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**IN THE FAMILY COURT  
AT MANUKAU**

**FAM-2001-048-000104  
[2016] NZFC 4029**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	LOYD BURRELL Applicant
AND	NANICE BURRELL Respondent

Hearing: 16 February 2016; 4 March 2016

Appearances: M Coogan for the Applicant  
R Sinisa for the Respondent

Judgment: 25 May 2016

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**RESERVED DECISION OF JUDGE A G MAHON**

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[1] On 16 November 2001 the applicant (“Mr Burrell”) filed an application seeking division of the relationship property of his marriage to the respondent (“Mrs Burrell”).

[2] The supporting affidavit filed by Mr Burrell was succinct and stated:-

- (1) *I am the applicant in the proceedings.*
- (2) *The respondent and I were married on 29 September 1979 at [location deleted] and our marriage was dissolved on 17 November 2000.*
- (3) *Our main asset is the matrimonial home at [address deleted].*
- (4) *The respondent has occupied our house since we parted.*
- (5) *I seek an equal division of all matrimonial assets, and if the respondent wishes to purchase my share in the matrimonial home at valuation this is perfectly acceptable to me.*

[3] The application was filed on the last day of the twelve month period after dissolution of marriage when relationship property proceedings can be filed in this Court without leave.

[4] On 25 May 2015 Mr Burrell filed a further application for division of relationship property. Had this been his first application, leave of the Court would have been required to commence proceedings. As the 2001 application has neither been struck out nor discontinued, it remains live and leave was not therefore required.

[5] Mrs Burrell filed notice of defence on 30 June 2015.

[6] I heard the application on 15 February 2016 and counsel filed detailed submissions in support their respective clients' cases on 4 March 2016.

## **Background**

[7] The parties were married on 29 September 1979 and first separated for three years between 1990 and 1993, before finally separating in 1995.

[8] They have nine children of their marriage. The youngest child at the date of hearing was 23 years old.

[9] Mr Burrell has had the [number of children deleted] since separation of the parties and [number of children deleted] before his relationship with her.

## **Evidence of Mr Burrell**

[10] Mr Burrell seeks an order of sale of the house at [address deleted] ("the family home") which was purchased by the parties in 1980. The property was subject to the following mortgage/charges at the date of separation:-

- (a) A first mortgage to the House Mortgage Company (paid off after separation by Mrs Burrell - the last payment made in about November 2005).
- (b) A charging order dated 2 October 1990 in favour Knight Coldicutt Solicitors for a judgment against the respondent for \$715.
- (c) A charging order dated 30 October 1995 for a debt of \$8,420 to Patrick Gibbs. A judgment for this sum was entered against Mr Burrell following damage to a [details of property damage deleted].<sup>1</sup>

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<sup>1</sup> Counsel for the respondent suggests that the charging orders will be discharged at the time of sale.

[11] Mrs Burrell disputes that the later two debts are relationship debts. The only other debt of the parties at the date of hearing is for \$11,841.49 in outstanding rates to Auckland City for the period 1982 – 1994.

[12] Ancillary family chattels are also in dispute, the details of which were clarified by counsel in closing submissions and are:-

- (a) [Chattel details deleted].
- (b) [Chattel details deleted].
- (c) [Chattel details deleted].
- (d) Grandmother's grand piano.
- (e) [Vehicle details deleted] truck.
- (f) [Chattel details deleted].
- (g) [Chattel details deleted].
- (h) [Vehicle details deleted] car.
- (i) Cabinet.
- (j) Gazebo.

[13] In his 2015 affidavit Mr Burrell referred in general terms to his request that “an allowance should be made to the respondent for the repayment of the mortgage after separation” and “this needs to be counterbalanced by her sole occupation of the property and especially for the last 10 years since the mortgage was repaid in 2005”. His position was that the respondent should be given a credit for rates and insurance payments, but this adjustment should be set off against the sum awarded to him for the benefit to her of the sole occupation of the property.

[14] He stated in paragraph 37:-

“Consequently I accept it is likely the house has to be sold in an “as is” condition as I need to resolve our property issues and take my entitlement from the house. However I am willing to give to Nanice first right of refusal to purchase my interest if she wishes to keep the property”.

[15] Mr Burrell did not file any supporting documentary evidence or financial analysis to justify these post-separation claims although he did further clarify them to some extent in his counsel’s closing submissions.

[16] A joint valuation obtained by the parties from Marsh & Irwin Valuers, dated 7 October 2015 was produced by consent at the hearing. Mr Burrell acknowledged in his oral evidence that the parties had agreed to obtain a joint valuation. He is however unhappy with the value assessed by the valuer and it was his evidence that as Mrs Burrell did not proceed to implement the “buy out” option after receipt of the valuation, it was not an agreed valuation position.

