

Update

Fisher on Relationship Property

March 2022 — Service 99

Legislative amendments

Secondary Legislation Act 2021 (2021 No 7)

This Act amended the following Acts on 28 October 2021:

- ss 16, 26 of the Joint Family Homes Act 1964
- ss 2D, 21E, 53 and 53A of the Property (Relationships) Act 1976

Case commentary

Chapter 1 — Nature of relationship property — marriage settlements

Preston v Preston [2021] NZSC 154, [2021] NZFLR 304 is one of the leading cases in New Zealand on the use of s 182 of the Family Proceedings Act 1980 with respect to family trusts. See [1.17], [1.65] and [19.22].

Chapter 2 — De facto relationships, civil unions, engagements, and other relationships — polyamorous relationships

The Property (Relationships) Act 1976 extends the statutory scheme for the provision of property division after the breakdown of a relationship to such relationships within polyamorous relationships: *Paul v Mead* [2021] NZCA 649. See [2.1], [2.13] and [19.4].

Chapter 9 — Protecting the non-owner spouse or partner — lodging notice of claim — s 42, Property (Relationships) Act 1976

In *Flavell v Chote* [2021] NZHC 2262 it was held that there is no principled reason why an executor cannot lodge a claim. See [9.17] and [19.14].

Chapter 9 — Protecting the non-owner spouse or partner — claim under the Act — s 44, Property (Relationships) Act 1976

Sutton v Bell [2021] NZCA 645 the Court of Appeal held a claim under s 44 can be made but “the couple, at the time of the disposition, must have reached a stage where there was mutual contemplation of beginning a qualifying relationship”. See [9.41] and [9.42].

Chapter 9 — Protecting the non-owner spouse or partner — disposition of property — s 44, Property (Relationships) Act 1976

Money advanced to a trust by way of loan rather than a distribution has been held not to be a disposition to which s 44 applies: *Poros v Bax* [2021] NZCA 149. See [9.43].

Chapter 9 — Protecting the non-owner spouse or partner — disposition without good faith and valuable consideration — s 44, Property (Relationships) Act 1976

Is s 44(2)(b) conjunctive or disjunctive? If the former, then it is not necessary to prove both a lack of good faith and lack of valuable consideration. This is the ruling of the Court of Appeal in *Sutton v Bell* [2021] NZCA 645. See [9.47].

Chapter 10 — Meaning of property — nature of interest in company

Paragraph [10.23] of Fisher on Relationship Property was cited in *Turner v del la Varis* [2021] NZHC 776, [2021] NZFLR 418. See [10.23].

Chapter 12 — Division of relationship property — exception to equal sharing — extraordinary circumstances — s 13, Property (Relationships) Act 1976

In *Woolridge v Kumari* [2021] NZHC 1975, [2021] NZFLR 461 the husband was awarded a 65 per cent share and his wife a 35 per cent share of their relationship property on the basis that the marriage lasted just under 3 years 5 months, the husband was aged 70 at the time of the separation and he had contributed a home worth 93 per cent of their total relationship property. See [12.35] and [19.27].

Chapter 18 — Jurisdiction, orders and implementation — direct vesting of assets

In *Palmer v Alalaakkola* [2021] NZHC 2330 Isac J said “there is no requirement that copyright in a work must follow an order vesting the work in one party or the other. Those matters are entirely at large”. See [18.29].

Chapter 18 — Jurisdiction, orders and implementation — contempt proceedings

The issue of contempt arose in *H v Z* [2021] NZHC 3007. Sale orders involving a property held in trust had not been carried out. The applicant failed to provide any evidence of other steps to enforce the sale orders. The contempt proceedings therefore failed. See [18.101].

Chapter 19 — Proceedings under the Property (Relationships) Act — parties to proceedings — spouses and partners — polyamorous relationship

The Court of Appeal has now determined that the Act does apply to polyamorous relationships: *Paul v Mead* [2021] NZCA 649. As such, the Family Court has jurisdiction to hear claims under the Property (Relationships) Act as between partners in a polyamorous relationship where each partner is either married to or in a civil union or de facto relationship with each of the other partners. See [19.4].

Chapter 19 — Proceedings under the Property (Relationships) Act — personal representative of deceased spouse or partner — s 78, Property (Relationships) Act 1976

Section 78 accords clear preference to the relationship property entitlement of the surviving spouse or partner. In *Harvey v Harvey* [2021] NZHC 2405 shares left as a specific gift to the deceased father’s son were considered relationship property and as such his mother’s relationship property claim took priority over his gift. See [19.8].

Chapter 19 — Proceedings under the Property (Relationships) Act — personal representative of deceased spouse or partner

A surviving partner is not precluded from initiating proceedings under the Property (Relationships) Act 1976 where the deceased’s property which was owned prior to death has passed to a third party: *Hau v Hau* [2018] NZHC 881, [2018] NZFLR 464. See [19.8].

Chapter 19 — Proceedings under the Property (Relationships) Act — interest in the property — s 37, Property (Relationships) Act 1976

In *Meads v Muldrew* [2021] NZHC 1864, the Court considered whether the sole corporate trustee of a third-party trust had been given proper notice pursuant to s 37 of the Property (Relationships) Act 1976. In the circumstances of that case, His Honour considered that the corporate trustee had been given notice. See [19.9].

