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IN THE FAMILY COURT
AT AUCKLAND

FAM-2014-090-000878
[2016] NZFC 7132

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	PHILIP DAVID BROWN Applicant
AND	MURIEL MAY STARKE (PREVIOUSLY BROWN) Respondent

Hearing:	3 & 24 August 2016
Appearances:	S Bennett for the Applicant R Evans for the Respondent
Judgment:	10 October 2016

RESERVED JUDGMENT OF JUDGE SJ FLEMING

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[1] Mr Brown and Ms Starke were married on 29 January 2011. They separated sometime in August 2014.

[2] At the time of their marriage, Ms Starke (aged 69 years) owned a unit at Roberts Road, Te Atatu which she had acquired prior to them meeting. There was a mortgage secured against the title of around $80,000. The unit was then worth around $250,000 according to Ms Starke leaving an equity of about $170,000. Ms Starke also owned a car and chattels.

[3] Mr Brown (who was aged 47 years when they married) had owned a home but he sold that in June 2010 (the year before marriage) when he moved in to live with his mother in Buscomb Avenue, Henderson. He served a term of home detention there following on a number of convictions for driving with excess breath/blood alcohol. He originally said he sold that house for a profit of $150,000 and gave most to his mother so she could pay off her mortgage. It is clear however from his mother's evidence and Mr Brown's evidence at the hearing that he lent her $20,000 which she (the mother) repaid during the parties marriage together with an interest component of $2000. Ms Attree (Mr Brown's mother) said she believed Mr Brown had about $30,000 invested in Bonus Bonds at the time he met Ms Starke which appears to be accepted by Ms Starke (her affidavit 5 February 2015). In total therefore Mr Brown had assets of around $50,000 at the time he and Ms Starke married.

[4] During the marriage, Mr Brown lived with Ms Starke in the Te Atatu unit. It was transferred into their joint names in April 2013 and at the same time an additional $15,000 loan was added to the mortgage so that the mortgage then totalled about $95,000.

[5] There was a discussion about signing a prenuptial agreement. Both parties unsurprisingly have a different recollection of why there was never one signed but I cannot determine which version is correct because it is difficult to rely upon either partners' recollection and I comment further on this later in my decision. In any event there was no agreement signed.

[6] The issues for determination are:

1. The length of the relationship – that is, was there a qualifying de facto relationship prior to the parties' marriage?

2. Whether having regard to all the circumstances it would be just to treat the marriage as being of short duration.

3. If it is a relationship of short duration what should each parties share be in relationship property?

4. If it is not a relationship of short duration are there extraordinary circumstances making the equal sharing of property repugnant to justice?

5. If there are such extraordinary circumstances, what share should each have in the property?

Length of relationship

[7] Mr Brown alleges the two started living together in the Te Atatu unit "about four months after they met". Ms Starke alleges they never lived together until their marriage in January 2011.

[8] Mr Brown and Ms Starke met during 2010 at the Bridge Programme which they were attending to address their respective addiction issues. There is no dispute both abused alcohol again during the course of their relationship. Mr Brown could not recall many matters put to him and it is difficult to place reliance on what he said in contentious areas. He admitted frankly his memory was poor (probably as a result of alcohol abuse). Ms Starke appeared to have better recall but was also contradictory in her evidence. There are question marks around the credibility of both which makes it difficult to resolve issues of conflict between them.

[9] After Mr Brown and Ms Starke met their friendship developed into a romantic one and they were spending overnights together in each other's houses by

about November 2010. I prefer the evidence of Ms Starke that the two did not start living together in the Te Atatu unit until their marriage. I note while Mr Brown said he was living in the same house with Ms Starke prior to marriage, he also said in his affidavit sworn on 27 July 2016 (paragraph 4) he "was residing at [street number deleted] Buscomb Avenue, Henderson, his mother's home" when he married Ms Starke as is evidenced by the marriage certificate.

