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

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IN THE FAMILY COURT
AT PORIRUA

I TE KŌTI WHĀNAU
KI PORIRUA

FAM-2019-091-000448
[2022] NZFC 1915

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	DEBORAH JENNIFER SHERMAN Applicant
AND	LESLIE GRAHAM NEILSON Respondent

Hearing:	29 November 2021
Joint memorandum filed:	17 December 2021
Submissions filed:	22 December 2021
Appearances:	A Gulbransen for Applicant F Vining for Respondent
Judgment:	31 March 2022

RESERVED JUDGMENT OF JUDGE A R McLEOD

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[1] Ms Sherman applied to the Court in November 2019 for orders for the division of the relationship property owned by the parties. Since the proceedings were filed the issues for resolution have been refined, predominately as a consequence of the sale of all real estate that was owned by the parties as at the date of separation.

[2] There is agreement that all relationship property should be divided equally subject to a number of adjustments.

ISSUES FOR DETERMINATION

[3] The following issues remain for determination:[1]

(a) What value should be attributed to the Toyota Prado ("the car").

(b) What adjustment should be made in favour of Mr Neilson for payments made by him for the car insurance post-separation.

(c) What adjustment should be made in favour of Ms Sherman for occupational rent, and over what period post-separation (factoring in Mr Neilson's occupation of the relationship property homes and the payments he made towards them while in occupation).

(d) What adjustment (if any) should be made in favour of Mr Neilson for post-separation withdrawals made by Ms Sherman from the joint bank account.

(e) What adjustments (if any) should be made in favour of Mr Neilson for post-separation contributions in the form of work undertaken selling [the family home] and work undertaken renovating [the third property], and if so, the amount of those adjustments.

BACKGROUND INFORMATION

[4] Mr Neilson and Ms Sherman entered into a de-facto relationship in November 2005, began living together in February 2006 and married on 9 February 2007. The parties did not have any children together. Mr Neilson had three children from a prior relationship. Mr Neilson shared the care of the children with the children's mother. [2]

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[1] Paragraph 7 of the joint memorandum of counsel dated 17 December 2021 ('joint MOC')

[2] The children were for all intents and purposes children of the marriage - see Property (Relationships) Act 1976 ("the Act"), s 2.

[5] On 12 June 2012 Mr Neilson applied on a without notice basis for protection, occupation and ancillary furniture orders against Ms Sherman. These orders were granted. The children were recorded as protected persons on the temporary protection order.[3]

[6] Ms Sherman was served on 14 June 2012, following which the parties separated. Ms Sherman attended and completed a non-violence programme. The orders made under the Family Violence Act were discharged by consent on 12 November 2012, in exchange for an undertaking given by Ms Sherman.

[7] Immediately following the separation on 14 June 2012, Ms Sherman returned to live with her parents in Invercargill where she has remained living since.

[8] As at the date of separation the parties owned the following property:

(a) Household chattels.[4]

(b) The car.

(c) A Subaru motor vehicle. [5]

(d) Various joint and separate bank accounts.[6]

(e) The family home located at [address deleted], Otaihanga ("the family home").

(f) A rental property located at [address deleted], Mangakino ("the [second] property").

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[3] It is noted that the temporary protection order records only the children [names deleted]. However, I have reviewed the Family Violence proceedings file and it would appear that this is an error. The application included all three children and the judge's minutes does not state that the order will only apply for two of the three children.

[4] Household chattels have been divided by agreement.

[5] This vehicle has been sold for $150. It is agreed that the sale proceeds should be shared equally. Refer para 1.b.iii. of the joint MOC.

[6] There is agreement as to the balance of the parties' separate bank accounts at the date of separation – Ms Sherman $240.75 and Mr Neilson $1,709.83. Refer para 1.b.v. and vi. of the joint MOC.

(g) A rental property located at [address deleted], Paraparaumu ("the [third] property").

[9] The car had been purchased one month prior to separation for $15,160.[7] On separation, Ms Sherman retained the car. Ms Sherman sold the car on 10 May 2018 for $10,000. Mr Neilson continued to make the insurance payments on the car, in the total sum of $2,457.77.

