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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2023-004-001087
[2024] NZFC 15340

UNDER	FAMILY PROCEEDINGS ACT 1980
IN THE MATTER OF	of an application for declarations pursuant to sections 27 and 32 of the Family Proceedings Act 1980
BETWEEN	IRINA HOOPER Applicant
AND	MELISSA FRANCIS MEO in her capacity as the administrator of the Estate of John Reginald Hooper (deceased) Respondent

Hearing:	15 October 2024
Appearances:	I Blackford and D Hammond for the Applicant K McDonald and N D P Percy for the Respondent
Judgment:	29 November 2024

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to applications for a declaration as to validity of marriage and a declaration as to presumption of death and order dissolving marriage pursuant to sections 27 and 32 of the Family Proceedings Act 1980]

Introduction

[1] In November 2023 an application for a declaration as to the validity of the marriage and a declaration of presumption of death was filed with the Auckland Family Court. The applicant was named as Irina Hooper. The respondent was referred to as "Estate of John Reginald Hooper". The file was placed before me in box work. I raised a query as to the validity of the respondent because the named "respondent was not a legal entity". No executor or trustee of the estate of Mr Hooper was named. I directed that steps will have to be taken for applications to the High Court to appoint an executor and/or trustee who could be a legal entity on behalf of the respondent.

[2] In January 2024 the applicant filed a further application for an order declaring that the other party to the marriage is presumed to be dead and the marriage be dissolved. The applicant relied on the Family Proceedings Act.

[3] The Court directed that the matter be set down for a judicial conference to address procedural aspects and directed legal submissions as to jurisdiction to make the declaration sought be addressed.

[4] The matter was set down for a judicial conference. The presiding Judge directed it to proceed to a short cause hearing where legal submissions were to be provided. It was directed a notice of response to be filed by the respondent. Ms Meo was in due course appointed as administrator of the estate of the late John Reginald Hooper.

[5] The short cause hearing came before me on 15 October 2024. The Court received comprehensive written submissions from both parties. The factual background is as follows.

Background

[6] The applicant Irina Hooper and the late Mr John Reginald Hooper were married on 30 April 2010 and were still married when Mr Hooper passed away between 8 October 2022 and 13 October 2022.

[7] Mr Hooper formed a trust by way of a Deed dated 25 September 1998 ("the trust"), which predated the marriage. The trustees of the trust were Mr Hooper (deceased), his son, Andrew Hooper (also deceased) and Gavin John Webber ("Mr Webber"). As at the date of Mr Hooper's death Mr Webber was the only surviving trustee.

[8] At his death Mr Hooper held in his personal name minimal assets (a boat, car and approximately $20,000), which will be reduced by liabilities for funeral expenses and legal fees for the estate's administration. Mrs Hooper has not been provided for at all in the Will of Mr Hooper and almost all of the assets acquired during the relationship are held by the trust.

[9] It is Mrs Hooper's view that she has been inadequately provided for by Mr Hooper.

[10] Mrs Hooper argues that she is a beneficiary of the trust by way of marriage to Mr Hooper (who was a discretionary beneficiary) whereby the Trust Deed provides at clause 1(g)(x) that a beneficiary includes:

> 1(g)(x): Any person who, in the opinion of the trustees is living in a stable relationship in the nature of marriage with any of the beneficiaries (final or discretionary)…

[11] The applicant contends that the trust is a post-nuptial trust.

[12] In addition to Mrs Hooper being a beneficiary of the trust she argues that on 11 June 2018 Mr Hooper signed a "memorandum of wishes", and the trustees signed an "irrevocable resolution of the trustees" agreeing that Mrs Hooper be maintained by the trust from the income received from commercial property, interest acquired by the trust during the marriage as well as providing Mrs Hooper with a life interest in the family home owned by the trust, situated at [address deleted], Beachlands ([property identifier deleted]), which was acquired by the trust during the marriage. For clarity, it is Mrs Hooper's position that this qualifies as a post nuptial settlement and an agreement for payment of maintenance relating to property held by the trust.

[13] Mr Webber, as trustee of the trust, has declined to provide for Mrs Hooper on the ground that he does not agree that Mrs Hooper and Mr Hooper were in a relationship at the time of Mr Hooper's death in the nature of marriage.

[14] Mrs Hooper has sought legal advice and she has instructed her lawyers to indicate an intention to make an application pursuant to s 182 of the Family Proceedings Act 1980 to seek for the variation or rearrangement of the trust so that she is properly provided for.

[15] Prior to filing the applications on 1 November 2023 referred to above the applicant's lawyers were advised by the High Court that no applications for Probate or Letters of Administration were pending. Counsel were advised by the High Court that an application for Letters of Administration was made on 21 November 2023. Subsequently that application was granted by the High Court and Ms Meo was appointed as administrator. As a result she has been substituted as the respondent in the proceedings.

[16] The applicant intends to rely on s 182 of the Act which empowers the Court to enquire into the existence of any maintenance agreement, or ante-nuptial and post-nuptial settlement, and allows the Court to vary such agreement or settlement on dissolution of a marriage to remedy the consequences of the failure of the settlement's premise of a continuing marriage.

