1976, s 1C.

³⁴ Property (Relationships) Act 1976, ss 2, 8, 9A and 10(2).

³⁵ Property (Relationships) Act 1976, s 1N(b). See also Department of Justice *Matrimonial Property Bill: Report of Department of Justice* (4 October 1976) ("**DoJ Report 1976**") at 1–2.

³⁶ Property (Relationships) Act 1976, ss 11 and 13; and *Alaläkkölä v Palmer* [2024] NZCA 24, 2 NZLR 80 at [31].

³⁷ Property (Relationships) Act 1976, s 8(1)(a).

- 3.3 "Separate property" is defined negatively in s 9 as property that is not captured by the Act's definition of "relationship property".³⁸ Partners usually retain their own "separate property" on separation or death.³⁹ A common example is property that one partner brings to a relationship (eg an existing share portfolio).
- 3.4 Broadly speaking, then, on separation or death, a partner will keep their separate property and take a half share of the relationship property. There are, however, complex provisions in the PRA that permit one partner to receive a greater share of the relationship property or some of the other partner's separate property in a number of circumstances (eg where that separate property has been sustained by the application of relationship property).⁴⁰ As a result, the PRA has been described in leading commentary as providing only "limited protection" to pre-relationship assets, or third-party gifts or inheritances.⁴¹
- 3.5 The Act is also something of a "Procrustean bed", assuming a (presumably young) couple with limited assets coming together to build a joint asset pool over time.⁴² For that reason, "contracting out" is common, particularly for marriages or relationships later in life and where there are children from an earlier relationship. That, in turn, allows for greater protection of pre-existing assets or third-party gifts for those existing children and others.⁴³

Contracting out

- 3.6 Provided that the formalities are complied with (s 21F), s 21 permits partners to "make any agreement they think fit with respect to the status, ownership, and division of their property (including future property)".⁴⁴ That is, rather than use the default provisions of the PRA, they can categorise and divide property as they wish by way of contract. Such agreements typically contain clauses and schedules setting out all property the partners agree to be "relationship property" and "separate property", and confirm how that property is to be divided.⁴⁵

³⁸ Property (Relationships) Act 1976, ss 2 and 9; and Nicole Peart, Margaret Briggs and Mark Henaghan *Relationship Property: Consolidated Legislation and Analysis* (Brookers, Wellington, 2001) at 19.

³⁹ *Alalääkkölä v Palmer* [2024] NZCA 24, 2 NZLR 80 at [31].

⁴⁰ Property (Relationships) Act 1976, s 17. See also ss 9A, 15, 15A, 16 and 17A.

⁴¹ R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.21].

⁴² R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.20].

⁴³ R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.20] and [5.22].

⁴⁴ As was recognised by the Court of Appeal: see *Rimmer v Wilton* [2025] NZCA 374 at [37] **[[05.001]]** at **[[05.012]]**. See also the Property (Relationships) Act 1976, ss 21(1) and 21O.

⁴⁵ See, for example, R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [30.1] (template pre-relationship property agreement covering all assets).

- 3.7 The contract created is simply that; its terms are not given positive statutory force (as distinct from the treatment of spouses' common intentions under s 6(2) of the Matrimonial Property Act 1963) but take effect according to ordinary contractual principles.⁴⁶ The PRA simply "superimposes on a conventional contract special provisions as to form, procedure, consideration and avoidance".⁴⁷ There is nothing in the Act preventing parties from incorporating other matters outside the PRA within their contract, such as (as here) a right of lifetime occupancy.

Division on death

- 3.8 Part 8 of the PRA is concerned with the division of property when a spouse or partner dies. Section 61 provides:

61 Surviving spouse or partner may choose option

- (1) If one of the spouses or partners has died (except in a situation described in section 10D(1)), the surviving spouse or partner may choose option A or option B.
- (2) Option A is to elect to make an application under this Act for a division of the relationship property.
- (3) Option B is as follows:
 - (a) to elect not to make an application under this Act for a division of the relationship property; and
 - (b) if the surviving spouse or partner is a beneficiary under the will of the deceased spouse or partner, to receive that property; and
 - (c) if the surviving spouse or partner is entitled to a beneficial interest on the intestacy or partial intestacy of the deceased spouse or partner, to receive that interest.

- 3.9 There are then a number of other provisions in Part 8 that govern the requirements for making a choice and the consequences of the choice made. These are returned to below.

Default intestacy provisions

- 3.10 As to the intestacy provisions, s 77 of the Administration Act provides that if a person dies intestate leaving a partner and children, then their partner receives the deceased's personal chattels, the prescribed amount (\$155,000) plus interest, and a one-third share of the residue of the deceased's estate.⁴⁸ The children receive two thirds of the residue.

⁴⁶ R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.38].

⁴⁷ R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.38].

⁴⁸ Administration Act 1969, s 77; and Administration (Prescribed Amounts) Regulations 2009, r 5.

- 3.11 If a separation order is in place, a surviving partner has no rights on intestacy.⁴⁹ Nor do the default intestacy entitlements apply to surviving de facto partners where the relationship was of short duration.⁵⁰
- 3.12 Whilst there is no express provision in the Administration Act recognising parties may contract out of default intestacy entitlements, it is submitted that this is a logical extension of these recognised exceptions to the default regime, as discussed further at paragraph 4.20 below.

Historical legislative development and purpose of PRA regime

- 3.13 The Matrimonial Property Act 1976 (which was renamed the PRA in 2001) was enacted to provide for the equal sharing of relationship property between spouses upon separation. Historically, matrimonial property legislation in New Zealand took the "contributions" approach of "I pay for I own".⁵¹ This was recognised by Parliament and the public alike as unfair and incompatible with the fact that marriage is an equal partnership between two people who often contribute in different ways.⁵² Historically, this would often involve the husband as "breadwinner" and wife as "homemaker" and primary caregiver for the couple's children.⁵³
- 3.14 Parliament enacted the Matrimonial Property Act 1976 to give effect to the widely accepted policy position that "the income earning contribution [to the relationship] is not to be regarded as having greater worth or value than contributions in other forms".⁵⁴
- 3.15 However, Parliament made clear that the "general approach" of equal sharing was "*subordinate* to the freedom of the husband and wife, subject to proper safeguards, to regulate their property relations in whatever way they think fit".⁵⁵ Spouses' freedom to contract and to arrange their financial affairs in the manner that best suited them was recognised to be of paramount importance.⁵⁶

⁴⁹ Family Proceedings Act 1980, s 26; and Administration Act 1969, s 77A.

⁵⁰ Administration Act 1969, s 77B; and Property (Relationships) Act 1976, s 2.

⁵¹ A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 4. This, in turn, having been an improvement on the position at common law, where a woman was incapable of owning or disposing of any property for the duration of a marriage.

⁵² Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection 1988* (October 1988) at 3.