[10] Further, although Mr Brown's mother, Ms Attree, said in her affidavit sworn on 28 July 2015, that her son and Ms Starke lived together for "about two months prior to marriage" she said later in the same affidavit (paragraph 16) Ms Starke would come around to her home when her son was still living there and they would spend Christmas together. There was only one Christmas when Mr Brown and Ms Starke knew each other prior to their marriage and that was Christmas 2010. Mrs Attress was spending time living elsewhere over the relevant period so it would be difficult for her to know whether Mr Brown had moved in with Ms Starke or was just spending time (including some overnights) at her house.

[11] Finally Mr Brown referred to applying for a superannuation benefit entitlement after he moved in with Ms Starke and he began receiving that at the very end of February 2011.

[12] All of this supports Ms Starke's evidence the two did not share the same house until their marriage in January 2011 and I am satisfied they did not move in to live together in one house prior to their marriage. There is also no evidence they shared their finances or any household duties. They were a couple spending time together and as their relationship developed to the point where they were prepared to commit to marry they spent a great deal of time together. That does not mean they were living in a de facto relationship and I am satisfied they were not. Accordingly there was no qualifying de facto relationship prior to their marriage in 2011.

Marriage of short duration

[13] Ms Starke claims the marriage was one of short duration. It is of three years and six months duration.

[14] Section 2E(1)(a)(ii) provides there is a discretion to treat a relationship of over three years as a relationship of short duration if:

> "Having regard to all the circumstance of the marriage (the Court) considers it is just to treat the marriage as a relationship of short duration."

[15] I note the comments of Woodhouse J in *L v P* (HC Auckland, CIV-2010-404-6103, 17 August 2011):

> "A realistic, objective assessment of the nature and quality of the relationship is required."

And the comments of the Court of Appeal in *Martin v Martin* [1979] 1 NZLR 97:

> "The question in every case would be whether the marriage has been so restricted in point of time and unduly limited in terms of quality that it may justly be described as a marriage of short duration."

[16] The basis of the submission it would be just to treat this marriage as being a relationship of short duration seems to be:

- Ms Starke alleges Mr Brown was psychologically and physically abusive, particularly in the latter stages of the relationship.

- Mr Brown was drinking alcohol and spending money gambling.

- An allegation Mr Brown never intended to be in a committed relationship but was only seeking to secure a share in Ms Starke's assets.

[17] There are allegations both were psychologically and physically abusive to each other and given the difficulties I have with each parties credibility I cannot be satisfied that one was more aggressive than the other over the entire duration of the relationship but do note Mr Brown was convicted for assault.

[18] There is no doubt their relationship was volatile. Both failed to maintain sobriety during the relationship. The police were called on more than one occasion and Mr Brown in the end faced a criminal assault charge. Mr Brown was drinking alcohol as was Ms Starke and she also acknowledges an addiction to painkillers

overdosing on at least one occasion combining drugs with alcohol. Both drank to excess. This is not unexpected given addiction to alcohol is a chronic relapse condition. If only one party had relapsed there would be more force in the submission about there being a direct effect on the relationship caused by that party as a result of both addiction and relapse, but in this case both did.

[19] Mr Brown did gamble. This evidence related to a period when Ms Starke was in hospital and certainly did not reflect well on Mr Brown. However this occurred over a relatively brief period and it was the only period which was particularly addressed in the evidence and established gambling by him.

[20] Ms Starke referred to a document which she thought had been written by Mr Brown which she alleged supported her contention he never intended to remain in a committed relationship with her but was only seeking a share in her property. However when she was cross examined it was apparent the note did not say what she thought it had and there was confusion as to whether it was even he who wrote it. The note was equivocal and did not support a conclusion Mr Brown was only in the relationship for financial gain even if he did write it.

[21] I accept Mr Brown entered into the marriage with a genuine commitment hoping that the relationship would endure. Both still spoke quite warmly about the other and had put effort into trying to make their marriage work.

