

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

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT  
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**IN THE FAMILY COURT  
AT PORIRUA**

**I TE KŌTI WHĀNAU  
KI PORIRUA**

**FAM-2017-091-000380  
[2018] NZFC 7378**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[KERSTIN HUBER] Applicant
AND	[DIETER HUBER] Respondent

Hearing: 24 September 2018

Appearances: B Bevan for the Applicant  
R Dean for the Respondent

Judgment: 15 November 2018

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**RESERVED JUDGMENT OF JUDGE J A BINNS**

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[1] Mr and Mrs [Huber] have not been able to agree on the status, value and division of their relationship property or whether compensation should be paid by Mr [Huber] for “occupation rent” under s 18B or s 15 of the Property (Relationships) Act 1976 (“the Act”) from his share of relationship property.

[2] The parties were married in Germany on [date deleted] 1996. Although they lived physically apart from sometime in [late] 2013 when Mrs [Huber] left New Zealand to have cancer treatment in Germany, they agreed that the date of their separation is [date deleted] 2014. This was when Mrs [Huber] returned to New Zealand. Before then, it was at least Mrs [Huber]'s intention, that they would resume their relationship, although Mr [Huber] says he informed Mrs [Huber] in March 2014 of his desire to end their marriage. Their marriage was dissolved on [date deleted] 2018.

[3] The parties have three children; [Laura], approximately 19, [Andrea], who is 16 and in year 12, and [Julia] aged 9. The two younger girls are living with their father in the former family home.

[4] Ms [Huber] wishes to realise her interest in the relationship property, specifically in the former family home, at [address deleted]. She seeks an order for its sale. Mr [Huber] wants the opportunity to buy out Mrs [Huber]'s interest in the family home once the disputed matters are determined and Mrs [Huber]'s interest in relationship property is quantified. Although an order for sale was sought, in evidence Ms [Huber] did not seem to oppose Mr [Huber] purchasing her interest provided settlement can occur reasonably quickly.

[5] The family home was purchased by the parties in October 2013 for \$421,000. Settlement of the purchase occurred just before Mrs [Huber] left New Zealand to undergo cancer treatment in Germany.

[6] Shortly before the purchase, Mrs [Huber] received the sum of \$100,000 from her health insurance provider; \$80,000 of which was used towards the purchase price. The balance was borrowed from Westpac bank. The rest of the insurance proceeds were used to pay debt, doctor's fees and Mrs [Huber]'s travel costs.

[7] There is huge distrust between the parties and significant conflict between them. Mrs [Huber] raises issues about Mr [Huber]'s infidelity during the marriage. She has significant regret about decisions made during the marriage. She holds Mr [Huber] responsible for a number of past decisions, including emigrating to

New Zealand in 2008, persuading her to have alternative cancer treatments and the decision to buy the family home, although I note she did sign the agreement for sale and purchase and presumably the related loan and mortgage documents.

[8] After moving to New Zealand, Mrs [Huber] was pregnant with [Julia] and felt alone in New Zealand. The first two years were awful for her. She had no income and no friends. She found a job at a [facility] as a part-time [job deleted] and in 2011 she did some [other] work.

[9] After completing her cancer treatment in Germany, Mrs [Huber] arrived back in New Zealand on [date deleted] 2014. There was an almost immediate dispute between the parties which led to the police being called. Mr [Huber] obtained a temporary protection order against Mrs [Huber] on [date deleted – 12 days after Mrs Huber’s return] 2014 following events which occurred. I do not know whether the order was made final.

[10] Mrs [Huber] was concerned that after an eighteen year marriage she was excluded from the family home and not able to provide care for the children. She had lost the support of her husband. She says that by then, he had “replaced me with a new relationship....”.

[11] I have limited knowledge of the proceedings between the parties relating to care of their children or domestic violence. Based on brief cross-examination during the hearing, it appears the children have suffered psychologically and have a strained relationship with their mother. There has been an allegation that Mrs [Huber]’s current partner has behaved in a sexually inappropriate way towards [Julia]. It is common ground that the children have been involved at different times with Child and Adolescent Mental Health Services.

[12] Mrs [Huber] gave evidence that she had no contact with [Julia] between September 2017 and March 2018 and has had supervised contact with [Julia] since then. She has limited contact with [Andrea]. [Laura] is described as being anxious. I believe she now lives independently and manages her relationship with her mother herself.