⁵³ A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 4–5; and DoJ Report 1976 at 2.

⁵⁴ DoJ Report 1976 at 1. See also A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 10.

⁵⁵ A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 10.

⁵⁶ DoJ Report 1976 at 10; and Matrimonial Property Bill 1976 (125–1) (explanatory note) at i.

Parliament accordingly enacted s 21 of the Matrimonial Property Act 1976 alongside the equal-sharing provisions, which allowed spouses to contract out of the Act's provisions and "make any agreement they think fit with respect to the status, ownership, and division of their property (including future property)".⁵⁷

- 3.16 When first enacted, the Matrimonial Property Act 1976 only applied during a couple's joint lifetimes (and only applied to married couples). On death, the survivor had to rely on the earlier Matrimonial Property Act 1963, which remained in force for this limited purpose and often left the survivor in a worse position. However, following the recommendations of the Working Group on Matrimonial Property and Family,⁵⁸ the Matrimonial Property Amendment Bill 1998 was introduced, proposing that the PRA be extended to apply on the death of one spouse.⁵⁹ In parallel, the government introduced the De Facto Relationships (Property Bill) 1999 to extend the PRA's application to both heterosexual and same-sex de facto couples.⁶⁰
- 3.17 These two bills were then combined into one, and in 2001, Parliament enacted the Property (Relationships) Amendment Act 2001 ("**Amendment Act**"), which brought these changes into force, in addition to giving the Act its new (current) name.⁶¹ Section 21(2) was modified to make clear that contracting out agreements are binding when one partner dies, and Part 8 (which includes s 61) was introduced, setting out how property is to be divided under the Act where one partner dies.
- 3.18 Finally, in 2005, the PRA was amended again to bring civil union partners within its ambit.⁶²
- 3.19 The Law Commission has published several reports noting that the Amendment Act is not perfect, and the division of relationship property on death complex.⁶³ At present, there is no planned legislative reform in this area. Therefore, it is important that any guidance provided to practitioners is clear and easily applicable in everyday estate planning and advice to surviving partners, beneficiaries and claimants throughout New Zealand.

⁵⁷ Property (Relationships) Act 1976, s 21(1).

⁵⁸ Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection 1988* (October 1988) at 77–82 in particular.

⁵⁹ Matrimonial Property Amendment Bill 1998, cl 1B.

⁶⁰ See also Property (Relationships) Act 1976, s 1M(b).

⁶¹ Property (Relationships) Amendment Act 2001.

⁶² Property (Relationships) Amendment Act 2005.

⁶³ Law Commission Report 2017, chapters 34 and 35; and Law Commission *He arotake i te āheinga ki ngā rewa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at [4.81]–[4.97].

Parliament's intent when enacting the Amendment Act

Default regime subordinate to contract

- 3.20 That the default statutory equal-sharing regime remained subordinate to the contracting out regime was made clear in the Parliamentary materials for the Amendment Act. The explanatory note to the Matrimonial Property Amendment Bill 1998 stated that the PRA's extension to apply on the death of a partner "will not affect the existing rights of the spouses to... contract out of the rules that would apply on death".⁶⁴
- 3.21 The Justice and Electoral Committee explained that contracting out was even more important under the Amendment Act, because the regime would now apply to a broader range of relationships.⁶⁵ This, the Committee noted, necessitated an amendment to s 21J, raising the standard for a court to set aside a relationship property agreement from "injustice" to "serious injustice".⁶⁶ The Committee stated that this higher threshold was necessary as de facto couples were to be brought within the Act's ambit. If "the procedural requirements [to execute a s 21 agreement] are met, there should be reasonable certainty that [these] agreements will be upheld".⁶⁷
- 3.22 The paramountcy of s 21 agreements also emerges through Parliamentary debates. Member of Parliament Clem Simich stated that contracting out provisions "must be there because people need to have a way of negating legislation... there are many people who will not want a statute telling them how they should... divide their property".⁶⁸ Other Parliamentarians stated "[i]t is important that couples know they also have the option of contracting out of this regime"⁶⁹ and stressed the importance of s 21 agreements for de facto partners because they have not actively contracted *for* equal-sharing through marriage.⁷⁰
- 3.23 Courts and jurists commenting on the Amendment Act have also affirmed this subordination of the statutory regime and the ability to "opt out".⁷¹ As Simon France J observed in *Wells v Wells*: "the

⁶⁴ Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at ii. See similarly Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection 1988* (October 1998) at 47; and Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at xiii.

⁶⁵ Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1999 (109-3) ("**SOP 109-3**") at 21.

⁶⁶ SOP 109-3 at 21.

⁶⁷ SOP 109-3 at 21.

⁶⁸ (5 May 1998) 567 NZPD 8229 (Clem Simich MP).

⁶⁹ (5 May 1998) 567 NZPD 8239 (Hon Deborah Morris).

⁷⁰ (6 May 1998) 567 NZPD 8277 (Neil Kirton MP).

⁷¹ *Wells v Wells* [2006] NZFLR 870 (HC) at [38]; *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [82] and [91]; and Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813 at 825.

legislation itself, and the legislative history, indicates a desire to respect the capacity of persons to contract out of the Act... the whole statutory scheme was based in part on recognition that people could opt out – it was an integral feature of its public legitimacy."⁷²

Preventing "double recovery"

3.24 Another important policy goal when enacting the Amendment Act was preventing double recovery by survivors. That is, Parliament was careful to prevent "double dipping", with survivors receiving both relationship property entitlements and succession entitlements (ie what was provided under a will or on intestacy).⁷³

3.25 As the Ministry of Justice stated, s 61 of the PRA:⁷⁴

[W]as adopted to avoid the possibility of "double dipping" – in other words to prevent a survivor receiving far more property than a testator intended... If the survivor is entitled to take the statutory entitlement plus half of the testator's remaining share under the will, the survivor will receive considerably more property than intended by the testator, possibly to the detriment of other beneficiaries.

3.26 The prohibition on double recovery is seen most starkly in s 76,⁷⁵ by which Parliament deliberately barred "stacking" of relationship property and succession entitlements. Section 76 provides that by electing Option A, every gift to the surviving partner in the deceased's will is revoked unless the will expresses a contrary intention, and the surviving partner will have no entitlement under Part 3 of the Administration Act 1969.⁷⁶ The Select Committee stated this strict restriction on receiving both relationship property and inheritance entitlements "was adopted to prevent a surviving spouse receiving more property than a testator intended".⁷⁷ Doug Graham MP similarly stated that the general prohibition on

⁷² *Wells v Wells* [2006] NZFLR 870 (HC) at [38].

