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**IN THE FAMILY COURT
AT BLENHEIM**

**I TE KŌTI WHĀNAU
KI TE WAIHARA KEKE**

**FAM-2017-006-000161
[2020] NZFC 1635**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SIRPA ELISE ALALAAKKOLA Applicant
AND	PAUL ANTHONY PALMER Respondent

Hearing: 10 February 2020

Appearances: Applicant appears in Person
B A Fletcher for the Respondent

Judgment: 6 March 2020

JUDGMENT OF JUDGE P R GRACE

[1] In my decision on 10 February 2020, I reserved the issue of copyright and occupational rent.

[2] I turn to the issue of copyright. It arises because the applicant is an artist who had the talent to create the artwork which is currently in dispute.

[3] As this relationship commenced in 1997, the issue of copyright is governed by the Copyright Act 1994.

[4] Section 14 of the Copyright Act makes it clear that copyright is a property right that exists in accordance with the Act and includes copyright over original artwork.

[5] That copyright vests in the applicant alone, because she was “the author” who created the work (s 5) of the Copyright Act.

[6] Although the point has not been argued, primarily because until the respondent retained legal counsel very late in the proceedings, both parties had represented themselves. The respondent claims to have assisted the applicant with the art by purchasing canvasses and the like, but, it is the applicant who has been solely responsible for the actual creation of the art. She has the talent. I do not consider therefore that the paintings can be regarded as the work of joint authorship as provided by s 6 of the Copyright Act.

[7] Section 16 of the Copyright Act, states that the owner of the copyright, in this case the applicant, has the exclusive right to copy the work.

[8] It is clear the parties recognise the relevance of copyright in this proceeding, because it does seem that they did agree that the respondent could keep the paintings which he has identified, but the sticking point was that the respondent sought also to have the Court transfer the copyright in those particular paintings to him. The purpose behind that wish on the part of the respondent was to enable him to reproduce copies of the artwork and then to sell them as part of his wish to derive a future income stream from the art.

[9] The applicant was agreeable to the respondent keeping the art which he had identified, but objected to him having the copyright, because in her view, it has the potential to undermine the ongoing value of her future and current creations. She would have no control over how many prints were made, and the cost at which they may be sold, and in her view the respondent could therefore undermine the future

financial or intrinsic value of her artistic creations, and that she therefore loses control over her own work.

[10] The questions for determination therefore are:

- (a) Is the copyright relationship property for the purposes of the Property (Relationships) Act 1976 (“the Act”); and if so,
- (b) Can the Court transfer copyright in the agreed pieces of art from the applicant to the respondent? and
- (c) If so, should the Court exercise its ultimate discretion and transfer the copyright?

Is the copyright relationship property?

[11] Section 14 of the Copyright Act makes it clear that copyright is a property right existing in respect of artistic works. So, copyright is “property.”

[12] Is it relationship property.

[13] Section 2 of the Act defines property as:

- (a) Real property
- (b) Personal property
- (c) Any estate or interest in real or personal property
- (d) Any debt or anything in action
- (e) Any other right or interest.

[14] The paintings themselves are property. An individual copyright must attach to each individual painting.

[15] Due to the definition of copyright in the Copyright Act, the copyright that attaches to the art work would be “property” under s 2 (c) of the Act. If that is not correct, then it would constitute “property” in terms of s 2 (e) of the Act.

[16] Support for this is obtained from *Clayton v Clayton*,¹ where the Court said at [38], after reviewing relevant authorities:

“The property definition in s 2 of the PRA must be interpreted in a manner that reflects the statutory context. We see the reference to “any other right or interest” when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property, and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.”

[17] That gives support for the conclusion that when considering the issue of copyright, in this particular case, the copyright in the artwork must be regarded as property which attaches to each of the pieces of art created during the relationship.

[18] Whilst copyright in favour of the applicant would also attach to the pieces of art created both prior to the relationship and post separation, and whilst those rights in respect of those paintings would constitute property, they would not constitute relationship property.

[19] It seems the art work is therefore has two distinct property rights, firstly the painting itself, and secondly the copyright. They are severable.

