EDITORIAL NOTE: NO SUPRESSION APPLIED.

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IN THE FAMILY COURT
AT HAMILTON

FAM-2014-019-000829
[2016] NZFC 10795

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	KAREN ANNE MILLIKEN Applicant
AND	WILLIAM DAVIDSON-MEEK Respondent

Hearing:	8 December 2016
Appearances:	P Cornege and L Miles for the Applicant C Bielby for the Respondent
Judgment:	16 December 2016 at 3.30 pm

RESERVED JUDGMENT OF JUDGE D R BROWN
[Division of Relationship Property]

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[1] The only issue in this proceeding is whether a parcel of shares held by the respondent husband, being the proceeds of the sale within the marriage of an Australian property purchased by him in the pre-marriage phase of the relationship, are his separate property or are relationship property.

Background and history

[2] The applicant Karen Milliken and the respondent William Davidson-Meek became aware of each other in August 1995 through a mutual acquaintance and began writing to each other as pen pals.

[3] At that time Mr Davidson-Meek, a New Zealander, was working as an engineer in the mining industry in Western Australia. He owned land in a Whangarei forest park development on which he was building a huge house which was uncompleted.

[4] Ms Milliken was living in Auckland in her Glenfield unit. She was working for Air New Zealand as a ticket checker.

[5] In July 1996 Mr Davidson-Meek came to New Zealand for a four day holiday. Ms Milliken offered to put him up. They became sexually intimate on the last day of his visit.

[6] Later that year Mr Davidson-Meek paid for Ms Milliken to travel to Australia for a few days, perhaps a week.

[7] In 1997 Ms Milliken's work with Air New Zealand ended. At the end of one of Mr Davidson-Meek's trips to New Zealand to deal with the Whangarei house, Ms Milliken travelled back to Australia with him and they stayed with friends of his in Perth for two to three weeks. At the end of that period Mr Davidson-Meek went back to his work which was based in Calgoorlie but took him away from there into the outback for weeks at a time. For a period Ms Milliken rented a unit in Perth but she then decided she wanted to move to Calgoorlie to be closer to Mr Davidson-Meek. She lived in a boarding house in Calgoolie.

[8] Ms Milliken had not been successful in finding employment. She had equipped herself at Mr Davidson-Meek's suggestion with a heavy traffic driver's licence before she left New Zealand to assist her in obtaining employment in the mines.

[9] Ms Milliken then left Calgoorlie and travelled 2,500 kilometres north to Broome, where a "colleague" of Mr Davidson-Meek helped her with work and accommodation.

[10] The journey between Calgoorlie and Broome was 33 hours by bus. During a two day visit there in July 1997, Mr Davidson-Meek bought in his sole name a house at 108 Robinson Street Broome. Mr Davidson-Meek funded his equity ($A30,000) from his Family Trust and borrowed the balance (approximately $A230,000) by way of mortgage.

[11] In April 1998 Ms Milliken and Mr Davidson-Meek became engaged during one of his visits to her in Broome. He bought her an expensive diamond ring. Ms Milliken returned to New Zealand soon after and a few months later Mr Davidson-Meek also returned to New Zealand.

[12] In New Zealand the parties lived initially in Mr Davidson-Meek's Whangarei property and then at Ms Milliken's Glenfield unit. They both found employment.

[13] Mr Davidson-Meek then learned that the tenant in the Broome property was not paying rent and there was risk that the mortgage might foreclose. He and Ms Milliken returned to Australia and, according to Mr Davidson-Meek, lived in a backpackers until he was able to secure the ejection of the tenant. Ms Milliken then lived in the house and Mr Davidson-Meek came home from time to time from where he was working, a two day bus trip away.

[14] I am satisfied on documentary evidence that Ms Milliken was mistaken in her evidence that it was 1998 when the tenant moved out and she moved into the house and lived there rent free as Mr Davidson-Meek's de facto partner. I am satisfied it was 2001.