[17] She asserts that it has been established that the right to make a claim under s 182 of the Act does not abate upon death of one of the parties.[1]

[18] She accepts that there are four requirements to bring a s 182 claim, namely:

(a) there must have been a marriage or civil union;

(b) the Court must have made an order dissolving the marriage or civil union. The Court may also act under s 182 following an order under

[1] She relies on *Thakurdas v Wadsworth* [2018] NZHC 1106 and the subsequent Court of Appeal decision.

Part IV of the Act (including a declaration validating a marriage or civil union, or declaration of presumption of death);

(c) the order must have been made within a "reasonable time";

(d) there must have been 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.

[19] Ms Blackford in her submissions makes it clear that the applications that have been filed in November 2023 and January 2024 are to meet the jurisdictional requirements of s 182 and provide "keys to open the door".

[20] The applicant argues as follows in her written submissions provided to the Court and I set out paragraphs 26-39:

> 26. Section 27 of the Act provides that any person, regardless of whether they are party to the marriage, can apply for a declaration as to the validity of marriage. The Application may be made regardless of whether any other relief is claimed under the Act.
>
> 27. The purpose of Mrs Hooper's Application under section 27 is to satisfy the preliminary requirement of an order under part 4 under section 182 and confirm that the parties duly registered marriage under New Zealand law is valid.
>
> 28. Counsel for the Applicant has not found any reported case law on this matter. However, Counsel is aware of an unreported case, *Singh v Bourchier*, where the Family Court declared a marriage valid under Part 4 of the Act, which allowed the widow to apply to the Court under section 182 for an inquiry into and relief from the family's trust despite the fact that the marriage was not and never will be dissolved. Annexed and marked hereto with the letter "A" is a copy of the article referred to, along with the Minute of His Honour Judge McHardy dated 14 February 2019, obtained from the firm acting for the Applicant (Martelli McKegg).
>
> 29. This is the same result Mrs Hooper is trying to achieve.
>
> 30. Making a section 27 Application is a "belts and braces" approach for this unprecedented matter.
>
> 31. Section 32 of the Act provides that any married person may apply for an order declaring that the other party to the marriage is presumed to be dead and that the marriage is dissolved.

> 32. Mrs Hooper cannot obtain a dissolution order following the standard route as she was not separated from Mr Hooper at the date of Mr Hooper's death. Dissolution does not automatically occur upon death. By way of Application under section 32, the Court can declare that one party (Mr Hooper) to the marriage is presumed dead and that the marriage is dissolved, satisfying the jurisdictional requirement to apply under section 182.
>
> Response to Counsel to the Respondent
>
> 33. Counsel disagrees with the Respondent's argument in stating that there is no justiciable issue before the Court. Counsel submits that the applications for the declarations are required and are a formality to ensure that the justiciable issue of whether Ms Hooper can have a claim to the Trust under section 182 of the Family Proceedings Act can be put to the court.
>
> 34. Counsel submits that the Respondent is seeking to prevent the section 182 claim being brought against the Trust.
>
> Orders Sought
>
> 35. Mrs Hooper cannot make an Application under section 182 of the Act without first obtaining an order under Part 4 of the Act.
>
> 36. Counsel respectfully submits that the intentions of Mrs Hooper have been made clear, which Counsel believes should satisfy the Court to use their discretion to grant the orders sought.
>
> 37. This is the only legal avenue Mrs Hooper can pursue to remedy the maintenance and support she has lost upon death of Mr Hooper, support which the deceased himself had promised his wife via the Trust vehicle by taking the extra step of completing not only a Memorandum of Wishes but also ensuring the existence of an Irrevocable Resolution of the Trustees.
>
> 38. Without the orders sought, Mrs Hooper cannot seek relief against the Trust under section 182 of the Act, to which she believes she is entitled given the maintenance agreement and the ante-nuptial settlement of the family home on the Trust during the marriage.
>
> 39. In these circumstances, it is appropriate that the Court grant the orders as sought so Mrs Hooper can proceed with her Application under section 182 of the Act.

[21] The respondent's overall position is that:

(a) the Court should decline to make the declaration sought by the applicant because there is no dispute concerning the validity of Mr and Mrs Hooper's marriage, nor is there any dispute about the fact that Mr Hooper is dead;

(b) section 182 of the Family Proceedings Act 1980 is not intended to be applied in all cases. The Court's discretion is only engaged if the parties' marriage, or civil union has been dissolved;

(c) if death intervenes before an order is made dissolving the parties' relationship, then relief under this cause of action is not available;

(d) Parliament deliberately set the preconditions for relief under s 182 FPA in order to define the legal boundary between the cases where the law of Wills and estates is used to determine property rights, and when the law relating to relationship property and maintenance is to be applied. The applicant's attempt to invoke s 182 FPA in this case is misguided.