[10] As at the date of separation, the parties retained a number of joint bank accounts:

(a) Choices home loan [account number deleted]. The account had an overdraft facility of $25,000. On the date of separation, the account had an overdraft balance of $88.39OD. On the date of separation Ms Sherman made two withdrawals from the account in the sums of $200 and $25,000. On 15 June 2012 Ms Sherman made a deposit into the account in the sum of $200. On 18 June 2012 Ms Sherman made a deposit into the account in the sum of $4,000. On 21 June 2012 Ms Sherman made a further deposit into the account in the sum of $19,037.50.[8]

(b) Online saver [account number deleted]. On the date of separation, the account had a credit balance of $1,503.01. On the date of separation Ms Sherman made two withdrawals from the account in the sums of $50 and $1,300.[9]

(c) Online saver [account number deleted]. On the date of separation, the account had a credit balance of $15,525.71. On the date of separation Ms Sherman made two withdrawals from the account in the sums of $325 and $15,200.[10]

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[7] Page 26 of Ms Sherman's affidavit of assets and liabilities sworn 26 November 2019.
[8] Pages 18 and 19 of Ms Sherman's affidavit of assets and liabilities sworn 26 November 2019.
[9] Page 23 of Ms Sherman's affidavit of assets and liabilities sworn 26 November 2019.
[10] Page 27 of Ms Sherman's affidavit of assets and liabilities sworn 26 November 2019.

[11] On the basis of the forgoing, the net total of monies retained by Ms Sherman from the joint bank accounts totalled $18,837.50 (being the total withdrawals of $42,075 less the total deposits of $23,237.50).

[12] After separation, Mr Neilson remained living in the family home for a period of approximately 79 weeks.[11] The family home was sold on 20 December 2013. The entirety of the sale proceeds were applied to reduce the loan secured against the title to the [second] property.

[13] At separation [the second property] was tenanted and remained tenanted until it was sold on 4 May 2018. The entirety of the sale proceeds were applied to reduce the loan secured against the title to the [third] property.

[14] Mr Neilson moved out of the family home on 22 December 2013 and moved into the [third] property.

[15] In November 2019, Ms Sherman applied to the court for orders for the division of relationship property. Mr Neilson was served on 6 December 2019 and took no steps. Because Mr Neilson did not engage, Ms Sherman's applications were set down for a formal proof hearing on 17 June 2020. Mr Neilson did participate in the formal proof hearing and eventually filed documents in reply.

[16] By consent on 11 June 2021, an order for sale was made with respect to the [third] property. The property was sold on 13 August 2021.

[17] As at the date of the sale of the [third] property, Mr Neilson had been in exclusive occupation of the [third] for a period of 399 weeks.[12]

[18] Both parties have received an interim distribution in the sum of $100,000. The net balance of the sale proceeds being funds in the sum of $354,040.70 (plus any interest accrued on the same) are currently being held on interest bearing deposit.

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[11] Page 26 notes of evidence ('NOE'); page 4 joint MOC
[12] Page 26, lines 33 – 34, and page 5 of the joint MOC.

THE LAW

Date at which value of property is to be determined

[19] The general rule is that the value of any property is to be determined as at the date of hearing.[13] There is however, a discretion to decide that the value of property is to be determined at another specific date. [14]

[20] Following the enactment of ss 18B and 18C, there is less need to depart from the default position of hearing date valuation. However, this is subject to the principle that valuations at separation date may be appropriate where one of the parties has had the post-separation use and enjoyment of a depreciating asset.[15]

Post Separation Contributions

[21] Section 18B of the Act empowers the Court to compensate a spouse or partner for post-separation contributions to the relationship.[16] Contributions to the relationship post-separation include both monetary and non-monetary contributions, and contributions of either nature are to be treated equally.[17]

[22] One party making their share of capital available to the other party post separation qualifies as a contribution. A common example of this is where, following separation, one party continues to live in a jointly owned property to the exclusion of the other party, who is unable to access their capital because it is tied up in the jointly owned property. Compensation for the contribution can be reflected by way of occupational rent or interest (one or the other and not both) but is not an automatic right, is discretionary, fact dependent and subject always to the underlying purposes and principles underpinning the Act that the division of relationship property must be a just one.[18]