⁷³ Ministry of Justice *Matrimonial Property Amendment Bill Departmental Report Clause by Clause Analysis* (2 March 1999) at 44; Matrimonial Property Amendment Bill 1999 (109-2) (select committee report) at iv; Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at ii; and (26 March 1998) 567 NZPD 7918 (Hon Doug Graham). This approach is nothing new. It reflects the equitable maxim that "a person cannot both approbate and reprobate" by simultaneously accepting entitlements under the deceased's will and rejecting those entitlements to receive additional property outside of the will. See *Halsbury's Law of Canada* (online looseleaf ed, LexisNexis) at [7(4)(a)]. See also *Grant v Hersen* (1999) 43 OR (3d) 421 (ONCA).

⁷⁴ Ministry of Justice *Matrimonial Property Amendment Bill Departmental Report Clause by Clause Analysis* (2 March 1999) at 44 discussing s 58 (now s 61). See also 39.

⁷⁵ Referred to as cl 73 at the time the Matrimonial Property Amendment Bill 1999 was being debated.

⁷⁶ Property (Relationships) Act 1976, s 76.

⁷⁷ Matrimonial Property Amendment Bill 1998 (109-2) (select committee report) at iv.

receiving will entitlements under Option A was necessary because this pathway simply extends the sharing rules to apply on death.⁷⁸

4. THE APPELLANTS' POSITION: CONTRACTUAL PRIMACY

4.1 The appellants submit that the respondent has contracted out of her intestacy entitlements by way of the Agreement. This submission is advanced through three propositions:

- (a) First, partners are able to contract out of the default regime in s 77 of the Administration Act pre-death.
- (b) Second, Mr Rimmer and Ms Wilton *did* contract out of their default intestacy entitlements. The clear intent of the Agreement was to deal finally with their respective property interests on inter vivos separation and on death.
- (c) Third, following Mr Rimmer's death, Ms Wilton retained the choice provided for in s 61 of Option A or Option B. Option A would have been the logical choice had Ms Wilton intended to apply for orders setting the Agreement aside on serious injustice grounds, or in the event the Agreement did not cover all of the parties' property (neither of which applies here). Option B would have been the logical choice had Ms Wilton wished to take her entitlements on intestacy (though, in the present case, the terms of the Agreement mean Ms Wilton has no such entitlement). The reality is that, with a s 21 agreement on these terms, the practical effect of either option is likely to be very similar. The appellants submit that this result is the best fit for the statutory language, and best achieves the purpose of the PRA death provisions.

4.2 The respondent has contracted out of her intestacy entitlements and elected Option B. Therefore, her entitlements are limited to her share of the relationship property as set out in the Agreement (in addition to retaining her separate property), and her cl 4.4 occupancy right.

4.3 The appellants observe that, had Mr Rimmer left a will that expressly provided for Ms Wilton, then she *may* have been entitled to inherit under that will in addition to receiving entitlements under the Agreement. However, whether that was so would depend on

⁷⁸ (26 March 1998) 567 NZPD 7918 (Hon Doug Graham). The court does, however, retain the ability to award a surviving partner additional entitlements from a will or intestacy, if that is "necessary to avoid injustice" (s 77).

the precise terms of the will and the s 21 agreement, and decisions made by the respondent following Mr Rimmer's death, so cannot be answered definitively either way.

Partners can contract out of intestacy entitlements

The position in New Zealand

- 4.4 The principle that partners can contract out of intestacy laws is well established in Canada, and the subject of conflicting authority in New Zealand.
- 4.5 The respondent agrees at least in principle that intestacy rights can be contracted out of.⁷⁹ The Court of Appeal (at least implicitly) also accepted this was permissible, although this does not neatly sit with that Court's observations that distribution in accordance with the s 77 default rules is, by use of the word "must", mandatory.⁸⁰ Respectfully, the appellants submit "must" can be read subject to an earlier agreement reached by a survivor contracting out of this beneficial interest, as discussed further below at paragraph 4.20. This aligns with the conditional language of "if" in s 61(3), which confirms that not all survivors will have a beneficial interest.
- 4.6 In any event, the Court of Appeal's judgment failed to address any of the relevant authorities, including the leading decision, *Warrender v Warrender*.⁸¹ The analysis of Woodhouse J in *Warrender v Warrender* is compelling.
- 4.7 The Court considered it instructive that there was no statutory prohibition on contracting out of s 77 of the Administration Act.⁸² Absent such a prohibition, there was no general rule of law preventing parties from contracting out of statutory provisions.
- 4.8 As a result, the Court looked to whether there was any policy basis to prevent contracting out. It concluded that policy instead supported the ability of parties to contract out. The Court reasoned that:⁸³

The law, in general, provides wide freedom to deal with property rights. This includes contracting out of rights which may be available from a range of sources, both statutory and non-statutory. The fact that property rights are regulated in numbers of ways, through statute and the common law, does not derogate from the general freedom that underpins the law in relation to

⁷⁹ Respondent's Court of Appeal Submissions at [4.21] **[[101.045]]** at **[[101.057]]**.

⁸⁰ *Rimmer v Wilton* [2025] NZCA 374 at [61], [46]–[48] **[[0.5001]]** at **[[05.016]]**.

⁸¹ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 (Woodhouse J).

⁸² *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [18].

⁸³ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [19].

private property rights as a whole. There does not appear to be any reason to elevate the statutory right of succession provided by s 77, being a provision dealing with the distribution of private property, above the more fundamental right to choose not to receive a benefit.

- 4.9 The Court's general conclusions were reinforced by the particular purpose of s 77, being a default provision in place to avoid difficulties that might otherwise occur.⁸⁴ Disposition is determined by reference to status. A statutory system based on "fairly arbitrary" provisions of this nature was not one that suggested it would be contrary to policy to permit contracting out.⁸⁵
- 4.10 On the terms of the contract at issue in *Warrender v Warrender*, the Court held that the survivor had contracted out of her entitlements on intestacy, such that she no longer had priority under rule 27.35 of the High Court Rules 2016 ("**HCR**") to apply for letters of administration.⁸⁶
- 4.11 The respondent in this case sought to distinguish *Warrender v Warrender* before the Court of Appeal on the basis it concerned a separation agreement entered into at the end of the relationship, whereas the Agreement here was entered into at the beginning of the relationship.⁸⁷ This distinction does not withstand scrutiny. The underlying principle – freedom to contract out of a right – applies with equal force irrespective of when the agreement was entered into.
- 4.12 The weight afforded to contractual freedom in *Warrender v Warrender* aligns with the approach of New Zealand courts to freedom of contract more generally. As this Court has noted: "[o]ne of the organising principles of the law of obligations is freedom of contract".⁸⁸ The "parties are free to contract as they please and the courts will enforce that bargain" unless the agreement is forbidden by statute or unenforceable at common law.⁸⁹ Similarly, the authors of *Chitty on Contracts* state:⁹⁰

⁸⁴ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [20].

⁸⁵ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [20].