[22] In support of the above position I set out Mr McDonald and Mr Percy's submissions. I set out paragraphs 2(a)-(h):

> 2. It is submitted that:
>
> (a) The Applicant has filed and served:
>
> i. An application for a declaration as to validity of marriage.
>
> ii. An application for a declaration as to presumption of death.
>
> (b) The applications should be dismissed.
>
> i. There is no justiciable issue before the Court. This is because there is no dispute between the parties regarding either the validity of their marriage or the fact that Mr Hooper is dead. (See paragraph [5] below.)
>
> ii. Relief under section 32 FPA cannot be granted when a spouse is legally dead. The section only applies in cases where a spouse is missing, and it is uncertain whether the spouse is dead or not. (See paragraph [6] below.)
>
> iii. The Applicant does not have the necessary standing to invoke section 32 FPA. (See paragraph [7] below.)
>
> iv. The Court will not issue a declaration that is futile. In the present case, the declarations sought by the Applicant under section 27 FPA serve no purpose as

they will not enable her to invoke section 182 of the Family Proceedings Act 1980 (“FPA”). (See paragraph [8] to [13] below.)

v. If Parliament intended that the death of a spouse entitles the surviving spouse to bring a claim under section 182 FPA, then this would be expressly provided for.

(c) The Applicant has filed this application in an attempt to confer upon herself the necessary standing to bring a subsequent application under section 182 FPA.

(d) The Applicant has taken this step because should a spouse die before their marriage is dissolved, the surviving spouse does not have the standing to bring a claim under s 182 FPA.

(e) This is because the parties’ marriage ends by operation of law automatically upon one spouses’ death. At law, a marriage is for life, and it is ended by death or dissolution.

(f) Once a spouse dies, the Family Court is unable to make an order dissolving the parties’ marriage. This means that in the majority of cases a spouse’s death prevents the surviving spouse from applying pursuant section 182 FPA for relief. Instead, the surviving spouse’s rights fall to be determined by the death provision of the Property (Relationships) Act 1976 and the laws relating to wills and estates.

(g) The fact that death prevents the Court from making an order for dissolution is confirmed by case law.

i. Where a Family Court Judge hears an undefended application for a dissolution order, the order becomes final upon it being made. However, should a party die before the final order is made, there is no marriage to dissolve. Instead, the marriage is ended by the death of the spouse.

ii. If an order dissolving a marriage is made in a defended proceeding, the interim order takes effect as a final order one month from the date on which it is made. Section 42(3) FPA qualifies this rule and states that if “either of the parties to the marriage or civil union dies, the order shall not take effect as a final order.” As such, it is the death of one of the parties which ends the marriage, as opposed to the Court’s order.

iii. When a joint application for dissolution is made by the parties, a Registrar may make an interim order dissolving the marriage. Such an order made by a Registrar takes effect as a final order one month from the date on which it is made.

iv. The FPA was silent as to the effect of the death of one of the parties following the making of a Registrar's interim order but before that interim order becomes final under section 38(2) FPA. In the estate of SP Taotahi, Mather FCJ held that in such a case the marriage ends due to the death of the spouse and not as a result of the Court's interim order.

(h) That death automatically ends a marriage is confirmed by the fact that:

i. In order to remarry widows and widowers do not need to file applications for dissolution of marriage with the Court. Instead, they are free to remarry when they choose.

ii. To succeed with a prosecution for bigamy pursuant to section 205 of the Crimes Act 1961 it must be proven that the first wife or husband was alive at the date of the second marriage. If the first wife or husband is dead at the time of the second marriage, then the offense of bigamy is not committed because there is no existing marriage at the date of the second ceremony.

[23] With respect to s 27 of the Act Mr McDonald/Mr Percy argued as follows. I set out paragraphs 3(a)-(f) of the submissions:

3. It is submitted that:

(a) Section 27(1)(a) FPA permits the Court to make a declaration that a marriage is valid. Section 27(1)(b) FPA enables the Court to declare whether a marriage has been validly dissolved.

(b) The section enables a wide class of individuals to apply to the Court for a declaration. It is not necessary for the applicant to be a party to the marriage, or for the applicant to be domiciled or resident in New Zealand. Nor is it necessary for the marriage to be solemnised in New Zealand.

(c) Section 28(2) FPA states that a declaration under that section:

> "is discretionary, and the Family Court may, on any grounds which it considers sufficient, refuse to make such a declaration."

(d) The wording of section 28(2) FPA is almost identical to the wording used in section 10 of the Declaratory Judgements Act 1908 ("DJA"). Section 10 DJA states:

> "The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which

it deems sufficient, refuse to give or make any such judgment or order."

(e) Section 28(3) FPA sets out the effect of a declaration. It does this by reference to section 4 of the Declaratory Judgments Act 1908 ("DJA"). Section 4 DJA states a declaration shall be binding on the person who makes the application, all persons who were served with the application, and all other person who would be bound as if the declaration had been sought in an action. As such, a declaration under Section 27 FPA is of limited effect as it is only binding on the parties to the application.

