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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2020-009-000913
[2021] NZFC 8995

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SAMUEL FRASER ERIC WILKINSON Applicant
AND	JESSICA MONIQUE WILKINSON (AKA JESSICA MONIQUE WEST) Respondent

Hearing: 2 June 2021

Appearances: S van Bohemen with E Bristow for the Applicant
A Bradley with J Wilson for the Respondent

Judgment: 9 September 2021

RESERVED JUDGMENT OF JUDGE S M R LINDSAY

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[1] The parties seek orders classifying property and in respect of the division of property.

[2] The parties met as teenagers and began dating in 2004. The applicant and respondent were 18 and 17 years of age respectively.

[3] Before he met the respondent the applicant had been in America. The parties met in New Zealand, but the applicant subsequently spent a short period living and working in Australia. On his return to Christchurch in September 2009 the applicant lived with his father and, then flatted with a friend in St Albans. Prior to marriage the respondent lived at her parents' home but also flatted for a year. The parties did not live together before they married.

[4] The parties married on 7 January 2010. Once married the parties began living together at the applicant's rental property in Knowles Street, St Albans. The applicant left the parties' family home in July 2019. The parties agree that their relationship ended in September 2019.

[5] There are no children of the marriage.

Issues

[6] The applicant's position is that prior to marriage the parties were dating. The applicant accepts that the parties were in a serious relationship and committed. However, for religious and social reasons, they consciously chose not to live together as a couple before marriage.[1] The applicant submits the parties' qualifying relationship began when they married in January 2010.

[7] The respondent submits they were in a de facto relationship for around six years prior to marriage. The respondent submits that the de facto relationship began in 2004. The respondent argues for family, religion and social reasons they chose not to live together before marriage.

[8] At separation:

a) The applicant claims funds held by the parties' ANZ Serious Saver and term deposit are the applicant's separate property. He makes this claim on the basis the funds are the balance of an inheritance. The respondent is opposed to this claim and submits intermingling has occurred.

[1] BOD Vol. 2, page 52 at [10].

b) The applicant claims extraordinary circumstances exist that make equal sharing of property repugnant to justice: the applicant's disproportionate financial contribution to the relationship. The applicant submits there should be a division of either 70/30 or 80/20 if the Court determines the savings account is relationship property, subject to valuation adjustment.

c) The respondent submits equal sharing must occur. The respondent also counters with claims pursuant to s 5, 18(c) and 20(e) of the Property (Relationships) Act 1976.

Start date of the relationship

[9] At the conclusion of the fixture I gave my preliminary view the parties had not been in a de facto relationship prior to marriage. The parties were engaged in January 2009. They married a year later in January 2010. I had come to a clear view the parties dated prior to the marriage and the qualifying relationship commenced on or about their wedding day.

[10] The parties share a Christian faith which is relevant to their decision to not cohabit before marriage. The applicant had a period living with family but mostly he flatted with a friend. The respondent flatted but mostly lived with family until marriage. Both parties accept their intimate relationship was limited and known only to themselves.

[11] The parties did not share bank accounts prior to marriage. They may have "sprung" for the other on a date for lunch or the movies, but their real financial position reflects young people who both worked and studied but did not take financial responsibility for nor support the other. The evidential picture was of a young couple who dated, as opposed to being in a de facto relationship. The wider evidential picture is that before marriage the parties were not viewed by their family or their community as a de facto couple.

[12] The respondent asserted in her affidavit evidence that her name change occurred on the day of marriage. However, her evidence clarified the name change

occurred over time; as various forms of identification expired, she undertook a name change and legally adopted her married name incrementally.

[13] The parties did not share household duties before marriage. Both were students and at times worked part time to fund study. Occasionally they holidayed, but this was infrequent and for relatively short periods. Any sharing of duties in the holiday spirit is distinct from the hand-in-hand sharing of daily household responsibilities. The parties' cessation of an intimate relationship between engagement and marriage served to reinforce to one another that their union would commence from the date of marriage, while also reflecting the expectations of their family and friends.

[14] The parties may have shared future aspirations, but this is distinct from an immediate (prior to marriage) financial endeavour. As young people they offered emotional support as one or other went about tertiary study, but this was not at a level to reflect a shared responsibility for the outcomes and funding of tertiary study.

[15] I found the evidence of the applicant as to the nature of the parties' relationship credible. Both were sensitive about being protective of their sexual relationship before marriage. Both were respectful of the significance of the decision to marry but with the emphasis being the marriage ceremony. At points the respondent's evidence sat squarely within the same framework of the applicant's around the parties' dating relationship prior to marriage. I accept that, retrospectively, she views the six years prior to marriage as part and parcel of the parties "growing up" together and the parties relationship spanned more than half of their lifetime. However, I conclude the parties relationship before marriage stops well short of the parties being in a de facto relationship. Not only were the parties viewed by family and friends as dating, but I accept the applicant's evidence which was consistent with the parties' values. Going a step further, I conclude having seen the respondent's evidence at hearing, had the parties been viewed as a de facto couple prior to marriage this would have been intolerable for the respondent.

[16] There is no formulaic approach in determining whether a couple reach the threshold of being in a de facto relationship. Indeed, the age of a couple may be significant, but it is the wider context that brings relevance to the Court's analysis.

[17] The parties' relationship prior to marriage in 2010 was different in kind and nature from its character post their marriage. I find, for the purposes of the Property (Relationships) Act, the length of their relationship is from January 2010 to the agreed date of separation, being July 2019.

The funds held in the ANZ Serious Saver ($155,072) and term deposit ($201,383)

[18] The applicant submits the combined balance of these accounts, totalling $359,119, are the applicant's separate property. Section 9 provides all property which is not relationship property is separate property:

> **9 Separate property defined**
>
> (1) All property of either spouse or partner that is not relationship property is separate property.
>
> (2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.
>
> (3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.
>
> (4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:
>
> (a) all property acquired by either spouse or partner while they are not living together as a married couple or as civil union partners or as de facto partners:
>
> (b) all property acquired, after the death of one spouse or partner, by the surviving spouse or partner, as provided in section 84.
>
> (5) Subject to subsection (6), all property acquired by either spouse or partner after an order of the court (other than an order made under section 25(3)) has been made defining the respective interests of the spouses or partners in the relationship property, or dividing or providing for the division of that property, is separate property.
>
> (6) However, where relationship property has been divided on the bankruptcy of a spouse or partner,—
>
> (a) the family home and any family chattels acquired after that division may be relationship property; and
>
> (b) any other property acquired by either spouse or partner after the discharge of that spouse or partner from bankruptcy may be relationship property.

Background

[19] In 2007 and at 21 years of age the applicant received shares worth around $100,000 from his uncle.

[20] The parties married on 7 January 2010.

