In the Supreme Court of New Zealand **SC 97/2025**

I Te Kōti Mana Nui

Between **Nigel David Rimmer** and **Nicola Rimmer**
Appellants

And **Carolyn Mary Wilton (as administrator of the estate of David Rimmer)**
Respondent

Respondent's submissions on appeal

20 February 2026

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May it please the Court,

1. Introduction

1.1. This is a case about the duties of the administrator of Mr Rimmer's estate (his surviving partner, Ms Wilton) and the process she is required to follow under the Administration Act 1969 (**Administration Act**), in circumstances where:

(a) two years into their 16-year relationship, Mr Rimmer and Ms Wilton entered into an agreement pursuant to s 21 of the Property (Relationships) Act 1976 (**PRA**) to define and, in the event of their separation, divide, the parties' relationship property and separate property (**Agreement**);[1]

(b) the Agreement provided the survivor of Mr Rimmer and Ms Wilton with a right to "lifetime occupancy and use of all relationship property," with such right being extinguished on the life tenant's death;

(c) Mr Rimmer died without a will; and

(d) as his surviving de facto partner, Ms Wilton elected "Option B" under s 61 of the PRA (to receive her entitlements from Mr Rimmer's estate pursuant to s 77 of the Administration Act).[2]

1.2. The appellants are Mr Rimmer's adult children from a prior relationship. They assert that: (i) the Agreement evidences a clear and unequivocal intention by Mr Rimmer and Ms Wilton to 'contract out' of the intestacy regime in Part 3 of the Administration Act; and (ii) by virtue of the Agreement alone, the administrator is obliged to depart from the prescriptive and mandatory provisions of the Administration Act, and distribute the entirety of Mr Rimmer's estate to the appellants.

1.3. The appellants assert that Ms Wilton cannot receive both her entitlements under the Agreement and her succession entitlements (will or intestacy) *unless expressly provided for* by the Agreement and/or will. The upshot of the appellants' case is that Ms Wilton, a retired librarian now in her late 70s, would receive nothing from her partner of 16 years' estate save for a life interest (which they say has expired).

[1] Agreement dated 6 June 2002. **[301.001]**
[2] *Rimmer v Wilton* [2025] NZCA 374 at [10].

2. Summary of Ms Wilton's position

2.1. The appellants' case departs significantly from the grounds of appeal for which leave was granted. It also departs from their case in the Court of Appeal, which in turn was fundamentally different from their case in the High Court. The core issues raised in the lower Courts have now been largely conceded. The appellants acknowledge:[3]

(a) Where a relationship ends by death and a s 21 agreement has been entered into by the deceased, the most appropriate choice for a survivor under s 61 of the PRA is generally "Option B" (that is, to take under the will or intestacy).

(b) Having elected Option B, a surviving partner may receive: (i) their share of relationship property under the s 21 agreement; *and* (ii) any additional gifts under a will or their intestacy entitlements, but only if the s 21 agreement expressly provides for that.

2.2. The sole remaining issue for determination is whether the Agreement evidences a clear intention to 'contract out' or exclude the intestacy regime.

2.3. The Court of Appeal was correct to conclude that the Agreement did not evidence an intention to exclude the parties' rights on intestacy (this issue was not raised in the High Court):

(a) The purpose of the Agreement was to comprehensively define what was to be separate and relationship property.[4]

(b) With the exception of the life interest, none of the clauses in the Agreement purport to place any limit on what each of the parties could do with their estate.[5]

(c) The constellation of clauses relied on by the appellants do not, taken together or alone, demonstrate an objective intention to forgo later inheritance entitlements (will or intestacy). Clear words would be necessary to override (i) each party's autonomy to gift their estate as they wished and (ii) the mandatory provisions of ss 61, 77 and 81 of the Administration Act.[6]

[3] Appellants' submissions at [1.12] and [4.49].
[4] *Rimmer v Wilton* [2025] NZCA 374, at [55].
[5] *Ibid*, at [57].
[6] *Ibid*, at [59]-[63].

(d) Crucially, if it had been the parties' intention to limit each other's entitlements on death, the established and simple way of achieving that was to execute wills. Mr Rimmer did not.

2.4. The Court of Appeal's decision is a conventional application of the PRA and Administration Act. It provides a simple, clear path for estate planners/ administrators to follow and affirms the importance of a will if a person wishes to make different provision from their estate.

2.5. This appeal can be dismissed on the basis that the Agreement does not purport to exclude or 'contract out' of the intestacy regime.

2.6. If the respondent is wrong about that, and the Court finds that Ms Wilton did promise not to take her intestacy entitlements under the Agreement, the Court will need to go on to consider whether that promise is able to be given effect to by an administrator, in light of the Administration Act's prescriptive, mandatory process for intestate estates. The respondent's position is that it cannot, because such an agreement is fundamentally incompatible with the Act:

(a) Intestacy entitlements under s 77 of the Administration Act are based solely on a person's legal status to the deceased (eg spouse, de facto partner). That legal status cannot be changed by private contract.

(b) A private contract cannot override the mandatory nature of an administrator's obligations under: (i) s 25 of the Administration Act: to distribute an estate "*according to Part 3* of the Administration Act"; or (ii) s 77: that an administrator "*must*" distribute an estate in accordance with the prescribed table.

(c) The Administration Act prescribes a single method by which a person can disclaim their intestacy entitlements (s 81).

2.7. The appellants' approach does not sit easily (or at all) within this comprehensive, mandatory statutory framework. According to the appellants, the injustice in this case derives from the intestacy regime impinging on the right of a person to do what they want with their property. But the intestacy regime does not deprive individuals of their autonomy. By definition, it only applies where a person does not execute a will, which they are free to do at any time. Equally, a person is free to decide that, notwithstanding the promises they have made in an earlier agreement, they will gift additional benefits from their relationship and/or separate property when they die. In either case, an individual's autonomy is wholly unrestrained.

2.8. The appellants' "subsidiary construction arguments" are outside the scope of this appeal. Those arguments were not raised (let alone decided) in the High Court or Court of Appeal. They should not be considered for the first time, in the absence of any evidence, on a second and final appeal.

3. Facts

3.1. David Rimmer, cabinetmaker, died on 18 March 2016 at the age of 66. The appellants are Mr Rimmer's only children (from a prior relationship). The respondent (**Ms Wilton**) is Mr Rimmer's surviving de facto partner and the administrator of his estate.

3.2. Early in their relationship, on 6 June 2002, Ms Wilton and Mr Rimmer entered into the Agreement, which defined the parties' separate property, confirmed that their family home at 99 Moumoukai Road (**Family Home**/**Property**) was relationship property and provided for division of the Family Home in the event their relationship ended. The Agreement also provided a life interest in the deceased's share of the Family Home to the survivor. Mr Rimmer left no will when he died. Consequently, administration of his estate proceeded under the intestacy regime.

