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

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2021-044-000185
[2023] NZFC 11590

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	LORRAINE ALTHEA MORGAN (HENRY) Applicant
AND	COLIN SAMUEL HENRY Respondent

Hearing:	4 October 2023
Appearances:	J Macdonald for the Applicant Respondent Appears In Person
Judgment:	7 December 2023

RESERVED JUDGMENT OF JUDGE KEVIN MUIR

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[1] Lorraine Morgan and Collin Henry are the settlors of the Boucanier Trust which previously owned their family home. They disagree about how the proceeds of sale of that home should be divided between them. Mr Henry wants 80 per cent of the money. However, Mr Henry also says that Ms Morgan's s 182 Family Proceedings Act 1980 (the FPA) application was filed too soon and I have no jurisdiction to make orders under that section as a result.

[2] Ms Morgan asks for an equal division. Alternatively, she says I should use s 44 or s 44C of the Property (Relationships) Act 1976 (the PRA) as a mechanism to treat the assets of the Boucanier Trust as relationship property and I should divide that property equally between the couple.

[3] All other issues about their relationship property have been resolved by agreement.

[4] Mr Henry and Ms Morgan first met in 1986 in their homeland of Jamaica. Ms Morgan came to New Zealand to join Mr Henry in April 2001 and the parties were married on 28 July 2001. Their son Jannick Henry was born on [date deleted] 2002.

[5] Ms Morgan and Mr Henry settled the Boucanier Discretionary Family Trust on 18 May 2006. On 18 May 2006 Mr Henry and Ms Morgan lent the sum of $24,900 to the trustees of the Boucanier Trust who were then Ms Morgan and a lawyer, Mr Alexander Witten-Hannah.[1] That advance was used to purchase a property at [street number deleted] Anchorite Way, Totara Views in Red Beach which became the family's home.

[6] Ms Morgan and Mr Henry lived in that home as a couple until 2017 when they separated. They continued to live in the home together after separation. The home was sold on 3 December 2022 with their Trust's solicitor retaining the net proceeds of sale of $748,734 in their trust account.

[1] Deed of Acknowledgement of Debt, 18 May 2006 and Minutes of Boucanier Trust, 10 May 2006.

The Issues

[7] It is common ground that the Boucanier Trust is a nuptial trust and hence a post-nuptial family settlement for the purposes of s 182(1) of the FPA. This is really a paradigm example of a post-nuptial family settlement being a discretionary trust established by a husband and a wife during their marriage to hold core family assets.

[8] If I am able to exercise my discretion under s 182 in a way that will achieve justice between the parties and in a way that is congruent with the outcome that would be achieved if I were to apply the principles under the PRA, I may not need to consider whether or not all or any part of the Trust assets were the result of a disposition made with the intent of defeating Ms Morgan's rights or claims under the PRA or with the effect of defeating her claims under the PRA.

[9] The reason Mr Henry says there is no jurisdiction to make orders under s 182 of the PRA is because the application was filed six weeks before their marriage was dissolved, rather than "*on or within a reasonable time*" after dissolution. That is the first issue I must resolve.

[10] If I decide that I do have jurisdiction to proceed, I must then decide how to exercise my discretion under s 182.

[11] Ms Morgan's alternative applications under s 44 of the PRA argue that the advance of $24,900 to the Trust was a disposition of relationship property made in order to defeat her claim or rights and that disposition ought to be set aside and all or part of the proceeds of sale of [Anchorite Way] treated as relationship property and divided between her and Mr Henry. In the alternative she applies for compensation under s 44C of the PRA arguing that the advance to the trustees of the Boucanier Trust was a disposition which had the effect of defeating her claims under the PRA and that she is entitled to compensation.[2]

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[2] Although the remedies realistically available to Ms Morgan under s 44C(2) are very limited. There is no other significant relationship property which could be subject to a s 44C(2) or s 44C(23)(b) order. There is no significant separate property in Mr Henry's control which could be subject to a s 44C(2(b) or (c) order. The remaining proceeds of sale of the home are unlikely to produce significant income to fund a s 44C(c) order for payment of income.

[12] On 18 August 2022, Ms Morgan in her capacity as a trustee of the Boucanier Trust agreed to advance $150,000 to Mr Henry. On 21 November 2022, Ms Morgan in her capacity as trustee agreed to advance a further $75,000 to each of herself and Mr Henry.

Mr Henry's Position

[13] Mr Henry says that the proceeds of sale should not be divided equally between the parties because he is now 72 years old and Ms Morgan is 55. He says he is suffering from significant chronic and acute health issues and that his financial needs are significantly greater than hers. He argues that if orders are made under s 182 of the FPA he ought to receive the lions share with the applicant to receive approximately 20 per cent of the funds held by the Trust – he says that is a total of around $150,000. $75,000 has already been advanced to Ms Morgan so she would only receive an additional $75,000.