[13] The issues for determination are:

- (1) The values of certain items of relationship property, namely:
  - (a) the parties' [van],
  - (b) gold and silver coins in the possession of Mr [Huber],
  - (c) family chattels in the possession of Mr [Huber], and
  - (d) the family home where Mr [Huber] and the two youngest children currently reside.
- (2) The status and value of Mrs [Huber]'s German [telecommunications company] fund.
- (3) Competing claims for compensation under s 18B of the Act in relation to Mr [Huber]'s post-separation contributions in respect of the former family home and Mrs [Huber]'s claim for occupation rent.
- (4) Whether Mr [Huber] should be ordered to pay Mrs [Huber] compensation from his share of relationship property, under s 15 of the Act and if so, the quantum of any order.
- (5) Whether Mr [Huber] can buy out Mrs [Huber]'s interest in the former family home and if so, what sum should be paid? Alternatively, whether an order should be made for the sale of the former family home?

#### **Value of the [Van]**

[14] The motor vehicle concerned is a [year and make deleted] van which was purchased during the marriage in July 2013, for \$8,900.

[15] Mrs [Huber] asks me to adopt that value for the purposes of division. Alternatively, she proposes a value of \$4500 to \$5000.

[16] Mr [Huber] contends that a recent offer to purchase the van for \$2000 reflects the current market value and should be adopted.

[17] The only information to assist me in determining the value is:

- (a) The purchase price of \$8990.
- (b) A value of \$1398, being the average of estimates provided by Turners Auctions for a [year and make deleted] van.
- (c) Mr [Huber]'s opinion contained in a letter from his lawyer dated 7 October 2016 that the van could sell for between \$4,500 and \$5,000.
- (d) The offer in or about June 2018 to purchase the van for \$2000.

[18] In respect of a motor vehicle, I would usually favour a valuation date at the date of separation as it is a depreciating item and I consider the party who does not have possession or use of the vehicle should not be disadvantaged by any reduction in value which would likely occur, if a date of hearing value was used.

[19] Mr [Huber] has had the use of the van and has maintained it at his cost. It has also been necessary for him to have the vehicle to provide transport for the children.

[20] It would be unfair and inconsistent with the principles in s 1N(a) and (c) of the Act which refer to equality and achieving a just division, to adopt the purchase price as the value, as this was about a year before separation. Furthermore, I consider the valuation from Turners is too low as it was based on an online search for a 1999 vehicle and the van was not inspected to assess its condition or to verify its mileage.

[21] While the value of \$2000 is recent and best reflects the current market value, to adopt that value so long after separation would be unfair to Mrs [Huber], even though both parties were willing to purchase the van at that price and Mrs [Huber]'s other proposed value is based only on Mr [Huber]'s opinion.

[22] I am left to make an assessment of the value of the van at the date of separation, as best I can, in the absence of reliable evidence of value. While I acknowledge that Mr [Huber] has no expertise as a valuer of motor vehicles, I consider that he made appropriate enquiries before instructing his lawyer to write the letter on his behalf.

[23] I take into account, the purchase price one year before separation, Mr [Huber]'s opinion of the value and the online valuation from Turners in determining the value of the [van] at the date of separation as being \$4000.

### **Value of gold/silver coins**

[24] While cash held by the parties at separation was listed as an issue for determination, it was agreed that Mrs [Huber] would receive half of the gold and silver coins which remain in the possession of Mr [Huber].

[25] What has impeded resolution of this issue is that Mr [Huber] divided up the coins himself. Because Mrs [Huber] does not trust Mr [Huber] and because all issues were not resolved and required a hearing, Mr [Huber] has not implemented the agreement.

[26] I direct that Mr [Huber] is to take all the gold and silver coins to Mr Bevan's or Ms Dean's office within 21 days at a pre-arranged time and date. In the absence of agreement about where to meet, the parties are to attend the Family Court at Porirua. The parties are to attend (with their respective lawyers in attendance if they wish) and are to alternate choosing a coin, until they have an equal number of coins in their possession. Mrs [Huber] shall have first choice. Once divided, all the coins each party have in their possession will represent their respective one- half share.

[27] The process I have directed will ensure a fair and equal division, consistent with the purposes and principles of the Act. As such the value of the coins is not relevant to the calculations.

## **Family Chattels**

[28] Mrs [Huber] considers that it is unfair that Mr [Huber] has received the bulk of the family chattels and has had possession and use of them since separation which is now a period of over four years.

[29] The difficulty in determining a monetary sum to compensate Mrs [Huber] is that there is no evidence provided by her of the value of the family chattels which remain in Mr [Huber]'s possession.

[30] Mr [Huber] indicates that the chattels are old, second-hand, and are of limited value.

[31] Mrs [Huber] has adopted values based on the purchase price of various chattels and then used a percentage figure for depreciation. The sums used indicate that the chattels are very old. The items are relatively modest.

