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IN THE FAMILY COURT
AT GREYMOUTH

I TE KŌTI WHĀNAU
KI MĀWHERA

FAM-2014-018-000091
[2018] NZFC 9120

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	RAEWYN PHYLLIS COOPER Applicant
AND	MARCUS ROBERT WILLIAM PINNEY Respondent

Hearing:	20, 21 and 22 November 2018
Appearances:	S Zindel for the Applicant S van Bohemen and K Mundy for the Respondent
Judgment:	5 March 2019

RESERVED JUDGMENT OF JUDGE P R GRACE

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[1] This hearing was to determine division of relationship property.

[2] The parties were in a relationship for approximately nine and a half years, from September 2004 through to April 2014. There were two children born to the relationship, now aged 11 and 9 respectively.

[3] The applicant entered the relationship at aged 21. The respondent was aged 27. At the commencement of the relationship the parties lived on a farm which was owned by a family trust which had been set up in 1977 by the respondent's father. The dispute in this case revolves around that trust and a later trust set up in 2006.

Issues

[4] There are several issues that require determination. They are:

(a) What is relationship property? This revolves around the farm, chattels and a company;

(b) The applicant advances a case for seeking an award under s 15 of the Act for economic disparity;

(c) The applicant invites the Court to adjust the Trust pursuant to the provisions of s 44 of the Act; and

(d) The applicant is also seeking past maintenance from April 2014 through until 31 October 2017, less a period of six months for which she received payment of $25,000.

[5] The parties have been unable to resolve these issues despite having been through two settlement conferences. Unfortunately the matter has previously been set down for hearing but, due to the length of time required for the hearing, it was not able to be heard until now.

Applicant's position

[6] The applicant's position is that she was unaware of the fact that the trusts existed, and that the farm was owned by a trust. She claims that there has been deception on the part of the respondent and she considers that she is entitled to half of the value of the farm. She seeks an award to her for chattels which are all owned by the trust and she seeks half of the value of the company. She owns one share in the company and the respondent owns one share and all remaining shares are owned by

the trust. She seeks the award of maintenance and an additional sum by way of economic disparity.

Respondent's position

[7] The respondent's position is that when one analyses the evidence, there is little by way of relationship property and that the applicant is indebted to him for approximately $77,000 to bring about an equal adjustment of relationship property.

The evidence

[8] The original trust (the Pinney Trust) was settled on 9 August 1977 when the respondent was approximately eight months of age. It seems that the respondent was never a trustee of the Pinney Trust. The evidence clearly demonstrates that this was a soundly run trust, with credible trustees who exercised their duties and obligations diligently and there can be no criticism raised in respect of that trust.

[9] One of the beneficiaries under that trust was the respondent.

[10] In September 2000 the respondent and his then partner entered into an agreement to purchase farmland on the West Coast ("the farm"). (A copy of the agreement for sale and purchase has been placed in evidence and shows that the respondent and his then partner signed that agreement in their personal capacities). The respondent and his then partner did not complete the purchase of the farm but, rather, the Pinney Trust completed the acquisition. The evidence from one of the trustees of the Pinney Trust (Lindsay McIntyre) (whose affidavit of 10 November 2015 has come in by consent as Mr McIntyre has subsequently died), is that in the spring of 2000 there were discussions between the respondent and the trust to the effect that the trust would take over the purchase and that the respondent and his then partner would farm the property in partnership.

[11] A valuation was obtained by the Pinney Trust and a market value of $495,000 was obtained.

[12] Mr McIntyre wrote to the respondent and his then partner on 30 October 2000 and confirmed that the Pinney Trust would purchase the land, stock and plant and then on-sell the stock and plant to the respondent and his then partner's farming partnership (at that point to be established). The land was to remain owned by the Pinney Trust. The stock and plant would be owned by the farming partnership ("the partnership").

[13] Settlement of the purchase of the farm was completed on 2 April 2001. The Pinney Trust then leased the land to the partnership for a period of five years. The evidence from Mr McIntyre is that the trustees were to undertake a review of the position at the end of the five-year term and, if satisfied with the way the farm was being run properly, the Pinney Trust would consider transferring the title to any entity in which the respondent was a discretionary beneficiary of a trust and his assets appropriately structured. It was agreed that the partnership would pay the Pinney Trust lease payments of $24,250 per annum plus GST.

[14] In addition, the Pinney Trust was to advance the partnership $107,500, being half of the amount required by the partnership to acquire the stock and the partnership was to borrow the remaining half from a bank, together with any funds required to finance the partnerships' trading activities.

[15] Mr McIntyre's evidence, supported with copies of correspondence written over the years, suggested that the trustees had concerns about the ability of the respondent to manage the farming business and they questioned his business acumen to do so in a profitable way. The Pinney Trust required the respondent to put any business proposals about the farm in writing so the trustees could consider any such proposals.

[16] The trustees of the Pinney Trust had always made it clear to the respondent that he needed off farm income to make the farm viable.

