

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 125 OF THE DOMESTIC VIOLENCE ACT 1995, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

**IN THE FAMILY COURT
AT WAITAKERE**

**FAM-2015-090-000659
FAM-2015-090-000673
[2017] NZFC 3207**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976 and THE DOMESTIC VIOLENCE ACT 1995
BETWEEN	[ELLIOT PAYNE] Applicant
AND	[KATHERINE BRADLEY] Respondent

Hearing: 1-3 May 2017

Appearances: J Noble for the Applicant
S Bailey for the Respondent

Judgment: 13 June 2017

RESERVED JUDGMENT OF JUDGE D M PARTRIDGE

[1] A three day hearing was allocated to determine proceedings brought by [Elliot Payne] against [Katherine Bradley] under the Property (Relationships Act) 1976 and the Domestic Violence Act 1995.

[2] At the commencement of the hearing on 1 May 2017 counsel for Mr [Payne] sought leave to withdraw his client's applications for protection, occupation and furniture orders. I granted leave and discharged the temporary protection, occupation and ancillary furniture orders made on 4 November 2015 against Ms [Bradley]. The protection order which named Ms [Bradley]'s daughter, [Elizabeth Bradley], as associated respondent had earlier been discharged by consent on 10 March 2016.

Proceedings

[3] The current proceedings before the Court under the Property (Relationships) Act 1976 for determination are:

- (a) Application by Mr [Payne] for orders dividing relationship property, dated 27 October 2015.
- (b) Application by Mr [Payne] to set aside the transfer of [address 2] to Ms [Bradley] in November 2014 due to undue influence and/or unconscionable bargain, dated 6 June 2016.
- (c) Interlocutory application by Ms [Bradley] to discharge the order made on 3 November 2015 that she is to immediately pay \$135,000 into the trust account of Boyle Mathieson, Solicitors, dated 11 December 2015.

Background

[4] Mr [Payne] owned a significant amount of property at the time the parties met. This included a 2.043 hectare property at [address 1 deleted]("[address 1]"). Mr [Payne] resided in the main house on the property, and rented out other dwellings

on the property.¹ In addition, Mr [Payne] owned rental properties at [address 2 deleted] (“[address 2]”), [address 3 deleted] (“[address 3]”), and [address 4 deleted] (“[address 4]”), as well as a timeshare in [location 5].

[5] The parties met through Ms [Bradley]’s brother, [Raymond Fry], who was a tenant on Mr [Payne]’s property at [address 1].

[6] In approximately March 2014 Ms [Bradley] moved into Mr [Payne]’s home. He was 69 years old at the time, and she was 49 years old. Ms [Bradley] had the master bedroom in the house and Mr [Payne] had the smaller bedroom.

[7] Mr [Payne] has experienced very poor health over a number of years as a result [medical details deleted].² His health deteriorated further leading to his decreased mobility and the need to have someone with him who could seek or provide medical assistance in case he had further [medical details deleted]. He required caregiving assistance. He was, and remains, extremely vulnerable.

[8] Ms [Bradley] assisted Mr [Payne], and did work around [address 1] during the period that she lived there. She also undertook work on [address 3] and in respect of [address 4].

[9] On 20 November 2014 Mr [Payne] transferred [address 2] to Ms [Bradley] for the sum of \$300,000 and signed a deed of forgiveness of debt for the full amount.

[10] Mr [Payne] and Ms [Bradley] were married on [date deleted] September 2015.

[11] On [date deleted] October 2015 Ms [Bradley] withdrew \$140,000 from the parties’ Kiwisaver joint account. There is disagreement about whether this was done at the direction of, and/or the knowledge of, Mr [Payne].

¹ See Exhibit 1.

² [Medical details deleted].

[12] On [date deleted] October 2015 Mr [Payne] visited the bank and withdrew the balance in the joint account of \$22,908.78. He did not return home that day. The parties separated on that date, four and a half weeks after their wedding.

[13] Mr [Payne] subsequently issued trespass notices to Ms [Bradley] and the other people, including Ms [Bradley]'s family members, who were occupying the dwellings at [address 1].

[14] On 3 November 2015 Mr [Payne] obtained an order without notice that Ms [Bradley] immediately pay \$135,000.00 into the trust account of Boyle Mathieson, Solicitors. Ms [Bradley] has not complied with that order.

[15] On 4 November 2015 Mr [Payne] obtained a temporary protection order against Ms [Bradley] and [Elizabeth Bradley]³, and temporary occupation and ancillary furniture orders.

Issues

[16] The issues for determination are:

- (a) The duration of the parties' relationship.
- (b) Whether the transfer of [address 2] by Mr [Payne] to Ms [Bradley] was the result of undue influence or unconscionable bargain.
- (c) The financial and non-financial contributions made by Ms [Bradley] to the relationship.
- (d) Whether Ms [Bradley] gave Mr [Payne] the \$140,000 which she withdrew from the parties' Kiwisaver joint account.
- (e) Whether Ms [Bradley] is in contempt of the Court order made on 3 November 2015.

³ As associated respondent.

- (f) The pool and value of relationship property.
- (g) How the relationship property should be divided to represent a just and equitable division.

[17] In my assessment Mr [Payne]'s ability to give evidence was compromised by his medical condition. Dr McVeagh, who was Mr [Payne]'s doctor for a number of years, gave evidence that Mr [Payne] has [medical details deleted] and memory loss. In addition, as with all older people, if he is tired or unwell he loses his short term memory more quickly. Mr [Payne] referred to his memory loss in his affidavit and when giving evidence. He clearly struggled to recall dates, timeframes and sequences of events. Monetary amounts and figures also caused him difficulty. On most other matters, he was able to provide clear evidence. As a result of this, I have sought corroborating evidence in order to make findings in respect of the credibility of his evidence.

What was the duration of the parties' relationship?

[18] Both parties accept that their relationship was one of short duration pursuant to s 2E of the Property (Relationships) Act 1976 ("the Act").

[19] Ms [Bradley] moved into Mr [Payne]'s home in approximately March 2014. They married on [date deleted] September 2015 and separated on [date deleted] October 2015. They disagree about whether they were in a de facto relationship prior to their marriage. This is relevant in light of s 2B which states that the length of a de facto relationship which commenced immediately prior to a marriage is included in the calculation of the length of the marriage.

[20] In his evidence Mr [Payne] portrayed their relationship variously as caregiver and patient, a business relationship, and a marriage of convenience. He denied that he had a personal relationship with Ms [Bradley]. Ms [Bradley]'s evidence was that she moved into the property as Mr [Payne]'s partner, and that they were living together as a couple from the date she moved in.

[21] The basic criteria for a de facto relationship are set out in s 2D(1) of the Act. Essentially, there must be a relationship between two people, who are at least 18 years old, and who are not married to each other or in a civil union, but who are living together as a couple. There is no issue in this case with the first three limbs of the test. However issues arise in respect of whether Mr [Payne] and Ms [Bradley] were living together as a couple prior to their marriage.

[22] Sections 2D(2) and (3) provide guidance on this issue. These state:

- (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.

[23] In *B v F* Heath J gave a cautionary reminder that these factors are guides and not a strict set of rules to be applied.⁴ He warned against reaching a determination “by an overly mechanical application of non-exhaustive statutory criteria”.⁵

[24] In *Scragg v Scott* the High Court provided an explanation of the approach to be adopted when applying s 2D:⁶

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 ... 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.

