

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

**IN THE FAMILY COURT  
AT MANUKAU**

**I TE KŌTI WHĀNAU  
KI MANUKAU**

**FAM-2019-092-001067  
[2022] NZFC 4154**

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	KATHRYN FRANCIS BOSWELL Applicant
AND	ANTHONY ROBERT KORVING First Respondent
AND	ANTHONY ROBERT KORVING GRAHAM GUNN as Trustees of the ROBERT KORVING FAMILY TRUST Second Respondent

Hearing: 17 March 2022

Appearances: Applicant appears in Person  
Mr Tapsell for the First Respondent  
No appearance by or for the Second Respondent

Judgment: 9 May 2022

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**RESERVED DECISION OF JUDGE K TAN**

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[1] The parties have active proceedings under the Property (Relationships) Act 1976 (“PRA”) seeking the courts determination of the division of relationship property. The proceedings have been before the Court for some time and during that process there have been Interlocutory Applications for Discovery. There has also been an appeal to the High Court in relation to Discovery Orders made by this Court on 4

August 2021.<sup>1</sup> On 25 November 2021 Ms Boswell made an application to transfer the substantive relationship property proceedings to the High Court.

[2] The item of property that is of particular contention between the parties is the property situated at [address deleted – property A]. [Property A] is owned by the Robert Korving Family Trust, and the trustees have now been added as a party to the proceedings pursuant to an application made by Ms Boswell.

[3] In terms of the substantive proceedings, the issues that are in dispute between the parties are as follows:

- (a) The length of the de facto relationship.
- (b) The nature and/or extent of what constitutes their pool of relationship property.
- (c) Did the respondent operate the Family Trust as his personal account i.e., is it a sham?
- (d) Did the applicant make contributions to the Trust and/or the assets of the Trust (specifically [property A] or any businesses run from the property) resulting in a constructive trust?
- (e) If [property A] - is the party's family home what does that mean?

[4] Currently there are no contemporaneous proceedings in the High Court that relates to these parties and/or the Trust.

[5] The issue for determination by me is whether the High Court is the more appropriate venue for dealing with PRA proceedings.

[6] When making this application, the applicant based her argument on four key areas:

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<sup>1</sup> *Boswell v Korving and Robert Korving Family Trust* [2021] NZHC 3373.

- (a) The monetary limits in terms of the District Court jurisdiction being \$350,000.00.
- (b) That the High Court only has jurisdiction under Trust Law.
- (c) The complexity of the issues before the Court.
- (d) The right to a fair and impartial judgment pursuant to the New Zealand Bill of Rights Act.

[7] The respondent opposes the transfer of the case to the High Court.

[8] Section 38A of the PRA sets out the grounds for transferring proceedings from the Family Court to the High Court:

**38A Transfer of proceedings to High Court**

- (1) A Family Court Judge may order the transfer of proceedings to the High Court if the Judge is satisfied that the High Court is the more appropriate venue for dealing with the proceedings.
- (2) In considering whether to make an order under subsection (1), the Judge must have regard to—
  - (a) the complexity of the proceedings or of any question in issue in the proceedings;
  - (b) any proceedings before the High Court that are between the same parties and that involve related issues;
  - (c) any other matter that the Judge considers relevant in the circumstances.
- (3) An order may be made under subsection (1) on—
  - (a) the application of a party to the proceedings; or
  - (b) the court's initiative.
- (4) Any proceedings transferred to the High Court by an order made under subsection (1) continue in that court as if they had been properly commenced there.

[9] This section was amended in 2014 to expand the matters a Judge must consider when making such a determination and specifically included the mandatory provision that the Family Court must consider any proceedings before the High Court, that are

between the same parties and that involve relationship issues and any other matters the Court considers relevant.

[10] The Court has a discretion which must be exercised in accordance with the overriding principles of the PRA, which includes the principle that questions arising under the PRA about relationship property should be resolved inexpensively, simply and speedily for the parties as is consistent with justice.<sup>2</sup>

### **Monetary limits in the District Court Act.**

[11] In Ms Boswell's oral submissions to the Court, she referred to s 74 of the District Court Act 2016 and the limit of the District Court's general civil jurisdiction to claims of \$350,000.00 or less. Section 74 says:

#### **74 General civil jurisdiction**

- (1) The court has jurisdiction to hear and determine a proceeding—
  - (a) in which the amount claimed or the value of the property in dispute does not exceed \$350,000;
  - (b) that, under any enactment other than this Act, may be heard and determined in the court.
- (2) The amount claimed in a proceeding under subsection (1) may be for the balance, not exceeding \$350,000, of an amount owing after a set-off of any claim by the defendant that is admitted by the claimant.