[21] In 2012 the applicant cashed in the shares gifted to him by his uncle (for approximately $80,000). It is common ground that $65,000 from the proceeds of the sale of the shares and the sum of $9,547 from his KiwiSaver were applied by way of the deposit on the parties first family home at Stanbury Avenue. The balance of the proceeds from the sale of the shares (around $15,000) was applied to renovate the house. The applicant does not claim these funds as separate property.

[22] In February 2018, six years into the marriage and less than 18 months before the parties' marriage ended, the applicant inherited $1,037,434. The inheritance funds were deposited into the parties joint Serious Saver account. In December 2018 the applicant inherited more money, $9,552.94, and this was deposited into the parties' joint savings account. The total inherited funds was $1,046,986.

[23] In March 2018 the applicant applied the money from his inheritance to the mortgage on Stanbury Ave, a total of $251,111.19. These funds are not claimed as part of the applicant's separate property.

[24] In July 2018 the parties bought the respondent a new Jeep. These funds, nor vehicle, are claimed as the applicant's separate property.

[25] In November 2018 the parties bought a new property at Toledo Place for $850,000. The applicant had already applied some of his inheritance to pay off the Stanbury Ave mortgage. The applicant used $675,000 of his inherited funds and a small loan was necessary to complete the purchase. The applicant does not seek these funds as his separate property.

[26] On purchasing Toledo Place the parties also bought new furniture to fill the home and, in a sense, complete the purchase.[2] At separation (and at the date of hearing) most of the household chattels remained in Toledo Place.

[27] The parties sold Stanbury Ave for $506,000 and the proceeds were received in December 2018. The mortgage on Toledo Place was repaid and the sum of $380,000 deposited to the parties' Serious Saver account. After those transactions the balance of the Serious Saver account totalled $390,076.

[28] In January 2019 the applicant transferred $200,000 from the Serious Saver into a term deposit leaving the balance in the Serious Saver account of $190,076. In May 2019 the applicant applied $26,500 to buy a Subaru vehicle which he retains. The applicant does not seek to recover that payment nor vehicle as his separate property.

[29] At separation there was a term deposit of $201,383 and the Serious Saver had a balance of $155,072. The applicant claims the funds in the Serious Saver and term deposit account at separation are his separate property. The applicant submits the funds are separate property because of his inheritance and the funds can be traced.

[30] The respondent counters that the parties viewed the inheritance to be received by them both and utilised towards their common relationship property pool. The respondent further claims that intermingling has occurred to such a degree the funds cannot be classified as separate. The respondent rejects there is any valid basis to a claim of separate property and because the intermingling of the funds took place well before separation they can only be viewed as relationship property. The respondent rejects there is any argument that to share equally in the division of relationship property would be repugnant to justice.

[31] The respondent submits the parties grew their wealth and shared financial aspirations. In essence the respondent claims the applicant's focus on the balance of funds in the Serious Saver account and the term deposit (and claimed as his separate property) is interwoven with his deception over ending their marriage.

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[2] Paragraph 20 affidavit of the respondent dated 7 August 2020.

[32] 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:
>
> (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 one 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

[33] It is common ground the applicant inherited funds as a young man prior to marriage and during their marriage, the larger portion of funds being received in 2018, not long before separation.

[34] At hearing the respondent deposed as to the strength of the relationship between herself and the applicant's uncle. The respondent also alludes to the inheritance attracting a joint benefit for the Wilkinson children and their partners. This was not provided for in Mr Geoffrey Wilkinson's will. The applicant's uncle made testamentary disposition (specified) for his immediate family members as opposed to his family members' spouses. Partners may have received some financial support in relation to health needs but this was case by case and not a given. The respondent's evidence at hearing still "looked back" to the strength of her relationship with Mr

Wilkinson. There is no evidence to better support the respondent's claim referencing the strength of her relationship and the inheritance funds/bequests.

[35] For his part, the applicant accepts, and without argument, the proceeds of the sale of the share portfolio, which went towards the deposit and the purchase of Stanbury Ave, is relationship property. The applicant had cashed in his share fund worth around $80,000; he applied $65,000 from the proceeds of the sale of the shares and $9,500 from his KiwiSaver account to pay the deposit on the parties purchase of Stanbury Ave. The balance of the share funds (approximately $15,000) was used to renovate Stanbury Ave.

[36] In March 2018 the applicant comes into significant inheritance funds of $1.037 million.

[37] It is also common ground the applicant applied inheritance funds to "pay off" the mortgage on Stanbury Ave ($251,111.19) in March 2018.

[38] The parties purchased a new house in Toledo Place for the sum of $850,000. Inheritance funds were used to pay the deposit of $85,000 and a further $765,000 was used towards the balance of purchase price. The balance of $89,493 was covered by a flexi-mortgage pending the sale of Stanbury Ave.

[39] In November 2018 the parties purchase a new home on Toledo Place, Christchurch. The purchase price being $850,000.

[40] On 11 December 2018 Stanbury Ave was sold and the funds from Stanbury Ave are used to pay the balance of the flexi-loan, with the residual transferred to the parties' accounts ($480,000 to the Serious Saver account).

[41] On 12 December 2018 the applicant received the balance of inheritance funds in the sum of $9,552.95.

[42] On 17 January 2019 the applicant transferred $200,000 from the Serious Saver account to a term deposit account. This left the balance of approximately $155,000 in the Serious Saver account.

[43] The applicant submits it is reasonable and practical to classify the funds in the Serious Saver account and the term deposit as separate property because they can be traced back to his separate property inheritance.

[44] The applicant evidences the Serious Saver account received a monthly deposit of $20 to ensure the account fit within the criteria for the premium interest payment on the deposited funds. In the period the funds were deposited in the Serious Saver account a total of 20 deposits were made by the parties joint funds totalling $400. The respondent points to the 20 payments of $20 a month as evidence of intermingling. The applicant counters the total sum of $400 is modest set against the total amount of inheritance funds but, in addition, it was more a case of joint funds intermingling with separate property.

[45] The applicant works in banking and was savvy to the financial benefits of the $20 per month payment. It was a minimal payment but attracted a "premium" rate of interest. The interest received on the funds deposited in the Serious Saver account was not insignificant. Given the $20 per month was paid from joint funds it is a reasonable conclusion the respondent also expected to benefit not only from the premium interest but ultimately also the account. In effect the parties were "growing" the account.