[17] In 2003 the respondent and his then partner separated. The partnership was wound up. The respondent acquired the assets of his partner in the partnership and his partner was then paid out (with money advanced from the Pinney Trust to the respondent so he could pay his partner out).

[18] The applicant met the respondent in February 2004 and she moved in to live with him in October 2004. It is common ground that the qualifying relationship commenced in September 2004.

[19] The applicant had no qualifications. She had worked in a motel, carrying out both administration and cleaning, and had managed the motel for the proprietors when they went on holiday. She had also managed a friend's accommodation facility when her friends had gone on holiday. Following the commencement of the relationship she continued to work off farm because the evidence is clear that the parties needed off farm income to make ends meet.

[20] During 2004 there were exchanges of correspondence with Mr McIntyre to the trustees of the Pinney Trust, and with the respondent. It is apparent that the respondent was approaching the Pinney Trust from time to time with various business propositions which the Pinney Trust did not consider viable.

[21] There was a meeting on 8 March 2004 (before the relationship began) at which time the respondent indicated that he had made a commitment to travel to Canada to undertake guiding which would mean extra farm costs during his absence, but the extra income earned in Canada would meet the extra farm costs. At that point, the trust had advanced the respondent amounts totalling approximately $673,000.

[22] Again in April 2004, (again before the relationship began) the trust accountant wrote indicating that an off farm income of at least $15,000 was required to ensure the farming business was viable.

[23] This issue of off farm income was addressed by the arrival of the applicant on the scene as she was working off farm and was bringing in an income.

[24] On 24 November 2004 the respondent wrote to the trustees with a proposal to lease out approximately seven hectares of land for grazing to bring in income and consider building ensuite accommodation on the farm in an effort to run a B&B or homestay type business. The trustees did not support that proposition as they considered the proposal would lead to over capitalisation of the farm.

[25] Mr McIntyre's evidence is that at a trustees meeting on 2 June 2005, there were discussions about the possible final distribution of the Pinney Trust to the two beneficiaries, the respondent and his brother, and it was agreed in principle that the time was appropriate to transfer the Pinney Trust assets to individual trusts for the two beneficiaries.

[26] Mr McIntyre wrote to the respondent on 10 June 2005 setting out what he proposed to be the appropriate way forward. That was to set up a separate trust so that any assets transferred from the Pinney Trust to the new trust, together with any future inheritance from the respondent's mother and his late father, could be regarded as separate property under the Property Relationships Act 1976. Mr McIntyre advised that, on the advice that he had received, any new trust should exclude spouses or partners.

[27] The result was that the MRW Pinney Trust ("MRW Trust") was established on 27 January 2006. The settlors were the respondent, his mother, Mr McIntyre and John Acland (who had been a trustee in the Pinney Trust). The trustees were the respondent, his sister, Jennifer, and Mr McIntyre. The final beneficiaries were the respondent's children and grandchildren. The discretionary beneficiaries were the final beneficiaries and, importantly, the respondent.

[28] The Deed of Distribution from the Pinney Trust is dated 16 December 2005. The farm was then transferred to the MRW Trust at a book value of $470,000 (rounded). Stock and plant all valued at $311,000 (rounded) was transferred to the respondent. The respondent also received cash of $216,000. He took over his overdrawn account with the Pinney Trust so in effect he had that as a debt to the MRW Trust. The farm has remained in the ownership of the MRW Trust since that time.

[29] The applicant says that she had no knowledge that the farm was owned by a trust and did not find that out until 2011. She claims that she was always led to believe that the respondent owned the farm. For his part, the respondent disputes that claim by the applicant and says that she was always fully aware that the farm was owned by

a trust. He says he kept the applicant informed of any correspondence from the trustees.

[30] Following Mr McIntyre's death in 2016 there has been no replacement trustee appointed. The trustees therefore remain as the respondent and his sister.

[31] As part of the deal done when the Pinney Trust resettled the assets on the MRW Trust, the respondent set up a company and he transferred the livestock and equipment to that company (Te Taho Deer Park Limited**)** ("the company"). The company was incorporated on 1 December 2005. The company was to manage the farm. The company was to be 98 per cent owned by the MRW Trust and one percent each by the applicant and the respondent.

[32] The applicant says that she was taken to either a solicitor or accountant in Greymouth to sign the necessary documentation for the formation of the company to be completed. She says at no stage was she given any independent advice regarding the matter. The result is that she now owns one share. The respondent owns one share and the MRW Trust owns the balance.

[33] In 2006 the respondent, through the trust, undertook alterations to the homestead on the farm so that the parties could undertake a bed and breakfast operation. There are no minutes produced in evidence as to the approval from the MRW Trust to do this work, but the costs of doing the alterations were paid by the trust.

[34] The applicant's evidence is that the bed and breakfast business did not prove the success that the parties had hoped it to be. They had one good year but, following the global financial crisis and earthquakes in Christchurch, tourist numbers declined and it became difficult to make any profit.

[35] The financial records which have been produced for the company show a consistent deterioration in the financial position of the company with the indebtedness increasing as the years went by.