[25] In *PZ v JC* the Court found that the parties were not living together as a couple in the situation where the parties had kept their finances and property separate; there was a lack of emotional commitment to a shared life; and a lack of “signposts” or public disclosure that the relationship had changed from that of landlord and boarder and become more intimate.⁷

[26] In the present case, the parties lived in the same home for a period of 19 months, and were married for four and a half weeks of that period.

[27] Before and after their marriage Ms [Bradley] slept in the master bedroom in the home, and Mr [Payne] slept in the smaller bedroom. There was no sexual relationship between the parties at any time as a result of Mr [Payne]’s health. Mr [Payne]’s evidence is that they did not share the same bed. In evidence Ms [Bradley]

⁴ *B v F* [2010] NZFLR 67 (HC).

⁵ At [51].

⁶ *Scragg v Scott* [2006] NZFLR 1076, (2006) 25 FRNZ 942 (HC) at [64].

⁷ *PZ v JC* [2006] NZFLR 97 (FC).

said that she and Mr [Payne] sometimes shared a bed. This was not put to Mr [Payne] in cross-examination. I do not accept Ms [Bradley]'s evidence on this point. It was sparse and unconvincing. In my view Ms [Bradley] attempted to 'play up' the closeness of their relationship.

[28] The parties retained separate bank accounts. They opened a joint bank account in August 2015 to which Mr [Payne] contributed \$180,000 from the sale proceeds of [address 3], and Ms [Bradley] contributed \$1,500. The account was used to pay for items required on [address 1]. Neither of the parties made any further deposits into the account.

[29] Ms [Bradley] assisted Mr [Payne] on a day to day basis, and undertook work on [address 1],⁸ and Mr [Payne]'s other properties. Ms [Bradley] did not pay rent during the period she lived on the property. She was employed for periods of time while living there. She also continued to receive a benefit from Work and Income New Zealand ("WINZ") throughout the period that she lived with Mr [Payne]. Ms [Bradley]'s evidence was that Mr [Payne] had told her that he would not financially support her until they were married. That proposition was not put to Mr [Payne] in evidence. In my view the fact that Ms [Bradley] was continuing to receive a benefit is counterintuitive to the submission that the parties were in a de facto relationship. In her oral evidence Ms [Bradley] stated that she continued to receive a benefit after the marriage. This is inconsistent with her affidavit evidence that her benefit stopped when they got married.⁹ I note that Ms [Bradley] did not inform WINZ that Mr [Payne] had transferred [address 2] into her name or that she was receiving income from it.

[30] Ms [Bradley]'s position is that the parties were in a de facto relationship from the date she moved in, which is why she undertook the things she did. Ms [Bradley]'s evidence on this point is inconsistent with her affidavit evidence that when she moved in Mr [Payne] told everyone that she was his property manager.¹⁰

⁸ Some of this was to benefit her daughter and her partner and baby.

⁹ Affidavit of [Katherine Bradley] sworn 10 December 2015, paragraph 31.

¹⁰ Affidavit of [Katherine Bradley] sworn 10 December 2015, paragraph 10.

[31] Mr [Payne]’s position is that the parties had a business relationship. Ms [Bradley] lived rent-free, and she and her family members benefitted from him financing their meals, and in return he received her caregiving and labour in and around the property. He maintained that he paid for any items required on the property, either directly or indirectly through his bank accounts, and that there was an agreement that he would pay Ms [Bradley] and her brother for work done on [address 3].

[32] Somewhat surprisingly, the lead up to the parties’ marriage does not assist to determine the date when the parties’ relationship commenced. There was no engagement or any evidence of an announcement to friends and family of their intention to marry. Mr [Payne] accepts that he proposed to Ms [Bradley] on a number of occasions, the first time being soon after she moved into his home. He said that the wedding was hurriedly arranged within a short timeframe after Ms [Bradley] told him that a “soothsayer”¹¹ had told her they should marry otherwise bad things would happen in respect of his property.

[33] Ms [Bradley] denied this. Her evidence was that she does not know a “soothsayer” and had not visited a psychic while living with Mr [Payne]. She said she agreed to marry Mr [Payne] in early 2015 but they had not set a date or made any arrangements and she wanted to wait until Mr [Payne]’s daughter came over from Australia to have the wedding and invite family and friends. She stated that Ms [O’Donnell] told her that Mr [Payne] wanted to marry sooner rather than later, and Ms [O’Donnell] arranged the wedding. None of their family members were invited to the wedding, or told about it. Ms [O’Donnell] denies arranging the wedding. Her evidence is that Ms [Bradley] asked her if she knew a celebrant and asked her to accompany her to the Court registry, and she drove the parties and her father to the ceremony. I find Ms [Bradley]’s evidence on this point unconvincing. My assessment of Ms [Bradley] is that she is a strong and outspoken woman. I believe that it is extremely unlikely that she would simply acquiesce to her own wedding arrangements being made by someone else,¹² without having any input, and without

¹¹ Clarified to be a clairvoyant or psychic.

¹² Particularly someone who was not a close friend.

her own or Mr [Payne]'s children being told or being present, if she considered this to be an important or significant event which sealed their commitment to each other.

[34] During the course of the hearing a number of witnesses gave evidence about their perception of the parties' relationship.

[35] Mr [Payne]'s daughter, [Evie Brown], understood that Ms [Bradley] was her father's caregiver when she moved into the property. She believed that their relationship changed and they became partners at some stage before their wedding, but after her father had transferred [address 2] to Ms [Bradley] in November 2014.

[36] [Adam] is the father of [Chloe O'Donnell]. His evidence is that when Ms [Bradley] introduced herself to him in mid-2015 she told him that she was looking after Mr [Payne]. He thought that they had become partners approximately two weeks before they married.

[37] [Brooke Burgess] is [Chloe O'Donnell]'s daughter, and a good friend of [Elizabeth Bradley]. She stated that Ms [Bradley] told her that she was helping Mr [Payne] out as a friend. She never saw any intimacy¹³ between them despite visiting the property on a regular basis during 2014 and 2015 and did not consider the parties to be in a de facto relationship. She did not see any change in their interactions with each other after they were married.

[38] [Chloe O'Donnell] did not consider that the parties were in a relationship with each other even at the time they married. She said that Ms [Bradley] told her that she and Mr [Payne] had got married to protect her from his children. They had an agreement that they would look after each other. His children wanted to put him in a retirement home and Ms [Bradley] was there to stop that happening. Ms [O'Donnell] and her father were the only attendants at the wedding. She said it was not a loving marriage and described it as "weird".¹⁴ Her evidence, corroborated by Mr [O'Donnell] in his affidavit,¹⁵ is that Ms [Bradley] flirted with Mr [O'Donnell] on the night of the wedding. Ms [Bradley] denies doing so.

¹³ Cuddling or kissing.

¹⁴ NOE page 174, line 18.

¹⁵ He was not cross-examined on this point.

[39] Ms [Bradley] accompanied Mr [Payne] to most of his medical appointments. Dr McVeagh “assumed” that Ms [Bradley] was Mr [Payne]’s partner from the way they spoke with each other.