[46] The first contest arises over the inheritance funds. The applicant submits this property was not so intermingled with other relationship property that it is unreasonable or impractical to regard that property or proceeds as separate property. The applicant does not seek the funds utilised to purchase Toledo Place or the vehicle as his separate property. It is submitted the funds in the bank account and term deposit can be traced through several transactions, and that the process of tracing these funds is both reasonable and practical. At the end of the relationship the funds held in the Serious Saver account and the term deposit totalled $359,119. Are the funds in the Serious Saver account and the term deposit the applicant's separate property?[3] The applicant submits funds held in these accounts were property acquired by the applicant by succession. It is a question of analysing the evidence about whether the property

[3] Property (Relationships) Act 1976, s 10(1)(a)(ii).

has been "so intermingled with other relationship property that is unreasonable or impractical to regard the property as separate property".[4]

[47] The inheritance from the applicant's uncle and his injection of these funds into the purchase of Stanbury Ave, together with his KiwiSaver funds (and the proceeds from the sale of his shares) to renovate the house got the parties financially "up and running". On marriage, the parties shared joint bank accounts. It was only later the respondent had a separate and sole account to operate her business, West and Wu.

[48] The respondent's evidence is that during their marriage they shared in every financial decision, whether it be the purchase of their first home at Stanbury Ave, renovating the property, management of household expenses, but also forward planning with savings in mind. Although the respondent attributes her input into the renovation of Stanbury Ave as attracting a premium sale price, the evidence reflects they jointly maintained and renovated the property. Certainly approximately $15,000 of his inheritance funds were applied to a renovation of the Stanbury Ave property.

[49] As an aside, the respondent gave evidence at hearing that she is a good saver and there is no doubting her business acumen and enterprise at setting up West and Wu. The applicant is experienced and knowledgeable about banking and financial transactions. Not only because of his studies but also given his career pathway in banking.

[50] The evidential picture I have is of a young couple who both worked hard in their separate careers and at building up their asset base.

[51] The respondent deposes the transfer of funds into accounts were decisions they made together and for their joint benefit.[5]

[52] I accept the parties not only worked towards a secure financial future but they anticipated sharing in that together. Up until a point and for the applicant that ended sooner than the respondent.

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[4] Section 10(2).
[5] Respondent's affidavit sworn 7 August 2020, paras [18] and [29].

[53] There is no contest between the parties that prior to the applicant receiving the bulk of his inheritance the parties discussed purchasing a new or second family home. It is clear from the evidence they explored a number of options.[6]

[54] The applicant deposes, "The only reason there is money in these accounts (the Serious Saver and the term deposit) is because I inherited it."[7] The respondent rejects this proposition.

[55] The respondent describes the term deposit as the parties "rainy day funds". Effectively, these funds were ear-tagged for retirement or should a time come when they needed extra funds out of necessity or by way of a splurge.[8]

[56] The respondent submits the funds in the Serious Saver and the term deposit were the result of their joint financial growth and: [9]

> … the funds went back and forth between multiple joint accounts and used to acquire various joint and assets rendering it indistinguishable from other joint funds, the proceeds of our former home, our income earned during the relationship and our other investments.

[57] A key evidential point is that, having received the inheritance funds, the parties together sought advice. Both parties accept prior to the inherited funds being distributed to the applicant they met with financial advisors.[10] This occurred prior to the purchase of Toledo Place. A month later in September 2017 they also obtained legal advice.[11]

[58] The funds deposited into the Serious Saver account and the term deposit were funds that had filtered through the purchase and sale transaction for Stanbury Avenue. On one had the applicant concedes the funds he contributed to the initial deposit (proceeds of his share portfolio) and the mortgage on Stanbury Avenue is relationship

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[6] Respondent's affidavit, 7 August 2020, paragraph [28] – the parties were in discussion about their financial options.
[7] Applicant's affidavit sworn 26 June 2020, para [26].
[8] The respondent deposes the applicant considered the purchase of a motorhome and taking a year to travel together.
[9] Affidavit of Respondent, August 2020, Paragraph [32] and Annexure 10.
[10] Hamilton, Hindin Greene, Financial Advisors, 25 September 2017, paragraph [28] of respondent's August affidavit evidence.
[11] Chris Morrison, Solicitor of Parry Field Lawyers.

property; but yet by the sale of the property the applicant argues the proceeds from the sale of Stanbury Avenue, which were placed in the Serious Saver account, be treated differently and the sum of approximately $355,000 be classified as separate property. These positions are somewhat contradictory.

[59] There is no evidence adduced by the applicant (or around that time) as to discussions between the parties or professional advice to protect the inheritance funds as separate property. Ultimately, the parties proceeded with the purchase of Toledo Place and the various financial transactions that then followed.

[60] A spirited submission is made as to the practicable tracing exercise of funds that flowed from the applicant's inheritance but were applied to joint assets (or repaid the Stanbury Avenue mortgage and on sale of that property transferred out) but later "siphoned off" into the Serious Saver account and the term deposit. The respondent is critical of the applicant and points to his deception over occupation of the Toledo Place property (which she perceives as strategic to manipulate her into accepting a less favourable relationship property settlement) but also his decisions to set West and Wu up to fail. There is no evidence of a deliberate campaign or financial deception by the applicant designed to undermine the respondent. However, the applicant comes from the world of finance and what is clear is he was able to achieve an optimum outcome as to previous interest on the Serious Saver account. In part, that was due to his knowledge that by depositing the minimum payment of $20 per month to attract the premium interest rate. Careful financial planning or financial acumen does not immediately translate into deception. Although the respondent points to the applicant's sole occupation of the family home reveals the applicant was acting with some underlying financial motive or agenda. In truth they both have had different periods in occupation of the home. I discern for the respondent there is a higher level of emotional attachment to the home than it holds for the applicant and this colours her interpretation of the applicant's decision or actions.

[61] The inheritance funds were applied to the purchase of Toledo Place and, sadly for the parties, it seems likely some time around then or shortly thereafter, their marriage was in strife. I accept the applicant's evidence it was not sudden or an overnight decision but rather over his twenties his expectations or outlook of family

life changed. The applicant began to doubt the strength of their marriage. In the period leading up to the applicant leaving the family home (in July 2019) he had an eye to the future and although no doubt he was confused, the reality was the applicant had more insight as to the extent of the breakdown in the marriage, as opposed to the respondent.

[62] Irrespective of whether there was any level of strategic financial planning being undertaken by the applicant, my conclusion is the argument as to tracing does not reach the threshold. Over 2018 inheritance funds went in and out of the parties' joint accounts and this paralleled their joint financial enterprise. Prior to the proceeds of Stanbury Avenue being deposited into account, the balance was in the vicinity of $10,000.[12] Nearly all of the inherited funds were applied to the purchases of two family homes.