[32] It appears from correspondence that Mrs [Huber] did request a cup and some medical books, which have been provided to her. She also received some pictures, a bread cutting machine, a sewing machine, and sewing magazines. There was a couch which was auctioned. The sale proceeds of \$599 were to be divided equally between the parties, however Mrs [Huber] has not received her share.

[33] I accept that the family chattels are relationship property, however in the absence of a valuation I decline to make a monetary order to compensate Mrs [Huber], other than in relation to the couch proceeds. I take into account, also the age and condition of the chattels and the interests of the children to have a home, furniture and appliances in reaching my decision.

[34] I order that:

- (a) Mr [Huber] is to pay Mrs [Huber] the sum of \$299.50 representing half the proceeds of sale of the couch, and

- (b) each party is to retain the chattels which are currently in their possession or under their control as their separate property.

### **Value of Family Home**

[35] Mrs [Huber]'s position is that the family home has a value of \$640,000. She relies on a valuation from Mr Nathan Stokes who is a Registered Public Valuer and her statement in her updating evidence where she said:

Since the last valuation, in May 2017, the value of the house has increased almost 11 percent, from \$550,000 to \$610,000. On that basis I would expect, by the date of the hearing, the value would have increased by another 5% to \$640,000

[36] Although an affidavit from Mr Stokes was not provided, the best evidence of value is \$610,000 as per his report which is annexed to Mrs [Huber]'s affidavit sworn on 27 October 2017. No other evidence of value was provided.

[37] Mrs [Huber] has no experience or qualifications as a valuer. Her opinion expressed in her affidavit is not supported by valuation evidence or an updated report from Mr Stokes who could have provided updating information when he provided an assessment of the average market rental for the former family home.

[38] While I accept that in the current economic climate the value of the family home may have increased, it is not for me to assess the value as I have no expertise as a valuer and no knowledge of the current condition of the former family home.

[39] Based on the valuation report provided, I determine that the value of the former family home is \$610,000.

### **The German [telecommunications company] Fund**

[40] The parties have agreed on the value of Mrs [Huber]'s superannuation policy with [a telecommunications company] in Germany ("the fund") as being NZ\$37,784.30.

[41] Mrs [Huber] contends that because the sum payable is not realisable until she is either 60, or on her death, that the fund should be excluded from the relationship property pool. She seeks that the fund is to remain her separate property without adjustment to Mr [Huber].

[42] Mrs [Huber] provided an email from Mr [Schubert] which suggests that payments from the fund may be realised in certain circumstances. In relation to the full income reduced pension, Mr [Schubert] notes that in the event of a disability, a pension from the fund is available as a monthly payment, a lump sum, or in agreed instalments. He recommended asking [the telecommunications company] for more precise details on this point. However, that has not been followed up by Mrs [Huber].

[43] Mr [Schubert] also pointed out that the policy definition of the term “disability” needed to be clarified. He stated that depending on the definition and whether it includes terminal illness, it may be possible to make a claim for immediate payment from the fund of a full lump sum.

[44] Mr [Huber]’s counsel submits that Mr [Huber]’s Kiwisaver account can only be accessed in limited situations, but otherwise, cannot be paid out until Mr [Huber] is aged 65 or upon his death. She points to the inconsistency in approach by Mrs [Huber] and submits that Mrs [Huber]’s interest in the [telecommunications company] fund should be treated in the same way as Mr [Huber]’s KiwiSaver account.

[45] In cross-examination Mrs [Huber]’s approach to this issue was inconsistent. The exchange was as follows:

Q : Do you agree that if the Court finds that no value should be attributed to your pension (the fund) that the Court should make the same finding in respect of Mr [Huber]’s Kiwisaver?

A : I’m happy with that. Before all these things started I had a talk with [Dieter] two years ago like some things, that we don’t touch Kiwisaver, we don’t touch pension (the fund) because of the issues to get the money out and he agreed to that so I was happy with that.

[46] In my view, there is no reason to differentiate between Mr [Huber]'s Kiwisaver account and the fund. Both have a value to be paid out at age 65 (or 60) or on death. Both are relationship property. It would not accord with the purposes and principles of the Act (referred to in the next section), for Mrs [Huber] to retain the fund which is worth considerably more than Mr [Huber]'s Kiwisaver account, without an equalising adjustment.

[47] I therefore determine that the fund with [the telecommunications company] in Germany is relationship property at the agreed value of \$37,784.30 and it must be brought into account.

### **Section 18B claims**

[48] Mrs [Huber] seeks compensation for occupation rent in relation to the family home for the period from separation until the hearing. The agreed calculation is 220 weeks at \$563.35 per week, making a total of \$123,937.

