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IN THE FAMILY COURT
AT AUCKLAND

FAM-2015-004-001026
[2016] NZFC 4413

IN THE MATTER OF	the Property (Relationships) Act 1976
BETWEEN	KIT POWERS OF AUCKLAND Applicant
AND	EVE POWERS OF AUCKLAND Respondent

Hearing:	24 May 2016
Appearances:	Ms A Ramphal for the Applicant Mr M Headifen for the Respondent
Judgment:	8 June 2016

RESERVED JUDGMENT OF JUDGE P J CALLINICOS
[Duration of Relationship]

Introduction

[1] This decision explores a sad situation where two people who, on the one hand loved each other and were very committed to the other, could not reconcile fundamental personality differences to the point where their marriage wound its way to termination.

[2] They commenced living together in a de facto relationship on the 9th of February 2010, when the applicant moved in to live with the respondent in a home owned in her sole name. They married on 17 February 2011 and continued living together until 18 February 2013 when the applicant left the relationship home. While issues abound as to the nature and quality of the relationship from that date, it transpires the parties did not reconcile their marriage.

The Proceedings

[3] On 5 October 2015 the applicant filed proceedings under the Property (Relationships) Act 1976 for orders defining relationship property. The respondent opposes that application.

[4] It is not disputed that the total period for which the parties lived together, both in the initial de facto relationship and the subsequent marriage, amounted to three years and nine days. However, the respondent seeks that the Court exercise the discretion reposed in s 2E to determine that, having regard to all the circumstances in which the parties lived together, it is just to treat the overall relationship as being one of short duration.

[5] This hearing was allocated for the purpose of that preliminary issue, at which I heard the evidence of the parties and received full submissions from both counsel.

Law

[6] The starting point is s 2A(2) which provides the marriage of two people ends if:

> "(a) They cease to live together as a married couple."

[7] In the context of this case, it is salient to note that s 2B provides:

> **2B Marriage includes immediately preceding de facto relationship**
>
> For the purposes of this Act, if a marriage was immediately preceded by a de facto relationship between the 2 spouses (**A** and **B**), the de facto relationship must be treated as if it were part of the marriage.

[8] By virtue of s 2B, the preliminary de facto relationship between the parties subsumes into the marriage, carrying the effect that I must treat the total length of the marriage as being of 3 years and 9 days duration.

[9] The key provision around which this dispute revolves is s 2E, the relevant portion of which provides:

> **2E Meaning of relationship of short duration**
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> (1) In this Act, relationship of short duration means,—
>
> (a) in relation to a marriage or civil union, a marriage or civil union in which the spouses or partners have lived together in the marriage or civil union—
>
> (i) for a period of less than 3 years; or
>
> (ii) for a period of 3 years or longer, if the court, having regard to all the circumstances of the marriage or civil union, considers it just to treat the marriage or civil union as a relationship of short duration.

[10] Given the respondent does not contest[1] that the relationship exceeded the requisite period of the three years, the pivotal issue is whether the Court should exercise the discretion in s 2E (1)(a) (ii) and "treat the marriage as…a relationship of short duration".

[11] The leading authority on the application of that discretion is that of the Court of Appeal in *Martin v Martin,*[2] in which the Court considered a marriage lasting 3 ½ years. The Court concluded that although the relationship of the parties had been an unhappy one, they had lived together as "man and wife" and provided a home for the three children. The Court upheld the earlier decision of the High Court that this was not a situation where it should exercise the discretion by declaring the marriage to be

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1 Submissions of Respondent para [17] – [20]
2 *Martin v Martin* [1979] 1 NZLR 97

one of short duration. At first instance Ongley J recorded the state of the marriage[3], observing that the marriage was not a happy one at any stage. He described the relationship between the parties as deteriorating steadily and, at about the time of the birth of their child, they commenced to occupy separate bedrooms. The High Court described the sexual intimacy as "generally unsatisfactory". Ongley J concluded:

> "…clearly it was a marriage full of difficulties and some considerable unhappiness for both parties. But they continued to live as husband and wife for 3 ½ years and I see nothing in the circumstance of the marriage, unhappy though they were, which requires me and justice to either party to treat it, as a marriage of short duration."

