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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2021-009-000760
[2023] NZFC 4613

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[DYLAN EMMERSON] Applicant
AND	[BRENNA LOGAN] Respondent

Hearing:	8 May 2023
Appearances:	A L Kissick for the Applicant A J Butler for the Respondent
Judgment:	12 May 2023

RESERVED JUDGMENT OF JUDGE P W SHEARER

Introduction

[1] The applicant [Dylan Emmerson] and the respondent [Brenna Logan] commenced a defacto relationship in 2001 and were married in [detail deleted] 2009. They separated in [detail deleted] 2011, now more than 12 years ago. There are two children of the marriage, being [Duncan] now aged [under 18], who is autistic and intellectually disabled, and [Tibby] aged [under 15].

[2] [Brenna] and the children have remained living in the former family home at [address 1], since the date of separation. [Brenna] has been solely responsible for the outgoings (mortgage, rates and insurance payments) since the date of separation. [Dylan] has been renting a property at [address 2].

[3] Other relationship assets in existence at the date of separation[1] have been divided by agreement and it is agreed that [Dylan] owes [Brenna] the sum of $4,710.50 to equalise the division of that other property.

[4] Based on a registered valuation obtained in March 2022 the parties agree that the current market value of the family home is $550,000. It is also agreed that the current mortgage over the home is approximately $148,000, meaning that the equity is now $402,000. The mortgage principal at the date of separation in 2011 was $204,250.[2] [Brenna] has, therefore, reduced the mortgage principal by $56,000[3] since separation.

Issues

[5] The issues that I am asked to determine relate to which party should retain the family home, and how much they have to pay to purchase the other party's share therein. The specific issues are:

(a) [Brenna]'s claim for unequal sharing pursuant to s 13.

(b) [Brenna]'s proposal that I make an order under s 26 settling part of the family home for the benefit of the children.

(c) Both parties claims under s 18B for compensation for post-separation contributions.

(d) Whether the family home is to vest in either party individually, or be sold.

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[1] KiwiSaver policies, chattels, vehicles and one joint debt.
[2] BOD page 52.
[3] Rounded to the nearest $1,000.

[6] I presided over a one day hearing on Monday 8 May 2023, which hearing followed an unsuccessful judicial settlement conference before another Judge on 6 April 2022. I heard updating evidence, the cross-examination of both parties and oral submissions from each counsel, in addition to having received comprehensive written submissions prior to the hearing.

[7] I will address the background and evidence in more detail as I consider the different issues and the applicable law.

Section 13 claim for unequal sharing

[8] Section 11 of the Act[4] provides the statutory presumption that parties are entitled to share equally in all relationship property.

[9] In s 13 the Court has a discretion to part from equal sharing if there are extraordinary circumstances which render equal sharing repugnant to justice:

> **13 Exception to equal sharing**
>
> (1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.

[10] Numerous cases have noted that this is a high threshold. As the Court of Appeal said in *Martin v Martin*:[5]

> Clearly enough "extraordinary circumstances" and "repugnant to justice" are strong words and reflect a parliamentary intention that the primacy of the equal sharing of the matrimonial home and the family chattels is not to be eroded in the ordinary circumstances of marriage. … "Extraordinary circumstances" imposes a stringent test, particularly when it is recognised that such matters as the provision of the matrimonial home by one spouse or by gift to that spouse are not in themselves extraordinary circumstances. "Repugnant to justice", even when stripped of its emotional overtones, is a most emphatic phrase. Moreover, it is repugnancy to justice giving full weight to the scheme and objectives of the legislation that must be established … it seems to me that the legislature intended to impose a rigorous test allowing very limited scope for unequal sharing of the matrimonial home and the family chattels.

[4] Property (Relationships) Act 1976.
[5] *Martin v Martin* [1979] 1 NZLR 97 at pg 111.