[36] On the other hand, the respondent's credit account in the MRW Trust appears to have increased as time went by. This seems to be largely due to payment of rent from the company to the trust which has allowed that to happen.

[37] The applicant's evidence is that she was the homemaker following the birth of the children and that she cared for the children. The respondent claims that it was an equal shared care arrangement for the children. Whatever the position may have been, the reality is that the applicant remained working around the farm and running the home and caring for the children. The respondent worked on the farm and carried out guiding trips and no doubt played role with the children.

[38] The applicant's evidence is that when she found out in 2011 that the MRW Trust owned the farm and majority of shares in the company, she considered the whole arrangement to be unfair and asked the respondent to take steps to rectify the situation. Although she says he made appropriate responses, nothing was ever done and eventually she decided that there was little point in continuing in the relationship and, accordingly, the parties then separated.

[39] The situation at the end of the relationship was that the company was running at a reasonable loss and the respondent is seeking a contribution from the applicant to offset that loss.

[40] Somewhere along the way all chattels and any equipment not owned by the company has been transferred to the MRW Trust, but no documentation or minutes supporting resolutions to do this have been placed in evidence. The respondent merely says those assets are owned by the MRW Trust and they show up in the books of the MRW Trust.

Submissions

[41] The applicant approaches the matter in two ways. Firstly, Mr Zindel argues that when the respondent and his previous partner entered into the agreement for sale and purchase of the farm, they did so in their own names. The purchase was never carried through in their own names but, rather, was completed by the Pinney Trust. In his submission there is no scope for "or nominee" in the purchase agreement and there

has been no deed of nomination from the respondent and his then partner to the Pinney Trust. In those circumstances it is submitted that the purchaser would be the named purchaser, *Lambley v Silk Pemberton Ltd.*[1] In his submission, there has been no novation and, therefore, it is argued that the respondent was the beneficial owner of the farm and, as such, the farm was relationship property prior to the transfer to the MRW Trust.

[42] If the Court does not accept that argument, then Mr Zindel argues that, in considering the evidence, the respondent has personal rights in relation to the MRW Trust and these rights amount to relationship property. He relies on *Clayton v Clayton.*[2]

[43] He argues that the farm was disposed of into a trust with the intention to defeat the applicant's rights and claims pursuant to s 44 of the Act.

[44] He also argues that there has been a disposition of relationship property into the trust and the company which has the effect of defeating the applicant's claim or rights pursuant to ss 44C and 44F. This property includes contributions made under s 18.

[45] The relationship property includes the respondent's powers under the MRW Trust. In his submission, there should be an adjustment of relationship property in favour of the applicant, having regard to the economic disparity under s 15.

Submissions of behalf of respondent

[46] The respondent argues that this is not a *Clayton* type case and that the rights of the respondent cannot be classified as property in terms of the Act. The Court cannot, therefore, go behind the trust deed.

[47] As a consequence, all property is tied up in the MRW Trust and that there is very little relationship property for division.

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[1] *Lambley v Silk Pemberton Ltd* [1976] 2 NZLR 427 (CA).
[2] *Clayton v Clayton* [2016] NZSC 29.

[48] When considering the company, the respondent acknowledges his debit balance in the shareholders' account and claims that constitutes a relationship debt and the applicant, therefore, owes the respondent money too.

[49] The respondent says the applicant does not meet the criteria that would allow the Court to award her a sum for maintenance. If that were found to be incorrect, then the respondent claims that he is not in a financial position that would allow the Court to make an award in favour of the applicant.

[50] The respondent argues that this is not a s 15 case and, if it was found to apply, any award needs to come from relationship property and, as there is a debt situation only, there is nothing from which to make an award.

Discussion

Novation argument

[51] There can be no doubt that in 2000 the respondent and his then partner entered into the purchase agreement to buy the farm. There is no evidence of any assignment or documentation transferring that agreement to the Pinney Trust.

[52] What is clear from the evidence, however, is that the Pinney Trust was asked to take over the purchase of the farm. That appears to have been discussed by the trustees of the Pinney Trust and the Pinney Trust agreed to take over the transaction, and the evidence is clear that the Pinney Trust settled the purchase. The land was transferred into the name of the Pinney Trust. The Pinney Trust paid the money for the purchase of the farm.

[53] Does that amount to a novation? A novation occurs where two contracting parties agree that a third party, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and the essential element is that all parties consent. A finding of novation is not made lightly – *Stonne Ltd v Ronyx Holdings Ltd.*[3]

[3] *Stonne Ltd v Ronyx Holdings Ltd* (2005) 7 NZCPR 18 (HC).

[54] It seems that the applicant is reliant upon the lack of a written document between the respondent and his then partner and the Pinney Trust to support her contention that there has not been a novation. A written document is not essential for novation to occur. I bear in mind also that the vendors of the farm would probably have required some form of documentary exchange (whether it be by letter, fax, or some other document) in order to account for the change of purchase entity. They would have required that to protect themselves from transferring the property to an entity other than the name which appeared on the agreement for sale and purchase. The change in entity must have been done with the consent and approval of the respondent and his then partner, and with the consent of the Pinney Trust and in my view, with the consent of the vendor.

