

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT TAURANGA**

**I TE KŌTI WHĀNAU
KI TAURANGA MOANA**

**FAM-2020-070-000506
[2021] NZFC 6332**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[JOSHUA CLAYTON] Applicant
AND	[EVE BARLOW] Respondent

Hearing: 28 June 2021

Appearances: Applicant appears in Person
R Savage and D Wiltshire for the Respondent

Judgment: 29 October 2021

**RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO DIVISION OF PROPERTY;
CONSIDERATION OF SS 133 AND 141 OF THE TRUSTS ACT 2019]**

[1] Ms [Barlow] and Mr [Clayton] had been in a de facto relationship from 2002 until February 2019. Ms [Barlow] maintains that the parties separated on 26 February 2019 and Mr [Clayton] considers the date of separation was 20 February 2019.

[2] There have been previous proceedings between the parties in relation to Care of Children Act matters and Family Violence Act matters. A Final Protection Order was made against Mr [Clayton] by his Honour Judge Geoghegan on 26 February 2021.

[3] There are also proceedings under the Family Proceedings Act relating to the payment of interim maintenance, and following a hearing Mr [Clayton] was required to pay Ms [Barlow] interim maintenance; he has not paid all of that interim maintenance and there is a debt outstanding of \$9,000. Mr [Clayton] has also been ordered to pay costs on that application to Ms [Barlow] in the sum of \$7,087, and costs in relation to the family violence proceedings in the sum of \$3,770.51.

[4] The parties' property consists of the following:

- (a) The family home situated at [address A] owned by the [J Clayton] and [E Barlow] Trust (and therefore not relationship property);
- (b) [Company 1]; the shares are owned a third each by Mr [Clayton], Ms [Barlow] and the [Barlow] Trust;
- (c) Motor Vehicles;
- (d) Chattels;
- (e) A Boat; and
- (f) Funds in joint bank accounts.

[5] There are also a number of relationship and trust debts. The hearing before me occurred on 28 June 2021. At the end of the hearing I directed by consent, that further evidence needed to be filed, particularly in relation to the debt situation of [company 1]. That evidence was filed on 10 September 2021 attached to a memorandum filed by

Ms Savage. In that memorandum Ms Savage advises that Mr [Clayton] has indicated that he is in agreement with the amended debt figures.¹

[6] Mrs Savage in her submissions dated 7 May 2021 sets out the issues that I need to determine. Those issues are:

- (a) Whether to make an order for the sale of the [Barlow] Trust owned property, at [address A] ;
- (b) If it is sold what is to happen with the proceeds of sale;
- (c) The status of the boat; is it relationship property or separate property;
- (d) The value of [company 1];
- (e) Whether there should be a compensatory award made pursuant to s 15 of the Property (Relationships) Act 1976 in favour of Ms [Barlow]; and
- (f) Whether there are any post-separation adjustments which need to be made as between the parties including:
 - (i) The costs awarded against Mr [Clayton] for the interim maintenance and family violence proceedings; and
 - (ii) The outstanding amount of interim maintenance owed by Mr [Clayton] to Ms [Barlow].

Jurisdiction of the Family Court under the Trusts Act 2019

[7] Prior to the introduction of the Trusts Act 2019, there was no jurisdiction under the PRA, or s 182 of the Family Proceedings Act 1980 (as the parties were not married or in a civil union) to make orders in respect of the [address A] property. Mrs Savage submits that that has all changed with the commencement of the Trusts Act on 1

¹ Ms Savage's submissions, 10 September 2021 at [7].

February 2021.² Ms [Barlow] seeks directions pursuant to s 133, including a direction for sale, with the jurisdiction to bring any such application contained in s 141 of the TA 2019. Section 141 states as follows:

141 Jurisdiction of Family Court

- (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.
- (2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—
 - (a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or
 - (b) to give proper effect to any determination of the proceeding.
- (3) If the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute between the parties that is closely related to the proceeding (but only if the Family Court considers that making the order is necessary or desirable to assist the resolution of the proceeding).
- (4) Despite subsections (2) and (3), the Family Court does not have jurisdiction to appoint a receiver to administer a trust under section 138.
- (5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.
- (6) In any case to which this section applies, the High Court or Family Court may order, on the application of a party to the proceedings, that the proceedings be transferred to the High Court.

