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**IN THE FAMILY COURT
AT HUTT VALLEY**

**FAM-2015-096-000573
[2016] NZFC 8114**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	FRANK ERNEST LOVE Applicant
AND	PATRICK BRIAN SCANNELL ANN MARIE JUDD EXECUTORS OF THE ESTATE OF ELIZABETH ANN LOVE Respondents

Hearing: 16 September 2016

Appearances: J Gwilliam for the Applicant
F Handy for the Respondents

Judgment: 20 October 2016

RESERVED JUDGMENT OF JUDGE J A BINNS

[1] Mr and Mrs Love married in 2005.¹ They had lived together since March 2004. It was the third marriage for Mr Love and the second for Mrs Love. At the time of her death Mr and Mrs Love lived in a property owned by them in unequal shares at [address 1 deleted]. Mr Love now seeks an order to occupy the home. The executors of Mrs Love's estate oppose that application. They have issued proceedings in the High Court seeking immediate possession of the property.

[2] Mrs Love died in 2015.² She had been terminally ill for some time before her death and was cared for by Mr Love. During the latter stages of her illness she spent time in hospital. In the period before her death Mr Love took steps to prevent Mrs Love's daughter Ann Marie Judd, from visiting her mother.³ He did not tell Mrs Judd that her mother was in hospital and he subsequently issued trespass notices against Mrs Judd and her husband.⁴ These actions soured the relationship between Mr Love and Mrs Judd. It was apparent from their evidence that the relationship remains severely strained.

[3] During their relationship, Mr and Mrs Love entered various agreements and arrangements concerning their property and affairs. Mrs Love made a will dated 8 August 2008 in which she directed that Mr Love could live in the home at [address 2 deleted] which she then owned as her separate property. That property became hers following a property settlement with her first husband sometime after their marriage ended in 2000. Mrs Love sold the [address 2 deleted] home in late 2008 and put the proceeds into the [address 1 deleted] property. The will was not changed subsequently and was in force when Mrs Love died.

[4] The [address 2 deleted] property had been Mrs Love's separate property at the time of the marriage. It had been preserved as such in a contracting out agreement and related indemnity made shortly before Mr and Mrs Love married⁵.

[5] The parties were independently advised and the agreement was certified in accordance with the statutory requirements. No issue is taken with the execution of

¹ 5 March 2005

² 22 February 2015

³ Mrs Judd is not Mr Love's daughter.

⁴ Dated 24 January 2015

⁵ 4 March 2005

the documents. Mr Love in his evidence confirmed he understood he had agreed that he had no claim against the [address 2 deleted] property and that Mrs Love could change her will to negate his right to occupy the house in the event of her death.

Contracting Out Agreement and Indemnity March 2005

[6] Mr Love had made no financial contribution towards the purchase of [address 2 deleted]. Before signing the agreement Mr Love had signed an indemnity in which he acknowledged that he was waiving any entitlement to the equity in [address 2 deleted], that he would not receive any interest in it nor be reimbursed in any way, even if he made a financial or some other contribution to the relationship home.

[7] The contracting out agreement provided under the following background paragraphs (using the references from the agreement):

- A. Elizabeth and Frank⁶ have been living in a de facto relationship since March 2004.
- B. Elizabeth and Frank intend to marry on 5 March 2005.
- D. Frank and Elizabeth wish to record their rights and interests in respect of the property owned by them separately as at the date of this agreement and to contract out of the Property (Relationships) Act 1976 (“the Act”) to ensure that their respective separate property as set out in this agreement remains separate property regardless of the nature of the property, the use to which that property is put and any subsequent contributions (either financial or non-financial) made by either of them to that property.

⁶ Mrs and Mr Love respectively

[8] The schedules attached to the contracting out agreement provided:

(a) Mrs Love's separate property was:

(i) The property at [address 2 deleted].

(ii) A Nissan Primera motor vehicle.

(iii) All chattels owned by Mrs Love at [address 2 deleted] on the date of the agreement.

(b) Mr Love's separate property was:

(i) His Holden motor vehicle.

(ii) An Indian collection.

(iii) A 14 inch television.