[40] Alan Broadbent was the solicitor engaged by Mr [Payne] in respect of the transfer of [address 2] in November 2014. He stated that at the initial meeting Mr [Payne] told him that he and Ms [Bradley] had been “together” since January 2014. On that occasion he observed Ms [Bradley] as overly affectionate to Mr [Payne] and cuddling up to him. He felt like he was being persuaded that this was a genuine de facto relationship and Ms [Bradley] was “over the top playing to the gallery.”¹⁶

[41] I consider the parties’ own perceptions of their relationship to be relevant. Mr [Payne] said that he felt affection for Ms [Bradley] but was not sure if it was reciprocated. Whilst Ms [Bradley] was adamant that she had strong feelings for Mr [Payne], the fact that he had no awareness or confidence in that is significant. Mr [Payne]’s evidence is that he “felt like an outsider in his own home”. He also told Ms Burgess this. Ms [Bradley] would go out socialising and he was not included and left home. He was left alone at the table at dinnertimes to finish his meal because he ate slowly, while Ms [Bradley] and the rest of her family went outside and talked and smoked. Ms [Burgess] was concerned about how Mr [Payne] was spoken to and treated by Ms [Bradley] and her family, and spoke to Ms [Bradley] about this.

[42] The most compelling evidence available to me to determine when the parties de facto relationship commenced are the bank account records which show that Mr [Payne]’s national superannuation payment reduced by \$66.92 per fortnight on 1 December 2014 when his living alone allowance was cancelled. I am satisfied that his living alone allowance was cancelled because he was in a de facto relationship with Ms [Bradley]. This was conceded by counsel for Mr [Payne] in closing submissions.

[43] When considering all of the circumstances of the relationship, including the criteria set out in s 2D(2), I adopt the date of 1 December 2014 as the date of

¹⁶ NOE page 136, lines 6-7.

commencement of the parties' de facto relationship. The duration of the relationship was approximately 10 months, and ended on [date deleted] October 2015.

Was Mr [Payne] subject to undue influence when he transferred [address 2] to Ms [Bradley]?

[44] On 20 November 2014 Mr [Payne] transferred [address 2] to Ms [Bradley] for \$300,000 and signed a deed of forgiveness of debt for the full amount. From that date Ms [Bradley] received the rental from the property directly and was responsible for payment of the outgoings on the property.¹⁷

[45] Ms [Bradley] had been living on the property for 8 months at the time Mr [Payne] transferred the property to her.

[46] Mr [Payne] seeks an order that the transaction is set aside and the ownership of the property is returned to him on the basis that he was unduly influenced by Ms [Bradley] to transfer the property to her.

[47] Mr [Payne]'s vulnerability has been evident from the commencement of the proceedings. Dr McVeagh gave evidence that Mr [Payne]'s medical condition caused TIAs and memory loss. This made him physically impaired and vulnerable, and also impaired his cognitive ability to some degree, although Dr McVeagh did not consider that Mr [Payne]'s judgment was significantly impaired.¹⁸

[48] When this fixture was allocated, a direction was made for an updated medical report on Mr [Payne] to be filed prior to the hearing. Dr McVeagh filed an affidavit on 1 May 2017 annexing a copy of Mr [Payne]'s Mini-Mental State Examination ("MMSE") results and expressing the view that Mr [Payne] had the capacity to participate in Family Court proceedings. On that basis, I was satisfied that Mr [Payne] had the competence and capacity to participate in the hearing.

¹⁷ Although it appears that Mr [Payne] continued to make payments to the [Location deleted] Council from his personal bank account after that date.

¹⁸ NOE page 133, lines 26-27.

[49] Undue influence is an equitable doctrine premised on the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. It involves the “exercise of pressure, directly or indirectly, by the stronger party on the weaker party to enter into the impugned transaction”.¹⁹

[50] The legal principles relating to undue influence were outlined by the higher Courts in the proceedings of *Green v Green*.²⁰ They may be summarised as follows:

- (a) The overall burden of proof rests on the person seeking to establish undue influence.
- (b) The burden of proof is the balance of probabilities.
- (c) The person asserting undue influence must show the alleged influence led to the making of the impugned transaction, and the influence was undue in the sense that the transaction was not the result of the free exercise of an independent will on the part of the person at whose expense the transaction was made.
- (d) The question of whether a transaction was brought about by undue influence is a question of fact. A party can succeed in establishing this either directly by proving “actual undue influence” or by establishing circumstances giving rise to a “presumption of undue influence”.
- (e) A presumption of undue influence arises where it is established that:
 - (i) the person said to have been subject to undue influence placed trust and confidence in the other; and
 - (ii) the transaction called for an explanation in light of that relationship.

If both elements exist, the evidential onus shifts to the alleged influencer to demonstrate the absence of undue influence.

¹⁹ *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [70]; cited in *Marston v Moor* [2013] NZHC 2249 at [27].

²⁰ *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [35], [40] and [44] adopting *Green v Green* [2015] NZHC 1218 at [100] per Winkelmann J.

- (f) The presence of independent advice is one of many factors that may be taken into account in determining whether undue influence is proved. Whether the independent advice helps to establish that the transaction was the result of a person's free will depends on the facts of the case. Independent advice can help establish that a person understood the decision they were making. But establishing that a person fully understood the act is not the same as establishing that the act was not brought about by undue influence. A person can fully understand an act and still be subject to undue influence.

- (g) The essence of the undue influence doctrine is impairment of free will. It is the overbearing of the will that makes the influence "undue". The focus is thus on the mind of the person consenting to the impugned transaction, not the motives of the person exerting the pressure or influence. Therefore the person asserting undue influence does not have to demonstrate unconscionability or impropriety on the part of the alleged influencer in order to establish undue influence.

[51] Simply put, the onus is on Mr [Payne] to establish on the balance of probabilities that at the time he transferred [address 2] to Ms [Bradley] he was influenced to do so, such that he was not freely exercising his independent will. If that is established, the onus shifts to Ms [Bradley] to demonstrate the absence of undue influence.

[52] Concerns have been raised throughout the evidence about Mr [Payne]'s vulnerability to being influenced by others. Ms [Brown] described her father as being easily manipulated and pressured during the period Ms [Bradley] was living on the property, and subsequently since the separation. Ms [Bradley] herself raises this as a concern in respect of Ms [O'Donnell].

[53] Ms [Brown] had concerns about her father's relationship with Ms [Bradley] and was concerned that [address 1] was being turned into a commune, and being taken over by people that she and her sisters did not know and hardly recognised. She described observing her father being socially isolated at a Guy Fawkes party at

the home in 2014, where none of his friends were there and Ms [Bradley] and her family were not talking to him.

[54] There is a significant amount of evidence to support the conclusion that Mr [Payne] was susceptible to influence at the time he transferred the property to Ms [Bradley], and that he continues to be so. The combination of his health issues; inability to be by himself in the property; isolation from his family; a number of members of Ms [Bradley]'s family and friends living on his property; and his feeling like an outsider in his own home, make him more vulnerable to this. Some of the decisions he made are further evidence of this, such as agreeing to get married at short notice, on his evidence because Ms [Bradley] told him a "soothsayer" had predicted that something bad would happen if they did not do so.