[49] Mr [Huber] says his post separation contributions should be off set against this claim. He seeks no adjustment by either party.

[50] Sections 18 and 18B provide:

#### **18 Contributions of spouses or partners**

- (1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:
  - (a) the care of—
    - (i) any child of the marriage, civil union, or de facto relationship:
    - (ii) any aged or infirm relative or dependant of either spouse or partner:
  - (b) the management of the household and the performance of household duties:
  - (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

- (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
  - (e) the payment of money to maintain or increase the value of—
    - (i) the relationship property or any part of that property; or
    - (ii) the separate property of the other spouse or partner or any part of that property:
  - (f) the performance of work or services in respect of—
    - (i) the relationship property or any part of that property; or
    - (ii) the separate property of the other spouse or partner or any part of that property:
  - (g) the forgoing of a higher standard of living than would otherwise have been available:
  - (h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
    - (i) enables the other spouse or partner to acquire qualifications; or
    - (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.
- (2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

#### **18B Compensation for contributions made after separation**

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

- (3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

Section 18B must be considered, in light of the guiding purposes and principles of the Act set out in ss 1M and 1N:

**1M Purpose of this Act**

The purpose of this Act is—

...

- (b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:
- (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

**1N Principles**

The following principles are to guide the achievement of the purpose of this Act:

...

- (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
- (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
- (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.”

[51] In making my determination, I draw guidance from several cases. In *E v G*, the Court determined that if one partner makes their share of capital in the family home available to the other partner, this will qualify as a contribution under s 18.<sup>1</sup> However, as highlighted in *C v C*, the Court also needs to be satisfied that it is just in all the circumstances to make an order under s 18B.<sup>2</sup>

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<sup>1</sup> *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006.

<sup>2</sup> *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008.

[52] If children continue to live in the family home, this can sometimes affect whether the Court awards compensation for occupation rent. In *Lawrence v Baker*, the High Court upheld the following analysis of the Family Court:<sup>3</sup>

I decline to make an order for occupation rental. I consider that the needs of the children to have a roof over their head and the husband's responsibility to ensure that that occurred extinguishes any right or claim to any adjustment for the wife's use of his capital in the home. There are other compensatory factors available to the husband. The Australian property will be sold at current market and so he will benefit from any increase in value. The superannuation fund will be valued at the date of separation without interest adjustment which is another form of compensation to the husband. He has had the benefit of significant income since separation. Whilst he has acted responsibly in maintaining the home and the wife and children nevertheless this is part and parcel of his ongoing responsibility. If I ordered the wife to pay some form of occupational rent it would be a way of her effectively paying him for what he should have done as part of his responsibility. I consider her devotion to the children and providing for them emotionally and physically rules out any adjustment in the husband's favour. I consider that her contributions as defined by s 18 equate with or match the husband's financial contributions by way of direct financial support or indirect financial support by way of the home not being sold.

[53] The contributions made by one partner may entirely offset or at least reduce the amount of compensation ultimately awarded to the other partner. In *Devery v Manukonga*, Randerson J noted that “it is within the discretion of the Court to allow, as an offset to any such claim, an amount for occupational rent in whatever form the Judge considers appropriate”.<sup>4</sup>

[54] Even if a claimant establishes that he or she made a qualifying contribution during the relevant period, the Court will not make provision for compensation unless it considers it is just to do so.

[55] If a s 18B claim is successful, the approach to assessing the quantum of compensation is not a precise science. A global assessment of the post-separation contributions of each partner will be necessary. In *Chong v Speller*, the High Court noted that an actuarial approach to quantifying compensation will generally not be helpful.<sup>5</sup>

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<sup>3</sup> *Lawrence v Baker* [2013] NZHC 2378.

<sup>4</sup> *Devery v Manukonga* HC Auckland CIV-2003-404-5871, 21 May 2004 at [9].

<sup>5</sup> *Chong v Speller* (2004) 24 FRNZ 273, [2005] NZFLR 400 (HC) at [40].

[56] Mr [Huber] and the children remained living in the family home after separation. He says that he should be compensated for payments he has made in relation to the family home regarding rates, insurance and mortgage. It is agreed that the payments he made for rates, insurance and mortgage total \$123,679.60 at \$562.18 per week. The figure for reduction in mortgage principal is agreed at \$46,541.08.

[57] Mrs [Huber]'s position is that while the sums for occupation rent and the outgoings paid are agreed, she does not consider that the respondent should receive an offset for all the outgoings he paid. Mrs [Huber]'s claim is based on a deduction in Mr [Huber]'s favour for rates, insurance and for the mortgage principal, but not for any interest payments in respect of the mortgage.