[15] A few months later Ms Milliken returned to New Zealand. Mr Davidson-Meek had his solicitor draw up a pre-nuptial agreement. In draft, at least, the proposed agreement listed only the Whangarei and Glenfield properties and a company to be formed in New Zealand as the individual property of the parties to be retained by each. There was no mention of the Broome property. Ms Milliken resisted signing it and it was never executed.

[16] The parties married in New Zealand on 20 April 2002.

[17] There is a profound difference of account as to whether the parties lived thereafter in the Broome house but the issue is not material to this judgment.

[18] In October 2002 Ms Milliken sold her Glenfield unit. She transferred the proceeds of sale to Mr Davidson-Meek and he bought a portfolio of shares with it in the name of his family trust. They have subsequently been sold and the proceeds used within the marriage,

[19] From December 2002 Mr Davidson-Meek and Ms Milliken worked together in a mine in Southern Cross, Western Australia. They had married couples' accommodation at the mine. About six months later they moved to the Gold Coast to help with the care of Mr Davidson-Meek's elderly father. The next year they returned to New Zealand and began living in the garage of the unfinished house in Whangarei.

[20] In January 2007 Mr Davison-Meek sold the Broome property for $A775,000. The net return after payment of mortgage and other costs was $A564,972. Mr Davidson-Meek invested around $450,000 in Australian shares. He paid off a revolving credit debt secured against the Whangarei property in the sum of $65,000. The balance was "drip fed" into the joint account. The parties had a temporary separation between February 2011 and November 2011. They finally separated on 8 January 2013. The Whangarei property was sold by Mr Davidson-Meek and the proceeds of sale are held in trust pending the outcome of these proceedings.

The law

[21] Section 2D of the Property (Relationships) Act 1976 provides:

> **2D Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to, or in a civil union with, one another.
>
> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship:
>
> (b) the nature and extent of common residence:
>
> (c) whether or not a sexual relationship exists:
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
>
> (e) the ownership, use, and acquisition of property:
>
> (f) the degree of mutual commitment to a shared life:
>
> (g) the care and support of children:
>
> (h) the performance of household duties:
>
> (i) the reputation and public aspects of the relationship.
>
> (3) In determining whether 2 persons live together as a couple,—
>
> (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
>
> (b) a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.
>
> (4) For the purposes of this Act, a de facto relationship ends if—
>
> (a) the de facto partners cease to live together as a couple; or
>
> (b) one of the de facto partners dies.

[22] In *Scragg v Scott* [1] a full Court of the High Court (Gendall, Ellen France JJ) set out a number of often cited observations on s 2D:

> [31] We do not accept the submission by counsel for Mr Scragg that there must exist four key indicia, irrespective of the existence or exclusion of other factors. That may have been the case for determination of a "relationship in the nature of marriage" but Parliament has made it clear that all the circumstances are to be taken into account including some factors which may or may not exist in any particular case. The complexity and diversity of human nature and behaviour is such that many types of associations may properly fall into the category of a de facto relationship as envisaged by Parliament. For there to be a relationship there must be an emotional association between two persons. Some associations will clearly be de facto relationships such as where partners are living in the same accommodation, perhaps sharing sexual conduct and proclaiming that they are a de facto couple sharing their lives. At the other end of the scale two persons may simply be lovers living apart and without any special bond or affiliation or emotional association which would place their relationship into the category of a de facto relationship.
>
> …
>
> [37] The test must inevitably be evaluative, with the Judge having to weigh up as best he or she can all of the factors - not only those contained in s2D, but also any others there may be - and applying a common sense objective judgment to the particular case. Counsel has helpfully provided to us in Appendix form a summary of a large number of cases in the benefit fraud context pursuant to the Social Security Act 1964, the constructive trust cases and a number of cases decided in the Family Court in respect of the Property (Relationships) Act 1976. They are all factual findings based upon the evidence in individual cases but can only be viewed as examples. Generalisations are to be avoided because every case is fact specific. For example, it might be thought that if a man and woman do not live together, nor have a sexual relationship, nor ever plan to live together, nor have children, then they could not be in a de facto relationship. Yet that was the factual situation involved in the case of *Horsfield v Giltrap* (2001) 20 FRNZ 404 (a constructive and express trust case) and the parties regarded themselves as a close and devoted couple who had committed themselves to each other and accumulated joint assets and were:
>
> > "a partnership between a man and a woman, who professed love for each other and were prepared to commit to each other their emotional and financial resources".
>
> Although it was said that that was "not a de facto union" we have no doubt that it would have qualified as a "de facto relationship" under the present legislation if such had been in force.
>
> …

