

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

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**IN THE FAMILY COURT
AT TE KUITI**

**I TE KŌTI WHĀNAU
KI TE KŪITI**

**FAM-2021-073-000013
[2022] NZFC 69**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[AIDEN ROSS] Applicant
AND	[KIRI HUGHES] Respondent

Hearing: 8 December 2021

Appearances: R Holz for the Applicant
No appearance by or for the Respondent

Judgment: 17 January 2022

RESERVED DECISION OF JUDGE N J GRIMES

[1] These are proceedings under the Property (Relationships) Act 1976 (“the Act”) between [Aiden Ross] and [Kiri Hughes]. In particular, it is an application by Mr [Ross] for orders dividing property pursuant to s 23 and s 25 of the Act.

[2] This is a reserved decision after a formal proof hearing at which I made an order for sale of the parties’ family home at [address deleted].

Background

[3] The parties commenced a de facto relationship as defined in the Act in 2015 and separated on 10 August 2020. Mr [Ross] initiated both Family Violence Act 2018 and Care of Children Act 2004 proceedings against Ms [Hughes], alleging physical violence and threats of the same. He was concerned at Ms [Hughes]'s presentation and alleged she was heavily using methamphetamine.

[4] Final protection and parenting orders were made in favour of Mr [Ross] that provided him with the day-to-day care of the parties' two small children, [Natalia], aged two, and [Brody], aged four. Ms [Hughes]'s contact is supervised as agreed between the parties. Mr [Ross] deposes that since the order was made there have been three contact visits and none since March 2021.

[5] Mr [Ross] brought relationship property proceedings, having been unsuccessful in resolving the division of relationship property directly with Ms [Hughes]. Ms [Hughes] was served by way of substituted service on her grandmother, who confirmed to Mr [Ross] that she had brought the proceedings to Ms [Hughes]'s attention.

[6] When the matter was called before the Court on 15 September 2021 her Honour Judge Paul identified the parties' assets and liabilities, made timetabling directions and set the matter down for a formal proof hearing. This hearing has proceeded by way of cross-examination of the three witnesses, being Mr [Ross], his mother, Mrs [Catherine Ross], and his grandfather, Mr [Lawrence Mohan], together with legal submissions. Ms [Hughes] did not attend at Court, nor was she represented.

The evidence

[7] Mr [Ross] has filed five affidavits in these proceedings, three on 26 March 2021, including his affidavit of assets and liabilities, and further evidence on 28 July and 7 October 2021. These affidavits exhibit the necessary disclosure to identify the relationship property pool, including values of the same. It also identified Mr [Ross]'s post-separation contributions to relationship property.

[8] Mr [Lawrence Mohan] filed two affidavits on 28 July 2021 and 10 October 2021 regarding outstanding monies owed to him by Mr [Ross] and Ms [Hughes]. Mrs [Catherine Ross] and her husband, Mr [Howard Ross], swore their affidavit on 28 July 2021 regarding monies owing to them by Mr [Ross] and Ms [Hughes].

[9] Notwithstanding Ms [Hughes]'s non-attendance at the hearing, I recognise I still have an obligation to make orders to provide a fair and just division of property, having regard to the provisions of the Act. As can occur in cases such as this, full valuations of all the property have not been able to be obtained, and Mr [Ross] has given evidence as best he can about the property and what has become of it now.

The relationship property pool

[10] In summary, the relationship property consists of the following:

Family home

[11] The family home located at [address deleted] is registered in the parties' names as tenants in common in equal shares. As the property is to be sold, a formal valuation has not been necessary. There is evidence from Ms Linn of Ray White Real Estate of the property having a value of between \$190,000 and \$200,000 as at 12 January 2021. At that time there was a secured mortgage to Westpac of \$120,197.

Chattels

[12] Mr [Ross]'s case is that chattels have been unilaterally divided between the parties on 25 August 2020 when Ms [Hughes] broke into the family home and removed a number of chattels from the garage area. These have been identified by Mr [Ross] who has exhibited either Trade Me or Buy Now prices for those items. Mr [Ross] has also produced a list of the chattels that were left in the home for him to retain, together with Trade Me or Buy Now prices for the same.

