EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT AUCKLAND

FAM 2013-090-1016
2013-090-1058
[2016] NZFC 8970

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976 AND THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[DAWN SANDS] Applicant
AND	EXECUTOR OF [B O'HORGAN] ESTATE First Respondent
AND	TRUSTEES OF [O'HORGAN] FAMILY TRUST AND BENEFICIARIES OF [B O'HORGAN] ESTATE Second Respondent

Hearing: 14, 15, 16, 17 June, 1 July 2016

Appearances: J Gandy & A Jones for Applicant
J Murray for First Respondent
V Crawshaw & S Powrie for Second Respondent

Judgment: 28 October 2016

RESERVED JUDGMENT OF JUDGE L de JONG
[PRA & FPA - de facto relationship/s44C compensation]

Introduction

[1] 82 year old [B O'Horgan] died on [date deleted] May 2013 with dementia and the effects of a serious alcohol problem but it was a brain haemorrhage that brought a swift end to his life following a fall in the shower.

[2] The applicant says she was in a de facto relationship with [B O'Horgan] until his death. The applicant has been locked in a dispute with the executors of [B O'Horgan]'s estate ("first respondents"), and the trustees of his family trust ("second respondents"), about whether she has an entitlement under the Property (Relationships) Act 1976 ("PRA") and Family Protection Act 1980 ("FPA").

What are the legal issues ?

[3] The applicant says that, apart from a temporary interruption in their relationship for about five or six weeks in 2001, she and [B O'Horgan] were in a legally qualifying de facto relationship which began in 1991 and ended with [B O'Horgan]'s death in 2013.

[4] The first respondent executors of [B O'Horgan]'s estate will abide the Court's decision and for this reason their lawyer's attendance was excused at the outset of the hearing.

[5] The second respondents comprise the trustees of [B O'Horgan]'s family trust and beneficiaries of his estate. They dispute the nature and extent of the relationship between the applicant and [B O'Horgan].

[6] The applicant's whole case therefore depends on whether, and to what extent, this Court finds the applicant was in a legally qualifying relationship with [B O'Horgan]. Findings about the nature of the relationship between the applicant and

[B O'Horgan] affects the legal path this case follows. If they were not in a de facto relationship the applicant walks away with a $20,000 bequest under [B O'Horgan]'s will but little else from the relationship.

[7] If they were in a de facto relationship the path leads through a legal obstacle course. The applicant alleges that in 2001 [B O'Horgan] transferred his home into a family trust he settled without her prior knowledge. Until then the applicant says they both lived in a home together that was registered in [B O'Horgan]'s sole name before it was transferred to his family trust. Whether or not [B O'Horgan] deliberately removed the home from her grasp, the applicant claims she was deprived of her rights for the purpose of s44 or, alternatively, s44C. The applicant wants the home placed in the relationship property pool for equal division or otherwise seeks a compensatory award.

[8] The applicant also claims [B O'Horgan] breached his moral duty to adequately provide for her under the FPA by bequeathing her only $20,000 under his will.

[9] Whatever this Court decides happened leading up to and beyond 2001, the respondents dispute the applicant and [B O'Horgan] were in a qualifying relationship for most of 2001. The significance of this is that in 2001 the PRA was amended to, among other things, recognise de facto relationships, and associated de facto property rights, in a similar way to married couples. If this Court finds there was no qualifying relationship in 2001 the applicant will be left to lick her wounds and little else because she is time barred from filing a constructive trust civil claim.[1]

[10] However, if they were in a qualifying relationship in 2001 the respondents submit the applicant also had an interest in two homes that must be taken into account for the purpose of s16 when dividing all the property, and that there are other reasons for finding there should be an unequal division of property.

[11] The legal issues this Court must therefore decide are as follows

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[1] On the facts in this case it is questionable whether there would have been any grounds for the applicant to mount a *Lankow v Rose* [1995] NZFLR 1; (1994) 12 FRNZ 682 (CA) constructive claim.

(a) Were the applicant and [B O'Horgan] in a legally qualifying de facto relationship at any time ?

(b) If so

(i) has the applicant been deprived of her rights in terms of s 44 or, alternatively, does s44C apply.

(ii) does the applicant have a home that is relevant for the purpose of s16

(iii) are there grounds for an unequal division of property in terms of s13

(c) if the applicant and [B O'Horgan] were in a legally qualifying relationship at anytime, has [B O'Horgan] breached his moral duty to the applicant under the FPA

ISSUE 1 : WAS THERE A DE FACTO RELATIONSHIP ?

Introduction

[12] The nature and extent of any success the applicant might have with her PRA and/or FPA claims depends on whether the legal threshold[2] for a qualifying de facto relationship is reached.

What are the relevant legal principles ?

[13] The test for determining whether a couple have been or are in a de facto relationship is prescribed by s 2D.[3] It is an essential feature of the legal test that the parties "live together as a couple" – s 2D(1)(b). Whether they "live together as a couple" requires the Court to consider "all the circumstances of the relationship."

[2] The s2(1) FPA interpretation of a "de facto relationship" relies on the s 2 PRA definition of that phrase.
[3] All references to statutory provisions are to the PRA unless otherwise stated.

[14] The Court may have regard to the matters set out in s 2D(2) and any other relevant factors.[4] To this extent the Court must be satisfied on the balance of probabilities that the parties did "live together as a couple"[5] having regard to whatever matters the Court deems appropriate and necessary – s 2D(3).

[15] Section 2D(2) provides an important guide for the Court when determining whether a de facto relationship existed. However, the Court has a wide discretion when weighing up what is relevant and what weight is to be given.[6]

[16] In that regard this Court appreciates that, just as there are many different kinds of people in the world, so too are there many different kinds of relationships. This is recognised by the High Court when referring to a variety of relationships and de facto relationships in *S v M* 17 April 2007, Gendall J, Wellington High Court, CIV-2006-485-001940 at [14].[7]

[17] Whatever findings this Court makes about this couple, and their relationship, it is "important to ensure that property consequences do not flow from relationships formed between two people that are not necessarily indicative of an intent to share property. For that reason some rigour is required in analysing whether a de facto relationship exists."[8]

What is this Court's decision about the relationship ?

[18] The second respondents accept there was some kind of relationship between the applicant and [B O'Horgan] but this whole case turns on whether their relationship qualified as a de facto relationship as defined[9] by the law.

[19] When determining whether the applicant and [B O'Horgan] did "live together as a couple" this Court must assess all the circumstances of their relationship and

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[4] Section 2D(3) - *Scragg v Scott* [2006] NZFL 1076 at [64] and *Benseman v Ball* [2007] NZFLR 127 at [20].
[5] Asher J observed in *L v P* (2008) 26 FRNZ 946 at [44] that it is important "not to lose sight of the structure of s2D and that the central plank of a de facto relationship is the parties living together." See also *Scragg* at [24].
[6] Section 2D(3).
[7] See also *B v F* [2010] NZFLR 67 at [54] and *Scragg* at [31] &[32].
[8] *B v F* at [48].
[9] The s2(1) FPA interpretation of a "de facto relationship" relies on the s 2 PRA definition of that phrase.

decide whether any of the nine factors identified in s 2D(2)(a)-(i),[10] or any other factors, are relevant to this case.

Duration of the relationship – s2D(2)(a).

[20] The applicant's husband died in July 1989.[11] The applicant dealt with her grief by visiting her father at his home in Trojan Crescent so frequently that he finally suggested she move in with him. By this time the applicant's 16 year old daughter had moved out of the applicant's home to live with her partner. The mother initially left her furnished home with one of her sons to rent with his partner. She later sold the home to him in a rent to buy arrangement that was not settled until around 2001.