3.3. In accordance with advice from the estate solicitors, on 28 April 2016, Ms Wilton elected Option B under s 61 of the PRA. On 25 May 2016 Ms Wilton was granted letters of administration, appointing her as administrator. On 17 June 2016 the estate solicitors transferred legal title of Mr Rimmer's half share of the Family Home to Ms Wilton (as administrator).[7]

3.4. The estate solicitors also advised on the distribution of the estate as follows:

(a) per cl 4.2 of the Agreement, Ms Wilton owned 56.45% of the Family Home (reflecting her greater capital contribution) as her separate property. Mr Rimmer's share of 43.55% goes to his estate;

(b) Per cl 4.4, Ms Wilton has a life interest in the Family Home (as relationship property).

(c) Per s 77 of the Administration Act, Ms Wilton was entitled to receive: (i) Mr Rimmer's personal chattels; (ii) the first $155,000 of the Estate (prescribed amount); and (iii) one third of the residue of the estate. The remaining two thirds of the Estate was to be held for the benefit of the appellants equally.

[7] Statement of Agreed Facts dated 18 May 2023 (**Agreed Facts**), at [10(b)] **[201.001]** at **[2.003]**

3.5. Following her appointment as Administrator, distribution of the estate began as matters became available to be dealt with. The following interim distributions were made to Ms Wilton: (i) Mr Rimmer's personal chattels; and (ii) $138,232.06[8] in part-payment of the prescribed amount. No distributions have yet been made to the appellants.[9] Distribution of the estate was paused after the appellants foreshadowed this proceeding.

3.6. On 31 May 2021, the Family Home was sold for $1.2m. In June 2021, $599,335.21 (50% of the net sale proceeds) was transferred to Ms Wilton directly. This reflected her separate (and uncontested) interest in the Family Home and was without prejudice to her claim to the further 6.45% accorded to her by cl 4.2 of the Agreement. The balance of the sale proceeds (together with all accrued interest) continues to be held on trust by the estate solicitors pending the outcome of the litigation.[10]

4. High Court and Court of Appeal proceedings

4.1. The appellants challenged the distribution of Mr Rimmer's estate in the High Court. They relied on a single cause of action: breach of fiduciary duty.[11] The case proceeded on an agreed statement of facts.[12] No evidence was adduced. The sole (legal) issue raised by the appellants for determination was:[13]

> *Whether Ms Wilton's election of 'Option B' under s 61 of the PRA precludes Ms Wilton from also relying on the contracting out agreement.*

4.2. The High Court held Ms Wilton was not so precluded. She was entitled to receive her relationship property entitlements under the Agreement *and* her entitlements under s 77 of the Administration Act (intestacy).[14]

4.3. On appeal, the appellants advanced two mutually exclusive arguments:

(a) On a proper construction of the Agreement, the parties contracted out of the intestacy regime. Consequently, Ms Wilton receives her entitlements under the Agreement, but is precluded from receiving any intestacy entitlements from Mr Rimmer's estate save for the life interest (**New Argument**). This argument was not raised in the High Court.

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[8] $130,132.58 was paid on 5 December 2016. A further $8,099.48 was paid on 25 January 2017. $16,767.94 remains to be paid.
[9] Agreed Facts, at [12] **[201.001]** at **[201.004]**
[10] *Rimmer v Wilton* [2025] NZCA 374 at [12(c)]
[11] Statement of claim dated 23 August 2002, first cause of action **[101.067]** at **[101.069]**
[12] Agreed Facts, at [12] **[201.001]**
[13] *Rimmer v Wilton* [2023] NZHC 1372, at [24].
[14] *Rimmer v Wilton* [2023] NZHC 1372, at [60].

(b) Alternatively, the appellants fell back on their argument in the High Court, that having elected Option B under s 61 of the PRA, Ms Wilton receives only her entitlements under the intestacy provisions and is precluded from claiming her entitlements under the Agreement (**HC Argument**).

4.4. The Court of Appeal dismissed both arguments. In relation to the New Argument, the Court held that the Agreement did not exclude entitlements on intestacy.[15] Save for the life interest, the Agreement did not purport to place any limitation on what each of the parties could do with their estate.[16] "Clear words would have been necessary if [the Agreement] was intended to override the power each of them would have to give their estate as they wished, or to override the otherwise mandatory terms of s 77 of the Administration Act and the detailed requirements in s 81 of that Act for disclaiming the s 77 entitlements."[17]

4.5. In relation to the HC Argument, the Court held that where a surviving partner wishes to rely on a s 21 agreement in the event of death, Option B is the appropriate election under s 61 of the PRA. Having done so, Ms Wilton is entitled to receive her entitlements both under the Agreement and from Mr Rimmer's estate.

5. Relevant Law

5.1. The PRA provides a default regime for dealing with *relationship property*. Part 3 of the Administration Act provides a default regime for dealing with *estate property*.

Property (Relationships) Act 1976

5.2. According to s 1C, the PRA is "mainly about how the property of [couples] is to be divided up when they separate or one of them dies". While the PRA is a code,[18] parties are free to "contract out" of it by making their own agreement under s 21, 21A or 21B as to how their property will be divided in the event the relationship ends (**RP Agreements**).

5.3. There are three types of RP Agreements, that arise in different circumstances:

(a) *At the beginning of/during a relationship*. This type of agreement is made under s 21 of the PRA and is in the nature of pre/post-nuptial agreement. Its purpose is generally to define the property each partner has brought into the relationship up to that point, what is to remain their separate property, and

[15] *Rimmer v Wilton* [2025] NZCA 374, at [62].
[16] *Ibid*, at [58].
[17] *Ibid* at [61].
[18] PRA, s 4.

what becomes relationship property. A key aspect of this type of RP Agreement is that the relationship is ongoing. Further separate/relationship property may accumulate that is not necessarily addressed at the time of the agreement (**Contracting Out Agreement**[19]/ **s 21 agreement**).

(b) *At the end of a relationship*. This type of agreement is made under s 21A of the PRA and is a settlement agreement. It provides for the distribution of separate/relationship property and is intended to be a full and final settlement of any/all claims between the partners in connection with their relationship. Because the relationship is at an end, the relationship property has crystallised (no further will accumulate), and the agreement is intended to deal with all of it, once and for all (**Settlement Agreement**).

(c) *After one party has died, and the survivor has brought proceedings against the estate*. This type of agreement is made under s 21B of the PRA. It involves a compromise of the survivor's and estate's rights and may be approved by the Court at either party's request (**Compromise Agreement**).

5.4. Where death ends the relationship, Part 8 of the PRA "deals with matters like: (i) what if the deceased partner has left a will?; (ii) can the deceased partner's estate make a claim against the survivor; and (iii) what is the effect [of the PRA] on rights under other legislation that relate to claims against an estate, including the Law Reform (Testamentary Promises) Act 1949 (**TPA**) and Family Protection Act 1955 (**FPA**)."[20] These being the usual questions that follow after a person dies. The PRA itself does not, however, deal with how property is administered following death. Per 95 of the PRA: "nothing in this Act applies to the distribution of property" under either the deceased's will or intestacy.[21]

5.5. Following the death of one partner in a relationship, the surviving partner is required to make an election under s 61 of the PRA:

(a) **Option A** is to elect to make an application under the PRA for a division of the relationship property (according to the default rules such as the presumption of equal sharing);

[19] This was the Law Commission's preferred term in its PRA and succession law reviews.
[20] PRA, s 1K.
[21] PRA, s 95 (with specified exceptions, none of which are relevant to this appeal).