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[13] The Act, s 2G(1)
[14] The Act, s 2G(2)
[15] *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129; *Cullen v Cullen* [2017] NZHC 42
[16] The Act, s 18B
[17] The Act, ss 2 and 18
[18] The Act, ss 1M and 1N; *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006; *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008; *Griffiths v Griffiths* [2012] NZFLR 237 (HC); *Butcher v Haack* [2012] NZHC 2991.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

The value of the Toyota Prado motor vehicle

[23] Motor vehicles are depreciating assets. The car was purchased only one month prior to separation for $15,160. On separation Ms Sherman retained the exclusive use and enjoyment of the car for six years post-separation. The car did depreciate in value. Ms Sherman sold the car on 10 May 2018 for $10,000. Both parties agreed that the car was sold for less than its value, and that a fairer market value would have been closer to $13,000. There is no evidence to support how that valuation was arrived at.

[24] On the basis of the foregoing, it is fairer in my view to depart from the default position and to set the value of the car as at the date of separation. I do not consider the car will have depreciated in the month between purchase and separation. Accordingly, the valuation of the car is to be set as at the date of separation with a value of $15,160. The separation date of the car is to be included in the total pool of relationship property available for equal division.

Post Separation Contributions

[25] There is agreement that both parties have made post-separation contributions to the various properties for which adjustments should be made as follows:[19]

(a) Mr Neilson - $77,399.44

(b) Ms Sherman - $14,766.71

[26] There is no agreement however in respect of the following claims for compensation for post separation contributions as follows:

Mr Neilson

(a) For payments made by him for the car insurance.

[19] Paragraphs 1(e)i – iii of the joint MOC.

(b) For withdrawals made by Ms Sherman from the joint bank accounts.

(c) For contributions in the form of work undertaken selling the family home and work undertaken renovating the [third] property.

Ms Sherman

(d) For occupational rent.

Car Insurance Payments

[27] There is agreement that post separation Mr Neilson continued to pay the insurance premiums for the car, totalling $2,457.77. There is agreement that Mr Neilson should be compensated for these payments. There is no agreement as to how much he should receive in compensation.

[28] Mr Neilson says that he should be compensated for the full amount of the payments made by him. Ms Sherman says that he should be compensated for one half of the total payments made by him.

[29] The car was jointly owned property and both parties will receive one half of the separation date value of the car. Ms Sherman retained the exclusive use and enjoyment of the car post separation. If one applies the same principles of compensation for occupational rent in relation to rates and insurance payments vis a vis the insurance payments, then Mr Neilson should be compensated for half of the insurance payments from Ms Sherman's share of the relationship property pool. [20]

[30] Accordingly, there will be an adjustment in favour of Mr Neilson, from Ms Sherman's share of the relationship property pool in the sum of $1,228.89.

[20] See *Griffiths v Griffiths* [2012] NZFLR 237 (HC); *Butcher v Haack* [2012] NZHC 2991 for the approach taken regarding occupational rent and rates.

Post-separation withdrawals made by Ms Sherman from the joint bank

[31] On the basis of the evidence before the court, as set out at paras [10] and [11] above, the net total of the monies retained by Ms Sherman from the joint bank accounts is on my calculation $18,837.50 (being the total withdrawals of $42,075 less the total deposits of $23,237.50). Mr Neilson is seeking compensation for one half of the net total of the monies withdrawn, which on my calculation would be $9,418.75.

[32] Ms Sherman's position is that Mr Neilson should not be compensated for any of the funds withdrawn by her and that his claim has been offset taking into account Mr Neilson's post-separation spending from the [Choices home loan account]; the drawdown of a loan of $20,000 deposited into the [Choices home loan account] (which was then applied for renovation work on the family home and the [third] property); and a deposit of $5,000 from the sale of the [second] property which was applied to reduce the overdraft facility on the [Choices home loan] account. On Ms Sherman's calculations, Ms Sherman should be receiving compensation from Mr Neilson however she is waiving her claim to compensation.[21]

[33] There are some real difficulties with the position taken by Ms Sherman. There are also however some real difficulties in respect of the evidence from the parties regarding the post separation lending and its application, as well as the application of the $5,000 received from the sale of the [second] property generally.