[21] The applicant's father lived at [address 1 deleted] Trojan Crescent and [B O'Horgan] lived next door at number [address 2 deleted]. This Court accepts the applicant and [B O'Horgan] may very well have commenced an intimate relationship around February 1990[12] when it is possible they had their first sexual encounter. The relationship flourished to a point when the applicant says she made a record of moving into [B O'Horgan]'s house on 15 March 1991 to live with him. While notations made by the applicant are interesting they are not conclusive because they form a curiously small collection of events and dates. The applicant's evidence about these records left this Court wary about relying solely on these records.

[22] Various family members suggest the applicant and [B O'Horgan] continued living together at [address 2 deleted] Trojan Crescent until [B O'Horgan] sold this property at the end of 1993.[13] The applicant's daughter says she was present when [B O'Horgan] and the applicant looked for another property and [B O'Horgan] purchased [address 3 deleted] Meadow Crescent ("Meadow Crescent"). The applicant's case is that they remained together in this property until [B O'Horgan] became so unwell that he was hospitalised in 2013.

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[10] Having regard to s2D(3).
[11] Notes of evidence line 13 p49. This evidence is consistent with independent evidence that the wife began receiving a widow's benefit on 24 July 1989 – notes of evidence lines 31 & 32 p6.
[12] 10 February 1990 – bundle of documents paragraph 3 p10; p21.
[13] Bundle of documents paragraph 11 p12.

[23] The weight of applicant's family evidence suggests the parties did physically live together when [B O'Horgan] owned [address 2 deleted] Trojan Crescent. However, this Court proceeds with some caution because [B O'Horgan] is not available to give evidence and the corroborative quality of evidence about their relationship in the very early years is poor. In fact one long time mutual family friend relied on to provide evidence did not visit the applicant and [B O'Horgan] at his [address 2 deleted] Trojan Crescent property[14] and another did not think they lived together there but is not sure why he thinks this.[15] The difficulty with the quality of evidence is understandable because people's memory about events that happened more than 20 years ago can be sketchy or unreliable.

[24] Having reviewed all the evidence this Court is satisfied on the balance of probabilities that the applicant and [B O'Horgan] are likely to have commenced an intimate relationship in the early 1990's.

Nature and extent of common residence – s2D(2)(b).

[25] The applicant's evidence is that for about two years between 1991 and the end of 1993 she and [B O'Horgan] lived together at [address 2 deleted] Trojan Crescent until [B O'Horgan] replaced this home with the purchase of Meadow Crescent. They then lived together in this home until [B O'Horgan] was eventually hospitalised and died.

[26] This Court is satisfied on the balance of probabilities that from at least the beginning of 1994 the parties used [B O'Horgan]'s Meadow Crescent home as a common residence. The evidence from various members of the applicant's family is consistent on this point. This is also consistent with the evidence of long time family friends of [B O'Horgan] who also stayed with the applicant and [B O'Horgan].[16]

Whether or not a sexual relationship exists – s2D(2)(c).

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[14] [Witness 1] relied on the word of others and memory of their relationship in those days – notes of evidence lines 19 to 25 p178;lines 4 to 7 and lines 14 to 17 p179; lines 17 & 18 p182.
[15] [Witness 2]'s notes of evidence lines 25 to 31 p185; lines 2 to 7 p186.
[16] For example, [Witness 1] and [Witness 2].

[27] The overwhelming evidence is that the applicant and [B O'Horgan] had a sexual relationship together. The applicant made a notebook entry that she had her first sexual encounter with [B O'Horgan] on 10 February 1990. While this is not proof in itself of a sexual relationship the evidence of a wide range of witnesses suggests they were an affectionate couple at times and slept in the same bed together.[17]

[28] This Court is satisfied on the balance of probabilities the applicant and [B O'Horgan] had a sexual relationship from around the early 1990's.

The degree of financial dependence, or interdependence, and any arrangements for financial support, between the parties – s2D(2)(d).

[29] [B O'Horgan][18] was on a sickness benefit until he qualified for National Super in January 1991.[19] When they began their relationship the applicant[20] was on a widow's benefit until she turned 65 and qualified for National Super in June 2006.[21]

[30] When [B O'Horgan] purchased Meadows Crescent the property was registered in his sole name with a mortgage in his name. It seems he received rental payments from time to time from a sleep out[22] on his Meadows Crescent property. At one stage the applicant's son rented the flat. The evidence suggests the applicant and [B O'Horgan] may have used these rental payments to meet the cost of day to day expenses.

[31] The applicant had a property at Hillings St in her sole name and received rent in her name. This money is likely to have been used as a contribution towards day to day living expenses. The applicant also had an interest in her father's Trojan Crescent property after he died.[23]

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[17] For example, see evidence of [Witness 3] (bundle of documents pp561 & 562) and [Witness 2] (bundle of documents paragraph 6 p579).
[18] He was born on 26 January 1931 – bundle of documents p256.
[19] Notes of evidence lines 6 to 24 p9.
[20] She was born 25 June 1941.
[21] Notes of evidence lines 31 & 32 p6.
[22] Bundle of documents paragraph 11 p12.
[23] The applicant's father died 4 November 1992 – exhibit 2 produced at hearing.

[32] Neither party carried out any work on their homes. There is no evidence to suggest either party made contributions towards the other's property. However, it is more likely than not the applicant and [B O'Horgan] used their benefits and rental payments to meet day to day expenses in relation to Meadows Crescent and living expenses. It appears likely that any expenses or contributions in respect of Hilling St and [address 1 deleted] Trojan Crescent were met by the applicant and not [B O'Horgan].

[33] The parties had their own bank accounts and never had joint accounts. By the applicant's own evidence she borrowed money from time to time from [B O'Horgan] when she went to Skycity to gamble on the machines. This Court is satisfied on the balance of probabilities that the applicant's interest in gambling was more significant than she cares to admit if only because it was necessary for her to borrow money from [B O'Horgan]. This view is reinforced by her daughter's evidence[24] about how much her mother spent when gambling at Skycity and how often the visits were.

Ownership, use and acquisition of property – s2D(2(e).

[34] Prior to her relationship with [B O'Horgan], the applicant had a home at Hilling St which was transferred into her sole name after her husband died in July 1989. The applicant and [B O'Horgan] never lived together in this home. The applicant sold this home to one of her son's in a rent to buy arrangement.

[35] [B O'Horgan] owned a home in Trojan Crescent when he first met the applicant. In 1993 he sold this home to purchase his Meadow Crescent home. This home was purchased[25] in his sole name with the help of his bank[26] and is the home the parties lived in together. The bank loan was repaid over time. This home remains freehold but was purchased by [B O'Horgan]'s family trust in 2001 and transferred into the names of the trustees.

[36] Both parties had limited incomes when they were together and did not purchase any other property. However, the applicant (and one of her daughters)

[24] Evidence of [Witness 4] - notes of evidence line 17 p213 to line32 p214.
[25] He became the registered proprietor on 22 December 1993 – bundle of documents p28.
[26] The mortgage was discharged less than a year later on 26 October 1994 – bundle of documents p28.

gained a life interest in her father's home at [address 1 deleted] Trojan Crescent when he died on 4 November 1992.

[37] The applicant did not drive and did not have a car. [B O'Horgan] had the same car throughout his relationship with the applicant.[27]

Degree of mutual commitment to a shared life – s2D(2)(f).

[38] This Court is satisfied on the balance of probabilities that the parties had a mutual commitment to a shared life. This finding is supported by the overwhelming evidence from witnesses including extended family members, mutual friends, friends of [B O'Horgan], and medical personnel.[28]

[39] The applicant and [B O'Horgan] clearly loved each other and had a mutual commitment to a shared life. They travelled within NZ to visit friends, they slept together, and went together in the car to attend to shopping, the doctor and visit others.

[40] In [B O'Horgan]'s last years the applicant cared for [B O'Horgan] when he was unwell.

The care and support of children – s2D(2)(g).