(b) **Option B** is to elect not to make an application under the PRA and instead to receive succession entitlements under either the will (if one exists) or the intestacy regime (if one does not).

5.6. If no election is made within the prescribed time limit,[22] the survivor is deemed to have elected Option B.[23]

Administration Act – intestacy regime

5.7. The Administration Act, on the other hand, sets out the legal framework for managing and distributing a person's estate after they die. It is part of a body of law that deals with how a person's property is distributed after death. The Administration Act applies both where there is a will, and where there is not.

5.8. The estate vests in the administrator as soon as they are appointed[24] and the administrator holds the estate: (i) if a will is left, according to the trusts and dispositions of the will, so far as the will affects the estate; or (ii) in the case of a person who has died intestate, according to Part 3 of the Administration Act.

5.9. The intestacy provisions are deemed to represent the deceased's wishes in the absence of a will.[25] Even where the Court has direct evidence of the deceased's intentions – for example in the form of a will which has been revoked but not replaced – those are not necessarily followed.[26]

5.10. Section 77 sets out a priority list of who shall receive what share of the estate in different circumstances. As noted in *Re Trotter*[27] and *Re Storm/Re Baker*,[28] this priority is based solely on a person's legal status/relationship to the deceased.

5.11. Section 77 is mandatory: "If a person…dies intestate as to any real or personal estate and leaves the other person or people referred to in column 1 of the…table, that estate *must* be distributed in the manner or held on the trusts set out in column 2 …" Relevant to this case, the table in s 77 provides:

[22] PRA, s 62.
[23] PRA, s 68.
[24] Administration Act, s 24.
[25] Te Aka Matua o te Ture: Law Commission, *Review of succession law: rights to a person's property on death* (NZLC R145, 2021) (**NZLC Succession Report**) at [7.12].
[26] *Lynch v Lynch* (HC Napier, CIV 2006-441-000242, 20 December 2006, Frater J) at [43].
[27] *Re Trotter* HC Christchurch, CIV-2009-409-2584, 10 May 2010 (Panckhurst J) at [10].
[28] *Re Storm* [2018] NZHC 742 (Whata J) at [9].

Person or people intestate leaves	How estate to be distributed

2. Husband, wife, civil union partner, or surviving de facto partner, and issue	**Personal chattels (as defined in s 2(1)):**
	the husband, wife, civil union partner or surviving de facto partner takes these absolutely…
	Residue of the estate:
	• this stands charged with the payment to the [partner] of the prescribed amount, plus interest…on that amount from the date of the death…
	• anything that remains of the residue is held in trust as follows:
	  ○ a third for the [partner] absolutely; and
	  ○ two-thirds on the statutory trusts for the issue of the intestate in equal shares.

5.12. The knowledge or consent of the successor is not required for distribution. If a successor does not wish to receive their entitlement, they may disclaim it under s 81. The requirements for such a disclaimer are strict, including being made by way of a deed. Disclaimer under s 81 is the sole mechanism in the Act by which a beneficiary can waive their entitlements from an intestate estate.[29]

6. Legislative background – development of PRA and succession law

6.1. The original predecessor to the PRA was the Matrimonial Property Act 1963 (**MPA 1963**), which was introduced in response to the way in which the law disadvantaged women at the time. It maintained the previous right for women to own property separate from their husbands[30] but introduced a judicial discretion that allowed a court to override strict property rights and take account of spouses' respective contributions to the relationship in dividing matrimonial property.[31]

6.2. The Matrimonial Property Act 1976 (**MPA 1976**) came next. This introduced the concept of marriage as an equal partnership, and the ability to contract out of the regime under s 21. The MPA 1976 only applied to marriage, and only to relationships ending by separation, not death.[32] The result was a mismatch: while the MPA 1976 applied on separation, the MPA 1963 continued to apply on death (with no presumption of equal sharing).

6.3. A Working Group (established in 1988)[33] and the Law Commission (in its 1997 review of succession law) considered the law should provide the same rules for division of property on death as on separation.[34] But they disagreed as to how that

[29] Administration Act, s 81.
[30] Under the Married Women's Property Act 1884.
[31] Te Aka Matua o te Ture: Law Commission, Issue Paper 41, *Dividing relationship property – time for a change? – Te mātatoha rawa tokorau – Kua eke te wā?*, October 2017 (**NZLC PRA Issues Paper**), at [2.23]
[32] *Ibid*, at [2.33].
[33] The Working Group was convened by Geoffrey Palmer (Minister of Justice) to identify the broad policy issues with the MPA 1976, the Family Protection Act 1955, matrimonial property on death and for de facto relationships.
[34] NZLC PRA Issues Paper at [34.18].

goal should be achieved. The Working Group advocated for a single (new) statute dealing with both separation and death. The Law Commission preferred separate statutes, with the rules applicable to all property claims on death consolidated under a new statute – the Succession (Adjustment) Act – and the FPA and TPA being repealed.[35]

6.4. In 2001, the Property (Relationships) Amendment Act 2001 was enacted. This renamed the MPA 1976 (as the PRA) and introduced a raft of changes largely reflecting the PRA as we know it today. Despite the intervening decade, the changes followed the recommendations previously made by the Working Group, including the introduction of Part 8 (relating to separation on death).

6.5. The Working Group's policy rationale for Part 8 was that the surviving partner should receive, *at a minimum*, the same entitlements they would have if the relationship had ended by separation. The purpose of the election under s 61 was to avoid forcing a compulsory division of relationship property on couples who were content for the surviving partner's entitlements to be determined by the deceased's will.[36]

6.6. The PRA, and particularly Part 8, has been contentious. Professor Nicola Peart ONZM described the Part 8 provisions as conceptually at odds with the rest of the PRA: when the relationship ends on death there is no automatic division of relationship property. Instead, the surviving partner must elect to apply for a division under s 61. If division is sought (by electing Option A), the survivor loses their succession entitlement, unless the will includes a contrary intention provision.[37] Professor Peart opined:[38]

> By forcing the survivor to make a choice between his or her relationship property entitlement and inheriting from the deceased, the Act merges two distinct concepts. **When a widow chooses to apply for a division, she is claiming what is rightfully her property**. **When she inherits, she receives what is her husband's property**. The former is the payment of a debt, while the latter is a duty to support and provide for the wife. The election merges the debt and the duty.
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> [Emphasis added]

Law Commission review of the PRA

6.7. In 2017 the Law Commission commenced a review of the PRA. This represented the first holistic review of the legislation since its introduction some 40 years earlier.

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[35] *Ibid*, at [34.22].
[36] NZLC Succession Issues Paper, at [3.7] to [3.10].
[37] Nicola Peart, *The Property (Relationships) Amendment Act 2001: a Conceptual Change* (2008) 39 VUWLR 813, p 829.
[38] *Ibid*.