[12] In terms of the approach the Court ought to take in the exercise of the discretion, the Court of Appeal held that the Court must undertake an assessment of all the circumstances, it is this assessment which is central to the exercise of discretion. Woodhouse J observed[4];

> "… the question in every case will be whether the marriage has been so restricted in point of time and unduly limited in terms of quality that it may justly be described as a marriage of short duration."

[13] The Court of Appeal also observed that any consequences that may flow from the decision will be irrelevant. Such observation stands to remind the Court that its consideration of all the circumstances ought not to be influenced by the significant implications that might follow for the competing parties in terms of their respective rights in relationship property.

[14] Woodhouse J confirmed the observations made by Ongley J in the High Court that there were strains and difficulties between the parties but they lived together in a common home with their children, stating[5]:

> "…I think the case is quite different from the situation that sometimes can develop where a husband and wife make use of a single dwelling but in every respect live entirely independently from one another."

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[3] (1977) 1 MPC 139 at 140
[4] *Martin v Martin* [1979] 1 NZLR 97, at 101
[5] At 100

[15] Cooke J added[6]:

> "If the Court *having regard to all the circumstances of the marriage* considers it just, a marriage in which the spouses have lived together as husband and wife for a period longer than three years may be treated as a marriage of short duration. Here the legislature is concerned, not directly with the property consequences of exercising the discretionary power to put the marriage in that category, but with the circumstances of the marriage itself. For instance, if a marriage has lacked the qualities and incidents of marriage as generally understood it may be fair to treat it as of short duration, although in form it has lasted more than three years. A marriage "in name only" and with little companionship or mutual support, although the parties ostensibly lived as husband and wife under the same roof, could well be an example."

[16] In terms of the particular marriage in dispute before the Court, he observed:

> "In the present case the marriage was less than happy and the relationship between the parties left much to be desired. But the wife bore the husband a child and looked after that child and the older children, as well as generally managing the household. And the husband lived with them as the father of the family and supported them. It could certainly not be called a mere shell of a marriage. Even after the husband left the home the possibility of reconciliation was not totally excluded at first by either party. Without attempting to evolve hard-and-fast tests or exhaustive considerations, I do not think the Judge was bound to treat it as a marriage of short duration and would not interfere with his discretionary decision declining to do so."

[17] The circumstances of the marriage as described by both Courts in *Martin* bear considerable resemblance to the factual situation before me.

[18] In terms of onus, the High Court in *L v P*[7] held that the onus is on the party arguing for short duration, in this case the respondent wife.

[19] In addition to principles deriving from *Martin*, other authorities have indicated that reference needs to be had to both physical and mental components in determining matters of cohabitation. For instance, in *Sullivan v Sullivan*[8] the Court of Appeal determined that the term "living apart" must involve two essential ingredients:

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[6] At 106
[7] *L v P* HC Auckland CIV-2010-404-6103, 17 August 2011 at para [32]
[8] *Sullivan v Sullivan* [1958] NZLR 912 at 924

> "a physical separation, and a mental attitude averse to cohabitation on the part of one or both spouses."

[20] In *W v H*[9] Hammond J considered the issues of the physical and mental elements. He recorded that the leading authority on the question of separation as being *Sullivan v Sullivan*[10] and stated that:

> "As to the law, there was no dispute between the parties as to the twin criteria for determining whether a couple is living apart: there must be both physical separation and a mental attitude held by at least one of the parties which is consistent with separation, or living apart."

[21] Against the helpful guidance of those learned authorities I turn now to consider the particular facts in the case before me.

The Evidence

[22] I heard the evidence of both parties and had the advantage of their affidavits which presented their respective recollections of the state of their relationship from beginning to end.