[12] The central argument of Ms Boswell is that her claim, in terms of the division of relationship property is going to be in excess of \$350,000.00 therefore, on this reason alone, the proceedings would be transferred to the High Court. The respondent disagrees. The submission made by counsel for the respondent is that, frequently the Court in relationship property matters deals with assets and claims that have a value in excess of \$350,000.00. The example of the price of houses in Auckland was given. If the argument of the applicant is to be followed, then the Family Court would have no jurisdiction on most matters where the claim over the relationship home is valued over \$350,000.00.

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<sup>2</sup> Property (Relationships) Act 1976, s 1N(d).

[13] The Family Court in matters relating to the division of relationship property has jurisdiction pursuant to the express provisions of the PRA and the provisions of s 74 of the District Court Act do not apply to the division of relationship property in the Family Court. Under the PRA there is no financial limit to the Family Courts jurisdiction when making determinations under the PRA. This is not a matter to be determined under the general civil jurisdiction, so this argument of the applicant's is rejected as it is misplaced.

**The High Court can only deal with Trust matters.**

[14] The applicant's argument under this heading is that the Family Court has no jurisdiction to deal with matters that relate to family trusts and as [property A] is owned by a family trust this court has no jurisdiction to determine arguments relating to this property. The respondent says that is not the case and the Family Court does have jurisdiction.

[15] Prior to the enactment of the Trust Act 2019, the Family Court would transfer proceedings involving constructive trusts to the High Court as the Family Court neither had jurisdiction under the Trustee Act nor an inherent jurisdiction to deal with such a case. Given the Family Court is a creature of statute, the Court only had jurisdiction to deal with cases in a manner as prescribed by statute, for example under ss 33(3)(m) and 44A(2) and 44C of the PRA.

[16] However, the Family Court now has powers to deal with a Trust under s 141 of the Trust Act 2019. Section 141 says:

**141 Jurisdiction of Family Court**

- (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.
- (2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—
  - (a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved;  
or

- (b) to give proper effect to any determination of the proceeding.
- (3) If the parties to the proceeding consent, the Family Court may make any order available under this Act to resolve an issue or a dispute between the parties that is closely related to the proceeding (but only if the Family Court considers that making the order is necessary or desirable to assist the resolution of the proceeding).
- (4) Despite subsections (2) and (3), the Family Court does not have jurisdiction to appoint a receiver to administer a trust under section 138.
- (5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest.
- (6) In any case to which this section applies, the High Court or Family Court may order, on the application of a party to the proceedings, that the proceedings be transferred to the High Court.

[17] Section 5(1) of the Trusts Act 2019 states that the Act however, only applies to express Trusts governed by New Zealand law. Nonetheless s 5(2)(b) states:

- (b) A Court may, when necessary or appropriately, apply the provisions of this Act to any of the following governed by New Zealand Law:
  - (i) A Resulting Trust.
  - (ii) A Constructive Trust.
  - (iii) A Trust that does not satisfy the definition of Express Trust but is recognised that Common Law or an Equity as being a Trust.

[18] In light of these amendments, my view is that the Family Court can deal with trust matters within the limitations of the sections outlined above and this includes arguments that might be raised about a constructive trust. Therefore I do not accept the submission of the applicant that the Family Court in the circumstances of this case cannot deal with all the arguments that might be raised by the applicant about a potential constructive trust such that a transfer to the High Court should be made on this ground.

## **Complexity of Family Trust issue.**

[19] The applicant's argument is that:

- (a) It is the High Court that has the experience and expertise to deal with the complexities of a family trust where the main trust asset is the family home. She relies particularly on the following:
  - (i) Most of the relevant case law cited by her and other counsel is from either the High Court, Court of Appeal or Supreme Court.
  - (ii) Where cases involving family trust have been dealt with initially in the Family Court they have at a later date been transferred to the High Court.
- (b) A transfer now to the High Court will free up valuable Family Court time and save any doubling up of court processes.

[20] The respondent disagrees with all of the arguments made by the applicant. His arguments are that:

- (a) The issues to be determined in this case are not complex or outside the experience of the Family Court.
- (b) Issues around the start of a de facto relationship, the nature and extent of what constitutes relationship property and claims for an interest in Trust property when the trust owns the residence where the parties lived, long and short term businesses being conducted at the property or by the trust are not outside of the jurisdiction or competence of the Family Court and are not novel or complex.
- (c) Much of what needs to be determined are factual and evidentiary issues.