6.8. In October 2017, the Commission released an issues paper for discussion (**PRA Issues Paper**).[39] Hundreds of submissions were received. In November 2018 the Commission released a further issues paper setting out its preferred approach.[40] In June 2017, the Commission released its final report (**PRA Report**).[41] In summary, the Commission concluded:

(a) The PRA is no longer fit for purpose in 21st century New Zealand. It should be replaced by a new statute that applies only to relationships that end on separation, incorporating the Commission's recommendations for reform.[42]

(b) A separate new statute is required to deal with relationship property claims arising on the death of a partner, alongside FPA and TPA claims. The rules of this new statute should be the subject of further consideration within a broader review of succession law.[43]

6.9. Central to the Commission's recommendation for a new statute, was recognition that the context in which relationship property is divided following the death of a partner, is fundamentally different from the context in which property is divided when a relationship ends by separation. Key differences are that:[44]

(a) A relationship that ends on death is not one ended by choice. In the absence of contrary evidence, it can reasonably be assumed the relationship would have continued if the partner had not died.

(b) There is no conflict between the partners. Any dispute will be between the surviving partner and third parties who claim an interest in the estate (eg children). Such disputes are of a different nature to inter-partner disputes.

(c) There is an expectation that a deceased partner will provide for the surviving partner to enable them to continue to enjoy the same lifestyle shared during their relationship. The expectations that arise on separation are different.

6.10. In November 2019, the Government responded to the PRA Report. It tasked the Law Commission was a review of succession law and held off consideration of the Commission's other recommendations for the PRA pending that review.[45]

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[39] NZLC PRA Issues Paper, above n 31.
[40] Te Aka Matua o te Ture: Law Commission, Issues Paper 44, *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga i Mariu ai*
[41] Te Aka Matua o te Ture: Law Commission, Report 143, *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976*, June 2019 (**NZLC PRA Report**).
[42] *Ibid*, at [2].
[43] *Ibid*, at [7].
[44] NZLC PRA Issues Paper, at [36.2].
[45] Government response to the Law Commission Report: review of the PRA.

Law Commission review of succession law

6.11. In 2021 the Commission commenced its review of succession law. An issues paper was released in April 2021 (**Succession Issues Paper**)[46] and in November 2021 the Commission released its final report (**Succession Report**).[47] In summary, the Commission recommended a new statute – the Inheritance (Claims Against Estates) Act – based on the following conclusions:

(a) The original policy basis for Part 8 of the PRA – that a surviving partner should be no worse off on the death of their partner than if the couple had separated – remains sound.[48]

(b) A relationship property division under the new Act should occur differently to division under the current Part 8 rules. The s 61 election should not continue. Instead, a partner should have a right to apply for a relationship property division within 12 months of the grant of administration. Where the surviving partner elects this option, they should still be entitled to receive any gifts under the deceased's will (the present election of Option A excludes that).[49]

(c) The intestacy rules should be updated to reflect modern societal expectations.[50] The 'prescribed amount' to which a surviving partner is entitled should be repealed. Instead, their entitlement should be based on a proportion of the estate.[51]

(d) Partners should continue to be free to enter *Contracting Out Agreements* excluding the application of the PRA (as under s 21) subject to the same procedural safeguards as now. They should also be allowed to contract out of 'family provision' claims (except for minor children or adult children lacking capacity).[52]

(e) Former partners should be free to enter *Settlement Agreements* upon separation, and such agreements should be presumed to be full and final settlement of the surviving spouse's entitlements under the new Act unless

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[46] Te Aka Matua o te Ture: Law Commission, Issues Paper 46, *Review of Succession Law: Rights to a person's property on death - He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (**NZLC Succession Issues Paper**).
[47] Te Aka Matua o te Ture: Law Commission, Report 145, *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana – Review of Succession law: rights to a person's property on death* (**NZLC Succession Report**).
[48] *Ibid*, at [11].
[49] *Ibid*, at [14].
[50] *Ibid*, at [33].
[51] Where the intestate's children are from the relationship with the surviving partner, the survivor should take the entire estate. Where the intestate has one or more children from another relationship, the survivor should receive the family chattels and 50% of the remaining estate. The children should share the other 50%.
[52] NZLC Succession Report, at R68 and R69, p 276.

the agreement provides otherwise.[53] The new Act and the Administration Act should clarify that this includes any rights on intestacy.[54]

6.12. In June 2022 the Government responded to the Succession Report. It acknowledged that new legislation was required. However, the extent of the proposed changes meant the reforms would take years, and "will need to be balanced against other Government priorities."[55] Nothing has happened since.

"Contractual "primacy" and "double dipping"

6.13. The appellants seek to emphasise two points in relation to the development of the PRA and succession law. First, that the default 'equal sharing' regime under the PRA is subordinate to the right of parties to make their own arrangements via an RP Agreement. Second, a primary policy goal of the modern PRA is to prevent double recovery.

6.14. No issue is taken with the first point insofar as it relates to the express right of partners under ss 21 to 21B to contract out *of the PRA*. However, it is necessary to distinguish between that right, and the proposed further right of parties to contract out *of other legislative regimes* (eg the intestacy rules).

6.15. None of the authorities and materials relied on by the appellants stand for the proposition that the legislative history supports an ability to "contract out" of the intestacy regime.

(a) According to the appellants, the explanatory note to the MPA Bill 1998 stated that the PRA's extension of the equal sharing regime to apply also on death "will not affect the existing rights of the spouses to…*contract out of the rules that would apply on death".*[56] The appellants at least imply this encompasses the intestacy rules. In fact, the explanatory note stated that the PRA's extension "will not affect the existing rights of the spouses *to deal with their property prior to the death of one of them."* And later "it will be possible for the spouses to contract out of the rules that would apply on death, with the same procedural safeguards as exist generally for contracting out of the 1976 Act."[57] Read in context, the "rules that would apply on death" are the PRA rules, not the intestacy regime.

[53] *Ibid*, at R 75, p 277.
[54] *Ibid*, at R77, p 282.
[55] Government Response to the Law Commission Report: review of the PRA.
[56] Appellants' submissions, at [3.20].
[57] Matrimonial Property Amendment Bill 1998 109 1, Explanatory note, at p 2.

(b) Read in context, the comments of the Justice and Electoral Committee,[58] MP Clem Simich,[59] the High Court in *Wells v Wells,*[60] the Court of Appeal in *Harrison v Harrison*[61] and Professor Nicola Peart[62] are equally directed only to the right to contract out of the PRA.

6.16. Care must also be taken to clarify what is meant by "double recovery" by surviving partners. The purpose of s 76 of the PRA is to prevent multiple claims in respect of the same pool of property. (Although s 77 of the PRA provides the Court with discretion to nevertheless permit a survivor to take both). To use the example provided by the MoJ in its review of the MPA Bill:[63]

> A testator who owns all or most of the matrimonial property may agree to leave half to the surviving spouse on the understanding that a division under the [PRA] will not be sought.