[17] During the course of his cross-examination Mr Burrell gave further evidence in support of his claim for post-separation adjustments as follows:-

- (a) From 2007 onwards any children still in the home with Mrs Burrell were adults.
- (b) He accepted that the adult children “came and went from the house” over that period.
- (c) He was not aware of the arrears in Auckland City rates until earlier last year.
- (d) He has no capital or savings and is paying \$250.00 weekly in rent at a boarding house.
- (e) He has not been able to work for a number of years because of a serious heart condition and his sole income is approximately \$835.00 a fortnight from National Superannuation.

- (f) There were discussions between him and Mrs Burrell after separation during which he agreed that Mrs Burrell could continue to occupy the property until the youngest child either turned 18 years old or left school, whichever was the earlier date.
- (g) Mrs Burrell's occupation was on the basis that she paid the mortgage rates and insurance outgoings for the property (he had given her the option of paying rent instead but accepted her choice to pay the former costs).

[18] Mr Burrell did not give any independent evidence as to the current market value of the family home or its rentable value. He did not contest the evidence provided by Mrs Burrell in her affidavit sworn 16 February 2016 which set out various outgoings met by her during the period since separation. It was in fact the basis of any reimbursement by him for those costs which he disputed.

[19] Mr Burrell was cross-examined on his alleged domestic violence to Mrs Burrell and to at least one of the children. On the issue of the alleged domestic violence Mr Burrell gave evidence in his affidavit of his response to the proceedings under the Domestic Violence Act which were before the Court at the time of this hearing. Since the hearing I was the Judge who heard Mrs Burrell's application for a final protection order. I accepted Mr Burrell's evidence and also determined it was appropriate that a final order was made in her favour.

[20] He also challenged the extent to which he was involved in parenting of the children after separation or giving them financial support. It was his evidence that he paid child support throughout the period after separation and that he was involved with the children.

### **Evidence of Mrs Burrell**

[21] Mrs Burrell seeks an order giving her the opportunity to purchase the share of Mr Burrell in the family home on the following basis:-

- (a) The value of the home is assessed at the Marsh & Irwin Market Valuation of \$520,000.
- (b) She is awarded \$60,000 for her sole care of the nine children over 16 years during which she managed the household, foregoing a higher standard of living which would have been available to her had she been able to work and had she received reasonable support from the applicant. It was Mrs Burrell's evidence that the child support received from Mr Burrell was minimal (and at least one year the minimum of about \$500.00) although she accepts that she was in receipt of a domestic purposes benefit for much of this period.
- (c) She also seeks compensation of:
  - (i) \$24,859.41 for the rates paid by her from 1995 to 2016.
  - (ii) \$10,340.26 for insurance she has paid from 2010 to 2016.
  - (iii) \$28,478.82 compensation for mortgage repayments made by her.
- (d) She agrees to be responsible for payment of the historical rates and to credit Mr Burrell for half of this sum (\$6,127.97).

[22] Mrs Burrell challenges her liability for two judgment debts secured by the charging orders on the title to the family home.

[23] She described a marriage history of frequent domestic violence. It was as a result of an assault on their daughter Tasha that Mr Burrell was excluded from the home in 1995 and the final separation occurred. She gave evidence of Mr Burrell's receipt of a sentence of four months periodic detention which she recalls may have been for her assault on Tasha.

[24] In summary, Mrs Burrell is seeking full reimbursement for all outgoings on the property without having to compensate Mr Burrell in any way for the benefit she received from its occupation.

[25] On the issue of family chattels, it is Mrs Burrell's evidence that:-

- (a) The vehicles Mr Burrell seeks were available for his collection at any time, are not working and are dangerous for the children. She suggests they were removed by him without any monetary compensation to her.
- (b) She then gave evidence on the other family chattels to the effect that none of these chattels are still at the family home other than the grand piano and china cabinet which Mr Burrell was welcome to uplift as part of the orders I am asked to make.<sup>2</sup>

### **The law**

[26] The Court has discretion to make post-separation adjustments in favour of either party under s 18B of the Property (Relationships) Act 1976 ("The Act"). The Court also has discretion under s 2G of the Act to adjust a date for valuation of any property. The later section was often historically used by parties seeking post-separation contributions from a party who had received the benefit of occupation of the family home after separation. Since the enactment of s 18B, post-separation contributions are more appropriately addressed under that section.

