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 QUEENSTOWN

I TE KŌTI WHĀNAU
KI TĀHUNA

FAM-2018-002-000028
[2023] NZFC 7971

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976, and
	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[BETHANY GOLDEN] Applicant
AND	[PHILLIP HERRING] First Respondent
AND	[HERRING] FAMILY TRUST Second Respondent

Hearing: 11-12 July 2023

Appearances: B A J Taylor for the Applicant
L A Andersen KC for the First Respondent
M G Kirkland and S Gaskell for the Second Respondent

Judgment: 21 August 2023

JUDGMENT OF JUDGE R J WALKER

Introduction

[1] The [Herring] Family Trust ("the trust"), established by Mr [Herring]'s parents, purchased an investment property in Alexandra in October 2008. The trust then sold that property to Mr [Herring] in May 2009, before his relationship with Ms [Golden] commenced.

[2] Following the birth of Ms [Golden] and Mr [Herring]'s first child and their subsequent engagement, the trust "re-purchased" the property back from Mr [Herring], which has given rise to Ms [Golden]'s claims pursuant to ss 44 and 44C of the Property (Relationships) Act 1976 ("PRA") and s 182 of the Family Proceedings Act 1980 ("FPA").

Background

[3] The parties – Ms [Bethany Golden] and Mr [Phillip Herring] – began living together on 18 December 2009, married [in February] 2013, and separated on 3 April 2018. Their marriage was dissolved on 31 August 2020. They have two children, the elder of whom is 12 and a half, and the younger who is almost 11.

[4] The trust was settled on 24 July 1996. The appointers of the trust were Mr [Herring]'s parents: [Drew] and [Shannon Herring]. The trustees were [Stanley McIntyre] of Alexandra, solicitor, and [Vincent Wagner] of Alexandra, farmer.

[5] The trust's beneficiaries are [Drew Herring], [Shannon Herring], [Phillip Herring], [Gail Herring] (now [Ellison]), the children, grandchildren, and remoter issue of those beneficiaries, and the spouses of any of the beneficiaries. That final group of beneficiaries included Ms [Golden] so long as she was Mr [Herring]'s spouse.

[6] According to a deed dated 20 May 2014, [Stanley McIntyre] and [Vincent Wagner] resigned as trustees and were replaced by [Phillip Herring] and his sister, [Gail Herring]. In 2019, [Phillip] and [Gail] resigned as trustees and were replaced by [Drew] and [Shannon Herring]. The trustees of the trust have a discretion to pay income and capital gain from the trust, both before and on the date of distribution (which is 31 March 2030 or such earlier date as the trustees by deed determine).

[7] Clause 10 of the trust deed states that the trustees have an absolute and uncontrolled discretion to resettle trust property for any trust person being a beneficiary under the trusts.

[8] In 2008, the trust purchased a property at [address deleted] in Alexandra ("the house") for $287,000.

[9] On 5 May 2009, prior to the relationship with Ms [Golden] commencing, Mr [Herring] purchased the house from the trust for $287,000, being a discount of $23,000.00 on the market valuation of $310,000 obtained at that time. Mr [Herring] borrowed the entire sum needed to purchase the house, consisting of an on-demand interest-free loan of $153,607 from the trust[1] and the balance via a mortgage from Kiwibank.

[10] On 18 December 2009, the parties moved into the house and lived there together (meaning it became the family home). On [date deleted] 2010, the parties' first child was born. The parties became engaged on 25 December 2010.

[11] On 8 July 2011, Mr [Herring] sold the house back to the trust for $290,000.[2] The sale occurred on 31 July and the mortgage to Kiwibank was repaid, as was the debt to the trust.

[12] The parties subsequently married [in February] 2013 and their second child was born on [date deleted] 2013. The parties separated on 3 April 2018.

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1 As evidenced by deed of acknowledgment of debt.

2 A figure agreed by the parties and based on a market valuation of $290,000.00 obtained on 8 June 2011.

[13] Ms [Golden] and Mr [Herring] settled all issues regarding relationship property by way of order of the court dated 16 April 2021 – with the exception of Ms [Golden]'s claims under s 44C of the PRA (later extended by the court on 7 March 2022 to include s 44) and her claim under the FPA.