[21] I am of the view that the issues for determination in the substantive proceedings are not uncharacteristically complex. A family trust owning the family home (which is the most valuable property item) is not a novel or new proposition and neither are claims around the running of businesses via trust owned property. The intertwining of personal property with trust property and businesses and arguments of contributions made by one spouse to the property owned by the trust is not unique or uncertain. This is evident in the case law that has developed with these types of factual situations. I accept it is an assessment of the facts and how that fits with the established law that is the required analysis.

[22] The Family Court is a court of specialist jurisdiction where the division of relationship property and the issues of defining property, assessing contributions and the interplay with these issues and the existence of a family trust is within the scope of specialisation of the Family Court.

[23] During the hearing I questioned the applicant about her statement that most of the relevant case law involving family trusts were transferred from the Family Court at a later date to the High Court. She confirmed that she was not saying they were all transferred cases. It was accepted that the cases referred to by her in the higher courts arise also from appeals or were cases that originated in the High Court as opposed to were there by way of transfer.

[24] I have considered the argument that given the issues in dispute that there will be an inevitable transfer of these proceedings – I do not accept this argument. If there is an appeal of any Family Court decision an appeal would be in the High Court but an appeal is entirely different to a transfer, and the prospect of an appeal is not a ground for considering a transfer before substantive matters are determined.

[25] I am not satisfied that a transfer will result in less costs for the parties or a speedier outcome. In terms of costs the filing fees and setting down fees for hearings they are more in the High Court than the Family Court. There are no existing proceedings in the High Court jurisdiction which would support a reduction in costs arguments due to efficiency and the utilisation of one Judge for substantially similar



or related matters. In terms of speed in the current post-covid 19 environment all courts are faced with delays and backlogs.

### **Impartiality and Fairness**

[26] Another significant plank of the applicant's case for transfer is that she believes she will get a more impartial and fair hearing in the High Court. In her written and oral submissions she raises concerns about her previous experiences in the Family Court where she questioned the conduct and impartiality of the judicial officers she has previously appeared before and made specific allegations of judicial opinion/advise in the court room that supported threats the respondent had made to her, and her concerns that all evidence was not taken into account and judicial behaviour demonstrated bias.

[27] The respondent rejects the assertions made by the applicant and submits the allegations made by the applicant are nothing short of a 'conspiracy theory.'

[28] If the applicant is unhappy with any decision made in the Family Court then she can appeal to the High Court. This is the course of action she took with regards to the 5 August 2021 decision of Judge Adams ordering her to discover aspects of her medical records.

[29] The decision of Justice Woolford ultimately does not discuss any matters raised by the applicant around bias or impartiality (if in fact they were raised) and in fact disposed of the appeal due to subsequent developments. Those developments being that by the time of the appeal the applicant had provided medical evidence via a sworn three-page affidavit dated 7 September 2021 such that the court found that "this new material is sufficient for the purposes of the relationship property proceedings together with the affidavit evidence from both the appellant and the respondent. This was not available to the Judge when he made his order for discovery."<sup>3</sup>

[30] It is not for this court to make any comment on the conduct of other judicial officers involved in this case. If the applicant has issues with judicial conduct, there

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<sup>3</sup> Paragraph 13, of *Boswell v Korving* [2021] NZHC 3373 per Woolford J.

are other appropriate avenues for her to raise her concerns. I find that the issues that she raises are not grounds for me to consider when determining if there should be a s 38A transfer to the High Court.

## **Result**

[31] Having considered the arguments made for or on behalf of the parties and the grounds for transfer under section 38A I determine that the proceedings should remain in the Family Court for determination. I am not satisfied that the High Court is the more appropriate venue for dealing with the proceedings as the case does not involve any complexity that is not ordinarily dealt with by the Family Court nor is there a novel issue of law at play. The Family Court is specialist in nature and the Judges are suitably qualified to sit in the jurisdiction.<sup>4</sup> Further there are no current proceedings before the High Court involving the same parties with related issues which may result in efficiencies for the parties due to cross over of issues, discovery or the mitigation of costs due to only one judge hearing all matters. There are not multiple respondents involved in this case nor a plethora of Trusts or companies at play. With the current backlog of court cases in all jurisdictions due to Covid-19 it cannot be said that a transfer to the High Court will likely result in an earlier hearing date than in the Family Court.

[32] The application for transfer is declined. I direct that a 30-minute prehearing conference is allocated as soon as possible.

Judge KMSH Tan  
Family Court Judge | Kaiwhakawā o te Kōti Whānau  
Date of authentication | Rā motuhēhēnga: 09/05/2022

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<sup>4</sup> *Jacobson v Jacobson* [2012] NZHC 2292 at [21].