[14] In the alternative he says that there are extraordinary circumstances which would render equal sharing repugnant to justice and that if I grant relief under the PRA the presumption of equal sharing should not apply and he ought to receive approximately 80 per cent of the party's property in any event.

[15] However, Mr Henry also argues that the principles of the PRA ought not to apply to the Trust assets, principally because there was no disposition of relationship property either with the intention of nor the effect of defeating Ms Morgan's claim or rights under the PRA.

[16] Mr Henry says that Ms Morgan made no significant contribution to the acquisition of the land at [Anchorite Way] owned by the Boucanier Trust nor to the construction of the property. He says that a reduction of the mortgage debt over the property following the sale of another property was another significant contribution by him.

[17] He also says there were aspects of the marriage that were not "*satisfactory*" to him and that he made "*real sacrifices and contribution(s) … to give the applicant a very comfortable lifestyle*".

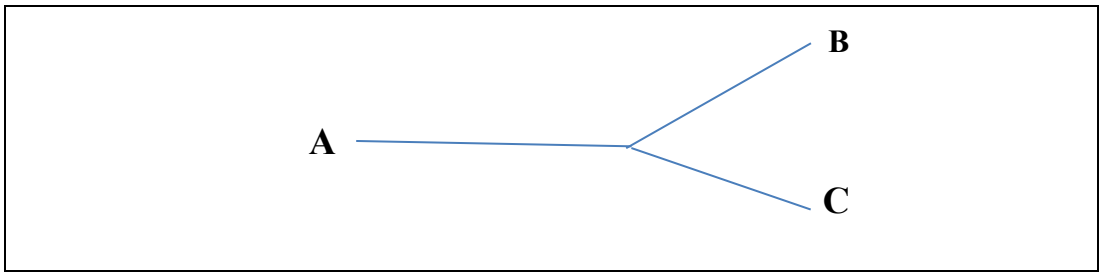
[18] Mr Henry says the allocation of 20 per cent of the Trust funds to Ms Morgan will leave her with "*more than enough*".

The Law – Section 182

[19] The principles to be applied when considering the exercise of a discretion in relation to a trust under s 182 are now well established. In *Clayton v Clayton (Claymark Trust)* the Supreme Court emphasised that the exercise of discretion under s 182 is forward looking to the end of the marriage not backward looking to the time of settlement of the Trust.[3] The Court needs to undertake a comparison of the expectations of the parties prior to dissolution of their marriage, with their position after dissolution. The comparison is not undertaken in a fixed point. It is a general comparison between the position under the settlement had the marriage continued with the position of the parties after dissolution.[4]

[20] More recently the Supreme Court has confirmed the need for Courts to undertake "… *a forward-looking exercise, comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage*".[5]

[21] In both *Clayton* and *Preston,* the exercise was illustrated diagrammatically as follows:



[3] *Clayton v Clayton (Claymark Trust)* [2016] 1 NZLR 590 (SC).
[4] At [52]–[54].
[5] *Preston v Preston & Ors* [2021] NZSC 154 at [32]. Quoting *Clayton* at [53].

[22] In the diagram A is the position of the parties at the time of settlement; B is the position of the claiming spouse under the settlement with the marriage dissolved; and C is the position the spouse claiming would have been in under the settlement assuming the marriage had continued. The comparison is not between position A and position B but rather between position B and position C.

[23] Section 182(3) permits the Court to take into account not only the circumstances of the parties, and any change to those circumstances since the settlement, but also "*any other matters which the Court considers relevant*".[6] The approach to be taken is neither formulaic nor presumptive.

[24] In *Clayton* the Supreme Court did not think it was either necessary nor desirable to attempt to comprehensively list the relevant considerations. Each case requires individual consideration.[7]

[25] Factors that have been found to be relevant in the leading cases include:[8]

(a) The interest of any children who are beneficiaries – this has been described as a "*primary consideration*".[9]

(b) The interest of other beneficiaries of the nuptial settlement.

(c) The terms of the settlement and how the trustees are exercising or are likely to exercise their powers in the changed circumstances.

(d) Who established the trust and the source and character of its assets.[10] Regardless of the origin of the assets though they are all part of the nuptial settlement.[11]

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[6] Section 182(3).
[7] *Clayton* above n 3, at [57] and *Ward v Ward* [2010] 2 NZLR 31 (SC) at [26].
[8] *Preston* above n 5, at [35].
[9] *Clayton* above n 3, at [56] and [58]. *Preston* at [35] noting that s 182(1) and (6) refer specifically to the interests of a "*child of the marriage or civil union*".
[10] *Preston* above n 5, at [36].
[11] *Clayton* above n 3, at [68].

(e) The manner in which the trustees would have exercise their discretion if the marriage had continued.

(f) The wider benefits to the family the trust has provided or might have been expected to provide.[12]

(g) The suitability of the relevant trust structure in light of the changed circumstances.