6.17. (Assuming the s 61 election does not exist) if the survivor makes an application under the PRA, *all* the deceased's property is presumed to be relationship property (ss 81-82). On the presumption of equal sharing, half the total property pool goes to the surviving spouse. The other half goes to the estate. Pursuant to the will, the surviving spouse then receives another half of the estate's half (total of 75%). In this example, the operation of the PRA (without the election) in addition to the will would provide more than the testator intended.

6.18. However, references to "double recovery" and "double-dipping" are not apt to describe what occurs when a person elects (via will or intestacy) to leave their partner more than they promised in a s 21 agreement.

7. Option B: survivor may receive entitlements under s 21 agreement and on succession

7.1. In the lower Courts, the appellants maintained that Option A must be elected in order to apply a s 21 agreement. The appellants now concede that: (i) Option B is also permissible and will generally be the appropriate election where a s 21 agreement is concerned;[64] and (ii) under Option B, a surviving partner may receive both their entitlements under the s 21 agreement and their succession entitlements under a will/on intestacy.[65]

[58] Appellants' submissions, at [3.21].
[59] *Ibid*, at [3.22].
[60] *Ibid*, at [3.23].
[61] *Ibid*, at footnote 71.
[62] *Ibid*.
[63] Ministry of Justice, Departmental Report – Clause by Clause Analysis, at p 44.
[64] Appellants' submissions, at [1.12].
[65] Subject to the appellants' argument about contracting out of intestacy entitlements.

7.2. The appellants' concessions are appropriate. Option B is the only logical choice to enforce a s 21 agreement. The alternative – electing Option A – was properly dismissed by both the High Court and Court of Appeal. In short, the very purpose of a s 21 agreement is to contract out of the PRA. In the absence of a dispute, it is nonsensical to suggest that a formal application under the Act is nonetheless required to apply the agreement. Further, the provisions of Part 8 of the PRA that automatically apply if Option A is elected are inconsistent with the application of a s 21 agreement.[66]

7.3. Having elected Option B, there is nothing inconsistent about a survivor receiving both their entitlements under a s 21 agreement as well as any additional succession entitlements (will or intestacy):

(a) The first job of an administrator is to call in the assets of the estate. Where those include a share of relationship property, it is the s 21 agreement (where one exists) that determines the amount of that share and converts it to separate property. The surviving partner receives their separate property directly. The deceased's separate property goes into their estate.

(b) Having crystallised the property in the estate, the survivor's s 61 election then arises. It is only after crystallisation that the survivor is in a position to weigh the benefit of the alternative options. If Option B is chosen, the administrator is required to distribute the estate according to the will or intestacy rules.

7.4. There is nothing that prevents a person from making *additional* provision for their partner in a will, beyond what is provided in a s 21 agreement. That is inconsistent with a person's testamentary freedom. The appellants concede this point. They accept that, had Mr Rimmer made a will, it *may* have been possible for Ms Wilton to inherit property under the will in addition to her entitlements under the Agreement. The appellant's say "may" because – on their argument – where a s 21 agreement exists, a person cannot additionally receive their inheritance unless that is specifically provided for by the s 21 agreement and/or will. This argument is addressed in the next section.

7.5. But what is good for the goose must be good for the gander. The intestacy regime is deemed to reflect Mr Rimmer's testamentary wishes in the absence of a will.[67] If Ms Wilton could receive more from Mr Rimmer under a will, she must likewise be able to receive more under the intestacy regime.

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[66] Section 81 provides that all the deceased's property at death is presumed to be relationship property. See also ss 82 and 84.
[67] NZLC Succession Report, at [7.12].

8. Agreement does not evidence an intention to exclude intestacy rights

8.1. There is nothing to suggest Ms Wilton/Mr Rimmer intended the Agreement to exclude future succession rights (under a will or intestacy).

No evidence of factual matrix or appropriate pleadings

8.2. This Court has affirmed that evidence of prior negotiations and subsequent conduct may be relevant to determining the objective meaning of a contract.[68] Here, such evidence might include that from the estate solicitor who drafted the Agreement, Ms Wilton, and documentary evidence of the negotiations leading up to the finalisation of the Agreement.

8.3. Because of the way in which the appellants have advanced their case, there is no evidence of the parties' background knowledge or relevant factual matrix surrounding the Agreement. There is no evidence at all. Nor are there appropriate pleadings of the appellants' interpretation arguments. They advanced a single legal question (since conceded) in the High Court. It is contrary to authority for the appellants to introduce substantive new arguments for the first time on appeal, and prejudicial to Ms Wilton for those issues to be determined without the right to call evidence.

Words of the Agreement

8.4. The appellants' construction arguments – raised for the first time in the Court of Appeal – instead rest solely on the following words in the Agreement:[69]

> 2.1 …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 owner…and the other party **shall make no demand** on that separate property including any increase in value thereof:
>
> 5.1 …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 at common law or in equity**.
>
> 6.1 This agreement shall bind the executors, administrators and personal representatives of both Caroline and David…
>
> [Emphasis added]

8.5. The words relied upon by the appellants are boilerplate language included to comply with the requirements of s 21D of the PRA.[70] This language falls well short of what should be required to establish an intention to contract out of the

[68] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85 at [54]-[90].
[69] Agreement at [2.1] **[301.001]** at **[301.003]**
[70] PRA, s 21D.

Administration Act. The Court of Appeal's reasoning on this point is simple and unimpeachable:

(a) The intention of the Agreement was to comprehensively *define what was to be separate and relationship property*. That is clear from the detailed way in which the parties went on to do so.[71]

(b) Clauses 4.2, 4.3 and 4.4 of the Agreement specify how relationship property is to be divided and shared in the event of separation/death. Apart from the life interest granted under cl 4.4, these clauses *do not purport to place any other limit on what each of the parties could do with their estate*.[72]

(c) The appellants' argument requires a combination of words in cls 2.1, 5.1 and 6.1 to be linked together (highlighted in bold above). But each of those clauses has a particular meaning and effect, none of which relate to inheritance entitlements. Clause 2.1 does not assist because it applies only to the parties' separate property as listed in Schedules A and B. Their relationship property (Schedule C) is dealt with discretely under clause 4 of the Agreement.[73] Clause 5.1 refers only to "claims" which is an inapt description of gifts under a will or intestacy entitlements.[74] Clause 6.1 does not add anything to the other clauses. It simply binds executors/ administrators to what has been agreed elsewhere.

(d) Clear words would have been necessary if the parties intended to override the power each of them would have to gift their estate as they wished, and to override the mandatory provisions of s 61, 77 and 81 of the Administration Act.[75] Each remained free to leave the other none, some, or all of their estate property under their will, subject only to the life interest granted in the Agreement.[76] In the absence of a will the intestacy provisions apply.

