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

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU**

**FAM-2021-044-000389
[2022] NZFC 5711**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	MARC STEVEN WHINERY Applicant
AND	XIANGLING NIU Respondent

Hearing: 16 June 2022

Appearances: S Mitchell/Mr Lynch for the Applicant
K Sun for the Respondent

Judgment: 23 June 2022

**RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to whether s 16 of the Property (Relationships) Act 1976 applies**

Background

[1] The applicant Mark Steven Whinery and the respondent Xiangling Niu entered into a de facto relationship on or about February 2017. They separated on or about September 2020.

[2] On 20 April 2018 the parties entered into a s 21 Agreement ("Contracting Out Agreement") to contract out of the provisions of the Property Relationships Act 1976 ("PRA"). At the time the parties signed the Contracting Out Agreement their relationship was one of short duration i.e. they had been together for about one year at the time.

[3] During the parties' relationship they lived at [number deleted] Geoffrey Road, Torbay, Auckland. That became their family home. They became the parents of two children: one born on [date deleted] 2019 and the second born on [date deleted] 2020.

[4] The Geoffrey Road property at the time of commencement of the relationship was jointly owned by the applicant and his ex-wife. It was accepted by the respondent that the ex-wife was entitled to one half share of the Geoffrey Road property.

[5] With respect to the remaining half share of the Geoffrey Road property owned by the applicant the parties expressly agreed in the Contracting Out Agreement (clause 2.3) as follows:

(a) On 31 January 2018, 33% of the applicant's interest in the Geoffrey Road property would become relationship property;

(b) On 31 January 2019, 66% of the applicant's interest in the Geoffrey Road property would become relationship property; and

(c) On 31 January 2020, 100% of the applicant's interest in the family home would become relationship property.

[6] It is common ground between the parties that because the separation occurred after 31 January 2020 that the one half share formally owned by the applicant in Geoffrey Road became relationship property.

[7] Subsequently it was agreed that the Geoffrey Road property would be placed on the market for sale and the net proceeds of sale were $952,000. The parties agreed that the value of the relationship property interest after payment to the applicant's ex-wife is the sum of $476,000. The applicant's ex-wife has been paid her interest in the property. The remaining $476,000 is held in a solicitor's trust account.

[8] The respondent claims pursuant to the Contracting Out Agreement a one half share in that sum, namely $238,000 together with interest accrued thereon. She relies on the terms of the Contracting Out Agreement and says that is what it provides.

[9] The applicant acknowledges that $476,000 is relationship property pursuant to clause 2.3 of the Agreement. However, the applicant claims that clause 2.3 is silent about how the parties' interest ought to be divided. Therefore, the applicant intends to rely on s 16 of the PRA. He says, in order to achieve justice between the parties there should be an adjustment pursuant to s 16 of the Act which means that the respondent should not be paid anything from the sale proceeds of Geoffrey Road. In the alternative, the applicant says that if the Court determines s 16 of the PRA has been contracted out of, then the applicant claims that the Contracting Out Agreement ought to be set aside pursuant to s 21J of the PRA for causing serious justice to the applicant. Therefore, the first issue that has to be determined by the Court is whether s 16 of the PRA applies or not. It is common ground between the parties that the Contracting Out Agreement does not refer to s 16 of the Act. Both the applicant and the respondent in their evidence say that they were not advised about the existence of s 16 or its effects and implications. Accordingly, it is agreed as follows:

(a) the parties' property relationship agreement dated 20 April 2018 provided a timeline for the applicant's interest in the property in Torbay becoming relationship property;

(b) the agreement does not state that the relationship property will be equally shared;

(c) the agreement does not contract out of the provisions of s 16 of the PRA, nor other sections of the PRA but does preserve property brought to the relationship as separate property subject to clause 2.3.