[9] The contracting out agreement also contained the following provisions in paragraphs 5, 6, 7(c), 8, 10 and 11:

5. For the avoidance of doubt Elizabeth and Frank agree that notwithstanding that Frank may make financial or non-financial contributions to the house at [address 2 deleted], Frank shall have no claim against that property and shall have no claim for compensation for absence of interest in the family home, for reduction in the loan secured by mortgage over that property, for increase in value of the property or otherwise howsoever in respect of that property.

6. Elizabeth and Frank agree that any other property acquired during the relationship, or otherwise, up for consideration as relationship or separate property shall be classified as relationship property or separate property according to the principles of the Act.

7(c). Any assets acquired during the relationship shall be classified as relationship property or separate property according to the principles of the Property (Relationships) Act 1976 and divided in accordance with the principles of the Act.

8. Elizabeth and Frank agree that neither of them shall make application under part 8 of the Property (Relationships) Act following the death of the other.

10. If any dispute or a difference arises between Elizabeth and Frank following a separation as to interpretation of this agreement, then the Family Court shall have full power to resolve and adjudicate on these issues in the same manner as if the Court were dealing with conventional proceedings under the Act.
11. This agreement shall be binding in all circumstances, including bankruptcy, the taking of property in execution by creditors, the death of one of the parties and regardless of any subsequent marriage between the parties.

Mrs Love's Will – August 2008

[10] On 8 August 2008, Mrs Love made her will which was current at the time of her death. The relevant portions of the will provide:

Life Interest

3. I give the interest which I own at my death (“my interest”) in the house and land at [address 2 deleted] to my trustees on the trusts set out in the following clauses.
4. My trustees will let my husband, Frank Ernest Love, (herein referred to as “my husband”), live in the home rent free until the first point in time (“the expiry date”) when I have died and either:
 - (a) husband has died, or
 - (b) husband has remarried someone other than me or,
 - (c) trustees have decided that my husband is not living permanently in the home. My trustees may disregard temporary absence when making this decision, which will be binding on my beneficiaries.

[11] The right to occupy the [address 2 deleted] home was given on certain terms and conditions including Mr Love making payment of outgoings, including rates, taxes, interest, insurance premiums and mortgage payments and other outgoings, keeping the home in the same condition it was in at the time of Mrs Love's death and that Mr Love will not be responsible for any damage or loss to the home or any chattels, caused by fire, earthquake, storm or other inevitable accident. From the expiry date (death, remarriage or Mr Love vacating the home) the trustees were to transfer Mrs Love's interest in her home to her residuary estate.

Addendum Agreement - December 2008

[12] On 8 December 2008, Mr and Mrs Love signed an addendum to the contracting out agreement which provided, among other things, that Mr and Mrs Love had entered into an agreement to purchase [address 1 deleted].

[13] The addendum agreement's stated purpose was to confirm that it was entered into, to confirm that Mr and Mrs Love would continue to be bound by the contracting out agreement and to record the terms on which they would own [address 1 deleted].

[14] The addendum agreement recorded that the price of [address 1 deleted] was \$258,000. The purchase price was to be funded by Mr Love's cash contribution of \$26,500, Mrs Love's contribution of the net proceeds of sale of [address 2 deleted] of approximately \$220,000 and a \$12,500 loan, secured by mortgage over [address 1 deleted]. Mrs Love was to be solely responsible for mortgage repayments.

[15] The addendum agreement stated the respective contributions from the parties to the purchase were 10.25 percent from Mr Love and 89.75 percent from Mrs Love.

[16] Clause 4 provided:

4. The parties shall own the property as tenants in common in unequal shares, Elizabeth (Mrs Love) as to 90/100ths and Frank (Mr Love) as to 10/100ths.

[17] Clause 5 provided that on sale of the property, following payment of legal costs, any rates arrears and payment of any real estate agent's commission:

- (a) Mr Love shall receive 10.25 percent of the proceeds of sale before deduction of the mortgage debt.
- (b) The mortgage debt would then be repaid.
- (c) The balance of the proceeds would be paid to Mrs Love.

[18] Clause 8 provided that the addendum agreement shall be binding in all circumstances, including bankruptcy, the taking of property in execution by

creditors, the death of one of the parties, separation, reconciliation or dissolution of marriage.