[41] The applicant has five children and 8 grandchildren but none of her children were financially dependent on her or [B O'Horgan]. When the applicant left her Hilling Street home to live in her father's home at the end of 1989, or beginning of 1990, her youngest child was only about 16 or 17. However, she had already left school around then and within weeks moved to live with her boyfriend.

[42] [B O'Horgan]'s four children were adults at all material times of this case and were not dependent on [B O'Horgan], or the applicant.

The performance of household duties – s2D(2)(h).

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[27] Notes of evidence lines 27 to 29 p167.
[28] For example, [B O'Horgan]'s doctor (Dr Rowe) and a gerontology nurse (J Parker).

[43] The evidence from the applicant, and a mutual friend,[29] that she did most of the household duties is consistent with [B O'Horgan]'s history and the evidence of [B O'Horgan]'s youngest daughter.[30]

[44] [B O'Horgan] regularly drove the pair to the supermarket to shop but after an unknown period of time he elected to remain in the car while the applicant shopped for supplies.

[45] When [B O'Horgan]'s health progressively deteriorated [B O'Horgan]'s children accept the applicant assumed a more active care giving role for [B O'Horgan] from at least the end of 2011.

Reputation and public aspects of the relationship – s2D(2)(i).

[46] [B O'Horgan] and the applicant dealt with a wide range of people who are able to attest to their relationship. This includes mutual friends, [B O'Horgan]'s long time friends, and medical staff.

Were [B O'Horgan] and the applicant in a legally qualifying relationship ?

[47] This case turns on whether the applicant and [B O'Horgan] were "living together" in a way that legally qualifies as a de facto relationship. After four days of evidence this Court was left in no doubt the applicant and [B O'Horgan] had a loving, caring and intimate relationship which began in the early 1990s and ended with [B O'Horgan]'s death in May 2013.

[48] There are three major areas of contention. The first relates to the difference between the evidence of [B O'Horgan]'s children and all other witnesses. The second relates to the status of the relationship between [B O'Horgan] and the applicant in 2001. The third concerns WINZ evidence that the applicant and [B O'Horgan] were on single benefits and did not declare their relationship to WINZ.

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[29] [Witness 3]'s evidence is that the applicant did the housework and cooked the meals – bundle of documents paragraph 5 p560.

[30] See his daughter's notes of evidence lines 17 to 23 p290 about how [B O'Horgan] never did any housekeeping.

[49] In regard to each contentious issue this Court must do the best it can to distil from the evidence what is more likely than not to have occurred in the relationship in the context of a balance of probabilities assessment. The overwhelming evidence is that [B O'Horgan] and the applicant began a relationship sometime in the early 1990s and commenced a de facto relationship by 1994, at the very latest, but possibly as early as 1991.

[50] This Court relies on the overall effect of findings referred to earlier in this judgment and a summary of the following factors

(a) The applicant and [B O'Horgan] are more likely than not to have commenced an intimate sexual relationship in the early 1990s. This was at a time when the applicant was living with her father in a house next door to [B O'Horgan]'s property.

(b) It is more likely than not that the applicant and her youngest daughter assisted [B O'Horgan] in his choice of a new home when he purchased Meadow Crescent. This home was occupied by the applicant and [B O'Horgan] as their common residence from at least the beginning of 1994.[31]

(c) The evidence of mutual friends and [B O'Horgan]'s long time friends support the evidence of the applicant's family members that the applicant and [B O'Horgan] were in a long term committed de facto relationship from at least 1994, if not earlier.

(d) The evidence from medical personnel and records is that the applicant and [B O'Horgan] had been in a long term de facto relationship.

(e) In 2011 [B O'Horgan] instructed his lawyer to draft a s21 agreement to contract out of the PRA. This agreement records he and the applicant commenced a de facto relationship in 1991.[32] Of itself this document is not conclusive evidence of the commencement date,

[31] [B O'Horgan] became the registered proprietor of Meadow Crescent on 22 December 1993 bundle of documents p28.
[32] Paragraph A to the preamble of the agreement – bundle of documents p447.

especially in light of [B O'Horgan]'s medical assessment in October[33] that year and concerns expressed by the applicant's lawyer about his health in November,[34] but it is relevant when considered in the context of the overall evidence.

(f) The applicant and [B O'Horgan] had a mutual commitment to a shared life from at least the beginning of 1994.

Why is there such a conflict of evidence ?

[51] As to the first contentious issue referred to paragraph [48] of this judgment (evidence of [B O'Horgan]'s children vs the rest) I note three of [B O'Horgan]'s four children gave evidence.

[52] [B O'Horgan]'s youngest son did not believe the applicant and [B O'Horgan] were in a relationship until the mid 2000s and thought by 2009 they had "become close."[35] It was in 2009 that the youngest son replaced [B O'Horgan]'s lawyer as trustee for his father's family trust. Until then the youngest son said he had really only saw his father away from his father's home.

[53] It was only at hearing that [B O'Horgan]'s youngest son accepted [B O'Horgan] and the applicant had been in a relationship. However, he believed [B O'Horgan] and the applicant were not living together in 2001. His evidence is that he received an unusual request from [B O'Horgan] to be taken to his lawyer's office twice in May 2001 to sign his new will, family trust deed and sale of Meadow Crescent to his family trust. He thought the request to be unusual because, although he knew [B O'Horgan] did not like travelling alone, [B O'Horgan] usually relied on

[33] Bundle of documents p106 October
[34] Bundle of documents p558.
[35] Notes of evidence lines 9 to 12 p248; lines 3 to 18 p249;line 19 p255; lines 10 to 12 p256.

his former wife or the applicant to accompany him to appointments. [36] [B O'Horgan] told him the applicant had left. The youngest son had no reason to doubt this especially as he did not see the applicant in [B O'Horgan]'s home when he picked him up and returned his father up from legal appointments.

[54] [B O'Horgan]'s older son believed the applicant was merely his father's care giver but acknowledges she was a "great" care giver.[37] He only saw the applicant at his place on one occasion.[38] He says his father was a regular visitor at his place and over the years he asked his father how the applicant was but his father would say "no, she's not there."[39] The son does not accept his father may have misrepresented the situation to him about this even when others have said they were in a relationship.[40]

[55] It is the older son's belief the applicant did not live with his father for a "greater part" of 2001.[41] He formed this view because the applicant did not answer the phone when he called[42] and the applicant was not present on two visits he made to his father's home between May and June 10 2001.[43] [B O'Horgan]'s older son recalls the two visits involved dropping off some poles on one occasion and some firewood on another occasion.[44] He says the applicant was not in the home on those visits.

[56] The youngest daughter remains adamant the applicant and [B O'Horgan] were not in a de facto relationship. She relies on her observations and on her father telling her that the applicant was initially his housekeeper and later became his care giver.[45] The youngest daughter gave evidence the applicant was not present when she (and her family) stayed a night in [B O'Horgan]'s home in January 2001.[46] However, when questioned about this, the daughter conceded she was unable to recall whether

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[36] Notes of evidence line 17 p244 to line 5 p245; lines 7 to 13 p263.
[37] Notes of evidence lines 21 to 24 p278.
[38] Notes of evidence lines 3 to 5 p267.
[39] Notes of evidence lines 18 to 23 p267.
[40] Notes of evidence lines 4 to 13 p273.
[41] Bundle of documents paragraph 4 p337; notes of evidence lines 6 to 9 p268.
[42] Bundle of documents paragraph 4 p337.
[43] Notes of evidence lines 10 p268 to line 27 p269.
[44] Notes of evidence lines 1 to 3 p269.
[45] Notes of evidence lines 9 to14 p287; lines 17 to 33 p290
[46] Notes of evidence lines 25 & 26 p287; lines 9 to17 p289.

or not the applicant was present during this visit.[47] The applicant is adamant she was present and slept with [B O'Horgan] on this occasion. The applicant recalls special sleeping arrangements were made to accommodate the daughter and her family. There is no reason to doubt this part of the applicant's evidence.