[11] Case law has also established that post-separation events are not relevant to this issue.[6] The extraordinary circumstances must relate to the period of time that the parties lived together,

[12] The circumstances that [Brenna] relies on are that the deposit to purchase the family home in 2007 came from an inheritance that she received from her grandmother's estate of approximately $70,000.[7]

[13] [Brenna] did not supply any documents verifying that inheritance or the precise sum contributed to the deposit in 2007. Nonetheless [Dylan] accepted in cross-examination that the parties paid a deposit of *"about $60,000"* and that [Brenna] contributed her inheritance. [Dylan] said that he worked full-time as a [profession deleted] during the relationship and that overall he contributed a lot more to the relationship financially than [Brenna] did, as [Brenna] worked part-time only prior to the birth of the children. I do not understand [Brenna] to dispute that point and nor did [Dylan] dispute [Brenna]'s point that she was always the primary caregiver for the two children who were only [under 5] and [under 3] years old respectively when the parties separated.

[14] The relevant point, however, in terms of the s 13 application, is that one party contributing a deposit to purchase the family home, or even providing all of the family home (if, for example, the house was owned by that party prior to the relationship) is not in itself "extraordinary". Apart from the incomplete evidence about the inheritance and deposit, although I acknowledge and don't doubt [Brenna]'s oral evidence that she has kept every scrap of paper about the inheritance and the house, I am not persuaded that [Brenna] providing the deposit for the purchase of the family home in 2007 amounts to "extraordinary circumstances".

[15] As I said, the threshold for unequal sharing in s 13 is very high and this case does not satisfy that test. Other matters that Ms Butler referred to in her written

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[6] *Meikle v Meikle* [1979] 1 NZLR 137.
[7] Affidavit of 6 July 2021 at [24].

submissions in support of the s 13 claim[8] are more appropriately considered under the separate s 18B claim.

Section 26 orders for the benefit of the children

[16] Section 26 of the Act provides:

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
>
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.
>
> (2) If the court makes an order under subsection (1), the court may reserve such interest (if any) of either spouse or partner, or of both of them, in the relationship property as the court considers just.

[17] Pursuant to s 26 [Brenna] asks me to consider settling half of the family home upon [Duncan] for his lifetime, because of his special needs. In her written submissions Ms Butler submitted:[9]

> This would provide him with the ability to remain in his familiar environment for the rest of his life while still freeing some capital for Mr [Emmerson].

[18] Previous cases have, however, warned against using s 26 as an alternative way of dividing relationship property unequally.[10] The power is not often used. In *B v B*[11] for example, the court held that awards under s 26 related to exceptional cases where a child was left unprovided for or where a parent was not playing a parental role.

[19] Similarly, the High Court in *Babylon v Babylon*[12] said that a s 26 order will not usually be required if the Court is satisfied that the parents intend to fulfil their roles responsibly.

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[8] [Brenna]'s payment of all outgoings since the date of separation, her majority care of the children and her foregoing the opportunity of paid employment.
[9] Opening submissions of counsel for respondent dated 8 February 2023 at [28].
[10] For example *Bradwell v Kennedy,* HC Wellington CIV-2004-485-611, 23 March 2005 and *Coxhead v Coxhead* [1993] 2 NZLR 397 at 408.
[11] *B v B* FC Auckland FAM 2004-004-872 9 October 2006.
[12] (2009) 27FRNZ 622.

[20] In this case there is no suggestion, let alone evidence, that both [Brenna] and [Dylan] will not make adequate provision for [Duncan] and [Tibby]. [Dylan] does have one other child, [Sierra], from a previous relationship and who is now [over 20] years old, and he will morally and legally need to provide for all three children in his estate. [Brenna], likewise, will need to provide for [Duncan] and [Tibby] but I have no reason to doubt that both parents will do exactly that.

[21] [Dylan] is [in his late 40s] and [Brenna] is [in her mid-40s]. They both still have a lot of life to live, and in my view there is no need or justification for a share of the family home to be vested in the children now. Both [Brenna] and [Dylan] need to extricate the maximum sum that they can from the relationship, so that they can each move on with their lives. It would not be fair to either of them to vest relationship property in the children, let alone the significant portion of the family home suggested by [Brenna]. Nor would it be fair to vest a share of the relationship property in [Duncan] only, but not in [Tibby].

[22] I, therefore, decline the application to make an order(s) under s 26.

Section 18B compensation for post-separation contributions

[23] Both [Brenna] and [Dylan] contend that they should be compensated for things they have done since they separated in 2011 which would have been contributions to the marriage had they not separated.