8.6. The appellants are at pains to undermine the Court of Appeal's analysis, particularly in relation to cl 5.1. They rely on the High Court's statement in *Warrender* that "there is nothing in the distinction"[77] between claims and entitlements (and presumably demands). They argue that, in cl 5.1, "claims" is being used "in a global, catch-all sense, to include (for example) what the law would otherwise see as rights, interests or entitlements";[78] and, whether a person

[71] *Rimmer v Wilton* [2025] NZCA 374, at [55].
[72] *Ibid*, at [57].
[73] *Ibid*, at [59].
[74] *Ibid*, at [60].
[75] *Ibid*, at [61].
[76] *Ibid*, at [62].
[77] *Warrender v Warrender* [2013] NZHC 787 at [36].
[78] Appellants' submissions, at [4.31].

has a claim or an entitlement, "active steps" are required to establish it (i.e. proof of beneficial interest).[79]

8.7. No authority or evidence is cited for the appellants' propositions. The Court in *Warrender* does not provide any reasoning in support of its conclusion which, with respect, is wrong. As a matter of ordinary meaning, a *claim* is an asserted right which must be proved or conceded before it gives rise to any entitlement. An *entitlement*, on the other hand, is an "absolute right to a benefit, granted immediately upon meeting a legal requirement".[80]

8.8. The distinction is not just legal. It makes sense that relationship partners may wish to exclude any future *claims* (thereby avoiding unnecessary disputes) without excluding future *entitlements*.

8.9. The appellants' approach must also apply equally to all succession entitlements. Property gifted under a will is an entitlement, the same as benefits distributed under the intestacy regime. The consequence of the appellants' argument would be that entitlements under a will are also excluded. Plainly that is not the intention of the testator.

Context of the Agreement

8.10. The context and timing of the Agreement support this interpretation. Most significantly, the Agreement was a s 21 agreement entered into at an early stage of the parties' enduring relationship, which was ended by death, not choice. It was not a Settlement Agreement entered into following separation (s 21A) nor a Compromise Agreement (s 21B).

8.11. *Warrender*[81] concerned both those latter agreements. In that case Mr and Mrs Warrender were married in 1983. They separated in 1995 but never formally divorced or obtained a separation order. In 1997 they entered into a Settlement Agreement (s 21A). By the terms of that agreement, Mr and Mrs Warrender each agreed they were *estopped "against the other from all or any claim or demand in respect of the property of any nature whatsoever."*[82]

8.12. Mr Warrender died intestate and without children in 2010. Mrs Warrender sought to be appointed administrator and receive Mr Warrender's estate under the intestacy provisions, on the basis she was still legally his spouse. That was challenged by Mr Warrender's siblings, who entered into a separate compromise

[79] *Ibid*, at [4.31].
[80] Garner et al, *Black's Law Dictionary* (8th ed, Thomson Reuter) at p 840.
[81] *Warrender v Warrender* [2013] NZHC 787.
[82] *Ibid*, at [12], citing parties' Settlement Agreement at paragraph 23.

with Mrs Warrender for her to receive 10% of Mr Warrender's estate. The evidence established that Ms Warrender understood that, as a result of the settlement agreement (let alone the compromise), she was not entitled to anything from Mr Warrender's estate.[83] Ms Warrender tried to renege on both the settlement agreement (with Mr Warrender) and the compromise agreement (with his siblings). Unsurprisingly, the High Court was not motivated to let her.

8.13. The Court's reasoning in *Warrender* is open to scrutiny (addressed in the next section), but it is also distinguishable from the present case, which concerns a s 21 agreement. Mr Rimmer and Ms Wilton were not separated, nor contemplating separation. Unlike cases such as *Warrender* and *O'Donoghue v Comia*,[84] where the parties were, by definition, trying to achieve a clean break, there is nothing in the factual matrix to suggest that Mr Rimmer and Ms Wilton were intending to do so. In the context of a long, loving relationship that would be the exception rather than the rule.

8.14. As noted in *O'Donoghue v Comia*,[85] and by the Law Commission, if Ms Wilton and Mr Rimmer had intended the other to have no interest in their estate, the obvious and logical step was to execute a will saying so.

8.15. Ms Wilton's position is that the appeal ought to be dismissed on the basis of this issue alone: the parties did not agree to exclude additional entitlements under a will or intestacy. It is not necessary, and this is not the appropriate case, for the Court to go further and decide whether it is *ever* possible for an RP Agreement to 'opt out' of the otherwise mandatory provisions of the Administration Act and require the administrator to make a different distribution.

9. 'Contracting out' is incompatible with the Administration Act

9.1. If the Court finds that the Agreement *did* amount to a promise by Mr Rimmer and Ms Wilton not to receive their intestacy entitlements (denied), Ms Wilton's position is that it cannot be enforced. On a proper construction of the Administration Act, such a promise is fundamentally incompatible because it:

(a) cannot change the survivor's legal status as de facto partner of the deceased;

(b) cannot override the mandatory provisions of s 25 and Part 3 of the Administration Act; and

[83] Ibid at [16] and [41].
[84] *O'Donoghue v Comia* [2023] NZHC 2735.
[85] *Ibid*, at [21].

(c) cannot compel the administrator to distribute the assets of the estate other than in accordance with the table of entitlements provided in s 77.

9.2. This approach is most consistent with the text and purpose of the Administration Act and provides a clear path for practitioners and administrators dealing with estates.

How the administrator holds the estate (whether by will or intestacy)

9.3. The Administration Act is the sole source of an administrator's rights and duties, whether under a will or intestacy. Per s 24, immediately on the grant of administration all the deceased's estate vests in the administrator. By s 25, and subject to the provisions (only) of the Administration Act, the administrator holds the estate either according to "the trusts and dispositions of the will" or, where the deceased is intestate, "according to the provisions of Part 3" (intestacy rules).

Section 77: distributions are prescriptive and mandatory

9.4. Section 77 (in Part 3) provides that in the case of intestacy, the estate "*must be distributed"* to the persons referred to in column 1 of the table in that section; "*in the manner"* prescribed in column 2. Column 1 of the table identifies the persons entitled to receive a distribution solely by reference to their legal status or relationship to the deceased (eg husband, child, etc). The administrator may need to be satisfied that a person meets the requisite status. But once satisfied (or not), the distributions in column 2 are absolute. The administrator has zero discretion.

Legal status: cannot be altered by contract

9.5. The legal statuses referred to in Column 1 are not unique to the Administration Act – they apply across the wider statute book. And, in each case, those descriptions have a legal meaning that cannot be altered by agreement. For example:

(a) Parties may enter a marriage or civil union by contract, but they may only end it by way of Court order (separation order or divorce). Until such order(s) are made, the parties retain the legal status of "spouse",[86] whatever they might agree.

(b) "De facto partner" has a specified meaning in the PRA (incorporated into the Administration Act by s 77B). Where a person meets the statutory definition

[86] See ss 23 and 26 of the Family Proceedings Act 1980, which apply to marriages and civil unions.

(ss 2C and D of the PRA), the legal status of "de facto partner" is conferred on them, again whatever they might privately agree.

9.6. These statuses have legal significance. As Baroness Hale put it in *Granatino*, the status of marriage (or civil partnership) "…means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state."[87] As discussed in the next section, the Administration Act prescribes the (limited) circumstances in which a party's legal status is changed so as to be excluded.