[55] The evidence of Mr McIntyre makes it clear that the possibility of the Pinney Trust purchasing the farm was an issue which was discussed by the trustees (see clauses [12], [13], [14], [15] of Mr McIntyre's affidavit).

[56] Although there is no evidence from the respondent's former partner, I have no reason to doubt the evidence of Mr McIntyre in that she was fully aware of the Pinney Trust being involved in the purchase.

[57] In those circumstances, I am satisfied that a novation has occurred in this case and that the transfer of the farm to the Pinney Trust was proper and, without any clear evidence to the contrary, I am not prepared to go behind the evidence currently before the Court.

Transfer to MRW Trust (MRWT)

[58] The significance of this is that the formation of the MRWT and the transfer of the farm to the MRWT occurred some 14 to 16 months after the applicant and the respondent commenced their relationship.

[59] What cannot be ignored is the fact that the Pinney Trust which, in my view, cannot be subject to criticism, was the legal owner of the farm at the time the relationship between the applicant and the respondent commenced. The Pinney Trust was efficiently administered. In saying that, I distinguish between the trust being

efficiently administered in the sense of documentation, meetings and overall control by the trustees, compared to the actual day to day management of the farm undertaken by the respondent. The evidence of Mr McIntyre, supported with copies of the correspondence, clearly demonstrates that the trustees of the Pinney Trust had concerns about the business acumen of the respondent, who in their assessment did not appear to have a sound grasp of the financial viability of various proposals which he was putting to the trust. The trust appears to be continually expressing concern about proposals and also the Pinney Trust seemed to be continuously propping the respondent up through advances made from the trust to the respondent to ensure the farm stayed afloat financially. Whilst the farm was owned by the Pinney Trust, the respondent did not have free control. He could not act on his own as he had to run his propositions passed the trustees for their approval.

[60] The resettlement which took place in 2006 was, on the evidence before the Court, carried out in a proper and legitimate fashion. The respondent was a beneficiary in terms of the original Pinney Trust but, significantly, he was not, and never had been, a trustee under that trust.

[61] Mr McIntyre's evidence is that he, Mr McIntyre, and the other trustees, wanted to ensure that the original settlor's intentions (the settlor being the respondent's father) had his wishes adhered to. In other words, the MRWT was set up on similar terms and conditions to that which were contained in the Pinney Trust. The Pinney Trust excluded partners to protect the trust from claims under the Property Relationships Act, and Mr McIntyre's evidence was that a similar approach was taken with the MRWT.

[62] This is not a situation of a part, who is in a relationship and who owns property is divesting himself or herself of that ownership into a trust to protect the property from potential property relationship claims. This is a case where there was one legitimate trust properly established being resettled.

[63] Had the Pinney Trust not been resettled, it would no doubt have remained in place and it would have remained as the owner of the farm and, in my view, there could have been no challenge to the legitimacy of that trust. The resettlement merely

divided the Pinney Trust between the two beneficiaries, thus enabling them to be "detached" from each other, but the terms of the MRWT remain much the same as they had with the Pinney Trust.

[64] The decision to resettle into the MRWT was made by the trustees of the Pinney Trust. The respondent was not one of those original trustees. The respondent was, however, agreeable to the resettlement. The respondent only became a trustee under the MRWT.

[65] Significantly, the respondent asked Mr McIntyre to remain on as a trustee. This tends to suggest that the respondent was not attempting to get himself into a position of virtually sole control of the MRWT. The evidence from Mr McIntyre suggests that the MRWT continued to be run appropriately, at least up until Mr McIntyre's death.

[66] Mr Zindel's argument is along the lines that the respondent was virtually in charge of the MRWT and he could make decisions as he saw appropriate, and virtually could do as he wished.

[67] One of the issues that has implications in this case is, at what point do you consider the argument now being forward by the applicant? Is it to be determined at the date of separation or at the hearing date? I say that because, potentially, a different situation could develop between those two dates as they did here, due to the death of Mr McIntyre.

[68] It seems to me that this issue must be determined at the date of separation at which time Mr McIntyre was still alive and a trustee of the MRWT.

[69] Several things, however, changed dramatically when the MRWT was set up:

(a) The respondent became a trustee whereas he had not been a trustee before.

(b) The respondent was a discretionary beneficiary of the MRWT - cl 1(g).

(c) The trust deed gave the trustees power to advance.

(d) Mr McIntyre, although remaining as a trustee of the MRWT, stepped back and the administration of the MRWT and the administrative matters were taken over by other accountants and lawyers, closer to where the respondent lived so he could use local advisors when required. Mr McIntyre received copies of annual accounts but his evidence suggests he was only maintaining a watching role as there is nothing to suggest he was involved to the extent that he had been with the Pinney Trust.

(e) There is no evidence from the new advisors that anyone was questioning the respondent or keeping a watchful eye on his management of the farm.