[63] Moreover, the argument as to tracing fails to take into account that undoubtedly Stanbury Ave, which sold at $506,000 and was considered by both parties to be a premium sale figure, inevitably gave rise to capital gain, so the proceeds, and therefore the balance of the account, are not solely attributable to the applicant's financial input. To try and peel back the application of their joint income in repaying the mortgage, but also various joint expenditure, combined with the fact that some of those proceeds are attributable to capital gain, does not persuade me that tracing of separate property is reasonable and practicable. The inherited funds and the use of monies towards relationship assets and a joint future financial enterprise (or future) was some 18 months before the agreed date of separation. This is not a short period of time and a reasonable conclusion can be drawn that a longer period serves to reinforce the respondent's expectations of sharing as distinct to the funds being the applicant's separate property.

[64] Eighteen months is a considerable length of time and, over that period, the transactions move in and out of joint accounts. This timeframe is arguably longer than that described in other cases.[13] I come back to the strong likelihood that over that 18

[12] At paragraph 43 of the submissions of counsel for the applicant he describes after the $380,000 was put into the Serious Saver account the balance was $390,000.
[13] *S v W* [2006] 2 NZLR 669. (a seven month period).

month period the applicant came to a different outlook about his future and the marriage's prospect of success, but that is quite distinct from finding the tracing of funds accumulated in the Serious Saver account and term deposit remain the applicant's separate property.

[65] It is a question of fact as to whether an intermingling of these funds has occurred with other relationship property to such a degree that it is unreasonable or impractical to properly regard it as separate property. The parties disagree as to their intention on retaining the funds in the Serious Saver account and the term deposit. The respondent deposes the inheritance (and it is relevant the funds total a significant sum, over one million dollars) was put into an "all-purpose bank account". The applicant submits his inheritance funds were not intermingled. He submits some relationship property ($400 which was accumulated on a month by month payment of $20) amounts to an intermingling or injection of relationship funds into the inheritance. However, this amounts to a narrow focus in respect of the issue of intermingling, and ignores the various transactions that were made over the 18 month period, including the purchase of substantial assets.

The extraordinary circumstances argument – the context

[66] The applicant submits but for his inheritance the parties would have shared equally in a relationship property pool worth around $250,000 with an amount payable to the respondent of approximately $125,000[14].

[67] The applicant submits his inheritance funds, received in February 2018 some 18 months prior to the agreed separation date of September 2019, gave rise to a property pool of around $1.1 million. That sum is further inflated if the Court finds that the proceeds of the Serious Saver and term deposit are not separate property. The property pool would increase to over $1.4 million.[15]

[14] Paragraph 20 of applicant's affidavit dated 26 June 2020.
[15] There is no agreed valuation for the Toledo Place property.

[68] The applicant deposes the respondent "always said she would not claim against my inheritance. I do not hold her to that, but I believe equal sharing would be repugnant to justice".[16]

[69] The applicant submits the disparity of financial contribution, and his "injected capital" which was not connected to the relationship, is to such a degree that equal sharing would be repugnant to justice.

[70] If the Court accepts the applicant's s 10 argument, the applicant proposes a 70/30 split. On that basis the respondent would receive approximately $331,293. However, if the Court does not accept the applicant's separate property claim, the increased relationship property pool increases and on that basis the applicant seeks an 80/20 split. The respondent would receive a payment of approximately $292,686.

[71] The respondent rejects the applicant's proposals and claims a division of relationship property on an equal share of division of assets.

[72] Should I find for the applicant, the respondent submits that she will make alternative claims including an adjustment for her contributions,[17] but also for the respondent to be compensated for economic disparity between the parties.[18] Additionally, the respondent claims for compensation for post-separation contributions,[19] together with a claim that the respondent should be compensated for the loss of the value of her business – West and Wu – an online clothing company.[20] Finally, the respondent seeks compensation for the applicant's use of relationship property to repay personal debts.

[73] At hearing the division of chattels was still being worked through between the parties. The respondent is in occupation of the home. Both argue the other has the lion share of the chattels, and they also disagree on artwork the applicant was gifted by his uncle. The applicant deposes leaving with very limited chattels, certainly the

[16] Paragraph 21 of applicant's affidavit dated 26 June 2020.
[17] As defined in s 18 of the Property (Relationships) Act 1976.
[18] Property (Relationships) Act 1976, s 15.
[19] Section 18(b).
[20] Section 18(c).

large chattels stayed in the home. The respondent is critical the applicant has taken the chattels of value. In short the evidence at hearing pointed to the respondent retaining the property, not only the bulk of the chattels but also of value.

[74] Finally, and as part and parcel of the chattels argument, is the question of the continued ownership and care of the parties' two dogs, Nelson and Eric. The applicant's position is he should retain Nelson and the respondent retain Eric. The respondent seeks the care and control of both Nelson and Eric. The respondent's evidence is that she acquired the two dogs. Nelson and Eric are pets and fall within the definition of family chattels, and as such should be shared between the parties.[21] However, the respondent submits it is the value of the family chattels that is to be divided equally between the parties and not the two dogs.

[75] There was a heavy emotional component to the respondent's evidence at hearing but both parties were distressed about the risk of losing the care of either dog. However, the evidence favoured the conclusion Nelson and Eric are settled in their respective homes. For the respondent, she is aggrieved and distressed by the prospect she may not be able to retain the care of both dogs.

Exception to equal sharing

[76] Section 13 of the Act provides:

> **13 Exception to equal sharing**
>
> (1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.

[77] The decision of *Martin v Martin* provides that s 13 is a stringent test.[22]

[78] The law has been more recently reviewed by Grice J in the decision of *Kidd v Russell.*[23] Justice Grice, in her decision, upheld the Family Court's decision of equal

[21] Section 2.
[22] *Martin v Martin* [2016] NZCA 225; [2015] NZHC 1823, (2015) 30 FRNZ 568.
[23] *Kidd v Russell* [2018] NZHC 3032.

sharing being repugnant to justice. Justice Grice formed the view that the test is "a stringently difficult test to overcome", but that the test was not designed to be impossible. And there's the rub, the threshold to overcome has been interpreted as stringently difficult but the opportunity to depart from equal sharing is provided for and as such it is not impossible.

[79] The parties ask the Court to consider whether or not equal sharing of relationship property is "completely unfair". Equal division of relationship property is prescribed unless an exception applies. Section 13 provides an exception where equal division would be repugnant to justice.

[80] The decision as to whether extraordinary circumstances exist is a factual question. Whether or not an equal division of property is repugnant to justice turns on a value judgement based on the facts of the case.

The parties' financial contributions

[81] The parties have made differing financial contributions to the marriage.

[82] The applicant, through inheritance funds, has made a significant financial contribution to the relationship asset pool.