(f) The common law principles that the Courts have developed when determining whether to grant relief under section 10 of the DJA apply by analogy when the Court considers is discretion to grant relief under section 27 of the FPA. These principles are summarised in McGechan on Procedure in paragraph DJ 10.01:

> "In *Moveme Health Ltd v New Zealand Artificial Limb Service* [2023] NZCA 621, the Court of Appeal recognised (at [90]) that:
>
> > the court cannot refuse to make a declaration where refusal would be inconsistent with the court's essential function of interpreting the law and applying the law to the facts of a particular case … where there is uncertainty about the meaning of legislation, parties need to be able to turn to the court for an authoritative ruling."

As against that, the Court recognise that in appropriate cases courts can and should refuse to make a declaration.

In *Kung v Country Selection NZ Indian Association Inc* [1996] 1 NZLR 663, Hammond J likened the discretion to grant a declaration to the approach of a Court to equitable remedies "the broad question being whether justice requires a declaration". In *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA), the Court of Appeal listed a number of "sound reasons" why a declaratory judgment or order should be refused:

- where the question is one of mixed law and fact;
- where the question is abstract or hypothetical question; and
- where the order will have no utility.

…

These factors that weigh against the exercise of a discretion to grant declaratory orders and others identified in previous and subsequent authorities are discussed further below.

…

> (4) No controversy
>
> Access to the declaratory jurisdiction does not depend on there being an existing dispute (*Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135 …, however, the absence of a controversy can be relevant to the exercise of the discretion to grant a declaration.
>
> There is a common law principle that it is contrary to public policy for courts to entertain proceedings where there is no actual outstanding issue in existence between the parties (*Simpson v Whakatane District Court* [2006] NZAR 247; *Te Whakakitenga o Waikato Inc v Martin* [2016] NZCA 548, …, although this principle is not absolute; on occasion the public interest may dictate a determination of an important point and it may be convenient to do so even when there is no lis.
>
> In S*ecretary for Internal Affairs v Kilbirnie Tavern* … whether the Court should exercise its discretion and make declarations dependant on whether there is a live controversy on matters on which declarations were sought; the Court refused to make a number of the declarations as there already was agreement between the parties. In *Timaru District Council v Minister of Local Government* [2023] NZHC 244 declaratory relief was refused in part because the Court was not persuaded that the declarations would serve a useful purpose; the principles were already well known to Parliament.

[24] With respect to the issue of utility and justiciability they argue as follows. I set out paragraph 4(a)-(c).

> 4. It is submitted that the terms “utility’ and “justiciability” are interchangeable.
>
> (a) In S*impson v Whakatane District Court (No. 2),* Asher J considered the utility principle in depth. Counsel refers to paragraphs [22] to [28], [37], [42] and [43].
>
> (b) In *Gazley v A-G*, the Court of Appeal considered the issue of justiciability and held that:
>
> > “Nevertheless, jurisdiction to entertain the proceedings is essential, and it cannot be created by consent or by default: the Court must be satisfied that it has jurisdiction and, if it has, that it is an appropriate case for the discretionary remedy of declaration.”
>
> (c) The Court declined to deal with the application before it and stated at pages 318 and 319:
>
> > “There is no matter in dispute between any parties. The issues are raised, in effect, as hypothetical questions. On these grounds taken together the application falls short of raising a justiciable issue. … Accordingly we decline to deal with the application because the proceeding either does not involve a

justiciable dispute between the parties or attempts to reopen a matter this Court has already determined and is an abuse of process."

[25] With respect to the issue of validity of the marriage and whether there is justiciable issue Mr McDonald and Mr Percy argue as follows and I set out paragraphs 5(a)-(h)(i)-(iv):

5. It is submitted that the Court should not make a declaration concerning the validity of the parties' marriage pursuant to section 27 FPA.

(a) The granting of a declaration is a discretionary remedy. An applicant has no right to a declaration. Rather, the court "may, on any grounds which it considers sufficient, refuse to make such a declaration."

(b) When considering whether to issue a declaration, the practice of the Court is not to grant relief if there is no dispute between the parties. Counsel refers to paragraphs [3] and [4] above.

(c) The Applicant relies upon the unreported case of *Singh v Bourchier*. That case involved an unopposed application for a declaration pursuant to section 27 FPA. There was no discussion of the legal principles involved by the Court, and the judgement is not binding on this Court. The present case is distinguishable as the application for a declaration is opposed.

(d) There is no dispute between the parties, or anyone else, concerning the validity of the Applicant's marriage to Mr Hooper. It is accepted by the Respondent that the parties' marriage was a valid marriage.

(e) There is no evidence before the Court that calls into question the validity of Mr and Mrs Hooper's marriage. The Applicant's affidavit in support of her application contains no evidence to suggest that her marriage to the deceased was invalid.

(f) A marriage certificate has been issued for Mr and Mrs Hooper. Pursuant to section 79 of the Birth, Death, Marriages, and Relationships Registration Act 2021 ("BDA"), a certificate issued under the BDA "is admissible as evidence in any legal proceedings and is presumed, in the absence of evidence to the contrary, to be an accurate record of the information recorded in the registry as at the date of issue". The Applicant has not led any evidence disputing the accuracy of the marriage certificate.

(g) In some circumstances, the Court is prepared to grant a declaration even though there is no dispute. However, there is nothing about the present case which makes it in the public's interest for the Court to grant a declaration as to the validity of the parties' marriage.