⁸⁶ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [41]. See also High Court Rules 2016, r 27.35(4); Greg Kelly, Chris Kelly, John Earles and Kevin Lenahan *Dobbie's Probate and Administration Practice* (7th ed, LexisNexis, Wellington, 2025) at [29.3.2]; and Laura O'Gorman (ed) *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [HCR27.35.3].

⁸⁷ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [2].

⁸⁸ *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] 1 NZLR 179 at [57].

⁸⁹ *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] 1 NZLR 179 at [57]. See similarly *Almata Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA) at [56] citing *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

⁹⁰ Hugh Beale *Chitty on Contracts* (34th ed, Sweet & Maxwell, 2021) at [2-005]. See also [2-001] and [2-004]. See also Ronan Feehily and Raymond Tong *An Introduction to the Law of Contract in New Zealand* (7th ed, Thomson Reuters, Wellington, 2024) at [1.1.3]; Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022)

...the general rule is that parties may choose whether or not to conclude a contract, the content and terms of any contract which they do agree, and that, unless one of the specific grounds of invalidity...is established, any concluded contract binds the contracting parties, despite any arguable resulting unreasonableness or subsequent change of circumstances.

- 4.13 The appellants accept that there is High Court authority to the contrary, in the form of *Re Trotter*⁹¹ and *Re Storm / Re Baker*.⁹² The appellants submit that these decisions can be safely distinguished and put to one side:
- (a) In *Re Trotter*, it does not appear there was any argument from counsel about the ability to contract out, and the Judge did not even refer to s 77 in his analysis.⁹³
 - (b) In *Re Storm / Re Baker*, an undefended decision on the papers, the Judge simply relied on the analysis in *Re Trotter* to conclude that the surviving spouse continued to enjoy a beneficial interest (which was in fact *obiter* as the survivor had no interest in acting as administrator).⁹⁴
- 4.14 The High Court in *O'Donoghue v Comia* recently considered the apparent High Court split in this area and adopted the analysis of Woodhouse J from *Warrender v Warrender* in preference to that of *Re Storm*.⁹⁵ Associate Judge Brittain made particular mention of the learned authors of *Dobbie's Probate and Administration* who suggest "that all that is required to contract out of a beneficial interest in the deceased's estate is an agreement which deprives the survivor of any interest in the deceased's property".⁹⁶
- 4.15 This ability to contract out is universally recognised in the leading textbooks in the area,⁹⁷ and the majority of submissions on the Law Commission's recent review of succession law agreed that this form of contracting out should be available.⁹⁸

at 19 and 220; and J W Carter and John Ren *Carter's Guide to New Zealand Contract Law* (LexisNexis, Wellington, 2016) at [1-21].

⁹¹ *Re Trotter* HC Christchurch CIV-2009-409-2584, 10 May 2010 (Panckhurst J).

⁹² *Re Storm* [2018] NZHC 742 (Whata J).

⁹³ *Re Trotter* HC Christchurch CIV-2009-409-2584, 10 May 2010 at [10]–[13] as discussed in *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [32].

⁹⁴ *Re Storm* [2018] NZHC 742 at [7]–[9].

⁹⁵ *O'Donoghue v Comia* [2023] NZHC 2735 at [33].

⁹⁶ *O'Donoghue v Comia* [2023] NZHC 2735 at [28] citing Greg Kelly, Chris Kelly, John Earles and Kevin Lenahan (eds) *Dobbie's Probate and Administration Practice* (6th ed, LexisNexis, Wellington, 2014) at [29.3.1].

⁹⁷ Greg Kelly, Chris Kelly, John Earles and Kevin Lenahan (eds) *Dobbie's Probate and Administration Practice* (7th ed, LexisNexis, Wellington, 2025) at [29.3.2]; William M Patterson *Wills and Succession* (online ed, LexisNexis) at [8.2]; William M Patterson "Rights of Surviving Spouse" in Hon Justice A Tipping (ed) *The Laws of New Zealand* (online ed, LexisNexis) at [479]; and C H Sherrin and R C Bonehill *The Law and Practice on Intestate Succession* (3rd ed, Sweet & Maxwell, London, 1987) at [17–040] and [17–041].

⁹⁸ Law Commission *Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at [10.30] and [10.39].

Position is confirmed by other common law jurisdictions

- 4.16 Several other common law jurisdictions have affirmed that freedom to contract should prevail over default intestacy laws.
- 4.17 Notably, the Supreme Court of Canada in *Stern v Sheps* confirmed that partners can contract out of intestacy rights through a relationship property agreement.⁹⁹ The Supreme Court's (and other Canadian courts¹⁰⁰) reasoning echoes that in *Warrender v Warrender*, affirming the orthodoxy of this position. The Court ruled there was nothing in the relevant intestacy legislation, the Dower Act of 1954, that showed the legislature intended to interfere with the wide freedom of partners to contract out of benefits under that Act.¹⁰¹
- 4.18 *Stern v Sheps* has been endorsed more recently by Canadian courts, and numerous other courts have reached the same conclusion.¹⁰² For example, in *Re Rist* the Alberta Supreme Court determined that a partner can forfeit their rights to their partner's intestacy by "an express or implied agreement".¹⁰³ This passage of *Re Rist* was endorsed by the High Court in *Warrender v Warrender*.¹⁰⁴
- 4.19 Historically, both the United Kingdom and Australia recognised the ability to contract out of intestacy rights.¹⁰⁵ However, the statutory framework in both countries now significantly differs from New Zealand. In the United Kingdom, relationship property agreements are a creature of the common law not statute, and the Inheritance (Provision for Family and Dependents) Act 1975 grants the court broad discretion to vary these agreements where the deceased did not make reasonable financial provision for the survivor.¹⁰⁶ In Australia such agreements explicitly apply only in the case of separation not on death.¹⁰⁷ The only way to vary a will or intestacy

⁹⁹ *Stern v Sheps* (1986) SCR 834 (SCC) at 837 and 838.

¹⁰⁰ *Stern v Sheps* (1986) SCR 834 (SCC) at 837 and 838; *Starosielski v Starosielski* 1998 ABQB 651 at [21], [25] and [27]; *Re Janes Estate* (1950) 2 WWR 313 (BCSC) at 314; and *Philippson v Van Gruting* [1994] 2 WWR 73 (BCSC) at [27].

¹⁰¹ *Stern v Sheps* (1986) SCR 834 (SCC) at 837.

¹⁰² See, for example, *Re Rist* (1939) 2 DLR 644 (ABCA) at 648; *Re Janes Estate* (1950) 2 WWR 313 (BCSC) at 314; and *Starosielski v Starosielski* 1998 ABQB 651 at [27]; *Philippson v Van Gruting* [1994] 2 WWR 73 (BCSC) at [27]; *Fune v Hoy Estate* [1995] 10 RFL (4th) 361 (ONCJ) at [14]; and *Dauids v Balbon Estate* [2002] 9 WWR 1 at [23].