[20] Does the “property” in respect of the copyright attaching to the painting created during the relationship, change to relationship property merely because the paintings were created during the relationship and are therefore themselves relationship property?

[21] On the one hand it could be argued that the copyright does not come into existence until the painting is created, and if the painting is created during the relationship it must therefore be relationship property.

¹ *Clayton v Clayton* [2015] NZCA 30.

[22] On the other hand, it could be argued that the artistic skill that rests in the applicant to create the art is a personal skill or qualification particular to her, and a skill which she had prior to the relationship, that it remains her separate property. This approach is consistent with s 16 of the Copyright Act which vests the copyright in the author of the art.

[23] Both parties were not involved in the creation of the artworks. They were created solely by the applicant as the artist. The work created is relationship property, but her skill in the creation is not. It is her separate property.

Can a Court order a transfer of copyright?

[24] It seems to me that the answer to this must be in the affirmative.

[25] Support for this view is to be found in the provisions of s 113 of the Copyright Act. Also, in *Oraka Technologies v Geostel Ltd*,² where the Court said:

“We accept the appellant’s submission that an assignment by operation of law occurs when, without any voluntary action on the part of the owner, ownership passes, such a might arise upon intestacy or bankruptcy or **by an order of the Court**”. (Emphasis added)

[26] That clearly anticipates that the Court has the jurisdiction and power to order that the copyright can be transferred from one party to the other.

Should the Court exercise its discretion?

[27] This is really the crux of the problem in this case, because clearly the Property (Relationships) Act requires a just and fair division of relationship property. The intent is that both parties are entitled to share equally in property that has come into existence during the relationship.

[28] The Court only has jurisdiction to order division of relationship property. It has no jurisdiction to order transfer of separate property. If I am in error over the

² *Oraka Technologies v Geostel Ltd* [2013] NZCA 111 at [76].

classification of the copyright as separate property, then I will give reasons as to why I would not have ordered a transfer of the copyright to the respondent.

[29] Parties are always free to reach any compromise as to the division of property. In this case the parties have reached a compromise in the sense that they have agreed that the paintings should be divided on the basis that those which have been created by the applicant both prior to the relationship and post the relationship are her sole and separate property. Those paintings that were created during the relationship are relationship property. They have then agreed upon the division of the paintings created during the relationship. The agreement has been that the respondent would keep the paintings that he has identified, and the applicant would keep the balance. The issue has been the argument over copyright.

[30] There are a number of problems that can arise. Firstly, if copyright is transferred in respect of the paintings which the respondent is to retain, then of course copyright in the balance remains with the applicant. The purpose behind the copyright is to protect the owner of the object in question. It enables the owner to replicate or reproduce the items over which they have copyright should they choose. This enables the owner to create objects which can then be marketed to the public. Does this then mean that each party is required to account to the other in respect of any item created under their copyright? If this were the case, then it would create a potential nightmare for accountability in the future. It would also be contrary to clean break principle encompassed in the Act. In my view once the paintings are divided, and if copyright is transferred, then the owner of the copyright is free to deal with the paintings as they see fit and would not be required to account to the other party for any income derived from the sale or reproduction of a print.

[31] Secondly, and perhaps more importantly, in this case, it is the applicant who is the creator of the art. The creative ability is “her”. It is highly probable that she will continue to paint into the future, thus creating new artworks which in turn will provide her with a future income stream. She will have copyright over those new works of art. Notwithstanding that, if copyright in the agreed paintings is to be transferred to the respondent, then the applicant will potentially find herself in competition with copies of her own artworks (they being the reproductions produced by the respondent) as she

would have lost total control over the numbers of prints that the respondent may reproduce and the cost at which he may sell them. I do agree with the applicant that this has the potential to undermine the value and saleability of any new work that she may create, and any prints that she herself would be at liberty to produce by virtue of the copyright in the paintings which she retains and creates in the future. I do not consider it practical or appropriate to seek to limit the copyright by imposing conditions on how many prints the respondent is authorised to reproduce from any particular painting, or the price at which they may be sold.