(h) The caselaw shows that the Court has only made declarations pursuant to section 27(1)(a) FPA where there has been a legitimate question about a specific marriage's status.

i. In *Re G FC Napier* FP 041/71/01, 27/4/2001, the Court considered the validity of the marriages of two couples whose marriage ceremonies were celebrated by a person who was not an authorised marriage celebrant. The Court held that the couples and the celebrant had an honest belief that she was a duly authorised celebrant and found that the marriages were declared to be valid.

ii. In *Julian v Oo* (2001) 20 FRNZ 508 the parties were married on the border of Burma and Thailand, where the respondent husband was based as a soldier with an outlawed organisation. All the legal requirements of marriage under Thai law were met except there was no formal registration. The Family Court declared that the marriage was valid.

iii. In *N v D FC Waitakere,* FAM-2008-090-1403, 24/11/2008, the parties had legally married in the USA. They undertook a second ceremony in New Zealand. Pursuant to section 27 FPA the Court declared that the New Zealand marriage was invalid as there was no basis for parties to a legal marriage in one country to contract again in New Zealand as if they were unmarried. However, no consequential relief was granted.

iv. In *Walters v Estate R Entwisle* [2016] NZFC 10786 the parties married on 23 August 2014. The wife passed away later that day. Unfortunately, the parties did not have a marriage licence and a marriage certificate could not be issued. Notwithstanding the lack of a marriage certificate, the Court declared the marriage to be valid.

[26] In relation to s 32 of the Act on the presumption of death application Mr McDonald/Mr Percy argued as follows:

6. It is submitted that there is no justiciable issue before the Court:

(a) A declaration that a party is presumed to be dead pursuant to section 32 FPA and a subsequent dissolution order is solely concerned with resolving uncertainty about an applicant's marital status so as to permit them to remarry.

(b) Section 32 FPA is invoked in cases where a spouse is missing and the missing spouse's body cannot be found. The section enables the Court to make a declaration that the spouse is "presumed dead" and an order dissolving the parties' marriage. The subsequent order is necessary to dissolve the pre-existing marriage so as to permit the applicant to remarry.

(c) A declaration and dissolution order made pursuant to section 32 FPA does not have any effect on property rights or estate matters. Instead, the High Court has the exclusive jurisdiction to determine whether a party is dead as far as it concerns issues involving property. This is determined in an application for leave to swear death, which is brought in the context of an application for the grant of administration.

(d) Section 182 FPA applies because a presumption of death case is akin to a case where spouses have separated and a dissolution order is then made. In both types of cases, the applicant is not entitled to any benefits pursuant to estate law.

(e) In the present case, there is no dispute between the parties about the fact that Mr Hooper has died.

(f) A death certificate has been issued for Mr Hooper. Section 79 BDA applies. Counsel refers to paragraph [5](f) above. The Applicant has not led any evidence disputing the accuracy of Mr Hooper's death certificate.

(g) The High Court has appointed the Respondent as the administrator of Mr Hoopers estate. In paragraph 1 of the High Court's order the Court has held "The deceased John Reginald Hooper died at [address deleted], Beachlands, Auckland, between 8 October 2022 and 13 October 2022, leaving a will. A copy is attached." Mr Hooper's death is a matter of legal record.

(h) Section 32 FPA simply does not apply in the present case. The Family Court cannot make a declaration pursuant to section 32 FPA presuming Mr Hooper to be dead when the High Court at Wellington has made an order confirming Mr Hooper's actual death as part of the process of appointing the Respondent as Mr Hooper's administrator. The Family Court is unable to "presume" what has been legally recognised by a superior Court.

(i) If the Family Court is unable to make a final order for the dissolution of a marriage under the FPA when a spouse dies following the making on an interim order, then it is illogical to suggest that the Family Court can make a declaration presuming someone to be dead and a subsequent order dissolving the parties' marriage when the person who is the subject of the application is dead. In both cases, the death of the spouse means each respective application becomes a nullity.

[27] Mr McDonald/Mr Percy argued there is no standing to invoke s 32 and contend as follows:

7. It is submitted that the Applicant does not have the required standing to apply for a declaration pursuant to Section 32 FPA.

(a) In order to apply for a declaration pursuant to section 32 FPA, the applicant must be a "married person or a party to a civil union".

(b) As at the date of the application Mrs Hooper was not a married person, she was a widow.

(c) This is because her marriage to Mr Hooper was dissolved in October 2022, by operation of law, automatically upon Mr Hooper's death.

(d) Such an interpretation is consistent with the purpose of section 32 FPA, which is to enable a party to apply for a declaration presuming

> the death of a spouse and obtain an order dissolving their marriage so as to permit them to remarry. A widow or widower does not need a Court order to remarry.

Judgment

[28] I decline to make a declaration as to validity of marriage and a declaration as to presumption of death.

[29] I uphold the submissions of Mr McDonald/Mr Percy. I find there is no justiciable issue for the Court to determine. There is no dispute that Mr Hooper is dead. There is no utility or point in making a declaration as sought. A death certificate has issued.