[8] Significantly, s 141(2) and subs (3) respectively refer to “any direction” or “any order” available under the TA. Thus, the Family Court in exercising jurisdiction pursuant to s 141 of the TA, can only make directions or orders that are permitted pursuant to the Act itself. That is significant. For Mrs Savage effectively submitted that the Court should make an order for sale, and then an order dividing the net sale proceeds equally between the parties, subject to any adjustments, so as to achieve an equal division under the PRA. In effect she is asking the Court to ignore the provisions

² Pursuant to the Trusts Act 2019, s 10 of sch 1, pt 1 the Family Court can exercise jurisdiction under s 41 in relation to these proceedings because they were commenced but not completed before the commencement date being 1 February 2021.

of the trust and/or to *trust bust*. The difficulty with that submission, is that there is no jurisdiction under the TA to do exactly that. For if there was, there would be arguments about the need for legislative reform in relation to the PRA, and parties would routinely have applied to the High Court to transfer PRA proceedings from the Family Court to the High Court, and to then have the High Court set aside the trusts.

What then is the jurisdiction under the Trusts Act 2019?

[9] There are limited judicial authorities on the applicability and scope of s 141 of the TA, and to date no appellate authorities that I have been able to find. His Honour Judge Russell in *[Howard v Howard]* stated that if both parties do not consent under s 141(3), then s 141(2)(b):³

... ought to enable [the Family Court] to make any necessary adjustments to the terms of the trust once the substantive issues in the relationship property components of the case is heard and determined. Section 33(3)(m) of the Property (Relationships) Act [1976] is also available to vary the terms of any trust.

[10] In *Green v Hing* an application was made, amongst other remedies sought, seeking that the Family Court, pursuant to the jurisdiction afforded in s 141, remove and replace a trustee.⁴ Judge Muir noted that whilst there was no “specific discrete provision giving the Family Court power to appoint and remove trustees” in the TA, his Honour held:⁵

... but the wording of s 141 could hardly be clearer. The Family Court now has the power to make any order or give any direction available under the Trusts Act provided the Court considers the order or direction is necessary to either protect or preserve any property or interest pending resolution, or to give proper effect to any determination of the proceedings.

[11] Judge Muir’s position is indicative that it is open to the Family Court to make any orders authorised by the Trusts Act 2019 so long as they are closely related to the proceeding, and the Family Court considers that the making of the order is “necessary or desirable to assist the resolution of the proceeding”.⁶

³ *[Howard v Howard]* FC Blenheim FAM-2020-006-019, 4 February 2021 at [7]; his Honour made similar comments in *Hiatt v Hiatt* FC Nelson FAM-2018-042-344, 11 February 2021.

⁴ *Green v Hing* [2021] NZFC 4687.

⁵ *Green v Hing*, above n 4, at [145].

⁶ Pursuant to the Trusts Act 2019, s 141(3).

[12] Part 7 of the TA sets out the Court's powers, with ss 126 to 140 providing a number of discrete powers available to the Court during a proceeding under the TA. The Court may:

- (a) Review a trustee's act, omission or decision.
- (b) Take into account investment strategy in action for breach of trust.
- (c) Set off gains and losses arising from investment.
- (d) Vary or extend trustees' powers in relation to property.
- (e) Relieve a trustee from personal liability.
- (f) Make a beneficiary indemnify a trustee for breach of trust.
- (g) Give directions about trust property or the exercise of any power by the trustee.
- (h) Appoint a receiver for the trust.
- (i) Order payment of remuneration to a trustee.
- (j) Charge costs on trust property.

[13] Under the Trustee Act 1956 the Court had the power to authorise dealings with trust property and variation of trust.⁷ There is no equivalent provision in the 2019 Act. Historically under the 1956 Act there was a power of the Court to direct sale or lease, but this was repealed in 1960. There is no specific power within the Trust Act to order the sale of property. That is important as, pursuant to either s 141(2) or subs (3) the Family Court can only make orders available under the TA to resolve an issue or dispute between the parties. In relation to the application of the TA, Ms Savage refers to comments by the Law Commission where it stated at [13.25]:⁸

⁷ Trustee Act 1956, s 64 (repealed).

⁸ Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013).

We recommend that the Family Court should be able to make orders under the new Act where these are necessary during the proceedings to protect or preserve any property or interest that is the subject of those proceedings until the issues are fully resolved by the court. Our recommendation would allow the Family Court to, for example, make an order removing one trustee and appointing (even on a temporary basis) a new independent trustee where this is necessary to manage serious deadlock, hostility between trustees, ascertain the nature of the trust assets, or to preserve those assets until the property claims of the parties can be properly resolved.