[19] The addendum agreement was signed and independently certified by the lawyers acting for Mr and Mrs Love, that they had provided independent legal advice to their respective clients regarding the addendum agreement and explained the effect and implications of it to Mr and Mrs Love before it was signed.

[20] No evidence was adduced as to any file notes made nor to advice given at the time of signing.

Position of the Estate

[21] The executors of Mrs Love's estate submit that the two agreements should be read together and that the separate property status of [address 2 deleted] was preserved to the effect that [address 1 deleted] remained the separate property of Mrs Love. Therefore, I have no jurisdiction to make an occupation order under s 27 of the Act.

[22] If I find to the contrary, the executors submit that I exercise my discretion by not making an occupation order in favour of Mr Love.

Position of Mr Love

[23] After Mrs Love died, Mr Love elected to proceed in terms of the Act, and formally elected option A under s 61(2) of the Act, to make an application for division of relationship property. Counsel for Mr Love made it clear that the only purpose in doing so, was to provide an avenue for the Court to set aside the contracting out and addendum agreements in case I find that [address 1 deleted] is Mrs Love's separate property as this finding would prevent me making an occupation order.

[24] Mr Love maintains that if he is required to vacate [address 1 deleted], this will amount to a serious injustice in view of Mrs Love's desire to leave him a life interest in their home. This serious injustice would provide grounds to set aside the

agreements, determine the status of [address 1 deleted] as relationship property thus providing jurisdiction to make an occupation order in his favour.

[25] Mr Love's counsel emphasised that Mr Love's purpose in issuing proceedings is not to challenge the property division reflected in the addendum agreement or to seek division of relationship property, but is solely for the purpose of ensuring Mr Love can remain living in [address 1 deleted] until he dies.

Interpretation of the Agreement

[26] Section 21 allows for spouses to contract out of the Act. It provides:

21 Spouses or partners may contract out of this Act

- (1) Spouses, civil union partners, or de facto partners, or any 2 persons in contemplation of entering into a marriage, civil union, or de facto relationship, may, for the purpose of contracting out of the provisions of this Act, make any agreement they think fit with respect to the status, ownership, and division of their property (including future property).
- (2) An agreement made under this section may relate to the status, ownership, and division of property in either or both of the following circumstances:
 - (a) during the joint lives of the spouses or partners:
 - (b) when one of the spouses or partners dies.
- (3) This section is subject to section 47.

[27] In *Pyne Gould Guinness Ltd v Montgomery Watson NZ Ltd*⁷, the Court of Appeal commented on how to interpret contracting out agreements:

The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background — to 'surrounding circumstances' — to cross-check whether some other or modified meaning was intended. Apart from matters of previous negotiation, and matters of purely subjective intention as to meaning, both excluded on policy grounds, one looks at everything logically relevant. At some extremes, background can be compelling. If background shows natural and ordinary meaning flouts common-sense, natural and ordinary meaning very probably must give way.

⁷ *Pyne Gould Guinness Ltds v Montgomery Watson NZ Ltd* [2001] NZAR 789 (CA) at [29].

The Status of [address 1 deleted]

[28] The first issue I consider is whether [address 1 deleted] is the separate property of Mrs Love or relationship property.

[29] It is common ground that the contracting out agreement provided that the Wood Street property was to remain Mrs Love's separate property and that the proceeds of sale of [address 2 deleted] contributed a large portion of [address 1 deleted]. Clause 1 of the addendum agreement stated:

The parties acknowledge that they continue to be bound by the terms of the agreement between them dated 4 March 2005, with the exception that the property at [address 2 deleted] will now be sold and will no longer be Elizabeth's separate property.

[30] The executors submit that the words "...and no longer be Elizabeth's separate property" in the addendum agreement merely reflect that the [address 2 deleted] property was to be sold and could no longer be her separate property. Therefore they argue that Mrs Love's share of [address 1 deleted] remained her separate property.

[31] In my view the ordinary meaning of the addendum agreement is clear. It provides for an unequal sharing arrangement in the family home. Although the respondents emphasised that Mrs Love purchased her share of [address 1 deleted] with the proceeds of her separate property, the later use of funds from the former property at [address 2 deleted] towards the purchase of the [address 1 deleted] home does not affect the usual situation that the family home is prima facie relationship property, under s 8(1)(ee)(i) of the Act.