[10] Section 16 of the PRA says as follows:

16 Adjustment when each spouse or [partner] owned home at date relationship began

(1) This section applies if,—

(a) at the date the marriage, civil union or de facto relationship began, each spouse or partner owned a home; and

(b) each of those homes was capable of becoming a family home; but

(c) at the time when the relationship property is to be divided, the home (or the proceeds of the sale of the home) of only 1 spouse or partner is included in the relationship property.

(2) This section also applies if,—

(a) before the marriage, civil union or de facto relationship began, each spouse or partner owned a home; and

(b) each of those homes was capable of becoming a family home; and

(c) 1 of the spouses or partners (party A) sold his or her home in contemplation of the marriage, civil union or de facto relationship; and

(d) at the time when the relationship property is to be divided,—

(i) the home (or the proceeds of the sale of the home) of the other spouse or partner (party B) is included in the relationship property; but

(ii) the proceeds of the sale of party A's home are not included in the relationship property.

(3) If this section applies, the Court may adjust the shares of the spouses or partners in any of the relationship property (including the family home and the family chattels) according to what it considers just to

> compensate for the inclusion of the home of only 1 spouse or partner in the relationship property.
>
> (4) This section overrides sections 11 to 14A.

[11] Both parties owned property prior to the relationship. The Contracting Out Agreement preserved the property each brought to the relationship as their separate property. This is pursuant to clause 2.1 of the Contracting Out Agreement ("COA"). Schedule A of the Agreement provided for the respondent's separate property which included a residential property situated at [number deleted] Drummond Street, Newton, Wellington and a further property at [number deleted] Steven Street, Mangere East, Auckland. It provided for other incidental property remaining her separate property, and also included two apartments situated in China. Schedule B provided for the applicant's separate property which included a residential property situated in Anchorage, Alaska, USA. That property was sold during the course of the relationship and net proceeds remitted to New Zealand. The applicant says that a significant proportion of those net proceeds were used to meet the parties' expenses. Schedule B also provided for the applicant's KiwiSaver and superannuation funds to remain as separate property together with other incidental items of property.

[12] It is accepted by the respondent that [Steven Street], Mangere is a residential property that the parties could have lived in had they so chosen. That it was capable of being a family home. Similarly, she accepts that [Drummond Street], Wellington also could have been the family home of the parties. At the date of the Court hearing the respondent was living at Drummond Street which is divided into five separate flats. The respondent says that they chose to live in the Geoffrey Road property because in due course they thought the school nearby that property would be better for their two children.

The applicant's case

[13] A summary of the applicant's case is as follows. That Steven Street and Drummond Street were capable of being the family home and they happened to choose the property that he owned prior to the relationship to live in. That pursuant to the Contracting Out Agreement only his property became relationship property. All of the respondent's property remained her separate property. He says that s 16 is intended to

provide a jurisdiction to the Court to address unfairness that arises as a result of one party's home becoming relationship property (by use) when the home of the other party does not. He says the circumstances that he finds himself in, is exactly what s 16 is designed to cover and that if it does not apply it would cause an injustice to him. In the alternative he says that if the Court determines that it is precluded by the Contracting Out Agreement (COA) for making a s 16 adjustment, then he argues the agreement is void pursuant to s 21F due to a lack of independent legal advice being provided about the agreement (i.e. he was not advised about s. 16 and its effects). Alternatively, the Court could set aside the agreement pursuant to s 21J on the basis that the agreement causes serious injustice to the applicant. He argues the injustice arises from the applicant's loss of half of his equity in the family home during the course of their relationship as compared to the respondent's financial position remaining constant along with the receipt of half of the applicant's equity in the home. That is if the Court accepts her position in the case. He further says that the only item of property which was not provided for in the agreement was a Toyota motor vehicle purchased during the course of the relationship for $31,000. He accepts the value of $20,000 (date of hearing) as assessed by the respondent in her affidavit of assets and liabilities. He therefore seeks a credit of one half of that value payment by her to him of $10,000. He says that the Steven Road property is worth $980,000 and the Drummond Street property is worth $2,080,000. That subsequent to the Contracting Out Agreement being signed the respondent had raised further mortgage finance and acquired another property post-separation. He therefore says that the equity in both those properties were considerably in excess of the equity in the Geoffrey Road property. He therefore seeks an adjustment under s 16 by way of setoff at nil. He therefore seeks the outcome for the hearing to be payment to him in the sum of $10,000 for the Toyota and no other adjustment.