¹⁰³ *Re Rist* (1939) 2 DLR 644 (ABCA) at 648.

¹⁰⁴ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [21] citing *Re Rist* (1939) 2 DLR 644 (ABCA) at 648.

¹⁰⁵ See for example *Gurly v Gurly* (1842) 8 CI & Fin 743, 8 ER 291 (HL) at 764; and *Penny v Milligan* [1907] 5 CLR 349 (HCA) at 351.

¹⁰⁶ Inheritance (Provision for Family and Dependents) Act 1975, s 2(1)(f). See also *Granatino v Radmacher (formerly Granatino)* [2011] 1 AC 534 (SC).

¹⁰⁷ Family Law Act 1975 (Aus), s 4: "breakdown".

is under specific legislation where the deceased has not made reasonable financial provision or has breached their moral duty.¹⁰⁸

Section 81 disclaimers

- 4.20 The respondent has previously argued that s 81 of the Administration Act is the sole mechanism by which a beneficiary can waive their entitlement to an intestate estate.¹⁰⁹ This is incorrect. Section 81 only bites once a person has become entitled, by operation of the intestacy provisions of that Act, to an interest as a beneficiary. In such circumstances, s 81 sets out a method by which such a person can disclaim that interest. Where a survivor has already agreed, pursuant to a s 21 agreement, to forgo their intestacy entitlements, s 81 is simply not triggered: no interest has arisen to be disclaimed.

Conclusion

- 4.21 The appellants submit it is clear that partners can contract out of intestacy entitlements before death. If that occurs, then the s 21 agreement serves as an estate planning document, binding on death. The question is: did Mr Rimmer and Ms Wilton achieve that here?

Mr Rimmer and Ms Wilton *did* contract out

Contractual interpretation

- 4.22 Contractual interpretation principles are well settled. Courts objectively assess what the contract would mean "to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".¹¹⁰ A term's ordinary and natural meaning when construed in the context of the contract as a whole is a powerful but not a conclusive indicator of what the parties meant.¹¹¹ Intention is construed from "what the parties using those words against the relevant background would

¹⁰⁸ For example, Succession Act 2006 (NSW), ss 57–59; Administration and Probate 1958 (Vic), ss 90A and 91; Family Provision Act 1972 (WA), ss 6 and 7; and Succession Act 2023 (SA), ss 115–116.

¹⁰⁹ Respondent's Court of Appeal Submissions at [3.11] **[[101.045]]** at **[[101.052]]**.

¹¹⁰ *Bathurst Resources v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696 at [41] citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, (HL) at 912 per Lord Hoffman.

¹¹¹ *Bathurst Resources v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696 at [43] citing *Firm PI 1 v Zurich Australian Insurance* [2014] NZSC 147, [2015] 1 NZLR 432 at [63].

reasonably have been understood to mean".¹¹² These principles apply equally to s 21 agreements as well as to wills and trusts.¹¹³

- 4.23 An additional statutory interpretation principle that applies to s 21 agreements is Parliament's encouragement of parties to reach their own agreements for classification and division of their property on inter vivos separation or death.¹¹⁴ Provided that the statutory safeguards in s 21F are met, an interpretation which gives effect to the parties' agreed bargain should be favoured.
- 4.24 Here, the appellants submit it is clear on the facts, as agreed by the parties, that the Agreement was intended to deal finally with respective property interests on separation *and* on death. This is a common approach in second relationships, where partners wish to build a life together while still preserving property for their children from an earlier relationship.

Construction of the Agreement

- 4.25 The recitals are clear – the parties are entering into the Agreement to address the status, ownership and division of *all* their property, relationship and separate, current and future. They are also agreeing as to how relationship property is divided on death between the survivor and the deceased's estate. The recitals contemplate death and provide for estate planning. Recital E provides:

Caroline and David wish to enter into a contracting out agreement pursuant to Section 21 of the Act with respect to the status, ownership, and division of their property (including future property), which is to provide for the following:

- (a) Provide that any property, or any class of property, is to be relationship property or is to be separate property;
- (b) Define the share of their relationship property, or any part of the relationship property, that Caroline and David are to be entitled to if the relationship ends;
- (c) Define the share of the relationship property, or any part of the relationship property, that the survivor of Caroline or David and the estate of the deceased partner is to be entitled to on the death of either of the parties;

¹¹² *Bathurst Resources v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696 at [41] citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffman.

¹¹³ *M v H* [2018] NZCA 525, [2018] NZLR 918 at [25]; *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [71]–[72]; and *Kemp v Kemp-Upton* [2024] NZHC 398, [2024] NZFLR 106 at [27] and [29].

¹¹⁴ A M Finlay "Matrimonial Property – Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975" [1975] AHJR E6 at 10; and Matrimonial Property Amendment Bill 1998 (109-1) (explanatory note) at ii.

- (d) Provide for the calculation of those shares;
- (e) Prescribe the method by which the relationship property, or any part of the relationship property, is to be divided.

4.26 The obvious implication of these recitals is that the survivor will have no claim against the property of the estate beyond that provided for in the Agreement.

4.27 That protective intent is precisely what cl 2.1 provides in respect of separate property:

Subject to clause 3 of this agreement, the parties do hereby agree and declare that the following property shall at all times in the future be the absolute and separate property of the party recorded as the owner, registered proprietor or person entitled to ownership at law or in equity (as the case may be), together with all increases in value thereof and the other party shall make no demand on that separate property including any increase in value thereof:

4.28 In other words, each party's *separate* property is protected from the other on separation. No "demand" is to be made of that property. No distinction is made as between separation on death or otherwise. This is wholly consistent with long-term protection of their existing, separate, asset pools.

4.29 In respect of relationship property:

- (a) Clauses 4.2 and 4.3 provide for division of relationship property on separation by reference to capital contributions (and a process for buying the other out). The reliance on contributions is, again, consistent with the protection of existing assets.
- (b) Clause 4.4 covers separation by death. Interestingly, the survivor is given a right to lifetime occupancy. That is something entirely separate to PRA division: it is really testamentary provision being made for the survivor, who is permitted to occupy the only relationship property, indefinitely, free of charge.

4.30 The appellants then place particular reliance on the full and final settlement in cl 5.1, which provides:

That subject to the provisions of this agreement the parties agree that this agreement shall be in full and final settlement of all claims which each of them may have against the other under any statute whatsoever or at common law or at equity.

