

Update

Fisher on Relationship Property

November 2023 — Service 104

Legislative amendments

Natural and Built Environment Act 2023 No 46

This Act amended on 24 August 2023:

- s 3 of the Joint Family Homes Act 1964

Family Court (Family Court Associates) Legislation Act 2023 No 25

This Act amended on 6 October 2023:

- ss 25, 37, 40, 42, 43 of the Property (Relationships) Act 1976

Case commentary

Chapter 1 — Nature of relationship property — jurisdiction of Family Court — s 141, Trusts Act 2019

In *Kruize v Kruize* [2022] NZFC 4893, the ex-partners who were trustees were replaced via s 141 of the Trusts Act 2019 by an independent trustee because of the conflict and dysfunctional relationship between them. See [1.36], [18.27] and [18.37].

Chapter 1 — Nature of relationship property — jurisdiction of Family Court — s 141, Trusts Act 2019

In *Masters v Masters* [2022] NZFC 4043, orders were needed under both the Trusts Act 2019 and the Companies Act. As the powers under s 141 of the Trusts Act 2019 are not replicated in the Companies Act, the case was transferred to the High Court. See [1.36], [18.27] and [18.37].

Chapter 1 — Nature of relationship property — agreements to defeat creditors void — s 47, Property (Relationships) Act 1976

In *Purucker v Huebler (No 3)* [2023] NZHC 2246, [2023] NZFLR 334 a property agreement made in Germany in 1994 was updated following a purported separation in 2018 and 2019 (it looked as though the marriage was in fact continuing). The wife had been convicted of theft and was being sued by a person she stole from. Isac J ruled that the agreement contained a grossly disproportionate division in favour of the husband that did not take account of the wife's contributions over 25 years. There was "an unavoidable inference" that the transfer of funds and the separation agreement were intended to defeat creditors. The agreement and dispositions were void under s 47. See [1.48].

Chapter 4 — Trusts — general power of appointment — whether consistent with valid trust

In *Cooper v Pinney* [2023] NZCA 62, [2023] 2 NZLR 455, [2023] NZFLR 20 the majority of the Court of Appeal held that Mr Pinney having a general power of

appointment was inconsistent with the existence of a valid trust. They concluded that the powers he had in the MRWT were not so extensive as to amount to a general power of appointment which was “property” (“any right or interest”) for the purposes of the Property (Relationships) Act 1976. He was not able to deal with the trust assets as his own and was constrained by fiduciary duties when exercising powers in his own favour. See [4.3].

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

In *Nadan v Sharma* [2022] NZHC 2553 the wife’s failure to comply with a judgment made from an arbitral award resulted in the removal of both parties and replacement with an independent trustee. The trustees were at an impasse and the order was necessary so orders removing them under s 112 of the Trusts Act 2019 and replacing them under s 114 were made. See [4.51].

Chapter 4 — Trusts — constructive trusts imposed upon express trusts

In *Chignall v Keane* [2022] NZHC 2566 the de facto couple each had trust structures and reasonably separate finances. Mr Keane’s trust purchased a property where the parties would be living. When his trust had insufficient funds to build the house Ms Chignall advanced \$200,000 to the cost. The evidence for Ms Chignall was that this was to be on the basis that she would have a 20% interest in the property. Mr Keane said that the funds were loaned. The Court accepted Ms Chignall’s claim and ordered the Keane Trustees to pay her an amount that was 20% of the value of the property. See [4.53].

Chapter 6 — Variation of agreements and trusts on dissolution — discretion under s 182 of the Family Proceedings Act 1980 — unequal contributions to purchase of properties within trust

In *Zhou v Lassnig* [2022] NZHC 2475, [2022] NZFLR 430 the parties were in a short duration marriage. They settled a trust to purchase properties and made unequal contributions to the purchase. Mr Lassnig advanced \$167,000 to the deposit and Ms Zhou \$1,211,000. The Family Court held that after the payment of the loan accounts (the parties’ separate property), the balance of the equity should be divided equally. On appeal, instead of an equal sharing after repayment of advances the High Court substituted a 60/40 resettlement with a payment of 40% to Mr Lassnig. See [6.15].

Chapter 6 — Variation of agreements and trusts on dissolution — discretion under s 182 of the Family Proceedings Act 1980 — occupation rent

K v K [2022] NZHC 3123, [2022] NZFLR 624 illustrates the types of orders that can be made to give effect to s 182 of the Family Proceedings Act 1980 including as to s 112 of the Trusts Act 2019 and compensation for the occupation of the trust owned home. Compensation for occupation rent as part of the exercise of discretion is clearly a means of addressing the difference between dissolution and continuation of the marriage and recognises in the s 182 context the benefits to the occupant spouse. See [6.15].