[23] While I found both parties to be honest and open witnesses, I had a preference for the evidence of the applicant. I found his evidence to be presented in a spontaneous and candid manner and in a way which displayed that he was presenting evidence not driven by the goal he sought to achieve. I did not gain such a sense from the respondent, on occasion finding her to be less spontaneous and with some answers being influenced by the outcome sought. I intend no criticism of her given the potential consequences that may affect her property rights. It must be remembered as well that these parties were in a sometimes difficult relationship where their perspective of events was significantly different from the other.

[24] I also reject the suggestion put to the applicant in examination to the effect that he deliberately remained in the marriage until just after the 3 year jurisdictional period, so as to gain an advantage. While the timing coincides, there was an absence of evidence to support a conclusion that such timing was deliberate and calculated.

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[9] *W v H* (2002) 22 FRNZ at 874
[10] Para [55]

[25] On the critical element of 'mental attitude', I preferred the applicant's evidence, evidence which was corroborated by reference to extraneous material.

The Physical and Mental Elements of the Relationship

[26] As prefaced, these parties were physically living together from 9 February 2010 until 18 February 2013. There were perhaps two days in December 2012 when the applicant left the home, taking with him a small bag of clothes and residing in a hotel/motel in an effort to "cool off" from the stresses of the relationship. He then returned to the marriage. Given that the period of absence was minimal, it is not pivotal to the overall period of the relationship.

[27] It is clear from the evidence that for the first year or so of their relationship, they interacted very well with few disputes of a significant nature. A number of greeting cards which had been received by the applicant from the respondent were presented in evidence. All of these were in positive terms, which is generally the intent of greeting cards, containing comments from the respondent as to how wonderful the relationship had been, what a wonderful husband the applicant was, what a "lucky lady" she was to "walk beside" him. The cards display that at the time they were authored the nature of their relationship was very loving and positive.

[28] Most of the cards were in the first year or so of the relationship and prior to their child, Jasmine, being conceived. The overall weight of the evidence supports the conclusion that the circumstances of Jasmine's conception led to difficulties beginning to creep into the marriage. Part of this was due to the respondent receiving hormone therapy because of the parties' desire to have a child under an IVF programme. The evidence of both shows they were aware that the hormone therapy could well cause some undesirable emotional consequences. The evidence does not demonstrate that there was anything corrosive to the marriage up until Jasmine's conception and certainly nothing which would derogate at all from declaring the marriage to be a reasonably sound one at that point.

[29] The cards following Jasmine's birth still reflect very positive tones from the respondent to the applicant, declaring him to be a "beautiful person" and that she

was “so proud to call you my husband – daddy to our little girl, best friend and lover”. A card given to the applicant on his 40th birthday in [month deleted] 2012 was perhaps less effusive but nonetheless confirmed her love for him. However, the weight to be attached to such cards must be balanced against the fact that people generally do not write negative and unhappy things on cards for special occasions, especially when still living together.

[30] Notwithstanding the positive nature of the cards to which I have referred, difficulties crept into the relationship, leading the parties to attend relationship counselling in 2012. In general terms, and without apportioning fault or responsibility for the eventual breakdown of the relationship, the key point of difference arose from the applicant’s perception that the respondent would become unnecessarily stressed from matters during her working day, the level of which he felt to be excessive to the circumstances. Rather than continue discussion about these circumstances he began to shut down, becoming less and less communicative as time moved on. From the respondent’s perspective she felt the applicant was not communicating sufficiently with her and was not willing or able to talk through matters she felt to be important. It was those sorts of dynamics which led the parties to seek relationship counselling in an effort to try and improve channels of communication between them.

[31] As time moved on the applicant did not see the respondent as addressing the underlying causes of her anxieties. He wished her to seek some form of “behavioural therapy”. It did not help matters that during at least two heated arguments the applicant reacted in a violent manner, on one occasion punching a hole in the wall and on the other by stabbing a screwdriver into a couch. Given the nature of his concerns as to the respondent’s stress levels, his reactions were somewhat ironic. From the respondent’s perspective, she was not enamoured by the applicant’s minimisation of the way in which he, too, acted when under stress.