[14] Ms Savage invites the Court to find that the parties consent to the Family Court making orders under the TA to resolve the dispute in respect of the [address A] property. In her submissions she sets out the background to the discussions between the parties, including the agreement between the parties that the [address A] property should be sold and the proceeds divided equally. However, Mr [Clayton] subsequently resiled from that agreement, unilaterally withdrew the listing, and retained the use of the property for himself.

[15] As I pointed out to Ms Savage during her submissions, even if there was to be an agreement between the parties for the sale of the property, the Court would be obliged to not only consider the interests of Mr [Clayton] and Ms [Barlow] as discretionary beneficiaries, but also the interests of their children as the final beneficiaries of their family trust. I suggested, that an option could be to devolve the existing trust into two parallel trusts, of which Mr [Clayton] was a discretionary beneficiary and their children final beneficiaries in relation to one trust, and Ms [Barlow] was a discretionary beneficiary and their children final beneficiaries in relation to the other trust. That still leaves a situation of “deadlock” in which Mr [Clayton]’s trust could refuse to agree to the sale of the property.

[16] However, even if I was to determine that the parties consented pursuant to s 141(3) the power of the Family Court to intervene is only to make an order available under the TA to resolve an issue or dispute between the parties that is closely related to the proceeding, but only if the Family Court considers that making the order is necessary or desirable to assist resolution of the proceedings. Fundamentally, property held in the ownership of a trust is not relationship property, and under the PRA, it falls for consideration only if the s 44 or s 44C grounds are established. No argument as to the applicability of either section has been raised on behalf of either party.

[17] If any case highlights the necessity for reform in this area it is this case. For if the parties had not transferred ownership of their home to the family trust, then there would have been a net asset position which could then have been divided equally under the PRA subject to the adjustments sought by Ms [Barlow]. However, in this case the only asset of value is that owned by the trust; the parties' relationship property (as defined under the PRA) consists entirely of debt. I cannot find any jurisdiction under the TA to order trustees to sell a property, and there certainly is no jurisdiction to then require the trustees, if there was jurisdiction to order a sale, to then pay out Mr [Clayton] and Ms [Barlow] a half share (again subject to adjustments under the PRA) as submitted by Ms Savage. At best the Court could simply devolve the ownership into two mirror trusts in the manner set out above,⁹ arguably pursuant to a combination of s 141, s 130 and/or s 33(3)(m) of the PRA. That option does not assist as there would unlikely be a consequent agreement to sell the property by Mr [Clayton]'s trust.

[18] My suggestion to the parties is that one of them brings an application to remove the parties as trustees and to appoint an independent trustee in their stead. The independent trustee, together with the existing independent trustee, may then resolve to either wind up the trust, or to sell the property and to then transfer the net sale proceeds into two mirror trusts. However, they may not as they will have obligations as Trustees to all of the beneficiaries. That option will involve the parties in further litigation and cost, and I would hope that Mr [Clayton] would again revert to his earlier agreement to simply sell the property.

[19] I appreciate this is not the outcome that Ms [Barlow] seeks, but, as I have set out above, s 141 of the TA does not allow the Court to 'trust bust', or in other words to effectively treat the trust property as relationship property.

[20] An alternate course of action may be for Ms [Barlow] to appeal this decision so that there can be some High Court guidance as to what are the precise powers under the TA available to the Family Court, including whether, in the absence of a specific power under Part 7, the Family Court has the power to direct the sale of a property owned by the trust.

⁹ Which could not be given effect to unless ANZ, as the holder of the registered mortgage, consents.

[21] For the balance of this judgment I intend to see out the orders that I would have made if the home was in the family trust, as that may or may not be of assistance to the parties and/or any replacement trustees appointed in the future. However, any replacement trustees will need to make, as a matter of law, their own independent assessment and decisions, and should in no way feel bound or fettered by this judgment.

[Company 1]

[22] At issue in this hearing is the value of [company 1]. It is a limited liability company in which the parties and the trust each hold a one-third shareholding in the company. As the parties accept the company is not relationship property, and the only relationship property component is the value of the respective shares held by the parties in their individual name. No formal valuation has been provided in relation to the shareholding, but Mrs Savage in her original submissions has set out on a notional liquidation basis that the value of the company shares amounts to \$62,980.99. However, attached to her submissions dated 10 September 2021, is a new spreadsheet which now shows the value of [company 1], on a notional liquidation basis, to be - \$28,266.46. That is the only value which I have before me in relation to this matter, and in effect the company shares are worthless.

