

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

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2021-090-000363
[2021] NZFC 10149**

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	DEBBIE VAN DAALEN Applicant
AND	DANIEL THORN Respondent

Hearing: On the papers

Appearances: N George for Applicant
S Tolich for Respondent

Judgment: 8 October 2021

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
[section 31 order relating to Superannuation Rights]**

[1] Debbie van Daalen applies for an order under s 31 of the Property Relationships Act 1976 (“the Act”) asking the Court to endorse the terms of a s 21A agreement entered into between herself and Daniel Thorn. Mr Thorn consents to the order being made.

[2] The parties request that the Court direct that the ASB Bank release from the applicant's ASB KiwiSaver fund (member number [deleted]) the sum of \$40,000 to her solicitor's trust account in order to pay an agreed adjustment sum to Mr Thorn in full and final settlement of relationship property issues.¹

[3] The parties were in a relationship from 1 November 2013 and married on 28 April 2018. They separated on 25 May 2020. They have one child.

[4] They reached agreement on a just division of their relationship property after negotiation and disclosure with the assistance of counsel. On 1 June 2021 they signed a s 21A agreement. They had an overall negative equity outcome when all their assets were considered. The main asset is Ms Van Daalen's Kiwisaver account which is acknowledged to be partly separate property, and partly relationship property.

[5] In order to achieve an overall just and equal division of property and debts, Ms Van Daalen has agreed to pay Mr Thorn \$40,000, and that sum must come from her KiwiSaver account as there are no other assets which can be realised.

Does the Court have jurisdiction to make the order sought?

[6] The parties agree that this Court has the jurisdiction to provide a mechanism to enforce the s 21A agreement.

[7] Sections 8(1)(i) and 31 provide the Court with the jurisdiction to make orders in relation to superannuation rights which are binding on spouses and managers of superannuation schemes.² A spouse who benefits under a scheme must enter an arrangement or deed of covenant designed to ensure the non owner spouse receives their share of the property.

[8] The property issue clearly falls within section 8(1)(i), being a KiwiSaver superannuation scheme owned by Ms Van Daalen. The parties have entered into a written agreement.

¹ The application is filed under sections 25, 31, and 33 of The Property Relationships Act 1976; PES v DNS (2006) 25 FRNZ 863(FC).

² In addition to s 25 and 33.

[9] In addition, the Court has a range of orders available to it under s 33. Clearly Parliament intended the Court to have all of the jurisdiction necessary to ensure that the parties seeking to resolve relationship property matters in the Family Court jurisdiction are able to achieve a just result. This must be done in accordance with the principles of the Act, which include the need for this to be swift and inexpensive.³

[10] The KiwiSaver Act 2006 acknowledges the Court's jurisdiction to make an order releasing funds from a KiwiSaver scheme and specifically makes reference to s 31 of the Property (Relationships Act) 1976. s 127 of that Act provides:

127 Member's interest in KiwiSaver scheme not assignable

- (1) Except as expressly provided in this Act, a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.
- (2) However, subsection (1) does not prevent a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme from being released, assigned, or charged, or from passing to any other person if it is required by the provisions of any enactment, including a requirement by order of the court under any enactment (including an order made under section 31 of the Property (Relationships) Act 1976).

[11] Furthermore rule 7 of the KiwiSaver Scheme Rules envisage the release of funds from a KiwiSaver scheme pursuant under s 31 of the Act. It provides:

7 Release of funds required under other enactments

- (1) The manager must comply with the provisions of any enactment that requires the manager to release funds from the KiwiSaver scheme in accordance with that enactment.
- (2) A requirement to release funds from the KiwiSaver scheme under any enactment includes a requirement by order of any court under any enactment (including an order made under section 31 of the Property (Relationships) Act 1976).

[12] Parliament's explicit reference to s 31 of the Act and the KiwiSaver Act 2006 shows its specific endorsement of the Court's ability to direct the release of KiwiSaver funds in relationship property matters.

³ Section 1N

Should the order be made?

[13] Counsel jointly submit that the parties agree to the Court to making an order to enable them to establish a clean break from each other in terms of their finances in accordance with the provisions of the s 21A agreement they have signed.

[14] It is clear that the parties only entered into that agreement on the basis that the funds would be released and it would be unjust for the Court not to endorse that agreement. Furthermore, it would be unjust for one party to the marriage to retain the only asset, leaving the non owner spouse without recourse to it.

[15] Parliament has clearly given the Court the jurisdiction under s 31 to override withdrawal restrictions when determining relationship property matters where the Court can ensure that the division adheres to the overall principles of the Act. These principles include the presumption of equal status between the parties to a marriage, the equality of division, the need to consider the interests of the children, and achieving an inexpensive, simple and speedy result.

[16] Because of those reasons, and with the consent of the parties, I am satisfied that an order should be made. I grant the application and make the following orders:

- (a) ASB is directed to release from Debbie Van Daalen's ASB KiwiSaver fund [number deleted] the sum of \$40,000 to her solicitors, Haigh Lyon trust account; and
- (b) Haigh Lyon is to pay to the respondent's solicitors trust account, namely Richard Allen Law's trust account the sum of \$38,500 being:
 - i. The \$40,000 adjustment sum owing to the applicant to the respondent;
 - ii. Less the respondent's agreed costs in respect of the agreement including \$750 to Haigh Lyon for drafting of the agreement and \$700 filing fee for the s 31 application under the Act; and

- (c) The balance of funds held in Debbie Van Daalen's ASB KiwiSaver fund is her separate property. Once the respondent's share is dispersed from Haigh Lyon to Richard Allen Law's trust account, it is the respondent's separate property.

Judge B R Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 08/10/2021