[83] The applicant's capital contributions total $1,214,533.94, and his financial contributions comprise of:

a) At 21 he received a share fund worth $100,000.

b) At 25 years of age he cashed this in and netted approximately $80,000 of that sum $65,000 was applied as a deposit to purchase Stanbury Ave, together with the balance of his KiwiSaver ($9,547). The balance of these funds (approximately $15,000) was used to renovate Stanbury Ave.

c) In February 2018 the applicant received an inheritance of $1,037,434. In January 2019 the applicant received a second payment of $9,552.94. The total 2018/2019 inheritance funds being $1,046,986.94.

d) In January 2010 the applicant's KiwiSaver policy had a value of $1,000 and by July 2019 it is calculated at a value of $58,000.

e) The applicant has worked full-time during the marriage and his salary range commenced at $65,000 and is now approximately $133,000 per annum.

[84] The respondent has made no capital contributions other than her KiwiSaver, and her financial contributions comprise of:

a) The respondent has worked part-time but also for a period operated her business West and Wu.

b) The respondent's income range being between $35,000 to $44,000 per annum.

c) The respondent's KiwiSaver was established during the marriage.

[85] The parties also had vehicles which are not claimed as separate property.

[86] Both parties have made non-financial contributions, including improvements to Stanbury Ave resulting in a premium sale price.

[87] At separation they had various joint ANZ bank accounts with funds.

Discussion

[88] It is not uncommon for one partner to make a greater monetary contribution than the other.[24] The disparity must be so gross that it cannot be ignored.[25] The

[24] *De Malmanche v De Malmanche* [2002] NZLR 838, [2002] NZFLR 579 at 50; cited in *Bowden v Bowden* [2017] NZFLR 56.
[25] *Castle v Castle* [1977] 2 NZLR 97 at 102.

overarching question is whether equal sharing of relationship property is completely unfair.[26]

[89] In order to assess whether disparity in the financial contribution of the parties is of such a dimension to be considered gross, the contextual circumstances of the case need to be assessed.[27]

[90] The applicant has made a more sizeable financial contribution to the parties' relationship property. The parties were a young couple and early in their relationship they benefited from the injection of funds through the applicant's inheritance. He applied the proceeds of his share portfolio as a sizeable deposit to purchase Stanbury Ave. There is no contest by the applicant these funds represent relationship property.

[91] During the marriage the parties shared in responsibilities in and around the home. They both contributed to the mortgage. The applicant supported the respondent as for a time she worked part-time and also studied. The applicant's higher income arguably also supported borrowing for the property. That said both financially contributed to their living expenses. It would seem the parties were careful with funds and did not lead an excessive lifestyle. The parties did not have children and their non-financial contributions to the marriage were on a par.

[92] It is significant only 18 months prior to the parties' relationship ending the applicant came into a substantial inheritance. The funds were in excess of $1m and some funds were applied to the purchase of a family home, but there was a residual left over which was effectively siphoned off and ring-fenced as investment.

[93] I consider it significant the applicant, as a young man, received a significant inheritance and the parties, as a young couple, enjoyed the benefits of those inheritance funds. In *Bowden v Bowden* the High Court took into account the age of the parties, who were in their late fifties/early sixties. Their age and stage was seen as a relevant factor. This was also so in the decision in *[T] v [C]* in that the respondent had introduced the home to the relationship which represented her life endeavour.[28]

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[26] *Kidd v Russell* [2018] NZFC 3989 at 42; approved by *Kidd v Russell* [2018] NZHC 3032.
[27] *Bowden v Bowden* [2017] NZFLR 56 at 44.
[28] *[T] v [C]* [2019] NZHC 2018.

[94] There has been a tendency to treat the parties' age and stage of life as relevant when determining extraordinary claims and findings of unequal sharing pursuant to s 13. Perhaps more so if parties are in subsequent relationships and/or in a later stage in life. Equally, there is a case for the age and stage of parties' lives being be a relevant consideration for a young couple. In the case of the applicant and respondent they do not have a family nor any appreciable non-financial contribution. The injection of over $1m in terms of acquiring property is a significant amount of money particularly given their youthfulness and relatively limited work experience (and modest salaries). The injection of these funds is disproportionate to the parties' ability to earn, as it is unlikely they could save towards a sum over $1m.

[95] For the applicant, there is significance attached to inheritance funds from his Uncle. There is a significance to a family inheritance and once the funds are distributed, which come about solely through a family relationship between the applicant and his uncle, the financial transaction is complete. It cannot be replicated.

[96] The applicant's contribution to the relationship property pool was more than notable. For the parties it is a significant sum and the financial transactions that followed were of significance. At a young age they became the owners of a freehold property. They also ringfenced future investment funds. This is a relatively uncommon position for a young couple. It is overwhelmingly compelling that the applicant's financial contribution has been so disproportionately beyond that of the respondent it simply cannot be ignored, particularly given their marriage was lengthy but by no means a marriage of a particularly long duration.

[97] I also accept a compelling consideration is the introduction of the over $1m inheritance funds came a relatively short period before the marriage ended - a marriage of less than nine years, as opposed to a defacto relationship of 15 years as claimed by the respondent. The parties were not in the same position as described in the case of *Dalton v Dalton,*[29] nor are there the same level of non-monetary contributions as relied on in the decision of *J v J.*[30] The inheritance was less than 18 months before separation and the applicant took steps to ensure, with the sale of Stanbury Ave and the Toledo

[29] *Dalton v Dalton* [1979] 1 NZLR 113 at pgs 120-121.
[30] *J v J* [2003] NZFLR 1088.

Place property now freehold, that funds were deposited into the Serious Saver account and the term deposit. The respondent concedes there was no confirmed alternative plan. Over the course of a long relationship non-monetary contributions might level out a disproportionate financial contribution. In this case the non-monetary contributions by the parties were even. I express doubt that non-monetary contributions could level out such a substantial financial contribution over a period as short as 18 months.

[98] The applicant moved out of Toledo place on 10 July 2019. In effect, the parties are living apart, although there may have been some unresolved relationship issues or confusion as to whether they would remain separated or reconcile.

[99] The parties sat down together in September 2019 and closed their other joint accounts. For the respondent this signalled the end of the relationship. The respondent's evidence is unequivocal as to the significance of this decision. It is a fair conclusion the applicant may have reached this conclusion a little earlier. For the sake of agreement, the parties settled on a date of separation being September 2019.

[100] In March 2020 the parties discussed reconciliation. Within a short timeframe the applicant advised the respondent he did not wish to reconcile. There is no fault attributable to either party but most likely these discussions and the possibility of reconciliation extended the respondent's distress over their marriage ending.

[101] The respondent invites the Court to find against the applicant and affirm a total relationship property pool and a full division of the total property pool on the basis of equal sharing.

[102] There is a tension between the proposed financial outcomes for the respondent. If I were to find it is reasonable and practical to trace the inheritance funds and a resulting division of 70/30, this comes at a higher financial reward for the respondent, opposed to rejecting the claim but accepting the alternative argument that equal sharing would be repugnant to justice and order division of the total asset pool on the basis of 80/20, which would yield less for the respondent.