Summary of dispute

[14] Ms [Golden] argues that the 2011 sale of the house back to the trust was Mr [Herring]'s sole decision and that it amounted to a disposition of relationship property. She argues that this transfer is one that qualifies under either s 44 or s 44C of the PRA. She also argues that the sale of the property to the trust during the relationship:

(a) was a nuptial settlement that was made in contemplation of marriage; and

(b) made some form of continuing provision for either or both of the parties and that the court should exercise its discretion to remedy any 'gap' between the parties' positions under the settlement on dissolution and their hypothetical positions had the marriage continued.

[15] By way of remedy, Ms [Golden] now seeks compensation from the trust as there is no longer any relationship property from which an award could be made.

[16] In response to Ms [Golden]'s s 44 and s 44C claims, Mr [Herring] argues:

(a) that the disposition of the house to the trust did not have the effect of defeating Ms [Golden]'s claim or rights;[3] and

(b) that – even if the disposition did have that effect – there should not be compensation.[4]

[17] In relation to the claim under s 182 of the FPA, Mr [Herring] argues that:

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3 Property (Relationships) Act 1976, s 44C(1)(b).
4 Section 44C(1)(c).

(a) there was no nuptial settlement;

(b) the only ongoing benefit that Ms [Golden] could reasonably have expected from the alleged settlement was to occupy the property;

(c) Ms [Golden] could have no reasonable expectation she would receive any distributions from trust income or capital; and

(d) the court should accordingly decline its discretion to make an award.

Issues for determination by this Court

[18] The issues to be resolved by the court are:

a) Is there a disposition to the trust to which ss 44 or 44C of the PRA could apply?

b) Was the disposition to the trust made in order to defeat the applicant's rights under the PRA?

c) If the disposition was not made in order to defeat the applicant's rights under the PRA, did it nevertheless have the *effect* of defeating the applicant's rights under the PRA?

d) Was the transfer of the property to the trust a nuptial settlement in terms of s 182 of the FPA?

e) If the court finds in favour of the applicant on the above issues, then how should the court exercise its discretion as to any remedy?

f) Is there a valid claim for unpaid rental or other unpaid debt to the second respondent which would offset any remedy the applicant may receive?

Applicant's position

[19] The applicant claims she was not consulted and had no knowledge of the property being repurchased by the trust and seeks compensation for *"...*the removal of this relationship property asset from our pool and receive compensation for half the value of the equity in the property from the Trust's income".[5]

[20] Ms [Golden] maintains that the unconsented garage had a value of $12,600.00 which was not included in the purchase, and that the trust retained equity of $6,392.82 built up during the relationship with Mr [Herring].

[21] Ms [Golden] argues that there was no reason for the trust to repurchase the property as the parties were meeting their outgoings and living comfortably and were not in financial strife. She also maintained that the property was in a good liveable state and did not require the renovations subsequently undertaken by the trust after the property had been repurchased.

First respondent's position

[22] The first respondent, Mr [Herring], says that he and Ms [Golden] were in a dire financial situation and were not in a position to continue paying the mortgage on the property or the loan owing to the trust due to debt they had accumulated by way of hire purchase for a vehicle and new furniture. Mr [Herring] argues that he and Ms [Golden] decided to sell the property back to the trust on the basis that they would continue to live in the property and rent it.[6]

Second respondent's position

[23] Evidence on behalf of the second respondent (the trust) was given by Mr [Herring]'s parents, [Drew] and [Shannon Herring]. Their position was that Mr [Herring]'s financial position changed when he entered into a de facto relationship

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5 Affidavit of Ms [Golden] dated 20 September 2019: para 11: volume 2: bundle of documents: page 102.

6 Mr [Herring]'s affidavit dated 19 March 2019: paragraphs 13 and 14: volume 3: bundle of documents: page 257.

with Ms [Golden], that both complained about how cold the property was during winter, and that after their first child was born, both decided the house needed double-glazing to keep the house warm for the baby but knew they could not afford to make those improvements. Therefore, it was agreed by all parties that the trust would "re-purchase" the property and repay the hire purchase debt on Ms [Golden] and Mr [Herring]'s motor vehicle. The trust thereafter spent approximately $94,000 on improvements to the property including double glazing, carpet, improved insulation, and a new kitchen.

[24] The trust maintains that it paid full value for the house having obtained a market valuation; that the unconsented works to the garage had no value; and that the unpaid equity of $6,392.82 was offset by the trust repaying the hire purchase incurred by Ms [Golden] and Mr [Herring] on their motor vehicle of $8,099.42. [Drew] and [Shannon Herring] say that Ms [Golden] knew about the sale and that she and Mr [Herring] jointly initiated discussions with them about it.