[24] Section 18B states:

> **18B Compensation for contributions made after separation**
>
> (1) In this section, relevant period, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.
>
> (2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—
>
> (a) order the other spouse or partner (party B) to pay party A a sum of money:

(b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

[25] Section 18 states:

18 Contributions of spouses or partners

(1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:

(a) the care of—

(i) any child of the marriage, civil union, or de facto relationship:

(ii) any aged or infirm relative or dependant of either spouse or partner:

(b) the management of the household and the performance of household duties:

(c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

(d) the acquisition or creation of relationship property, including the payment of money for those purposes:

(e) the payment of money to maintain or increase the value of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(f) the performance of work or services in respect of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(g) the forgoing of a higher standard of living than would otherwise have been available:

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i) enables the other spouse or partner to acquire qualifications; or

(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

[26] The High Court has observed[13] that s 18B has to be considered in light of s 1N which sets out the principles which are to guide the achievement of the purpose of the Act:

> **1N Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
>
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
>
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
>
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[27] The Court of Appeal in *X v X [Economic disparity]*[14] and various other cases have confirmed that s 18B provides the Court with a wide discretion to compensate a spouse for contributions they have made from the end of the marriage to the date of the hearing of the application under the Act. The overriding consideration is whether an award under s 18B is just.

[28] Because it is now more than 12 years since [Brenna] and [Dylan] separated in 2011, there is significant scope for s 18B claims and each party has made a number of claims.

[Dylan]'s claim for occupation rent

[29] [Brenna] has had exclusive occupation of the family home since February 2011, which Ms Kissick calculated is a period of 624 weeks.[15] At the market rental of $450 per week assessed by the registered valuer in March 2022, the rent that could have been achieved for the property over 624 weeks is $140,400.

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[13] *Chong v Speller* [2005] NZFLR 400.
[14] *X v X [Economic disparity]* [2009] NZCA 399.
[15] Submissions of 8 February 2023 at [32].

[30] There are, however, a number of counters to that argument:

(a) Although market rent of $450 per week was assessed in 2022, it is unlikely the property could have been rented for $450 per week in 2011. Rentals naturally increase over time with market forces, but there is no evidence about market rent prior to 2022.

(b) Had the property been rented to a third party, [Dylan] and [Brenna] would have had to pay the outgoings from the rental income. [Brenna]'s evidence was that the outgoings are $440 per week currently, comprising mortgage ($350), rates ($55) and insurance ($35). As such, renting the property would cover the outgoings (which [Brenna] has paid without contribution from [Dylan] since separation) but there would have been very little left over.

(c) Whilst [Dylan]'s first lawyer did mention in a letter sent to [Brenna] in September 2014[16] the issue of "occupation rental for anyone occupying his half of the property since he moved to [a suburb in Christchurch]", it is submitted for [Brenna] that [Dylan] did not pursue that claim.[17] [Brenna] and Ms Butler draw attention to the fact that in [Dylan]'s first affidavit dated 26 May 2021 he said:

> 23. I acknowledge that [Brenna] has remained in occupation of the family home with the children and has meet all outgoings associated with the property. As such I am not seeking an order for post-separation contributions under s 18B of the Act as to occupation rent.

(d) In that same affidavit [Dylan] also stated as follows:

> 7. [Brenna] and I decided in 2012 that I would vacate the family home and that [Brenna] would remain living in the home with the children. It was agreed that we would continue working on our relationship albeit not living in the same property.
>
> …
>
> 10. It was agreed in 2012 that the property would be retained and serve as a form of investment for [Brenna] and I. As such

[16] BOD pg 30.
[17] Submissions at [16.1].

> [Brenna] has continued to reside in the property and met all of the outgoings.

(e) [Dylan] conceded under cross-examination that *"I'm not too worried about occupation rent"*. He said that he made the claim because he wanted to hurry up a settlement and thought that making a claim for occupation rent might help. He said *"I don't want to leave [Brenna] in the lurch. It just has to be fair"*.