[57] The difficulty with the evidence this Court heard from [B O'Horgan]'s children is that they had very little to do with [B O'Horgan] in his world because "he kept to himself."[48] They generally did not visit him at his home and therefore only saw [B O'Horgan] when he visited them or attended paternal family events. The paternal siblings also believe [B O'Horgan] was unlikely to have been in a relationship with the applicant in 2001 because [B O'Horgan] answered the phone that year rather than the applicant. However, the applicant's evidence about this was that [B O'Horgan] tended to answer the phone until he started having difficulties with his hearing and this was conceded by [B O'Horgan]'s youngest daughter.[49]

[58] With the benefit of hearing evidence from both sides of the family and, importantly, from [B O'Horgan]'s long time friends, it is clear [B O'Horgan] did his best to maintain two separate lives despite efforts by the applicant and her family.

[59] The evidence of [B O'Horgan]'s youngest daughter probably best explains why [B O'Horgan] kept the applicant away from his family and did not disclose to his own family the true nature of his relationship with the applicant. The daughter explained that [B O'Horgan] always carried a torch for his ex-wife even though they had separated many years before due to [B O'Horgan]'s problem with alcohol[50] and infidelity.[51] [B O'Horgan]'s youngest daughter explained [B O'Horgan] told her "numerous" times over the years that he wanted to reconcile with his wife and repeated this in the last conversation they had in hospital before he died.[52]

[60] It is little wonder [B O'Horgan]'s children honestly believed their father when he told them the applicant was only his housekeeper or care giver. They had

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[47] Notes of evidence line 19 p269.
[48] Notes of evidence line 19 p236. See also bundle of documents paragraph 14 p562.
[49] Notes of evidence lines 24 to 27 p288.
[50] [B O'Horgan]'s youngest son described how [B O'Horgan] would have a beer for breakfast and was "always drinking"
– notes of evidence lines 21 to 26 p258.
[51] Bundle of documents paragraph 4 p152.
[52] Notes of evidence lines 15 to 27 p296.

almost nothing to do with him in his world. Their experience of their father was different from other witnesses this Court heard from. It was also clear from the evidence of the applicant, her family, and [B O'Horgan]'s friends, that [B O'Horgan] blamed his own family for keeping the two sides apart when in fact it was [B O'Horgan]'s choice.

[61] It is relevant that [B O'Horgan]'s youngest son was prepared to make some concessions about the nature of the relationship between the applicant and [B O'Horgan] in their later years together, but this was in contrast to his affidavit evidence and his sibling's evidence. In light of what [B O'Horgan] told his children, and the fact his children were not part of [B O'Horgan]'s life at Meadow Crescent, it is unsurprising [B O'Horgan]'s children grew concerned about the applicant's access to [B O'Horgan]'s finances in the last years of his life especially as [B O'Horgan] had a tendency to complain about everything including the applicant.[53]

[62] There is one particularly troubling aspect of the evidence from [B O'Horgan]'s two sons. Their evidence suggests there was no sign of the applicant when the youngest son picked up and returned [B O'Horgan] to his home twice in 2001 for the purpose of preparing and signing legal documents. It was out of the ordinary for the son was asked to do this. The oldest son's evidence also suggests there was no sign of the applicant when he visited [B O'Horgan] twice in 2001. This leads to the second contentious issue.

What was the status of the relationship in 2001 ?

[63] The second important contentious issue identified in paragraph [48] of this judgment relates to the status of the relationship between [B O'Horgan] and the applicant in 2001.

[64] 2001 is an important year for a number of reasons. The applicant transferred her Hilling Street property on 30 March 2001[54] to one of her sons following a rent to buy arrangement involving a weekly sum and a final payment of around $10,000. In

[53] Notes of evidence lines 11 to 14.
[54] Exhibit 6 produced at hearing.

2001 [B O'Horgan] settled his family trust, sold his home to the family trust, and signed a will leaving the applicant $10,000.[55]

[65] 2001 was also the year the PRA reforms received Royal Assent[56] affording de facto couples similar property rights to married couples. These reforms took effect from 1 February 2002 but allowed couples to contract out of the PRA from 1 August 2001.[57]

[66] What happened in [B O'Horgan]'s relationship with the applicant in 2001 is not straightforward. I have read and re-read the evidence at length in an effort to piece together what is likely to have occurred. I find it is more likely than not that the applicant and [B O'Horgan] were living together in the beginning of 2001 but lived apart at least once during that year for up to two months. I have been unable to discern from the evidence whether or not they were living together when [B O'Horgan] signed the agreement to sell Meadow Crescent to his family trust on 11 May.[58]

[67] This Court accepts the applicant's evidence that [B O'Horgan] returned unwell from his first trip[59] to Thailand on 20 April but I am satisfied on the balance of probabilities the applicant tended to him while he was sick. I am less clear about what happened in their relationship after this. [B O'Horgan]'s youngest son visited [B O'Horgan]'s home twice in May 2001 and saw no sign of the applicant. [B O'Horgan]'s oldest son visited [B O'Horgan]'s home on two occasions, once in May and once in June. He too found no sign of the applicant.[60]

[68] The applicant did not have a car and could not drive. It is difficult to understand why she was not at Meadow Crescent when [B O'Horgan]'s sons visited.

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[55] The applicant is referred to in his wife and a subsequent will as his "friend."
[56] 3 April 2001.
[57] Section 21 was substituted by s21(1) Property (Relationships) Amendment Act 2001 effective from 1 August 2001. See summary in *Gray v Gray* [2013] NZHC 2890 at [1].
[58] Bundle of documents p197. [B O'Horgan] also signed a debt of acknowledgement and gifting statement that
day but, curiously, his deed of trust was not signed until 17 May or otherwise not dated until then (174). His will was not signed until 18 May (241).
[59] He went to Thailand with a friend between 23 March and 20 April. It was widely accepted by witnesses from both sides of the family that [B O'Horgan] had returned to NZ unwell.
[60] I take no particular account of the fact that [B O'Horgan]'s children allege the applicant never answered the
phone when they called their father in 2001 – see paragraph [57] of this judgment.

She would have had to make special arrangements to leave the home but she claims she would have been in the home at the time of each visit. Either [B O'Horgan] and the applicant had separated and were living apart when these visits occurred, or the applicant had simply busied herself out of sight or elsewhere. If they had separated this would explain why [B O'Horgan] repeatedly told his children the applicant had "gone" around this time.

[69] If the applicant was still living with [B O'Horgan] at this time it is difficult to understand why she did not accompany him to his lawyer's office, unless he did not want her to accompany him for the ride or to know what he was signing. This evidence suggests the applicant and [B O'Horgan] may have been living apart during this time. The applicant's evidence is that she accompanied[61] [B O'Horgan] on subsequent occasions when he attended his lawyer's office but did not go into the office. This does not make the events in May 2001 any clearer.

[70] To confuse matters further the applicant's evidence is that she left [B O'Horgan] for five or six weeks after [B O'Horgan] returned to NZ from Thailand on 13 August[62] following his second trip there. She claims the relationship was over because [B O'Horgan] had behaved sexually inappropriately in Thailand and he wanted to bring two Thai women back to NZ.[63] It is alleged [B O'Horgan] was responsible for a violent incident involving a firearm and alcohol[64] but the applicant says they didn't separate until a "long time"[65] after that. There is no reliable evidence about when the violent incident occurred nor when it was reported to the Police.[66] However, the applicant is adamant she was still living with [B O'Horgan] when "9/11" happened.