[25] The second respondent also argued that compensating Ms [Golden] from the trust's income would be highly unfair to [Drew] and [Shannon Herring] as they were reliant on that income themselves. It was also argued that it would be particularly unfair given the extent of financial assistance that was provided to Mr [Herring] and Ms [Golden] over the course of their relationship.

The law

[26] Before entering into a discussion of each of the claims, I note that the Supreme Court in *Clayton v Clayton* has reiterated that s 182 of the FPA and s 44C of the PRA have different purposes.[7] Section 182 is concerned with nuptial settlements (which might not include relationship property), whereas s 44C is concerned with dispositions of relationship property. The justification for exercising the s 182 discretion is to respond to the adverse effect of a marriage's dissolution upon the applicant spouse's ability to continue benefitting from the nuptial settlement. The justification for s 44C, by contrast, is to redress the unequal benefits which result

7 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590 at [61] to [65].

from a disposition of relationship property, and to give effect to the PRA's equal sharing regime.

Section 44 of the Property (Relationships) Act 1976

[27] In cases involving property dispositions that have been made to defeat a spouse's claims or rights under the PRA, s 44 of the PRA empowers the court to set those dispositions aside or to compensate the relevant spouse for such dispositions. The section is not limited to relationship property dispositions and can include separate property dispositions.[8] The section's intention is to ensure that the Court's powers to divide property can be exercised in respect of all relationship property.[9]

[28] The relevant positions and elements for a successful claim under s 44 are as follows:[10]

(a) The disposition disposed of beneficial ownership in the property.

(b) The disposition may either remove assets from the pool of assets that are beneficially owned by one or both of the parties to the relationship, or it may prevent assets from coming into such pool of beneficially owned assets.

(c) The disposition was made by, on behalf, by direction, or in the interests of any person.

(d) The disposition has the effect of defeating a spouse's claim or rights under the PRA.

(e) The disposition was made with the intent of defeating a spouse's claim or rights. In regard to this element, the applicant holds the evidential burden. It is insufficient for the applicant to prove that the *effect* of the

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8 *Sutton v Bell* [2020] NZHC 1557 at [78]; and *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71 at [62].

9 *Sutton v Bell*, above n 8, at [77].

10 As stated in *[M] v [C]* [2018] NZFC 9155 at [27] per Judge A P Goodwin.

disposition was to defeat their claim or rights. The test – as per *Regal Castings v Lightbody* – is whether the person that disposed of the property knew or must have known that there was a significantly enhanced risk that their spouse would not obtain a share of the relationship property.[11] The critical issue, therefore, is whether the person disposing of the property knew or must have known that the other spouse would have a claim or rights under the PRA, and their conduct in light of that knowledge.[12]

(f) The evidence of intent can either be direct evidence or it can be inferred from all of the surrounding circumstances.

(g) The intention to defeat the spouse's claim or rights must exist at the time of the disposition. However, the spouse's claim or rights do not need to have existed at the time of the disposition.[13]

(h) A successful s 44 application results in the Court having the discretion to make one of the orders in s 44(2). There is the need for receipt of the property otherwise than in good faith and for valuable consideration. A lack of good faith is a lesser onus than demonstrable bad faith.

(i) There is a change of circumstances pursuant to s 44(4) of the PRA.

[29] In this case, it is clear that the disposition of the house on 8 June 2011 (or what was referred to throughout the hearing as the "re-purchase" of the house by the trust from Mr [Herring]) was a disposition of relationship property (the family home) into the trust.

[30] The applicant, who bears the evidential burden of establishing that the disposition was made with the intent of defeating her claim or rights, maintained that the disposition occurred because the first respondent's sister, Ms [Gail Ellison], had

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11 *Regal Castings v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
12 *Sutton v Bell* [2023] NZSC 65.
13 *Gray v Gray* [2013] NZHC 2890; and *Ryan v Unkovich* [2010] 1 NZLR 434 (HC).

been through a separation shortly before the disposition of the property to the trust, and invited the court to draw the inference that against the background of [Gail]'s separation, the trust would have been cognisant of the dangers of a home owned in Mr [Herring]'s name in the event of separation, and that this was the genesis for the trust repurchasing [the house].

[31] The applicant also pointed to the fact that one of the trustees, Mr [McIntyre], was a practising lawyer who had some experience in trust property matters and that both [Gail] and Mr [Herring] were subsequently appointed trustees of the trust (together with Polson Higgs Nominees (2013) Limited) in May 2014, and that this evidence lends itself to the conclusion that the trustees, who had just dealt with Mr [Herring]'s sister's relationship property matters, made a decision to repurchase the property under the guise of easing financial strain, but in reality did so to defeat the rights of the applicant under the PRA.

