EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2022-004-000128
FAM-2021-004-000851
FAM-2023-004-000337
[2024] NZFC 6499

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[MONA NYGAARD] Applicant
AND	[OSCAR NYGAARD] Respondent

Hearing:	7–10 May 2024 held in Newmarket Courtroom 01
Appearances:	J Hawker and K Martin for the Applicant B Snedden and R Huang for the Respondent
Judgment:	4 October 2024

RESERVED JUDGMENT OF JUDGE KEVIN MUIR

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[1] [Mona Nygaard] and [Oscar Nygaard] were in a relationship for 26 years and were married for over 21 years. Their son [Jonas] was 16 when Mr [Nygaard] insisted his wife leave the family home in November 2020. The home was owned by a Trust of which they were both trustees and beneficiaries with [Jonas] as the final beneficiary. In July 2021 [Jonas] was also excluded from the family home by his father. Mr [Nygaard] remained in occupation of the family home to their exclusion until the property was sold in April 2023. From January 2022 his new partner lived in the home with him.

[2] At the date of separation, the most valuable relationship property asset was a [company], [("the company")]. Mr [Nygaard] was the sole director and shareholder, but the company had been established during the parties' relationship with significant support and assistance from Mrs [Nygaard]. In the opinion of her expert, the value of the relationship property interest in [the company] at the date of separation was $1,172,749. As a result of a series of decisions which Mr [Nygaard] made after separation the company ceased trading. He moved to Australia with his new partner in February 2023. It is common ground that the shares in [the company] are now valueless. The pool of relationship property that remains is insufficient to meet a claim under s 15 of the Property (Relationships) Act 1976 (the PRA) that Mrs [Nygaard] had intended to pursue.

[3] Mrs [Nygaard] says that Mr [Nygaard] has deliberately diminished the value of the parties' interests in [the company]. She seeks compensation under s 18C of the PRA or alternatively, seeks to have the [the company] interests valued as at the date of separation under s 2G.

[4] Mrs [Nygaard] says that Mr [Nygaard] ought to compensate her for his exclusive occupation of the family home. She says that as well as excluding her and [Jonas] from the family home there were other decisions that Mr [Nygaard] made, which were in breach of his fiduciary duties as a Trustee and his obligations to the beneficiaries of the [Nygaard] Family Trust.

[5] Mrs [Nygaard] is asking the Family Court to review decisions that Mr [Nygaard] made in relation to Trust assets. She argues that the Court has

jurisdiction under s 141 of the Trusts Act 2019 to review Mr [Nygaard]'s acts as a Trustee under ss 126 and 127 of the Trusts Act.

[6] The compensation that Mrs [Nygaard] seeks from the review under the Trusts Act includes approximately $129,000 which Mr [Nygaard] withdrew from the Trust's flexible mortgage facility in January 2020 after an argument between the parties during a family holiday. One impact of that withdrawal was to drawdown all the loan funds that were available leaving Mrs [Nygaard] without access to any money so that she and [Jonas] were *"stranded"* in Canada for several days. Mr [Nygaard] says that the funds were legitimately applied by him to relationship or company expenses and that he had implied authority to draw on that Trust facility without the consent of his co-trustees.

[7] Mrs [Nygaard] is also asking that the Court exercise its discretion under s 182(1) of the Family Proceedings Act 1980 (the FPA) to ensure that she is justly compensated for the financially adverse steps she says Mr [Nygaard] has taken.

[8] The principal asset of the Trust – the family home – sold for a net price of $3,131,883.64 in April 2023. After several interim distributions totalling $684,780.26 to Mr [Nygaard] – (some of which was used by Mr [Nygaard] to meet his maintenance obligations to Mrs [Nygaard]) and $154,887.50 to Mrs [Nygaard] – the balance held on Trust is now approximately $2,303,385 plus any interest accrued.

[9] There are several significant subsidiary issues. Mr [Nygaard] says he should be compensated for relationship debts he will be responsible for, including a liability to pay dividend withholding tax of $153,650 and income tax of $184,381.07.[1]

[10] Mr [Nygaard] had a valuable collection of clothing – bomber jackets, high-end sneakers and the like – which Mrs [Nygaard] says was worth $200,000. The parties are unable to agree to what has happened to that clothing and whether Mr [Nygaard] should account for it as an item of relationship property.

[1] Mrs [Nygaard] says that the liability for dividend withholding tax is factored into her expert's valuation of the interest and email is a company liability, not a personal liability.

[11] Mr [Nygaard] disposed of tools and materials which he accepted in cross-examination were worth approximately $150,000, by giving them to a former employee. Mrs [Nygaard] says she is entitled to compensation and that they were relationship property. Mr [Nygaard] says that they were an asset of [the company].

[12] The parties are unable to agree on who was responsible for the chattels in the family home at the date the property was sold and which of them should receive compensation for their value.

[13] The total compensation Mrs [Nygaard] seeks significantly exceeds the money that Mr [Nygaard] might receive if the funds held for the Trust were divided equally between them.

[14] Mr [Nygaard] is also asking the Court to vary a final maintenance order that Judge Burns made on 14 February 2023. Mr [Nygaard] is required to pay maintenance until relationship property issue are resolved. Mrs [Nygaard] opposes that application saying there are no new circumstances which justify Judge Burns' decision being revisited – she alleges the application for review under s 99 of the FPA is a camouflaged appeal which the Court has no jurisdiction to grant.

The Issues

Issue 1 – What was the Value of the Shares and the Parties Total Interests in [the Company] at the Date of Separation?

[15] Mrs [Nygaard]'s expert, Mr Bassett, has approached the valuation exercise based on the capitalisation of future maintainable earnings. He assesses the value of the shares at separation at $3,305,964. From that he deducts a shareholder overdrawn current account of $2,132,215 to arrive at a total net interest of $1,172,749. I note his calculation here is incorrect. The resulting sum should be $1,173,749 – the figure I will adopt.

[16] Mr [Nygaard]'s expert, Mr Moriarty, considers a net asset valuation approach to be the more reasonable methodology to value [the company] business. He did not

provide a valuation for the separation date in November 2020. He gave an indicative estimated value in May 2022 of $64,000. There is consensus that [the company] has no current value.

Issue 2 – Section 18C Compensation or Section 2G Valuation Date Change – [the Company] Shares

[17] Mrs [Nygaard] says that the value of the relationship property issues in [the company] were materially diminished in value by the deliberate actions of Mr [Nygaard] after separation. The total assets of [the company] in the balance sheet for 2019 were $2,157,000. For 2020 they were $2,441,000. Net income for 2019 was $974,000 and for 2020 was $920,000. With net profit after tax being $534,000 for 2019 and $444,000 for 2020.