[71] To add to the confusion about what happened in 2001, [B O'Horgan]'s then lawyer wrote to the applicant's lawyer on 4 September[67] advising that the parties had agreed to separate and that $2000 had been deposited into the applicant's bank

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[61] Notes of evidence line5 p88.
[62] [B O'Horgan] travelled to Thailand for a second time between 18 July and 13 August.
[63] Notes of evidence lines 7 to 12 p165.
[64] Notes of evidence line 17 p165 to line 29 p166.
[65] Notes of evidence lines 5 to 32 p170; lines 5 to 7 p172.
[66] The only Police record the Court has is a Police acknowledgement form relating to a threatening behaviour complaint lodged by [B O'Horgan] on 17 March 2002- bundle of documents p433.
[67] Bundle of documents p583.

account by [B O'Horgan]. This evidence is inconsistent with the applicant's evidence they separated from "sometime mid-September, returning in November 2001."[68]

[72] Counsel for the applicant submits the 4 September letter was actually sent on 23 October, as revealed by fax details appearing at the top of the letter.[69] The fax details are not clearly visible. Even if this submission is accepted this does not explain why the letter was delayed, whether $2000 was paid, and whether there was a response from the applicant's lawyer.

[73] All this evidence provides a most confusing picture which may have been made clearer if there was independent evidence from the Police about when the alleged violent incident occurred, and evidence from [B O'Horgan]'s then lawyer about what his instructions were when he settled his trust in May 2001. I understand this evidence was not sought on behalf of the applicant or was otherwise not available.

[74] There is insufficient evidence for this Court to determine precisely what happened in the applicant's and [B O'Horgan]'s relationship between May and October. The applicant is adamant she and [B O'Horgan] were together on September 11. She believes they separated sometime after this date but she may be mistaken. The letter reveals an agreement between [B O'Horgan] and the applicant that they separated on an earlier unspecified date and refers to a monetary payment [B O'Horgan] made.

[75] I find on the balance of probabilities that any periods the applicant and [B O'Horgan] had apart in 2001 are more likely than not to have formed part of a continuous qualifying de facto relationship between them. In particular I rely on evidence of the applicant's youngest daughter. She was a straight forward, reliable, consistent and honest witness who at times gave evidence that did not reflect well on the applicant or [B O'Horgan].

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[68] Bundle of documents paragraph 20 p394; paragraph 23 p395.
[69] Bundle of documents p538.

[76] This evidence is also consistent with [B O'Horgan]'s long time friends [Witness 5][70] and [Witness 3].[71] Unfortunately [Witness 5] and [Witness 3] both died before this case was heard.[72] This Court finds there is a reasonable likelihood their evidence is reliable because their statements are in the form of affidavits sworn in circumstances where they will have known their evidence would be used for evidential purposes and that they would have been cross examined about those statements if alive. The contents of those affidavits serve to confirm evidence of other witnesses that the applicant and [B O'Horgan] were in a long term loving and caring relationship. [Witness 5] had known [B O'Horgan] since he was 16, saw him regularly, and knew about their separation. The only real impact from not being able to cross examine these two witnesses relates to the precise details of the separation in terms of how long it was and when it occurred.

[77] This Court finds the relationship was continuous because the separation is more likely than not to have been brief in nature,[73] the evidence is that [B O'Horgan] was distressed when the applicant left him and wanted her back, the parties' loved each other and relied on each other.[74]

Is it relevant [B O'Horgan] & the applicant did not disclose their relationship to WINZ ?

[78] The third and final important contentious issue identified in paragraph [48] of this judgment concerns WINZ evidence the applicant and [B O'Horgan] were on single benefits and failed to declare their relationship to WINZ.

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[70] Bundle of documents paragraph 8 p507.
[71] Bundle of documents paragraphs 12 & 13 p562.
[72] See paragraph 9 of my "Judge's notes" on file regarding preliminary issues about their evidence.
[73] Even if there was more than one separation period.
[74] This Court relies on cases that analysis whether a relationship is brought to an end by separation such as *Scragg v* Scott [2006] NZFL 1076 ; *G v B* (2006) 26 FRNZ 28; *O'Shea v Rothstein* 11/8/03, HC Dunedin CIV-2002-412-8. The facts in our case can be distinguished from found a de facto relationship had in fact come to an end in January 2000 but that the parties commenced their relationship afresh at the end of 2000 and married the following year.

[79] The uncontested evidence is that [B O'Horgan] was on a sickness benefit until he qualified for National Super in January 1991.[75] When they began their relationship the applicant was on a widow's benefit until she turned 65 and qualified for National Super in June 2006.[76]

[80] The applicant says she did not understand the need to reveal her de facto relationship when on a widow's benefit. The evidence from the WINZ officer contradicts this. I prefer the evidence of the WINZ officer on this point because of the steps WINZ takes to review benefits and notices sent to beneficiaries about their obligations. I note also the applicant did understand the need to disclose the existence of a de facto relationship when receiving National Super payments but failed to.

[81] In the normal course of events declarations made to WINZ that the parties were not in a de facto relationship would represent independent extraneous evidence that the applicant and [B O'Horgan] were not in a de facto relationship. However, the overall evidence makes this point equivocal especially in light of the s21 agreement drafted by [B O'Horgan]'s lawyer agreeing to have been in a long term de facto relationship. I also refer to the evidence of the applicant's youngest daughter suggesting [B O'Horgan] was aware of the need to disclose the existence of a de facto relationship,[77] and concessions made by [B O'Horgan]'s youngest son that the applicant and [B O'Horgan] had been dishonest.[78]

[82] The reality in this case is that the applicant and [B O'Horgan] were in a de facto relationship but failed to disclose this to WINZ when they had a legal obligation to.

ISSUE 2 : DOES s44 APPLY ***– was there an intent to defeat ?***

Introduction

[75] Notes of evidence lines 6 to 24 p9.
[76] Notes of evidence lines 31 & 32 p6.
[77] Notes of evidence line23 p221 to line 4 p222.
[78] Notes of evidence lines 5 to7 p254.

[83] The applicant alleges that in 2001 [B O'Horgan] transferred his Meadow Crescent property, out of her reach, to his newly settled family trust with an intention of defeating her rights under the PRA. She alleges this all happened without her prior knowledge and has the effect of defeating her rights especially as she is not involved in the family trust at all. For this reason the applicant wants the family trust unravelled and Meadow Crescent returned to the relationship property pool. Without this there is little to be divided between the applicant and [B O'Horgan]'s estate.

[84] The second respondents accept [B O'Horgan] settled a new family trust in 2001 and sold Meadow Crescent to [B O'Horgan]'s family trust. They say the transfer was undertaken for valuable consideration and solely to protect [B O'Horgan]'s property in case he was eventually placed in a rest home and was required to meet care charges.

What are the relevant legal principles ?

[85] For a claim to be successful in terms of s 44 this Court must be satisfied, among other things, that [B O'Horgan]'s transfer of Meadow Crescent to the family trust was made in order "to defeat the claim or rights" of the applicant.

[86] This phrase has been judicially considered in a wide range of cases. For example, this phrase appears in both s 43 (restraining intended dispositions) and s 44 (setting aside dispositions) as well as other legislation outside the realm of relationship property.

[87] In *Murtagh v Murtagh* [1960] NZLR 890, 896 MacArthur J sitting in the Supreme Court (as it was then known as) held

> if a wife is attacking a transaction entered into by her husband, she must show what was in his mind, i.e. that he intended, by means of the transaction, to defeat her claim or rights. But, as was said by Denniston J. in In re Reimer (1896) 15 NZLR 198: "A transaction may be made from many motives, as to which it may be difficult to say that any one predominates" (ibid., 209).
>
> A husband may enter into a transaction intending thereby not only to defeat the claim or rights of his wife but also to benefit some other person, for example, his mistress. I cannot think that s. 34 should be read as casting upon the wife, in such a case, the difficult if not

> impossible task of proving which of those intentions is dominant. In my view, if in a given case the evidence proves to the satisfaction of the Court that the husband did intend to defeat his wife's claim or rights, the case comes within s. 34, even though the evidence also shows that he intended some other result as well.