[31] The case law under s 18B is clear that continued occupation of the family home by one party post-separation can be a contribution to the relationship by the non-occupying party. As Fitzgerald J said in *Little v Little*:[18]

> The non-occupying party is effectively contributing their share in the capital of the family home, which for a time is being used exclusively by the occupying party. The occupying party accordingly retains emotional and practical benefits from their continued occupation, and avoids the financial burden of relocating to alternative accommodation. In such circumstances, and when considered just, the courts will often award compensation to the non-occupying party based on "occupational rental" (namely a half share of a notional rent of the property), or order the occupying party to pay interest on the non-occupying party's share of capital.

[32] The question is not whether I can order that [Brenna] pay occupation rent to [Dylan]. Rather, the question, as with any s 18B claim, is whether compensation is just in all the circumstances. I shall return to that question shortly.

[Dylan]'s claim for a share of board payments received by [Brenna]

[33] Secondly, [Dylan] seeks compensation for the use of the family home by boarders, which has generated income for [Brenna] since separation.

[34] [Brenna] gave evidence about the board she has received since separation in her third affidavit dated 21 December 2022:

(a) Her friend, [Chelsey Fawn], stayed in the sleep-out from mid-2014 until Christmas 2015. She paid [Brenna] board of $100 per week to cover power, phone, internet and rent. [Brenna] estimated that $50 per

[18] *Little v Little* [2002] NZHC 601 at [120] and [121].

week was the board. Over an 18 month period that is, therefore, $3,900.

(b) [Gretchen Leith] stayed in the sleep-out from June 2017 to May 2018 and paid $100 cash per week, including power and internet. Assuming the rental is $50 per week, 48 weeks rent is $2,400.

(c) Similarly, [Chloe Dorris] stayed from December 2018 to August or September 2019. She too paid $100 per week for power, internet and rent. Rent of $50 per week over approximately 9 months is $1,950.

(d) [Brenna]'s brother, [Simon], has lived in a separate "porta sleep-out" on the driveway (which sleep-out he purchased and brought to the property) for the last six years. [Brenna] explained that shortly before [Simon] moved in he was mugged and left for dead. He was not able to live independently after that and he is [Brenna]'s only sibling. [Simon] did not pay [Brenna] rent as such, but [Brenna]'s father paid her $100 per week to cover [Simon]'s groceries. More recently, since earlier this year, [Simon] is now working part-time and pays [Brenna] $200 per month towards the power bill. On [Brenna]'s evidence the payments that [Simon] has made cover his costs, but do not constitute "rent".

[35] I, therefore, find that [Brenna] has received rent totalling $8,250 from [Chelsy Fawn], [Gretchen Leith] and [Chloe Dorris]. This is significantly less than the figure of $24,000 proposed by Ms Kissick in her written submissions.[19]

[Brenna]'s claim for post-separation reduction of mortgage principal

[36] It is accepted by [Dylan] that [Brenna] has been solely responsible for the mortgage payments since separation. There is no evidence about the level of the loan payments in 2011, but [Brenna] has provided bank statements as at October 2019

[19] Submissions of counsel for applicant at [48].

which confirm the weekly mortgage payment was then $350 per week. Interest rates at that time (pre-COVID) were lower than they are now.

[37] Weekly payments at $350 per week come to $18,200 per year, which means that [Brenna] has paid more than $220,000 towards the mortgage since separation in February 2011. It is accepted by [Dylan] that she has reduced the mortgage principal by $56,000 in that time, from $204,250 at separation to approximately $148,000 now.

[Brenna]'s payment of other outgoings

[38] Likewise, [Brenna] has paid all rates and insurance payments since separation, together with rates arrears at separation which she says were $1,200.[20]

[39] The precise amount of rates and insurance paid is not in evidence. From the 2019 bank statement it is clear that rates were $55 per week and insurance was $148.40 per month. On those figures rates are $2,860 per annum ($34,320 over 12 years) and insurance is $1,780.80 per annum ($21,369.60 over 12 years).

[Brenna]'s claim for improvements to the family home

[40] [Brenna], in her affidavits, has summarised improvements which she says she has made to the family home over the years. In particular, renovating the bathroom and the outside sleep-out.[21] In her second affidavit she completed a longer list of the precise work she has carried out over the years[22] and she provided receipts totalling $3,500 for the various materials and purchases related to the house.