[18] Net income for the 2021 year was reduced to $1,350,000 with gross profit of $479,999 and net profit after tax of $168,670. Net assets in the balance sheet were $2,195,000 and they included an overdrawn shareholder current account of $2,053,140 which was a debt owed by Mr [Nygaard] to the company.

[19] At least by September 2022 Mr [Nygaard] had made a decision to *"wind down"* the [the company] business because he was embarking on a new business venture with his new partner and intended to relocate to [Australia].[2] Mr [Nygaard] specifically said, "*I was going to ditch the [deleted] business and help [Eve] with her [business], out of pure frustration with the situation back home*".[3] Mr [Nygaard] accepted that he had told Mrs [Nygaard] during the relationship that in the event of a separation he would do what he could to create debt within [the company] and the Trust so that Mrs [Nygaard] would receive nothing if they separated.

[20] Mr [Nygaard] submits that his decision to begin a new relationship and move to Australia does not amount to, nor is it evidence of, a deliberate intention to diminish the value of [the company]. He argues that even though his actions in deciding to cease trading the company and move to Australia were intentional, he was entitled to

[2] Para [22] decision of Judge Burns, 8 November 2022, [2022] NZFC 1146.
[3] Affidavit of Mr [Nygaard], 23 September 2023, para 23.

"*make a lifestyle change following a difficult separation*". He also says the primary cause of the decline in [the company] was a drop in work-flow pre-Covid, during Covid and because of the separation. He says it was not primarily as a result of his decision to relocate.

[21] Alternatively, he says that if his expert's valuation approach is correct and a net asset valuation is adopted, the assets of [the company] were not materially diminished by his decision to stop trading the company and move to Australia.

[22] As an alternative to her claim for compensation under s 18C, Mrs [Nygaard] says that the Court could adopt the separation date valuation for [the company].

Issue 3 – Chattels

[23] Mrs [Nygaard] says that Mr [Nygaard] should account to her for the value of his clothing collection – to which she attributes a value of $200,000 – and for the value of tools and materials, most of which were kept under the family home or in sheds at the family home, to a value of $150,000. She says he should also account to her for the value of household chattels, some of which were left in the family home at the date of sale including some artwork. She says because he had exclusive occupation of the family home to her exclusion from November 2020, it was his responsibility to ensure these articles were secured.

[24] Mr [Nygaard] denies that he has kept his clothing collection. He accepts that he "*gave away*" tools and materials, but says they were assets of [the company]. He does not accept that he should be responsible for compensating Mrs [Nygaard] for chattels that were left in the family home. He says he had already relocated to Australia at the time the sale settled, he had nowhere to store the chattels and he took no steps to collect them, protect them or have them transferred. I need to decide:

(a) the value of the chattels;

(b) what has happened to them; and

(c) whether either party should pay the other compensation.

Issue 4 – Occupational Rent

[25] Mrs [Nygaard] says she should receive just compensation for Mr [Nygaard]'s exclusive occupation of the family home from 9 November 2020 until its sale on 28 March 2023. Awards of occupational rent are commonly made under s 18B of the PRA. Mrs [Nygaard] accepts that there is no jurisdiction to award occupation rent under the PRA because the family home was owned by the Trust.

[26] No current rental appraisals were in evidence. Mrs [Nygaard] relies on a rental contract from estate firm Goodwins,[4] which was prepared but never executed in September 2020 when Mr and Mrs [Nygaard] were considering renting the property during the America's Cup. The draft contract has a gross rental of $4,500 per week including all outgoings and garden maintenance. Mrs [Nygaard] says that would produce a reasonable net after expenses figure of $4,000 per week. She calculates a total "*halved*" compensation of $220,267.50 allowing for 129 weeks of rental and deducting rental which she says was taken into account by His Honour Judge Burns when granting her maintenance. Mrs [Nygaard] says that she ought to be compensated from the net proceeds of sale held on behalf of the Trust as part of the exercise of the Courts discretion under s 182 of the FPA. Alternatively, she says that the Court might order Mr [Nygaard] to reimburse the [Nygaard] Family Trust for the value of his occupation under s 127 of the Trusts Act.

[27] Mr [Nygaard] says the only legal avenues for Mrs [Nygaard] to pursue are either a derivative claim in equity, a claim for breach of trust, or for compensation under s 182. He accepts that a claim for occupation rent has been considered in the exercise of discretion under s 182 and at least one High Court case; *K v K*.[5]

[28] An issue that is relevant to quantum is the effect of the maintenance order that Judge Burns made on 8 November 2022 when he awarded spousal maintenance of $2,500 per week with an additional $1,500 for legal and accounting costs. His spousal

[4] BOD4 at p 980.
[5] *K v K* [2022] NZHC 3123, [2022] NZFLR 624 per Gwyn J.

maintenance order included an allowance for Mrs [Nygaard]'s accommodation expenses, but he recorded:[6]

> "There will need to be an adjustment between the parties in terms of occupation rent to reflect the difference in the standard of accommodation between the parties post-separation but I consider that it is more appropriate for that to be done under s 18B of the PRA rather than spousal maintenance so I am going to take the actual rental cost into account rather than what would be comparative to the standard of living enjoyed by the common household. … I give a clear indication that occupation rent should be paid in this case."

[29] Mrs [Nygaard] concedes that there should be a "*credit*" to Mr [Nygaard] for the rental which was taken into account by Judge Burns when granting maintenance to her – a total of $75,465.

[30] As an alternative route to compensation for Mr [Nygaard]'s occupation of the home to her exclusion, Mrs [Nygaard] argues that the maintenance order might be varied to include an allowance for occupation rent.

Issue 5 – Trusts Act – Jurisdiction and Remedies

[31] Mrs [Nygaard] says that the Court should exercise its jurisdiction under s 141 of the Trusts Act which allows the Family Court to "*make any order or give any direction available* …" under the Trusts Act if the Family Court considers the order or direction is necessary to protect or preserve property or to give proper effect to any determination of the proceeding. Specifically, Mrs [Nygaard] asks the Court to use the power to review trustees' acts, omissions, or decisions under s 126 and the broad remedial discretions given to the Court under s 127(3) of the Trusts Act.

[32] Mrs [Nygaard] says that these provisions might be used to compensate Mrs [Nygaard] – and possibly [Jonas] – for Mr [Nygaard]'s exclusive occupation of the family home.

[33] She also says that Mr [Nygaard] ought to compensate her for the withdrawal of $112,000 from a Trust mortgage facility on 22 January 2020 by Mr [Nygaard].[7]

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[6] Decision of Judge Burns, 8 November 2022 [2022] NZFC 11464 at [25](c).
[7] And other withdrawals made at about the same time to a total of $129,000 approximately.