[27] In exercise of my discretion I can take into account the contributions under s 18 which include care of children of a marriage; the management of household and the performance of household duties; and foregoing a higher standard of living than would otherwise have been available to one party.

[28] It is under s 18B that Mr Burrell is seeking compensation for the loss to him of use of the capital in the family home and the costs he has incurred as a result of

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<sup>2</sup> I note no valuation evidence was given as to the value of any motor vehicle or chattels.

rent paid. It is also under this section Mrs Burrell is claiming reimbursement from Mr Burrell for costs paid by her on the family home post-separation.

[29] Counsel have referred me to *IAT v SJG* [2013] NZHC 2976 where at [45] Collins J summarised the relevant principles applicable to exercise of the s 18B discretion as set out in the Court of Appeal decision of *X v X*.<sup>3</sup> These include:

- (a) Section 18B of the Act should not be used as a substitute for maintenance payments that might otherwise have been made. Nor should s 18B be used as a means of compensating for the inadequacy of any maintenance payments that have been made.
- (b) Section 18B provides the Court with a wide discretion to compensate a spouse or partner for contributions they have made from the end of the marriage to the date of hearing of the application under the Act.
- (c) Section 18B of the Act is a mechanism to compensate the spouse or partner who has made a contribution and not to punish the other spouse or partner.
- (d) The overriding consideration is whether an award under s 18B is just.

[30] The facts in *IAT v SAG* are relevant to this case. Collins J upheld the Family Court decision of Judge Walsh granting a s 18B compensation award in favour of the mother for the care of the parties' children for seven years during which time the mother was in receipt of a Domestic Purposes benefit, and received additional money from a family trust to meet extra-curricular activities. Collins J confirmed that Judge Walsh correctly applied the relevant principles under s 18B and took into account the relevance of:-

- (a) The mother's care of the children.
- (b) The extent to which she was responsible for that care.

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<sup>3</sup> *X v X* [Economic disparity] [2010] NZLR 601.

(c) The very difficult financial position she was in.

[31] In *Chong v Speller* the High Court upheld a Family Court finding that child support was to be treated as neutral in a case where the mother had sole responsibility of five children and management of the family home after separation.<sup>4</sup> The Court found that child support was never intended to meet all the costs of bringing up children but had been assessed as a minimum financial support for that purpose.

[32] This is an unusual case because of the length of time Mrs Burrell has continued to occupy the home since separation. In *Tarr v Tarr* the mother had cared for two children for 20 years after separation.<sup>5</sup> She sought an adjustment under s 18B for the first four years after separation at \$15,000 per year per child, based on the calculation in *JA v SNA*.<sup>6</sup> The High Court upheld a Family Court decision awarding a mother \$60,000 in compensation for four years care of the daughter of the parties while also crediting the husband with an occupational rent figure of \$9,023.00 (the husband also contributed towards the mortgage over the period).

[33] Justice Thomas approved the \$15,000.00 figure and observed at [79] that exercise of the discretion:

“...is not in an arithmetical exercise. It involves taking into account of matters readily quantifiable, such as costs of managing properties, and other considerations on which it is not easy to place a monetary value, such as prolonged periods of sole childcare.”

[34] If the Court finds it is appropriate to award “occupation rent” then it is a matter of discretion whether the compensation awarded is calculated as an occupational rent figure. That is, based on the net return if the property had been rented to a third party during the period of occupation, or based on an award of interest on the value of the capital of the party who did not have benefit of occupation of the home during the relevant period<sup>7</sup>.

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<sup>4</sup> *Chong v Speller* (2004) 24 FRNZ 273.

<sup>5</sup> *Tarr v Tarr* [2014] NZHC 1450, Thomas J

<sup>6</sup> *JA v SNA* [Economic disparity] [2008] NZFLR 297, Ronald Young J

<sup>7</sup> *Griffiths v Griffiths* (2002) NZFLR 327 (HC) at 37

[35] In essence the discretion available to me under s 18B is a wide one and is to be applied on a “fact specific” basis.<sup>8</sup>

### **Discussion**

[36] I have a broad discretion to determine what if any post-separation adjustments should be made in this case. Nearly every possible s 18B adjustment is claimed and I have the jurisdiction to make adjustments taking into account:-

- (a) The care of children.
- (b) The management of the household.
- (c) Foregoing of a standard of living that would have otherwise been available.
- (d) A party being deprived of access to capital (i.e. share in the family home).
- (e) Other adjustments in respect of outgoings on the family home.

### *Family home value*

[37] The valuation of the family home is to be at the date of hearing and the parties do not dispute this fact. The dispute is whether the joint valuation produced in evidence on behalf of the respondent is the current market value for the property.