[32] I do not accept that the addendum agreement indicated any intention that [address 1 deleted] was to remain Mrs Love's separate property. This interpretation is consistent with both parties contributing to the new family home and the acknowledgement by Mrs Love that [address 2 deleted] was no longer her separate property.

[33] I therefore find that the [address 1 deleted] is relationship property. It was the parties' home at the time of Mrs Love's death. It was the dwelling house that both

spouses habitually used as the principal family residence as defined in s 2 of the Act, which they both owned, albeit as tenants in common in unequal shares.

Is the Contracting Out Agreement Void?

[34] Mr Love submitted that the contracting out agreement and the addendum to the agreement should be set aside. Mr Love's primary reason for seeking to set aside the agreements is to enable [address 1 deleted] to be classed as relationship property. As is apparent, I am of the view that the [address 1 deleted] property is relationship property, notwithstanding the provisions of the agreement and the addendum and I have found accordingly.

[35] I now consider the application to set aside.

[36] The argument in favour of setting aside the agreement and addendum is that s 21 does not allow parties to contract out of making applications under the Act which is exactly what clause 8 of the contracting out agreement attempts to do.

[37] The submission is that s 21 agreements can only relate to "the status, ownership and division of property."

[38] Clause 8 provides:

Elizabeth and Frank agree that neither of them shall make an application under Part 8 of the Property (Relationships) Act following the death of the other.

[39] Under s 21, parties can contract out of electing "Option A" under s 61 of the Act (found in Part 8). Section 61 states:

61 Surviving spouse or partner may choose option

- (1) If one of the spouses or partners has died (except in a situation described in section 10D(1)), the surviving spouse or partner may choose option A or option B.
- (2) Option A is to elect to make an application under this Act for a division of the relationship property.
- (3) Option B is as follows:

- (a) to elect not to make an application under this Act for a division of the relationship property; and
- (b) if the surviving spouse or partner is a beneficiary under the will of the deceased spouse or partner, to receive that property; and
- (c) if the surviving spouse or partner is entitled to a beneficial interest on the intestacy or partial intestacy of the deceased spouse or partner, to receive that interest.

[40] A difficulty with the present clause 8 of the contracting out agreement is that it refers to the whole of Part 8 rather than the more specific option A in s 61(2) of the Act. Certainly, the entirety of Part 8 provides for other applications, besides that in option A, which may fall outside the scope of s 21⁸. Mr Love argues that clause 8 provides grounds to set the entire contracting out agreement aside. Certainly, Court of Appeal authority states that s 21 “does not allow for a contracting out agreement to be voided as to some provisions and to remain valid as to others.”⁹

[41] Even so, it is unlikely that clause 8 voids the entire agreement. Applying the principles in *Pyne Gould Guinness Ltd v Montgomery Watson NZ Ltd*, even if the “ordinary meaning” of clause 8 is a reference to the whole of Part 8 of the Act, it must give way to a more common sense interpretation.

[42] Clause 8’s wording (“shall make an application under Part 8 of the Property (Relationships) Act”) closely mirrors the wording of s 61(2) referring to option A (“elect to make an application under this Act for a division of the relationship property”).

[43] Mr Love’s letter of indemnity indicates that clause 8 would be preventing his right to claim against Mrs Love’s estate, in the event of her death. The letter of indemnity suggests the parties understood clause 8 as a limited, ordinary prohibition against the parties choosing option A.

⁸ The provision for an application in s 59(4) is one problematic potential application.

⁹ *Sloss v Sloss* [1989] 3 NZLR 31 (CA) at 39.

[44] If I were wrong on this point, the entire contracting out agreement would be void. Therefore, in my view clause 8 should be interpreted as referring to an application under s 61(2).

Does the Contracting Out Agreement Cause Serious Injustice?

[45] It follows that Mr Love will be barred from electing option A unless he can show that giving effect to the agreement would cause “serious injustice” under s 21J of the Act.