Chapter 6 — Variation of agreements and trusts on dissolution — discretion under s 182 of the Family Proceedings Act 1980 — parties’ expectations

In *Fleury v Fleury* [2021] NZFC 9116, [2022] NZFLR 887 Judge Muir declined to split the trust unequally in the wife’s favour as she had an expectation of being able to accommodate herself. The Court found that the parties’ expectation was for the trust assets to be equal. See [6.17].

Chapter 13 — Economic disparity — s 15, Property (Relationships) Act 1976

In *Beach-Ward v Ward* [2022] NZHC 2693, [2022] NZFLR 522 the High Court dismissed an appeal by a wife seeking a higher amount than awarded to her for income disparity. In a subsequent decision, *Beach-Ward v Ward* [2023] NZHC 1958, the High Court declined an application to the Court of Appeal for leave to appeal against the dismissal of her appeal to the High Court. See [13.4].

Chapter 16 — Changes after separation — date at which value of property to be determined — s 2G, Property (Relationships) Act 1976

In *Munro v Senior* [2022] NZHC 2103, [2022] NZFLR 945 the High Court upheld the decision of the Family Court to hold the parties to agreement to adopt valuations from years before the date of hearing. See [16.13].

Chapter 16 — Changes after separation — date at which value of property to be determined — s 2G, Property (Relationships) Act 1976

Meads v Muldrew [2021] NZHC 1864 was an unsuccessful attempt to value the home as at the date of appeal; there was no evidence of newer value and no manifest injustice. See [16.13].

Chapter 16 — Changes after separation — date at which value of property to be determined — s 2G, Property (Relationships) Act 1976

There is therefore a presumption in favour of a hearing date valuation; the onus is on any party seeking to establish the contrary: *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293. See [16.13].

Chapter 16 — Changes after separation — contributions to trust property — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

Contributions to a family home held in trust (and therefore trust property and not relationship property) do not fall within ss 18 and 18B: *Meo v Meo* [2021] NZHC 1601 See [16.22].

Chapter 16 — Changes after separation — proportion of value of life insurance policy attributable to relationship — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

In *Re Ebert* [2022] NZHC 2485 life insurance was valued at the separation date; the wife was the sole contributor to the policy post-separation, so s 18B did not apply, and she later died; the policy only had value upon her death; the proceeds of the policy held to be her separate property. See [16.24].

Chapter 16 — Changes after separation — compensation for contributions not leading to increase in net value — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

In *Bradford v Te Hei* [2021] NZHC 3485, [2021] NZFLR 649 there were compensable monetary contributions that had no effect on the net value of relationship property, such as insurance and rates payments. See [16.24A].

Chapter 16 — Changes after separation — compensation for dissipation of relationship property after separation — s 18C, Property (Relationships) Act 1976

In *Wylie v Wylie* [2019] NZHC 2638 a spouse's possible dissipation by personal expenditure using company funds was more than offset by that spouse's post-separation efforts in the business. See [16.25].

Chapter 16 — Changes after separation — sustenance of separate property after separation — s 17, Property (Relationships) Act 1976

A material connection between the contributions advanced by a claimant and the maintenance/preservation of the property's condition, existence or value is required: *P v S* [2019] NZHC 2608, [2019] NZFLR 448. See [16.26].

Chapter 16 — Changes after separation — sustenance of separate property after separation — s 17, Property (Relationships) Act 1976

In *Preston v Preston* [2019] NZHC 3389 at [132] the wages received by the wife for the work she said was compensable sustenance, and other benefits from the separate property business, were factors offsetting her s 17 claim (appealed on other grounds: *Preston v Preston* [2020] NZCA 679, [2020] NZFLR 696; and *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651, [2021] NZFLR 304). See [16.26].

Chapter 16 — Changes after separation — other statutory remedies — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

Other provisions in the Act or other legislation may provide a more appropriate avenue for remedy than s 18B for these contributions: *Little v Little* [2022] NZHC 601, [2022] NZFLR 316. See [16.29].

Chapter 16 — Changes after separation — occupation of family home post separation — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

There is jurisdiction to order one party to compensate the other for the former's post-separation occupation of the family home: *Little v Little* [2022] NZHC 601, [2022] NZFLR 316. See [16.30].

Chapter 16 — Changes after separation — occupation of family home post separation — occupation rent — compensation for contributions made after separation — s 18B, Property (Relationships) Act 1976

In *WL v AJ* [2023] NZHC 703 (occupier's payments towards mortgage, rates and insurance and work on property approximately balanced out non-occupier's claim for occupation rent); and see similarly *Sutton v Bell* [2020] NZHC 1557. See [16.30].

Chapter 16 — Changes after separation — income protection policy — date at which value of property to be determined — s 2G, Property (Relationships) Act 1976

The value of relationship property entitlements under an income protection policy was assessed at separation where the insured partner retained payments post-separation: *Greaves v Baldwin* [2019] NZHC 3390, [2019] NZFLR 473. See [16.30] and [16.37.1].