(h) Need. However, in *Preston v Preston* this was said to be "*not a prerequisite*".[13]

(i) The length of the marriage.

[26] Because the focus is on the gap in expectations, contributions are not a controlling factor of the s 182 discretion, however contributions may be relevant in assessing the source and character of the assets in the trust. The source and the character of the assets should be considered in the current social context where it is "*recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage*".[14] The Supreme Court in *Preston* emphasised that the contemporary recognition of different but equal contributions to a marriage in the accumulation of assets is also reflected in ss 1M(b), 1N(b) and 18(2) of the PRA.[15]

[27] Ultimately the discretion in s 182 has to be applied "*in the 21st century*".[16]

[28] In *Preston* the Supreme Court directed Courts conducting an inquiry under s 182 to adopt a three-stage analysis.

> "What is accordingly required is a three-stage process as follows:
>
> (a) The first stage is to determine whether there is a nuptial settlement.

[12] At [50] where the Court emphasized that when dealing with the discretionary family trust the situation must be looked at "*from the perspective of the family unit of which the applicant is part*".
[13] *Preston* above n 5, at [35](h).
[14] *Preston* above n 5, at [36] and *Clayton* above n 3, at [66].
[15] *Preston* above n 5, at [46].
[16] *Preston* above n 5, at [38] and *Clayton* above n 3, at [58] and [66], *Ward* above n 7, at [26].

(b) The second stage is to assess whether there is a difference between the position of the spouse under the settlement with the marriage dissolved … and what the position would have been under the settlement had the marriage continued. If there is a gap (between those positions) a discretion under s 182 is enlivened.

(c) The third stage is to determine how the discretion should be exercised in the particular case."[17]

[29] The Supreme Court in *Preston* went on to discuss the factors to be addressed in the third stage in order to determine how the discretion should be exercised in the particular case. A number of additional factors to those that had been cited in *Clayton* and *Ward* had been suggested by counsel. At paragraph [44] the Supreme Court observed:

> "We see no need to require a court to address these further factors as a matter of course. As we said in *Clayton*, the assessment is ultimately a factual one to be undertaken consistently with the purposes of s 182. What is relevant will accordingly depend on the particular facts. A long list of potentially relevant factors will not necessarily assist in undertaking the task."

[30] It is not necessary to require a Court to put itself in the place of an independent and fair-minded trustee when considering how to exercise the discretion under s 182.[18] There may be some advantage to using that as a more objective lens in order to provide a framework for the exercise of the discretion under s 182 which is more neutral about the property rights of the primary asset owning or contributing spouse. When deciding on the compensation or relief to be provided a trust framework to hold assets for a spouse in the future will not always be appropriate. In some cases, it may be better to move away from the existing trust arrangements. The Court should not be unduly restrained. The relief the applicant is entitled to is "*an order* "*in whatever form is best suited to the circumstances*"."[19]

Issue 1 – Do I Have Jurisdiction to Proceed?

[31] I set out s 182(1) in full.

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[17] *Preston* above n 5, at [39].
[18] At [48].
[19] *Preston* above n 6, at [48] quoting *Ward* above n 7, at [27].

> **182 Court may make orders as to settled property, etc**
>
> (1) **On, or within a reasonable time after, the making of an order under Part 4 of this Act** or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, **the Family Court may inquire into the existence of any agreement between the parties** to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, **and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement**, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, **as the court thinks fit**.
>
> (emphasis added)

[32] As the section says, it is "*on or within a reasonable time*" after the making of an order for dissolution of marriage that the Family Court can "*inquire*" into the existence of any post-nuptial settlement that is made on the parties. It is only then that orders may be made as to the application of the "*whole or any part of the property settled*" or the variation of the nuptial settlement (in this case the Boucanier Trust).

[33] In a memorandum filed some eight weeks after the hearing concluded, Mr Henry referred me to *K v H F Trust (No. 2)*[20] where the Family Court referred to the wife's earlier application under s 182 having been dismissed as a nullity because the application was filed within two years of the parties separating.

[34] The case that Mr Henry was obliquely referring to was the decision of Judge Rogers in *Van den Brink v Kidd*.[21] That case concerned a strike out application. There was an application for division of relationship property by Mr Van den Brink. The parties had separated in late May or early June 2006. On 5 April 2007, Ms Kidd filed a cross-application seeking orders under s 182 FPA. A strike out application was determined by Judge Rogers in October 2007.

[35] Her Honour decided that it was appropriate to strike out the claim under s 182 as the two years that needed to elapse for an application for dissolution could be filed had not elapsed at that time. It is clear from her judgment that she was concerned that

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[20] *K v H F Trust (No. 2)* [2010] NZFLR 177.