[13] I have considered the evidence about the chattels. In the absence of evidence to the contrary, I have determined that as both lists contain prices from Trade Me or

Buy Now that I will use these as the value for the chattels. The chattels retained by Ms [Hughes] are valued at \$7,500 and those in Mr [Ross]'s possession \$3,133.75. An adjustment in Mr [Ross]'s favour of \$2,183.12 will be ordered.

Motor vehicle

[14] Ms [Hughes] retained [the motor vehicle] which had a value of \$13,000 for insurance purposes. Mr [Ross] produced evidence of a similar make and model vehicle listed on Trade Me for \$13,900. In those circumstances, I fix the value at \$13,000 and order a cash adjustment of \$6,500 in Mr [Ross]'s favour.

Kiwisaver

[15] Mr [Ross] has provided evidence of his KiwiSaver at the date of separation being \$11,399.84. The value of Ms [Hughes]'s KiwiSaver is unknown. I accept Mr [Ross]'s evidence that Ms [Hughes] had a KiwiSaver scheme with her employer [job details deleted] where she worked from March 2016 until June 2020, although there were approximately 18 months of maternity leave during that time. I have determined to place a nominal value on Ms [Hughes]'s KiwiSaver of \$5,000.

[16] A cash adjustment of \$3,199.92 in Ms [Hughes]'s favour is ordered.

Bank accounts

[17] The parties had a number of bank accounts with nominal funds. Given this, I place a nil value on the bank accounts.

Alleged liabilities

[18] Mr [Lawrence Mohan] originally lent Mr [Ross] and Ms [Hughes] \$10,000 to assist with the purchase of the family home. Evidence of the funds being transferred from his account to Mr [Ross]'s has been provided. Mr [Mohan] in his evidence confirmed he kept a record of the monies that were repaid and did so from his monthly bank statements. He has also produced evidence of paying for fence materials and

confirmed the amount owing to him at the time of separation was \$4,968.54. I accept his evidence.

[19] Mrs [Ross] confirmed that over the course of the parties' relationship, she and her husband lent funds to them. These were repaid sporadically. Both she and Mr [Aiden Ross] have matched their bank statements to confirm funds lent and repaid with the outstanding balance being \$5,250. I accept that evidence.

Section 18B post-separation adjustments

[20] As Mr [Ross] was fearful of Ms [Hughes], he and the children vacated the family home on 11 August 2020. Ms [Hughes] also moved from the home and it has remained vacant since then. There is evidence before the Court of Ms [Hughes] having taken an axe to the inside walls and sustaining damage to the property. An earlier quote suggested that to fix the damage would cost \$3,400. That quote is out of date and will need to be revised.

[21] Mr [Ross] has, since separation, met the costs of the rates, house insurance, mortgage and Ms [Hughes]'s life insurance. As part of the pre-approval conditions for purchasing the property and securing a mortgage both parties were required to have life insurance.

[22] In the 69 weeks since the parties' separation to the date of the hearing, I find that the following payments totalling \$19,358.57 have been made by Mr [Ross]:

- (a) Rates: \$68.34 weekly, total \$4,715.46.
- (b) House insurance: \$61.19 per week, total \$4,222.11.
- (c) Ms [Hughes]'s life insurance of \$20.80 per fortnight, total \$728.
- (d) Mortgage payments of \$261 fortnightly for 13 payments, \$3,393.
- (e) Mortgage payments at \$300 for 21 payments, \$6,300.

[23] These are post-separation payments that should have been met by the parties jointly in the absence of either of them occupying the property. In these circumstances I find that Mr [Ross] and Ms [Hughes] are to meet those costs equally meaning Mr [Ross] is to be reimbursed.

[24] Further payments for the rates, house insurance, Ms [Hughes]'s insurance and mortgage will be met by Mr [Ross] until the property is sold. These too are to be met equally by Mr [Ross] and Ms [Hughes].