[22] During the marriage the parties shared their income and outgoings. They undertook renovations together on the Te Atatu unit. The unit was transferred into the joint names; they made wills which provided for their estates to pass to the other and they holidayed together. They cared for Ms Starke's daughter when she stayed and they socialised with family and friends. As late as July 2014, which was just one month before they finally separated, they signed an agreement to jointly purchase a property in Te Puke.

[23] There were obviously unhappy periods in the marriage just as there are in any relationship but that does not mean it would be just to treat the relationship as one of short duration. They shared their lives and finances, holidayed together, transferred

a substantial asset into joint names, and set about trying to acquire another property. This all runs very much counter to a suggestion it would be just to treat the relationship as one of short duration.

[24] In all the circumstances of this relationship I am not satisfied it would be just to treat the marriage as being one of short duration.

Are there extraordinary circumstances making equal sharing of property repugnant to justice?

[25] Section 13 provides an exception to equal sharing where:

> "The Court considers there are extraordinary circumstances that would make equal sharing of property … under s 11 … repugnant to justice, the share of each spouse in that property is to be determined in accordance with the contribution of each spouse to the marriage."

[26] Ms Starke relies on the following factors in support of the submission s.13 applies and there are extraordinary circumstances making equal sharing of property repugnant to justice:

- The relationship was a relatively brief one of just three and a half years.
- Ms Starke was 69 years old when the relationship commenced and Mr Brown was 47 years old. They are now 74 years and 52 years.
- Ms Starke owned her own home, car and chattels at the time they met.
- Mr Brown contributed minimal capital to the relationship.
- There is a gross disparity in the capital contribution.
- Ms Starke paid a greater sum towards outgoings on a regular fortnightly basis than did Mr Brown.

- The true meaning of the transfer of the home into the parties joint names was that if Ms Starke died during their marriage Mr Brown would be able to live in the home and then bequeath it to Ms Starke's children.

- Mr Brown played a very small part in assisting in renovations.

- Ms Starke's home provides accommodation for her intellectually handicapped daughter [name deleted] on the weekends and over holiday periods.

Financial contributions

[27] A great deal of time was taken up in a close examination of the financial contribution made by Mr Brown. In her affidavit (sworn on 5 February 2015) Ms Starke said Mr Brown's capital contribution was used on joint expenses, renovations to the Te Atatu unit and on their holidays. She acknowledged in that affidavit over $22,000 was used for those joint purposes. However in the course of the hearing Ms Starke's position altered and she did not accept Mr Brown had made anything more than the most minimal financial contribution. She accepted Mr Brown paid $500 per fortnight out of his benefit towards their living expenses.

[28] The evidence demonstrated a number of reasonably substantial payments were deposited into Mr Brown's account during the course of the relationship, but how all the monies were used is unclear. In the end I am satisfied, as well as making regular fortnight contributions, Mr Brown did contribute approximately $34,300 by way of capital into the relationship.

[29] The basis for my calculation is:

- $5000 deposited 24 January 2011 from Bonus Bond investment into Mr Brown's account

This deposit was five days prior to the wedding and an examination of Mr Brown's bank statement reveals almost all of those monies were spent after their marriage on 29 January. In the absence of any evidence to the contrary I

assume those funds were used for joint purposes. I note there were a number of Eftpos transactions made at various places, some of which are food stores and a motel.

- $10,000 deposit by way of direct credit on 18 April 2011 by A P Brown

This deposit seems to have been made by Mr Brown's brother, Andrew. There is no evidence as to why the brother made the deposit. There is a cheque withdrawal of $9900 on 19 April – that is, the following day. Mr Brown's evidence was he never had a cheque book. The fact the deposit was made one day and virtually withdrawn the next and in the absence of any evidence about what the funds were used for means I doubt it was used for joint purposes. It is not taken into account in my calculation of Mr Brown's capital contribution.

- $12,000 deposit from Bonus Bonds on 13 June 2013

This was clearly used for joint purposes. Over $10,000 went on the purchase of a camper van which the parties used on holiday and there is evidence of payments totalling almost $1300 being made to Ms Starke. I conclude the entire $12,000 was used for joint purposes.