[21] *Van den Brink v Kidd & Ors*, FC Papakura FAM-2007-055-000073, 16 October 2010, per Judge Rogers.

the delay in resolving the issues under the PRA application that might follow if the s 182 application was allowed to remain on foot. Ultimately Her Honour was satisfied that the application was premature. She was of the view that resolution of the PRA issues might render the s 182 application unnecessary, concluding that there was "*no reasonable basis*" for it (remaining on foot). The application was struck out.[22]

[36] Although this issue was raised "*late*" by Mr Henry – it was not raised in pleadings or at any time in submissions during the hearing – I must nonetheless decide whether Ms Morgan's application under s 182 can proceed. Mr Henry reminds me that it was filed "*some six weeks before the Court issued an order dissolving [the] marriage*".

[37] With respect to Mr Henry, the language in s 182(1) is clear enough. The Family Court cannot make or complete its inquiry as to whether there is a post-nuptial settlement and if so whether and how to exercise its jurisdiction, until the parties' marriage is dissolved.

[38] The section does not specifically say that no application can be "*filed*" in the Court until the marriage is dissolved.

[39] The s 182 application was filed on 23 March 2021. Although this application was filed, and some of the parties' evidence was filed before the marriage was dissolved in April 2021, the hearing before me did not commence until 4 October 2023. My inquiry under s 182 occurred and any orders I decide to make will be occurring "*within a reasonable time*" after the dissolution.

[40] I do not agree that an "*application*" cannot be filed until the marriage is dissolved. It is the "*inquiry*" or "*substantive hearing*" that can only occur on or after dissolution.

[41] As a result I find that I have jurisdiction.

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[22] At [69].

Issue 2 – What If Any Relief Should I Order?

[42] It is common ground that the Boucanier Trust is a post-nuptial settlement.

[43] It is also clear from the approach that Mr Henry took to the case and from his submissions, that he accepts that the position of the spouses under the settlement with the marriage dissolved differs from the position they would have been in had the marriage continued. That is apparent from his submission that he ought to receive 80 per cent of the assets of the Trust. If the parties had remained together, it is likely that the assets of the Trust (principally the home the parties lived in) would have to be applied for their common use and benefit as they had been from the date the Trust was established.

[44] The assumption that the assets of the Trust would be applied for the common benefit of the spouses is evidenced by and reflected in the way the Trust itself was structured with Ms Morgan and Mr Henry each having an equal level of control over the assets of the Trust.

[45] Mr Henry's submissions were directed at the third stage of the three-stage analysis from *Preston.*[23]

[46] In order to persuade me that I ought to settle the assets of the Boucanier Trust unequally in Mr Henry's favour, Mr Henry placed primary emphasis on three factors.

[47] Firstly, he emphasised the source or origin of the assets of the Boucanier Trust. He said that Ms Morgan came into the marriage with nothing. She arrived in New Zealand with no significant assets in her name and with financial assistance from her future husband. She had nothing to contribute to the acquisition of a home for the family nor to the establishment of the Boucanier Trust at that time.

[48] Secondly, he placed emphasis on his perception that their contributions throughout the relationship were unequal. He worked through much of the relationship as a lawyer, principally a Barrister. Ms Morgan initially "*was earning*

[23] *Preston* above n 5, at [39].

minimum wages as a store clerk with Mitre 10". He said that at no time during the marriage did Ms Morgan earn in excess of $20,000 per year.

[49] At an early stage of the marriage Ms Morgan accepted a part-time job as a children's pastor at her church. Mr Henry was critical of Ms Morgan for not taking up employment opportunities that he says he pointed out to her. Mr Henry claimed that Ms Morgan was "*anything but a "traditional" wife*". He said he was unhappy with the nature or frequency of sexual intimacy during the marriage. Mr Henry also emphasised the contributions that he made to "*domestic services*" which included some cooking tasks and the hiring of gardeners to mow the lawns and do landscaping and gardening work. Mr Henry emphasises that it was he that arranged loans with Westpac for the construction of a home on the land owned by the Boucanier Trust.

[50] The third factor Mr Henry says I should consider relevant is that his needs are currently greater than Ms Morgan. He says they are likely to continue to be greater than hers into the future. This is in part a product of their difference in their ages and in part a product of his declining physical health.

[51] In order to analyse Mr Henry's claims, I will first consider the terms of the Boucanier Trust, its creation and the origin of its assets.

The Boucanier Trust – Terms – Origin – Assets

[52] The "*Deed of Trust establishing the Boucanier Trust*" dated 18 May 2006 does not appear to have been accompanied or preceded by any directions or statement of wishes by the settlors Ms Morgan and Mr Henry. The initial trustees were Ms Morgan and Mr Witten-Hannah. The discretionary beneficiaries were the settlors Ms Morgan and Mr Henry and "*any issue of any final beneficiary*", as well as any trust which included among its beneficiaries any beneficiary. The final beneficiary is Jannick who is the only child of the settlors.

[53] There was no evidence that the terms of the Trust Deed were ever amended nor that any beneficiaries were ever added or removed.