[25] Mr [Ross] has confirmed the work necessary to ready the property for sale. In the first instance this will need to be paid for by him for which he will be reimbursed. In this regard I find that the building work to repair the damage inflicted by Ms [Hughes] is to be completed. A new quote will be required, and the cost of repair is to be met from Ms [Hughes]'s share of the relationship property.

[26] Other costs relating to painting and rust repair of the roof, general cleaning, rubbish removal and the replacement of trim in two rooms are to be met jointly by the parties.

Monetary adjustment

[27] From these findings, property calculations are set out as follows:

(a) Ms [Hughes] – property retained

Chattels in her possession	\$ 7,500.00
[Motor Vehicle]	\$13,000.00
Kiwisaver	\$ 5,000.00
Total	\$25,500.00

One half share owed to Mr [Ross] *\$12,750.00*

(b) Mr [Ross] – property retained

Chattels \$ 3,133.75

Kiwisaver \$11,399.84

Total \$14,533.59

One half share owed to Ms [Hughes] \$ 7,266.79

(c) Imbalance to be paid to Mr [Ross] from

Ms [Hughes]’s share of home sale proceeds **\$ 5,483.21**

(d) Proceeds from sale of family home \$

Firstly applied for joint liabilities:

- Westpac mortgage \$
- Outstanding rates and water rates \$
- Real estate agent fees \$
- Legal costs on sale (including registrar’s fees) \$
- Mr [Lawrence Mohan] \$ 4,968.54
- Mr and Mrs [Ross] Senior \$ 5,250.00
- Re-imbursments to Mr [Ross] for
payments made as per paragraph [22] \$19,358.57
- Mr [Aiden Ross] for s 18B post separation

payments from 8 December 2021 until date
of settlement of sale of the family home upon
Mr [Ross] providing evidence of the payments
to the conveyancer \$

- Mr [Aiden Ross] for the joint costs of readying
the property for sale upon producing receipts
to the conveyancer \$

(e) Mr [Ross] to retain:

One half net proceeds of sale \$

Plus

- Adjustment for division of other property \$ 5,483.21
- Cost of repairs to the family home caused
by Ms [Hughes] (upon producing the quote
and receipt to the conveyancer) \$
- Costs on 2B scale \$ 8,570.00

(f) Ms [Hughes]'s share:

One half net proceeds of sale \$

Less

- Adjustment for division of other property \$5,483.21
- Cost of repairs to the family home for
damage caused by Ms [Hughes] and paid
for by Mr [Ross] \$
- Costs awarded to Mr [Ross] \$ 8,750.00

Other matters

[28] Two other matters require a decision.

[29] Firstly, there is the question of whether extraordinary circumstances exist or a s 26 claim such that Ms [Hughes]'s net share of the sale proceeds (if any) are paid to Mr [Ross] or settled on the children. The second is the issue of costs.

Section 13 – Unequal sharing

[30] I accept Ms Holz submissions that the case law is clear that s 13 of the Act proposes a stringent and vigorous test to an applicant seeking an unequal division of relationship property.¹ The circumstances needing to be established must be both remarkable and unusual to be considered an “extraordinary circumstances”. If there are extraordinary circumstances present, then the Court must decide whether equal sharing would be rendered repugnant to justice.²

[31] In recent High Court case of *Bowden v Bowden*³ Mander J stated:

[26] The approach to be taken to the statutory test is reiterated over some decades now is uncontroversial and beyond doubt. “Extraordinary circumstances” and “repugnant to justice” are strong words which reflect parliament’s intention that the primacy of equal sharing of relationship property is not to be eroded in the ordinary circumstances of a qualifying relationship.

¹ *Martin v Martin* [1979] 1 NZLR 97.

² Above n 5.

³ *Bowden v Bowden* [2017] NZFLR 56.

[27] Disparity and contribution by itself cannot give rise to the exception to equal sharing. The fact of a disproportionately greater contribution is not a circumstance which on its own will attract unequal sharing under s 13. However it does not follow that disparity of the contributions may never be regarded as an extraordinary circumstance.