- $10,500 deposited on 11 October 2013

Again I conclude this was used for joint purposes. Two payments were made direct to Ms Starke and the rest are either cheque withdrawals or Eftpos transactions. At the time the two were holidaying together in the South Island. Mr Brown's evidence was he used the capital on travel in New Zealand for both parties and contributed towards the costs of renovations on the home. Ms Starke's evidence was to the same effect in her affidavits when she said the $22,000 paid by Mr Brown's mother was used on a holiday the two went on in October 2013 (affidavit sworn on 5 February 2015, para [12]). She conceded in the same affidavit some of the funds from bonus bonds "may have been used for our expenses and renovations" and subsequently in a latter affidavit sworn on 22 May 2015, she said:

> "Monies taken from his account were with his permission and consent, as he did not understand phone banking. Yes, monies were used for a gazebo, a dishwasher and plumber, the bathroom, for the many holidays we took together and general day to day expenses we shared."

- $1300 deposit on 14 November 2013

There is no evidence as to the origins of the deposit and the disposition of $1000 by way of cheque on 19 November. This is not a large amount and in the absence of evidence to the contrary I am satisfied it was used for joint purposes.

- Bonus Bond deposits of $2000 and $2500 (total $4500) on 11 & 13 December 2013

$3000 of this deposit was paid direct to Ms Starke –I will discuss this further subsequently. I am satisfied the entire $4500 was a contribution to the relationship.

- Bonus Bonds deposit $1000 on 28 January 2014

I assume that is for joint purposes. There is no evidence to the contrary and I am satisfied it is a capital contribution made by Mr Brown.

- Deposit of $13,000 on 30 June 2014

This was the proceeds of sale of the camper van and were divided equally between Mr Brown and Ms Starke. In fact Ms Starke's one-half share was paid as to 50 percent into her own account and 50 percent into her daughter's ([name deleted]) account. The evidence disclosed both Mr Brown and Ms Starke used [name deleted]'s account for their own purposes. That applied more to Ms Starke than Mr Brown. The $13,000 cannot be considered an additional contribution because it does represent the proceeds of sale of the camper van.

[30] Accordingly the total contribution is $34,300.

[31] In relation to the $3000 paid to Ms Starke out of the Bonus Bond deposited in December 2013 there was a period when Ms Starke was in hospital and Mr Brown

spent money withdrawn from Ms Starke's account. Upon an examination of that account there were withdrawals of $2565.70 over an eight-day period. This includes withdrawals from [name deleted]'s account by way of Eftpos. Mr Brown acknowledged that $853 spent over four days was used by him on gambling and alcohol and I am suspicious about the balance of $1712.70 having regard to where the Eftpos withdrawals were made from. In addition, $2500 was withdrawn from Ms Starke's credit card account over the same period and she said that was used by Mr Brown for the same purpose – that is, gambling and alcohol. That appears likely to be the position. It is Ms Starke's evidence that the $3000 paid to her from the $4500 Bonus Bonds withdrawal was used to repay those debts that Mr Brown had run up drinking and gambling. Even if that amount was removed from the calculation as to the capital contribution made by Mr Brown to the relationship, he has still made a capital contribution of over $30,000 and precise accounting over the entire course of this relationship is difficult, especially because of the unreliable historical accounts given by each party.

[32] In addition Mr Brown paid $500 per fortnight towards the parties' joint expenses from his benefit. This was slightly less than Ms Starke but not notably.

Renovations

[33] Some renovations were undertaken to the unit, particularly to the kitchen and bathroom. There was also some landscaping undertaken including the erection of a pergola.

[34] Mr Brown claimed he contributed towards those renovations, both financially and by way of physical labour.

[35] Although there is a dispute about how the renovations were financed it is of little consequence given I have determined the extent of Mr Brown's overall capital contribution to the relationship and I am satisfied some of those funds will have been used on the renovations. It appears more than likely also the additional $15,000 raised on the mortgage at the time the Te Atatu unit was transferred into the parties' joint names was also used to pay for those renovations.