The respondent's case

[14] A summary of the respondent's case is as follows. She says that both parties were very aware of what the agreement provided. It provided for the property that she brought to the relationship to remain her separate property. It clearly provided for the interest of the applicant in the Geoffrey Road property to become relationship property after three years of relationship. She says that it was entered as an incentive for her to

remain in the relationship and have two children. She feels tricked by the applicant in raising s 16 which in her view was never intended to apply. She considers the Contracting Out Agreement (although silent on s 16) if read as a whole and taking all the circumstances into account clearly meant that s 16 of the Act is not intended to apply. She considers it would produce an injustice to her if she did not receive a half share of the Geoffrey Road property which is what she says the agreement said. That both parties were given legal advice prior to entering into the agreement and fully understood what the agreement said. She accepts that she did not receive any advice about s 16 but says that the applicant must have because of reference to other provisions of the Act which incorporate s 16 particularly reference to s 13 of the Act. She refers to clause 9.4 which says sections 8, 9, 13 and 15 of the Act were explained to them. She also says that there have been issues with respect to child support and she is critical of the level of care that the applicant has provided for the children. She would be left with a strong feeling of injustice if the agreement was interpreted differently than what she understood to be the case.

Legal submissions

[15] The applicant through his counsel Mr Mitchell submitted as follows. I set out paragraphs 38-46 of Mr Mitchell's closing submissions:

> 38. It is submitted that Section 16 is intended to address a circumstance exactly like this one. That is, where the property of one spouse has been kept separate, but the property of the other spouse has become relationship property.
>
> 39. It is accepted that the Applicant's interest in the home is only a half interest as the property was owned by the Applicant and his former wife. However, it is submitted that Section 16 has been found to apply to properties held by a trust. In these circumstances, so too is a property held in part by another party, able to be the subject of a Section 16 adjustment.
>
> 40. It is submitted that the property in Torbay was the Applicant's home, and that it was always intended that it would become fully his. Ownership is defined in the Act to include any estate or interest in property. 1 In Letica v Letica, the Court found that the remainder interest in a trust that owned the home was sufficient. It is submitted that a half interest in the home during the course of the relationship entitles a party to seek an adjustment, pursuant to Section 16 of the Act.

41 In addition, the Agreement itself provides that the interest is relationship property

42. Section 16 is intended to enable the Court to do justice between the parties. In Shepherd v Shepherd, the High Court said at page 428:

> This section obviously contemplated that where two dwelling houses were suitable as the matrimonial home, and one is chosen, that there will be ongoing disadvantages for the party whose home is so chosen. In this case, it was the proceeds of the wife's home which were used to purchase the matrimonial home, which the section contemplates.

43. In *Besley v Besley*, at pg 133 the Court of Appeal referred to the Court's exercise under Section 16 being "an essentially discretionary assessment."

44. In *Place v Peat*, Hammond J said at p361:

> First, the discretion given under s 16 is just that. The Court can make adjustments to the extent it thinks just. It is not the case that all of a difference must be accommodated; and there may be very good reasons why such should not be, in a given case. It is impossible to know in advance what a Judge might do under a s 16 adjustment.

45. While it is usual for relationship property to be divided equally, the Act sets out circumstances where this is not appropriate. The Agreement is careful to address Section 15 of the Act, and addresses situations such as one party sustains the separate property of the other, it makes no reference to Section 16 of the Act.

46. It is submitted that Section 16 is intending to address a circumstance exactly like this one. That is, where the property of one spouse has been kept separate, but the property of the other spouse has become relationship property.