[32] That proposition was hotly contested by both the first and second respondents, who both maintained that the primary reason for the transaction was to ease the financial pressure that Mr [Herring] and Ms [Golden] were under at the time. Mr [Drew Herring], in his evidence, maintained that the primary objective of repurchasing the property was to help out Mr [Herring] and Ms [Golden] and get them back on their financial feet, and that the secondary intention was to further assist them by renovating and improving the house for them (and their new-born baby) in a situation where Mr [Herring] and Ms [Golden] were unable to do that themselves.

[33] There was some focus on Mr [Herring]'s and Ms [Golden]'s bank accounts during the hearing, the purpose of which to be to establish their financial situation at the time. There was a head-on conflict in the evidence between Ms [Golden] (who maintained that the bank accounts established they were living comfortably) and Mr [Herring] (who maintained that leading up to the sale of the house to the trust they were living hand to mouth).

[34] Although the bank account documentation was incomplete (in that it did not show the account from which Mr [Herring]'s wages were transferred, or the account referred to by Ms [Golden] as the "baby savings account" where she was saving money

for the birth of their baby), I consider that the evidence supported the proposition that the parties' financial situation was becoming increasingly impecunious up to and following the birth of their first child. At that point (October 2010), when Ms [Golden] was on maternity leave, the transfers she was making to the 'baby savings account' had reduced considerably. After she returned to part-time work in January 2011, she began incurring childcare costs and her "rent" payments reduced from $300 per fortnight to $200 per fortnight and then reduced further in June 2011 to $150.

[35] Ms [Golden] acknowledged that by the time their first child was born she was earning significantly less than what she had been earning previously,[14] that the cost of childcare was increasing, that Mr [Herring] continued to be on a low wage as an apprentice [trade deleted], and that they had all the extra costs of having their baby. However, Ms [Golden] denied that the couple were experiencing financial problems and could barely afford the outgoings on the home at that time, and that the house needed renovation. She denied that the house was cold or that it needed double glazing. She did, however, concede that the renovations that were subsequently undertaken to the house at the expense of the trust could not have been afforded by the parties themselves, but that the trust "could have lent them the money" to do so, rather than repurchasing the property.

[36] I find that the bank account evidence supported the conclusion that the parties had little to come and go on, particularly leading up to the birth of their first child. They did not show the parties living comfortably, notwithstanding some discretionary spending, and Ms [Golden]'s accounts showed, for the most part, negligible balances at the end of each month. Certainly, the parties were not in any position to carry out the renovations that were commenced (in terms of double glazing) before the disposition and carried on immediately afterwards by the trust.

[37] The house was built in the 1960's. A valuation was commissioned by [Shannon Herring] at the time of the disposition.[15] While the valuation is scant in terms of detail as to the condition of the house, the valuer did note that the condition of the house was "generally in tidy order both internally and externally. The interior has been painted

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14 From $1,250.34 per fortnight in May 2010 and $766.36 in October 2010.
15 Valuation from Moore & Percy: Volume 4 p 522.

throughout."[16] The valuer noted that double glazing of the property had commenced and referred to the unconsented garage being excluded from the assessment. I consider that while the house would have provided accommodation of an adequate standard for the most part, I do not accept Ms [Golden]'s proposition that the state of the house was "good" and did not require renovation (particularly in terms of better insulation and double glazing for the winter for the benefit of them and their new-born baby) and that anyone who said this was part of the reason for the disposition was "making it up".[17]

[38] Throughout her evidence, Ms [Golden] maintained that she was not consulted at all about the transaction. This did not accord at all with her other evidence, including her acceptance that relationships with both Mr [Herring] and his parents were strong and that, at that time, she and Mr [Herring] had contact with his parents at least two or three times a week (although Mr [Drew Herring] thought that it was even more frequently than that, especially after their first child was born).[18] Ms [Golden] described her and Mr [Herring]'s relationship with his parents as "very close"[19] and that the mood at the time of the disposition of the house was "very buoyant and happy".[20]

[39] Ms [Golden]'s position – that she was not consulted and was effectively left completely in the dark or, worse, that the transaction had been completed secretly behind her back – does not seem possible given the complete consensus between all of the witnesses of the warm and supportive relationships between all of the parties.