[36] Mr Brown said he assisted in the upgrade of the bathroom by fitting the vanity sink, mirror, shaving cabinet and shower box and also physically assisted the builder.

[37] Ms Starke acknowledged Mr Brown contributed to the house renovations but described those contributions as "minor".

[38] Mr Brown's mother (Ms Attree) said she observed her son working "tirelessly" on the property "including the erection of the pergola". In cross examination of Ms Attree, it became apparent she had limited opportunity to observe Mr Brown doing any work as she estimated she only visited the property on about two or three occasions a year.

[39] A Mr Barry, who stayed in the campervan parked at the Te Atatu property for about six months (and paid board), said he observed Mr Brown working on the property, particularly the bathroom and toilet, confirming he (Mr Brown) replaced a sink unit, did some painting and fitted a mirror and cabinet and worked on the shower box. He understood Mr Brown had undertaken other work and he said he saw Mr Brown assisting with the erection and painting of the pergola.

[40] Mr Barry was not residing at the property throughout the period of the renovations, but he was a reasonably frequent visitor as he lived close by. He also said he went with Mr Brown when he was purchasing various items for the renovations.

[41] I conclude Mr Brown did work on the renovations which were undertaken on the Te Atatu unit. The work he undertook was mainly by way of assisting the tradesmen but he did other work as well. The renovations themselves were not extensive and it is difficult to quantify with precision Mr Brown's contribution but I am satisfied it was more than a minor contribution.

The test

[42] Extraordinary circumstances making equal sharing repugnant to justice is a stringent and difficult test to overcome. However it was never designed to be an impossible one.

[43] There are two aspects to the test. There must be an:

- Identification of the extraordinary circumstances; and secondly

- A consideration of whether those extraordinary circumstances (if they exist) make equal sharing repugnant to justice.

[44] In this case there is a very high disparity of capital contribution to what is a relationship of brief duration. At the time of marriage there is no value attributed to Ms Starke's car and chattels which she owned prior to marriage and neither is there any valuation of the Te Atatu unit. Ms Starke said the value of the unit at marriage was still around the same as the purchase price but I expect it was worth at least $250,000 given it had been purchased for $249,000 some years before. The car is now valued at $6000 and would have been worth more in 2011 when they married. There is no valuation for the chattels but adopting Mr Brown's estimate and his counsel's submissions they were worth around $5000 at the time of separation. The unit is now estimated to be worth around $400,000, subject of course to the mortgage (which was increased by $15,000 and an overdraft of $5000 during the marriage).

[45] There are some other assets of modest value such as Mr Brown's Kiwisaver account (about $1000), some savings (about $2000) and a boat ($1200). However the submissions and evidence focused on the Te Atatu unit and Mr Brown's capital contribution.

[46] Mr Brown contributed $34,300 – far less than that of Ms Starke. Some of these funds were used solely by Mr Brown on gambling and alcohol. They were also able however to enjoy holidays together largely as a result of Mr Brown's financial

contribution but that is taken into account when calculating the capital he put into the relationship.

[47] A disproportionately greater financial contribution by one spouse to the relationship cannot of course of itself establish an extraordinary circumstance, but a gross disparity of contributions can, along with other factors, be regarded as an extraordinary circumstance. The circumstances of the relationship also need to be assessed (*Bowden v Bowden* [2016] NZHC 1201).

[48] In this case one partner has brought the assets now available for division to the relationship and it is a relationship of relatively brief duration. There are no children and both parties were mature when they met and married. Ms Starke is 22 years older than Mr Brown and realistically her opportunities to re-establish herself following on from the breakdown of the marriage are limited given she is aged 74 years and in receipt of a benefit.

[49] As has been noted in other cases the effects of a substantial financial contribution may be balanced out by other contributions in a lengthy relationship but this is far from a lengthy one. The principles contained in s.1N provide all forms of contribution to the marriage partnership are treated as equal and there is no presumption a monetary contribution is of greater value than a non-monetary one. In this case, the contribution, apart from the financial ones, are unremarkable in terms of a comparison between each spouse's contributions. There are of course the intangible benefits but those are mutual. Both suffered from addiction problems and relied on each other for support during periods of relapse. Mr Brown did contribute his labour in assisting with the renovations and that contribution cannot be ignored. However I am satisfied the combination of a disparity in financial contributions, the brevity of the relationship and the ages of the parties mean there are extraordinary circumstances.