[54] Mr Henry says that he met all of the significant expenses during the marriage including Jannick's school fees, maintenance repairs and any improvements to their home, groceries, mortgage payments, insurances and the like.

[55] Ms Morgan and Mr Henry as settlors had the powers to appoint and remove beneficiaries by joint deed during their joint lifetimes.[24]

[56] Each settlor had the power to appoint one trustee and to remove any trustee they had appointed. Ms Morgan was deemed to have appointed herself under the appointment and removal of trustees' clause.[25]

[57] There was a joint power for the settlors to appoint and remove an advisory trustee and Mr Witten-Hannah was deemed to have been appointed pursuant to this clause.[26] The trustees had the power to resettle the Trust Fund on the trustees of any Trust whether in New Zealand or elsewhere which included a beneficiary.[27]

[58] The discretion of the trustees was otherwise said to be unfettered.[28] The assets of the Trust could be applied for the benefit of any beneficiary during the subsistence of the Trust. On vesting day the assets of the Trust were to be settled on any of the discretionary beneficiaries and in such shares as the trustees by deed appointed. Any Trust funds not validly applied to any discretionary beneficiaries by vesting day were to be vested in the final beneficiaries – in this case Jannick.[29]

[59] The Trust Deed gave the settlors and trustees broad powers and discretions. However, the individual powers and discretions of each of Mr Henry and Ms Morgan were limited, controlled, or restricted principally by the requirement that they act jointly as settlors when appointing or removing beneficiaries and jointly as trustees when resettling the Trust Fund or making distributions.

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[24] Clauses 7.1.
[25] Clauses 17.1 and 17.2.
[26] Clause 17.4,
[27] Clause 8.1.
[28] Clause 11.1.
[29] Clause 10.1(b).

[60] I find that the terms of the Boucanier Trust Deed do not provide either Ms Morgan or Mr Henry with such an unfettered discretion or control over the Trust assets as a "*bundle or package of rights*" so as to be equal to the value of the net assets of the Boucanier Trust. Unlike Mr Clayton in *Clayton v Clayton* [Vaughan Road Property Trust] neither Ms Morgan or Mr Henry possess rights which might be equal in value to the Trust assets, or tantamount to ownership of the Trust assets.

[61] On the day the Trust Deed was executed the then trustees Ms Morgan and Mr Witten-Hannah resolved to purchase the land at [Anchorite Way] for $249,000 with settlement on 24 May 2006, to borrow $224,100 from Westpac Banking Corporation executing the relevant documents, and to borrow $24,900 from Mr Henry and Ms Morgan and to enter into a Deed of Acknowledgement of Debt.

[62] On the same day Mr Henry and Ms Morgan entered into a Deed of Forgiveness of Debt with the trustees forgiving the entire debt.

[63] It was Mr Henry's uncontested evidence that the $24,900 advanced originally came from the sale of a piece of real estate that he owned overseas. He said, "*That property was part of bequests to me by my foster parents*".

[64] Mr Henry said that he agreed to the creation of the Boucanier Trust in order to protect the funds that he was transferring into New Zealand. He was in his mid-50s and he said, "*Knowing that it would be virtually impossible for me to start over financially should a family breakup occur, I wanted to ensure that whatever property I'd brought here would provide me with accommodation the rest of my life*."

[65] Regardless of the original source of the $24,900 that was advanced to the Boucanier Trust the documents made it clear that the gift was made by Ms Morgan and Mr Henry jointly. That shows a clear intention by both of them that the funds existed for, and were being used for, their common use and common benefit.

[66] There is no evidence that Mr Henry and Ms Morgan as joint settlors of the Trust agreed or intended that the purpose of the Trust was to provide accommodation for Mr Henry for the rest of his life. It would have been possible for that to be recorded

in a Memorandum of Wishes or in the Trust Deed itself if that was the true intention of the settlors.

[67] It is unremarkable that five years into their relationship Ms Morgan and Mr Henry were agreeing to jointly advance funds to a Trust that they would effectively jointly control. It is unremarkable that the Trust was using those funds to buy land on which a home would be built for the family. The terms of the Boucanier Trust Deed and the transaction that occurred here could be described in Aotearoa/New Zealand terms at least, as a conventional use of a trust structure and trust assets.

[68] I am not satisfied that there was consensus or agreement between the settlors as to the purpose of the Trust when it was established. In response to Mr Henry saying the Trust existed to ensure he had accommodation for the rest of his life, Ms Morgan's evidence was "*To the contrary, the purpose was to ensure the family home was secured against claims against his professional practice and that made good sense to me*".

[69] While I find it is likely that the funds advanced were originally sourced from Mr Henry's separate property, if the intention had been to protect those funds for his benefit, a conventional and appropriate transaction to enter into might have been an agreement contracting out of the PRA. If that was the intention the deed of acknowledgement of debt should have named Mr Henry alone as the lender. Placing the funds into a trust that was to provide a core family asset and that was to be jointly controlled was a transaction that is inconsistent to the purpose that Mr Henry now says was intended. The establishment of the Trust, the joint advance of the funds, the joint forgiveness of that debt and the use of the funds to acquire the family home are I find consistent with Ms Morgan's belief that "*the property was in trust for protection and I always looked at it as our family home belonging to both of us*".