[55] In the course of the evidence a DVD was played, which Ms [O'Donnell] had recorded on her mobile phone on 30 September 2015, of part of a conversation that took place when Ms [O'Donnell] and the parties were on their way to Boyle Mathieson, Solicitors for Mr [Payne] to sign his Will. In the DVD Ms [Bradley] is heard telling Mr [Payne] "no saying you're confused today" ... "get straight to the point today, no fucking shit today, right?" ... "Just hand her the paper and be assertive and say 'Look I have had a long time to think about this. This is what I want'" ... "All you've got to do is hand it to her, and say you wanted a medical, here's the medical, and this is my wishes. This is what I want done. I've thought about it and this is what I want. I'm paying you good money to do this for me'. Alright?" In the lawyer's office, Ms [Bradley] is seen repeatedly instructing Mr [Payne] what to say, and he appears to repeat this, however the audio in this part is less clear. It is very clear however that Ms [Bradley] is directing him and trying to give Mr [Payne] a clear message. This was emphasised by her slapping him on the leg and giving him a stern look at the end of the DVD recording.

[56] Ms [Bradley] acknowledged saying these things to Mr [Payne], but said that these were said in the context that Mr [Payne] had been talking repeatedly about wanting to make a Will, and Ms [O'Donnell] had also been constantly talking about this. She said that she was "fed up" and just wanted it done so that there would be no more talk about him making a Will. I find her explanation implausible. I am of the

firm view that Mr [Payne], in the vulnerable state that he was in, received the very clear message from Ms [Bradley] that she wanted him to sign his Will in the form that it was provided to him on that day. The Will presented to Mr [Payne] that day gave his entire estate to Ms [Bradley].²¹

[57] In any event, Mr [Payne] did not sign his Will after meeting with the lawyer in the absence of Ms [Bradley] and Ms O'Donnell. Mr [Payne]'s evidence is that Ms [Bradley] was unhappy that the Will was not signed.

[58] It is unclear from the evidence who made the Will appointment and who gave instructions for the draft Will that was shown to Mr [Payne] at that appointment. From Ms [Bradley]'s comments in the recording, it seems apparent that she was aware of the contents of the draft Will as she was directing him to sign it. I further note that Ms [Bradley]'s mobile number was the contact number recorded. Issue was taken by counsel because one number was missing. I am satisfied that the number recorded was intended to be Ms [Bradley]'s, and was either misheard or recorded incorrectly.

[59] Mr [Payne]'s Will was a matter which was thoroughly canvassed in cross-examination. Ms [O'Donnell]'s evidence is that she recorded Mr [Payne]'s Will instructions which provided for Mr [Payne]'s children and sisters-in-law to receive the bulk of his estate with Ms [Bradley] receiving a small share. When Ms [Bradley] became aware of this, she became angry and verbally abused Mr [Payne] and told him that if he did not do what she wanted, she was going to leave him. She wrote a new Will and asked Ms [O'Donnell] to type it up. Subsequently, Ms [Bradley] took Mr [Payne] to a Justice of the Peace ("JP") and he signed his Will.²²

[60] Ms [Bradley] denies knowing Mr [Payne]'s Will instructions to Ms [O'Donnell], becoming angry and threatening to leave Mr [Payne], and writing a new Will for him. She acknowledged taking Mr [Payne] to a JP to sign his Will on 6 October 2015 but said that she was unaware of the terms of the Will he was intending to sign then as she had not looked at it.

²¹ Affidavit of [Elliot Payne] sworn 22 January 2016, annexure 'B'.

²² Narrative Affidavit of [Elliot Payne] sworn 27 October 2015, annexure 'E'.

[61] I prefer the evidence of Ms [O'Donnell] on this point. It does not escape me that Mr [Payne] and Ms [O'Donnell] are now living together and that there is animosity between Ms [O'Donnell] and Ms [Bradley]. However, I consider it is more likely than not that this occurred as it caused Ms [O'Donnell] to become wary of Ms [Bradley] to the point that she made enquiries about the validity of a Will drafted and signed in such a way. I further find it implausible that Ms [Bradley], who maintained that the parties were in a de facto relationship at that time and that she assisted him with his taxes, property and other paperwork, simply drove him at his request to sign a document with a JP without making enquiries about it.

[62] Although the recording was taken in September 2015, I have no hesitation in finding on the balance of probabilities that Ms [Bradley] also treated Mr [Payne] in a similar manner on previous occasions. It is significant that Ms [O'Donnell] took the step of recording this exchange on the way to the Solicitor's office because of her concern about Ms [Bradley]'s behaviour towards Mr [Payne]. His responses to Ms [Bradley]'s comments in the recording were quiet and inaudible. His simple acceptance of this behaviour, which Ms [Bradley] said in evidence was not usual behaviour for her, and the evidence of [Brooke Burgess] and Ms [O'Donnell] about the way Mr [Payne] was treated by Ms [Bradley] and her family, support this finding.

[63] Mr [Payne] received legal advice prior to signing the documents to complete the transfer of [address 2] to Ms [Bradley] in November 2014. The transaction was completed against Mr Broadbent's advice. Mr Broadbent met with Mr [Payne] on three occasions. Ms [Bradley] was with him on one occasion, and his daughter, [Natasha], was with him on another occasion, at [Natasha]'s request.

[64] During their meeting [Natasha] expressed concern about the proposed transaction and that Mr [Payne] was being isolated from his family and they were prevented from calling or contacting him. During the discussion Mr Broadbent advised about measures to protect the family home for the children through a contracting out agreement. Mr Broadbent subsequently received a phone call from Mr [Payne] telling him that Ms [Bradley] had found out that he and [Natasha] had met with him and was very angry. Mr [Payne] described himself as "between a rock

and a hard place” and said that he did not discuss the proposed contracting out agreement with Ms [Bradley] because “it’s too hot”.²³ He instructed Mr Broadbent to proceed with the transfer.

[65] Mr [Payne] stated in his oral evidence that he thought that he was arranging for the property to be transferred to Ms [Bradley] upon his death, not immediately. Mr Broadbent’s evidence is that option had not been discussed. Mr Broadbent is an experienced Family Court lawyer. I accept that he clearly advised Mr [Payne] on this matter on at least three occasions and that Mr [Payne] understood the transaction. Mr [Payne] completed a medical assessment to ensure his competence to undertake the transaction. There is no cogent evidence before me that Mr [Payne] did not understand what he was doing at that time. I am satisfied that at the time that Mr [Payne] signed the sale and purchase and gifting documents and instructed Mr Broadbent to proceed with the transaction, he was aware that he was immediately transferring the property to Ms [Bradley]. This is further supported by the evidence that arrangements were made for her to receive the rent and take responsibility for payment of the outgoings from that date.

[66] Mr Broadbent was of the clear view that Ms [Bradley] was the driving force behind [address 2] being transferred into her name, and that Mr [Payne] was under the influence of Ms [Bradley]. It is noteworthy that the parties had initially wanted to transfer all of Mr [Payne]’s property into their joint names when Mr Broadbent was first instructed, and that the Public Trust and another lawyer had declined to assist them to do this. Mr Broadbent identified at the outset that duress was an issue “front and centre”²⁴ to the transaction. He informed the parties of this and advised about ways to counteract this, both verbally and in writing.

[67] Mr [Payne] wanted to keep Ms [Bradley] happy and was desperate to maintain his relationship with her. He informed Mr Broadbent that Ms [Bradley] had experienced significant hardship and he wanted to help her financially as a sign of commitment to their relationship. Mr Broadbent described it as a balance between Mr [Payne]’s perception of his extreme need to have someone caring for

²³ NOE page 138, line 9.