(f) Perhaps, most importantly, the trust deed for the MRWT gives the respondent the power to remove and appoint new trustees. Clause 15 of the deed vests the sole power to appoint new trustees in the respondent. Clause 15(d) gives him power to remove any trustee. The only requirement is that there must be at least two trustees. This means the respondent had the power to remove Mr McIntyre and to reappoint a compliant trustee. He could also remove his sister and reappoint a compliant trustee. The fact he did not use that power is irrelevant.

(g) The second trustee currently is the respondent's sister. There is no evidence that she has played an active role in the administration of the trust. She could be described as a "tame" beneficiary. In any event, she could be removed and replaced by someone who would be compliant with the respondent's wishes.

[70] The issue is whether the respondent's powers and entitlements as trustee and discretionary beneficiary give him such a degree of control over the assets of the MRWT that it is appropriate to classify the powers as rights or interests in terms of para (e) of the definition of "property" in s 2 of the Property (Relationships) Act ("the Act").

[71] What practical limitation do the rights of the final beneficiaries have on the respondent's ability to appoint the property of the MRWT to himself?

[72] This does require a close analysis of the actual trust deed. The following are, in my view, relevant:

(a) I have already referred at para [68](f) to his ability to remove Mr McIntyre and his sister and appoint somebody who will adhere to the respondent's wishes. There is nothing that Mr McIntyre or the sister could do to prevent their removal.

(b) That power to appoint a new trustee could also apply to the appointment of a trustee company which the respondent could form, and then appoint that trustee company, of which he could be the sole director, as the other trustee of the MRWT, thus giving him that degree of complete control over the MRWT.

(c) Clause 6 enables the respondent, at any time, to transfer the whole of the trust fund to any discretionary beneficiary, namely the respondent, to the exclusion of others.

(d) The respondent has the power of resettlement in favour of himself – cl 7 of the MRWT.

(e) The respondent also has power to provide for general alteration of the MRWT or of the beneficiaries (cl 12 of the MRWT) save that it is "to the benefit of the trust", himself or his issue, but cannot include any or existing romantic partner.

(f) The power referred to in (d) above is absolute and uncontrolled – cl 13 of the MRWT.

(g) There is no prohibition on self-dealing – cl 17 of the MRWT.

[73] The combined effect of these provisions enables the respondent to deal with the property within the MRWT as though it were his own. He has complete freedom to advance capital to himself, transfer property to himself and to exclude any other discretionary beneficiaries, or indeed the final beneficiaries. Other discretionary beneficiaries, or the final beneficiaries, are not able to challenge decisions made by the respondent.

[74] The Supreme Court in *Clayton v Clayton*[4] came to a finding that these sorts of rights could be classified as relationship property as they fall within the definition of rights, and therefore property, as defined by s 2(e) of the Property (Relationships) Act. I agree with that approach in this case.

[75] This case, however, is clearly distinguishable from *Clayton v Clayton* because the bulk of the property that has been resettled into the MRWT would have been the separate property of the respondent, but for the trust. But just because it is distinguishable does not mean the principle set down by *Clayton's* case has no application.

[76] The resettlement took place during the relationship. The trust deed included a clause that was specifically designed to exclude the applicant as a partner of the respondent. The purpose of that clause seems to have been to pre-empt any claims under the Act.

[77] Relationship property has been applied to the property during the course of this relationship. I say that because any income generated during the relationship, whether it be from hunting or guiding, bed and breakfast guests or off farm income, has gone into the overall sustenance of the farm. The income from the company, which was controlled by the respondent and taken as drawings by the respondent, has also been used in the same fashion.

[78] The evidence is that as at resettlement in February 2006 the farm was valued at $470,000 as that was the figure it was transferred at. A new valuation has been presented in evidence at this hearing indicating that the current value of the property

[4] Above n 2.

is $1,545,000. At the date of separation the value was $1,860,000. It is clear from that, that the value has fallen since 2014 and this fall is reflected in a lower value per acre for the land. The improvements and chattels have remained much the same.

[79] The scheme of the Act is to allow a party to a relationship, who has contributed their efforts to improve the separate property of the other party, to be compensated for those efforts by regarding the increase in value of separate property as constituting relationship property.

[80] The Supreme Court in *Clayton v Clayton* took the view that the value of the rights, which the Court classified as property that belonged to Mr Clayton, equated to the value of the assets of the trust. If one takes that approach, with which I agree, then the value of the property in this case is the value of the most recent report fixed as at November 2018.

[81] I do not consider it appropriate to take the separation date value. The general principle in property cases is to take the value as at the date of hearing, as both parties should share any increase in value as well as any decrease in value. There is no suggestion that any decrease in value has been due to any actions of the respondent but, rather, that decrease is due to market forces beyond the control of either party.

[82] However, one should deduct from that latest valuation the earlier valuation for the farm at the date of resettlement, namely $470,000, and the difference between the two would constitute relationship property for the purposes of the Act.

[83] I have taken this approach because without the trust situation, initially the farm would have been the "separate property" of the respondent and I consider it is only fair that he retains his "separate share" and the applicant only share in the increase to which she has contributed.