[1] (2006) NZFLR 1076

[64] In determining whether a de facto relationship exists Courts are often required to assess multiple pieces of circumstantial evidence. That is why the indicia set out in s 2D are inclusive but not exhaustive. If sufficient pieces of evidence exist which, when viewed cumulatively, and through the application of common sense and proper reasoning, satisfy the finder of fact that the relationship is a de facto relationship then the statutory test is met. Weight to be given to individual pieces of circumstantial evidence may vary. If both parties say they are in a de facto relationship that may well be decisive direct evidence, depending upon the existence of other characteristics. Parties may simply present to the outside world in a particular way. They may share an emotional bond or association over an extended period and act in a way, inconsistent with any view other than that they are in a de facto relationship. It is the cumulative weight of all factors whether specified in the Act or not (because as was made clear by the minority judgment in *Ruka* (above) "there will be others"), which is decisive. The approach must be broad, with various factors to be weighed up in an evaluative task, similar to those the Courts are frequently called upon to undertake when drawing conclusions from circumstantial evidence.

[23] In *L v P* [2] (division of property) Asher J said:

[36] Thus, these three statutory provisions that give meaning to "de facto relationship" all emphasise two persons "living together" as the key to the concept of a de facto relationship. The factors in s 2D(2) are not in themselves criteria as to whether there is a de facto relationship. Rather, they help to determine whether the parties are living together as a couple, and must be read in that context. They should not be allowed to assume primacy on their own as qualifiers for a de facto relationship.

[24] In *Sew Hoy v Young* [3] Judge O'Dwyer said:

[25] It is clear from s 2D(3) that common residence is not a necessary factor. It will often be present in a de-facto relationship but it is not a pre-requisite to a finding that the relationship had that quality. It has been held that whilst physical cohabitation, is a common and important indicator, it is not essential (*Excell v DSW* [1990] 7 FRNZ 239). This view was supported by the High Court decision in *O'Shea v Rothstein* (11 August 2003) High Court, Dunedin where Chisholm J held:

> However "living together as a couple" is a statutory expression which carries a much deeper meaning than physically living together as a couple.

[26] A review of the authorities that relied on the meaning and application of s2D establish that the concept of "living together as a couple" is concerned with the intent of the couple to be partners, having a commitment to a shared life and demonstrating that by their conduct. The factors in s2 are a guide.

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[2] [2008] NZFLR 401

[3] FP 012/287/98 FC Dunedin, 11 August 2004, Judge O'Dwyer

When did the de facto relationship begin?

[25] For Mr Davidson-Meek it is contended that the parties' relationship most likely became a qualifying one in terms of the Act in early 1999 when they took up residence together at Whangarei. If that is not accepted, it is argued that the earliest date on which a qualifying relationship can be established is April 1998 when the parties became engaged.

[26] For Ms Milliken it is contended that when the issue is viewed objectively, she and Mr Davidson-Meek commenced a de facto relationship on 20 April 1997, when she moved to Western Australia.

[27] I had the sense that both parties were honest people who have done their best to piece together events from nearly 20 years ago. Recollection can however be faulty. I have already found that Ms Milliken misremembered the date of her first residence in the Broome property. I also note that Ms Milliken repeatedly refers to the Broome property as 69 Robinson Street, rather than 104 (I assume that it is possible that 69 Robinson Street was another address at which she lived in Broome).

[28] The narrative which I have recorded earlier in this judgment is a cautious account of all the objective events I am able to confidently record. Behind it are the two often non-interlocking accounts of the parties with their materially different emphases.

[29] For Ms Milliken it is emphasised that she travelled away from her native country to a place where she knew no-one but Mr Davidson-Meek and had no family. Mr Davidson-Meek supported her financially including paying for her fares. The periods apart were considerable but they were the inevitable consequences of Mr Davidson-Meek's weeks on end away in the outback on his work, exacerbated by the sometimes vast distances involved.