[41] I consider this a neutral factor, however, for the following reasons:

(a) [Dylan] included in his third affidavit a list of the work that he has done at the property and things he has paid for.[23]

[20] Affidavit of 6 July 2021 at [21].
[21] Affidavit of 6 July 2021 at [26].
[22] Affidavit of 11 October 2022 at [9].
[23] Affidavit of 27 January 2023 at [7].

(b) The registered valuation the parties jointly obtained notes that the work in both the bathroom and the sleep-out does not comply with the building code and likely will need to be re-done.[24]

(c) The valuation also notes that the property was in an untidy condition and now requires a number of upgrading works.[25] As such the property has not been maintained to a high standard.

[Brenna]'s claim related to the care of [Duncan]

[42] As I noted earlier, s 18 lists as contributions to a marriage/relationship the care of any child of the marriage and the foregoing of a higher standard of living than would otherwise be available. Ms Butler's oral submissions for [Brenna] at the conclusion of the hearing focused on this issue, as [Brenna] has been the primary caregiver and a stay-at-home mum for the children over the 12 years that the parties have been separated.

[43] As [Brenna] stressed in her affidavit and oral evidence, that is primarily because of [Duncan]'s special needs. When the parties separated in February 2011 [Duncan] was [under 5] years old and [Tibby] was [under 3]. They are now [in their teens].

[44] [Duncan] was diagnosed with autism at the age of 3 years old[26] and was later diagnosed with an intellectual disability.[27]

[45] [Brenna] has provided verification from [Duncan]'s GP, [name deleted], who assessed [Duncan]'s need for assistance at 10 out of 10. An earlier Lifelinks needs assessment completed in June 2009, before the parties separated, noted that:[28]

> [Duncan] is dependent on his parents for all household management. [Brenna] stated that [Duncan] was constantly trying to escape from the property. He is able to open the doors and ranch sliders, and he opens the windows and climbs out. [Brenna] said she has had to tie the windows shut. [Duncan] can climb over the gate and fences… When [Duncan] is outside playing in the garden he

[24] BOD pg 79.
[25] BOD pg 78.
[26] Affidavit of 11 October 2022 at [17].
[27] Affidavit at [21].
[28] BOD pg 129 and 130.

> is constantly discovering new and inventive ways of escaping. He has succeeded in escaping at least 20 times in the past 18 months. [Brenna] said that recently he got out 5 times in one day. He requires constant 24 hour close supervision for his safety…

[46] [Brenna]'s evidence is that she was [Duncan]'s full-time caregiver. When [Duncan] started school he was not able to do full days and she initially had to pick him up at lunchtime.[29] She says that for that reason she was not able to work. She went, and still goes, to every meeting for [Duncan] with doctors, speech therapists, Ministry of Education, school, occupational therapists and Autism New Zealand.

[47] [Brenna]'s deposed that [Dylan] worked overseas for nine months a year for the last two years of their marriage,[30] and it is apparent that [Dylan] has continued to work overseas for significant periods of time over the last 12 years. He gave evidence at the hearing that he worked overseas for 12 months recently and was able to save $40,000 in that time.

[48] [Brenna] noted that [Dylan] is a good father and that he has the children when he can, when he is home. [Dylan]'s evidence was that on average he has had the children every second weekend over the last eight months while he has been in New Zealand, whereas [Brenna] said that [Dylan] had [Duncan] for only one night in the month of April.

[49] For 12 years after separation [Dylan] paid [Brenna] child support of $250 per fortnight and has recently (earlier this year) increased that child support to $300 per fortnight. There is no suggestion that [Dylan] has shirked his child support responsibilities. Both parties agreed that on occasion [Dylan] has paid for other one-off expenses in relation to the children.

[50] The precise extent of [Dylan]'s income over the years has not been disclosed. He deposed that he is paid $33 per hour and that his net income is approximately $2,200 per fortnight, but there is no verification of his income. I suspect that [Dylan] would have been assessed to pay more than $125 per week had there been an Inland Revenue formula assessment, and certainly that was [Brenna]'s understanding. Her

[29] Affidavit of 11 October 2022 at [23].
[30] Affidavit at [22].

evidence was that she did not seek a formula assessment because she wanted to give [Dylan] an opportunity to save and IRD *"would rape him"*.