[70] In any event the intention of the parties' settlement is not key to the exercise of my discretion. The point of comparison I must make is not between the intentions at inception and now. It is between the position of the parties prior to dissolution – including the manner in which the trustees had exercised their discretion or powers that date – with the position of the parties now as a result of the separation/dissolution.

Has There Been a Change in Position?

[71] Clearly the positions of the parties have changed as a result of their separation and the dissolution of their marriage. They were no longer able to continue to live in the family home together indefinitely.

[72] The net proceeds of the sale of the home are insufficient to provide a new debt-free home for both of them.

[73] Mr Henry is currently living in the United States, or at least he is staying there for now. He describes himself as "*peripatetic*". He says is staying in accommodation at the courtesy of friends.

[74] Both Mr Henry and Ms Morgan have aged considerably since the trust was established and they have continued to age since the dissolution of their marriage. Mr Henry is suffering from a range of chronic and acute medical conditions which are likely to expose him to significant medical costs in the foreseeable future, particularly if he chooses to remain in the United States. However, both Ms Morgan and Mr Henry are New Zealand citizens and I understand Mr Henry continues to have rights of residence in Jamacia. Mr Henry's evidence was that there are public health facilities and services available in Jamaica as there are in New Zealand, although the facilities and services in Jamaica may not be optimal.

[75] Jannick is living with Ms Morgan in rented accommodation and although he is now 21 he is continuing to study. Jannick will no doubt continue to look to his parents for emotional support and where available financial support for some time to come. As long as Mr Henry chooses to continue living out of New Zealand the burden of much of that support is likely to continue to fall on Ms Morgan.

[76] The other significant change post-separation is that Mr Henry has received advances from the Trust totalling $225,000. Ms Morgan has received only $75,000. The balance remaining for distribution is some $448,000 plus interest. If Mr Henry were to succeed in retaining 80 per cent of the Trust assets that would mean that Ms Morgan would be limited to receiving an additional advance of some $75,000 while

Mr Henry might receive a further $373,000, taking the total that he would have received to something over $598,000 of the $748,000 sale price.

[77] If the marriage had survived it is possible that the Trust would have been in a position to continue to provide a home for Ms Morgan and Mr Henry together until the death of the survivor. The balance of the Trust funds, however they are divided, appear to be insufficient to provide a separate home for Ms Morgan and Mr Henry in New Zealand.

What Orders Should I Make?

[78] I am satisfied that there is a significant gap or difference between the expectations the parties had prior to separation/dissolution and the positions they are in now. It follows that the only issue I need to consider is what if any orders I should make.

[79] Mr Henry seeks 80 per cent of the Trust assets claiming that he made significantly greater contributions to the assets of the Trust, and that his future needs are likely to be significantly higher than Ms Morgan's.

[80] Ms Morgan seeks a 50/50 split of the Trust assets. She asks that the funds be settled on the parties personally rather than on a trust structure, citing the compliance and administration costs of a trust structure for such comparatively modest funds. I am urged to accept that the parties are likely to individually make such reasonable provision for Jannick as they are able to from the funds they each receive.

[81] There is of course no presumption of a 50/50 split.[30] However, with a "*conventional relationship*" of comparatively long duration like this one I would expect there to be good reason to depart from an equal division of Trust assets. That is in good part because of the presumption of equal contribution and equal sharing to the relationship that arises by analogy from the relevant provisions of the PRA.[31] Parties to a marriage are not to be encouraged to seek "*an audit*" from a Court as to

[30] *Preston* above n 5, at [52].
[31] Sections 1M, 1N and 18 Property (Relationships) Act 1976.

the day to day financial details and intimate details of their relationship. The focus of the Court's attention under s 182 should be on the disparity of expectations that has resulted from the dissolution, rather than on assessing the validity of any perceived grievances that the parties take from the relationship.

Contributions to the Trust Assets and the Relationship

[82] On any analysis when looked at objectively, Mr Henry and Ms Morgan's marriage was a successful one. The relationship subsisted for around 16 years. They have a son Jannick of whom they are both rightly proud. They clearly performed different functions during the marriage. The majority of the income brought in to the relationship was as a result of Mr Henry's work as a Barrister, but it is difficult to see how he could have so successfully continued in that career and achieved the income levels that he did without Ms Morgan's support in the home and in particular, without her contributions to the care of Jannick.

[83] I am not persuaded that the separate property origins of the original loan to the Trust is a factor justifying an unequal division. The clear intention when those funds were advanced was that they would be treated as an advance by both spouses. That was appropriate.