[30] For Mr Davidson-Meek, it is "ludicrous" to say they were in a committed de facto relationship in their early phases of knowing each other. While he liked Ms Milliken, it was also true that she needed and accepted help from him on issues

like employment, and for a considerable period of time she needed financial support. He regarded at least some of the money he advanced as a loan. He himself was more than once clearly half-hearted and undecided about the relationship.

[31] In my view the limited cohabitation by the parties in the early part of their relationship is completely irrelevant to the issue whether they were in a de facto relationship. Their lack of common residence was a simple result of the realities of Mr Davidson-Meek's working life and Ms Milliken's awkward situation in Australia. The fact that Ms Milliken moved 2,500 kilometres away at one stage bears little weight when it is considered that Mr Davidson-Meek more than once made the arduous bus trip to see her for small periods of time when he had days off.

[32] Neither does the way in which Mr Davidson-Meek bought the Broome property bear any real weight when it is carefully examined: it is true that he bought the property with literally no consultation with Ms Milliken but it was bought by him as a financial vehicle to be used to reduce his tax and was bought by him to a significant degree because it was already tenanted and had a guarantee of tenancy for some time. It was not bought to be their home.

[33] Similarly the level of financial interdependence indicated by Mr Davidson-Meek's funding of Ms Milliken has to be juxtaposed against a visibly reluctant acceptance by Mr Davidson-Meek that he had no choice while Ms Milliken continued to fail to find gainful employment.

[34] This is a rare s 2D situation in which I am, reluctantly, left to decide the issue of the date of the commencement of the de facto relationship on the degree of mutual commitment to a shared life (s 2D(2)(f)). That requires a sense of the probabilities of the situation seen imperfectly 20 years on. My sense of the situation, partly from Ms Milliken's letters, was that she was probably the more committed party. My sense of Mr Davidson-Meek is that he was at age 55 probably more cautious and probably uncertain whether Ms Milliken would pull her weight financially in the relationship, something of significant importance to him. I think that their commitment was insufficiently *mutual* to mean that they were "living together" as a

couple until Mr Davidson-Meek made a decision that they would become engaged. I therefore find that the de facto relationship began in April 1998.

The Broome property

[35] This was plainly purchased by Mr Davidson-Meek before, in my judgement, the de facto relationship started and was therefore separate property. It was however sold during the course of the relationship and the proceeds were invested in shares held by Mr Davidson-Meek's family trust. These shares were later transferred into Mr Davidson-Meek's sole name when he returned to New Zealand and no longer met residence requirements for the continuation of the trust in Australia.

[36] For Mr Davidson-Meek it is argued that the shares were at that point at least, "acquired" by Mr Davidson-Meek "for the common use or common benefit of both himself and Ms Milliken" (s 8(1)(ee)). The general proposition of the Act in s 9(2) that property acquired out of separate property is separate property is displaced by s8(1)(ee) if the property acquired after the relationship began was acquired for the common use or common benefit of both spouses or partners. It is my general sense of the evidence that long before this acquisition, the parties had effectively pooled their resources and that therefore the acquisition was for their common use and benefit. If I had any doubt on the issue it would be dispelled by the fact that Mr Davidson-Meek unguardedly said:[4]

> I could, I had either to go back to Australia and start work again or we had to get some money from *one of our assets*. Now it didn't need to be particularly Karen's assets, but I had to make some, find that cash somewhere so it was, it was a case of going back to Australia to sort it out. (Emphasis added)

[37] For Mr Davidson-Meek, it is further argued that s 8(1)(ee) is subject to s 10 of the Act. Section 10 provides:

> **10 Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift**
>
> (1) Subsection (2) applies to the following property:

[4] NOE, page 81, line 24

(a) property that a spouse or partner acquires from a third person—

(i) by succession; or

(ii) by survivorship; or

(iii) by gift; or

(iv) because the spouse or partner is a beneficiary under a trust settled by a third person:

(b) the proceeds of a disposition of property to which paragraph (a) applies:

(c) property acquired out of property to which paragraph (a) applies.