[40] I prefer the evidence of Mr [Herring], Mrs [Shannon Herring], and Mr [Drew Herring], along with the independent trustee, Mr [Wagner], that evidence being that Ms [Golden] was involved and consulted during the transaction and that – at the least – acquiesced to it. I consider that conclusion is confirmed by the fact that at no point following the transaction, when Ms [Golden] says she became aware of it, and prior to separation did she voice any dissatisfaction or protest to anyone as to what had taken place. Following the transaction, it is clear from the evidence that she had knowledge

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16 Ibid p 524.
17 NOE p 15 line 22.
18 NOE p 84 line 15.
19 NOE p 19 line 21.
20 NOE p 30 line 18.

of and participated in the renovations to the property, particularly the installation of a new kitchen, which Ms [Golden] conceded that both she and Mr [Herring] benefitted from.

[41] Interestingly, Ms [Golden] also denied that she knew about or was responsible for the hire purchase debt on the [vehicle] and suggested that she was seeing the hire purchase agreement for the first time when she was in the witness box. However, she then conceded – when the document was put to her – that it was, in fact, a loan to her and Mr [Herring] jointly and that she had indeed signed and initialled the agreement.

[42] I do not consider that the disposition or repurchase of the home by the trust was made with the intent of defeating any claim by Ms [Golden]. There is simply insufficient evidence to establish that proposition in light of the weight of the other the evidence given by Mr [Herring], Mr [Drew] and Mrs [Shannon Herring], and the independent trustee, Mr [Vincent Wagner], all of whom gave evidence that the couple were struggling financially and could not afford to make necessary improvements to the house.

[43] While there was a disposition made during the relationship of the family home to the trust, there was no evidence at all, other than Ms [Golden]'s assertions, that the disposition was made with intent to defeat her claim or rights under the PRA. While intent can, of course, be inferred from all the surrounding circumstances, at the time of disposition (or "repurchase" of the house by the trust) there was no indication at all from the evidence of any intention by the trustees to defeat any claim by Ms [Golden] under the PRA. In fact, during the hearing that proposition was not put to any of the trustees.

[44] While counsel for Ms [Golden] invited the court to infer an intention to defeat, on the basis that there was no genuine reason for the trust repurchase the property, I have already found that proposition is simply not supported by the evidence. I consider the repurchase by the trust was undertaken for full value on the basis of a registered valuation for genuine reasons, first in an attempt to alleviate financial stress for the parties, and secondly to enable renovations to be undertaken to the property which could not possibly have been paid for by the parties.

[45] I do not place any weight on the assertion that the house was undersold by the value of the unconsented work to the garage because I consider those works were illegal and subject to the ever-present possibility that the local council could require those additions to the property to be removed (no doubt at some cost to the trust). Although Ms [Golden] maintained that the trust could obtain a certificate of compliance form the local council for the unconsented works, it was Mr [Drew Herring]'s view (acknowledging he was not an expert) that the works would never gain acceptance from the local council as it was built on the boundary and did not include a firewall.[21]

[46] I do not consider the proposition the trust could or should have 'lent' the money to Ms [Golden] and Mr [Herring] to undertake the renovations to have been a realistic proposition in all the circumstances at the time, as Mr [Wagner], one of the two independent trustees of the trust at the time, said in cross-examination:[22]

> Q You say that you thought the Trust purchasing the property was a better option than advancing renovation funds to [Phillip]. Did you look at the time at other options by which the Trust could have advanced money, say by way of a mortgage or with interest or purchasing a share of the property or other options other than the Trust purchasing the property outright?
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> A They had issues paying what was there. If they [had] to borrow more money which could have been up towards $100,000 it would have just made things worse. It's just common sense.

[47] And later:[23]

> Q So what I'm saying is the trustees didn't need to own the property to be able to spend that money on renovations?
>
> A Yeah, but we were trustees of the trust, we had to look after the Trust's interests as well more so than possibly for [Bethany] and [name deleted].

[48] Because the trust paid full value for the property, I do not consider that any interest was defeated and that the disposition back to the trust in fact assisted the parties to get back on their financial feet and to a point where they were later able to establish an automotive business which had a value at separation which was divided between the parties.

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21 NOE p 85 line 8.
22 NOE p 107 line 10.
23 NOE p 107 line 28.

[49] It may be that the reason that the proposition that the trustees entered into the transaction with the intent of defeating Ms [Golden]'s claim or rights under the PRA was not put to the trustees in cross-examination was because the answer was self-evident on the evidence before the court. I find there was no evidence of any intention on the part of the trustees to transfer the property to the trust to defeat Ms [Golden]'s rights pursuant to the PRA.