[32] In terms of a sexual relationship, it is apparent that following Jasmine’s birth the parties’ level of sexual intimacy waned to the point where there was little in the way of a sexual relationship. However, they still shared a bed as I noted that the

respondent had been unhappy at the fact that she would often go to bed earlier and be disturbed by the applicant an hour or so later when he joined her.

[33] In terms of the level to which the parties undertook normal family duties and responsibilities, while there is some level of difference between the parties as to the degree to which each had involved themselves in these, there was nothing presented in the evidence which displayed to me the type of fractured relationship which could remotely meet the types I have described from the various authorities. The reality is that the parties continued to do the best they could, they continued to work and derive their respective incomes, they each took a role in aspects of Jasmine's upbringing and they each undertook variety of normal household chores.

[34] This was not the type of relationship where they had effectively become flatmates under the one roof. It was not, as Cooke J described in *Martin*, a situation where a husband and wife made use of a single dwelling but in every respect lived "entirely" independently of each other. These parties still did a lot together and, but for their inherent and irreconcilable difference over the respondent's stress and anxieties, would very likely never have separated. They portrayed to the world that they were still a couple and even following the physical parting in February 2013, they exchanged daily phone calls or texts and would often send photographs to each other of their daughter. There were photographs produced in evidence showing almost family-like scenes in action following the physical separation.

[35] There was no evidence presented to indicate that prior to the applicant leaving the home on the 18th February 2013 that either of them had voiced to the other that the marriage was over. Clearly, there were discussions between them about their relationship, but nothing presented that would support a conclusion that either or both of them were averse to cohabitation. The evidence of both parties supported the conclusion that, regardless of their ups and downs, their arguments and difficulties, each held a strong love and respect for the other and most certainly respected the other as the co-parent of their beloved daughter.

[36] As indicated, there had been a further argument between the parties in December 2012, leading to the applicant departing the home for a couple of days to

think things over. It was not, by any measure a separation. Rather it was some breathing space to think through the state of the marriage. The applicant returned from that break and the relationship continued in its problematic but not severed fashion.

[37] The applicant left the home on 18 February 2013. I accept his evidence that he moved out in the hope the respondent might realise he was serious about her needing to address what he saw as the main cause of the marital difficulties, namely that she should seek counselling for anxieties. He did not take any great level of property with him, as would normally be the case where a party was finally severing the relationship.

[38] The next day he returned to the home and left a letter under the respondent's pillow, a letter which again lends support for the conclusion that at this juncture the applicant was not possessed of a mental attitude averse to cohabitation. Instead, it was a plea for the respondent to address her anxiety, the factor which he regarded as "driving a wedge" between the couple. His letter opened by saying that he wrote it "with one single purpose in mind … saving our marriage". It outlined how he saw the respondent's anxieties as leading to demeaning and derogatory comments being made to him but that he made those comments because he loved her and wanted to see a change in interaction for the better. The letter concluded with the following comment:

> "I understand this could be the last letter I write as your husband, and that makes me sad. I hope this message gets through to you Eve as all I want is a happy and a loving environment for us and our daughter to embrace for the future.
>
> I love you … always"

[39] The respondent replied, in very defensive tones, dismissive of the positive intent of the applicant's letter. She criticised the fact that he had left the letter under her pillow rather than handing it to her, expressed that she was astounded he had laid all the guilt at her feet and that he was failing to take any responsibility for his "significant portion of our marriage crumbling apart". It was clear from her response that she saw little, if any, benefit in "working on their marriage" but that if the applicant were to change his view of matters, which I infer to be his concerns or

criticisms of her, then she would welcome the opportunity to work together on saving their marriage. Her letter was conciliatory at the end by expressing a love for him and that she was at a loss as to what to do in a "very, very sad situation". These letters represent each party firmly placing a stake in the ground, from which neither would move. However, each letter still held the prospect of a marriage being survivable.