²⁴ NOE page 138, line 18.

him because of his medical situation, and concern about what may happen if he did not have someone to look after him. The situation was made more difficult and complex because Mr [Payne]'s family were not offering an alternative option for his care.

[68] A significant factor in these proceedings is that Mr [Payne] is vehemently opposed to living in a rest home. He wants to live in his own home until the end of his life. He had made this clear to a number of people, including Ms [Bradley] and Ms [O'Donnell]. This was a real worry for him, as it is for many older people contemplating the last years of their lives. He was concerned that his daughters wanted to put him into a rest home, and wanted to safeguard against that by seeking assurance (of Ms [Bradley] initially, and latterly of Ms [O'Donnell]) that they would care for him in his own home until his death. Ms [Bradley] confirmed that he sought her reassurance, prior to their wedding, that if he married her she would not put him in a rest home.

[69] I am satisfied that this issue was, and remains, a very significant factor for Mr [Payne], which substantially increases his vulnerability to influence. Simply put, he would do whatever was necessary to ensure that he was not left without someone to care for him, because the inevitable alternative that he would go into a rest home was unpalatable to him. That issue may have been even more apparent to him after the breakdown of his medium-term relationship with [Rosie Connor]. Therefore, showing generosity such as gifting property (to Ms [Bradley]) and setting up a business (for Ms [O'Donnell]) could be seen as Mr [Payne] putting things in place to keep them happy, and a means to ensure that they will continue to fulfil their assurance to look after him.

[70] When considering the issue of undue influence, it is noteworthy to consider the reasons advanced for why the property was transferred to Ms [Bradley]. What was the consideration for this transaction? There are differing reasons advanced in the evidence, even between Ms [Bradley]'s own affidavits. The deed of forgiveness of debt dated 20 November 2014 states "in consideration of natural love and affection" which is a standard narrative in documents of this kind. In her first affidavit Ms [Bradley] deposed that Mr [Payne] offered the property to her for

looking after and caring for him (which she had done for approximately 8 months at that time), and he promised she would always have a home.²⁵ In her third affidavit Ms [Bradley] says the property was transferred to her in thanks and remuneration for her work on [address 1] and [address 4], and in return for her promise to do work on [address 3] and to look after him.²⁶

[71] Ms [Bradley]'s evidence was that she did not consider that the contributions that she had made to Mr [Payne]'s care and his properties equated to the \$300,000 value of [address 2] at the time, but she considered this was justified now because of the distress and trauma that she experienced because of the separation.

[72] Applying the principles set out in *Green v Green* I am not satisfied on the balance of probabilities that Ms [Bradley] exerted actual undue influence on Mr [Payne] to transfer the property to her. However, the evidence clearly establishes circumstances which give rise to a presumption of undue influence because Mr [Payne] placed significant trust and confidence in Ms [Bradley], and the transfer of [address 2] called for an explanation in light of that relationship, which at that time was akin to a caregiver-patient relationship.

[73] The fact that Mr [Payne] received legal advice from Mr Broadbent on three occasions before signing the sale and purchase agreement and deed of forgiveness of debt does not, in itself, preclude a finding that he was unduly influenced by Ms [Bradley]. Mr Broadbent was of the clear view that Ms [Bradley] was driving the transaction and that Mr [Payne] was influenced by her. He advised the parties in respect of duress and took all professional steps by detailing his advice in writing, and by meeting with Mr [Payne] separately, and with his daughter. I am satisfied that when Mr [Payne] signed the documentation and instructed Mr Broadbent to proceed with the transaction, he understood what he was doing. However, I am not satisfied that he did this as result of the exercise of his free will in light of the evidence that he instructed Mr Broadbent to proceed with the transaction after informing him that Ms [Bradley] was very angry that he and [Natasha] had met with

²⁵ Affidavit of [Katherine Bradley] in response sworn 10 December 2015, paragraph 30.

²⁶ Affidavit of [Katherine Bradley] sworn 20 February 2016, paragraph 14.

him, he could not discuss a contracting out agreement with her, and felt he was between a rock and a hard place.

[74] Having found a presumption of undue influence, and after considering all of the evidence, I find that Ms [Bradley] has been unable to demonstrate that Mr [Payne] was not unduly influenced by her at the time he transferred [address 2] to her and signed the deed of forgiveness of debt in November 2014.

[75] Mr [Payne]’s application is granted. The transfer of the property at [address 2] is to be set aside, and the property transferred back into Mr [Payne]’s sole name.

Was the transfer of [address 2] a result of unconscionable bargain?

[76] Justice Lang conveniently summarised the principles relating to unconscionable conduct in *Shields v Hayward* as follows:²⁷

[56] The learned authors of Butler's *Equity and Trusts in New Zealand* observe that the equitable principles relating to unconscionable bargains are designed to “protect those who, through poverty, infirmity, need, ignorance, or some such disadvantage, are unable to determine whether particular transactions are in their own best interests”. Equity will intervene to set aside transactions where one party knew, or ought to have known, of the other's disadvantage and that party has “actively exploited or passively accepted, a contractual benefit or advantage from the disadvantaged party”.

[57] Whereas undue influence focuses on the sufficiency of consent, the doctrine of unconscionable bargains is concerned with preventing advantage being taken of those in a position of disadvantage. All of the circumstances of the case will be relevant to the Court's assessment as to whether the stronger party has obtained a benefit in unconscionable circumstances. In particular, the Court is likely to examine the respective positions of the parties, the conduct of the stronger party and the substantive fairness of the resulting transaction. A key factor may be the inability of the disadvantaged party to make proper judgments as to what is in his or her own best interests.

[77] A non-exhaustive but comprehensive statement of the relevant principles was outlined by the Court of Appeal in *Gustav & Co Ltd v MacField Ltd*,²⁸ and

²⁷ *Shields v Hayward* [2017] NZHC 261 (footnotes omitted).

²⁸ *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205.

subsequently endorsed by the Supreme Court.²⁹ The principles outlined by the Court of Appeal were:³⁰

- 1 Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.
- 2 This equitable jurisdiction is not intended to relieve parties from “hard” bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.
- 3 A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.
- 4 If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.
- 5 Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must “take advantage of” that disability or disadvantage.
- 6 The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.
- 7 “Taking advantage of” (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in *Bowkett* at 457, an unconscionable victimisation will occur where there are:

“ ... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.”

²⁹ *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [6].

³⁰ Above n 26, at [30].

- 8 If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

[78] The Court of Appeal went on to note:

[31] While factors such as a marked imbalance in consideration or procedural impropriety are generally present in unconscionability cases, neither is a prerequisite for relief. However, if there is no significant imbalance in consideration or if the weaker party received full independent advice it is unlikely that any issue of unconscionability will arise.

[79] Having considered all of the evidence, I am not satisfied on the balance of probabilities that Mr [Payne]'s transfer of [address 2] to Ms [Bradley] was the result of unconscionable bargain. There is a marked and clear imbalance in the consideration for the transaction. Mr [Payne] has an obvious disability and a disadvantage that Ms [Bradley], as the stronger party, was well aware of and, in my view, took advantage of. However, the fact that Mr [Payne] received independent legal advice in respect of the transaction on at least three occasions in my view does not sustain the argument of unconscionable bargain.

[80] If I am incorrect in this finding, I note that I have found that Mr [Payne] was unduly influenced when he undertook the transfer of the property to Ms [Bradley].