Section 44C of the Property (Relationships) Act 1976

[50] Section 44C of the PRA establishes the Court's jurisdiction to make an order for the purpose of compensating a spouse who has a claim or has rights under the PRA which have been defeated through a disposition of relationship property to a trust.

[51] In *Nation v Nation*, the Court of Appeal set out the requirements for a successful claim under s 44C.[24] The requirements are that there be a disposition:[25]

(a) to a trust;

(b) of relationship property;

(c) that has been made since the relationship began;

(d) that has been made by either or both of the spouses;

(e) that s 44 does not apply to; and

(f) that has had the effect of defeating the claim or rights of one of the spouses.

[52] The section, of course, does not require any specific intent to defeat Ms [Golden]'s claim or rights, it simply requires the elements outlined above.[26] In this case, while the prerequisites for a successful claim under s 44C are made out in terms

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24 *Nation v Nation* [2005] 3 NZLR 46 (CA).
25 At [144].
26 That is, there was a disposition to a trust, of relationship property, made since the relationship began, by either or both of the spouses, and s 44 does not apply.

of subparagraphs (a) to (e), the crucial question in this case is whether the disposition "has had the *effect* of defeating the claim or rights of one of the spouses."

[53] I consider in this case that Ms [Golden]'s rights under the RPA were not defeated because, as was the position in relation to the s 44 claim, full value for the property was paid by the trust, it was paid in cash, and the loan owing to the trust by Mr [Herring] was repaid along with the mortgage to Kiwibank. Any arguable equity in the property at that time was more than offset by the trust paying off the parties' hire purchase obligation on the car. Ms [Golden] herself conceded that point.[27]

> Q … So when you look at your financial position at the time after that date was paid you had no equity in the house, did you?
>
> A I don't know.
>
> Q Well it's a straightforward proposition, when you added that hire purchase debt in you owed more money than you got from the sale of the house, didn't you?
>
> A Yes.

[54] The simple proposition here is that if there was no equity in the property at that time then what interest has been defeated? The only difference, it appears to me, between a sale for full value back to the trust or a sale to a completely independent third party is that the person or entity to whom the property was sold (in this case the trust) included the vendor (Mr [Herring]) as a discretionary beneficiary. Does that open the door to a s 182 claim?

Section 182 of the Family Proceedings Act 1980

[55] Section 182 of the FPA empowers the Court to make variations to the terms of an agreement or nuptial settlement upon the dissolution of a marriage (or other qualifying relationship) where those variations are to remedy the consequences of the failure of the settlement's premise of a continuing marriage.[28] The section can be

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27 NOE p 27, line 24.

28 *Family Property* (online ed, Westlaw) at [FA182.01]; *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31; *Clayton*, above n 7; and *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651 at [32]. See also *Brooks v Brooks* [1995] 3 All ER 257 (HL).

applied to assets initially settled on a nuptial settlement, as well as to assets added to the initial settlement.[29]

[56] In *Preston v Preston*, the Supreme Court established a three-stage test for s 182 FPA applications:[30]

(a) The first stage is determining whether there has been a nuptial settlement.

(b) The second stage is assessing whether there is a disparity between the position of the claimant spouse under the settlement following the dissolution of the marriage and the position that the claimant spouse would have been in if the marriage had continued. If such a difference exists, then the Court may exercise its discretion under s 182.

(c) The third stage is determining how the discretion should be exercised in each particular case.

[57] The principal appellate judgment in regard to the definition of a "nuptial settlement" is *Clayton v Clayton*.[31] In *Clayton*, the Supreme Court has emphasised that the term has a broad definition and has stated:[32]

> [33] …to come within the term 'settlement' as used in s 182, any arrangement must be one that 'makes some form of continuing provision for both or either of the parties to a marriage in their capacity as spouses, with or without provision for their children'. It was also made clear that discretionary family trusts can be settlements for the purposes of s 182. Further, property acquired by a trust after it is settled can also come within the definition of settlement. This is because the settlement is 'the trust itself and any trust property (whenever acquired) must be part of the settlement'.

[58] Although a finding that there is a disparity does not necessarily mean that the court shall exercise its discretion to remedy the disparity, in *K v K* the High Court said that *Preston* suggests that the existence of a disparity raises a presumption in favour

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29 *K v K* [2022] NZHC 3123 at [48].
30 *Preston*, above n 28, at [39].
31 *Clayton*, above n 7.
32 *Clayton*, above n 7, at [32] and [33].

of the exercise of the discretion.[33] In deciding whether or not to exercise the discretion, the factors that the Court might consider include the interests of any children, the interests of other beneficiaries, the source and nature of the assets, the duration of the qualifying relationship, need, and the provision of a home for each party.[34]

Has there been a nuptial settlement?