[51] [Duncan] has attended [School 1] since the age of 8 years old. He is able to stay there until he is 21. [Brenna]'s evidence was that:[31]

> This school is the best thing that ever happened to [Duncan] and we are very lucky that he is there. It is crucial that he be able to stay there because he is settled there, and it offers him the support that he needs.

[52] Because the family home is in the [School 1] zone, [Duncan] is able to travel to and from school on the school bus, and [Brenna] is very concerned about what would happen if she was forced to live elsewhere or out of zone. She does not think that she would be able to afford to buy another house within the [School] zone and she does not want [Duncan] to have to change schools. Nor does [Dylan].

[53] [Brenna] said that [Duncan]'s needs have changed over the years, but he is still high needs and requires a full-time carer, which is what she does. She explained, for instance, that [Duncan] still has regular *"melt downs"* and now that he is the size of an adult (the same size and weight as [Dylan]) he regularly damages property. [Brenna] referred to various holes [Duncan] has made in the walls at the house, [Duncan] being on his fourth bed because he jumps on them when he is excited and breaks them, and to [Duncan] breaking a pair of expensive headphones at school last week when he became frustrated.

[54] [Brenna] commented *"I love my son, but he is hard work"*. She said she has not been able to work since [Duncan] started school. She started but has not quite finished a [degree] at the University of Canterbury and is currently dabbling in [a gardening project] from home. It is clear that [Brenna] has made huge sacrifices and has devoted herself to caring for [Duncan] (and [Tibby]) for all of the 12 years that the parties have been separated. [Tibby] is now in [year deleted] at [School 2].

[55] [Dylan] does not dispute that [Duncan] is special needs and acknowledged that [Brenna] is a great parent.

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[31] Affidavit of 11 October 2022 at [24].

Weighing the respective contributions

[56] In my assessment both parties have made significant post-separation contributions, and therefore have valid claims for compensation. The unusual feature of this case is that the post-separation period is such a long one.

[57] [Dylan], in my assessment, does have a valid claim for some occupation rent. His capital, being his half share of the equity in the family home, has been tied up for 12 years, which has necessitated him paying rent for all of that time. He has not been able to move on and buy another property of his own, without extracting his capital from the family home and he has been very generous, in my view, in waiting so long to force a full and final settlement. [Dylan] is also entitled to share in the rent/board payments that [Brenna] received from third parties over the years.

[58] [Brenna], for her part, has reduced the mortgage principal by $56,000 since the date of separation, which has increased the parties' equity accordingly. She has also paid all of the rates and insurance payments and the rates arrears in existence at the date of separation, all of which were joint responsibilities.

[59] Previous court decisions have acknowledged that mathematically exact calculations cannot be achieved and that the evaluation of the respective contributions is likely a matter of general impression.[32]

[60] In my assessment, [Dylan]'s claim for occupation rent and for a share of board payments is cancelled out by [Brenna]'s claim for having paid the outgoings and reduced the mortgage principal. That was the position that [Dylan] has taken throughout the proceeding.

[61] That leaves, however, [Brenna]'s claim for compensation for the care of the children and [Duncan] in particular, and for having foregone a higher standard of living. She has had virtually the sole responsibility for the care of the children for 12 years, and as I have explained, [Duncan] has had and continues to have high and special needs.

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[32] *Rose v Rose* [2009] NZSC 46.

[62] [Brenna] undertaking that role and being available for [Duncan] 24/7 has meant that [Dylan] has been free to work overseas, further his own career and earn a higher income. It has given [Dylan] the luxury of being able to see the children when he is available, whilst knowing that they are in very good hands when he is away and not available himself.

[63] [Brenna], on the other hand, has not been able to work in paid employment, let alone pursue a career. She has been in receipt of WINZ benefits and support the entire 12 years and has, therefore, given up a higher standard of living than would otherwise have been available to her had she not had the sole responsibility (effectively) for [Duncan]'s care and special needs since separation in 2011.