What financial and non-financial contributions did Ms [Bradley] make to the relationship?

[81] Ms [Bradley] submits that she made financial and non-financial contributions to the relationship. The extent of her contributions is disputed by Mr [Payne].

[82] It is not disputed that Ms [Bradley] did not pay rent during the period she was living in the home. For some of that period Ms [Bradley] was employed. She was also in receipt of a benefit from WINZ throughout the period that she lived on the property, and received [address 2] and rental income from that property.

[83] Ms [Bradley]'s evidence is that she provided care for Mr [Payne], which included taking him to medical and other appointments, assisted him with things such as his taxes and other paperwork, work within the house and cooked meals.

[84] Mr [Payne] minimised the care that Ms [Bradley] provided to him, however accepts that he did require care and she provided this to him, including taking him to appointments.

[85] Mr [Payne] accepts that Ms [Bradley] did some work on his properties prior to their marriage. He accepted that Ms [Bradley] undertook the work on [address 1], [address 4] and [address 3] as detailed by her in her affidavit,³¹ but noted that some the work recorded in her affidavit to be for [address 4]³² was actually work required to make the relocated house on [address 1] habitable for Ms [Bradley]'s daughter, [Elizabeth], her partner and child. He stated that he had also assisted with some of the work detailed by Ms [Bradley].

[86] In addition to Ms [Bradley], Ms [Bradley]'s brother, Mr [Fry], and [Dominic Hammond]³³ also undertook work on [address 3]. Mr [Payne] conceded that the real estate agent selling the property recommended that the work was done, and he achieved a higher sale price than he would have if the work had not been undertaken. Mr [Payne]'s evidence is that he had agreed to pay Ms [Bradley] and her brother an hourly rate for the work done on the property. Ms [Bradley] disputes this. Mr [Fry] was not called to give evidence. No payments were made for their work. Mr [Payne] stated that Mr [Fry] told him he did not want payment, and Ms [Bradley] was not paid because she did not render an invoice.

[87] Ms [Bradley] did, however, receive \$20,000 from the sale proceeds of the property. On 13 August 2015 \$200,000 was withdrawn from Mr [Payne]'s account and paid into Ms [Bradley]'s personal account. Her evidence was that this occurred in error and the money was to have been paid into the joint account. However, that is inconsistent with the fact that only \$180,000 was then transferred from her

³¹ Affidavit in response of [Katherine Bradley] dated 10 December 2015, page 7, paragraphs 1, 2, and 5-10.

³² Paragraphs 3.2-3.4.

³³ Who was a friend of Ms [Bradley] and a tenant at [address 1].

account into the joint account, and that she retained \$20,000 to pay for work around the property, their general living and to reimburse her for amounts paid by her for [address 3].³⁴

[88] Ms [Bradley] states that she also made financial contributions to the relationship by buying food, paying for some dinners and lunches, paying Mr [Hammond] for his work, and paying for some items that were required when she was working on the properties.³⁵ Her financial contributions and their sources were not quantified in evidence. Mr [Payne]'s evidence is that he believed that he had funded all of the costs for the work, through his personal account or the joint account which predominantly contained his funds. In oral evidence Ms [Bradley] acknowledged that she used Mr [Payne]'s money to pay for things that were required for his properties, but she paid for her own personal items.³⁶ It is clear that Ms [Bradley] has made both financial and non-financial contributions to the relationship which Mr [Payne] has received benefit from. It is unfortunate that evidence of the more significant financial contributions, such as payment to third parties for work undertaken, has not been provided to assist the Court to identify the source of the funds which were used to make the payments, and to quantify the amount of her contributions.

Did Ms [Bradley] give Mr [Payne] the \$140,000 she withdrew from the joint account?

[89] It is not disputed that on 9 October 2014 Ms [Bradley] withdrew the sum of \$140,000 in cash from the parties' joint bank account. The account was opened in August 2014. Ms [Bradley] paid \$1,500 into the account on 18 August 2015. On 24 August 2015 \$180,000 from the sale proceeds of Mr [Payne]'s [address 3] was paid from Mr [Payne]'s individual account into the joint account.³⁷

[90] Ms [Bradley]'s evidence is that on 27 September 2015 Mr [Payne] asked her to withdraw \$140,000 from their joint account so he could pay people he owed

³⁴ Further affidavit of [Katherine Bradley] dated 20 February 2016, paragraph 20.

³⁵ Affidavit of [Katherine Bradley] dated 10 December 2015, paragraph 33.

³⁶ NOE page 236, lines 4-6.

³⁷ Via Ms [Bradley]'s individual account in error. Ms [Bradley] retained \$20,000 of the \$200,000 withdrawn.

money to, and purchase another cabin for the property.³⁸ She ordered the cash from the bank, collected it on 9 October 2014, and gave it to Mr [Payne] when she arrived home and he went into his room and shut the door.³⁹

[91] Mr [Payne] denies asking Ms [Bradley] to withdraw the money. His intention was that the sale proceeds of [address 3] would be used to reduce the mortgage on [address 1]. He stated that the council would not allow another structure on the property,⁴⁰ and he did not have the funds to finance it. Mr [Payne] also denies that Ms [Bradley] gave him the money she withdrew. Mr [Payne] did not have a debit card, and could only access the account through Ms [Bradley], or by physically going to the bank. He said that he had repeatedly asked her for a bank card for the account and to see the bank statements, but he was never given these, and Ms [Bradley] became annoyed with him for continuing to ask, to the point that he stopped asking.

[92] On [date deleted] October 2015, after Ms [Bradley] had gone to work, Ms [O'Donnell] took Mr [Payne], at his request, to a doctor's appointment and then to the bank. His evidence is that when he was at the bank he realised that Ms [Bradley] had withdrawn \$140,000, and he immediately withdrew the balance of \$22,908.78. He then went to the Police Station, but they were unable to assist because the parties were married and the withdrawal was from a joint account. Mr [Payne] and Ms [O'Donnell] did not return to the property that day.

[93] Mr [Payne] sought legal advice and on 27 October 2015 filed a without notice application for an order that Ms [Bradley] pay the sum of \$135,000 into the trust account of Boyle Mathieson, Solicitors. The order was made as sought on 3 November 2015. It has not been complied with.

[94] In evidence counsel addressed the discrepancy between the \$140,000 withdrawn and the \$135,000 claimed in the order. That issue is not addressed in Mr [Payne]'s supporting affidavit and his evidence about this was very unclear. I accept that this was a result of his health situation, and the period of time (almost 19

³⁸ Affidavit of [Katherine Bradley] dated 20 February 2016, paragraph 30.

³⁹ Affidavit of [Katherine Bradley] dated 10 December 2015, paragraph 25.

⁴⁰ A cabin.

months) that has elapsed since the application was filed. However, Mr [Payne] acknowledged that there may have been bills outstanding at that time that needed to be paid which the \$5,000 may have been used for. He therefore only sought an order for payment of \$135,000.

[95] In her evidence, [Brooke Burgess] said that Ms [Bradley] had told her that she was going to withdraw \$140,000 from the joint account and use it to purchase a cabin for her daughter, [Lauren], and [Brooke] to live in. She said that Mr [Payne] was involved in the conversation and told Ms [Bradley] that he did not want another cabin. Ms [Bradley] told her later that day that she had withdrawn the money. She subsequently saw Ms [Bradley] with some \$100 notes, although not in the amount of \$140,000.