[30] I accept that the marriage between Mrs Hopper and the deceased was validly entered into. There is no point in making a declaration as to the validity of the marriage. In traditional vows exchanged between bride and groom, it is often said that the marriage will continue "until death do us part". This applies in this case.

[31] I therefore dismiss the applications brought before the Court. I do not consider it is the role of the Court to make orders to provide a key to unlock a remedy if there is no genuine dispute. I would be concerned if the applicant did not have any remedy available to her so that she could have her concerns properly heard and have her day in Court. But in this case I consider that the applicant can apply to the High Court under the Trusts Act 2019 for a determination as to whether she is or is not a beneficiary and seek directions from the High Court as to the proper exercise of the trustees' discretion for the trust to provide for her (on the assumption she is determined to be a beneficiary) and if the trustees fail to properly exercise the discretion applications can be made to have the trustees replaced .

[32] I accept the case of *Singh and Bourchier (as trustees of the Shean Singh Family Trust) v Ash* can be distinguished from the facts of this case.[2] The point was not fully argued. The Judge recorded a consent position between the parties at a judicial conference not a hearing.

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[2] *Singh and Bourchier (as trustees of the Shean Singh Family Trust) v Ash* [2018] NZCA 310.

[33] I consider the application under s 32 with the grounds having to be established under s 34 and s 35 providing evidence of death. I accept the submission that Mr Hooper is not missing and the criteria does not apply to this case. Everyone knows that he has died. A death certificate has been issued by the Registrar of Births, Deaths and Marriages pursuant to the Births, Deaths, Marriages and Relationships Registration Act 1995. That creates a clear presumption.

[34] The facts of this case do not support the need for a declaration to be made as sought.

[35] Mr McDonald/Mr Percy argued that the applicant's attempt to invoke s 182 is futile. I set out paragraphs 8-12 of their submissions:

> 8. It is submitted that futility is a ground for the Court to refuse discretionary relief. In *G v G* Duffy J held that:
>
> > "In such a situation where the Court would not grant an order due to futility, it is extremely unlikely that a declaration would be granted. As the Court of Appeal noted in *Re Chase*, "[T]he Courts do not at all readily grant declarations where no consequential remedy or relief could be granted either at the time of the declaration sought or in the future. Henry J in that case found that declaratory relief was inappropriate where there was no discernible good purpose served by the making of a declaration."
>
> 9. Section 182(1) FPA requires an "order" to be made under Part 4 of the Act or a "final decree" to be made under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963 in order for the sub-section to be engaged. It is submitted that a declaration made pursuant to section 27(1)(a) or (b) FPA is not an "order" for the purposes of Section 182(1) and accordingly the application for a declaration is futile.
>
> (a) To obtain relief under Section 182(1) FPA, an applicant must first obtain an order under part 4 of the Act. There are 5 types of relief that may be granted under part 4 of the FPA:
>
> i. A declaration as to whether a marriage or civil union is valid or has been validly dissolved (section 27 FPA).
>
> ii. An order declaring a marriage or civil union to be void ab initio (section 29 FPA).
>
> iii. A declaration that a party is presumed dead and an order that the marriage or civil union is dissolved (section 32 FPA).

v. An order dissolving a marriage or civil union (section 37 FPA).

vi. An order recognising the validity of a foreign order for dissolution or divorce (section 44 FPA).

(b) Not every order under part 4 FPA permits section 182 FPA to be engaged. In *AKR v SP* Wylie J held that an order recognising a foreign order for divorce or dissolution pursuant to section 44 FPA does not constitute an order for the purpose of section 182 FPA.

(c) Sections 27 and 28 FPA use the term "declaration". The word "order" is not referred to in these sections.

(d) The only remedy a Court can issue pursuant to section 27(1) FPA is a declaration. Such a declaration is a ruling about the validity of a marriage or whether a marriage has been validly dissolved. The declaration is only binding on the parties to the proceedings.

(e) However, a declaration does not implement the ruling of the Court. Implementation is dependent upon further orders of the Court being made.

(f) This issue was considered by Duffy J in *G v G* [2023] NZHC 166. In that case, the husband had fraudulently obtained an order dissolving the parties' marriage. Ms G unsuccessfully applied to the Family Court for a declaration under section 27(1)(b) FPA that the marriage was not validly dissolved. On appeal Ms G sought an order quashing the dissolution order and a declaration that the dissolution order was invalid.

(g) The Court held that section 27 FPA permits the Court to declare whether a marriage or a dissolution of marriage was valid or invalid.

(h) The Court then considered the issue of relief and observed that there were two possible effects of a declaration of invalidity. Either the declaration would have the effect of quashing the order or it would be simply a declaration. Under the second option, the dissolution order would remain intact and consequential orders would be required to quash the order.

(i) Duffy J considered the Australian equivalent legislation to section 27 FPA. That legislation did not enable the Australian Courts to make consequential orders if a Court found a final divorce order to be invalid. However, it was held that the Court could make the necessary consequential orders (to set aside the divorce order) as part of its implied power to control its own processes.