[59] In his written submissions, Mr Taylor, for Ms [Golden], did not argue that the settlement of the trust was a nuptial settlement, but that the disposition of [the house] to the trust was a nuptial settlement.[35]

[60] Mr Taylor argued that the settlement was made in contemplation of marriage after the birth of the parties' first child on [date deleted] 2010 and their engagement to be married on 25 December 2010. He argued that the benefits the parties enjoyed from the trust included a high quality of accommodation, rental significantly below market rent, significant agency over the house and improvements to it, considerable involvement by the applicant in the planning and installation of a new kitchen and other renovations to the property, use of the Farmlands card, use of a vehicle loaned to them by the trust, and paying insurances which freed up the parties to use their funds elsewhere. He argued those benefits continued until the parties separated seven years later and would have continued if not for the separation and subsequent dissolution of the marriage. Mr Taylor argued an inherent disparity in each party's position following the dissolution of marriage compared to the applicant's position had the marriage continued.

[61] There appeared to be consensus between counsel that there was no relationship property that the court could call upon if it were to exercise this discretion under s 182. It was also clear from the evidence, and particularly that of the trust's accountant Mr Van Dyk, that the trust had considerable negative projected cashflow for the years ending 31 March 2022, 2023, and 2024. Accordingly, Mr Taylor submitted that the applicant should receive a half-share in the current value of the house property, minus

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33 *K v K*, above n 29, at [71] citing *Preston*, above n 28, at [7] and [53] – [58].
34 *K v K*, above n 29, at [72].
35 Submissions for the applicant, dated 2 July 2023, at [86].

the $135,094.07 expended by the trust's improvements, and minus a further $87,818 being the balance of the interest-free loan repayable to the trust at the date of disposition.

[62] Mr Andersen, for Mr [Herring], argued that the only nuptial settlement in this case was between [Drew] and [Shannon Herring] who established the trust and that no children have a claim against the trust simply because they are discretionary beneficiaries. He argued that what, in effect, is being claimed here is that Ms [Golden] (through Mr [Herring]) has an ability to claim trust property that none of the other discretionary beneficiaries have.

[63] Mr Andersen argued, in terms of the definition of nuptial settlement established in *Clayton,* that it must be one that makes "some form of continuing provision for both or either of the parties to the marriage in their capacity as spouses"[36] and that, in this case, the only right provided to the parties beyond settlement was an informal month-to-month tenancy of the property.

[64] This case, unlike most of the case law on s 182 and those cases referred to me in the bundle of authorities, did not involve a situation where the parties (or one of the parties) disposed of property to a trust settled by one or both of them over which either had power of appointment of trustees. This was a transfer to a trust which was established by Mr [Herring]'s parents for the primary purpose of providing for them in their retirement. This purpose contrasts against the Court of Appeal's guidance in *Ward*, which states that a fundamental element of ante and post-nuptial settlements is that nuptial settlements envisage and are premised upon the continuance of the marriage.[37]

[65] The situation in this case appears more analogous to the situation in *Da Silva v Da Silva*, in which the wife's mother settled the trust for the benefit of herself, her daughter (i.e. the wife), and her grandchildren.[38] Ms Da Silva's mother never included Ms Da Silva's husband as a beneficiary, and her memorandum of wishes stated that

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36 *Clayton*, above n 7, at [33].
37 *Ward*, above n 28, at [15].
38 *Da Silva v Da Silva* [2016] NZHC 2064.

trustees were to pay Ms Da Silva a sufficient allowance to enable the maintenance of a reasonable standard of living. Although the High Court's decision in *Da Silva* might suggest that it was the fact that Mr Da Silva was not a beneficiary that was fatal to his application, the commentary states that the better view is that Ms Da Silva was being provided for in her capacity as her mother's daughter and not as her husband's wife.[39] Regardless, in this case, both views are true. Ms [Golden] is not a beneficiary, and Mr [Herring] is included in the trust (which exists for his parent's benefit first and foremost) as a result of him being his parents' son.