[96] [Tyler Burgess] gave evidence that he had accompanied Ms [Bradley] to the shop to buy cigarettes in October/November 2015 and recalled seeing a wad of \$50 and \$100 notes in Ms [Bradley]'s wallet. Ms [Bradley]'s evidence is that he remained in the car and did not accompany her into the shop, so did not see inside her wallet.

[97] During this period Ms [Bradley] was in receipt of a benefit from WINZ and was also doing some casual work.

[98] [Brooke Burgess] and [Tyler Burgess] are Ms [O'Donnell]'s children. Doubt was cast over the reliability of their evidence because of this fact. I found them both to be credible and reliable witnesses. They both impressed me as being honest and answered questions in a thoughtful and open manner, without seeking to embellish their evidence.

[99] Mr [Payne] did not return to the property that day following his discovery that the money had been withdrawn. He returned a few weeks later, after Ms [Bradley], her family and other tenants had vacated after being served with trespass notices and/or protection orders. Other people, including [Brooke Burgess], packed up items from the property when moving out, including items in Mr [Payne]'s bedroom. There is no evidence that the money was located in Mr [Payne]'s bedroom.

[100] Ms [Bradley] contends that her lifestyle does not support the conclusion that she has retained \$135,000. The evidence in respect of her lifestyle was sparse. She stated that she had only very recently applied for legal aid to fund her legal costs.⁴¹ That raises a relevant question about how she has funded her legal costs to date. Ms [Bradley]'s ability to recall important and relevant matters about her finances was poor, to the point of being evasive. When asked questions such as how much she had paid a private investigator, or in legal fees to date, or the amount of the debts she owed to the people who had assisted her ([Dominic Hammond], her mother and her sister), her answers were vague or she stated she did not know. When pressed by me, she stated that she owed her mother \$2,000-\$3,000 and her sister approximately \$600. She did not know how much she owed Mr [Hammond], but said she had to repay him and he would work out how much she owed.

[101] The single agreed fact is that Ms [Bradley] withdrew \$140,000 on 9 October 2015. There is no evidence that anyone saw Ms [Bradley] give Mr [Payne] the money. There is no evidence about where the money which Ms [Bradley] withdrew may have gone, nor any evidence about what the money may have been used for in the intervening period between it being withdrawn on 9 October 2015 and Mr [Payne] visiting the bank on [date deleted] October 2015.

[102] I can only make findings on the evidence available to me. On the balance of probabilities I am satisfied that Ms [Bradley] retained the sum of \$140,000 and that Mr [Payne] did not receive the money from Ms [Bradley]. I am persuaded to this view by the promptness with which Mr [Payne] sought Police assistance and legal advice after visiting the bank and discovering that the money had been withdrawn. There would have been no reason for him to take those steps if he had received the money from Ms [Bradley] or if the money had been withdrawn at his direction. When Mr [Payne] left the property on [date deleted] October 2015, he did not know that he would not be returning that day. He did not return for approximately 2-3 weeks. Ms [Bradley] remained in the property during that period.

Contempt

⁴¹ So recently that the outcome of her application was unknown.

[103] I am satisfied that Ms [Bradley] failed to pay the sum of \$135,000 into the trust account of Boyle Mathieson, Solicitors in breach of the order made on 3 November 2015.

[104] Counsel for Mr [Payne] implores the Court to take a firm position in the face of its orders being ignored. He submits that Ms [Bradley] has failed to comply with the order and did so deliberately. He refers to r 237(1)(c) Family Courts Rules 2002 which grants jurisdiction to the Court to order that a party who does not comply with an interlocutory order be committed to prison, and submits that Ms [Bradley] should be charged with contempt and committed to prison for a term not exceeding 3 months.⁴²

[105] I am satisfied the Family Court has the power to punish a party for contempt in relationship property proceedings.

[106] The power of the Family Court to punish a person for contempt, namely a refusal to comply with a Court order “beyond the face of the Court”, was considered by Williams J in *P v F*.⁴³ Although that decision was made in Care of Children Act 2004 proceedings, the principles identified have also been applied in relationship property proceedings.⁴⁴ Furthermore, although His Honour considered that s 41 of the District Courts Act 1947 (now repealed) provided authority for the Family Court to punish a party for contempt of this type, s 84 of the new District Court Act 2016 is for all intents and purposes a replacement of s 41, and I am therefore satisfied that the statutory scheme is materially unchanged, and that the analysis in *P v F* continues to be relevant.⁴⁵

[107] The principles contained in *P v F* can be summarised as follows:

⁴² Counsel refers to s 79(2) District Courts Act 1947, however I note this section is now repealed by the District Court Act 2016. The content of s 79(2) is now found in s 134 of the new Act.

⁴³ *P v F* [2009] NZFLR 833 (HC).

⁴⁴ See *TAL v BKL* FC Tauranga FAM-2010-070-000207, 5 March 2011 and *PB v BJB* [2014] NZHC 3165.

⁴⁵ Section 84 of the District Court Act 2016 applies to Family Court Judges by virtue of s 16 of the Family Court Act 1980.

- (a) The contempt must relate to a proceeding before the Court. It cannot extend to matters unconnected to the relief, redress or remedy granted in respect of particular proceedings.⁴⁶
- (b) Punishment for contempt must be reasonably necessary in the context of the statutory objective and the facts of the case. It must be sufficiently significant for the Court to adopt the serious option of punishment for contempt.⁴⁷
- (c) The Court must be in a position to conclude that the alternative enforcement options are not appropriate in the circumstances, for example, due to delay or cost.⁴⁸

[108] In light of those principles, I consider that the issue should be approached in the following way:⁴⁹

- (a) First, determine whether Ms [Bradley] is in contempt of Court;
- (b) Secondly, identify if there are steps that may be taken short of instituting contempt proceedings, cognisant with the purposes and principles of the Property (Relationships) Act 1976; and
- (c) Thirdly, only if the Court is satisfied that none of the alternatives are available and/or are appropriate as measured against the provisions of the Act, should Ms [Bradley] be dealt with by way of contempt.

[109] *Jones v Skelton* is authority for the view that I need to be satisfied of the fact of contempt beyond reasonable doubt.⁵⁰ There is no dispute that Ms [Bradley] has not paid the sum to Boyle Mathieson, Solicitors as ordered. Her evidence is that she did not have money nor other means to do so. That is no excuse or reason for non-compliance with a Court order. She made only a limited effort to address this breach by filing an application to discharge the order over five weeks after the order was made. When doing so, she did not seek directions for this to be dealt with on an urgent or reduced notice basis to mitigate her continued breach. Ms [Bradley] has now been in breach of the order for 18 months.

[110] There is no doubt that Mr [Payne] has been deprived of the money during this time. However the reality is that he would not have had access to these funds even if

⁴⁶ *P v F*, above n 42, at [50].

⁴⁷ At [51].

⁴⁸ At [51].

⁴⁹ Adapted from *JMC v AHB FC Dunedin* FAM-2008-012-55, 10 June 2010 at [11] per Judge Coyle, summarising the approach from *P v F*, above n 42.

⁵⁰ *Jones v Skelton* HC Hamilton, CIV-2006-419-1489, 25 November 2006.

they had been paid into his solicitor's trust account, although they are likely to have been held on interest-bearing deposit.