(j) Duffy J observed that the Family Court has an inherent power to prevent an abuse of its processes and stated: "This might

extend to jurisdiction to make a collateral order quashing the dissolution if it is necessary to prevent an abuse of the Family Court's process."

(k) The fact that the High Court had to rely upon the Family Court's inherent power to find the jurisdiction to quash an impugned dissolution order confirms that a declaration made pursuant to section 27 FPA does not have the effect of implementing the Court's declaration.

(l) As a matter of logic, for the Court to exercise its inherent power to prevent its processes from being abused, there must first be an order or act of the Court which is impugned.

(m) In the case of *G v G* the order that was impugned was an order for the dissolution of a marriage that was obtained by fraud. The present case concerns the validity of a marriage. However, the Court processes are not invoked in order to permit parties to marry. As such, the Court's inherent power to prevent an abuse of its own processes cannot be used to dissolve an invalid marriage because the marriage is not the result of a court order.

(n) This means that a declaration of validity of a marriage made pursuant to section 27(1)(a) or (b) FPA cannot and does not end the parties' marriage.

(o) The Applicant's remedy in such a case is to apply for relief under either section 29 FPA (void marriages) or section 37 FPA (dissolution order).

(p) By comparison, a common feature of sections 29, 32, and 37 of the FPA is that if relief is granted, the Court makes an order ending the parties' marriage. For example:

   i. In section 29 FPA an order is made declaring the parties' marriage to be void ab initio. The order of the Court means that the parties' marriage never came into existence, therefore there is no marital relationship that needs to be brought to an end.

   ii. In section 32 FPA a declaration is made declaring the spouse to be presumed dead and an order is made dissolving the parties' marriage.

   iii. In section 37 FPA an order is made dissolving the parties' marriage.

(q) The fact that declarations pursuant to section 27 FPA are different from applications under sections 29, 32, and 37 FPA is highlighted by section 60 BDA.

   i. Section 60 BDA requires a Registrar of the Family Court to notify the Registrar General as soon as practicable after an order is made dissolving a

marriage, an order declaring a party to a marriage dead and the marriage dissolved, or an order is made declaring a marriage is void from the start.

ii. The Registrar General may then register the information provided under section 60 BDA in the record for that specific marriage.

iii. However, there is no obligation on the Family Court to notify the Registrar General about a declaration as to validity of a marriage made pursuant to section 27 FPA. Nor is there any obligation on the Registrar General to update the marriage records as a result of any such declaration.

iv. This is because a declaration under section 27 FPA does not affect the marital status of the parties. Implementation of a declaration requires an order under sections 29, 32, or 37 FPA. It is these orders, and not a declaration, which end a marriage and trigger the need to update marital records.

10. It is submitted that:

(a) In *Ward v Ward*, the Supreme Court held at [15] that:

> "Both ante and post-nuptial settlements had one fundamental thing in common. They both envisaged and were premised on the continuance of the marriage. If that premise ceased to apply, a fundamental change in circumstances came about. Parliament recognised that injustices could arise as a consequence and it was desirable to empower the Court to review the settlement on dissolution of the marriage. …"

(b) Orders pursuant to sections 32 and 37 FPA end the marriage. An order pursuant to section 29 FPA states that the marriage never came into existence. Orders made under sections 29, 32, and 37 FPA all engage section 60 BDA.

(c) However, a declaration pursuant to section 27 FPA does not alter the legal status of the marriage nor does it end the marriage. A declaration that a marriage is valid does not affect the parties' marital status, it simply confirms it. A declaration that a marriage is invalid is only binding on the parties to the application. Without a further order implementing the declaration, the marriage still, at law, subsists. A declaration under section 27 FPA does not engage section 60 BDA.

(d) As such, orders made pursuant to sections 29, 32, and 37 of the FPA are "orders" for the purpose of section 182 FPA because they end the marriage. Once the marriage has ended, the Court has the jurisdiction to invoke section 182 FPA.

(e) A declaration pursuant to section 27 FPA is not an order for the purposes of section 182 FPA because the marriage is not ended by the declaration. A further consequential order is required to end the marriage. However, section 27 FPA does not authorise the Court to make a consequential order ending the parties' marriage.

11. It is submitted that the interpretation that the term "order" in section 182(1) FPA does not include declarations made pursuant to section 27 FPA is supported by the Matrimonial Proceedings Act 1963 ("MPA").

(a) Relief under section 182(1) FPA can be activated if the party obtains a "final decree" under Part 2 or Part 4 of the MPA.

(b) The FPA repealed the MPA. However, section 182 FPA anticipated that there may be cases where a marriage dissolved under the MPA might give rise to a dispute concerning an ante-nuptial or post-nuptial settlement. The wording of section 182(1) FPA enables MPA cases to be determined under the FPA.

(c) The MPA was divided into 10 parts. Part 2 dealt with nullity cases. Part 3 dealt with separation. Part 3 also contained section 17, which permitted the Court to make declarations as to the validity of marriages and dissolutions.