[88] In *General Finance v Cooper* [1984] 3 NZFLR 109, Eichelbaum J suggested the "intent to defeat" needed to be the dominant or most probable intent. Dealing with the then s 47(1) Matrimonial Property Act 1976 he found it unnecessary to prove intent by "direct evidence or circumstances of which such intent is the only possible explanation. It is enough if he proves facts of which the intent to prefer is so much the most probable of the possible explanations that the Court can, on the ordinary principles governing the trial on an issue of fact, properly hold it to be the true explanation."

[89] The decision in *JCW v KFW* 15/3/05, Judge Mather, FC, Auckland, FAM 2002-004-2914 is also relevant and helpful. *Lowe v Lowe* [1987] 3 FRNZ 107, *Smith v Smith* [1987] 4 NZFLR 569 and *CIR v Smith* [1998] NZFLR 49 are examples of where the Family Court was "irresistibly" drawn to find the "most probable" explanation for the respondent's activities was to defeat the applicant's claim. These cases lend support to the view that s 44 can be implemented if the Court is satisfied on the balance of probabilities that one of the purposes of the disposition is or was to defeat the applicant's claim. In this regard *Regal Castings v Lightbody* [2009] 2 NZLR 433 (SC) is also relevant.

[90] Although *Regal Castings* involved a Property Law Act 1952 claim the principles distilled by the Supreme Court are applicable to s44 claims.[79] The effect of this decision, and the High Court decision in *Ryan v Unkovich* [2010] 1 NZLR 434, means that when someone makes a disposition of property[80] knowing this will have the effect of defeating their partner's[81] claim or rights, then an intention may be

[79] See High Court decisions in *Ryan v Unkovich* [2010] 1 NZLR 434 at [33]; *K v V* [2012] NZHC 1129 at [108]; *Patterson v Patterson* [2012] NZHC 2757 at [38]: *Gray v Gray* [2013] NZHC 2890 at [28]; *SMW v MC* [2013] NZHC 396; [2014] NZFLR 71 at [69].

[80] For the purpose of s44(1) PRA.

[81] For the purpose of s44 the parties must have been in a relationship at the time of disposition – *Genc v Genc* (2006) 26 FRNZ 67.

inferred even though they may not have wanted their partner to suffer a loss.[82] Section 44 may also include an intention to defeat future claims.[83]

[91] If s 44 is found to apply, s 44(2) contains provision for relief.

What is this Court's decision regarding the s44 claim ?

[92] The applicant has good reason to be suspicious about what [B O'Horgan] did in 2001. It was at a time when there was enormous media attention about law changes that gave people an opportunity to organise their affairs in the year before 1 February 2002 when de facto relationships were included in the PRA code that deals with relationship property.

[93] It is submitted on behalf of the applicant that the timing of the family trust, and transfer of [B O'Horgan]'s home into his family trust, is simply too coincidental. In this regard it is noted s 21P came into force on 1 August 2001 which enabled de facto couples to contract out of the anticipated changes to the PRA. However, instead of entering into discussions about a contracting out agreement [B O'Horgan] circumvented this by settling his family trust and transferring his home to the family trust out the applicant's reach.

[94] [B O'Horgan] is not with us to explain his actions in 2001. Nor do we have any evidence from the [B O'Horgan]'s lawyer at the time the family trust was settled and Meadow Crescent was sold to the family trust. However, his youngest daughter filed evidence and was cross examined. Her evidence is that she is a long time nurse and has worked mainly with aged care from 1992. Due to her experience in this field of work with patients, and their families, she had "repeated discussions"[84] with her father (and mother) about organising power of attorneys and transferring his assets into a family trust so he would be eligible to receive government subsidies if he went into care rather than expose his assets to meet the costs of aged care.

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[82] *Regal Castings* at [53]; *Ryan v Unkovich* at [33].
[83] *Ryan v Unkovich* at [42].
[84] Bundle of documents paragraph 9 p83.

[95] This Court has found the applicant and [B O'Horgan] were in a de facto relationship from at least 1994 until [B O'Horgan] died and that, although they had at least one period of separation, their de facto relationship was continuous.

[96] Whether or not the applicant and [B O'Horgan] were in a de facto relationship when the family trust was settled, and [B O'Horgan]'s home was sold to the family trust, there is insufficient evidence to establish on the balance of probabilities that the home was transferred in order to defeat the applicant's rights or claim for the following reasons

(a) it is accepted by counsel that the sale of Meadow Crescent to [B O'Horgan]'s family trust was organised by him and represented a disposition of property for the purpose of s44.

(b) there is clear and unequivocal evidence from [B O'Horgan]'s youngest daughter that she had numerous discussions with [B O'Horgan] about transferring Meadow Crescent to a family trust for asset protection. I accept her evidence that there was no discussion about changes affecting the PRA because she and her siblings did not know their father was in a de facto relationship.

(c) there is no evidence to suggest the applicant had a constructive trust claim[85] in respect of Meadow Crescent at the time [B O'Horgan] transferred this property to his family trust. There is no evidence the applicant had a *Lankow v Rose*[86] expectation of a share in [B O'Horgan]'s home. Neither party spent money on [B O'Horgan]'s home by way of maintenance or improvements. The parties kept separate bank accounts but it is likely they shared day to day living expenses.[87] There is no suggestion the applicant made contributions towards [B O'Horgan]'s mortgage.[88] At the time of the disposition it

[85] There was no expectation on the part of the applicant that she was entitled to a share of [B O'Horgan]'s
home. Neither party spent money on [B O'Horgan]'s home by way of maintenance or improvements. The
parties kept separate bank accounts but it is likely they shared day to day living expenses.
[86] [1995] NZFLR 1; (1994) 12 FRNZ 682.
[87] For example, see bundle of documents p243.
[88] The mortgage was discharged within a year of purchase – bundle of documents p28.

is likely the couple treated Meadow Crescent as [B O'Horgan]'s and Hilling St as the applicant's. The applicant signed an agreement to sell her Hilling St property in March 2001[89] to one of her sons on terms that were extremely favourable to the son.

(d) I accept the applicant's evidence that she did not learn about [B O'Horgan]'s family trust and transfer until after the event. The evidence about whether the applicant and [B O'Horgan] were together in May/June 2001 when the disposition of property occurred is equivocal.

(e) the sale price of the family home to the family trust represented valuable consideration and was within an acceptable range.

(f) although Royal Assent to PRA law changes was received on 3 April 2001 which allowed, among other things, the applicant and [B O'Horgan] to sign a s21 contracting out agreement from 1 August 2001, there is no evidence to suggest this was a factor when the sale agreement and related documents were prepared and signed. [B O'Horgan] was a simple man with little education. The applicant also presented as a simple person. There is no evidence to suggest the applicant or [B O'Horgan] were aware of the PRA law changes or their impact. We don't know what was in [B O'Horgan]'s mind when he signed the documents except from the evidence of his youngest daughter. [B O'Horgan]'s lawyer at the time was not called to give evidence and the lawyer's file was not produced.[90] For this reason we do not know what instructions [B O'Horgan] gave his lawyer or what legal advice [B O'Horgan] received.

(g) The evidence suggests it is very likely [B O'Horgan] was simply persuaded by his daughter to protect his home against future rest home/care charges given her work experience, and [B O'Horgan]'s advancing years and health issues.

[89] Exhibit 6 produced at hearing.
[90] Given the time that has since passed it is unlikely to be available.

[97] It was submitted on behalf of the applicant that [B O'Horgan]'s lawyer must have been aware [B O'Horgan] and the applicant were in a de facto relationship because of the letter she wrote in September 2001 to the applicant's lawyer. The fact that it refers to the applicant and [B O'Horgan] being in a de facto relationship "for sometime"[91] does not help us to understand what [B O'Horgan]'s lawyer knew about the applicant in May 2001 when all the documents were prepared and signed. At best the evidence suggests [B O'Horgan]'s lawyer knew the applicant and [B O'Horgan] were "friends." [B O'Horgan]'s will was prepared and signed around the time Meadow Crescent was transferred to [B O'Horgan]'s newly formed family trust. His will included a bequest of $10,000 to the applicant his "friend."[92]

ISSUE 3 : DOES s44C APPLY – *were the applicant's rights defeated* ?