[58] In terms of offsetting Mr [Huber]'s position with her own, Mrs [Huber] claims the nett sum of \$23,400.30 being one half of the difference, calculated as follows:

Occupation rent claimed by Mrs [Huber]	\$123,937.00
Less allowance to Mr [Huber] for rates, insurance and mortgage principal paid by him	\$77,136.40
Balance	\$ 46,800.60
½ share claimed by Mrs [Huber]	\$ 23,400.30

[59] Mr [Huber] made payments totalling \$123,679.60. Mr [Huber] says that once offset against the applicant's claim, he should pay no compensation to Mrs [Huber]. He points out that he has had the sole financial responsibility for the children since the date of separation and has met the costs of their day to day living, their school fees, uniforms, health and orthodontal work for the parties' daughter (until [Laura] left home). Mrs [Huber] has paid no child support since separation.

[60] At all times since [month deleted – the date of the parties' separation] 2014, Mr [Huber] has continued to live in the family home with the children and has solely contributed to the ongoing maintenance of the family home. At the hearing Mr [Huber] was not permitted to produce receipts or invoices for repairs on the home, however his evidence in his affidavit of assets and liabilities was that he had paid for repairs to

pipes, the back patio and stairs totalling \$25,090.34. While not supported by invoices this evidence was not substantially challenged other than in terms of the mistrust by Mrs [Huber] which was evident in her evidence.

[61] In respect of child care, s 18B was intended to be a way of providing to a child caring spouse a capital sum which recognizes the fact that day-to-day care of the children has fallen on one parent, by virtue of the separation.<sup>6</sup>

[62] I accept that the issue should not be determined according to a strict mathematical formula. I have taken into account these key factors:

- (1) Mr [Huber] has provided care to the children post separation without child support from Mrs [Huber].
- (2) Mr [Huber] has maintained the family home.
- (3) Mr [Huber] has paid all the outgoings on the home and paid for some repairs and maintenance as well as accommodation for Mrs [Huber] for 6 weeks after separation.
- (4) Mr [Huber] is not seeking compensation for one half of the reduction in the mortgage principal (other than being offset against the occupation rent claim).
- (5) Mrs [Huber] has been without her interest in the home for a long time and has had to pay to re-house herself elsewhere, for a period from 6 weeks after separation up until January 2016 when she moved in with her de facto partner. However, the sums paid for rent or board were not provided.

[63] I have considered what is just in all the circumstances.

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<sup>6</sup> *JA v SNA [Economic disparity]* [2008] NZFLR 297 (HC).

[64] The matter is finely balanced. Had I been given information about Mrs [Huber]'s expenditure required to provide a home for herself post separation, I may have been persuaded to make a nominal payment to her.

[65] However, primarily because Mrs [Huber] will benefit from the reduction in mortgage principal of \$46,541.08, the increase in value of the former family home as at the 2 April 2018 valuation date, due to market forces and Mr [Huber]'s role in maintaining the home and caring for the children since separation without practical or financial input from Mrs [Huber], I have decided to adopt the approach taken by Mr [Huber] as being just in all the circumstances. While Mrs [Huber] would have preferred to have greater practical involvement in caring for the children after separation, that was not the reality and it needs to be recognised.

[66] Accordingly, I make no order under s 18B in favour of either party.

### **Section 15 claim**

[67] Mrs [Huber] seeks a payment from Mr [Huber] out of his share in relationship property, pursuant to section 15 of the Act.

[68] Section 15 provides:

This section applies if, on the division of relationship property, the Court is satisfied that after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse are likely to be significantly higher than the other spouse or partner because of the effects of the division of functions within the marriage, civil union or de facto relationship while the parties were living together.

In determining whether or not to make an order under this section, the Court may have regard to –

- (i) the likely earning capacity of each spouse or partner.
- (ii) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship.
- (iii) any other relevant circumstances.

If this section applies, the Court, if it considers it just, may, for the purpose of compensating party A –

- (a) order party B to pay party A a sum of money out of party B's relationship property.
- (b) order party B to transfer to party A any other property out of party B's relationship property.

This section overrides sections 11 to 14A.