[50] The second aspect of the test is whether those extraordinary circumstances make equal sharing repugnant to justice. I am satisfied they do because:

- Ms Starke was elderly when she married Mr Brown, over twenty years her junior. She was established in her own home which may be of modest value in comparison with many Auckland properties but it provided her with security and was intended to be her home for the rest of her life.

- Ms Starke is now aged 74 years and is receiving superannuation (as she was when she met Mr Brown). She has no prospect of improving her financial situation (whereas Mr Brown at his age does have) and would certainly loose her home if there were to be equal sharing.

The share of each party

[51] In order to assess the share of each party in the relationship property in accordance with their contribution to their relationship I need to assess their contributions and have regard to the relevant provisions of s.18.

[52] There were no children of the relationship Ms Spark's handicapped daughter stayed generally on weekends. There is no evidence suggesting either had to provide any particular care for her.

[53] There is no evidence either were more responsible for managing the household and undertaking household duties except Ms Starke did run the financial affairs of the couple (s.18(1)(b)).

[54] Both Ms Starke and Mr Brown provided money to live on and I do not regard the fact that Mr Brown's entire superannuation was not contributed to be of significance because most of it was (s.18(c)).

[55] Almost all of the relationship property existed prior to their marriage except for the campervan (purchased by Mr Brown) which was sold and the proceeds divided equally, prior to the separation. Ms Starke's contribution in this regard vastly exceeds that of Mr Brown (s.18(1)(d)).

[56] Some money was contributed by Mr Brown to pay for the renovations but account is taken in the calculation of Mr Brown's total capital contribution. There is

no evidence of any increase in the value of relationship property as a result of those renovations but it could fairly be categorised as at least maintenance (s.18(1)(e)).

[57] Mr Brown did work on the renovations but that work was not extensive (s.18(1)(f)).

[58] There is no evidence there were any contributions of the type referred to in the other subsections of s.18.

[59] There has been a significant disparity in contributions made by Mr Brown and Ms Starke over the course of this relatively brief relationship. Each case in which there has been a determination of extraordinary circumstances making equal sharing repugnant to justice depends very much on its own facts but they are of assistance in assessing the appropriate division based on the contributions of each party. The decision of Mander J in *Bowden* has some similar features.

[60] In this case I am satisfied the relationship property should be divided on the basis of each parties contribution to their relationship which I assess as being:

(a) 80% contribution by Ms Starke; and

(b) 20% contribution by Mr Brown.

[61] I understand Ms Starke wishes to try and raise funds to acquire Mr Brown's interest in relationship property. I consider she ought to be given an opportunity to do so and would not expect there to be any further applications to enforce the order made within eight weeks to enable her to have a reasonable period to make those enquiries. There was a suggestion in submissions Ms Stark should have an occupation order for her lifetime but having regard to the purposes and principles of the Act I do not regard that as being a just outcome.

Occupation rent

[62] Mr Brown seeks an adjustment in his favour for occupation rent since separation in August 2014 through until the date of the judgment. I am not satisfied

there should be any such adjustment, noting Mr Brown would only be entitled to 20 percent of a market rental after deducting outgoings. In this case I am not satisfied there should be any award noting the limited means of Ms Starke (albeit not dissimilar to those of Mr Brown) and the fact she has paid the mortgage and other outgoings associated with the property as well as maintaining it since separation.

Costs

[63] Costs are reserved. If costs are sought submissions are to be made within 28 days of the date of this judgment.

Leave

[64] Leave is reserved for either party to seek further orders implementing the division of relationship property.

Signed at Auckland this 10th day of October 2016 at am / pm

S J Fleming
Family Court Judge