[111] I have no difficulty finding beyond reasonable doubt that Ms [Bradley] is in contempt, having deliberately refused to comply with the order. To uphold the integrity of the Court, it is crucial that those that disobey the Court's orders are held accountable for this. However, I am not satisfied that the punitive measure of committing her to prison is required, or appropriate, in the circumstances.

[112] Having regard to the purposes and principles of the Property (Relationships Act) 1976,⁵¹ I do not consider that committing Ms [Bradley] to a period of imprisonment to address her failure to comply with the order is necessary for the simple and speedy resolution of these proceedings or in the interests of justice. In this case, the purpose of obtaining the order was to ensure that the money was secure so that a fair division of relationship property could be achieved.⁵² The parties are now at the end of their relationship property proceedings. I am satisfied I can provide for a just and fair division of relationship property without needing to imprison Ms [Bradley] for contempt. Were it not for the fact that I am able to take account of this money in Ms [Bradley]'s share of the property division,⁵³ the outcome may have been different.

Property pool and division of relationship and/or separate property

[113] The parties had a relationship of short duration, which I have determined to be from [date deleted] December 2014 to [date deleted] October 2015. Their relationship property therefore falls to be divided in terms of their contributions to the relationship pursuant to ss 14(2) and 14(3) of the Act.

[114] It is acknowledged by both parties that at the time of the commencement of the relationship Mr [Payne] owned four properties and a time share. He also had assets of vehicles, household chattels and money in the bank. Ms [Bradley] did not file an affidavit of assets and liabilities. Her evidence was that at the commencement

⁵¹ Sections 1M and 1N.

⁵² Section 1M.

⁵³ Including that Ms [Bradley] has had access to the money for 18 months.

of the relationship she owned a 1999 [vehicle make and model deleted], some household chattels, and had less than \$5,000 in the bank.

[115] In closing submissions, counsel for Mr [Payne] sought a division of property whereby the [address 2] property is transferred back to Mr [Payne], and Ms [Bradley] receives as her share of relationship property the \$135,000 cash that she retained, and the \$9,500 sale proceeds she received from the sale of a cabin⁵⁴ which she removed from [address 1] and sold in April 2016.

[116] In her closing submissions, counsel for Ms [Bradley] submitted that a just and equitable division of property will be achieved by Ms [Bradley] retaining [address 2] as her share of relationship property.

[117] Much of Mr [Payne]'s property at the commencement of the relationship remains his separate property. This includes [address 4], sale proceeds of [address 3],⁵⁵ the time share in [location 5], and his bank accounts.

[118] As I have determined that the transfer of [address 2] is to be set aside, and the property transferred back into Mr [Payne]'s sole name, that property also becomes Mr [Payne]'s separate property.

[119] The main house on [address 1] was used by the parties as their family home during their relationship and marriage. Counsel for Mr [Payne] submits that if the Court finds that the property is relationship property, as I must, then only the homestead should be found to be relationship property, and not the entire property pursuant to s 12 of the Act.

[120] The evidence shows that the parties lived in the main house. Mr [Payne] paid the outgoings for his properties from his personal account. The rental received from the other dwellings on the property went into his personal account. I am satisfied having considered the evidence that the other dwellings on the land, apart from the family home, were not used wholly or principally for the purposes of the household. Therefore, I find that the other dwellings on [address 1] remain Mr [Payne]'s

⁵⁴ Paid for by Mr [Payne] but registered in her name.

⁵⁵ The balance that was not paid into the parties' joint account.

separate property, with the exception of the cabin purchased by Mr [Payne] from his personal account in Ms [Bradley]'s name. That cabin remains her separate property as I have no evidence about who lived in that cabin, whether they paid rent and, if so, who it was paid to.

[121] The pool of relationship property is therefore as follows:

- (a) The homestead on [address 1]. The whole property was sold in February 2017 for \$1,550,000. Mr [Payne] retained the net proceeds of sale of that property. There is no separate valuation of the homestead alone.
- (b) Household chattels. I understand these were divided upon separation.
- (c) The parties' vehicles. I understand each party retained their own vehicle upon separation.
- (d) The proceeds of the parties' Kiwisaver joint bank account.

[122] Both parties contributed funds to the joint bank account. Mr [Payne] paid in \$180,000 from the sale proceeds of his [address 3]⁵⁶ and Ms [Bradley] deposited \$1,500 from her separate account. Prior to Ms [Bradley] withdrawing the sum of \$140,000 on 9 October 2015, the joint account had a balance of \$163,135.12. Mr [Payne] withdrew the balance remaining of \$22,908.78 on [date deleted] October 2015. I understand that account holds no funds and is now closed.

[123] As noted above, Mr [Payne] acknowledged that Ms [Bradley] made non-financial contributions to the relationship within the home by providing care to him, working in the home, and doing work around [address 1] and [address 3] prior to their marriage. Ms [Bradley]'s evidence is that she also made some financial contributions to the relationship, although these are not quantified. She acknowledged that Mr [Payne] financed most of the things that were paid for, either directly or indirectly, including paying the bills for the property while she lived rent-free.

⁵⁶ Which can be traced.

[124] Whilst Ms [Bradley]'s financial contributions have not been quantified, I am satisfied that she made financial and non-financial contributions to the relationship. She also received [address 2] and rental income from that property, and a cabin purchased for \$13,000 by Mr [Payne] in her name.

[125] Ms [Bradley] entered the relationship with very few assets. At the commencement of the relationship Mr [Payne] owned significant assets at that time with real estate worth in excess of \$1,500,000⁵⁷, plus money in the bank and other assets.

[126] It is impossible to accurately estimate the value of relationship property at the date of hearing in the absence of a valuation of the homestead. Counsel and the parties will appreciate that in the absence of clear and quantified evidence, the division of relationship property is not an exact science. In my view, Ms [Bradley]'s share of relationship property should be calculated as no more than 5 percent of the pool. This represents her contributions to the 10 month relationship, and includes the benefits she has received of the use and income of [address 2] since November 2014, and the \$135,000 which she has retained since October 2015.

[127] Having regard to all of the evidence I am satisfied that a just and equitable settlement of relationship property will be achieved by Ms [Bradley] receiving as her separate property the \$135,000 she has retained. Mr [Payne] shall retain the rest of the property as his separate property.

Orders

[128] The transfer of the property [address 2] to Ms [Bradley] in November 2014 is set aside and the property is to be transferred back to Mr [Payne], unencumbered and undamaged.

[129] The order made on 3 November 2015 that Ms [Bradley] pay \$135,000 into the trust account of Boyle Mathieson, Solicitors is discharged.

⁵⁷ The value of his properties at date of hearing is significantly higher. All of them have been sold.

[130] Ms [Bradley] is in breach of that Court order and I find her in contempt. However, for the reasons referred to above, I am not satisfied that committing Ms [Bradley] to prison is appropriate. I have taken account of her contempt in the division of relationship property.

[131] Ms [Bradley] shall receive as her share of relationship property the sum of \$135,000, which she has retained.

[132] Mr [Payne] shall retain the balance of relationship property as his separate property.

[133] Costs are reserved. If costs are sought, a memorandum is to be filed within 14 days setting out clearly the jurisdiction, grounds upon which costs are sought and addressing legal aid factors. A memorandum in response is to be filed 14 days thereafter. The file is then to be referred to me in chambers.

D M Partridge
Family Court Judge

Signed 13 June 2017 at pm