That withdrawal was made before separation. The effect of the withdrawal was to draw-down the Trust's revolving mortgage facility to its full limit where it remained until the family home was sold. Some of the funds were spent by Mr [Nygaard] on a "*shopping spree*" when he flew to Los Angeles leaving Mrs [Nygaard], [Jonas] and a friend of [Jonas]'s temporarily "*stranded*" in Vancouver for four days until their flight home was scheduled.

[34] Mr [Nygaard] says that he had implied authority to draw on the funds in the Orbit facility for purposes not directly related to the beneficiaries of the Trust. It was frequently used during the marriage as a source of funding for [the company] and frequently received funds from [the company] and/or Mr [Nygaard]. He says that as a matter of law the withdrawals from an overdrawn bank account cannot be traced citing *Re Registered Securities Ltd*.[8]

[35] Mr [Nygaard] also says that the $112,000 drawn on 22 January "*did not leave relationship bank and/or credit card accounts*".[9] Mr [Nygaard] says that withdrawal is reflected in the balance that was in Mr [Nygaard]'s Streamline account at separation of $323,379. Mr [Nygaard] accepts that account balance was an item of relationship property available for division.

Issue 6 – Tax Debts

[36] There is a substantial shareholder current account debt payable by Mr [Nygaard] to [the company]. To clear that debt a dividend would need to be declared and dividend withholding tax of $166,931 would be incurred. Mr [Nygaard] says that contingent liability is a relationship debt which Mrs [Nygaard] should share.

[37] Mrs [Nygaard] argues that the potential dividend withholding tax liability is a liability of [the company] not Mr or Mrs [Nygaard] and that tax liability has been taken into account by Mr Bassett in his share valuation.

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[8] *Re Registered Securities Limited* [1991] 1 NZLR 545 (CA) at 554–555.
[9] Affidavit of Paul Moriarty, 26 September 2022 at 98.4.

[38] Mr [Nygaard] says he has a contingent tax liability of $184,381.07 which will arise when a dividend is declared to clear the current account debt he owes to [the company]. Mrs [Nygaard] says that the "*additional*" tax liability of $184,381.07 only arises because Mr [Nygaard] failed to declare a dividend prior to 1 April 2021 when there was an increase in personal tax rates from 33 per cent to 39 per cent. That was a decision or omission he made after separation, and he ought to bear responsibility for it. Alternatively, she says it is a contingent liability that has not yet arisen and may never arise. If it does it should be classified as a personal debt and not shared. Finally, she would argue that Mr [Nygaard] had deliberately diminished the value of relationship property by failing to declare the dividend before the tax rates changed and she seeks compensation under s 18C if her alternative arguments on this issue fail.

Issue 7 – Section 182 Family Proceedings Act

[39] It is common ground that the [Nygaard] Family Trust is a qualifying nuptial trust and that the Court will need to exercise its discretion in line with the relevant authorities, including *Ward v Ward* and *Clayton v Clayton*.[10] Ultimately, Mrs [Nygaard] seeks orders which resettle the Trust on her, removing Mr [Nygaard] as settlor, trustee, and discretionary beneficiary. She asks that the trust deed be varied to appoint her as the sole remaining settlor with the power to appoint trustees. Mrs [Nygaard] says that if it were not for the dissipation of relationship property by Mr [Nygaard], he would be required to make a total adjustment payment to her of approximately $872,000 under the PRA because of the difference in value between the assets retained by each of them.[11]

[40] She says that Mr [Nygaard] has already received significant financial benefits from the Trust including exclusive rent-free occupation of the family home for two-and-a-half years, capital distributions totalling $673,000, and the use of $112,000 which was withdrawn from the Trust's Orbit account.

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[10] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31; and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590.

[11] Applicant closing submissions, para 138.

[41] Both parties agree that a key purpose for the Trust was to provide comfortable housing for the parties. Mrs [Nygaard] says that [Jonas] cannot expect to receive any further financial benefits from Mr [Nygaard], whether directly or through any Trust that he has control of. In effect, the orders that she seeks would be to leave Mr [Nygaard] with nothing beyond the assets that he has already taken from the Trust or from relationship property.

[42] On Mr [Nygaard]'s calculations of the remaining $2,242,215 approximately. from the sale of the home Mrs [Nygaard] should receive $1,386,054 and he should receive $856,161.

[43] I have to decide how I should exercise my discretion under s 182 so as to "*… remedy the consequences of the failure of the promise (a continuing marriage) on which the settlement was made*".[12] A question that I have to answer is to what extent s 182 can or should be utilised to compensate or adjust for reasonable expectations or rights that arise under the PRA or as a consequence of a breach of Mr [Nygaard]'s fiduciary obligations in relation to the assets of the Trust.

Issue 8 – Section 99 Family Proceedings Act – Application to Vary or Suspend Maintenance Order and/or Remit Arrears

[44] Section 99 of the FPA allows the Court to discharge, vary or suspend the maintenance order where the Court "*is satisfied that it ought to do so having regard to the principles of maintenance set out in sections 62–66 and in section 81 [of the Family Proceedings Act]*".[13] The maintenance order Judge Burns made on 8 November 2022 requires Mr [Nygaard] to pay Mrs [Nygaard] $4,000 per week including $1,500 per week as a contribution to legal and accountancy costs until such time as relationship property issues are resolved. Mr [Nygaard] says he cannot afford to pay any part of the maintenance awarded to Mrs [Nygaard]. He does not have sufficient capital to pay the arrears. He has moved to Australia, has an infant son with another child expected and now has a mortgage over an apartment that he has bought with his new partner.

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[12] *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651 at [32].
[13] Section 99(1) of the Family Proceedings Act 1980.

[45] Mrs [Nygaard] says that there has been no change in circumstances that justifies varying the existing order.[14]

[46] Mrs [Nygaard] says that the circumstances that Mr [Nygaard] cites in support of his alleged inability to pay maintenance were matters that were known to him at the time of the hearing before Judge Burns and that the majority of those circumstances were taken into account when Judge Burns issued his decision, so there is no relevant change in circumstances and no justification for the order to be varied. She seeks payment of the maintenance arrears due which were $136,000 on 17 May 2024.

Matters Agreed or Not in Dispute

[47] The parties agree that Mrs [Nygaard] will retain her KiwiSaver account with a value of $88,080. Mr [Nygaard] will retain his KiwiSaver account with a value of $90,641.

[48] Mr [Nygaard] had initially argued that a significant credit balance in his ASB account at separation had been spent on renovations to the family home. Mrs [Nygaard] disputed the validity of the many of the invoices he produced in support and disputed the timing of the alleged work. Mr [Nygaard] has now conceded that the $323,378.86 that was in his ASB suffix 00 account at separation should be attributed to him as an item of relationship property he has retained. Mrs [Nygaard] had $5,346 in her ASB suffix 00 account which should be attributed to her. Adjustments will be required.