[66] In essence, as I have observed previously, the only features that separate this transaction from a straightforward house sale to a third party for value is that Mr [Herring] remains a discretionary beneficiary of the purchasing trust and that the parties were able to rent the property pursuant to an informal arrangement after the transaction had been completed. Those two points are, for these purposes, immaterial. As regards the sale, as the Court of Appeal has said in *Ward*, a disposition which confers an immediate and absolute interest in an item of property does not constitute a settlement of that property.[40] Similarly, as regards the discounted and informal rental arrangement, this can be compared with the case of *Little v Little*. In *Little*, the trust held the house that Mr and Mrs Little lived in, and Mr Little's family's funeral business (which operated out of said house).[41] Mr Little was both a trustee and beneficiary of the trust. The Littles received income and free accommodation (c.f. a house rented for below market rate on a rolling and informal basis). The High Court ruled that the *Little* trust was nuptial in character because it was so intertwined with the Little family's day-to-day lives, whereas the current trust has much less relevance to Ms [Golden] and Mr [Herring]'s own lives.

[67] I consider that, had the trust created some formal entitlement for the parties following settlement of the repurchase, for example, a right to occupy, this may have been some form of continuing provision which could potentially constitute a right for the purposes of s 182.

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39 *Family Procedure* (online ed, Thomson Reuters) at [FP182.07(2)(b)].
40 *Ward*, above n 37, at [25].
41 *Little v Little* [2020] NZHC 2612.

[68] In this case, however, there was no such right of tenure and the parties simply continued to occupy the house on an informal (unwritten) month-to-month tenancy. In this regard, the case can be contrasted against *Ben Hashem v Sharif*, a case from the Family Division of the English and Welsh High Court, in which the wife's licence to occupy an apartment that was owned by a company was considered to be a nuptial settlement.[42] It can be seen that the rights or entitlements that either Ms [Golden] or Mr [Herring] had in regard to the property were much weaker and less formalised than the wife's rights and entitlements vis-à-vis the apartment in *Ben Hashem*. This is underscored by the fact that both parties, in this case, subsequently left the property of their own volition (Ms [Herring] on 3 April 2018 upon separation, and Mr [Herring] some three years later on 30 April 2021).

[69] While the trust gave Ms [Golden] and Mr [Herring] some benefits from time to time, as outlined previously at [60], at no time did Mr [Herring] receive income from the trust. There is also no evidence before the court as to what the market rent for the property should have been for the house, with the effect that even if I did consider there to be a disparity that needs to be addressed by the court, I would not have been able to quantify it. There was no entitlement to any continuing provision in terms of ongoing use of the Farmlands card, use of a vehicle loaned by the trust, or payment of insurances. Again, even if here had been, there was no evidence as to how that could have been quantified.

[70] I do not consider the repurchase of the house by the trust to be a nuptial settlement, even in terms of the broad definition outlined in *Clayton*. Nor do I consider, if it had been a nuptial settlement, that there is a quantifiable disparity (in terms of the claim of Mr [Herring]'s post-separation occupation of the property at below-market rental) between the position of the claimant as spouse under the settlement following the dissolution of marriage and the position that the claimant would have been in if the marriage had continued. Accordingly, the claim must fail.

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42 *Ben Hashem v Shayif* [2008] EWHC 2380 (Fam).

Debts

[71] Mr Kirkland, on behalf of the trust, referred to debts owing to the trust for unpaid rental of $3600 and $5800 for two periods when parties were not paying rent to the trust and a further $24,000 approximately for Mr [Herring]'s current account with the trust incurred during the relationship.

[72] His submission was that in the event the court made an order against the trust, those debts should be offset in terms of any settlement awarded.

[73] Given that I have concluded that none of the claims under ss 44 and 44C of the PRA or s 182 of the FPA have been made out, there is no need to consider that matter further.

Outcome

[74] In response to each of the issues the court was asked to determine, as outlined in [18] above, I find as follows:

a) The disposition to the trust is one to which ss 44 and 44C could have applied.

b) The dispositions to the trust, however, were not made in order to defeat the applicant's rights under the PRA.

c) Nor did the disposition have the effect of defeating the applicant's rights under the PRA.

d) The transfer of the property to the trust was not a nuptial settlement in terms of s 182 of the FPA.

e) Having not found in the applicant's favour, the court cannot exercise its discretion as to remedy.

f) The claim for unpaid rental by the trust was only raised as an offset in the event that any remedy was awarded to the applicant. Given that the applicant's

claims have been dismissed, the issue of the trust's claims to offset unpaid rental and/or the proportion of Mr [Herring]'s current account incurred during the relationship, does not need to be considered further.

Costs

[75] Costs are reserved.

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Judge R J Walker
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 21/08/2023