[84] If one regards the value of the property of the MRWT as constituting the "worth" for the purposes of the Property (Relationships) Act, then of course the credit balance standing in the respondent's account as at the date of separation would constitute a relationship asset because it has been generated during the relationship.

In the circumstances, that amount is to be considered in its entirety for the purposes of calculating the value of relationship property for the purposes of division.

[85] How does this fit with the provision in the MRWT that spouses or partners are not to benefit or be included as a discretionary or final beneficiary?

[86] That provision was only included in the MRWT because the trustees of the Pinney Trust required that clause as a condition of resettlement.

[87] But the terms of the MRWT give wide powers to the respondent and would allow him to alter the terms of the trust and, as such, he could authorise a distribution to himself as a discretionary beneficiary and then make a payment to his partner if he so wished. That would not amount to a breach of any fiduciary duty he may have owed to the final beneficiaries.

[88] It is also arguable that such a clause is contrary to public policy.

The company

[89] The respondent was the sole director of the company.

[90] When the distribution from the Pinney Trust was completed, the MRWT took over the livestock and the farming assets amounting to $311,120. The debt that was owed by the respondent to the Pinney Trust, amounting $23,307, was also transferred to the MRWT. The plant and stock were then transferred to the company and when that happened the company took over the debt.

[91] Without any evidence to the contrary, it seems that the applicant was not aware of the true nature of the transactions in setting up the company. Her signature does not appear on any documentation. Indeed, her signature would only have been required to acknowledge acceptance of a one share in the company. That, probably, was the purpose of her attending an office to sign documents.

[92] There is no independent evidence to show that someone explained to the applicant that the company in which she was receiving one share was assuming debt

right at the outset. Her evidence is that she thought that she and the respondent were equal shareholders, each holding one share. There is no independent evidence that it was ever explained to her that the MRWT was the owner of the majority shares.

[93] The company was run by the respondent as the sole director. He is the only name that ever appears in the shareholder accounts.

[94] In cross-examination, Mr van Boheman took the applicant through the accounts and in doing so demonstrated that the company had not been a financial success. The debt owing by the company to the MRWT has grown from $23,291 as at 30 June 2007, to $188,071 as at 30 June 2014.

[95] The shareholder account for the respondent had gone from a credit balance of $58,945 as at 30 June 2007, to a negative balance of $108,813 as at 30 June 2014.

[96] The respondent's argument is that the shareholders' account is a relationship debt which, in terms of the Act, must be considered in assessing the division of property and if one does that, then the applicant is indebted to the respondent.

[97] What the respondent is saying is that the applicant has given 10 years of her life to this relationship, contributed the money which she earnt when working off the farm, which money was clearly used to support the couple during the relationship but now, at the end of the relationship, she walks away with nothing and has to pay him a sum of money to equalise the division of property. The respondent is entitled to sit behind the trust asset.

[98] Shareholders' accounts are assets that are to be considered in determining the overall pool of relationship property. If the accounts are in debit then that debit must be offset against any assets.

[99] The respondent's approach is to say that the company accounts show that the company had a negative worth as at 30 June 2014 amounting to $90,991, and two shares of this is $-1819.82 and, in effect, he is asking that that sum be considered in

the overall assessment. That loss figure includes the money owed by the company to the MRWT.

[100] I do not accept that approach. I say that because if the company was liquated, then any shortfall would not fall on the shareholders as the shares have been fully paid up. That, after all, is one of the reasons for having a company.

[101] The shareholders' account is a different matter.

[102] That negative amount must be considered. That is because, if the company is wound up, the shareholder would be required to pay that deficit to the company.

[103] If that is done, and both parties paid half the overdrawn shareholders' account back, then the negative value of the company moves to a positive figure (ie. if $108,813 is introduced into the company account by repayment of the shareholder account, then the negative figure for the company of $90,991 becomes a positive $17,822 and, on the face of it, the applicant would be entitled to half that surplus in the event the company was wound up).

[104] If the applicant was to, therefore, repay the respondent half of that outstanding shareholder account, namely $54,406, that figure should be reduced by half of the $17,822 in [103] above, thus reducing the repayment to $45,495.

[105] But is that justice in the circumstances of this case? The applicant had no say in how the company was operated. The respondent was the sole director and therefore in total control. The respondent is also one of, now, only two trustees of the MRWT. The other trustee is his sister, who is likely to be supportive of the respondent. There appears to be nothing stopping the respondent, acting in his capacity as a trustee, forgiving the company the debt owed to the MRWT. That would benefit the company. It would remove a personal liability from the respondent.

[106] The Act requires fairness. Section 11 requires equal division of all relationship property unless s 13 applies, which is a provision relating to the question as to whether equal division is repugnant to justice and, if so, then the division is to be decided in

accordance with the contributions of each party to the relationship. This is an unusual case where the respondent had total control of the company which meant he had control of all income and outgoings and how the money was applied and recorded for his protection. He also is a trustee of the MRWT, with only his sister as the other trustee. The applicant has no say whatsoever. The respondent can therefore manipulate the situation to his advantage and to the detriment of the applicant, and she has no ability to stop that. So, I regard the concept of equal division of that debt as being repugnant to justice.