4.31 This, on its terms, includes claims available via the Administration Act (as they are claims under any "statute"). The appellants

acknowledge that the Court of Appeal drew a distinction between "claims" (prevented by cl 5.1) and "demands" (prevented by cl 2.1) on the one hand, and "entitlements" on the other. The Court of Appeal concluded that the parties had not given up their *entitlements* through these clauses.¹¹⁵ The appellants submit that no such distinction should be drawn. Clearly, the word "claims" was used in clause 5.1 in a global, catch-all sense, to include (for example) what the law would otherwise see as rights, interests or entitlements. The parties are giving up those rights, interests or entitlements in favour of the asset-planning bargain they have struck. There is no other way to make sense of the broad terms of clause 5.1, with its reference to "any statute whatsoever".¹¹⁶ In any event, the distinction collapses on closer analysis. To establish any entitlement, active steps are required (including, in this case, proving one has a beneficial interest in Mr Rimmer's estate). These active steps are indistinguishable in practice from a "claim".

- 4.32 The plaintiff in *Warrender v Warrender* tried a variation of this same argument, submitting that by contracting out of "rights" the survivor had not contracted out of "entitlements". Woodhouse J concluded: "[t]here is nothing in the distinction".¹¹⁷ The settlement captured in the agreement was "plainly intended to include [that is, prevent] claims of any nature to any of the property of Mr Warrender".¹¹⁸ The appellants submit the same applies here. The Agreement was clearly intended to delineate between the relationship property that was "up for grabs" and the separate property that was not, and to deal comprehensively with division of the former.
- 4.33 The plaintiff in *O'Donoghue v Comia* similarly contended that a settlement of "property claims... under any statutory enactment" encompassed the statutory right of succession in s 77.¹¹⁹ Even in the absence of a clause providing that the agreement continued to apply on death, the Court concluded that the reference was sufficiently broad to capture intestacy succession interests.¹²⁰
- 4.34 The final clause of note is clause 6.1, which provides:

This agreement shall bind the executors, administrators and personal representatives of both Caroline and David given the parties acknowledge that they have had independent legal advice

¹¹⁵ *Rimmer v Wilton* [2025] NZCA 374 at [59]–[63] **[[05.001]]** at **[[05.020]]**.

¹¹⁶ The Court of Appeal's reference to the potential for "the common law and equity to apply" as an explanation is, with respect, entirely unconvincing. See *Rimmer v Wilton* [2025] NZCA 374 at [60] **[[05.001]]** at **[[05.020]]**.

¹¹⁷ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [36].

¹¹⁸ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [40].

¹¹⁹ *O'Donoghue v Comia* [2023] NZHC 2735 at [45].

¹²⁰ *O'Donoghue v Comia* [2023] NZHC 2735 at [45].

before signing this agreement and the effects and implications of this agreement have been explained to them by their respective solicitors. They further acknowledge that they have received a draft of this agreement for consideration and approval prior to executing it.

- 4.35 That is, there can be no doubt the Agreement applies to whoever is responsible for administering the relevant estate, a clear indication as to the effect of the operative clauses. A similar clause (which provided that the agreement was binding "on death") was referred to in *Warrender v Warrender* as making "clear, beyond reasonable argument, that property of Mr Warrender excluded from a claim by Mrs Warrender, or in respect of which she contracted out of all rights, included all property owned by Mr Warrender at this death".¹²¹
- 4.36 More broadly, the Court of Appeal's interpretation of cls 4.4 and 5.1 divorces these clauses from the broader context of the Agreement.¹²² The appellants submit that the purpose and effect of the document read as a whole was clearly to limit the survivor's entitlements to those expressly set out in the Agreement (and therefore to exclude those under s 77). The lack of an explicit reference to s 77 does not diminish this plain intent.¹²³
- 4.37 Finally, the Court of Appeal referred repeatedly to the Agreement not placing "any other limit on what each of the parties could do with their estate".¹²⁴ The appellants accept this; the Agreement did not limit what the other could do with their estate. What it did do, however, was limit the ability of the survivor *to claim* against that estate, unless – potentially – specific provision had been made for them. It may have been possible, had Mr Rimmer made a will, for the respondent to receive property pursuant to the will in addition to her entitlements under the Agreement. That would depend on the language of any will, so is entirely hypothetical. But, in principle, there can be no objection to Mr Rimmer *voluntarily* disposing all or part of his estate by will to Ms Wilton. This is an entirely different proposition from Ms Wilton *claiming* entitlement to his estate through the default intestacy provisions.
- 4.38 That Mr Rimmer and the respondent contracted out of intestacy laws becomes all the clearer upon comparing the Agreement in these proceedings with the following precedent clause:

¹²¹ *Warrender v Warrender* [2013] NZHC 787, [2013] NZAR 603 at [41].

¹²² Contrary to the approach required by *Bathurst Resources v L&M Coal Holdings* [2021] NZSC 85, [2021] 1 NZLR 696 at [41] and [43].

¹²³ Contrary to the Court of Appeal's finding in *Rimmer v Wilton* [2025] NZCA 374 at [61] **[[05.001]]** at **[[05.021]]**.

¹²⁴ *Rimmer v Wilton* [2025] NZCA 374 at [57] **[[05.001]]** at **[[05.020]]**

Mickey and Minnie agree that:

- (a) in the event of the death of one of them, the survivor will not, and will not be entitled to, elect under section 61 of the Act to make an application under the Act for the division of any relationship property of the parties; and
- (b) the survivor will elect not to make an election under the Act for the division of any relationship property of the parties, and instead to take any bequest made to the surviving party under the will of the deceased party or on his or her intestacy.

4.39 Clearly, in that situation, the correct construction would allow the survivor to take on intestacy (or under any will) as well as under the agreement. And in working through the effects and implications of the agreement with the client, the solicitor would discuss what testamentary provision the client wanted to make, and draw up a will.

Cross-check – what if Ms Wilton had died first, intestate?

4.40 We also consider the situation from the other (hypothetical) perspective – had Mr Rimmer survived Ms Wilton, and she had died intestate, leaving Mr Rimmer as her surviving de facto partner, and issue. Applying the approach advanced by Ms Wilton, Mr Rimmer would have been entitled to, on top of his separate property preserved under the Agreement:

- (a) Lifetime occupation of Ms Wilton's estate's half share of the Hunua Property, and its plant, equipment and stock.
- (b) All of Ms Wilton's personal chattels at 306 Cowan Road and the Hunua Property, notwithstanding that these were designated in the Agreement as her separate property.¹²⁵
- (c) Payment of the prescribed amount of \$155,000, whether from Ms Wilton's cash or other liquid assets (if she had any), or the proceeds of sale of the property classified as Ms Wilton's separate property at 306 Cowan Road.
- (d) One third of the residue of Ms Wilton's estate (even though: (i) the major asset comprising the residue of Ms Wilton's estate is likely 306 Cowan Road, which is carefully preserved as her separate property under the Agreement;¹²⁶ and (ii) Mr Rimmer agreed that the Agreement was in full and final settlement of all claims under any statute whatsoever (cl 5.1)).

¹²⁵ This is because the chattels in Schedule A of the Agreement **[[301.001]]** at **[[301.009]]** fall within the definition of "personal chattels" under s 2(1) of the Administration Act 1969.