[38] It was not clear from the evidence or submissions whether the parties had agreed to “plan B” in the event that the agreed valuation was not accepted by both of them. It was however clear that the instruction to the valuer was a joint one and so I can presume that the parties accept this valuer had the expertise to undertake the valuation. The valuation is relatively recent as this the hearing took place in February 2016 and the valuation assessed the property’s market value as at October 2015. There is no evidence before me to suggest that either:-

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<sup>8</sup> *Chong v Speller* above at n 5 [21]

- (a) That valuation was not an accurate market valuation at the time it was completed, or
- (b) That there has been a change in the value of the property between October 2015 and February 2016.

[39] The fact there is a lot of discussion about the continuing increases in the value of Auckland properties within the media, is not evidence. Whether or not there is an increase or a decrease in values of homes in the area of the family home or for the family home itself, is simply not known. I must proceed on the basis of the evidence I have before me. Mr Burrell has not filed any evidence challenging the market value.

[40] In those circumstances I accept the valuation as a current market valuation for the property and I assess the value of the property at \$520,000.

*Other property*

[41] The only other property for division is the chattels claimed by Mr Burrell.

[42] Of the list referred to in paragraph 12 above I note it is Mrs Burrell's evidence that only the grand piano and cabinet still exist.<sup>9</sup> It is not surprising after such an incredibly long time that this is the case and even if I found that other items claimed by Mr Burrell were still in the possession of Mrs Burrell, I have no valuation evidence before me to determine the value of those assets either at the date of separation or currently.

[43] Mrs Burrell is to make the grand piano and cabinet available to Mr Burrell within 42 days of this judgment. That availability does not require Mrs Burrell to deliver the items to Mr Burrell. I am however aware that Mrs Burrell has a protection order in her favour and I ask that arrangements for Mr Burrell's collection of the grand piano and cabinet be made through the parties' lawyers.

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<sup>9</sup> Whether the vehicles are still on the property is not clear but if they are I do not intend to make orders in respect of them.

*Post-separation adjustments*

[44] What was clear from the evidence is that at some time shortly after separation, and perhaps on at least one other occasion, the parties discussed what was going to happen to the family home.

[45] Mr Burrell had applied for an order for sale of that home in 2001 and it is not clear why he did not proceed with that application as the evidence given by Mr Burrell as to the reason for doing so (the health of Mrs Burrell at the time) was not put to Mrs Burrell in cross-examination. Nor was it consistent with the other evidence given by Mr Burrell as to the reason for his delay. That he had agreed to Mrs Burrell remaining in the family home until the youngest of their children turned 18.

[46] I find that the parties did reach this agreement about occupation of the family home by Mrs Burrell at some stage early after their separation. I am not bound by that agreement in exercise of my discretion under s 18B but it is appropriate to follow that agreement as far as the period until 2011 when the youngest child (“Bobbie”) turned 18.

[47] The evidence relevant to whether Bobbie was or was not with Mrs Burrell for the entire period until his 18<sup>th</sup> birthday is conflicting and I am not able to make a definitive finding in this respect. I therefore find that at least one of her children was still living with Mrs Burrell during the relevant period.

[48] Mr Burrell did not take steps in this Court to address post-separation adjustments for over 20 years. Even after Burrell turned 18 in 2011, there is no evidence of any legal steps taken by Mr Burrell to finalise relationship property division. In those circumstances and taking into account that Mr Burrell lived in the home again for a period of months last year, I have decided it is not appropriate that Mrs Burrell pay occupation rent for any period of her occupancy of the property.

[49] I now turn to the issue of whether she should be responsible for any of the property's outgoings during this very long period between 1995 and 2016? I find that it is appropriate she meet some of these costs taking into account:-

- (a) The agreement of the parties that her occupation be subject to this obligation.
- (b) The low mortgage debt on the property at the time of separation which meant that the outgoings on the property were low.
- (c) The fact Mr Burrell had costs of alternative accommodation over that period although I did not have any evidence of what these costs have been except his oral evidence of the rent he is currently paying at the boarding house he is now living in.

[50] Even if I were to award "occupation rent" to Mr Burrell, he has not provided evidence of the rentable value of the property. In answer to a question in cross-examination, Mrs Burrell agreed that the home would probably rent for \$200 weekly but my difficulty is that I do not have evidence as to the market value of the property for rent over the entire 21 year period.