[32] Thirdly, by transferring copyright to the respondent, which then potentially enables him to go into competition with the applicant in reproducing copies of her own art, is in my view contrary to the clean break principle which is envisaged in the Act. The clear intent of the respondent is to derive a future income by his reproducing and selling artworks created by the applicant. The prints that he would reproduce will carry with them the name of the applicant. The story behind the art will be around and about the applicant. The applicant would have no ability to interfere or endeavour to control the amount or extent of reproduction as she would have lost copyright if it had been transferred to the respondent. It therefore has the potential to continue to bring the parties into conflict throughout the life of the copyright which is 20 years from the end of the calendar year in which the author dies (s 22 Copyright Act).

[33] Section 1M of the Act makes it clear that the purpose of the Act is to recognise the equal contributions of both parties to a marriage partnership and to provide a just division of relationship property between the parties when the relationship ends.

[34] What is being agreed upon in this case is an acceptable division of the paintings between the parties. Having regard to what has been said earlier, the question posed is should the respondent be entitled to continue to derive an income from the applicant's artistic skills once the relationship has ended? There is no dispute that he will receive the agreed paintings upon final division. He is always entitled to sell those paintings as he sees fit. That is no different to any individual who buys and sells any painting. Any individual who purchases a painting is not entitled to reproduce any painting without a proper authorisation from the artist. In this case the applicant

will not give that authorisation and the respondent is asking the Court to make an order against her wishes.

[35] The applicant has given what I regard as valid reasons why she does not give her consent. In my view on the division of property, in this case the Court should not go against the applicant's expressed wish. To do so, and grant the respondent his request, is merely inviting the parties to continue with future conflict.

[36] In those circumstances, I am not prepared to direct the transfer to copyright in the paintings which the parties have agreed can be retained by the respondent as his separate property.

[37] There will be a direction therefore that the paintings which the respondent identified during the course of the hearing, and which the applicant agreed that the respondent could retain, are to vest solely in the respondent. The remaining paintings are to vest solely in the applicant. There is no need for any valuation. Copyright in all paintings remains with the applicant. The respondent may attend the Family Court at Blenheim and uplift the paints identified by the parties, and he is to do that at the expiration of 14 days following the release of this decision. The applicant can also attend the Court at the expiration of 14 days from the date of release of this decision and uplift the paintings that are vested in her.

Occupational rent

[38] This argument arose because the applicant remained in occupation of the family home following separation and down to the present time. During that occupation she has, for an undefined period, run an AirBnB out of the property (while she remained in occupation). There is no evidence as to how long she ran that for or what money she derived from it. She did pay the mortgage, rates and most of the insurances, but recently she let the insurance lapse. The respondent ensured that the property was insured, but that has been only at the latter stages of this dispute.

[39] There were questions asked of the parties during the course of the hearing as to what they each considered an appropriate weekly rental for the property. There

appeared to be consensus that the property could have derived an income of \$300 per week. There is no valuation or evidence from an estate agent to support that figure, but it did seem to be a compromise between both the applicant and the respondent that \$300 per week would be a fair and reasonable expectation.

[40] In determining occupational rent, I bear in mind the following:

- (a) The respondent has by virtue of the decision of 10 February derived his share of increase in the equity due to inflation between the date of separation and now.
- (b) If the property were to be rented out at \$300 per week, from the date of separation until settlement of the sale of the home, then out of the accumulated income, one would have to pay mortgage, rates and insurance; and
- (c) There is absolutely no evidence to support any finding as to the length of time the AirBnB was operated or what income was derived so I am not in a position to make any adjustment in respect of that income.

[41] The fairest method in my view is to calculate the rent at \$300 per week from the date of separation down to the date of settlement. From that is to be deducted the mortgage, rates and any insurances paid by the applicant. The balance figure remaining is to then be divided between the parties equally.

[42] If the respondent has paid an insurance premium, then the applicant is to refund that premium to him as she has had the full benefit of occupation in respect of that, and that has been at his expense.

P R Grace
Family Court Judge