¹²⁶ Agreement, cl 2.1.1 and Schedule A **[[301.001]]** at **[[301.003]]**

(e) One third of Ms Wilton's half share of the Hunua Property.

- 4.41 Plainly this would be an absurd outcome, and would be contrary to the express terms of the Agreement he had entered into on legal advice. Objectively assessed, neither party would have contemplated that that further benefit to their surviving partner may be imposed on top of their agreed property on separation, to the detriment of the other beneficiaries of the estate.
- 4.42 Accordingly, it is submitted that on the correct construction of the Agreement, both Mr Rimmer and Ms Wilton contracted out the default intestacy entitlements they would have otherwise have had under s 77 of the Administration Act 1969.
- 4.43 With Mr Rimmer having died first, Ms Wilton has no entitlements to Mr Rimmer's estate on his death and intestacy, other than to the extent provided for in the Agreement – ie the right to occupy the Hunua Property.

What if Mr Rimmer had left a will?

- 4.44 As noted above, the appellants recognise that if Mr Rimmer had left a will that expressly gifted property to the respondent, she *may* have been entitled to receive under both that will and the Agreement. This is because Mr Rimmer may have contracted for this "double-dipping", and made clear this was the intended result.
- 4.45 Before the Court of Appeal, the respondent relied on several cases where the surviving partner received both s 21 agreement and *will* entitlements under Option B.¹²⁷ The respondent argued these cases also established that she, having elected Option B, was entitled to receive property under both the Agreement and s 77.¹²⁸ This ignores the fundamental differences between wills and the intestacy provisions.
- 4.46 The Administration Act provides a default, state-imposed framework for the distribution of property where the deceased died without a will or other document recording how their estate should be distributed.¹²⁹ A will, particularly if drafted alongside a s 21 agreement (ie with explicit cross-referencing) is a clear statement of testamentary intent. In such cases, it is clear the deceased intended for the survivor to receive under both documents, as the

¹²⁷ Respondent's Court of Appeal Submissions at [5.9]–[5.23] **[[101.045]]** at **[[101.062]]** citing *Chambers v Chambers* [2016] NZHC 583; *Dymond v Upritchard* [2020] NZHC 3274, (2020) 33 FRNZ 284; *Ibrahim v Public Trust* [2020] NZFC 10345; and *Thurston v Thurston* [2014] NZHC 2267.

¹²⁸ Respondent's Court of Appeal Submissions at [5.23] **[[101.045]]** at **[[101.065]]**.

¹²⁹ Being the status of persons vis-à-vis their relationship with the deceased

High Court correctly found in *Thurston v Thurston*.¹³⁰ It does not follow, however, that surviving partners are similarly entitled to receive property under both a s 21 agreement and default intestacy provisions.

Application of the PRA death provisions – Choice of Option A or Option B

4.47 In accordance with s 61, the survivor has a choice between Option A or Option B. However, under either option, a s 21 agreement is to be given effect according to its terms (unless declared void or set aside). The choice between relationship property and succession entitlements is accordingly largely made by the survivor ahead of time, by entering into the s 21 agreement on the terms that they did.

4.48 Taking each option in turn.

Option A

4.49 Option A is "to elect to make an application under this Act for the division of the relationship property." A s 21 agreement stands in the way of division under the PRA. This election is therefore of little utility unless the agreement does not cover all property, or the surviving partner wishes to have the agreement set aside under ss 21J or 21F. It follows that a survivor who is a party to a s 21 agreement will usually choose Option B. On this point the appellants agree with the Court of Appeal's rejection of the Law Commission's position that Option A should be selected if a surviving partner wants to rely on a s 21 agreement.¹³¹

Option B

4.50 If the surviving partner chooses Option B, the s 21 agreement remains in effect. If the terms of the agreement contract out of intestacy entitlements, then that will continue to be the case.

4.51 Under this pathway, the survivor receives their entitlements under the s 21 agreement. Those have been contracted for by the parties and are not "undone" by way of the election. The survivor could

¹³⁰ See *Thurston v Thurston* [2014] NZHC 2267 at [73]–[74].

¹³¹ Compare *Rimmer v Wilton* [2025] NZCA 374 at [39]–[42] **[[05.001]]** at **[[05.013]]** with the approach followed in Law Commission Report 2017 at [34.45] discussed at fn 28 **[[05.013]]** of that judgment. As a second order matter, the appellants recognise that the wording of ss 61(3) and 95(1) (ie the Option B pathway) suggest a survivor who chooses Option B would be unable to bring proceedings to clarify the meaning and effect of a s 21 agreement where there is a dispute between them and the deceased's personal representative. However, it is submitted that the Law Commission's approach should not be favoured out of concern for protecting the survivor's right to a remedy. A survivor who elects Option B would be able to bring Declaratory Judgments Act 1908 proceedings where there is a dispute as to the interpretation of a s 21 agreement.

also receive property under intestacy provisions (or will) *if* the agreement made clear that this was the deceased's intent (as in *Chambers v Chambers* and *Thurston v Thurston*, or the Mickey and Minnie precedent clause referred to above).¹³² This reflects the conditional language of s 61(3), discussed above at paragraph 4.5.

Alignment with statutory scheme and purpose

- 4.52 This interpretation best aligns with the statutory scheme and Parliament's intention in enacting the Amendment Act. The survivor continues to have the choice intended by the text of s 61,¹³³ but, in either case, the s 21 agreement trumps (subject always to its terms).
- 4.53 That the terms of the s 21 agreement take priority under either Option A (unless set aside) or Option B is reflected in s 21J(4)(e), which provides that the court "must have regard to... the fact the parties wished to achieve certainty as to the status, ownership, and division of property" when deciding whether to set aside a s 21 agreement on serious injustice grounds.¹³⁴ When read alongside the conditional language in Option B,¹³⁵ it is clear Parliament intended for the survivor to receive under the s 21 agreement only, unless additional beneficial interests can be proved. That is, there must be clear evidence the deceased intended for the survivor to *also* receive will or intestacy entitlements.
- 4.54 The appellants recognise that s 95(1) of the PRA provides that nothing in the PRA other than ss 20–20F and ss 58–59 apply to the distribution of property under the deceased's will or the intestacy provisions under Option B.¹³⁶ The appellants see no problem with that – there is no need for s 21 to apply on an ongoing basis, as the agreement has already been validly entered into pursuant to that section before death. However, the s 21 agreement *itself* will continue to apply given these agreements are given legal force by the law of contract.¹³⁷

¹³² *Chambers v Chambers* [2016] NZHC 583 at [59]; and *Thurston v Thurston* [2014] NZHC 2267 at [73]–[74].

¹³³ Property (Relationships) Act 1976, s 61(1). Further, s 68 provides that if the survivor "does not choose", they are "treated as having chosen option B". See also, High Court Rules 2016, r 27.35(4)(a)(iv) and Form PR 3.