### **Section 15 assessment**

[69] The elements of the operation of s 15 are helpfully set out in *X v X* as follows:<sup>7</sup>

- (a) The jurisdictional foundation is a disparity in both living standards and income.<sup>8</sup>
- (b) The disparity must be significant as between the parties. It is a subjective assessment. What the community at large enjoys is irrelevant as to living standards. As to income a \$20,000 disparity would be significant for low income earners but not for high income earners.<sup>9</sup>
- (c) The purpose of the award is compensatory.<sup>10</sup>
- (d) Income should be considered in the round from all periodic streams of money. The assessment is of potential income so that actual income may not be the relevant starting point.<sup>11</sup>
- (e) There is no onus of proof in the strict sense it being for the court to be satisfied.<sup>12</sup>
- (f) The disparity must be caused by the division of functions but it is presumed that there is mutuality to the election of roles such that the Court need not enquire into the merits of the decision. Evidence of

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<sup>7</sup> *X v X* [2009] NZCA 399, [2010] 1 NZLR 601.

<sup>8</sup> At [77].

<sup>9</sup> At [77], [83] and [93].

<sup>10</sup> At [77].

<sup>11</sup> At [88] and [200] (majority decision).

<sup>12</sup> At [95] and [96].

reluctance to work or preference of leisure may be relevant to the discretion rather than causation.<sup>13</sup>

(g) The exercise is discretionary and therefore not a formulaic one.<sup>14</sup>

[70] When determining whether to make an award under s 15, the Court may have regard to the likely earning capacity of each partner, daily child care arrangements and any other relevant factor pursuant to s 15(2). I note that the date of assessment is made as from the date of separation pursuant to the Court of Appeal decision in *X v X*<sup>15</sup>.

[71] The section authorises the Court to provide compensation from relationship property where the income and living standards of one party is significantly higher than the other party as a result of the division of functions within the relationship.<sup>16</sup>

[72] An award under s 15 will only be made if the Judge determines that it is just to make an award for the purpose of compensating party A. Factors that may be assessed in determining whether an award is just include:

- (a) Any unfairness in making a substantial redistributive award.
- (b) Whether the disparity is likely to be long term or short term and whether the disparity might be more appropriately redressed by awards of periodic or capital sum maintenance under the FPA.<sup>17</sup>
- (c) If the division of functions is only one of several causative factors, its causative effect would have to be weighed in the exercise of the discretion.<sup>18</sup>
- (d) The clean break principle – including the allowance for the personal autonomy of partners to switch careers.<sup>19</sup>

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<sup>13</sup> At [104].

<sup>14</sup> At [115], [128] and [129].

<sup>15</sup> *X v X* [2009] NZCA 399, [2010] 1 NZLR 601

<sup>16</sup> *Scott v Williams* [2017] NZSC 185 at [141].

<sup>17</sup> *Monks v Monks* (2005) 25 FRNZ 36, [2006] NZFLR 161 (HC), at [22]

<sup>18</sup> *De Malmanche v De Malmanche* [2002] 2 NZLR 838, (2002) 22 FRNZ 145 (HC).

<sup>19</sup> *M v B [economic disparity]* [2006] 3 NZLR 660, (2006) 25 frzn 171 (CA).

- (e) Choice of part-time versus full-time work by the spouse with the lower earning capacity.<sup>20</sup>
- (f) Ongoing responsibility for care of the children.
- (g) Support given after separation, for example mortgage payments.<sup>21</sup>
- (h) Voluntary spousal maintenance.
- (i) The age of the partners and the number of years left in the work force.

[73] The evidence of the employment history for the parties during the marriage is as follows:

- (a) When the applicant moved in with Mr [Huber] and his family, in August 1995, he was a student. The decision to move out of his parents' home was made in June 1996. Mr [Huber] did not have regular financial support from his parents and he relied on Mrs [Huber]'s income to finance the flat they moved to.
- (b) In [1999], when their first child [Laura] was born, Mr [Huber] started working for [company name deleted] in information technology (IT).
- (c) After [Andrea] was born, in 2002, Mr [Huber] started his own IT business. He went into debt but regardless of that he booked a flight for the family to come to New Zealand in 2002/2003.
- (d) Mrs [Huber] says that when they returned to Germany Mr [Huber] applied for personal insolvency. She does not say when this was, but she noted that she was forced to go back to work, even though she was breastfeeding [Andrea] and on parental leave.

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<sup>20</sup> *Cunningham v Cunningham* HC Auckland CIV-2003-404-2392, 28 November 2003.

<sup>21</sup> *Cunningham*, above n 20.

- (e) She said that Mr [Huber] was unable to look after the two children and that, as they urgently needed money, she turned to prostitution in order to keep the family together.
- (f) She says that Mr [Huber] did not work during this time but lived off her earnings and income.
- (g) Mr [Huber] returned to paid employment in February 2004, which included training in the USA for three weeks.

[74] The parties emigrated to New Zealand in 2008. Mrs [Huber] said she only agreed to move to New Zealand if she could return to Germany after three months if she did not like it in New Zealand. However, that never occurred.