(2) Property to which this subsection applies is not relationship property unless, with the express or implied consent of the spouse or partner who received it, the property or the proceeds of any disposition of it have been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

(3) Property that 1 spouse or partner acquires by gift from the other spouse or partner is not relationship property unless the gift is used for the benefit of both spouses or partners.

(4) Regardless of subsections (2) and (3) and section 9(4), both the family home and the family chattels are relationship property, unless designated separate property by an agreement made in accordance with Part 6.

[38] It is argued that Mr Davidson-Meek acquired the shares as "a beneficiary under a trust settled by a third person" (s 10(1)(a)(iv). It emerged in closing submissions that the settlor of the W Davidson-Meek Family Trust (originally the WD & BM Meek Family Trust) was one Peter Arnold Murrell.

[39] No evidence is available as to the identity of Mr Murrell. The entire evidence, both affidavit and oral, proceeded on the firm affirmative basis that the Trust was Mr Davidson-Meek's trust and had been established by him. He was not cross-examined to the contrary. Mr Davidson-Meek routinely described how he had had a former partner removed as a beneficiary.

[40] No authority was presented on this issue.

[41] On the balance of probabilities, I find that Mr Murrell was a nominee settlor utilised for the purposes, or within the processes, of Queensland Law (the trust was established in Queensland in 1981) and, on the evidence before me, the trust was formed by Mr Davidson-Meek. Section 10 applies to property acquired *from a third person* in one of the four situations described. It is my view that for the purposes of s 10(1)(a)(iv), a trust is "settled" by the person who causes or arranges the settlement. That person on the evidence is Mr Davidson-Meek. In my view s 10 does not apply to this acquisition.

[42] I hold that the shares presently held by Mr Davidson-Meek are relationship property and are thus to be shared equally.

[43] It is finally argued for Mr Davidson-Meek that there are extraordinary circumstances that make equal sharing of property repugnant to justice.

[44] No authority has been presented in respect of this submission. In *Martin v Martin* [5] the Court of Appeal said in respect of the similarly worded predecessor to s 13 that there was a "strong statutory bias in favour of the equal entitlement". In *Dalton v Dalton*[6] Richardson J said:

> Mere disparity of contributions or even a disproportionately greater contribution is not sufficient to justify unequal sharing. But the disparity may be so gross as to be an extraordinary circumstance rendering equal sharing repugnant to justice.

[45] For Mr Davidson-Meek it is argued that he has contributed in round terms $1,115,000, comprising $535,000 from the Whangarei home, $476,000 from the Broome sale proceeds now invested in shares and a further $105,000 from the Broome sale proceeds contributed to relationship property. Ms Milliken's contribution is contrasted at $75,000, being the proceeds of sale of the Glenfield unit.

[46] Disparity of contribution can of course be eroded and ultimately swept away by the duration of a relationship. Here the relationship lasted 15 years.

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[5] [1979] 1 NZLR 97
[6] [1979] 1 NZLR 113

[47] Furthermore, there are hidden factors in the calculation presented for Mr Davidson-Meek:

(a) First, the Glenfield unit was sold first (2002) and its return crystallised and ultimately spent without the inflation which distorts the calculation;

(b) Second, a good deal of the money to be divided is the result of the vast increase (mainly during the term of the relationship) of the Broome property, which increased in market value from $250,000 at purchase to $775,000 at sale;

(c) Third, a proportion of the increase in value of the Whangarei property was the result of Mr Davidson-Meek's considerable work on it during the latter stages of the relationship when they were back in New Zealand and Ms Milliken was earning an everyday wage.

[48] Cumulatively, these factors and the length of the relationship lead me to conclude that the strict test in s 13 is not met and there should be equal sharing.

[49] Perhaps because of pressure of time, there was no ultimate clarity as to the respondent's position as to the orders the applicant seeks in para 67 of her memorandum, most of which were not addressed at hearing on the implied basis they were settled. The parties may file a draft order if its terms are agreed or memoranda if they are not.

[50] Costs are reserved.

D R Brown
Family Court Judge