[34] Both parties agreed in their affidavit evidence and under cross examination that they obtained post separation lending which was utilised to ready the family home for sale and to prepare [the third property] for tenants. Although the parties have agreed that the amount in question with respect to post-separation lending is $20,000 that does not appear to be consistent with the affidavit evidence of the parties.[22]

[35] Further, there was an inconsistency on the dates that the post separation lending was drawn down. The affidavit evidence from Ms Sherman was that the funds were received in May 2013. Under cross examination the evidence of the parties was that

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[21] Pages 12 – 14 of the submissions of counsel for Ms Sherman dated 22 December 2021.

[22] Paras 20 and 50 of Ms Sherman's affidavit sworn 26 November 2019; para 30 of Mr Neilson's affidavit sworn 5 August 2020; Para 30 of Ms Sherman's affidavit sworn 9 June 2021.

the funds were received in May 2014. There was an absence of any reliable evidence as to the amount of the lending, the date it was drawn down, how the lending was used and for which property.

[36] There was no clarity in the written or oral evidence as to how the $5,000 received from the [second] property was utilised.

[37] Overall, the evidence in relation to post-separation expenditure and contributions by each party was confusing and lacked clarity.

[38] However, both parties agreed to rely on the analysis undertaken by Ms Sherman in terms of what the post-separation contributions were by each party to the properties owned by them. They also both agreed that the amount of the post-separation lending in question was $20,000.

[39] The process of calculating the contributions, on Ms Sherman's own evidence, required a painstaking labour-intensive analysis of all transactions in and out of the parties' bank accounts post separation and an extrapolation of personal spending versus any spending that could be classified as a contribution by either one of them to the various properties. Ms Sherman was clear in her evidence that her analysis of the post-separation expenditure accounted for payments made to tradespeople and any other costs associated with readying the family home for sale and readying the [third] property for tenants, and the source of those specific funds.

[40] I have given regard to the evidence of both parties in relation to this matter, considering Ms Sherman's evidence in particular on the basis that the parties have agreed on: the amount of post separation lending; how much they each contributed post-separation to the properties; and, that Ms Sherman's analysis of post separation expenditure fully accounted for the $20,000 loan and the $5,000 received from the sale of [the second property]. I also take into account that there is no requirement to account for the specific balance of the joint bank accounts following the withdrawals made by Ms Sherman as there is no dispute on the evidence that any debit balances of the joint bank accounts were repaid from the sale proceeds of the jointly owned properties.

[41] On the basis of the foregoing, I have determined that it is fair and just for there to be an adjustment in favour of Mr Neilson from Ms Sherman's share of the relationship property pool for one half of the funds withdrawn by Ms Sherman post-separation, in the sum of $9,418.75.

Post-separation contributions in the form of work undertaken selling [the family home] and work undertaken renovating [the third property],

[42] Mr Neilson claims that he should be compensated for post-separation contributions made by him as follows:

(a) Selling the family home. He says that he should be compensated in the sum of $6,125 being one half of the total real estate fees that would have been paid had the property been sold by a real estate agent.[23]

(b) For work undertaken in readying the [third] property for sale. He says that he should be compensated in the amount of $3,760.[24]

[43] Both claims are rejected. Neither claim is supported by any tangible or reliable evidence to justify the claims being advanced or to explain how either claim has been quantified.

[44] The fact is that the family home was not sold by a real estate agent and so the fees were not in actuality incurred. Mr Neilson accepted this under cross-examination.[25] Further, Mr Neilson received significant benefit from being able to remain in the family home post-separation for which, for reasons fully articulated below, I have determined there will not be any adjustment made in favour of Ms Sherman for occupational rent for the entire period of that occupation.

[45] Insofar as the claim for any work that Mr Neilson says that he undertook in readying the [third] property for sale, the evidence of the parties as discussed above is that some of the funds that were lent post separation were applied to ready the property

[23] Paragraph 3 of Mr Neilson's affidavit sworn 23 November 2021.
[24] The basis on which Mr Neilson has reached this figure is set out at paragraphs 5 and 6 of his affidavit sworn 23 November 2021.
[25] Page 28 NOE.

at [the third property] for tenants. The property was therefore, by all accounts, ready for tenants at the date that Mr Neilson moved into the [third] property. It is only fair that in the seven and a half years that Mr Neilson was in exclusive occupation that he maintained the property to the same standard that any property owner would expect any tenant to maintain a rental property.

