

Review of the Property (Relationships) Act 1976

Response to issues paper from the Office of the Children's Commissioner

7 February 2018

Children's lives are affected both materially and emotionally if their parents, guardians or adults they are dependent on should separate. In 2015, over 6000 children were affected by divorce and with 43% of all children in one parent families, in the absence of recorded statistics, we can assume that hundreds more children were impacted by separation in de facto relationships.¹ The Property (Relationships) Act 1976 (the 'PRA') provides some legal protection for the rights of the child with regard to property. The United Nations Children's Convention² directs that New Zealand should take appropriate measures to assist those responsible for children to access the child's right to a standard of living adequate for their development.³ With this in mind, the Office of the Children's Commissioner supports all policy and legislative measures that create an adequate standard of living for households supporting New Zealand's 1.1 million children.

Our response is limited to the issues paper on the PRA. However, we would encourage a child-centred consideration of the PRA within the context of the legal pillars of support namely working for families, child support, maintenance and social security. The consideration of these pillars together would

have a greater impact, particularly for children in whānau and families with limited financial resources to receive the support needed for them to reach their potential.

We have not provided a comprehensive response to all issues raised in the paper but offer an overview response from a child-centred perspective, provide some comments and recommendations.

We support the call for the PRA to take a more child-centred approach. :

- Where there are children of the relationship their welfare and interests are given paramount consideration in determining division of property; and
- The PRA direct that the views of rangatahi and tamariki of a relationship be taken into account always in or outside of court; and
- Greater support for child-centred processes to occur outside of court be made available as majority of separations take place without court intervention; and
- Where claims are heard in court and a child is involved, a lawyer for child is always appointed so children's views are heard; and
- Where there is a child of a relationship, regardless of the length of the relationships, the interests of children protected in the PRA always apply.

The OCC represents **1.1 million** people in Aotearoa New Zealand under the age of 18, who make up 24 percent of the total population.

We advocate for their interests, ensure their rights are upheld, and help them have a say on issues that affect them.

For more information, please contact:

Julia Whaipooti
Senior Advisor

j.whaipooti@occ.org.nz

¹ <http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/qstats-families-households/one-parent-children.aspx>

² United Nations Convention on the Rights of the Child, available at Schedule 2 of the *Children's Commissioner Act 2003*: <http://www.legislation.govt.nz/>

³ Article 27, United Nations Convention on the Rights of the Child: <http://www.ohchr.org/>

BEING CHILD-CENTRED

Taking a truly child-centred approach is a way of elevating the interests and voice of children. In Aotearoa, New Zealand this means:

... all decisions and actions are grounded in what is best for the child. It means understanding the child within the context of their family and whānau. Determining what is in a child's best interests involves talking and listening to them and their families and whānau, and it also requires that social workers and others use their professional judgement, expertise in child development and attachment, cultural competence, and knowledge of the child and their circumstances to make informed decisions that meet that child's needs.⁴

Where children are involved in relationship separation, the division of property directly impacts their needs and interests. Their voice and interests must be given paramount consideration in the context of PRA.

The Children's Convention stipulates that the best interests of the child should be a primary consideration in any decision that affects them.⁵

Currently, the interests of children is specifically recognised in the purposes of the PRA⁶, **section 26**, where orders can be made for the benefit of children of the relationship. However, orders under this section for the benefit of children are rarely made. Currently the section states the Court 'must have regard to the interests of any minor or dependent children...' but there is little evidence to show this section is applied. Where there are children in the relationship:

We recommend the PRA amend section 26 or include a new provision to ensure the welfare and best interests of any child or children of the relationship must be the first and paramount consideration.⁷

A critical part of being child-centred is listening to the views of children and young people. This is their right under the UN Convention. We know it produces better decisions and outcomes when done well.

Seeking and listening to children's views on decisions that affect them is an important part of being child-centred. The PRA presents an opportunity to ensure that the right of children to be heard in meaningful ways.

Currently, **Section 37** of the PRA directs that any person who is affected by the division of relationship property have the right to be heard and to appear in court on applications. The court room is not a child-friendly environment however, to take a truly child-centred approach requires mechanisms to ensure children affected by separation have an opportunity to have their voices heard.

Section 37(a) allows for the Judge to appoint children and minors a lawyer so their views can be represented in court. This is at the discretion of the Judge. However, as noted in the issues paper, very few property issues are determined in court.

We support the principles of the PRA that the best processes to support division of property occur outside of court in a way that is quick, inexpensive and fair.⁸ With the lack of information available on how people resolve their relationship property issues outside of court there is also little information on how the views of the majority of children and young people affected by separation are heard.

This raises broader access to justice issues when the majority of separations resolve property matters outside of court, how we ensure people are aware of their legal rights,

⁴ See *State of Care 2016*, page 2:
<http://www.occ.org.nz/assets/Uploads/OCC-State-of-Care-2016FINAL.pdf>

⁵ Article 3, United Nations Convention on the Rights of the Child:
<http://www.ohchr.org/>

⁶ S 26, Property (Relationships) Act 1976

⁷ Similar to s 4 of the Care of Children Act 2004

⁸ S 1N(d), Property (Relationships) Act 1976

and especially where children are involved, how 'fair' is measured.

We recommend that where children are involved in a separation s37 direct that their views should *always* be taken into account whether a claim is heard in court or otherwise.

We recommend greater support for child-centred processes that occur outside of court to be made available. This could be an extension of the family dispute resolution service or a similar mediation service.

We recommend where a claim is made in court that s 37(a) be amended to require a Judge to *always* appoint a lawyer for child and not just at their discretion.

PRESUMPTION OF 50/50 DIVISION

The presumption of a 50/50 split should be altered where children are involved on a case to case basis. The immediate and final division of property does not seem appropriate, and is not child-centred. A child of a relationship creates a permanence of a relationship regardless of the status of the adults who have or are separating, or the length of time their relationship lasted. The permanence of the relationship with a child means the on-going material needs of children need to be considered in property division and full and final division of property cannot take this into account.

THE PRA TO APPLY WHEN CHILDREN ARE INVOLVED

The issues paper poses whether the PRA could apply to de facto relationships on an opt-in or opt-out basis. Taking a child-centred position means that whenever there are children of the relationship their rights and interests protected in the PRA should always apply. Where children are involved in any relationship, de facto or otherwise, there should be no provision to opt out of the PRA. The interests and rights of children protected in the PRA should always apply.

This also raises questions as to who is a child for the purposes of the PRA. The definition of who constitutes a child of the relationship in the PRA has limitations such as the length of time of the adult relationship that is coming to or has come to an end. Regardless of the duration of the relationship, where children of the relationship exist, their interests protected under the PRA should apply.

Section 14A of the PRA provides a two stage test for relationships of short factor including if there is a child of the relationship. We consider where there is a child of the relationship that this is always a factor and should be reflect4ed in the act.

We consider any child of a relationship is any child who is materially and emotionally dependent on that relationship and their interests in the PRA should always apply.

We recommend the PRA should apply to all de facto relationships where children from the relationship exist. There should be no opt-out clause provided.

In summary, we believe the interests of children and young people in the PRA should be paramount, and their needs and views considered where the relationships they are dependent on should come to an end. Again, we hope that the interests and needs of children in the PRA is considered in the context of the broader legal supports that affect their care and well-being; working for families, child-support, maintenance and social security.