Sections 77A to C: 'disqualifying' exceptions to intestacy entitlements

9.7. The Administration Act provides certain exceptions to the s 77 entitlements. Where those exceptions apply, the Act provides a prescriptive alternative path for distribution:

(a) Section 77A applies where the deceased is party to a separation order. In that case, the s 77 entitlements devolve, as if the survivor had predeceased the intestate.[88] The path the administrator then follows is straightforward: they move directly to "row 4" of the s 77 table and distribute accordingly.

(b) Section 77B of the Administration Act applies to de facto relationships of short duration (adopting the PRA's definition). In that case, the surviving de facto partner is not entitled to their s 77 entitlements unless the Court is satisfied that: (i) there is a child of the relationship; or (ii) the partner has made substantial contributions to the de facto relationship; and (iii) not being entitled to succeed on intestacy would result in serious injustice. But, again, the obligations on the administrator are clear: an application to the Court is required to determine the surviving partner's entitlements (if any).

(c) Finally, s 77C of the Administration Act applies to multiple relationships (eg a "throuple"). Where the deceased leaves behind multiple partners, column 1 of the s 77 table continues to be read as though the deceased had left behind only one partner, but all partners share equally in the column 2 entitlement. There may be arguments about whether the deceased had more than one qualifying relationship. But, once established, the path is again clear.

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[87] *Granatino v Radmacher (formerly Granatino)* [2011] 1 AC 534 (SC) at [132].
[88] S77A itself incorporates s 26 of the Family Proceedings Act 1980. See also s 19 of the Wills Act 2007, which provides for the same in the wills context.

9.8. The fact that these limited exceptions are expressly provided within the Administration Act indicates that they are intended to be the *only* exceptions. Their purpose would be undermined if parties were free to make up their own.

Section 81: disclaiming intestacy entitlements

9.9. The Administration Act provides a single method by which a successor can give up or "disclaim" their s 77 intestacy entitlements (s 81). Section 81 applies only once a successor "has become entitled under this Act to an interest" – i.e. after the deceased's death. There are formal requirements for disclaimer, including being made by way of a deed delivered to the administrator. But, provided those are met, the administrator is required to distribute the estate as if the beneficiary had died immediately before the intestate person.

9.10. The fact that this procedure is contained within the Administration Act tells against the availability of other options for giving up intestacy rights, particularly in advance. Section 81 would be redundant if parties are able to exclude intestacy rights off their own bat by private contract.

Conclusion: a private agreement cannot modify the Administration Act

9.11. The appellants urge the Court to see giving effect to a s 21 agreement as a "logical extension" of the exceptions recognised in ss 77A – C of the Act and as consistent with s 81.[89] However, the existence of the statutory exceptions in ss 77A – C demonstrate that Parliament intended to limit a person's (automatic) entitlements only in specific circumstances. Section 81 is likewise intended to limit the means by which parties can give up intestacy entitlements.

9.12. While disputes around the applicability of those provisions may arise (eg was the deceased's relationship of short duration?), once triggered, a clear path is provided for the administrator. The same is not true of the appellants' proposed approach. It provides no clear path for an administrator. Rather it introduces an unhelpful degree of ambiguity.

9.13. The appellants' argument of 'contractual primacy' goes further than just contracting *out* of the intestacy regime. It would transform it into an *opt-in* system where a s 21 agreement exists. The appellants' position is that a survivor cannot receive both their relationship property entitlements and their succession entitlements unless *expressly provided for by the s 21 agreement and/or will*.[90] In the case of intestacy, there will obviously be no will. According to the appellants, then, the

[89] Appellants' submissions, at [3.12].
[90] Appellants' submissions, at [1.10].

intestacy provisions do not apply unless the s 21 agreement specifically says so. Further, the *extent* of any entitlements that do exist, are limited to what is provided for in the s 21 agreement.

9.14. That approach is incompatible with the mandatory ("*must*" distribute) language of s 77 and fails to recognise that a person's entitlements stem from their legal status. It also leaves an administrator in a significant grey area as to how to proceed. Do they follow the mandatory provisions of the intestacy regime and distribute accordingly? Or do they accept an interpretation from one of the parties that the s 21 agreement excludes the intestacy regime and change the distributions that they make? Administrators would have to obtain independent legal advice before proceeding and would open themselves up to legal challenge either way.

9.15. The whole point of the intestacy regime is to be a default backstop. As stated by the Law Commission, key objectives of any intestacy regime include ensuring that the rules are (a) simple to understand and (b) efficient to implement: "People should know what will happen to their property if they die without a will. Beneficiaries in an intestacy ought to be able to consult the regime to understand their entitlements. This is particularly important given that individuals eligible to be administrators of the estate are beneficiaries and are unlikely to be professional executors".[91] The appellants' approach does not advance that goal. It would relegate the Administration Act to secondary legislation that only applies if and when parties "opt in". In the context of a default regime, this is plainly at odds with the purpose of the legislation.

No problem to "fix"

9.16. Contrary to what the appellants say, there is no problem here that the Court needs to "fix": a will is already the well-established means of displacing the intestacy provisions. As stated by the Law Commission, the lack of provisions in the Administration Act dealing with contracting out of the intestacy regime is understandable, "*because the deceased could simply have made a will*" which achieves the same result, and more efficiently.[92] A s 21 agreement is not a will and, unless an order is made under s 14 of the Wills Act, cannot have the legal consequence of a will. Without a will, the intestacy provisions apply. And, as in Australia and the UK, the Court has broad discretion to ameliorate the operation of the rules via the FPA.

[91] NZLC Succession Report, at [7.17(a)].
[92] NZLC Succession Issues Paper, at [11.8].

Warrender et al do not assist the Court

9.17. The main decision relied on by the appellants is *Warrender*. It is the only authority relied on in *Dobbie's Probate and Administration Practice*,[93] *Wills and Succession*[94] and *The Laws of New Zealand*[95] for the proposition that it is possible to contract out of the Administration Act. *O'Donoghue* simply adopts its reasoning. However, *Warrender* provides little assistance to the Court.

9.18. As discussed above, *Warrender* involved a very different set of circumstances to those here. Further, the Court in *Warrender* does not explain how its conclusion – that parties can contract out of the Administration Act in advance of the deceased's death – is consistent with an administrator's mandatory obligations under ss 25 and Part 3 of the Administration Act (particularly ss 77 and 81). Nor how it can change a person's legal status. According to the High Court:[96]

> A statutory system based on fairly arbitrary provisions of this nature [s 77 entitlements] is not one which suggests that it would be contrary to policy for those who might otherwise be entitled to the property to contract out of the entitlement.

9.19. With respect, the provisions are anything by arbitrary. This statement ignores: (i) the ability of a person to avoid effect of s 77 by making a will; (ii) that the distributions in s 77 are designed to reflect what a deceased would have done had they left a will; and (iii) the actual words of s 77 which, on the Judge's reasoning, are swept away by contract.

9.20. The Judge's reliance on *Re Rist* is misplaced.[97] Parties are free to agree whatever they like between themselves, including in relation to their estates and intestacies. The relevant question is whether a s 21 agreement can override an administrator's mandatory duties under the Act? *Re Rist* does not engage with this.