[46] On the evidence, both parties contributed in some way, shape or form to readying the [third] property for sale. There is no tangible or reliable evidence before the court that quantifies the value of the contributions made by either party.

Occupational rent

[47] Mr Neilson remained living in the family home from the date of separation until on or about 22 December 2013. There is agreement that occupational rental is not payable for the period that the orders under the Family Violence Act were in force.[26]

[48] Ms Sherman is therefore seeking occupational rent for the following periods:

(a) The family home: 12 November 2012 – 22 December 2013. A total period of 51 weeks.[27]

(b) [The third property]: 22 December 2013 – August 2021. A total period of 399 weeks. There is agreement that the total market rent that could have been received for the [third] property during the relevant period is $167,685.43.[28]

[49] Mr Neilson's position is that occupational rent should not be paid for any of the period that he was in occupation of the family home.

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[26] Paragraph 1.f.iii.1.a of the joint MOC.

[27] It is noted that in the joint MOC that there is agreement that Mr Neilson was in occupation of the family home post separation for a period of 79 weeks. However, the relevant period that is in dispute is from 12 November 2012 until Mr Neilson vacated the property on or about 22 December 2013. The date of 22 December 2013 is agreed. On my calculation then the relevant period in dispute is 51 weeks.

[28] Paragraph 1.f.ii.6 of the joint MOC.

[50] Mr Neilson agrees that occupational rent should be paid in respect of his occupation of the [third] property for the period from December 2019 (when he was served with the proceedings) until August 2021, when the [third] property was sold.

[51] Mr Neilson's position generally in respect of occupational rental for the period December 2013 – December 2019 is that:

(a) The total amount payable should be reduced to account for fees charged by a property manager if the property had been rented out. It is submitted on behalf of Mr Neilson that the fees charged would total 8.5% of the total rental received, thereby reducing the total available to be claimed as occupational rent to $153,432.29.

(b) Then, the reduced total available to be claimed as occupational rent (being the $153,432.29 referred to above) should be reduced by half to reflect the following:

(i) A contribution made by Mr Neilson during the relationship by application of his police superannuation fund.

(ii) The advantage to Ms Sherman and the disadvantage to Mr Neilson of the increased property value.

[52] Dealing firstly with the claim for occupational rent in respect of the family home during the period 12 November 2012 – 22 December 2013. I have determined that it would not be fair or just to make an adjustment for occupational rent in favour of Ms Sherman for this period.

[53] On the evidence of both parties, Mr Neilson solely was responsible for the outgoings on the family home from the date of separation until February 2013, and, that from February 2013 until the property was sold, both parties contributed to the outgoings on the family home.[29] There is a lack of evidence as to precisely how much each party contributed to the outgoings on the family home.

[29] Page 22 NOE and para 24 of Ms Sherman's affidavit sworn 26 November 2019.

[54] There is no evidence from Ms Sherman as to what her outgoings were in Invercargill. The only evidence before the court in this regard is that Ms Sherman was living with her parents from the point of separation until the current time.

[55] Both parties accepted in their written and oral evidence that following separation they both took steps to try to resolve relationship property matters. Ms Sherman accepted that her lawyer did not respond within an appropriate timeframe to Mr Neilson and so in early 2013 she was required to instruct another lawyer.[30]

[56] Ms Sherman accepted that post November 2012 the parties agreed that the family home should be sold. Ms Sherman accepted under cross examination that the family home required work to be done to it to make it saleable. Mr Neilson was living in the property and was therefore at a practical level responsible for managing the renovations to the family home, given Ms Sherman was living in Invercargill.

[57] Although Ms Sherman's evidence was that it was an option for the house to be sold as is where is, on the evidence, the delay of the sale of the home combined with the renovations resulted in an increase in the sale price from which both parties have benefited. Further, Mr Neilson continued to care for the children post separation and was required to house the children. It is fair and just in my view that Mr Neilson and the children were entitled to stable and secure accommodation for a reasonable period post separation.