[49] It is agreed that $50,000 which is owing to Mrs [Nygaard]'s mother, [Gina Bell], is a relationship debt. Mr [Nygaard] has conceded that should be paid from the funds that are held by the Trust from the sale of the home before further distribution.

[50] Mr [Nygaard] has received $684,780.26 as an interim distribution from the Trust funds held on deposit.[15] Much of that has been applied to meet his spousal

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[14] *Clayton v Clayton (maintenance payments)* [2015] NZFLR 501 (HC), and *Frost v Frost* (1989) 5 FRNZ 655 (HC).

[15] Figures taken from respondent's relationship property.

maintenance obligations to Mrs [Nygaard]. Mrs [Nygaard] has received $154,887.50 by way of interim distribution.

[51] Mrs [Nygaard] retained a Range Rover Sport motor vehicle with a value of $53,600.[16] Mr [Nygaard] retained artworks by Karl Maughan and Martin Poppelwell with a total value of $8,700.

[52] The purchaser of the home has agreed to pay $9,000 for certain furniture that was left in the home. The money has not been paid. The parties do not agree which of them should be credited with that as an asset.

[53] Mr [Nygaard] agrees Mrs [Nygaard] should receive a credit for $6,469.50 she paid to clear rates arrears on the home after separation.

[54] The parties agree that ASB Visa debts as at separation of $876 and $244 were paid for by Mr [Nygaard] and he should be compensated.

Issue 1 – [the Company] – Valuation

[55] Because there is consensus that the value of relationship property interest in [the company] (shares, shareholder current account and other interests) is now nil, I will first decide what the value of that asset was at the date of separation.

[56] [The company] was incorporated in 2006. The parties had returned to New Zealand from living in the UK and Mr [Nygaard] was initially employed as a [occupation deleted]. The [company] bears [Oscar Nygaard]'s initials as part of its name. [Jonas] was less than three years old when the company was established. Mrs [Nygaard] was working full time but was primarily responsible for the care of [Jonas].

[57] The success of [the company] had a connection to Mrs [Nygaard] and her family. Much of the initial work that was referred to [the company] came from family

[16] Although at one point Mr [Nygaard] "recovered" the car, taking it without notice to Mrs [Nygaard] – he claimed he did it because it was not registered in her name, and she was allowing uninsured people (presumably [Jonas]) to drive it. She said this caused her hardship including having to bike to work. The car was eventually returned to her by agreement at the time of a maintenance hearing.

friends, or family contacts. For the first 10 years of [the company]'s existence Mrs [Nygaard]'s father did the accounting work for the company without remuneration.

[58] There is no doubt that Mr [Nygaard] worked very hard in the company and there is no doubt that it had built a good reputation with substantial and valuable work available to it. By the time of separation Mr [Nygaard] had been "*off the tools*" for several years. The company employed no staff. Instead, it had a significant roster of loyal [subcontractors] – captive contractors – and good connections to third-party trade contractors. The profit and loss statements for [the company] disclose no salaries other than directors' salaries. $150,000 was being paid to Mr [Nygaard] by the date of separation.

[59] A lot of the work that [the company] carried out was [details deleted]. The family home at [address deleted — address 1] was something of a "*[detail deleted]*" for [the company]. The parties had received the benefit of significant work by [the company] contractors over the years and Mr [Nygaard] was justly proud of the quality and finish of [the work]. A carport at the home had been converted for use as an office for [the company] and an administration/accounting assistant, who was another contractor, worked from those premises.

[60] Mrs [Nygaard] was not actively working for [the company]. I accept her evidence that she was not consulted by Mr [Nygaard] about either day to day or strategic decisions concerning [the company]. Part of the dynamic of power and control that existed between Mr [Nygaard] and Mrs [Nygaard] included his occasionally insisting that what was happening with [the company] was none of her business. For example, she was specifically excluded from access to [the company] "*office*" at the home.

[61] [The company] did not advertise. It relied on word of mouth and the quality of the work that it had already carried out as well as referrals from Mr [Nygaard]'s family and friends as well as the family and friends Mrs [Nygaard]'s whanau. At about the time of separation, [the company] was completing a very significant [work] project with a total cost of several million dollars.

Mr [Nygaard]'s Position – [the Company] Valuation

[62] Mr [Nygaard]'s expert accountant, Mr Moriarty, did not provide a written opinion as to the value of [the company] at separation date as part of his affidavit evidence. He was instructed instead to comment on the valuation method adopted by Mrs [Nygaard]'s expert accountant Mr Bassett. He considered that the approach Mr Bassett took which was a capitalisation of future maintainable earnings (CFME) was incorrect in principle. He considered that the future maintainable earnings (FME) Mr Bassett adopted at $451,381 was derived without regard to trading conditions or the trading outlook. He considered that the earnings before proprietor's remuneration, interest, taxes and depreciation (EBPITD) Mr Basset adopted was based on ventures that were not comparable to [the company]. In Mr Moriarty's opinion, Mr Bassett's valuation multiple was applied to an incorrect level of earnings, and he asserted that Mr Bassett had not undertaken any cross check or *"reasonableness check"* of his conclusion of value. Ultimately, he did not consider that a reasonable and informed individual would transact at the value Mr Bassett advanced.

[63] Mr Moriarty considered the net asset valuation approach was the more reasonable methodology, principally because:

(a) Earnings were declining rapidly due to economic conditions and a projection of [the company]'s FME could not be undertaken with sufficient confidence for a CFME valuation to be adopted.

(b) Mr [Nygaard]'s reputation and personal importance to the business meant that any goodwill would be personal to him and difficult or impossible to transfer.

(c) The only goodwill in the business capable of transfer would be the value of work in progress; and

(d) He asserted there were no barriers to entry for a prospective business purchaser to simply establish their own business and commence trading for a minimal cost.

[64] Although Mr Moriarty did not give his opinion of the value of [the company] at separation date he gave a value as at May 2022.[17] He adopted the reported net assets including $90,000 of goodwill as shown in the financial accounts as fair value.

[65] Mr Moriarty considered that the income stream of [the company] was not sustainable without Mr [Nygaard], with or without appropriate restraints of trade or vendor assistance agreements in any Agreement for Sale and Purchase. He did not believe that the profitability would follow the purchaser. Mr Moriarty had not interviewed any of the existing customers or any past customers as part of his valuation exercise. His inquiries were limited to an interview of Mr [Nygaard].

[66] In his closing submissions Mr [Nygaard] said he relied on the High Court decision of Dobson J in *[S] v [S]* and produced a table of comparisons between the [business], that the husband operated in that case, and [the company].[18]

[67] Mr [S] was a sole trader. He was the only working employee of the company and he did not have any captive subcontractors or other staff of any kind. His business consisted of agreeing on a price for motor vehicle trade-ins with a dealer and (generally immediately) securing a buyer for the on-sale of the vehicle at a higher price.