[16] I set out paragraphs 15-21 of Mr Sun's opening submissions:

15. Section 21 of the PRA provides that:

> Spouses, civil union partners, or de facto partners, or any 2 persons in contemplation of entering into a marriage, civil union, or de facto relationship, may, for the purpose of contracting out of the provisions of this Act, make any agreement they think fit with respect to the status, ownership, and division of their property (including future property).

16. Section 16 of the PRA provides that if, at the date the relationship began, each partner owned a home capable of becoming the family home, but only one of those homes is included in the relationship property to be divided, the Court may adjust the division of relationship property to compensate one party.

17. However, s 16 will have no effect if this clause has been contracted out of in accordance with s 21.

18. Section 21J(1) of the PRA provides that the Contracting Out Agreement may be set aside if the Court is satisfied that giving effect to that agreement would cause serious injustice.

19. When exercising its discretion under s 21J(1), the Court must consider the following factors (as set out in s 21J(4) of the PRA):

    (a) the provisions of the agreement;

    (b) the length of time since the agreement was made;

    (c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made;

    (d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):

    (e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement; and

    (f) any other matters that the Court considers relevant.

20. With respect to the definition of "serious injustice", Paterson J held in *Clark v Sims*:

    A Judge, in my view, should not set aside an agreement unless there has been a substantial injustice of sufficient gravity for the Judge to determine that in conscience the Court should intervene. That one party can establish that he or she did not receive what she may have received under the provisions of the Act, will not in itself be a sufficient ground to set aside an agreement, although gross inequality may well be a factor which weighs heavily in the determinative process of the Courts.

21. The Court of Appeal stated in *Harrison v Harrison*:

    at least for contracting out agreements, 'serious injustice' is likely to be demonstrated more often by an unsatisfactory process resulting in inequality of outcome rather than mere inequality of outcome itself.

Judgment on whether s 16 of the PRA applies

[17] If the authors of the Contracting Out Agreement intended for the parties to contract out of s 16, the agreement would have said so. A simple clause could have included a clause to the following effect:

> Section 16 of the Act is not to apply and neither party will seek an adjustment pursuant to s 16.

[18] No such clause is in the Contracting Out Agreement. Neither party was alerted to it and it was not taken into account. As a result the respondent feels tricked because her clear understanding was the agreement provided she would get half of the house after 3 years of relationship and her property would remain separate. Her lawyer says the parties intended to contract out of the Act. If s 16 applies then the result would be the same as if the agreement had never existed. Therefore he raised the question, what did the parties intend to be implemented. The problem with that submission is that the PRA is a code – s 4. The statute applies unless specifically contracted out pursuant to s 21. Section 21D of the Act provides jurisdiction to the parties to contract out of classification and division. I accept Mr Mitchell's submissions that the Contracting Out Agreement deals with classification but not division. In my view I have no power or jurisdiction to exclude s 16 unless the Contracting Out Agreement specifically excludes it and provides for it not to apply. The Court has to interpret the agreement as it reads. There was no ambiguity or contradiction in the agreement. I do not have to look at the evidence outside the agreement to resolve any ambiguity or internal conflict. The agreement is clear on its face. It provides for a regime of increasing interest in the Geoffrey Road property over a period of three years of the de facto relationship to a point where the applicant's interest in the property becomes a 100% relationship property after three years. The agreement preserves the property that each party brought to the relationship (excluding Geoffrey Road) and preserves it as separate property. It does not exclude s 16. The Act must apply. In my view I am required to exercise the discretion vested in the Court pursuant to s 16. I cannot see how it can be avoided despite Mr Sun's best efforts to try and persuade the Court to the contrary.