[46] Section 21J provides:

21J Court may set agreement aside if would cause serious injustice

- (1) Even though an agreement satisfies the requirements of section 21F, the court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.
- (2) The court may exercise the power in subsection (1) in the course of any proceedings under this Act, or on application made for the purpose.
- (3) This section does not limit or affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.
- (4) In deciding, under this section, whether giving effect to an agreement made under section 21 or section 21A or section 21B would cause serious injustice, the court must have regard to—
 - (a) the provisions of the agreement:
 - (b) the length of time since the agreement was made:
 - (c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:
 - (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):
 - (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:
 - (f) any other matters that the court considers relevant.

- (5) In deciding, under this section, whether giving effect to an agreement made under section 21B would cause serious injustice, the court must also have regard to whether the estate of the deceased spouse or partner has been wholly or partly distributed.

[47] In *Wells v Wells*¹⁰, Simon France J outlined some of the principles associated with “serious injustice” under s 21J:

- (a) serious injustice is a broad discretion which must be exercised in light of the policy underlying the legislation;
- (b) an important component of the statutory scheme is the capacity of parties to contract out of its provisions so long as certain procedural requirements are met;
- (c) resultant disparity of outcome at the time of separation is relevant, but is not generally as important a factor in contracting out cases as it might be in compromise cases. In any particular case it might of course require considerable weight, but generally it is not to be seen as a determinative or necessarily dominant consideration;
- (d) consistent with (c), a comparison to the outcomes that would be ordered if the Act were applied is relevant but not as significant as it might be in compromise cases;
- (e) contracting out will usually occur in circumstances where one party has the assets and is pushing for an agreement. The circumstances will often involve pressure, and may involve an issue of whether the relationship will continue in the absence of an agreement. Accordingly, the presence of such circumstances is not generally relevant to the issue of serious injustice;
- (f) more than disparity of outcome per se will often be present before serious injustice arises. Concerns with the procedure will often provide that extra factor. Case law will no doubt develop on the issue of what procedural concerns the Court is referring to. I assume that they are something other than a breach of the s 21F requirement;
- (g) a discretion exercised in accordance with these considerations will be difficult to disturb on appeal.

[48] Between the signing of the contracting out agreement and the creation of Mrs Love’s will, Mr Love’s entitlement to property was governed by intestacy laws. After Mrs Love made her will, Mr Love would have been entitled to a testamentary life interest in [address 2 deleted]. The sale of [address 2 deleted] meant that Mr Love was no longer able to receive a life interest in that property. Then Mr Love

¹⁰ *Wells v Wells* [2006] NZFLR 870 (HC)

could neither receive a life interest, nor was he entitled to Mrs Love's interest in [address 1 deleted] through survivorship.

[49] It must be borne in mind that the parties signed the addendum to agreement in contemplation of purchasing [address 1 deleted]. In clause E of the addendum, the parties reaffirmed that they were bound by the terms of the contracting out agreement. The fact that there was an update to the contracting out agreement, four years after the parties initially made it, explicitly dealing with the asset in question, weakens the case for "serious injustice.

[50] The documents are clear on their face. The contracting out agreement in its non-amended form sought to guarantee to Mrs Love, [address 2 deleted] as her separate property. Mr Love had the benefit of legal advice on this agreement. The addendum to agreement then reflected the change in circumstances and the parties' intention to reflect their respective interests in their new home according to their financial contributions.

[51] I also note that the letter of indemnity shows that Mr Love signed the initial contracting out agreement knowing that he could be disadvantaged if Mrs Love changed her will and did not leave him a life interest. Mr Love accepted this state of affairs. He received independent legal advice throughout.

[52] I have also turned my mind to the non-monetary contributions of the parties to the marriage, which are referred to in s 18 of the Act and the fact that there is no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature. It was a relationship of over 10 years. The overall indications are that it was a mutually supportive and loving relationship. I have noted that Mr Love looked after Mrs Love during the last stages of her illness. Even though the argument was not advanced, I do not consider that this was a contribution that would support an argument that the non-monetary contributions of Mr Love meant that there was "serious injustice" sufficient to set aside the agreement.

[53] Setting aside the agreements will only threaten to undo Mrs Love’s consistent endeavour to maintain a high level of control over her interest acquired through her ownership of the [address 2 deleted] property, and so the assets flowing from its sale. I am of the view that there is no “serious injustice” shown.

[54] Accordingly, the agreements should not be set aside.

[55] I turn now to consider the application for an occupation order.