[68] His business did not need any tools or premises. There was a significant amount of mutual trust involved as vehicles were often brought sight unseen. There is no doubt that Mr [S]'s relationship with people in the motor vehicle trade was the principal asset of [the business].

[69] Following cases such as *Briggs v Briggs* a distinction has long been drawn between personal goodwill – which has generally been disregarded when valuing relationship property interests in a business or undertaking – and tradeable goodwill which represents the value an informed purchaser would pay to receive the benefit of future maintainable earnings over and above a reasonable salary for the work the proprietor would carry out.[19] In *Briggs* Thorpe J adopted a definition of personal

[17] It may have been based on a mediation date.
[18] *[S] v [S]* [2019] NZHC 3462.
[19] *Briggs v Briggs* (1996) 14 FRNZ 404 (HC) per Thorpe J.

goodwill from the 1995 edition of Canadian Valuation Services which included a review of Canadian and USA cases:[20]

> Personal goodwill is related to the business skills of an entrepreneur, personal contacts built up by individuals in a certain environment, reputations of those engaged in business or in professional undertakings, and so on. Personal goodwill may give rise to so called "excess profits" (or generate a rate of return in excess of that required on net tangible assets), but not be of a transferable nature or possess a market value. To have commercial value, goodwill must be transferable.

[70] The Supreme Court in *Scott v Williams* indicated that it might well be time, in an appropriate case, to review the approach taken to personal goodwill.[21] However, I accept that the law is currently as summarised in *[S] v [S]* by Dobson J.

[71] Having said that, in a relationship property context where personal goodwill has been established entirely during the relationship, and where the division of functions during the relationship has clearly been a factor in enabling the proprietor of the business to establish that personal goodwill, it is understandable that the spouse of the proprietor will view that personal goodwill as a valuable asset created during the relationship which the proprietor spouse is likely to retain. In some cases, s 15 compensation may adequately compensate the claiming spouse by allowing compensation for the disparity in income and living standards between them and the proprietor spouse, but that will not always be the case. This case may be an illustration as [the company] is no longer trading, now has no value, and Mr [Nygaard] may not otherwise be able to meet Mrs [Nygaard]'s s 15 claims.[22]

[72] I will apply the "*conventional approach*" of distinguishing "*personal goodwill"* when analysing the separation date value of [the company], but I am conscious of Glazebrook J's observation in *Scott v Williams*:[23]

> Any valuation methodology chosen should be suitable for the particular business and the particular circumstances. Comparison with other cases should be undertaken with care as the method used, the inputs in the result will have been related to the particular business and to the evidence called in that case.

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[20] *Briggs* at 412.
[21] *Scott v Williams* [2018] 1 NZLR 507 at 277, 330 and 370.
[22] Section 15 requires compensation to be derived from relationship property – s 15(3)(a) and (b).
[23] *Scott v Williams (supra)* per Glazebrook J at [138].

[73] There are key differences between the business in *[S] v [S]* and the business of [the company] which I find make Mr [Nygaard]'s reliance on that case as a point of comparison inappropriate.

[74] Mr [S] not only had no employees, but he also had no "*captive subcontractors*". Not only was he the only employee of [the business], he was the only worker engaged in [the business] – he was the only person engaged in any way in producing income for [the business]. In contrast Mr [Nygaard] was heavily reliant upon his skilled and experienced subcontractors, on the quality of their workmanship and on their skills and the day-to-day management of individual projects.

[75] Mr [S] had been in the auto business for 30 years by the date of hearing. His extensive experience in the auto industry pre-dated the relationship. All of Mr [Nygaard]'s relevant experience and hence [the company]'s reputation was developed during this marriage.

[76] The success of Mr [S]'s business was entirely dependent upon his personal skills. He needed to make accurate and rapid assessments of the value that he could extract from any trade. In contrast the reputation and income of [the company] was largely dependent upon the workmanship it produced and its ability to deliver [business] projects within a reasonable time and at a price that was acceptable to its customers. Once he was off the tools Mr [Nygaard] was dependent upon the people who worked with him and for him.

[77] Mr [Nygaard]'s evidence was that he relied heavily on verbal agreements with clients as did Mr [S], but I do not consider this to be a significant factor in my assessment.

[78] Mr [S]'s company had no business premises. Mr [Nygaard] had a significant part of the company's assets and materials stored at the parties' home. He had tools and equipment such as mitre saws set up in the basement area. His office operated from the family home and the family home was used as a [deleted] – a significant promotional asset for [the company].

[79] Mr [Nygaard] did not make any attempt to sell the business of [the company] after separation. He simply decided that he would not continue trading and ultimately made the decision to move to Australia with his new partner, initially intending to focus on a business [details deleted].

[80] One of his subcontractors, Mr [Bruce], with encouragement from Mr [Nygaard], has incorporated a company and is operating a [business] carrying out [work] in the same sector of the market as [the company] operated. The name of the company, [company 2], also has a three-letter acronym name which are the initials of the proprietor.

[81] Mr [Bruce] was given the bulk of the tools and materials that remained in New Zealand after Mr [Nygaard] had moved to Australia. Mr [Nygaard] accepted that the materials would have had a value of at least $100,000 and the tools at least $50,000. Mr [Nygaard]'s evidence was that he could not afford to store those items nor take them to Australia and was struggling to find someone who could take them. However, a text exchange between Mr [Nygaard] and Mr Mahon included "*There's a load of money you can make from all the items. Everything is chargeable to every client. You'll make a load out of it*."

[82] Mr [Nygaard] accepted that he did not discuss Mr [Bruce] paying for any of the tools. Mr [Nygaard] accepted that Mr [Bruce]'s business was going well. The company is promoting itself through Instagram. With Mr [Nygaard]'s consent it is using photographs of the [Nygaard]'s family home as its promotional material. Other photos and images on the [company 2] Instagram page are also of work that was carried out by [the company] – presumably while Mr [Bruce] was working as a subcontractor with Mr [Nygaard]. Mr [Nygaard] accepts that Mr [Bruce] and his other captive sub-contractors were skilled and competent [professionals], although he had some reservations about their ability to communicate as effectively as he did with [the company]'s client base. He accepted that his staff, particularly his supervisor Mr [Bruce], would have had good connections with the key trade subcontractors.