The parties' evidence

[103] The distress of the parties was evident at hearing. I believe as a young married couple they shared a vision of a good life together. The applicant explains in his early twenties he took no issue with the respondent's preference not to have children. However, over his twenties his outlook changed and he came to want to have children. Certainly, by 2019, the marriage was in strife and on 10 July 2019 the applicant left the family home. The parties never lived together again at Toledo Place. Even in the period of March 2020, when they contemplated reconciliation, they did not cohabitate.

[104] At hearing the applicant was forthright in his evidence and he was able to make concessions when appropriate, or, as he accepted, necessary. The applicant had a good memory for the various financial transactions to purchase Stanbury Ave and the subsequent purchase of Toledo Place. There was no quarrel over the respondent's account the parties sought financial and legal advice (late 2018) and the applicant was clear as to the transactions on the sale of Stanbury Avenue and both the Super Saver and term deposit. To be fair the respondent also adds clarity of transactions however she deposed a different context or intent.

[105] The respondent presented throughout, not only while she was giving her evidence but over the course of the hearing, in a state of distress. In 2021 the respondent's grief at the end of her marriage appeared to be as heightened as if she had just separated. I accept most likely the cumulative effect of stress and anxiety of the separation and proceedings has deeply affected the respondent. The respondent's evidence as to her former husband's choices and actions were very much viewed through an entirely negative lens. She referenced deception by him in maintaining occupation of Toledo Place but not living there continuously (2020). The respondent also expressed, in a profoundly negative way, the applicant's actions impacting on her online business. The respondent's circumstances had changed but it was not the result of any campaign of difficult behaviour perpetrated by the applicant. The fledgling online business floundered but through no fault of the applicant.

[106] I tend to accept the respondent has not given consideration to the reality for the applicant. He was also confused as he grappled with important decision-making, not

only for his own future but decisions which would also ultimately affect the respondent. The applicant's failure to confirm his commitment to the marriage is perceived by the respondent as something of a financial strategy, when I take from his evidence he struggled to discuss openly with his distressed and most likely highly emotional former spouse. I gained no sense from the applicant's evidence that his hesitancy to occupy full-time the home at Toledo Place was designed to deliberately undermine the respondent's financial situation, either at the time nor in the future. They were living apart, in changed circumstances, which also meant in different homes. I took from the respondent's evidence most likely she hoped by her continuing to live with family this took pressure off the applicant and, in turn, their relationship rupture would heal. That did not come to pass.

[107] Over 2020 and up until October 2020, when the respondent resumed occupation at Toledo Place, she was living with family. It is conceivable that this relationship was supportive, even if it was not entirely convenient. I am in no doubt the applicant's decision to remain in occupation, even if not living at Toledo Place full-time, was in no way designed to undermine the respondent financially. I do not accept, as is suggested by the respondent, the applicant's decisions were intended to be strategic to promote his financial interests over and above the respondent. I have a strong suspicion, drawn from the evidence, the respondent's hesitancy into even requesting occupation of the family home at Toledo Place may have been linked at her hope that the parties may yet reconcile. Moreover, it may have provided the respondent with some comfort that the applicant was in the family home and not forging ahead and making a new life for himself.

[108] In October 2020 the respondent moved back into the family home and the applicant's arrival at the property on or about the same day was coincidence. It is evident the applicant was unaware the respondent had taken over occupation of Toledo Place. The respondent's reaction and interpretation to his presence reflects more her emotional response than any objective review of the evidence. However, it also reinforces her entirely critical or negative view of the applicant and his choices.

[109] It is undeniable the applicant's grief has clouded her view of her former partner and she now sees him in a very poor light. I believe the reality in 2021 is the parties

are not the same young couple who married in 2010. Put simply, they want different life outcomes.

[110] The respondent, in her evidence, conceded decision-making over the division of property. She calls upon the Court to direct a "clean break" regarding the vesting of the home at Toledo Place, but she only interprets this in terms of a vesting order in her favour. Meanwhile, the applicant seeks an order for sale to effect market value for the property.

[111] There was a strong sense drawn from the respondent's evidence she attributes all future financial security and her emotional comfort in the family home, but she does so in a way that looks past any responsible valuation for the property.

[112] There is work to be undertaken to present the property for sale and, in the absence of a registered valuation or agreed market appraisal, the respondent's position is she attributes the value of the home at a lower value than the applicant. The purchase price was $850,000 and, by way of settlement, the respondent would attribute a value on the property at $950,000. However, this still falls well short of an appraisal undertaken by an agent familiar with the property that was in excess of $1.1 million. The respondent's proposal to purchase the applicant's share in the property was aspirational but lacked a robust financial framework.

[113] Moreover, it is unclear whether the respondent could successfully fund the purchase of the property given uncertainty over the classification and division of the property.

[114] The respondent hopes to avoid any ongoing contact with the applicant through the process of improvements to the property pending any sale. However, to effect the outcome sought by the respondent would come at a financial cost to the applicant.

[115] Reasons were advanced as to why negotiations had fallen short but, overwhelmingly, the respondent's evidence, which was underscored with her grief, presents an evidential picture that ultimately her preference is for the Court to decide as opposed to her be party to the division of property.

The Respondent's counterclaims – sections 15, 18B, 18C and 20E

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (*party B*) are likely to be significantly higher than the other spouse or partner (*party A*) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to—
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
>
> (c) any other relevant circumstances.
>
> (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—
>
> (a) order party B to pay party A a sum of money out of party B's relationship property:
>
> (b) order party B to transfer to party A any other property out of party B's relationship property.
>
> (4) This section overrides sections 11 to 14A.

[116] The respondent claims submits that there is economic disparity given the significant disparity in their respective incomes (the applicant earns approximately $144,000 per annum while the respondent earns approximately $51,000 per annum).[31] The question is whether the disparity between the parties' income and (it follows) living standards attributable to the division of functions in the relationship?

[117] The parties both attended university (over the period they dated) and did not join finances before marriage. The respondent has been very successful in her career in retail and has demonstrated she is a highly valued employee. At the date of hearing the business she works for was on the market (due to the unexpected passing of the owner) but the respondent noted any change in ownership of the company could possibly bring about a change in either her role and/or renumeration. The applicant

[31] Page 16 vol 1 and page 104 vol 2 BOD

has also enjoyed a measure of success. He has pursued employment opportunities to bring about more favourable terms of employment.

[118] Early in the relationship the respondent balanced study and employment with a view to improving her long-term career aspirations and/or outcomes.