[51] Mrs Burrell's application for reimbursement from Mr Burrell in respect of the following payments is therefore declined:-

(a)	Rates 1995/2016	\$24,859.41.
(b)	Insurance 2010 to 2016	<u>\$10,340.26.</u>
		<b>\$35,199.67<sup>10</sup></b>

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<sup>10</sup> Even if I was inclined to require Mr Burrell to contribute to those costs, I agree with the submissions of Mr Coogan on his behalf that any compensation would only be for one half of those payments.

[52] There will be no compensation to Mrs Burrell for the interest paid on the mortgage during this period as she had the benefit of occupation of the home and as I have noted above, even with the mortgage outgoing, the outgoings on the home were modest.

[53] I have considered whether it is appropriate that Mrs Burrell is compensated for principal payments on the mortgage after separation. Her repayment of the mortgage principal increases the equity of the parties in the family home and often a party is compensated for such a payment.

[54] I have declined the claim for interest and in these circumstances nor am I going to award Mrs Burrell any compensation for her repayment of the mortgage principal, a sum I note from exhibit "A" to her evidence was \$14,227.11 at the date of what is referred to as "last statement" in a statement to the parties from the Home Mortgage Company on 30 September 1998.<sup>11</sup>

[55] Mrs Burrell seeks compensation for her care of the children over a 16 year period until Bobbie was 18. In her counsel's closing submissions Mr Sinisa submits this sum is "very reasonable given the respondent here has cared for nine children". I agree with that submission and also with the submission that I am not prevented from making an award under this category by the fact that Mr Burrell was paying child support for the period.

[56] Mr Burrell's evidence was that he has not been working for most, if not all of the post-separation period and his child support would therefore have been minimal. However, the low contribution by way of child support would not of course have reduced the sum of the domestic purpose benefit payments Mrs Burrell received over that period.

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<sup>11</sup>I presumed this figure was a principal outstanding for the previous twelve months of that statement and if it were, the credit Mr Burrell would have given Mrs Burrell, would have been \$7,113.56. As I have said I will not however be making any adjustment on mortgage repayments.

[57] It is appropriate to make a monetary award in favour of Mrs Burrell for her care of so many children in circumstances where her domestic purposes benefit gave a minimal weekly financial support. In addition I find that Mr Burrell had little or no contact with the children over this time. The \$60,000.00 sum is modest and notwithstanding that, I have declined to award occupational rent in favour of Mr Burrell. It is appropriate that Mrs Burrell is credited with this sum by Mr Burrell and because of the nature of this payment, the full sum and not one half of it is to be credited to the respondent.

[58] I now come to the debts of the parties. I note from Mr Coogan's final submissions that he is not seeking any adjustment for the debts related to the two charging orders noted on the title. Mrs Burrell alleges that neither of the debts are relationship debts and Mr Burrell has not established to my satisfaction that they were. In those circumstances, if those debts still exist then they are to be the responsibility of Mr Burrell.

[59] I note the submissions of counsel that the charging orders will be discharged on transfer of title to Mrs Burrell or sale of the property. This may very well be the case but in the event that it is not, Mr Burrell is to meet those debts and any interest and costs either creditor is legally entitled to claim on the debts, as a condition of providing release of the charging order.

[60] I now turn to the sum of \$12,255.94 owed by way of "deferred land rates" to Auckland Council from the period prior to separation. This is a joint debt of the parties and they are to share responsibility for that debt equally.

[61] It is Mrs Burrell's evidence that at the time of hearing in February 2016 she had bank approval to purchase the share of Mr Burrell in the property based on the October 2015 valuation. I do not know whether this approval is either still valid or available for the figure I am now going to direct Mrs Burrell pay Mr Burrell for purchase of his share in the property and otherwise in settlement of any relationship debts.

## **Outcome**

[62] I make the following orders:-

- (1) I find the market value of the family home is \$520,000.00 and each party has an interest of \$260,000.00 in the property.
- (2) I decline Mr Burrell's application for occupation rent.
- (3) I decline Mrs Burrell's applications for reimbursement for payments in respect of mortgage (principal and interest), rates and insurance outgoings on the family home.
- (4) The share of Mr Burrell in the family home is to be reduced by any sum required to be paid to the creditors under the two charging orders registered against the title.
- (5) Mrs Burrell is to receive a credit from Mr Burrell of \$60,000.00 for care of the nine children over the period from 1995 until 2011.
- (6) Mrs Burrell has a period of 28 days within which to pay the sum to Mr Burrell and I calculate the sum as \$193,872.03 made up as follows:-

Half share in family home	\$260,000.00
Less compensation to Mrs Burrell for care of the children	\$60,000.00
Less his responsibility for historical rates	<u>\$6,127.97</u>
	\$193,872.03

A G Mahon  
Family Court Judge