Should the Court Grant an Occupation Order?

[56] One of the respondent’s core submissions is that the Family Court cannot make an occupation order under s 27 of the Act, because it lacks jurisdiction. Section 27 provides:

27 Occupation orders

- (1) The court may make an order granting to either spouse or partner, for such period or periods and on such terms and subject to such conditions as the court thinks fit, the right personally to occupy the family home or any other premises forming part of the relationship property.
- (2) Where an order is made under subsection (1), the person in whose favour it is made shall be entitled, to the exclusion of the other spouse or partner, personally to occupy the family home or the other premises to which the order relates.
- (3) An order made under subsection (1) against a spouse or partner shall be enforceable against the personal representative of the person against whom it is made, unless the court otherwise directs.
- (4) An order made under subsection (1) by a District Court or a Family Court shall be enforceable as if it were an order for recovery of land made pursuant to section 31(1)(d) of the District Courts Act 1947.
- (5) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 91.

[57] The requirement that occupation orders can only be over “the family home or any other premises forming part of the relationship property” has proven fatal to

some applications. Certainly, applications for occupation orders have failed in trust cases involving purely discretionary beneficiaries¹¹.

[58] This submission must fail as I have found that [address 1 deleted] is relationship property. As such, the Family Court has jurisdiction to make an occupation order.

[59] Nevertheless, the decision to grant an occupation order is discretionary. Therefore I must consider whether to exercise my discretion to grant such an order.

[60] In *Doak v Turner*¹², the Court of Appeal noted:

The approach of the Court must be flexible. But ultimately the inquiry must be as to what is just and fair in the particular circumstances of the case.

[61] The only mandatory consideration is a duty, under s 28A, to have particular regards to minor or dependant children's needs. This is not relevant in this case.

[62] Section 28A allows judges to consider "all other relevant circumstances". In *JAR v AMR*¹³ the Family Court referred to a list of circumstances found in *Butterworth's Family Law*. These are:

1. The health and age of the parties.
2. The desirability of bringing about finality to a broken marriage or relationship.
3. The desirability of affording parties an opportunity to re-establish themselves by obtaining their capital shares in the home.
4. The fact that one party has had rent free accommodation in the home.
5. The payment of outgoings on the home by the non-occupying party.
6. The extent to which the parties need to improve their present accommodation.
7. The relationship of the house to the occupying party's business.

¹¹ See, for example, *Keats v Keats* [2006] NZFLR 470

¹² *Doak v Turner* [1981] 1 NZLR 18 at 23.

¹³ *JAR v AMR* FC Oamaru FAM-2010-045-11, 17 February 2010 at [16].

8. Misconduct, so long as it is gross and palpable and has significantly affected the extent or value of the relationship property.
9. Disability on the part of one of the parties. This disability may be relevant where the house has been fitted out for rehabilitation or has become important for the person's recovery from accident or illness.
10. Child support obligations.

[63] The Court may make occupation orders in relation to the family home following the death of one spouse. *Westlaw* commentary notes that this gives rise to different considerations to those relevant to a separation of two living partners. For example, concern about tying the hands of one of the parties to a relationship is no longer an issue, although an occupation order may prevent distribution of the estate.

[64] Mr Love's age and health are important considerations. Mr Love is aged 74 years. Apart from reading that he suffered a foot injury in October 2014, I had no evidence about his current state of health, apart from observing that he walks with the aid of a stick. He claims to suffer ill health but I had no information about that.

[65] Mr and Mrs Love had a 10 year marriage. Mrs Judd expressed some concerns about his relationship with her mother and said he was a "bad man". Nevertheless the evidence indicated:

- (a) Mr Love was attentive and cared for his late wife for four years before she died.
- (b) Mrs Love appointed Mr Love as her attorney in relation to personal care and welfare and property on 30 January 2015.
- (c) The marriage did not end due to a separation. [address 1 deleted] has been Mr Love's treasured home. Mr Love has many happy memories of his time living there with Mrs Love.
- (d) Independent evidence from Ms Francis indicated that she witnessed a deep loving relationship between Mr Love and his wife. That evidence was not challenged.