[75] Mrs [Huber] has provided no information about her job in a [facility], as a [job deleted], or [other work] in 2011 or any other employment she may have had while residing in New Zealand during her marriage with Mr [Huber]. However, she broadly said, “slowly it got better financially” and that she paid bills and saved money to buy a better car.

[76] It was in May 2013, that her husband noticed a lump in Mrs [Huber]’s breast. She says, “He convinced me I should not be bothered,” and she ignored the signs. She was formally diagnosed with cancer in August 2013. An email dated 12 March 2018 records that Mrs [Huber] has metastatic breast cancer.

[77] Mrs [Huber] says that Mr [Huber] was always capable of earning good money in the IT industry. She refers to his substantial income, of \$143,911 per annum, for the year ended 31 March 2015. This was during a period when he was looking after the three children while she was in Germany from early in 2014 until [the month of the parties’ separation] 2014.

[78] She says that she had earned very little in the same period and because of her illness she has been unable to obtain any kind of decent employment since separation. Her tax returns show nominal income. For example, for the years ending

31 March 2015, 31 March 2016, 31 March 2017 and 31 March 2018 her taxable income for each year was \$9,061, \$11,703, \$1,872 and \$17,018 respectively.

[79] Prior to the first child being born, Mrs [Huber] was earning the equivalent of \$36,000 per annum. I do not know how this income or work would equate with likely earnings in 2015 or currently. For the period 1999 to 2005 Mrs [Huber] was the primary caregiver for the children. She had some part-time work from 2005 to 2007.

[80] It has been difficult for Mrs [Huber] since separation due to her illness and the circumstances of her separation. She has survived on welfare benefits prior to moving in with her current de facto partner in January 2016 who has supported her. Although Mrs [Huber] contributes financially when requested.

[81] Mrs [Huber] says her limited ability to earn income was also exacerbated by the different roles she and Mr [Huber] assumed when they were living together.

### **Analysis**

[82] Under s 15(1), I need to be satisfied that the income and living standards of Mr [Huber] are likely to be significantly higher than Mrs [Huber] because of the effects of the division of functions within the marriage while the parties were living together.

[83] I only have information about Mr [Huber]'s earnings for the year ending 31 March 2015 and Mrs [Huber]'s for the years ending 31 March 2015, 2016, 2017 and 2018.

[84] The difference between Mrs [Huber]'s nominal annual earnings since the separation and Mr [Huber]'s likely higher salary, albeit based on his income for the year ending 31 March 2015, is significant. Essentially, I am asked to infer from the evidence that there is a significant disparity in the living standards of each party. However, to assess living standards I need to take into account, Mrs [Huber]'s support from her de facto partner and Mr [Huber]'s costs of ongoing child care and responsibility for maintaining the home.

[85] It is not as straight forward to conclude that the living standards for each party are significantly disparate as the factual evidence is quite sparse.

[86] It is also difficult to form a clear view about the division of functions within the marriage based on the evidence provided. Even though it is accepted that Mrs [Huber] was the parent who mostly cared for the children that was not always the case during their marriage.

[87] On the evidence provided, the division of functions within the marriage is not the causative factor for the large disparity in incomes post separation. Based on Mrs [Huber]'s own evidence the causative factor for her limited ability to work is her poor state of health.

[88] While I have sympathy for Mrs [Huber]'s position I have reached the conclusion that the criteria in s 15(1) have not been established.

[89] Even if I was satisfied, I would then need to consider whether to exercise my discretion and make an order for compensation.

[90] The relationship property pool is modest. There is a need because of the psychological issues and needs of the children for Mr [Huber] to maintain a stable home for the children. It is relevant that he will be providing for the future care of the two youngest children without financial input from Mrs [Huber]. That position seems unlikely to change in the foreseeable future. The children will be dependent for some time to come; [Andrea] for another year and [Julia] for about another 8 years.

[91] Even if the s 15(1) criteria were made out, I am not persuaded that payment of compensation to Mrs [Huber] would be just in view of the parties contributions during an 18 year marriage, the purposes and principles of the Act and Mr [Huber]'s likely future child care obligations.

[92] While I do not have detailed information of the parties' proceedings under the Care of Children Act, I have sufficient to know that the children's psychological issues and lack of contact with their mother indicate that whatever decisions are made about

her future contact with the children, Mr [Huber] is likely to continue to provide the majority of future care for the children, without practical or financial assistance from Mrs [Huber].

[93] Accordingly, I make no order under s 15(3) of the Act.