[83] A key point that Mr [Nygaard], his lawyer, and his expert witness made in relation to a future maintainable earnings valuation approach was that there were "*low*

barriers to entry" – so no incentive for a purchaser to pay to acquire the goodwill or business of [the company]. However, unlike the business in *[S] v [S]* anyone setting up a building company trading in the market that [the company] traded in would need tools, links to suppliers, links to reliable specialist trade subcontractors, a reliable pool of workers particularly skilled building subcontractors to call on, and it would need to establish a reputation for completing quality work. The potential market for the sale of [the company] included Mr [Nygaard]'s subcontractors, particularly his supervisor Mr [Bruce]. Mr [Nygaard] accepted Mr [Bruce] had good connections within the business after his years of working with [the company]. It appears that Mr [Bruce] has acquired and/or attained significant advantages in the form of not only [the company]'s tools and materials but also its reputation and its key contacts and its contractors.

Mrs [Nygaard]'s Position – [the Company] Valuation

[84] Unlike Mr Moriarty, Mr Bassett did carry out a valuation of [the company] at the date of separation. He concluded in his updated valuation that the shares had a value of $3,305,964. Deducting the shareholder overdrawn current account of $2,132,215 he arrived at total net interest of $1,172,749. Mrs [Nygaard]'s "*half share*" was therefore on his calculation $586,874.

[85] For the purposes of his valuation, he adopted a nominal salary for Mr [Nygaard] of $150,000 per annum – an amount that matched the figure that was attributed to Mr [Nygaard] in [the company] accounts for 2019 and 2020.[24] In preparing his original valuation dated 6 May 2024, Mr Bassett took account of [the company] financial statements between 2018 and 2021 in the Xero Management Report to February 2022, assuming that the information supplied was materially accurate, assuming the business would continue as a going concern. He determined that the capitalisation of future maintainable earnings was the most appropriate method. In estimating future maintainable earnings, he relied on an analysis of historic operating results and expectations of future earnings. He cross-checked his assumptions, for example referring to Hayes Salary Guide in determining that "*a top*

[24] The figure was $142,971 in 2021.

of the range salary" of $150,000 per annum was appropriate remuneration for a business the size of [the company].

[86] In choosing a capitalisation multiple to apply, he noted that multiples for small to medium businesses range from 1 to 4. His starting point was to obtain comparable data and he relied on Bizstats Ltd information relating to businesses sold in New Zealand.

[87] The comparable transactions that he used were for wholesalers and distributors of building materials as opposed to building contractors. However, they were businesses of a similar turnover of [the company] operating within the same industry. He adopted a capitalisation multiple of between 1.75 and 2.25 with a mid-range of 2.

[88] He compared the future maintainable earnings using a normalised EBITDA[25] for 2018 to 2021. The 2022 figure was derived from the 11 months trading to February 2022. He apportioned a weighting to each of those trading years ranging from 10 per cent for 2018 to 30 per cent for 2021, arriving at a calculated weighted future maintainable earnings of $451,381.

[89] Following the receipt of Mr Moriarty's report, he corrected his valuation approach as he had inadvertently applied the Bizstats multiple for earnings before proprietors, income, interest, depreciation and tax (EBPIDT) to the EBITDA measure of earnings. It was necessary for him to "*add back*" the market salary allowance of $150,000 so that his "*midpoint*" EBPIDT was $691,214. Applying his multiple of 2, that produced an enterprise value of $1,382,428. The shareholder current account was added in as an asset and the deferred dividend withholding tax liability of $166,931 and a debt were deducted to produce a net equity value of $3,305,964. Deducting the shareholder overdrawn account of $2,132,215 produced a net value of $1,172,749.

[90] Mr Bassett appropriately addressed Mr Moriarty's criticism that his approach had failed to have regard to the impact of Covid-19 on the future earnings of the business. Adopting Stats NZ data, he noted a record number of new home consents issued for the 12 months ended 31 March 2021. A similar trend was revealed for the

[25] Earnings before interest, taxes, depreciation, and amortization.

12 months to 31 March 2022. Other Stats NZ data supported Mr Bassett's conclusion that it was a reasonable assumption [the company] could have continued to produce similar return to a working owner of approximately $691,000. Mr Bassett had cross-checked his assumptions with an experienced business broker and noted that vendors of such businesses could expect a multiple of 2 to 2.5 of EBITDA. He noted it is common that such businesses have a high level of goodwill and a relatively low asset base, which he said was one of the factors for why lower multiples to earnings are applied in the industry.

[91] In his opinion assets-based valuations were often and more appropriately used for businesses with a large portfolio of tangible assets. He did not consider it an approach appropriate for [the company] which was trading profitably, producing a return of approximately $340,000 to the working owner in the year to 31 March 2021 using relatively low value tangible assets.

[The Company] – Analysis

[92] Because Mr [Nygaard] has decided to stop trading [the company], it is not possible to precisely assess the impact of either Covid or any subsequent economic events on [the company]'s business.

[93] I find that the multiple adopted by Mr Bassett is comparatively moderate. The way that he has weighted the earnings for the company for the years between 2018 and 2022 is appropriate and allows for changes in market conditions. I do not accept Mr Moriarty's view that Mr Bassett's approach was inappropriate because of the economic conditions. He has appropriately adjusted for that.

[94] As for Mr Moriarty's belief that Mr [Nygaard]'s reputation and personal importance made the goodwill impossible to transfer, Mr Bassett made specific inquiries both through Bizstats analysis and information obtained from a business broker. Mr Moriarty does not appear to have carried out any similar inquiries. I accept Mr Bassett's view that with appropriate restraints of trade and vendor assistance, the benefit of the future maintainable earnings in [the company] could have been transferred to a reasonably informed purchaser.

[95] Addressing Mr Moriarty's view that the only goodwill capable of transfer was the value of work in progress, I find that [the company] had developed during the marriage a reputation for high quality workmanship which was not solely based on Mr [Nygaard]. He had long been off the tools and the "*product*" – the building work the company delivered – came down to the quality of the subcontractors engaged including his supervisor Mr [Bruce]. Mr [Nygaard] made no attempt to sell the business but with his experience and the contacts and reputation that [the company] had acquired over the years the shares in [the company] represented a valuable asset to him which I find is fairly represented in the market value that Mr Bassett has adopted.

[96] Finally, I do not accept Mr Moriarty's opinion that there are "*no barriers to entry for a prospective business purchaser*". Beyond tools and materials, establishing and maintaining connections with the company's existing and past customer base, with its principal subcontractors and trade contractors and being able to rely on the quality of the work that [the company] had carried out in the past, were all factors that would not be available to a "*new-to-the-market*" [occupation] seeking to obtain the kind of high-end [work] that [the company] carried out. I note it took some time for Mr [Nygaard] to establish a place in the market when he and his family first returned to Auckland to live. Mr [Bruce] has clearly had "*a leg up*" with [company 2].

[97] With appropriate restraints and vendor assistance a purchaser would have been acquiring a valuable business with a secure reputation. I prefer Mr Bassett's evidence and find that the separation date value of the parties' interest in [the company] was $1,172,749.

