

Update

Fisher on Relationship Property

August 2022 — Service 100

Index

The index has been updated up to Service 99.

Case commentary

Chapter 1 — Nature of relationship property — international law — forum non conveniens

In *Lee v Lee* [2020] NZFC 2984, an argument that New Zealand was forum non conveniens failed. The Judge doubted whether Korea would have jurisdiction but, even so, the main property including immovables were in New Zealand. See [1.51].

Chapter 4 — Trusts — construction of family trusts — bundle of rights

The Privy Council in *Webb v Webb* [2020] UKPC 22, [2021] NZLR 376 dealt with a very similar trust deed as that in *Clayton* however they took a different approach and determined that the trust deed created a bundle of rights that were indistinguishable from ownership. See [4.3].

Chapter 4 — Trusts — construction of family trusts — powers under trust deed

In *Pinney v Cooper* [2020] NZHC 1178, [2020] NZFLR 150 the High Court held that the combination of clauses in the Pinney Trust deed were not the same as in *Clayton*. The decision is before the Court of Appeal in 2022. See [4.3].

Chapter 4 — Trusts — construction of family trusts — powers under trust deed

In *Kwok v Rainey* [2020] NZHC 923 the High Court observed that it was doubtful that the trust was a trust at all. The Court decided the case under s 44 of the Property (Relationships) Act 1976. See [4.3].

Chapter 4 — Trusts — construction of family trusts — powers under trust deed — variation of trust deed

In *Higgins v Higgins* [2019] NZFC 3703, [2020] NZFLR 435 Judge Pidwell held that the powers held by the parties were property and that she could make orders under s 25(3) of the Property (Relationships) Act 1976 and then vary the trust deed to provide that Mr Higgins could sell the property unilaterally. See [4.3] and [4.5].

Chapter 4 — Trusts — construction of family trusts — powers under trust deed — no self-benefit clause

In a debt recovery context in *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 the Court held that the prohibition on self-benefit meant that the debtor could not use her power of appointment to defeat that prohibition and therefore the trust was not invalid. See [4.3].

Chapter 4 — Trusts — removal of trustees — s 112, Trusts Act 2019

The exercise of discretion to remove a trustee under s 112 of the Trusts Act 2019 has been applied in the context of separation in *Nyhoff v Atkins* [2021] NZHC 2238 where Ms Atkins's non-cooperation with the sale of a property lead the Court to remove and replace her as a trustee. See [4.51].

Chapter 4 — Trusts — removal of trustees — s 112, Trusts Act 2019

In *Taylor v Taylor* [2021] NZHC 992 Mr Taylor was removed (and Ms Taylor resigned) and the trustee company was left to manage the sale of a trust property which was heavily indebted. See [4.51].

Chapter 4 — Trusts — removal of trustees — s 112, Trusts Act 2019

In *Stratford v Moses* [2022] NZHC 1463 the Court was not satisfied that the wife who had removed the husband as trustee (she had sole power of appointment) should be removed as there was no evidence that trust assets were at risk and there had been an independent trustee appointed. See [4.51].

Chapter 5 — Agreements — contracting out agreement — independent legal advice — s 21, Property (Relationships) Act 1976

The adequacy of the legal advice, particularly in relation to then-future possibilities and potentialities, is assessed at the time the party enters into the agreement: *Wylie v Wylie* [2021] NZCA 521. See [5.70] and [5.71].

Chapter 6 — Variation of agreements and trusts on dissolution — time limits after dissolution — delays — s 182, Family Proceedings Act 1980

In *Oliver v Sparks* [2021] NZHC 220, [2021] NZFLR 152 the Court held that the delay of six years could be explained and s 182 of the Family Proceedings Act 1980 itself does not impose any time limits. The Court found the delays were explained. See [6.7].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlement — disparity between position of spouse and position had marriage continued — s 182, Family Proceedings Act 1980

In *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651, [2021] NZFLR 304 the Supreme Court changed the approach to s 182 applications from a two stage to a three stage process: (1) Was there a nuptial settlement?; (2) If so, was there a disparity or gap between the position of the spouse under the settlement with the marriage dissolved and the position under the settlement if the marriage had continued? (3) If there is a gap, should the Court exercise the discretion? The focus of the Supreme Court decision was the second and third stages. See [6.15].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlement

Booth v Booth [2020] NZCA 451, [2020] NZFLR 509 upheld *Booth v Booth* [2019] NZHC 2424, [2019] NZFLR 225 finding that there was no settlement. See [6.12].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlement

In *Little v Little* [2020] NZHC 2612 the Court found that a trust settled nine days before the marriage was to be a nuptial settlement. Mr Little had taken over a family business and he wanted to protect it for future generations. The Court of Appeal declined leave to appeal this case. See [6.12].

Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlement — strikeout application

In *Oliver v Sparks* [2021] NZHC 220, [2021] NZFLR 152 Fitzgerald J refused a strikeout application on the basis that the fruits of a joint venture between two trusts during the marriage could have a nuptial character and Mr Oliver's divestment in earlier creditor proceedings did not mean there was no nuptial settlement because the purpose of the trust structure was to preserve the home and investment for the family. See [6.12].

Chapter 18 — Jurisdiction, orders and implementation — superannuation — s 31, Property (Relationships) Act 1976

In *Van Daalen v Thorn* [2021] NZFC 10149 the Court by consent ordered release of money from a KiwiSaver scheme. This implemented a s 21A agreement between the parties. See [18.38].

Chapter 18 — Jurisdiction, orders and implementation — grounds for occupation

In *Domazet v Domazet* [2019] NZFC 3476, the Judge did not consider that an occupation order was appropriate, but he allowed the mother to remain in possession until the end of the children's school year to avoid their education being disrupted. See [18.70].