### **Purchase of the Family Home**

[94] Based on my findings the division of relationship property is as follows:

#### **Relationship property**

[Van]	\$4,000.00
Family home	\$610,000.00

(Mrs [Huber]'s accounts totalling \$42,548.04 as follows)

Westpac 00 account	\$902.23
Postbank account	\$1,351.28
Kiwibank account (opened post-separation)	\$0.00
German [telecommunications company] Fund	\$37,784.30
Sparda Bank account	\$2,510.23

(Mr [Huber]'s accounts totalling \$34,620.20 as follows)

KiwiSaver account	\$14,335.22
Westpac 01 account	\$5.80
Westpac 02 account	\$19,779.18
Westpac 25 account	<u>\$500.00</u>
Total Assets	\$691,168.24

(Liabilities totalling \$303,376.85 as follows)

Bank overdraft	\$1,959.75
The GEM hire purchase	\$7,194.79
The credit card debt	\$1,451.08
Inland Revenue Department ("IRD") debt	\$7,226.72
Mortgage	\$285,544.51
Nett value of relationship property	\$387,791.39
One half share	\$193,895.69

[95] It is proposed that Mr [Huber] will assume responsibility for repaying the debts listed under liabilities and there will be an adjustment.

[96] Also, it is agreed that Mrs [Huber] will pay Mr [Huber] the sum of \$908.60 from her share in the relationship property to compensate for insurance premiums paid on her behalf by Mr [Huber] since separation.

[97] The division will therefore be:

Mr [Huber]'s ½ share will be realised as follows:-

The former Family Home	\$610,000.00
His bank accounts	\$34,620.20
The [Van]	\$4,000.00
Less liabilities	\$303,376.85
Less equalising payment to Mrs [Huber]	\$151,347.65
Net sum representing Mr [Huber]'s ½ share	\$193,895.70

Mrs [Huber]'s ½ share will be realised as follows:-

Bank accounts totalling	\$42,548.04
Equalizing payment from Mr [Huber]	\$151,347.65
Net sum representing Mrs [Huber]'s ½ share	\$193,895.69

[98] From the sum due to Mrs [Huber] will be deducted reimbursement for the insurance premiums of \$908.60 less the sum due to Mrs [Huber] for the couch of \$299.50. This will make a net sum payable to Mr [Huber] of \$609.10.

[99] The sum due to Mrs [Huber] is therefore \$150,738.55 (“the settlement sum”).

[100] Because of the minor dependent children's needs for a stable home and the impact on them if the home is sold, I consider that Mr [Huber] should be able to purchase Mrs [Huber]'s interest in the former family home for the settlement sum, if he can obtain the necessary finance, hence the basis for my calculations.

[101] Mr [Huber] is to have until 10 December 2018, or such other date as the parties agree or the Court determines), to confirm finance. Provided finance is confirmed,

payment of the settlement sum should then occur by 24 December 2018 or on such other date agreed by the parties or determined by the Court.

[102] If finance cannot be obtained then an order for sale will need to be made. The parties will need to confer about a sale process. Leave is granted to either party to seek an order for sale if Mr [Huber] is unable to confirm finance by 10 December 2018 or to seek any further directions or orders on three days' notice.

[103] Counsel are to confer and file draft orders in terms of the findings and orders made in this judgment, for sealing by the Court by 12 December 2018.

[104] Costs are reserved.

**Summary of findings and orders:**

- (a) I determine the value of the [van] to be \$4,000.
- (b) The parties are to alternate selecting a silver or gold coin under the supervision of their respective lawyers until the coins are equally divided.
- (c) Each party is to retain the chattels which are currently in their possession.
- (d) The value of the former family home is determined to be \$610,000.
- (e) Mrs [Huber]'s German [telecommunications company] fund is relationship property.
- (f) No orders are made under s 18B and s 15(3) of the Act in favour of either party.
- (g) An order dividing relationship property and determining Mrs [Huber]'s half share in the relationship property on the basis that Mr [Huber] buys out her share in the former family home by payment of the settlement

sum of \$150,738.55 (which includes an adjustment for the sale proceeds of the couch and reimbursement to Mr [Huber] for Mrs [Huber]'s insurance premiums).

- (h) Mr [Huber] has until 10 December 2018 (or such other date as the parties agree or the Court determines) to confirm finance.
- (i) Payment of the “settlement sum” to Mrs [Huber] in respect of her interest in the former family home is to occur by 24 December 2018 or on such other date as the parties agree or the Court determines.
- (j) Leave is granted to either party to seek an order for sale of the former family home if Mr [Huber] is not able to confirm finance, or to seek any other directions on three days’ notice.
- (k) Costs are reserved.
- (l) Draft orders are to be filed by 12 December 2018 for sealing by the Court.

Judge J A Binns  
Family Court Judge