[107] How does one then divide the debt in accordance with the contributions of each party to the relationship? Here the applicant has worked for 10 years with nothing to show for it. Yet the respondent retains the control of the company. He is still a trustee and unlikely to remove himself from that position. He seeks to hide behind the trust which, legally, he can do. But it is the overall fairness of the situation that concerns me. Here he wants a contribution from the applicant which will bolster his position in assets, in which the applicant has no control or say.

[108] In the circumstances of this case I do not consider that I have jurisdiction to divide the debt in isolation. The contributions that each party made to the relationship were, in my finding, equal. As a result the debt must be divided equally, with the adjustments as set out in [103].

Insurance policy

[109] There is a life insurance policy on the respondent's life. The policy is owned by the applicant. It has no surrender value. The applicant has been paying the premium on that policy and she wishes to retain the policy. The respondent wants the policy transferred to him. He has not contributed to the policy since separation. This is an issue which seems to have been a major issue between the parties. Both claim they wish to retain the policy for the benefit of their children.

[110] As the applicant has maintained the policy without any assistance from the respondent, then, in my view, having regard to the overall fairness, the policy will vest in the applicant without any adjustment from the respondent.

Motor car

[111] There has been an argument about a vehicle. While the respondent was away on a hunting trip, it was agreed that the applicant could change over a vehicle. So, in July 2012 she traded in a four-wheel drive vehicle for a 2006 Subaru station wagon which cost, in total, $23,000. She took some money from a bank account and that went towards the replacement car and she entered into a hire purchase agreement for the balance.

[112] The applicant kept the car on separation. There is no market value provided for the car. The respondent says it was worth $20,000. The applicant disputes that figure.

[113] The debt to UDC on the car at date of separation was $5,496.

[114] The applicant should keep the car and be responsible for the debt, but the debt as at date of separation is to be considered in the overall calculation of the final adjustment.

[115] The real issue is what value to fix on the car. The applicant has kept and maintained the car since separation. The value should be as at the date of the hearing, which means the vehicle is four years older than it was at separation.

[116] The respondent also seems to want the amount of cash the applicant used on the purchase of the car to be taken into the final calculation. As the car was purchased two years prior to separation, the money was gone well before separation and incorporated into a different asset. The respondent cannot expect to have the amount considered twice.

[117] The vehicle was at least five years old at separation. It is now four years older. It is unlikely to be worth what the applicant paid for it in 2012. I am not able to pluck a figure from thin air as to the worth of the car. If the parties cannot agree as to a value within 21 days of this decision, both counsel are to file written submissions 14 days

thereafter, with evidence supporting the value they claim the car is worth and I will settle the matter on the papers.

Money

[118] An issue has been raised about the respondent keeping undeclared cash in a safe in the house. Both parties appear to accept that there was such cash, but they disagree about the amount.

[119] The respondent seems to be claiming a credit in his favour for an amount the applicant removed from the safe during the relationship. That sort of claim must fail as the division is to be determined as at the date of separation.

[120] The evidence from each suggests the amount was between $5,000 to $10,000 at the date of separation. For division of property, I fix the amount at date of separation at $7,500.

Children's bank accounts

[121] The children had bank accounts at the date of separation. They constitute relationship property and both parties have drawn against those accounts.

[122] The respondent has accused the applicant of drawing against the children's accounts and taking $3,000. The applicant accepts she took that sum but that it was before separation. As it was before separation, that is not to be taken account in the overall division.

[123] The balance of the accounts is to be determined as at the date of separation and the balance split equally between the parties.

Chattels

[124] The respondent says there are no chattels that are relationship property as they are all owned by the MRWT. There are chattels listed in the asset schedule for the 2014 MRWT accounts. There are chattels listed in the asset schedule for the 2007

MRWT accounts, but those chattels appear to relate to the chattels used in the B&B or homestay business. It refers to a couple of sofas and beds. It would be highly unusual to have all chattels used by a couple in their day-to-day relationship to be owned by some other entity. It would not be unusual for chattels used in a business operation, such as a B&B, to be owned by a separate entity.

[125] I do not, therefore, accept that most of the chattels that were part and parcel of day-to-day living were owned by the MRWT. Support for this view comes from the fact that the chattels were insured for $45,000. The chattels listed in the asset schedule of the MRWT are minimal and it is highly improbable that those listed chattels were worth anything like $45,000. That is not the figure which appears in the asset schedule. There must, therefore, have been more chattels.

[126] Because of the way the case has been run, there are no lists of chattels. The respondent merely says they are all owned by the MRWT and that is the end of that. The applicant has no list or valuation as she does not have access to the chattels.

[127] The insurance figure is the only figure available in fixing the value of chattels and I use that to fix the value of the household chattels at $45,000 and direct that the respondent is to account to the applicant for half that sum.

Economic Disparity

[128] The applicant brings a claim pursuant to s 15 for economic disparity.