[119] The parties have different careers. They made different choices and given the applicant built his in the world of finance and the respondent in the dynamic and changing arena of retail. The respondent has enjoyed success beyond her employment with the setup of her own online business, West and Wu. As at the date of hearing the online business was no longer operating but it is still a measure of success she built up a fledgling business. The respondent attributes a lack of proper accommodation (post separation) to run her business. At the time the respondent was out of the family home and living with family. Having the benefit of seeing the respondent at hearing I doubt this is the primary reason the respondent wound up West and Wu. I tend to accept the applicant's evidence the business did not require a fixed premise.

[120] In their home environment they also adopted different roles. The respondent's evidence being that her interest was inside the home and the applicant's domain was to maintain the outside property. Both contributed to improvements to Stanbury Ave. The parties did not have children. There was no division as to functions within the relationship linked to the care of family nor family-based responsibilities.

[121] What is the evidence that the parties' function within the marriage impacted on either party in terms of their career progression and future income? There is a clear sense the respondent is aggrieved about the disparate income earning capacity and what this means for her in the future. As teenagers they dated and, undoubtedly, they talked through their different career paths. There was no sense of the applicant's influence in any way inhibiting the respondent's working world and her professional aspirations. I accept that this change in circumstances represents another emotional loss for the respondent. It adds to her disappointment about her own future aspirations and I gained a sense from her evidence the respondent felt "stuck". However, stepping back from the facts of the case there was no evidence the parties' function within the relationship impacted in a positive way on the applicant and that it created an

advantage to his career aspirations and/or income earning capacity. I do not find evidence to support the respondent's assertion the parties' disparity in income and living standards came about from the division of functions within the relationship.

Occupational rent – section 18B

> **18B Compensation for contributions made after separation**
>
> (1) In this section, *relevant period*, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.
>
> (2) If, during the relevant period, a spouse or partner (*party A*) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—
>
> (a) order the other spouse or partner (*party B*) to pay party A a sum of money:
>
> (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.
>
> (3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

[122] An award of occupational rent is discretionary. Often a broad-brush approach is accepted or adopted by the Court and I accept that this is an appropriate way for me to deal with this claim given the particular facts of this case.

[123] Both parties have at different periods been in sole occupation of Toledo Place. In July 2019 the applicant left the home and they negotiated his return to the property while the respondent moved in with family members. The applicant was in occupation for a period until October 2020 when the respondent then assumed sole occupation of the property. The respondent's evidence resonated with a strong sense of grievance about the inconvenience in her change in living arrangements in the period the applicant had sole occupation of the home. It was disruptive. However, the respondent's sole occupation of the property has also come at an emotional and financial cost to the applicant. However both parties (and at different periods) needed time to "settle" and adjust. Arguably the longer period of sole occupation favours the respondent.

[124] On the occupational rent issue, I confirm that the parties competing claims are cancelled out, as they both had sole occupation at different periods. I make no award for occupational rent.

Section 18C

> **18C Compensation for dissipation of relationship property after separation**
>
> (1) In this section, relevant period has the same meaning as in section 18B.
>
> (2) If, during the relevant period, the relationship property has been materially diminished in value by the deliberate action or inaction of one spouse or partner (party B), the court may, for the purposes of compensating the other spouse or partner (party A),—
>
> (a) order party B to pay party A a sum of money:
>
> (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

[125] I accept the respondent struggled emotionally but it is difficult to attribute at what point this comes at a financial recompense or responsibility to be met by the applicant. Particularly given I accept the evidence of both parties, which reflects the fact that the applicant did not set about to undermine the respondent financially in such a way to disable her operation of West and Wu. The applicant did not set about to "trip" the respondent up financially or emotionally in such a way to disable her ability to continue West and Wu. Sadly, it was an unforeseen consequence and one over which he had no control. The interplay between the respondent's living environment (at her parents' home) may not have been comfortable for her nor, ultimately, advantageous for the business. The parties negotiated an arrangement for the applicant to return to live in Toledo Place and, sadly, the respondent now sees that decision as coming at a cost to her. However there is no reliable evidence the respondent was dependent on Toledo Place to run West and Wu. Rather the business did not require fixed premises, and that is why in 2019 the respondent agreed to leave Toledo Place and allow the applicant sole occupation. The respondent set about remedying that situation (her living arrangements) and in October 2020 resumed sole occupation of Toledo Place. There was no sense in the evidence that the applicant intended the respondent to be disadvantaged or he tried to undermine her financially. I took no such concern away from the evidence. I do not believe there is any evidential basis to

establish a claim pursuant to s 18C of the Property Relationships Act. There is no evidence to support the conclusion the applicant deliberately, or through admission or inaction, acted in such a way for an award to be made pursuant to s 18C of the Property Relationship Act.

Compensation of personal debts - Section 20E

> **20E Compensation for satisfaction of personal debts**
>
> (1) If a secured or unsecured personal debt of one spouse or partner (*party A*) has been paid or satisfied (directly or indirectly) out of the relationship property, the court may make one of the following orders in favour of the other spouse or partner (*party B*):
>
> (a) an order increasing proportionately the share to which party B would otherwise be entitled in the relationship property:
>
> (b) an order that property that is part of party A's separate property be treated as relationship property for the purposes of any division of relationship property under this Act:
>
> (c) an order that party A pay party B a sum of money as compensation.
>
> (2) The court may make an order under this section on its own initiative, but must make an order under this section if party B applies for such an order.
>
> (3) This section applies whether the debt was paid or satisfied voluntarily or pursuant to legal process.

[126] This is a discretionary remedy. The applicant's evidence pointed to an entirely different fact scenario than that posed by the respondent. The respondent is resolute the applicant applied joint funds to fund a ski trip prior to separation. In essence, the respondent alleges the applicant applied joint funds to pursue a new relationship. It is with bitter sadness the respondent concludes she funded the applicant's solo travel/holiday which set him up in a new life and one without her. Both argue the other applied joint funds for the benefit of one spouse alone. The applicant concedes some payments related to Airbnb payments but denies a double up on his occupation plus additional accommodation costs. The applicant claims they were a reasonable expense. The applicant counters the respondent made her own personal expenses over which he had no control. That said the applicant does not identify specific sums (unlike the respondent) and a reasonable observation is the respondent's claim specifies sums which were beyond the parties' usual day-to-day expenses or their normal expenditure range.

[127] This is a murky issue and although I accept the applicant's evidence, equally, the respondent was surefooted about her concern joint funds were applied for a solo enterprise. I have decided the way forward is an award in favour of the respondent. The respondent itemised the sums sought, which total $7,548.47.[32]

[128] I make an award in favour of the respondent for the sum of $7,548.47 pursuant to s 20E of the Property Relationships Act.