- (e) Mr Love says that Mrs Love's wish that he occupy the home can be ascertained from her will, albeit it referred to the [address 2 deleted] property it did refer to that as the "home". He says this should be respected and given considerable weight.

[66] Mrs Love did have opportunities to change her will to specifically provide for Mr Love to have a life interest in [address 1 deleted] at the time the addendum agreement was signed or, when the enduring powers of attorney were signed, the latter occurring immediately before she died. She did not do so. Of course, if she had, this application would be unnecessary.

[67] I also note:

- (a) Mr Love is only entitled to a minor share in [address 1 deleted] as against Mrs Love's beneficiaries' entitlement to a considerably larger share in the property.
- (b) Mrs Love's desire to preserve the whole of [address 2 deleted] and her 90/100 interest (less the mortgage) in [address 1 deleted] for her children, in particular for Mrs Judd.

[68] Another factor relates to the ongoing payment of the outgoings and maintenance of the property. The executors say that Mr Love is not putting sufficient monies into the bank account to pay the mortgage. Consequently, the shortfall in payments has diminished the value of the estate assets. Moreover, the executors assert that Mr Love cannot afford the home's upkeep costs including the cost of a scheduled repainting. The estate's only asset is Mrs Love's interest in [address 1 deleted]. It has no cash reserves.

[69] Mr Love says he is meeting the mortgage repayments and outgoings. He says he will be able to meet future outgoings for [address 1 deleted]. Nevertheless, it is not in dispute that since Mrs Love's death, the estate has made up a mortgage payment shortfall totalling \$1735.77.

[70] Against that Mr Love is entitled to reimbursement from the estate for various costs which he incurred in relation to the estate: \$450 for the priest, \$650 for catering and a nett \$6804 for funeral costs, totalling \$6904.

[71] Mr Love's income is from National Superannuation. Publically available information indicates that for a single person living alone, the rate from 1 April 2016 is \$20,007.52 per annum.

[72] Based on his affidavit of assets and liabilities and other evidence, I note that Mr Love has no significant assets, apart from his bank account balance as at February 2016 of \$3500. The balance in March 2015, after payment of the funeral costs, was \$4110. I note that the bank account shows some large cash withdrawals, although I do not know what these withdrawals were for.

[73] Based on the evidence provided, Mr Love's outgoings total \$9,129.10 per annum. They are itemised as follows:

Phone	\$1300.00
Electricity	\$1300.00
Mortgage	\$3129.36
Insurance	\$1392.04
Rates	\$2007.70

[74] This does not allow for other expenses such as food, clothing, travel, incidentals or maintenance on [address 1 deleted].

[75] The evidence suggests that after a period of about a year, Mr Love has no surplus or savings based on his current living costs. This indicates that Mr Love's ability to meet the mortgage payments and provide for future painting costs is not a realistic long-term prospect.

[76] An occupation order for life would likely mean that Mr Love would not fully service the mortgage nor pay other than minimal outgoings or maintenance. This will lead to the estate bearing the cost through the loss of equity in the property and so diminish the estate's financial position.

[77] The estate also has debts to Mrs Judd to reimburse her for payment of the mortgage shortfall, legal costs and future maintenance costs. If Mr Love remains in the property, Mrs Judd may have to fund future shortfalls in the mortgage, rates or insurance in the event of any default.

[78] I also take into account that the estate cannot be distributed and the beneficiaries will not receive their entitlements under the will during the period of any occupation order.

[79] Mrs Judd says she is in need of funds for her needs, such as repayment of her mortgage. [Details deleted].

[80] At the time she executed her will in 2008, Mrs Love swore an affidavit to explain the unequal treatment, in her will, of her two children. She said that Mrs Judd deserved a much greater share in Mrs Love's estate because in the previous seven years she had been extremely unwell and her daughter "had been there for her 100%" at great personal cost. The will recognised as well, Mrs Judd's responsibilities to her four children.

[81] It is difficult to know whether Mrs Love's will did truly give effect to her instructions. She may have intended that Mr Love have a life interest in any future home. She may have decided not to change her will after [address 2 deleted] was sold because she knew after the addendum agreement was signed, that Mr Love would receive some funds on the sale of [address 1 deleted].