[28] The “extraordinary circumstances” that makes equal sharing of property repugnant to justice must give rise to an exceptional situation and one so out of the ordinary as to make an equal division, something which the Court “simply cannot countenance”. Neither an imbalance in the contributions of the parties to the relationship nor even a substantial imbalance will be sufficient to constitute an extraordinary circumstance. Such a situation in the context of relationships is unremarkable.

[29] However there may be cases where the disparity in contributions is so gross as to compel a Court to conclude that an equal division of property would be repugnant to justice...

[30] The whole of the circumstances taken in combination need to be reviewed on a cumulative basis before determining whether there are extraordinary circumstances.

[32] I am not satisfied however that there are extraordinary circumstances in this case which would make the equal sharing of relationship property repugnant to justice for the following reasons:

- (a) Whilst Mr [Ross] contributed \$13,000 of his separate property to the purchase of the family home, it is not extraordinary for one party to apply their separate property in this way.

Case law has reiterated that the s 13 test is a high threshold, and that it is not extraordinary for a spouse to make a greater financial contribution to a marriage.⁴ Furthermore, the test is not what is extraordinary in the context of a particular relationship, but that is extraordinary in comparison to the context of marriages generally in New Zealand Society.⁵

While a contribution of \$13,000 may seem significant, the Court requires not just a high level of disparity, but a truly gross disparity to

⁴ *A v A* FC Hamilton-2003-019-588, 29 March 2007.

⁵ *Joseph v Johansen*, above n 2, at 315.

be present, usually requiring evidence of a grossly one-sided effort in the relationship, before being categorised as “extraordinary”.⁶

It is not unusual for one party to put in more financially to the purchase of the house, especially when considering the current housing market. I find that \$13,000 is not a high enough value to be seen as extraordinary.

- (b) This is a five-year relationship during which the parties had their two children. I do not have any evidence to suggest the parties did not equally share in childcare or household duties. Both parties were in paid employment and operated joint accounts to meet household expenditure.
- (c) Whilst I acknowledge the way in which the parties separated has resulted in Mr [Ross] subsequently making the greater financial and non-financial contribution to his and the children’s lives since separation, these cannot be considered under s 13 as they were not made during the relationship.
- (d) I acknowledge Mr [Ross] was subjected to serious violence during the relationship that on one occasion required hospital treatment and on another police intervention. However, as highlighted in *Holland v Dollard*⁷ violence on its own is not an extraordinary circumstance. Sadly, violence, alcohol and drug abuse are prevalent in proceedings that come before the Family Court. I do not have evidence that Ms [Hughes]’s conduct resulted in a disparity of contribution to the relationship.

Section 26 – Orders for benefit of children

⁶ Henaghan and Others (eds), *Family Law in New Zealand* (19th ed, LexisNexis, Wellington, 2019) at 1106.

⁷ *Holland v Dollard* [2020] NZFC 2051 at [53].

[33] In the alternative, Ms Holz has submitted that an order should be made settling the share of Ms [Hughes]'s relationship property which is not already in her possession on the parties' children given Ms [Hughes]'s minimal involvement with them.

[34] Section 26 of the Act provides that the Court must have regard to the interests of any minor or dependent children in any proceedings under the Act. Applying its discretion, the Court can, if it considers it just to do so, settle relationship property or any part of it for the benefit of the children.

[35] Whilst s 26 gives the Court a wide discretion, a review of the authorities suggests a reluctance to do so. As such, limited guidance has been given as to which may be appropriate cases where property may be settled.

[36] The Family Court's judgment in *R v R*⁸ reviews a number of authorities on the exercise of the s 26(1) discretionary power. Most are cases where the relationship property is vested in children where their parents had been killed, imprisoned, disappeared or were acting negligently. As highlighted in *Bate Hallett v Nakielski*⁹ the Court's discretionary power is not constrained by precedent as this is a guide and not a fetter.