Issue 2 – Date of Valuation – Section 2G, or Compensation for Dissipation – Section 18C?

[98] The default position under s 2G(1) of the PRA is that the value of any property is to be determined as at the date of hearing. However, under s 2G(2) the Courts retain the discretion to determine the value of property at another date. The Court of Appeal in *Burgess v Beaven* emphasised that given the inclusion of ss 18B and 18C in the Act

there is now "… *less need than in the past to depart from the default position of hearing date valuation*".[26]

[99] The date of separation valuation has traditionally been used where assets are of the type that depreciate over time.[27]

[100] Under s 18C the Court can order compensation if between the date of separation and the date of hearing "*the relationship property has been materially diminished in value by the deliberate action or inaction of one spouse or partner …*".[28]

[101] Clearly there has been a significant reduction (or diminution) in value of the shares in [the company] between their separation date value to the parties of $1,172,749 and the current position where they have no value.

[102] Mr [Nygaard] submitted that for compensation to be awarded under s 18C Mr [Nygaard]'s actions or inaction must be deliberate and he must act or fail to act with the deliberate intention of diminishing the value of [the company] shares. He cited in support the decision of the Court of Appeal (affirmed by the Supreme Court) of *GFM v JAM*.[29]

[103] The Court of Appeal in *GFM v JAM* confirmed that s 18C is generally the more appropriate for adjustment vehicle than s 2G:[30]

> Nevertheless, where a Court decides to attribute to one party the benefits or losses that a party has brought about post-separation, that is "more directly" achieved under ss 18B and 18C respectively, and "there is less need than in the past to depart from the default position of hearing date valuation".

[104] Mr [Nygaard] submits that logically the Court must work through the s 18C elements before addressing whether to adopt the separation date value under s 2G because Mrs [Nygaard] is relying on misconduct on Mr [Nygaard]'s part as a justification to adopt the separation date value.

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[26] *Burgess v Beaven* [2021] NZSC 71, [2013] 1 NZLR 129 at [25].
[27] *G v G* (2002) 22 FRNZ 990 (FC) per Judge Ellis; *Loader v Loader* [2003] NZFLR 553 per Judge Somerville; and in the High Court in *Cullen v Cullen* [2017] NZHC 42 per Clark J.
[28] Section 18C(2).
[29] *GFM v JAM* [2014] NZFLR 418 (CA); affirmed *GFM v JAM* [2014] NZSC 32, [2014] NZFLR 599.
[30] *GFM v JAM* [2014] NZFLR 418 (CA) at 35(c).

[105] Mr [Nygaard] says that there was no deliberate action or inaction that caused the diminution in the business's assets. He says that if s 18C is not satisfied then s 2G(2) cannot be utilised.

[106] He also argued that since Mrs [Nygaard] had received maintenance for the period between separation and 26 September 2023 – a time when the fortunes of [the company] were declining – the effect of Mrs [Nygaard]'s claim under s 18C or s 2G succeeding would be that she would be "*compensated twice*".

[107] Mr [Nygaard] submits that the authorities that are relevant to applications to set aside dispositions under s 44 have no application in the s 18C context. Section 44 enables a Court to make appropriate orders where the Court is satisfied that property has been disposed of "*in order to defeat the claim or rights of any person*" under the PRA. In *Potter v Horsfall* the Court of Appeal confirmed that the *Regal Castings v Lightbody* approach can be applied in the context of s 44.[31] In the *Regal Castings* case it was confirmed that a debtor "… *must be taken to have intended [*the consequences of their actions*], even if was not actually the debtors wish to cause … loss*". In the context of s 44 the authorities "… *demonstrate that the inquiry is directed to the disclosing party's knowledge of the effect the disposal will have on the other party's rights, from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence*".[32]

[108] Despite the different wording in s 18C and s 44, the attraction of using the *Regal Castings* approach to intention is obvious. People can and should generally be assumed to intend the obvious, natural, and ordinary consequences of their actions. To require the Courts to divine, even to the standard of the balance of probabilities, what lies within the mind of a party, what their actual motivation is, even when it is obvious that what they are doing will diminish the value of relationship property may often be unduly onerous. A spouse's actions will often be informed by multiple intentions or motivations. Should they escape the consequence of a deliberate action

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[31] *Potter v Horsfall* [2016] NZFLR 974 (CA) at [37]; applying *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
[32] *Potter v Horsfall (supra)* at [41].

which diminishes the value of relationship property if they can point to a plausible intention or motive other than an intention to diminish value?

[109] In *Cullen v Cullen* Clark J upheld the decision at first instance that the husband's actions in choosing to work elsewhere, in pursuing other commercial activities, and utilising company funds for his own purposes, in taking holidays overseas and in sending funds to his new partner's family supported a finding that Mr Cullen had acted or failed to act intending to diminish the value of relationship property.[33] Clark J found "*the husband's awareness of the consequence of not working the business meets the requisite standard of intentional conduct*".[34]

[110] Mr [Nygaard] sought to distinguish *Cullen v Cullen* on the basis that *Cullen* involved the joint operation of a company for crayfishing activities and the leasing of quotas. Mr Cullen was operating the company to the exclusion of Ms Cullen, fishing without reward under customary purposes and not working the business. Mr [Nygaard] submitted "*whereas here [the company] was a word-of-mouth renovation business that Mr [Nygaard] ran until his relocation to Australia*".

[111] If that submission is saying that the nature of the business means that *Cullen* is not a useful comparable authority, then I disagree. Mr Cullen evidently intended to resume working in the business once the proceedings were resolved, an option that might have also been open to Mr [Nygaard] given the high rating he gives his personal goodwill.

[112] Mr [Nygaard] was cross-examined for the purposes of the maintenance hearing. The following exchange occurred:

> Q: Well, because its Mrs [Nygaard]'s evidence that you have told her all along that if you separate and if she leaves you, you will do what you can to create debt within [the company] and to the Trust that she receives nothing in your separation. Do you accept saying that to her?
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> A: I might have said something along those lines yes.

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[33] *Cullen v Cullen* [2017] NZHC 42.
[34] *Cullen* (*supra*) at [83].

[113] Mr [Nygaard] made it clear during the maintenance hearing that his focus was not on the [the company] business. "*My new partner has a new [business] and that is where we are wanting to put our time into it I guess*". Mr [Nygaard] said, "*Once I realised I was moving on with (my new partner) and moving to Australia, I just notified my clients and just said I was closing down the business and moving on. I started winding the business down by telling some of the boys, who left to go onto other projects and other jobs, in about May 2022*."

[114] He referred to business trips he had undertaken with his new partner and said, "*I was going to ditch the [business] and help [his new partner] with her [business], out of pure frustration with the situation back home*". And "*If [Mona] and I had not separated, I would have continued to be working in the [business]*".