¹³⁴ Property (Relationships) Act 1976, s 21J(4)(e).

¹³⁵ That the survivor will only receive under the deceased's will or intestacy laws "if" they are a beneficiary or have a beneficial interest.

¹³⁶ Property (Relationships) Act 1976, s 95(1).

¹³⁷ R L Fisher (ed) *Fisher on Relationship Property* (online looseleaf ed, LexisNexis) at [5.38]. See also Property (Relationships) Act 1976, s 21L on the enforceability of these agreements.

5. SUBSIDIARY CONSTRUCTION ARGUMENTS – INTERPRETATION OF CLAUSES 4.2 AND 4.4

- 5.1 Subsidiary construction issues arise under cls 4.2 and 4.4 of the Agreement. Whilst not determining these issues, both the High Court and the Court of Appeal agreed that there may be issues with the position Ms Wilton has taken.¹³⁸ It is submitted that it makes sense for these subsidiary construction issues to be determined now, to save another round of dispute, cost and further delays in achieving complete resolution.
- 5.2 The terms of the Agreement provide that the respondent is entitled to retain her separate property, her share of the Hunua Property, and her "right to lifetime occupancy and use" of the *entire* Hunua Property under cl 4.4. Depending upon whether cl 4.2 is held to apply on death as well as on inter vivos separation, the appellant may also be entitled to compensation or adjustments to take into account her allegedly greater capital contributions.
- 5.3 Clause 4.1 and Schedule C provided that the couple's relationship property was the property at "99 Moumoukai Road, Hunua together with all plant and equipment used in relationship to the property and all stock depastured thereon".
- 5.4 Clauses 4.2 and 4.3 provide for the division of relationship property according to capital contributions where "the parties should separate or cease to live together as parties to a de facto relationship". Importantly, division in accordance with capital contributions can only apply in the case of an inter vivos separation. It is therefore submitted that Ms Wilton had no right to make capital contribution adjustments in her favour under cl 4.2, since separation occurred as the result of death. It follows that Ms Wilton and Mr Rimmer's estate each have a 50 per cent interest in the property, mirroring their respective 50 per cent legal ownership of it.¹³⁹
- 5.5 Finally, cl 4.4 provides the survivor with the additional right to lifetime occupancy and use of all relationship property – ie the Hunua Property – on the other partner's death.
- 5.6 By its sale, the Hunua Property was converted into cash. The lifetime occupancy clause is now spent – it is no longer possible for Ms Wilton to have "lifetime occupancy and use" of the property. The appellants acknowledge that a life tenant *may* be entitled to retain occupancy

¹³⁸ *Rimmer v Wilton* [2025] NZCA 374 at [64] [[05.001]] at [[05.021]]; and *Rimmer v Wilton* [2023] NZHC 1372 at [25] [[101.077]] at [[101.083]].

¹³⁹ Record of Title for the Hunua Property [[301.025]]; and Agreement, cl 4.1 [[301.001]] at [[301.004]].

rights in any replacement property, or invest the sale proceeds and retain the net income.¹⁴⁰ However, this is only where the relevant deed or agreement makes clear that the parties intended for the occupancy rights to so continue. There is no indication in the Agreement that Mr Rimmer and Ms Wilton intended for the right to occupy to extend to sale proceeds. The more likely interpretation is cl 4.4 was intended to ensure that the survivor would not be forced out of the family home on the other's death. Given cl 4.4 ceased to apply following the sale, half of the proceeds now belong absolutely to Mr Rimmer's estate.¹⁴¹

6. ORDERS SOUGHT

6.1 The appellants seek the following declarations:

- (a) Partners can contract out of intestacy entitlements under s 77 of the Administration Act 1969 before death, including by way of a s 21 agreement under the PRA.
- (b) By the Agreement, Mr Rimmer and the respondent did contract out of any intestacy entitlements.
- (c) Ms Wilton has no entitlements to Mr Rimmer's estate on his death and intestacy, other than to the extent provided for in the Agreement – ie the right to lifetime occupancy and use of the Hunua Property, together with all plant and equipment used in relation to the property and all stock depastured thereon (cl 4.4 and schedule C).
- (d) On the correct construction of the Agreement:
 - (i) Ms Wilton's occupancy and use right under cl 4.4 ended on the sale of the Hunua Property.
 - (ii) On the sale of Hunua Property, Mr Rimmer's estate was entitled to 50 per cent of the net proceeds.

6.2 Judgment is sought:

- (a) allowing the appeal, on the basis of the orders sought at paragraph 6.1 above;

¹⁴⁰ Compare *McGregor v McGregor* [2016] NZHC 3124 at [38] and *Guttenbeil v Swan* HC Auckland CIV-2004-404-6670, 19 September 2005 at [28]–[31] with *Jacka v Stocker* [2011] NZHC 1230, (2011) 3 NZTR 21-017 at [27]. In such situations, the sale proceeds cannot be dissipated. These assets must be held on trust for the legal owner: Trusts Act 2019, s 159(4); and Nicola Peart *Trusts Act 2019 Act and Analysis New Zealand* (Thomson Reuters, Wellington, 2024) at [TU159.02(2)], [TU159.02(5)] and [TU159.04].

¹⁴¹ This is especially so because per ss 9(4) and 84 of the Property (Relationships) Act 1976, the proceeds of sale of the Hunua Property (or at the very least the profit made from the sale) constitute property acquired after the relationship ended, which is presumed to be each parties (ie Mr Rimmer's estate's and Ms Wilton's) separate property.

- (b) quashing the decision of the Court of Appeal;
- (c) setting aside the costs judgment in the High Court and Court of Appeal and awarding costs to the appellants (payable by the respondent personally not from the estate), with any dispute over costs to be determined in the High Court; and
- (d) awarding the appellants costs in this Court, payable by the respondent personally, not from the estate.

6.3 The appellants also expressly reserve the right to seek the removal and replacement of the respondent as administrator if it continues to be clear that her personal position means she cannot properly carry out her fiduciary duties as administrator. That application can be dealt with in the High Court, if made. Relevant to any such application will be whether or not agreement can be reached on:

- (a) whether the cl 4.2 unequal sharing provision applies only where there was inter vivos separation (unless determined by this Court);
- (b) whether Ms Wilton's right to "lifetime occupancy and use of all relationship property" under cl 4.4 ended with the sale of the Hunua Property (unless determined by this Court); and
- (c) reimbursement by Ms Wilton of assets taken from and costs paid from the estate, and compensation to the appellants for loss of use of those funds for a decade.

Dated 29 January 2026

V T Bruton KC | N L Walker | J B C Trezise | L S B Acland
Counsel for the appellants

We certify that the submissions do not contain any information that is suppressed and the submissions are suitable for publication.