[19] In determining the way to exercise the discretion I must take into account the financial situations of the parties and property at the commencement of the relationship. At the commencement of the relationship the respondent owned two residential properties in New Zealand, held bank accounts and owned two properties situated in China. The applicant at the commencement of the relationship owned half share in the Geoffrey Road property along with funds from a property he owned in Anchorage. In his evidence on 11 October 2019 he held $248,500 being the proceeds of sale of that property. His evidence is that at the end of the relationship he had $35,000 left of that sum remaining. He therefore says he spent $213,500 during the course of the relationship. If s 16 discretion is not exercised the effect will be that the respondent at the end of the relationship is left with all the assets that she brought in to it together with the rental income that she received and a further additional $238,000. That would mean that for the applicant, he entered into the relationship with half of Geoffrey Road worth $476,000 and the Anchorage funds of $248,500; a total $724,500. If the respondent's position was accepted Mr Mitchell submits a loss for the applicant of $424,500 and a gain to the respondent of $238,000. This would mean a significant financial loss to the applicant while the relationship would have provided a substantial financial benefit to the respondent. Also in addition the applicant gave evidence that during the course of the relationship he used his income (and the sale proceeds of the Anchorage property) to meet the expenses of the parties. During cross-examination my view is that the respondent largely accepted that position. During the relationship the parties kept their finances separate. Also from cross-examination it was clear that the respondent received in excess of $3000 per week from her rental properties. She had the confidence to acquire another property subsequent to the relationship and raised mortgage funds collaterally secured and she has a mortgage outstanding of approximately $1 million. It is accepted that the properties have rates and other outgoings and need to be maintained but I am satisfied from answers to the questions that the rental payments met those outgoings and provided an excess to her above outgoings. In my view the position of the applicant should be the same as for the respondent. That each should preserve the separate property they brought to the relationship. With respect to the expenditure of the Anchorage proceeds of sale this was because of decisions made by the applicant during the course of the relationship. I do not consider those decisions can be revisited but I am satisfied that the interest that the respondent has in the Mangere property and the

Wellington property well exceed the interest that the applicant had in the Geoffrey Road property and the most appropriate adjustment pursuant to s 16 is to confirm that the respondent does not have any interest in the proceeds of sale of Geoffrey Road. I am satisfied that if the Mangere property had been chosen to be the family home and Geoffrey Road remained the applicant's separate property then the equity in the Mangere property would have exceeded equity in the Geoffrey Road property. In addition, the only other item of relationship property not provided for in the agreement is the Toyota motor vehicle purchase by the applicant from proceeds of the Anchorage property which he accepts is worth $20,000 as assessed by the respondent in her affidavit of assets and liabilities. I am satisfied therefore there should be an adjustment of $10,000 in his favour to equalise that item of relationship property not provided for in the agreement.

[20] Accordingly, I order the respondent to pay the applicant in full and final settlement of their relationship property $10,000. I make an adjustment pursuant to s 16 and order no further adjustment between the parties with respect to the proceeds of sale of Geoffrey Road, Torbay. I am satisfied that if the respondent was to receive one half of the net proceeds of sale it would produce an injustice to the applicant.

[21] I did consider whether to freeze the payment of the proceeds of sale for a period to enable the parties to negotiate some certainty for payment of child support but I am satisfied on the basis of Mr Mitchell's submissions that there is no evidence to suggest that the applicant will not pay his child support and intends to do so. A formula assessment is in place and it is now for the Inland Revenue Department to enforce child support if that becomes necessary. With respect to the parenting arrangements that is a matter that is for the parties to resolve. The respondent claims the quality of care provided by the applicant is poor but those sort of issues have to be resolved by appropriate proceedings under the Care of Children Act which are not before the Court.

[22] Accordingly, in summary the Court orders as follows:

(1) Pursuant to s 16 I make an adjustment in favour of the applicant and confirm that no portion of the proceeds of sale of Geoffrey Road are to

be paid to the respondent on the primary grounds that her interest in two residential properties (one or both), either of which are capable of becoming the family home, well exceed the interest that the applicant has in the Torbay property;

(2) I order the respondent to pay to the applicant the sum of $10,000 to equalise the relationship property not provided for in the agreement; otherwise the Contracting Out Agreement applies in full force and effect but because it is silent on s 16 the Court imports s 16 as required by the Act and exercises a discretion pursuant to that section accordingly.

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Judge DA Burns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhenga: 23/06/2022