Introduction

[98] Having determined s44 does not apply the applicant relies on s44C to seek compensation.

[99] Counsel for the second respondents submits s44C does not apply in this case because there "is no suggestion there was any action taken to deprive the applicant of her claim."

[100] This Court is left to decide whether s44C applies and, if so, whether the applicant is entitled to compensation.

Does the applicant have a s44C claim ?

[101] For the purpose of s 44C(1)[93] this Court has a discretion to make a compensatory award if satisfied that

(a) since the applicant and [B O'Horgan]'s de facto relationship began, relationship property was transferred to [B O'Horgan]'s Family Trust, and

[91] Bundle of documents p583.
[92] Bundle of documents p241.
[93] See also *Nation v Nation* [2005] 3 NZLR 46.

(b) the transfer had the effect of defeating the applicant's claim, and

(c) section 44 does not apply

[102] This Court has already found the applicant and [B O'Horgan] were in a qualifying de facto relationship from at least 1994 until 2003. Although Meadow Crescent could not be classified as relationship property as the law stood at the beginning of 2001, this changed from 1 February 2002 with retrospective effect from 1 February 1997 – s1(2) PRA.

[103] The result of this change means Meadow Crescent was the family home in May 2001 for the purpose of ss2 & 11(1). The parties had lived together in this home for about 7 years when it was sold by [B O'Horgan] to his then newly formed family trust. Had the family home not been purchased by [B O'Horgan]'s family trust it would have remained relationship property.[94]

[104] This Court is satisfied the transfer of Meadow Crescent to the family trust had the effect of defeating the applicant's claim because she is not a trustee or beneficiary of [B O'Horgan]'s family trust.

[105] The applicant is entitled to make a s44C claim because the grounds in s44C(1) have been made out for the reasons referred to above.

What, if any, compensation is the applicant entitled to ?

[106] Section 44C enables this Court to make an order to compensate the applicant if it is "just."[95] What is just depends on the circumstances of the case, the factors identified in s44C(4), and the purpose of the PRA. The purpose of the PRA is, among other things, to recognise parties' equal contributions to their relationship (ss1M(b) & 1N(b)), recognise the need for a just division (s 1M(c)), and resolve matters as "inexpensively, simply, and speedily as is consistent with justice" (s1N(d)).

[94] See similar result in *O v S* 26 FRNZ 459.
[95] Section 44C(4).

[107] This Court has a discretion to order compensation by making one or more of the following orders[96]

(a) requiring [B O'Horgan] to pay the applicant money out of separate or relationship property – s44C(2)(a). [B O'Horgan] had a net sum of around $92,000 in his estate at the date of his death.[97] The bulk of this sum is likely to be [B O'Horgan]'s separate property. Although $84,076 has since been lent to [B O'Horgan]'s trust this sum is recoverable because it is planned to sell Meadow Crescent. I also observe that the applicant is entitled to receive $20,000 from [B O'Horgan]'s estate by way of a bequest in terms of [B O'Horgan]'s last will. Despite this, an order requiring [B O'Horgan]'s estate to pay the applicant a sum of money is likely to be the most viable way of ordering [B O'Horgan] to pay the applicant any compensation particularly having regard to my remarks in (c) below.

(b) requiring [B O'Horgan] to transfer separate or relationship property – s44C(1)(b). As I understand it there is little relationship property. It comprises some chattels and a motor vehicle. The applicant has already disposed of the motor vehicle and the remaining chattels have no value to speak of.

(c) requiring the trustees of [B O'Horgan]'s trust to pay the whole or part of the family trust's income for a specified time or amount – s44C(1)(c). [B O'Horgan]'s family trust comprises Meadow Crescent. This property is currently rented out at $530 per week[98] less expenses. The family trust had net sum of around $30,000 including estimated tax that has not yet been paid. No tax returns have been filed to date. The family trust has met legal fees and other expenses but has borrowed from [B O'Horgan]'s estate to meet these commitments. It appears one or more of the siblings may have also met the cost of

[96] Section 44C(4) allows this Court to make one or more orders in terms of s44C(2).
[97] As referred to in updated financial position of [B O'Horgan]'s estate and trust in a memorandum filed by
counsel for the first respondent dated 28 June 2016.
[98] Notes of evidence line 24 p241.

work to ensure Meadow Crescent could be rented out in the meantime. This Court's ability to order the trustees to pay the applicant from family trust income is limited by s44(3) and the fact that it is unlikely Meadow Crescent will be rented out much longer because of the condition of the property and wishes of the beneficiaries.

[108] Having regard to the factors identified in s44C(4) I note as follows

(a) *value of relationship property disposed of to the trust* – the value of Meadow Crescent when transferred to [B O'Horgan]'s trust in 2001 was around $210,000 to $220,000.[99] The present value of this property assessed by a registered valuer is around $800,000.[100]

(b) *Value of relationship property available for division* – there are some chattels including [B O'Horgan]'s vehicle but they have a negligible value.

(c) *Date relationship property was disposed of to the trust* – this was May 2001.

(d) *Whether the trust gave consideration for the property and sum involved* – the sale agreement records $211,200 as the purchase price.[101]

(e) *Whether the parties or their children are beneficiaries of the trust* – [B O'Horgan] is the principal beneficiary and his children are the final beneficiaries.[102] [B O'Horgan] and the applicant do not have any children together.

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[99] The purchase price was $211,200 (bundle of documents p197), the QV at the time of purchase was $220,000 (p191), the value for rating purposes was $228,000 in July 2001 (paragraph 7.4 p622) and a more recent retrospective registered value is $210,000 (pp612 & paragraph 8.3 p623).
[100] Exhibit C produced at hearing.
[101] Bundle of documents p197.
[102] See definition of "final beneficiaries" and "principal beneficiary" – bundle of documents pp175 & 176.

(f) *Any other relevant matter* – counsel for the second respondents originally submitted ss13 & 16 are relevant. However, in closing submissions counsel for the second respondents offered that s16 does not apply because Meadow Crescent is no longer relationship property for the purpose of s16(1)(c). Counsel identified a host of benefits derived by the applicant, such as free rent after [B O'Horgan] died, payment of her legal fees amounting to around $1800, benefit of rental payments she received from her son after [B O'Horgan] died and so on.

[109] Counsel for the second respondents raised a s13 unequal division argument. Section 13 contains a discretion that allows the Court to depart from the equal property sharing principle if extraordinary circumstances are found to render equal sharing repugnant to justice.

[110] The extraordinary circumstances s13 test is a stringent one[103] because the PRA is based on the foundation of equal sharing. Quilliam J applied this stringent test in *Castle v Castle* [1997] 2 NZLR 97 at 102 by asking himself, is this "particular case so out of the ordinary that an equal division is something the court feels it simply cannot countenance." That question must be considered in the context of "marriages generally" and "whether tested against the whole range of marriages the particular circumstances are to be characterised as extraordinary" – *Joseph v Johansen* (1993) 10 FRNZ 302 at 307.

[111] The s 13 test therefore requires this Court to "consider the circumstances and decide whether or not they are properly to be regarded as 'extraordinary,' and as rendering 'repugnant to justice' the equal sharing of the matrimonial home between the spouses. Only if that test is found to have been met is the Court required to make some other determination, and for this purpose to consider the contribution of each spouse to the marriage partnership."[104]

[112] This Court finds there are no extraordinary circumstances which would render equal sharing repugnant to justice. I am unable to conclude that it is

[103] *Martin v Martin* [1979] 1 NZLR 97 at 111.
[104] *Joseph v Johansen* (1993) 10 FRNZ 302 at 308.

repugnant to justice to give "full weight to the scheme and objectives of the legislation." This case must be viewed in the context of a relationship of nearly 20 years.