[129] The applicant argues that there is disparity in earning capacity and that this is due to the respondent's role as sole director of the company that allowed him to create a successful hunting/guiding business. She argues that the applicant gave up her career in tourism and management to build the company with the respondent.

[130] The respondent (following the reasoning in *Scott v Williams*) argues that no award should be made because the applicant did not "give up" her career in tourism or management to build the company.[5] The applicant was merely minding a friend's

[5] *Scott v Williams* [2018] 1 NZLR 507.

place while they went away and her primary employment was part-time in a motel in which she was doing low paid work.

[131] The respondent also argues that any disparity was not caused by the division of functions in the relationship but was due to the parties' respective skill sets.

[132] The third matter raised by the respondent is that any payment must come from relationship property and, as he considers, there is none, then the Court cannot make any award.

[133] This involves a future assessment, looking at the income and living standards of the respondent. If the conclusion is that those are likely to be significantly higher than those of the applicant, then the first step is made out.

[134] The evidence is that the company was running at a loss. I cannot see how it could be described as a "successful" company. The accounts produced, following separation, show the losses continued, so things were getting worse. Other than cash payments that the respondent was likely diverting to his own benefit, and I have no evidence of the extent of that diversion and I cannot speculate, there is no evidence to suggest the respondent will be earning a significantly higher income than he is at present.

[135] The second factor is that the disparity between the parties must have been due to the division of functions within the relationship while the parties were living together.

[136] It seems the applicant was not drawing a salary while in the relationship. She ran the household and was the main provider for the children. She also managed the accommodation side of the business when quests stayed. She would have also worked around the farm, more particularly while the respondent was away on guiding/hunting trips.

[137] The care of the couple's children has had an impact on both parties. Initially the children lived with the applicant, but they now live with the respondent.

[138] There has been nothing to prevent the applicant returning to the workforce since separation. Understandably she has become embroiled in this property dispute and that has overtaken her life, but she has now re-established herself in what I understood to be the tourist industry.

[139] The applicant did not have any qualifications when the relationship began. When the relationship began, she was not on any career path. In saying that, she was still very young when the relationship began. It could be inferred that the respondent wanted someone like the applicant to join him on the farm because she did bring in off-farm income. But the parties set out to improve "their lot" and in doing that, both did have different skill sets. The respondent was a hunter and guide. The applicant managed the administrative side of that business and no doubt ran the farm while the respondent was away.

[140] Taking the above factors in to account, I am not satisfied that the various factors required for the application of s 15 have been made out. There is no significantly higher income being derived by the respondent. If I am wrong, then the causal link between that higher income and the division of functions within the relationship is not established. This is not a s 15 type case.

Spousal maintenance

[141] Mr Zindel argued that the applicant should receive further interim or substantive maintenance from separation to 31 October 2017, less the six months for which she did receive a payment.

[142] The applicant filed both interim and final applications for maintenance.

[143] One of the problems in this case is that it has taken so long to get to a hearing and there has been a "lot of water under the bridge" in the meantime. I say that because the care of the children had altered on occasions. The applicant went onto a benefit at some stage, and the exact dates are somewhat unclear. There is mention of the applicant having a de facto partner, which the applicant denies but does accept she had a male friend for some of the period. The applicant attempted to set up a business in

herbal infusion therapy massage, reflexology and healing treatments in 2014 but she did not generate an income. Her evidence is that she needed to continue training and she could not afford the ongoing cost.

[144] The applicant's position is that she lived in Hokitika. She had some employment but, because of her need to get the children to their school, she was committed to only part-time employment

[145] The applicant's budgets produced over that three-year period show a shortfall of around $25,000 per annum. Some of this includes the applicant's legal fees and accountancy fees.

[146] The respondent's position is that the applicant could have lived in Hari Hari, nearer to the children, and obtained work in the tourist industry in Franz Josef. The applicant says that living at Hari Hari would have meant a 45-minute drive to Franz Josef. While the accommodation may have been less, there would have been increased expenses with travel to Hokitika to shop.

[147] The respondent also claimed he was not in a position to pay maintenance, and he relies on the business accounts to support his low level of income. The applicant does not accept the records show the true position about the respondent's income. The respondent says he was only able to pay the agreed interim maintenance by borrowing.

[148] All in all, the situation and the evidence are unsatisfactory.

[149] The terms of spousal maintenance under s 63 is that an applicant is required to become self-supporting within a reasonable period. It seems the applicant has pursued this claim for some four years, which she is entitled to do, but it does appear to have consumed her and, perhaps, understandably so.

[150] It seems the main thrust of the applicant's claim is for a contribution towards her ongoing legal costs, which is something that is able to be included in an interim award but is not usually included in final award. I regard this current application as being directed at a final award.

[151] In those circumstances I do consider there is jurisdiction to make a final award.

[152] If I am wrong in that, then I would have come to the view that the respondent does not have the financial resources to pay maintenance.

[153] In view of the decision I have come to on the MRWT, I do not consider it necessary to consider the other matters raised by the applicant under ss 44C and 44F.

[154] Costs are reserved.

P R Grace
Family Court Judge