Chapter 16 — Changes after separation — conversion of separate property to relationship property — s 9(4), Property (Relationships) Act 1976

The description of purpose and function of s 9(4) in *Thompson v Thompson* [2014] NZCA 117, [2014] 2 NZLR 741, [2015] NZFLR 150 remains sound and cited with approval in *Goldstone v Goldstone (as administrator of the estate of Reece Clive Goldstone)* [2021] NZCA 664, [2021] NZFLR 883. See [16.38] and [16.39].

Chapter 18 — Jurisdiction, orders and implementation — extension of time — s 24, Property (Relationships) Act 1976 — right of appeal to High Court — s 39, Property (Relationships) Act 1976

A decision to grant an extension is not an “order” for the purposes of allowing an appeal under s 39. An “order” under the Act must “directly relate to – or have substantive

effect on – the division of relationship property”: *V v V* [2023] NZHC 2758. Contrariwise, Ellis J held that the refusal to grant an extension of time can be appealed because it comes within the phrase “otherwise finally determine the proceedings” in s 39(1)(c). See [18.16].

Chapter 18 — Jurisdiction, orders and implementation — order for sale — s 25, Property (Relationships) Act 1976

In *Liu v Qian* [2023] NZHC 2653, where the parties had been separated for four years and the wife had ignored attempts to discuss or reach an agreement on the division of the property. Campbell J ordered sale with the proceeds divided equally. See [18.32].

Chapter 18 — Jurisdiction, orders and implementation — occupation orders — s 27, Property (Relationships) Act 1976

In *Lindsay v Lamb* [2023] NZFC 8072, [2023] NZFLR 419 Judge Coyle declined to grant occupation through lack of jurisdiction. In that case, the applicant’s partner had died. See [18.69].

Chapter 18 — Jurisdiction, orders and implementation — orders with respect to tenancy — s 28, Property (Relationships) Act 1976 — licence to occupy granted by the trust

Lindsay v Lamb [2023] NZFC 8072, [2023] NZFLR 419 was a failed tenancy order claim. Where the property is held by a trust, a licence to occupy granted by the trustees has been held not to be sufficient. A licence to occupy cannot be classified as a tenancy. See [18.73] and [18.75].

Chapter 18 — Jurisdiction, orders and implementation — order for interim distribution — s 25(3), Property (Relationships) Act 1976

In *J v L* [2023] NZHC 2434, [2023] NZFLR 249 Paul Davison J allowed an interim distribution in favour of the wife because the parties, who were Chinese residents with property in New Zealand, had a daughter studying at university in Auckland. The wife had been paying the daughter’s university and living expenses out of borrowings. The amount of the interim distribution was well less than the wife’s expected relationship property entitlement and was not going to prejudice the husband. See [18.90].

Chapter 18 — Jurisdiction, orders and implementation — rights in personam — interest — costs

Under s 20 of the Interest on Money Claims Act 2016, interest may not be granted “on costs awarded to a party for a period before the date when the costs are awarded” noted in *Price v Price* [2022] NZFC 1389 where Judge de Jong was careful to separate costs from the substantive money judgment. See [18.100].

Chapter 19 — Proceedings under the Act — parties — spouses or partners — polyamorous relationships

The Supreme Court has upheld the Court of Appeal’s ruling that the Act does apply to polyamorous relationships where such relationships can be subdivided into two or more qualifying relationships: *Mead v Paul* [2023] NZSC 70, [2023] NZFLR 75. See [19.4].

Chapter 19 — Proceedings under the Act — protest to jurisdiction — s 4(1), Property (Relationships) Act 1976

The issue before the High Court in *Lobb v Ryan* [2023] NZHC 1297 was the scope and application of s 4 of the Property (Relationships) Act. The husband, Mr Lobb, claimed an equitable contribution from his former wife. Ms Ryan filed a protest to jurisdiction.

Walker J determined that the Property (Relationships) Act covers the same ground as the rules and presumptions of equitable contribution on which Mr Lobb relied. Walker J therefore held that the remedy is one which the Family Court is not only empowered to make under the Act but, according to the legislative regime, may only be brought under the Act because the Act takes the place of the rules and principles of equitable contribution. See [19.14].

Chapter 19 — Proceedings under the Act — application to strike out parts of affidavit — irrelevant or prejudicial evidence

In *An v Feng* [2023] NZFC 7210, [2023] NZFLR 170 Judge Muir struck out certain paragraphs of Ms An's affidavit on the basis that it was irrelevant prejudicial evidence where its principal purpose appeared to be to paint the opposition in a bad light. Judge Muir went on to comment that the inclusion of very lengthy documents that were not directly relevant would unfairly prejudice the proceeding and needlessly prolong it. See [19.33A].