[40] A month or so later the respondent asked the applicant to transfer the family home back into her sole name. He agreed to do this, but did so in an effort to display to her his support of her and hoped she would reciprocate by seeking some professional help. Although the respondent contests those circumstances, and argues that the transfer by him of his share in the home back to her was reflective of an end to the relationship, her letter to the conveyancing firm about the re-transfer into her name supports the applicant's evidence. On 14 April 2013 she sent an email to the Property Law Centre in which she advised that the applicant was prepared to "come completely off the title". She confirmed that at that stage the "inside possessions will be remaining inside the property" until the applicant was in a position to move from his mother's home. Significantly, she stated:

> "There is a chance we may get back together down the track but for now I would feel more comfortable with the title being only in my name".

[41] Accordingly, despite her emphatic statements in her affidavits that the marriage was well and truly over when the applicant moved out of the home in February 2013, her email is tangible and contemporaneous evidence that her mental view point was something different from that stated in her affidavits. In her affidavit she twice said[11] that in her mind it has been very clear to her that the separation was in fact not a temporary separation but was final. The evidence of the applicant to the contrary and her own email of 14 April 2013 show her statements to be inaccurate.

[42] At some time in April or May 2013 the parties attempted further counselling, the applicant saying that the counselling was for the purpose of talking about reconciliation, whereas the respondent stated it was to talk about better channels of communication to work co-operatively as co-parents. Given the matters I have

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[11] First affidavit para [18]; second affidavit para [24]

referred and my preference for the applicant's evidence, I determine that the further attempt at counselling certainly included the hope of a possible reconciliation.

[43] The counselling was unsuccessful and marked the absolute end of the marriage relationship.

Consideration of All the Circumstances

[44] As indicated in the case authorities, the central issue when deciding whether or not to exercise the discretion under s 2E is an assessment of "all the circumstances". I have presented a range of particular factual findings from the evidence I have heard.

[45] In accordance with the approach of Woodhouse J in *Martin,* I ask whether the instant marriage has been so restricted in point of time and unduly limited in terms of quality that it ought to justly be described as one of short duration? Noting that the onus is upon the respondent to establish that the relationship should be regarded as one of short duration, she has failed to meet that onus by a significant margin. This marriage was not unduly restricted in terms of quality to trigger exercise of the discretion.

[46] This marriage relationship was greatly distanced from the type of relationship required to support exercise of the discretion. It is quite different from the types of relationships referred to by Cooke and Woodhouse JJ as being required to support a declaration of short duration; this is not a situation of spouses living in a single dwelling but entirely independently of each other, this relationship did not lack the qualities and incidents of marriage as generally understood, it was not a "marriage in name only" and was not a mere shell of a marriage.

[47] As prefaced, there were great similarities in the evidence presented before me with the circumstances in *Martin,* where that marriage was found not to be of short duration. While there were certainly strains and difficulties between the applicant and respondent and some heated discussions and disputes, they continued to live together in a common home where they shared the care of their child. They shared the goal of keeping their marriage afloat, a desire which continued until at least April

2013. The relationship between the present parties was not as poor as that in the *Martin* decision, which Ongley J described as "not a happy one at any stage". The relationship between Mr and Mrs Powers was often a happy one. They did enjoy happy times. While their marriage was not of good quality following Jasmine's birth, it was not one such as in *Martin* which was "full of difficulties". The marriage considered in *Martin* lasted for 3 ½ years, but in all the circumstances of that case was not one which was deemed to be of short duration. I come to a similar view in the current case.

[48] The physical and mental elements of a marriage continued until the 18 February 2013, the physical component being severed on that day. Although aspects of the mental element continued until somewhere in April 2013, I determine that for the purposes of this determination the end of the marriage occurred on 18 February 2013.

Decision

[49] As a consequence of my factual determinations and applying the legal principles, it follows I am not satisfied to the requisite standard that the respondent has met the onus upon her to establish that the discretion in s 2E ought to be exercised in her favour. I therefore dismiss her claim that this is a marriage which ought to be declared as one of short duration.

[50] As to the specific duration of the marriage, I determine it was of 3 years and 9 days duration.

Delivered at am June 2016

P J Callinicos
Family Court Judge