Nelson and Eric Wilkinson

[129] Nelson (Maltese x Shih-Tzu) and Eric (Maltese) are much-loved pets. On one hand the respondent's counsel accepts the parties' pets can be legally interpreted as chattels but counsel for the respondent asks I adopt a welfare and best interests argument to support a decision awarding both pets in the favour of the respondent. As it stands Nelson has now been in the long-term care of the applicant and Eric in the long-term care of the respondent. Not without incident. I was left in no doubt the respondent acted unilaterally post a visit when she retained Nelson and, unfortunately, the respondent takes a very dim view on the applicant's care of and affection for Nelson. The respondent sees no hope for any shared care of the dogs and rather she hopes for a clean break with both dogs remaining with her.

[130] There was a lot of grief expressed during the fixture and a place of sadness for both parties is around the changed care and control of Nelson and Eric. I accept both parties miss the dog who is in the care of the other parent. I accept both parties are sensitive to their lovely pets. I also accept both parties/parents have loved and enjoyed both Nelson and Eric. However it was also clear that Eric is the respondent's dog and Nelson is the applicant's. Time marches on and the dogs are settled in their respective homes. I am not inclined to adopt welfare and best interests argument in relation to the pets, but in saying this I accept their needs are met in their current care arrangements; Nelson with the applicant and Eric to remain with the respondent.

[131] I appreciate my decision may sadden the respondent and for that I am regretful, but a "clean break" favours the party with the care of a dog retain that pet in their care.

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[32] Refer para [120] of submissions of counsel for the respondent dated 28 January 2021.

I decline to make an order both Nelson and Eric are retained by the respondent. Rather both dogs are the treasured pets; Nelson to remain with the applicant, and Eric to remain with the respondent.

Conclusion

To vest or to sell Toledo Place?

[132] It is not practical nor reasonable for the property to vest in one party or the other in the absence of evidence as to value of the property. Frankly, the respondent's estimated value of Toledo Place was unrealistic and if adopted would be unfair. The respondent's measure of the property and her steadfast attempt to downplay its value reflected her emotional connection to the property. The respondent's evidence at hearing as to the extent of remedial type work required on the property was most likely driven to downplaying any increase in the value of the home as opposed to a dire maintenance or restoration issue. To vest the property at Toledo Place in favour of the respondent may meet her emotional needs but it almost certainly would come at a financial loss to the applicant. It is clear that both parties would financially benefit if the property is worked on, prepared for sale and listed for sale. It would achieve a fair market value.

[133] It is apparent the respondent cannot undertake these steps to remediate the property and prepare it for sale and in saying this I am cognisant of the respondent's distress at the prospect of leaving Toledo Place. So much so I have no confidence the respondent could address the necessary steps to correct, restore or touch up areas of the property for sale. Nor, once the property was ready for listing, deal with the sale process. That would also prove problematic for the respondent.

[134] I appreciate the respondent attributes significant emotional attachment to the property but I also sense she hopes to recoup her financial footing. However, I was not convinced as to the respondent's insight and her evidence as to her preference the property be vested in her favour was underscored with a high level of unreasonableness. That said, I have considerable sympathy for the respondent as she faces a need to rehome will come at a financial and emotional cost. The respondent

requires support. The applicant has offered an immediate distribution of $50,000 in favour of the respondent, which I accept is well-intentioned, and should be adopted.

Orders and directions

Separate property – Section 10

1. The funds in the parties' ANZ Serious Saver account at date of separation and the parties term deposit account at the date of separation are relationship property.

Unequal division – Section 13

2. The parties relationship property shall be divided on the basis of 70 percent in favour of the applicant and 30 percent to the respondent.

Applicant's Section 18(b) claim

3. For 30 percent of the outgoings on the property at Toledo Place paid by the applicant for the period from separation to the date in October 2020 when the respondent took exclusive occupation of Toledo Place.

Respondent's Sections 15, 18(c) and 20E claims

4. The respondent's claims for compensation pursuant to s 15, 18(b) and s 18(c) of the Property (Relationships) Act 1976 are dismissed.

5. The applicant shall compensate the respondent pursuant to s 20E the sum of $7,548.47.

Ancillary Orders

6. The property, 4 Toledo Place, shall be listed for sale with Michelle Corkingdale of Harcourts no later than 1 October 2021 and sold with the net proceeds shared between the parties in accordance with order 2 above.

7. Prior to the parties listing the property for sale they shall attend to such remedial and/or preparatory work as the parties shall agree or the Court shall order – the cost of such preparatory work to be borne by the parties in the same proportions as specified in order 2.

Occupation Order

8. I make an occupation order in favour of the applicant to commence at 12 noon on Friday 17 September 2021 or at an otherwise agreed date and time:

    (i) Confirming a considerate time allowance for the respondent to leave the property is difficult but the process should provide for the needs of both parties. Preparing the property for sale (post the national lockdown and within the spring months) should be a priority for the parties. I specify that the period includes a weekend to enable the respondent to exit the property with her personal effects. If an agreement is reached between the parties as to an alternative timeframe for a change in occupation of the Toledo Place property, the date and time could move forward or be pushed back but subject to agreement.

9. I also make an ancillary furniture order given the chattels form part of the curated property package:

    (i) The respondent will need to remove her personal effects but, unless agreed otherwise, the larger household chattels should remain.

Leave

[135] Leave is reserved to the parties to seek such further directions and or orders as may be required to give effect to the Court's judgment on three days' notice.

[136] My notes record that the parties had reached an agreement as to the division of household chattels. To be clear, I specifically confirm the applicant retain all artwork gifted to him by his uncle, Geoffrey Wilkinson. The artwork should include any gifts made to the parties.

Concluding comments

[137] My decision could be viewed as favouring the applicant over and above the respondent's claims. I see it differently. I accepted the strength of the applicant's evidence and claim by the applicant in respect of s 13 of the PRA but the respondent also had a measure of success in defending the s 10 argument submitted by the applicant, together with her s 20E claim.

[138] Counsel for the parties may be considering seeking a costs order and I acknowledge the civil nature of the proceeding. However, as this decision is being finalised it is during the COVID I ask counsel and the parties to reflect on this wider context. I am sensitive to the fact the fixture was emotionally fraught for the respondent and she shall struggle not only with my decision as to division of property but also as to occupancy of the home pending the sale. Costs are a discretionary issue and it is difficult not to observe the respondent's heightened distress over the course of the long cause fixture. It was at such a level I appreciate the respondent may have struggled to step back from the factual issues and contemplate a settlement. During the course of a hearing there is always an opportunity for settlement, however, my observation is the respondent leaned away from that as a possibility, preferring the final outcome should be the decision of the Court. It is a possibility the respondent's emotional state meant she could only see it in those terms. I am simply indicating my preliminary view, but there is a strong case for costs to lie where they fall.

S M R Lindsay
Family Court Judge