[113] Counsel for the second respondents relies on *Venter v Trenberth* [2015] NZFLR 571 but that case was about a four year relationship and bears little resemblance to the facts in this case.

[114] On the face of matters the applicant stands entitled to receive a half share of the value of Meadow Crescent if it had not been disposed of to [B O'Horgan]'s trust. This half share is worth about $400,000. To this extent I find the applicant is entitled to be compensated pursuant to s44C for dispositions [B O'Horgan] made to his trust to the extent of $400,000 subject to adjustments.

[115] However, if Meadow Crescent had not been disposed of to [B O'Horgan]'s family trust s16 would be relevant and for this reason I find it is relevant in terms of s44C(4)(f) for the purpose of assessing what is a just compensatory award. This Court recognises the importance of not undermining the separate property principles and provisions of the PRA. However, ss16 & 44C are both compensatory provisions which invite the Court to provide a just outcome.

[116] Section 16 applies if both partner's owned a home at the beginning of their de facto relationship and each home was capable of becoming a family home, but only one home is included in the relationship property pool at the end of the relationship.

[117] I have found the applicant and [B O'Horgan] commenced their de facto relationship no later than the beginning of 1994. At that time [B O'Horgan] owned Meadow Crescent and the applicant owned Hilling St.[105] The evidence suggests Hilling St would have had a value of about $180,000. This represents about 85.7% of the value of Meadow Crescent around the same time based on a value of $210,000. Meadow Crescent now has a registered valuation report indicating a value of $800,000. We do not have a valuation report in respect of Hilling St because it was altered and sold by the applicant's son.

[105] It is also relevant that the applicant had a life interest in her father's home following his death in November 1992.

[118] [B O'Horgan] died nearly three and a half years ago. There is a need to bring matters to an end. This requires a robust approach especially as s44C is a discretionary award and there are limits to how an award can be paid in this case. The reality of the situation for the family trust is that the net rental income received from Meadow Crescent is likely to be around $20,000 per annum. The trustees would have taken steps to sell Meadow Crescent earlier but elected to await the outcome of this case instead. The family trust has debts it can not clear until Meadow Crescent is sold.

[119] One way of approaching this issue is to adopt a crude measure of relative values based on Hilling St being worth about 85.7% of the value of Meadow Crescent. On present day values this would mean Hilling St might be worth about $685,600. The difference between the value of both properties is $114,400 and a half share would amount to $57,200.

[120] After [B O'Horgan] died the applicant remained in Meadow Crescent rent free and the family trust met the outgoings. For a time the applicant also received the benefit of rental payments from her son. The family trust has met the cost of valuation fees associated with this case.

[121] I find a payment of $50,000 represents a just award in the particular circumstances of this case. This is capable of being paid out of [B O'Horgan]'s separate property from money held by, or due to, [B O'Horgan]'s estate in terms of s44C(2)(a). Leave will be reserved to bring this matter back to Court if there are difficulties with payment and an order pursuant to s44C(2)(c) is required.

[122] It was submitted on behalf of the applicant that [B O'Horgan] received the benefit of the sale proceeds of Hilling St. There is no evidence to support this submission. The evidence shows the applicant and [B O'Horgan] maintained separate bank accounts. It is likely they each contributed towards day to day living expenses. The applicant had a more regular gambling habit than she was willing to accept. My assessment of the evidence is that the rent to buy agreement between the applicant and one of her sons was not actually reached until close to the time of settlement when it was formalised by a sale and purchase agreement. The sale terms

meant the son received an extraordinary deal at the applicant's expense and a sale for a more realistic sale price would have left the applicant more resources.

ISSUE 6 : DID [B O'HORGAN] BREACH HIS MORAL DUTY TO THE APPLICANT ?

[123] [B O'Horgan]'s last will includes a $20,000 bequest in favour of the applicant. The applicant's case is that this sum is insufficient to meet his moral obligation to her.

[124] The applicant is only entitled to lodge a claim under the FPA if she was in a de facto relationship with [B O'Horgan] at the time of his death.[106] This Court has determined the parties were in a de facto relationship before [B O'Horgan] died.

What are the relevant legal principles ?

[125] There is power under s 4(1) the Act to make an enquiry into whether there has been "a breach of moral duty judged by the standards of a wise and just testator or testatrix; and, if so, what is appropriate to remedy that breach" – *Little v Angus* [1991] 1 NZLR 126; affirmed *Fisher v Kirby* [2012] NZCA 310 at [118]

[126] In *Vincent v Lewis* [2006] NZFLR 812 at [18] (HC) Randerson J isolated a number of principles relevant to cases of this kind as follows

> (a) The test is whether, objectively considered, there has been a breach of moral duty by [the deceased] judged by the standards of a wise and just testatrix.
>
> (b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.
>
> (c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.
>
> (d) The size of the estate and any other moral claims on the deceased's bounty are relevant considerations.
>
> (e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.

[106] Section 3(1)(aa) FPA

(f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.

(g) If a breach of moral duty is established, it is not for the court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach.

(h) The court's power does not extend to rewriting a will because of a perception it is unfair.

(i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives.

[127] The principles identified by Randerson J follow an arguably cautious approach[107] to family protection cases highlighted by the Court of Appeal decision in *Williams v Aucutt* [2000] 2 NZLR 479; [2001] 19 FRNZ 200; [2000] NZFLR 532; and *Fisher v Kirby* [2012] NZCA 310 at [118] – [120].

What is this Court's decision regarding the FPA claim ?

[128] Simply put, the applicant seeks a "recognition award."[108] While it may be open for this Court to make orders under the PRA and FPA,[109] whether and to what extent the applicant is entitled to a FPA award is affected by the outcome of her PRA claim.

[129] This Court does not accept [B O'Horgan] breached his moral duty to the applicant. She is due to receive an award of $50,000 as a result of this judgment which represents her entitlement under the PRA. She is also entitled to a payment of $20,000 from [B O'Horgan]'s estate as a result of a bequest under his will. In addition, the applicant had an opportunity to live rent free in Meadow Crescent for up to 2 years following [B O'Horgan]'s death. She elected to leave early. That was her choice due to her failure to properly understand the reasonable terms of offers made for her to remain.[110]

[130] However, whether or not the applicant elected to receive [B O'Horgan]'s gift of $20,000, this Court finds the applicant is entitled to interest on the sum of $20,000

[107] As opposed to a "conservative" approach
[108] See paragraph 49 of counsel for the applicant's closing submissions dated 27 November 2015.
[109] Section 57 PRA.
[110] The applicant has a tendency to get the wrong end of the stick and makes assumptions about what people know. For example, notes of evidence line 34 p141 to line 9 p142.

at the rate of 5% per annum from the date of [B O'Horgan]'s death to the date of payment because otherwise [B O'Horgan]'s estate receives this benefit at the applicant's expense.

ORDERS & DIRECTIONS

[131] The following orders and directions are made

(a) A declaration is made that the applicant and [B F O'Horgan] were in a qualifying de facto relationship between at least the beginning of 1994 and May 2013 – paragraphs [49] & [50].

(b) The applicant's s44 claim is declined – paragraph [96].

(c) The executors of [B F O'Horgan]'s estate are ordered to pay the applicant a compensatory award of $50,000 pursuant to s44C(2)(a) – paragraph [121].

(d) A declaration is made that [B F O'Horgan] did not breach his moral duty to the applicant – paragraph [129].

(e) The applicant is entitled to a payment of interest on the sum of $20,000 at the rate of 5% per annum from the date of [B O'Horgan]'s death to the date of payment – paragraph [130].

(f) Leave is reserved to the parties to refer the proceedings back to Court for the purpose of implementing or giving better effect to the orders outlined above

L de Jong
Family Court Judge

Dated at Auckland 28 October 2016 at 2 pm