[84] Mr Henry emphasises the fact that he funded the mortgage payments – although Ms Morgan was required to sign as a guarantor. However, the income that Mr Henry earned during the relationship was relationship property.[32] The fact that it was applied to meet family expenses is not remarkable and does not justify a finding that his contributions to the relationship were "*significantly greater*". Ms Morgan did work throughout the relationship, albeit in comparatively low paid and often part-time positions. There is no evidence that she retained the income that she earned for her own benefit. She has not left the relationship with a significant "*nest egg*".

[85] Mr Henry said that he used the equity in the home the Trust owned to invest in two rental properties, one in Helensville and one in Millwater. He says that he had suggested or recommended that the Trust sell the Anchorite Way home and that the

[32] Section 8(1)(e).

parties' live mortgage free in the Millwater apartment, but that Ms Morgan had rejected this suggestion. When the Millwater apartment was sold, the proceeds were applied to reduce the mortgage over Anchorite Way. Again, that is not remarkable and does not justify an unequal division of the major asset that was created during the marriage.

[86] Ms Morgan's evidence that she cooked, cleaned, ironed, and maintained the home and garden through until 2018 was not significantly challenged in cross examination. I accept Mr Henry's perception that he also made a significant contribution to domestic life. It appears he particularly enjoyed and was comparatively skilled at cooking meals for the family. Ms Morgan accepts that he cooked on the weekends while she cooked during the week. I do not need to resolve any conflict between them on that point.

[87] The fact that their relationship subsisted for as long as it did reinforces my finding that they each made contributions of a different kind to the relationship and there is nothing to displace the presumption that those contributions were of approximately equal value. I take into account the principle in Section 1M(b) of the PRA that all forms of contributions are treated as equal.[33]

[88] Both Mr Henry and Ms Morgan are now expressing dissatisfaction with some aspects of their past relationship. Mr Henry complains about a lack of sexual interest/intimacy between he and his wife. Ms Morgan complains that Mr Henry was dominant in the relationship, that she was excluded from participation in financial decisions, and that he sought to control the way she looked and behaved. Mr Henry complains that Ms Morgan was not as empathetic or supportive at times when he was suffering from ill health.

[89] They both travelled independently from time to time, but I do not need to analyse how any travel was funded or whether their leisure time and travel was equitably shared. It is enough to note that these were the decisions that they made during their relationship and that they chose to remain committed to their marriage

[33] Sections 1M(b) and 18(2).

and their family despite any periods of unhappiness during their comparatively long relationship.

[90] Mr Henry referred me to s 13 of the PRA submitting that there was "*more than a surfeit of extraordinary circumstances which would make equal divisions of property* "*repugnant to justice*"."

[91] I disagree. There are aspects of their relationship that were unique to them.[34] However, there are no extraordinary circumstances which would be sufficient to compel a finding that equal division was "*repugnant to justice*" if we were dealing with relationship property and we are not.

[92] Mr Henry refers to the fact that he financed Ms Morgan coming to New Zealand to enter the relationship. That is not uncommon. He refers to the age difference of 17½ years between them. Again, that is not remarkable and certainly not extraordinary. He alleges that Ms Morgan was "*unenthusiastic*" about the marriage and more interested in securing status as a New Zealand citizen or resident. I do not accept that. The fact that the marriage subsisted for as long as it did, persuades me that Mr Henry is wrong about that.

[93] I do not accept his evidence that Ms Morgan was indifferent to his chronic and acute illnesses nor that she reacted inappropriately when he was unwell. She was cross examined and her explanations when challenged were consistent and had an empathetic tone. In any event, Mr Henry's "*raft of ailments, both physical and mental*" would not constitute extraordinary circumstances if we were dealing with relationship property.

[94] I do not find that any of the factors discussed above are sufficiently compelling to justify Mr Henry's position that he should receive the vast majority of the Trust funds.

[34] There are aspects of almost all marriages that are unique.

Comparison of Future Needs

[95] I accept that at least while Mr Henry continues living in the United States his financial needs are likely to be greater than Ms Morgan, principally because of the health care costs that he may have to pay. I accept that Mr Henry genuinely believes that he cannot afford to return to New Zealand because he cannot purchase a new home for himself. However, as a New Zealand citizen he is entitled to a range of income support including National Superannuation and access to the universally available public health care services and facilities here.

[96] He left New Zealand to attend to family crises including the death of his brother. It appears that in part his decision to remain living overseas is motivated by the fact that he has been able to obtain cost-free accommodation overseas. However, his most pressing likely future financial needs are a direct result of the decision that he is making to remain outside of New Zealand – and possibly a result of his decision to live outside of Jamaica as well. That decision is not a product of the dissolution of marriage.