[64] I therefore regard it as "just" to compensate [Brenna] for that very significant post-separation contribution. Because it has been an enduring and ongoing contribution for more than 12 years now, it is appropriate that the compensation is a reasonably significant lump sum paid to [Brenna] from [Dylan]'s half share of the relationship property.

Decision

[65] The parties agree that the equity in the family home is now $402,000, a half share each being $201,000.

[66] It is also agreed that [Dylan] owes [Brenna] $4,710.50 to equalise the division of their other relationship property (principally KiwiSaver policies and vehicles).

[67] If [Brenna] is to retain the family home, and [Dylan] acknowledged that he is happy for [Brenna] to have first right of refusal so that the children (and [Duncan] in particular) don't need to move, she must therefore pay [Dylan] a lump sum of $196,289.50 in order to achieve equal sharing.

[68] For the sake of a round sum, I fix the s 18B compensation that [Dylan] is to pay [Brenna] from his share of the relationship property at $46,289.50. Spread over 12 years that is compensation of less than $4,000 per year, for what I consider to be

[Brenna]'s quite extraordinary contribution and sacrifice dedicating herself to the care and support of the parties autistic and intellectually disabled son.

[69] The result, therefore, is that [Brenna] needs to be able to refinance and pay [Dylan] a lump sum of $150,000 in full and final settlement, to also take over the existing joint mortgage and retain the family home.

[70] I will give [Brenna] a reasonable opportunity to confirm that necessary finance. If [Brenna] can't refinance, [Dylan] will then have the opportunity to buy [Brenna] out of the house, if that is what he wants to do. In that event, [Dylan] will need to take over the mortgage balance at the date of settlement and pay [Brenna] a capital sum of $252,000, calculated as follows:

• Half share of equity	$201,000.00
• Adjustment for balance property	$ 4,710.50
• Section 18B compensation	$ 46,289.50
Total	**$252,000.00**

[71] If [Dylan] is not able to refinance, or does not want to refinance, the family home will need to be sold. [Dylan]'s evidence was that the parties would need to spend some money to prepare the property for sale and I anticipate that [Dylan] would need to cover those costs in the first instance, on the basis that he would be reimbursed from the sale proceeds. Other sale-related costs would obviously have to be paid, and the net sale proceeds would then be divided equally. From [Dylan]'s half share he would need to account to [Brenna] for the two payments of $4,710.50 and $46,289.50 respectively.

Orders

[72] I make the following orders and directions:

(a) [Brenna] shall have until Friday 30 June 2023 to confirm that she can refinance and pay [Dylan] a lump sum of $150,000 in full and final settlement.

(b) Settlement is to take place within 28 days from when finance is confirmed, and no later than Friday 28 July 2023.

(c) If [Brenna] cannot confirm finance by 30 June 2023, [Dylan] will have until Friday 28 July 2023 to confirm that he can refinance and pay [Brenna] a lump sum of $252,000 in full and final settlement. In that event settlement is to take place no later than Friday 25 August and [Brenna] will have to vacate the family home by that date.

(d) Pending the date of settlement, and whether that be [Brenna] buying [Dylan] out by 28 July or [Dylan] buying [Brenna] out by 25 August, [Brenna] shall be entitled to exclusive occupation of the family home and she shall be solely responsible for the ongoing mortgage, rates and insurance payments.

(e) If neither party wishes or is able to buy the other party out, the property is to be listed for sale. [Brenna] will be entitled to remain in the property until sale, on the basis that she is responsible for the mortgage, rates and insurance payments, and for the maintenance of the property. Any sale-related costs are to be paid from the sale proceeds, and if either party pays agreed expenses for preparing the property for sale, he/she is to be reimbursed from the sale proceeds. The net sale proceeds are then to be divided equally and from [Dylan]'s half share he is to account to [Brenna] in the sums of $4,710.50 (to equalise the division of other assets) and $46,289.50 (for s 18B compensation).

(f) Because neither party has been entirely successful, in that the overall result is more than [Brenna]'s best offer to buy [Dylan] out but less than what [Dylan] was seeking, and also in view of the fact that [Brenna] is in receipt of legal aid, I make no order as to costs.

(g) Leave is reserved to apply for orders and directions to give effect or better effect to these orders.

_____
Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 12/05/2023