[23] Mr [Clayton] suggested that there needed to be a proper valuation undertaken by the company accountant. I note that he has had a number of occasions in which he would have been able to provide that evidence and a number of occasions in which he has failed to comply with directions made by the Court. I determine that the relationship property component of the value of the company shares is nil. The balance of the shareholding (also of nil value) is of course owned by the trust and is outside the jurisdiction of the Court.

Boat

[24] There is an issue in the proceedings as to the value of the parties' boat and whether it is relationship property. Mr [Clayton]'s position is that it was purchased out of funds received from an inheritance and is therefore his separate property. Ms

[Barlow]’s position is that it was purchased out of relationship property. I do not need to determine that factual dispute. Mr [Clayton] accepts that the boat was used for family purposes and thus in terms of the case law, it is clearly a relationship property asset. On that basis the value of the boat is to be divided equally between the parties. It now has an agreed value of \$24,000 being the amount for which it was sold.

[25] The difficulty in this case is that the parties’ relationship property consists of debt, with the equity of ‘their’ property being in the Trust. The parties’ relationship property therefore consists of the following:

(a)	<u>Asset</u>	<u>Value</u>
	Boat	\$24,000
	Family chattels	\$20,000
	Ms [Barlow]’s motor vehicle	<u>\$ 1,500</u>
		\$45,500
(b)	<u>Debts</u>	
	Q Card (Ms [Barlow])	\$6,723.94
	Farmers Card (Ms [Barlow])	\$2,874.97
	ANZ Low Rate Visa (Ms [Barlow])	\$5,047.98
	One Card (joint)	\$11,003.83
	Loan (Harmony)	<u>\$25,222.25</u>
		\$50,872.97
(c)	<u>Net Asset Position</u>	<u>-\$5,372.97</u>

[26] There are also a number of debts owed to the IRD for outstanding GST and income tax, all in the name of Mr [Clayton], and which should be his sole responsibility.

[27] However, the boat and Ms [Barlow]’s vehicle have been sold post-separation, and I cannot make any orders in relation to the sale of those items in order to cover some of the debt. What I intend to do therefore is divest the debt in each of the parties. This is particularly relevant as some of the debt in Ms [Barlow]’s name actually relates to monies used for the company and should be Mr [Clayton]’s responsibility. Whilst

the company is technically insolvent, it continues to trade, and those debts should therefore be the responsibility of Mr [Clayton] given that he is taking over the company. I also intend to remove Ms [Barlow] as a shareholder given that her shares are worthless.

Section 15 Claim

[28] Ms [Barlow]'s s 15 of the Property (Relationships) Act claim must fail, not because it is without merit, but because there is no jurisdiction to award compensation. Section 15(3) provides for compensation to be paid out of relationship property. In this case there is no relationship property of value, and therefore there is no relationship property from which to award compensation. Her claim must therefore fail.

Orders

[29] Against that background I now make the following orders:

- (a) I determine that the shares in [company 1] have a nil value on a notional liquidation value.
- (b) I vest the proceeds of sale of Ms [Barlow]'s vehicle in her, and the proceeds of the sale of the boat in Mr [Clayton].
- (c) I vest the Q Card, Farmers Card and ANZ Low Rate Visa debts in Ms [Barlow].
- (d) I vest the One Card and Harmoney Loan debts in Mr [Clayton].
- (e) I vest Ms [Barlow]'s shares in [company 1] in Mr [Clayton].

[30] If there had been relationship property of value, I would have ordered that Mr [Clayton] pay to Ms [Barlow] the outstanding amount of spousal maintenance and costs awards from his share of relationship property. Again, the court cannot do so

given that there is a negative equity position in relation to the parties' relationship property.

[31] I appreciate this judgment is an entirely unsatisfactory outcome for Ms [Barlow]. It leaves unresolved the outstanding debts owed to her by Mr [Clayton] in terms of Court costs and spousal maintenance payments which are owing by him. As set out above I invite, in essence, Ms [Barlow] to file a subsequent application to remove both herself and Mr [Clayton] as trustees and to appoint an independent trustee, or in the alternative, to appeal this judgment so that there can be some clarity by the High Court as to whether there is jurisdiction of the Family Court, outside the express provisions of the TA, to order the sale of the trust property and either, the dissolution of the trust, or the transferring of the trust into two mirror trusts.

S J Coyle
Family Court Judge

Signed this 29th day of October 2021 at 3:30 pm.