[82] Mrs Love was balancing the competing obligations she felt. On the one hand to Mr Love and providing him with a home until he died and on the other, providing for her children. She had worked hard and had taken steps to protect her interest in [address 2 deleted] and her 90 percent interest in [address 1 deleted].

[83] Ultimately, it is Mrs Love's significant interest in [address 1 deleted], the interests of the beneficiaries, the fact that the estate has no assets other than [address 1 deleted], debts to pay, the need for finality, plus Mr Love's limited ability to meet

outgoings and maintenance costs, which weigh against Mr Love having a life interest/non-finite interest in [address 1 deleted].

[84] I have considered all factors both for and against an occupation order being made.

[85] I consider that an occupation order should be made. However I consider that the period of occupation should be fixed.

[86] In considering the duration of occupation, an important factor is that Mrs Love has a 90 percent interest in [address 1 deleted] and she clearly intended that, that interest would be preserved for the benefit of her children. I am of the view that Mr Love is unlikely to be able to pay the outgoings and to properly maintain the property. I am also of the view that the beneficiaries should receive their entitlement under the terms of Mrs Love's will without that being compromised and within a set timeframe.

[87] The key parties do not have a good relationship and are unlikely to be able to manage matters relating to the property in an amicable manner. It is appropriate that the property be sold and the proceeds divide within a finite period of time to enable everyone to get on with their lives notwithstanding Mr Love's understandable attachment to the home he shared with Mrs Love.

[88] Mr Love has been in occupation since Mrs Love died which will soon be one year eight months.

[89] I am willing to grant Mr Love occupation of [address 1 deleted] but for a finite period, approximately three years from when Mrs Love died. This allows Mr Love a reasonable time to make plans to relocate. It also takes account of the funds due to him by the estate for Mrs Love's funeral costs, any likely shortfall in future outgoings and minimising any future prejudice to the estate from an extensive period of occupation.

Orders

[90] I make an occupation order in favour of Mr Love subject to the following conditions:

1. That Mr Love may personally occupy the property at [address 1 deleted] until:
 - (a) 31 December 2017, or
 - (b) with the prior written consent of the executors until such later time as [address 1 deleted] sells, or
 - (c) until Mr Love remarries or enters in to a de facto relationship.
2. That during the period of occupancy Mr Love will pay all outgoings including all mortgage repayments (both principal and interest), any local body and regional council rates and insurance premiums in relation to [address 1 deleted].
3. Mr Love will keep [address 1 deleted] insured to its full value for all usual risks for residential suburban properties of a similar type to [address 1 deleted].
4. Mr Love will maintain [address 1 deleted] in a similar condition to which it was in at the time of Mrs Love's death.
5. From 31 October 2017 or any other date two months before Mr Love's occupancy is to end, Mr Love will allow [address 1 deleted] to be marketed for sale and will cooperate with the process, including allowing reasonable access to [address 1 deleted] by any prospective purchasers.
6. Upon termination of the occupancy, [address 1 deleted] will be sold and the proceeds of sale applied in accordance with clause 5 of the addendum agreement, together with the agreed shortfall of \$1735.77,

less the costs he incurred in respect of Mrs Love's funeral of \$7904. If Mr Love owes the estate for any further costs incurred by the estate after the date of this order due to any breach of any of these conditions, these costs shall also be deducted from any sum due to be paid to Mr Love.

[91] I reserve leave to any party to seek any further conditions on seven days' notice.

[92] I do not allow any credit to Mr Love for reduction in mortgage principal as he has had the use of the estate's 90 percent interest in [address 1 deleted] and will continue to do so for his period of occupation, without paying rent to the estate.

Costs

[93] Each party has been partially successful. I have refused Mr Love's application to set aside the agreement. However I have made an order in his favour for occupation of the [address 1 deleted] property for a specified period of time, subject to various conditions.

[94] In those circumstances, I would be inclined to suggest that the parties bear their own costs. This may assist the parties to reach agreement on the matter of costs. However this is only my preliminary view. I have not heard from the parties on this matter. If the parties are unable to reach agreement, I will consider the matter following submissions.

[95] Any party seeking costs is to file and serve submissions within 14 days of the date this judgment is issued. The other party may respond within a further 14 days.

[96] A one hour hearing is then to be allocated before me to determine the application.

J A Binns
Family Court Judge