(d) Part 4 of the MPA dealt with dissolution of marriage. Within this Part section 18 dealt with the dissolution of voidable marriages. Section 19 dealt with a decree of presumption of death and dissolution of marriage. Sections 20 to 32 dealt with divorce. Sections 33 to 35 dealt with decrees nisi and decrees absolute.

(e) A spouse applying pursuant to section 17 MPA for a declaration as to validity of marriage under the MPA is not entitled to apply for relief under section 182(1) FPA. This is because:

i. Section 17 MPA is contained in Part 3 of the MPA and not Part 2 or Part 4 of that Act.

ii. Section 182(1) FPA requires a "final decree" to be made to activate the section. The term "final decree" does not appear in the MPA, only the term "decree absolute". Section 34 MPA defines the circumstances in which a final decree can be made. Section 34 MPA does not extend to section 17 MPA.

iii. However, "decrees absolute" can be made pursuant to section 34 MPA in applications for presumption of death and dissolution of marriage, dissolution of voidable marriages, and divorces.

iv. The above three categories of orders are the statutory predecessors to sections 29, 32, and 37 FPA.

(f) When drafting the FPA, Parliament made the conscious decision to bar a spouse who applied for a declaration as to validity of marriage under the MPA from obtaining relief under section 182 FPA.

(g) This decision reinforces the interpretation that the term "order" in section 182(1) FPA is not intended to include a declaration made pursuant to section 27 FPA. It would be illogical for a spouse who obtained a declaration as to the validity of their marriage under section 17 MPA to be denied relief under section 182 of the FPA, but a spouse who obtained the same declaration under section 27 FPA would be entitled to relief.

12. It is submitted that:

(a) Under the MPA a declaration as to the validity of a marriage did not entitle a spouse to relief under the MPA's equivalent to section 182 FPA.

i. Section 79(1) MPA is the equivalent provision of section 182 FPA in the MPA.

ii. Section 79(1) MPA lists the specific decrees by name that activate the section.

iii. A declaration as to validity of marriage under section 17 MPA is not included in the relevant list of decrees that engage section 79(1) MPA.

iv. Under the MPA, a declaration of validity did not permit a spouse to apply for relief under section 79 (1) MPA.

(b) If Parliament intended to change the law when it enacted the FPA so as to allow section 27 FPA declarations to engage section 182(1) FPA, it would have done so by expressly referring to declarations in section 182(1) FPA alongside the word "orders". The absence of the term "declaration" in section 182 FPA shows Parliament's true intention.

[36] I accept that even if the Court made the orders as sought or the declarations that it would not necessarily provide the keys to open the door as contended by the applicant. I accept that s 27 of the FPA does not entitle a spouse to apply for relief under s 182(1). To obtain relief a s 27 FPA declaration must be accompanied by an application pursuant to s 29, 32 or 35 FPA. Once a spouse dies a s 35 FPA dissolution order cannot be made because the marriage is ended by death and not by a Court order. I uphold Mr McDonald/Mr Percy's submissions that if Parliament intended widows and widowers were to obtain relief under s 182 FPA this would have been explicitly

provided for by Parliament. I accept that counsel cannot find any caselaw on this interpretation but the fact that it does not exist indicates that it has not been thought that it was possible. It may be that s 182 needs to be further reformed but that is not my role and it is to interpret the section as it reads. Therefore I am persuaded by the respondent's submissions in this regard and make the following orders and directions:

(a) The applications brought by the applicant for declaration as to the validity of marriage and declaration as to presumption of death is dismissed primarily on the grounds that there was no justiciable issue.

(b) I confirm that there is no dispute between the parties concerning the validity of the marriage between the applicant and her husband. It is accepted by the parties that they were validly married. That there is no point in making a declaration to say the obvious.

(c) There was no dispute between the parties that Mr Hooper has been legally declared dead and I understand there is a death certificate which has been issued. I also accept that the applicant does not have the necessary standing to bring an application pursuant to s 32 because their marriage has come to an end by his death.

(d) I uphold the submission that there is no point in the declaration being made on the grounds of futility as the declaration made pursuant to s 27 is not an order for the purposes of s 182 of the Family Proceedings Act.

Costs

[37] I decline to order costs because the memorandum of wishes clearly specified that the deceased intended to provide for the applicant from the trust. The applicant has been left in a very difficult position and the decision of the trustee(s) on the face of it does not seem to have given appropriate weight to her needs. In my view it is arguable that she is a beneficiary of the trust. The fact that they were living apart does not mean that they were not in a relationship in the nature of marriage. Spouses can be living apart from a whole host of reasons which does not necessarily mean that they are separated or not living in the nature of marriage. I consider that the applicant has

a clearly arguable case that she is a beneficiary of the trust and on the face of it to-date has not been properly provided for. I think to make costs against her in those circumstances would be unjust. I decline to make an order for costs. I encourage the parties to resolve the issues by agreement to save the necessity of an application to the High Court. I consider the applicant has only had to go to the unusual steps of seeking the declarations because of the response of the trustee(s). I consider the difficult situation the applicant has been placed in through no fault of her own. It needs to be rectified. Even though I have dismissed her applications I consider her case has merit.

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Judge D A Burns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 29/11/2024