

Update

Fisher on Relationship Property

November 2022 — Service 101

Case commentary

Chapter 1 — Nature of relationship property — form of proceedings immaterial — agreements — adjustment when each partner owned home at date relationship began — s 16, Property (Relationships) Act 1976

In *Whinery v Niu* [2022] NZFC 5711 the parties contracted out of the Property (Relationships) Act 1976. The man argued that s 16 (where there are two potential family homes) applied despite the agreement. Judge Burns relied on s 4 and the nature of the Act as a code. The Act, including s 16 applied, unless the parties had specifically contracted out of s 16, which they had not. See [1.24].

Chapter 1 — Nature of relationship property — form of proceedings immaterial — breach of building contract — jurisdiction of Court

In *Kake v Napier* [2022] NZHC 2395, a woman sued her de facto partner for breach of a building contract. The District Court Judge held that the claim had to be decided by the Family Court under the Property (Relationships) Act 1976. Campbell J reversed this, holding that the District Court had jurisdiction, although it may have to apply the substantive rules of the 1976 Act. See [1.24].

Chapter 11 — Classification of property — agreed relationship property — s 8(1)(j), Property (Relationships) Act 1976

In *Fox-Spencer v Stuart* [2022] NZHC 1855, during his lifetime a husband transferred funds which were his separate property to a bank account jointly owned by him and his wife. At a later date, he transferred \$1,000,000 from that joint bank account to a term deposit account in his wife's sole name. The Court ruled that the funds transferred from the joint bank account were relationship property. See [11.34].

Chapter 12 — Division of relationship property — exercise of discretion — adjustment when each partner owned home at date relationship began — s 16, Property (Relationships) Act 1976

The discretion under s 16 of the Property (Relationships) Act 1976 may be exercised even though the parties have entered into a contracting out agreement if that agreement does not expressly exclude the operation of s 16: *Whinery v Nui* [2022] NZFC 5711. See [12.94].

Chapter 12 — Division of relationship property — exercise of discretion — adjustment when each partner owned home at date relationship began — s 16, Property (Relationships) Act 1976

In *PT v S* [2021] NZHC 2399 where, in the exercise of the broad discretion under s 16 of the Property (Relationships) Act 1976, 50% of the value of the disputed property was included in the relationship property pool. See [12.94].

Chapter 18 — Jurisdiction, orders and implementation — property division — valuation — s 33, Property (Relationships) Act 1976

In *Munro v Senior* [2022] NZHC 2103, Tahana J emphasised the ancillary nature of s 33. In that case, an attempt to get a valuation updated fell outside the scope of s 33, the Family Court being “functus officio”. See [18.27].

Chapter 18 — Jurisdiction, orders and implementation — sale order — occupation order

In *Moon v Moon* [2020] NZFC 2960, the Court had earlier made a sale order in relation to the family home. In the later proceedings, the sale order was discharged and replaced with one that gave the wife occupation for the purpose of implementing a sale. The husband had “procrastinated and prevaricated”, causing unjustified delays. See [18.32] and [18.70].

Chapter 19 — Proceedings under the Property (Relationships) Act — personal representative of deceased spouse or partner — distribution of estate after choice made but before proceedings commenced — s 72, Property (Relationships) Act 1976

Where a surviving spouse or partner has elected option A, the personal representative cannot distribute the estate until the surviving spouse or partner has applied for division of relationship property, or 6 months have passed from either the date of death (for a small estate) or the date of grant of administration, whichever happens first: *Porter v Fordham* [2021] NZHC 3445. See [19.8].

Chapter 19 — Proceedings under the Property (Relationships) Act — personal representative of deceased spouse or partner — time limits for commencing proceedings — s 90, Property (Relationships) Act 1976

Section 90 of the Property (Relationships) Act applies when proceedings are brought by the personal representative of the deceased spouse or partner: *Smith v Velekof* [2022] NZHC 386. Section 90 governs the time limits for the commencement of such proceedings. See [19.8].

Chapter 19 — Proceedings under the Property (Relationships) Act — onus of proof — adjustment when each spouse or partner owned home at date relationship began — s 16, Property (Relationships) Act 1976

In *PT v S* [2021] NZHC 2399 where the Court said that the exercise of the discretion provided in s 16 must be done in a principled manner, noting that the ultimate object of s 16 is to compensate for the inclusion of the home of only one partner or spouse in the property pool. See [19.27].

Chapter 19 — Proceedings under the Property (Relationships) Act — onus of proof — effect of misconduct on spouses or partners — s 18A, Property (Relationships) Act 1976

Positive evidence should be adduced if a party proposes to allege that there has been gross or palpable misconduct significantly affecting the extent of the value of relationship property. The threshold is summarised in *Hewson v Deans* [2020] NZHC 1465, [2020] NZFLR 262. See [19.27].

Chapter 19 — Proceedings under the Property (Relationships) Act — onus of proof — effect of misconduct on spouses or partners — s 18A, Property (Relationships) Act 1976

In *Strong v Gross* [2020] NZFC 8075 it was accepted that the respondent had gambled

two thirds of the relationship property pool. In the circumstances of that case Judge Cook ordered that the amount dissipated be reintroduced to the property pool with orders then made for equal division. See [19.27].

Chapter 19 — Proceedings under the Property (Relationships) Act — extension of time for filing — r 132, Family Court Rules 2002 — application for rehearing — r 209, Family Court Rules 2002

In *K v K* [2021] NZHC 1743, [2021] NZFLR 489 Walker J noted that there is nothing in the wording of r 132 of the Family Court Rules 2002 which suggests that it should not apply in respect of a rehearing application under r 209 of the Family Court Rules 2002. See [19.37A].

Chapter 19 — Proceedings under the Property (Relationships) Act — costs on appeal — mixed success

In *Blake v Blake* [2022] NZHC 594 the High Court recently considered the issue of costs on appeal where there was mixed success of the parties involved. Whata J concluded that Mrs Blake was the successful party, however, in light of the mix of outcomes, Mrs Blake was awarded scale costs as sought, but reduced by 35 per cent. See [19.41] and [19.48].