[37] Whilst I have sympathy for Mr [Ross] and the children, I am not persuaded that the modest sum (if any) Ms [Hughes] would receive from the nett proceeds of the family home should vest in the children for the following reasons:

- (a) Ms [Hughes] has approximately \$25,500 of assets in her possession, any sum received from the sale of the family home given the adjustments to be made will be modest.
- (b) Mr [Ross] has not yet sought child support from Ms [Hughes]. To do so is the appropriate mechanism by which to obtain financial support.

⁸ *R v R* [1998] 17 FRNZ 75.

⁹ *Bate Hallett v Nakielski* (2000) 19 FRNZ 571 at [34].

- (c) No special needs or extraordinary costs for the children have been identified that suggest a payment to supplement what Mr [Ross] might receive in child support is necessary.
- (d) Whilst Ms [Hughes] had not seen the children since March 2021, plans to do so were being explored. There is too much uncertainty to make a prediction about the mother's future involvement with the children.

[38] However, I am conscious that Ms [Hughes] has not engaged in any of the Court proceedings, nor has she seen the children since March 2021 or kept to agreed arrangements to see the children. Proceedings were served by way of substituted service and evidence given of Ms [Hughes] leading a transient lifestyle. A continued lack of involvement with the children may impact the children.

[39] For these reasons I will grant Ms [Hughes] a year to uplift her share of the nett proceeds of sale (plus interest), to be held on interest bearing deposit by the solicitor undertaking the conveyancing. If after one year (from the date of this decision) Ms [Hughes] has not uplifted the funds, then they are to be divided equally between the children and held by Mr [Ross] on trust for them until they are 18 years old.

Costs

[40] Mr [Ross] is wholly successful in these proceedings. Ms [Hughes] has taken no steps and a number of affidavits were required to produce considerable evidence to the Court in order to make findings and orders. Had Ms [Hughes] taken legal advice and engaged in these proceedings then the issues I had to determine could have been resolved by agreement incurring less cost. Costs on a 2B scale are appropriate.

[41] Ms Holz has helpfully provided a memorandum setting out the costs and disbursements on a 2B basis, being \$8,750.00 and are less than actual costs accrued. In the circumstances I award costs of \$8,750.00 to be paid from Ms [Hughes]'s share of the sale proceeds of the family home.

Orders and directions

[42] Having already made an order for sale with particular conditions and set out the property calculations, I also make the following orders:

- (a) The life insurance policy insuring [Kiri Hughes], [policy number deleted] is to vest in [Kiri Hughes].
- (b) The life insurance policy insuring [Aiden Ross], [policy number deleted] is to vest in [Aiden Ross].
- (c) The joint bank accounts in the names of [Kiri Hughes] and [Aiden Ross] with Westpac New Zealand Limited, being [account numbers deleted] are to vest in [Aiden Ross].
- (d) The following property shall vest in Mr [Ross]:
 - (i) Chattels, \$3,133.75.
 - (ii) KiwiSaver, 11,399.84.
- (e) The following assets shall vest in Ms [Hughes] as her separate property:
 - (i) Chattels valued at \$7,500.
 - (ii) [The motor vehicle] valued at \$13,000.
 - (iii) Her KiwiSaver with a nominal value of \$5,000.
- (f) The sale proceeds of the family home are distributed in accordance with my property calculations set out in paragraph 27.

[43] The balance that would be paid to Ms [Hughes] is held in trust by the firm of solicitors undertaking the conveyancing for one year from the date of this decision. A copy of this decision is to be sent to Ms [Hughes]'s [grandmother – name deleted] at [address deleted], (she has previously been served with the proceedings pursuant to the order for substituted serve) to ensure Ms [Hughes] is aware of the decision. If Ms [Hughes] does not uplift her share of the nett proceeds of sale of the family home

within one year of the date of this decision then they are to be shared equally between the parties' children. Mr [Ross] is to hold the funds on trust for each child which is to vest in them when they turn 18 years old.

[44] Leave is granted to Mr [Ross] to seek the Court's directions on five days' notice if there are any issues with implementing the terms of this order.

[45] Ms Holz is directed to file a draft order for sealing. Her advocacy in these proceedings is appreciated by the Court and has assisted with a decision being issued in a timely fashion.

N J Grimes
Family Court Judge