9.21. The other cases relied on by the appellants are similarly unhelpful. With the exception of *Re Rist,* none of the Canadian authorities relied on by the appellants "confirmed that partners can contract out of intestacy rights through a relationship property agreement":[98]

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[93] 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].
[94] William M Patterson *Wills and Succession* (online ed, LexisNexis) at [8.2].
[95] William M Patterson "Rights of Surviving Spouse" in Hon Justice A Tipping (ed) *The Laws of New Zealand* (online ed, LexisNexis) at [479].
[96] *Warrender v Warrender* [2013] NZHC 787, at [20].
[97] *Warrender v Warrender* [2013] NZHC 787, at [21].
[98] Appellants' submissions, at [4.17].

(a) *Stern v Sheps* and *Starosielski v Starosielski* did not concern intestacies: in each case, the deceased left a will, and the courts were concerned with the contracting out provisions of the Dower Act 1954.

(b) *Davids* concerned the application of the Dependants Relief Act (a combination of FPA/spousal maintenance). The Court held the Act could *not* be contracted out of.

(c) *Re Janes Estate, Philippson* and *Fune* are at least all intestacy cases but all concern separation agreements and a different legislative framework.

9.22. Turning to the UK, *Granatino* concerned spousal maintenance, not intestacy, and the Supreme Court held unanimously that a contracting out agreement was a relevant, but not determinative, factor for the Court to take into account. *Gurly* is a decision from 1842 which concerns the application of the Statute of Distributions 1670. Perhaps more relevant is the UK's current intestacy regime which does not apply if a valid will exists (Wills Act 1837) and, in that case, s 46 of the Administration of Estates Act 1925 provides that the residuary estate of an intestate *shall be distributed* in the manner or be held on the trusts mentioned in this section – referring to a table of (i) people and (ii) entitlements. Such entitlements can be disclaimed after the deceased's death or altered by the Inheritance (Provision for Family and Dependents) Act 1975 (akin to the FPA).

9.23. Looking across to Australia, *Penny* is a 1907 will construction case, not a contracting out agreement/intestacy case. The High Court of Australia upheld the widow's entitlement to receive both a gift under a will and any share on a possible partial intestacy. Again, more relevant are the current (state) intestacy regimes in Australia which provide mandatory entitlements to fixed classes of people. Like the United Kingdom, contracting out agreements are not relevant on death. Per the Family Law Act 1975, such agreements do not apply where a relationship ends on death.

10. Appellants' "subsidiary construction arguments"

Not suitable for determination by the Court

10.1. The appellants' "subsidiary construction" issues, raised for the first time on a second and final appeal, are not suitable for determination by the Court. They were not the subject of determination in the lower Courts. Nor were they raised as a ground of appeal to this Court, or in the appellants' submissions in support of their application for leave to appeal.

10.2. While sea-changes in the appellants' arguments are not new, the kind of specific, granular construction of the Agreement the appellants now urge this Court to embark on was never part of their case in the lower Courts.

10.3. This is reflected in the very limited information available to assist the Court with construction of the Agreement. The statement of agreed facts is of no assistance in determining the construction issues raised. Solicitor file notes or email exchanges may well make clear what the parties were trying to achieve with the Agreement. The Court has none of it.

10.4. *If* the subsidiary issues were determinative of the case, they ought to have been raised in (i) pleadings and (ii) evidence. They cannot be raised for the first time in this Court.

10.5. Even if the Court is minded to determine the subsidiary construction issues, that would not be the end of the matter. The consequence of the appellants' position is that Ms Wilton gets nothing from the estate. In circumstances where Mr Rimmer's primary moral obligation was to Ms Wilton, and she made a greater capital contribution to the Family Home, Ms Wilton would have a strong basis for alternative claims under, for example, the FPA. Ms Wilton is prejudiced – through no fault of her own – in that the time for making such claims has expired.

Respective capital contributions equally relevant on death

10.6. If the Court disagrees and considers that the construction of cls 4.2 and 4.4 are properly matters for determination in this Court, then the respondent's position is as follows.

10.7. Clause 4 must be read as a whole and with regard to the overall purpose of the Agreement at the time it was executed. Clause 4.2 applies when the relationship ends, because the parties *"separate"* or "*cease to live together as parties to a de facto relationship"*. These boilerplate words are broad enough, and were intended to, encompass death. Had the appellants' advanced their construction argument at the appropriate time (at first instance), the estate solicitor could have given evidence on this issue.

10.8. In any event, there can be no dispute that the parties ceased to live together following Mr Rimmer's death. That interpretation is supported by clause 5.3, which defines "separation" as including "any occasion upon which the parties cease to live together in a de facto relationship." The term "separation" in cl 4.2 therefore already encompasses by reason of ceasing to live together. The second reference in cl 4.2 to the parties "ceas[ing] to live together" must therefore serve a different

purpose. It is properly read as referring to occasions where the parties cease to live together for reasons other than separation, including death. That reading avoids redundancy and gives operative effect to each phrase used.

10.9. Clause 4.4 is *additional* to cl 4.2. It provides a life interest to the survivor if they are predeceased by the other. The life interest attaches to the deceased's share of the relationship property. It does not change what the deceased's share is.

10.10. This interpretation makes the most sense of the clauses: why would the parties agree for their shares to reflect their capital contributions in the context of an acrimonious separation, but not on death?

Life interest extinguished by death, not sale of the property

10.11. Particular care should be taken in interpreting the life interest clause without the benefit of the factual matrix. Clause 4.4 is poorly drafted, but the appellants' approach:

(a) Ignores the work "lifetime" does in the clause. On its terms, cl 4.4 provides the survivor of Mr Rimmer or Ms Wilton "lifetime occupancy and use of all relationship property." While the reference to "lifetime" and "use" is dropped from the second sentence, the phrase "right to occupy" in that sentence only makes sense if it means that the "lifetime right to occupancy and use" is extinguished only on the survivor's death.

(b) Ignores the work "use" is doing in cl 4.4. At the time the Agreement was entered into, the parties' only relationship property was the Family Home. But the Agreement contemplates the acquisition of further relationship property in the future. Cl 4.4 would have applied to that, too. In circumstances where the parties already had a family home, that was likely to include other classes of assets which could be "used" by the survivor. Accordingly, cl 4.4 was intended to provide not only a right to occupy the Family Home, but also the "use" of any other relationship property that came into existence. Hence the reference to "*all* relationship property".

10.12. As noted at the outset of these submissions, while the Family Home has been sold, 50% of the net sale proceeds (Mr Rimmer's maximum share) and all accrued interest continues to be held in the estate solicitors trust account.

11. Orders and costs

11.1. For all the above reasons the appeal should be dismissed. In that event, Ms Wilton seeks costs on the standard basis. In the event the appeal is successful, costs are more complicated (given the ongoing reinvention of the appellant's case) and Counsel would seek to be heard.

Date: 20 February 2026

S Elliott / J McGuigan
Counsel for the respondent

Having made appropriate enquiries, counsel for the respondent certify that, to the best of their knowledge, these submissions do not contain any supressed information and are suitable for publication.