Chapter 19 — Proceedings under the Property (Relationships) Act — interest in the property — s 37, Property (Relationships) Act 1976

In *Zhou v Yue* [2019] NZHC 2167 the wife's father (Mr Zhou) was directed to be served with the proceedings by the Family Court Judge. The wife's position was that the property she and her husband owned was held on trust for her father who was the true owner. See [19.9], [19.10] and [19.12].

Chapter 19 — Proceedings under the Property (Relationships) Act — proceedings to be issued in the Family Court — s 38A, Property (Relationships) Act 1976

In *Flavell v Chote* [2021] NZHC 2262 the High Court held that claims under the Property (Relationships) Act must be heard and determined in the Family Court unless they are later transferred to the High Court pursuant to s 38A of the Property (Relationships) Act. See [19.14].

Chapter 19 — Proceedings under the Property (Relationships) Act — transfer of proceedings

In *Treasure River Enterprise Ltd v Wang* [2019] NZFC 5356 proceedings were transferred to the High Court on the basis of the complexity of the proceedings, the fact that there were existing proceedings in the High Court and the jurisdictional issues arising in relation to the application being brought by a creditor. See [19.17].

Chapter 19 — Proceedings under the Property (Relationships) Act — transfer of proceedings

In *Hare v Hare* [2019] NZHC 2801 proceedings were transferred to the High Court as there was a novel issue. See [19.17].

Chapter 19 — Proceedings under the Property (Relationships) Act — initiating proceedings — surviving spouse or partner — electing option A — s 65, Property (Relationships) Act 1976

A surviving spouse or partner may not commence proceedings under the Property (Relationships) Act for a division of the relationship property before electing option A: *Nelson v Codilla* [2021] NZHC 1958. See [19.20].

Chapter 19 — Proceedings under the Property (Relationships) Act — initiating proceedings — property owned by trusts

Where dealing with property owned by a trust one must carefully consider the appropriate application. For example, is it appropriate to apply under s 44C of the Property (Relationships) Act or is the application under s 182 of the Family Proceedings Act or is there an equitable claim (ie a claim for resulting or constructive trust). See *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31, *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590, [2016] NZFLR 189 and *Preston v Preston* [2021] NZSC 154, [2021] NZFLR 304 for more detail. See [19.22].

Chapter 19 — Proceedings under the Property (Relationships) Act — onus of proof — s 14, Property (Relationships) Act 1976

Wooldridge v Kumari [2021] NZHC 1975, [2021] NZFLR 461 where the High Court considered the meaning of “relationship of short duration” and the Court’s discretion to extend the time period beyond three years. See [19.27].

Chapter 19 — Proceedings under the Property (Relationships) Act — interlocutory application for sale of family home

Panikkar v Sharma [2021] NZFC 2251, [2021] NZFLR 443 an interlocutory application for the sale of the family home was declined on the basis that it was not in the interests of justice when weighed against the potential detriment to the children. See [19.31].

Chapter 19 — Proceedings under the Property (Relationships) Act — costs — s 40, Property (Relationships) Act 1976

Costs may be sought for an interlocutory application rather than awaiting the result of the substantive proceedings: *Panikkar v Sharma* [2021] NZFC 2251, [2021] NZFLR 443. See [19.41].

Chapter 19 — Proceedings under the Property (Relationships) Act — costs — s 40, Property (Relationships) Act 1976

The High Court has recently declined to reduce a costs award on the basis that the party had no means to pay the award and was insolvent: *Young v Young* [2021] NZHC 369. See [19.41].

Chapter 19 — Proceedings under the Property (Relationships) Act — appeals — High Court to Court of Appeal — extension of time to appeal

The Court of Appeal has jurisdiction to extend time to file the case on appeal under r 43 of the Court of Appeal (Civil) Rules 2005: *Sharma v Wati* [2021] NZCA 220. See [19.43.02].

Chapter 19 — Proceedings under the Property (Relationships) Act — appeals — High Court to Court of Appeal — extension of time to appeal

In *W v W* [2021] NZCA 676 the Court of Appeal granted an application for an extension of time to appeal a decision of the High Court where that Court had declined an extension of time to appeal a decision of the Family Court determining a relationship property dispute. See [19.43.02].

Chapter 19 — Proceedings under the Property (Relationships) Act — leave to appeal to Supreme Court — s 74, Senior Courts Act 2016

In *Almarzooqi v Salih* [2021] NZSC 161 A applied, out of time, for leave to appeal against a finding that New Zealand courts could not enforce a Dubai order requiring S to pay a deferred dowry to A. The application was declined. See [19.43.03].

Chapter 19 — Proceedings under the Property (Relationships) Act — leave to appeal to Supreme Court — s 74, Senior Courts Act 2016

In *Fan v Wu* [2021] NZSC 156 the Court declined F’s application for leave to appeal. F’s argument did not raise a matter of public importance and there was no appearance of a miscarriage of justice. See [19.43.03].