[58] There is no evidence that Mr Neilson was obstructive or delayed the sale of the family home.

[59] Under the circumstances set out above, it is my assessment that it was fair and just for Mr Neilson to remain living in the family home post separation until the family home was sold and that no adjustment should be made in favour of Ms Sherman to account for this.

[30] Paras 8 – 14 of Mr Neilson's affidavit sworn 23 November 2021.

[60] Insofar as the claim for occupational rent in relation to the [third] property is concerned, it is fair and just in my assessment that occupational rent should be awarded for the entire time that Mr Neilson was in exclusive occupation of this property.

[61] I do not accept that the amount available to be claimed should be reduced to account for fees payable to a property manager. There is no evidence at all that the parties ever utilised a property manager to manage their rental properties. Further, Mr Neilson has not submitted any reliable evidence on which he can advance this claim either to justify the claim or to quantify the amount claimed.

[62] Nor do I accept that the amount payable should be reduced by half to account for those matters identified at para [51](b) above. Both parties made significant financial contributions during the course of the relationship – Mr Neilson by virtue of his police superannuation fund and Ms Sherman by virtue of application of the funds received by her through settlement of her employment dispute.

[63] While there is no evidence that either party was particularly obstructive in terms of the sale of the [third] property, I do not accept Mr Neilson's evidence that Ms Sherman could have pushed ahead with the sale of the property or that she could have accessed her capital that was tied up in the property. Ms Sherman was living in Invercargill. It would have been impracticable for her to manage the sale of the property from Invercargill particularly given that Mr Neilson was in exclusive occupation of the property and did not appear on the evidence to be particularly motivated to sell the property.

[64] Mr Neilson accepted that there was significant benefit to him in remaining in occupation of the [third] property.[31]

[65] However, there appears to have been a degree of apathy by both parties to progressing the resolution of relationship property.

[66] As a consequence, both parties benefited in a positive way from the increase in the value of the [third] property. The increase in value was not attributable to any

[31] Page 40 NOE.

contribution made by either party but rather by virtue of the increasing value of properties nationally.

[67] As noted above at para [48](b) it is agreed that the total amount of rent that could have been received had the [third] property been rented out was $167,685.43. It is my understanding of the evidence that the post separation contributions that are agreed as being made by the parties (as referred to at para [25](a) and (b) above) take account of payments made by each party post separation of rates and insurances on the properties. On that basis the total rental income figure of $167,685.43 will not be reduced to account for those costs as they have already been accounted for.

[68] Standing back and viewing the totality of the evidence, I consider that it is fair and just that the total amount available to be claimed as occupational rent is reduced to take account of the post separation payments made by each party to the various properties. I have used the total figure of the agreed post-separation contributions made by each party because the evidence lacked any kind of clarity around precisely how much was paid by who, over what period of time and in relation to which property.

[69] Accordingly, the amount available becomes $75,519.28[32], being $37,759.64 each. On that basis there is to be an adjustment in favour of Ms Sherman from Mr Neilson's share of the relationship property pool in the sum of $37,759.64.

[32] Being the total figure of $167,685.43 less the post separation contributions of Ms Sherman of $14, 766.71 and Mr Neilson of $77,399.44.

FINAL DIVISION OF THE RELATIONSHIP PROPERTY POOL

[70] Taking account of the foregoing then the available relationship property pool available for division is made up as follows:

House sale proceeds	$354,040.70
Sale of Subaru	$150.00
The car	$15,160.00
Bank accounts:	
Mr Neilson	$1,709.83
Ms Sherman	$240.75
Total:	**$371,301.28**
Half each:	**$185,650.64**

[71] Adjustments are to be

Mr Neilson	
For insurance payments	$1,228.89
For money taken by Ms Sherman	$9,418.75
Ms Sherman	
For occupational rent	$37,759.64

[72] On that basis:

Final figure to Mr Neilson:	$158,538.64
Final figure to Ms Sherman:	$212,762.64

[73] Orders for division are made accordingly.

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Judge AR McLeod
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 31/03/2022