[97] Mr Henry says that the age difference between him and Ms Morgan should compel the Court to grant him a greater share of the Trust assets. I accept as a result of his age and health it is unlikely that he will be able to return to the workforce. He is suffering from significant acute and chronic health issues including [medical details deleted] and a range of other physical ailments. However, at the age of 55 Ms Morgan does not have an established career or income stream at a level that is likely to enable her to be able to afford to rehouse herself and Jannick in a house that she owns, even if she receives an equal share of the assets of the Trust. In that regard she is in a similar position to Mr Henry as I accept he is also unlikely to be able to rehouse himself in a house that he owns, at least in New Zealand, regardless of how the Trust assets are divided.

[98] As Ms Morgan ages she is also likely to have more significant health issues and her ability to earn even the modest levels of income that she has earned to date is likely to decline. She is likely to live longer than Mr Henry. As a consequence, any

capital sum that she receives will need to be preserved and applied carefully as she is likely to have continuing needs for at least a few decades into the future.

[99] If Mr Henry and Ms Morgan's marriage had subsisted, they would have been able to enjoy the Trust's main asset – presumably in the form of a home – for the rest of each of their lives. It is unlikely that they would have agreed or intended the assets of the Trust to be largely expended during Mr Henry's lifetime leaving Ms Morgan and Jannick with little prospect of significant continuing support from the Trust.

Should the Trust Structure be Preserved?

[100] Neither Mr Henry nor Ms Morgan were arguing that the Trust assets should be settled on a new Trust nor were they seeking to retain control of the Boucanier Trust. I agree that the costs of administration and compliance in a trust structure do not appear to be justified given the comparatively modest sum of cash that the Trust now holds. If I were to make orders that the funds be resettled on two new trusts the establishment and future administration and compliance costs would be significant.

[101] I do have to consider Jannick's position, particularly in light of Mr Henry's view that he is likely to need most of the assets of the Trust for his future medical expenses and accommodation. However, both Mr Henry and Ms Morgan have done the best that they can for Jannick to date. He is of an age where he ought to be establishing his independent life and given his education and the sound and loving base that his family has provided him, his prospects are likely to be good.

[102] Neither Mr Henry nor Ms Morgan have suggested that either of them are likely to neglect Jannick if he is facing a situation of acute need. It is also apparent to me that the terms of the Trust and the discretions vested on Mr Henry and Ms Morgan as trustees, were such that it was likely that the assets of the Trust would be applied principally for their benefit – at least during their lifetime.

[103] On that basis it is appropriate that the relief that I order take the form of a distribution of the remaining funds to the parties personally rather than a resettlement

on a new trust or new trusts. Neither Mr Henry nor Ms Morgan contend that there are other beneficiaries whose needs should be taken into account.

[104] Although Mr Henry's immediate needs and his needs in the near future are likely to be significantly higher than Ms Morgan's, the fact that Ms Morgan will need support for a longer period of time, leads me to the conclusion that the just outcome is an equal division of the net proceeds of sale of the Anchorite Way property.

[105] That means that Ms Morgan will first need to receive $150,000 as "*an equalising payment*", the balance of the funds to be divided equally between the parties.

Should I Make Orders Under the PRA?

[106] It follows that I do not need to consider Ms Morgan's alternative argument that relationship property was applied with the effect of, or the intention of, defeating her claim or rights under the PRA. It was an argument that had some merit. The $24,900 "*seed money*" for the Trust – the money used to purchase Anchorite Way – was settled jointly by Ms Morgan and Mr Henry some five years into their relationship. The debt owed back to them by the Trust was clearly relationship property. The forgiveness of that debt had the immediate effect of disposing of a valuable item of relationship property. However, whether or not that disposition would necessarily lead me to find that the entire current assets of the Trust are now relationship property or that the Trustees ought to pay compensation equivalent to the current assets of the Trust is not an issue that I need to determine.

[107] The parties have agreed that all relationship property issues other than issues related to the Boucanier Trust assets have been satisfactorily reached between them.

Orders

(a) The remaining assets of the Boucanier Trust held on deposit are to be distributed so as to ensure that Mr Henry and Ms Morgan have each received an equal share of the assets the Trust held.

(b) The Boucanier Trust is to be "*dissolved*" following that distribution.

(c) The costs of distribution and of the winding up of the Trust and any taxes and reasonable fees incurred are to be paid from the funds on deposit before the further distribution is made to the parties.

Costs

[108] Ms Morgan has succeeded. There is nothing about the procedural history and nothing about Mr Henry's submissions that would justify any increase in costs for her. On the other hand, there is nothing to displace the principle that costs ought to follow the event.

[109] Ms Morgan is entitled to costs on a 2B scale. Ms Morgan's lawyers are to prepare a schedule of the costs claimed. That is to be filed by 30 January 2024. If Mr Henry takes issue with any of the items in that schedule, he is to respond by 14 February 2024.

Further Directions or Orders

[110] If any further orders or directions are needed to give effect to this judgment, leave is granted to apply to me by memorandum on 72 hours' notice.

Signed at Auckland this 7th day of December 2023 at am / pm

Kevin Muir
Family Court Judge