[115] As well as notifying his contractors and suppliers that he would not be trading in the business, Mr [Nygaard] ceased looking for or accepting new work. As discussed above, he gave away $150,000 in materials and tools belonging to [the company]. It appears likely that other valuable tools which were either assets of [the company] or Mr [Nygaard]'s personal property were simply left by him in New Zealand – possibly at the family home. When it was put to him that he had threatened to "*do whatever he can to ensure she received nothing from [the company]*" he confirmed that he had told Mrs [Nygaard] "*something along those lines*". He accepted when cross-examined – as he ought – that a decision to move to a different country and stop accepting new work would make the business worth less.[35] He accepted that it was obvious that a business earning less and being wound up would see its share value drop. "*It's very obvious, yeah*."

[116] It was submitted by Mr [Nygaard] that he "*as sole director was entitled to make a "lifestyle change" following a difficult separation*". However, the result of Mr [Nygaard]'s "*lifestyle change*" was that he abandoned a business that was worth more than $1,700,000 causing a significant loss to both he and his wife. Mr [Nygaard] may not be permitted to unilaterally make a "*lifestyle change*" at his wife's expense when there were clearly other options open to him, at least not without

[35] Indeed it has literally made the business worthless.

compensating her for the loss he caused her. He had contemplated the prospect of running the business from Australia. He did not attempt to do that. He did not attempt to sell the business or market the business for sale. He did not attempt to negotiate a transfer of the company's reputation, assets, and future projects to his existing subcontractors. I find the evidence of intentional action by Mr [Nygaard] was compelling.

[117] I find that Mr [Nygaard] materially diminished the value of the parties' interests in [the company] by his deliberate actions in deciding to "*ditch*" the business to move to Australia with his new family without any attempt to preserve its assets. His actions were deliberate, arguably vengeful, and the diminution in value of [the company] was clearly also deliberate. It was not only an obvious outcome of what he did, it must have been his intended outcome.

[118] Having reached that conclusion I move on to consider whether Mr [Nygaard] should pay Mrs [Nygaard] compensation under s 18C(2) and if so, how much, or whether in this case would it be pragmatic to adopt the date of separation value and attribute that value to Mr [Nygaard] as an item of relationship property that he has retained.

[119] There is a significant problem beyond that however, and that is that the parties' interest in [the company] was the most significant item of relationship property that they had. There is an insufficient pool of other relationship property from which Mrs [Nygaard] could be fully compensated if I were to decide that she was entitled to compensation for a half share of the separation date value of [the company].

Section 18C – Causation and Contribution

[120] Mr [Nygaard] says destruction of the value of [the company] was caused, or significantly contributed to, by economic conditions and the impact of stress that he was suffering from because of the parties' separation.

[121] The impact of the economic conditions was considered and addressed by Mr Bassett. He noted the Stats NZ data with the record high for the number of [details

deleted] in the year to 31 March 2022. There was a 24 per cent increase on the previous 12 months. For the Auckland market, the [details deleted] increased year on year from 2020, 2021 and 2022. Mr [Nygaard] produced no evidence or data to establish that the section of the market [the company] was engaged in – [details deleted] – was experiencing any downturn contrary to that general trend. Mr [Nygaard]'s evidence was that it was in May 2022 that he and his new partner decided to move overseas. I find that was the most proximate, indeed the direct cause of the collapse in value of [the company].

[122] Mr [Nygaard] gave general evidence that he was suffering from stress following the breakup. He produced no medical evidence and no supporting evidence. Mrs [Nygaard] noted that after separation he enjoyed numerous trips overseas, there were frequent parties at the family home, her analysis of the bank accounts shows that a lot of money was spent dining out. She gave evidence as to how stress had affected Mr [Nygaard] during the marriage. It was her experience that he reacted emotionally, sometimes displaying anger, but it had not affected his ability to work.

[123] Mr [Nygaard]'s own description of his experience was "… *you just try and suck it up, you've got boys that look up to you, you've got your son that looks up to you, you've got people around you that rely on you, I didn't really think that I had time to feel down or feel stressed*".[36] He accepted the proposition that it was easy to "*double down on work and put [his] focus into that*" at times of stress.

[124] There is no reliable evidence that the business was facing significant economic pressure. The reduction in income and hours charged shown in the company's accounts and management accounts occur in lockstep with the end of the relationship and Mr [Nygaard]'s decision to "*ditch*" to the business.

[125] There was a decline in income, in gross profit, and in net profit after tax shown in the profit and loss statement for [the company] to 31 March 2021 echoing the Covid year and the early stages of the parties' separation. Seven months of that year was taken into account in Mr Bassett's separation date valuation with that result being given a 30 per cent weighting in his calculation of weighted average future

[36] NOE, p 345.

maintainable earnings. I find his calculation and weightings were not significantly challenged, either in cross-examination or in the evidence of Mr Moriarty.[37] Because the causal link between the decisions Mr [Nygaard] made and the loss is so direct, I find that it is appropriate to award compensation to Mrs [Nygaard] from Mr [Nygaard] of $586,874 under s 18C.

[126] Mr [Nygaard]'s argument that Mrs [Nygaard]'s compensation will be "*double counted*" because she has received spousal maintenance for the period post-separation is misconceived. Adopting the separation date valuation and compensating Mrs [Nygaard] for the capital loss she has suffered because of the destruction of that asset leaves Mrs [Nygaard] in the position she would have been had Mr [Nygaard] continued to responsibly trade. If Mr [Nygaard] had continued to trade it is likely the company would have been valued at hearing date. Mr [Nygaard] would have had the continuing benefit of the income received from trading throughout that time which would have been the principal source of income for maintenance payments.

[127] There is no "*double counting*" here. I am not directing that compensation be regarded as having been due at separation date. I am not directing that Mrs [Nygaard] receive interest on the sum she is entitled to prior to hearing date. My decision does not alter the position she was in after separation when she had no access to the income or capital from the business. It is conventional for spousal maintenance to be ordered and paid until the date of division of relationship property where there are significant assets in the control of the paying spouse. That simply reflects the reality that the paying spouse maintains the benefit of the income produced by the capital assets and control over the capital assets until division is complete.

Issue 3 – Chattels

Mr [Nygaard]'s Clothes Collection

[128] Mr [Nygaard] did not file valuation evidence to dispute Mrs [Nygaard]'s contention that his extensive collection of clothing had a value of $200,000. The clothing was never formally valued, but Mrs [Nygaard]'s contention as to its value

[37] Mr Moriarty instead focused on his net asset valuation approach.

was in evidence from the outset, including in her affidavit of assets and liabilities sworn in February 2022 and her narrative affidavit of the same date. Mr [Nygaard] had exclusive possession of the clothing collection and exclusive knowledge of the full cost of the collection. In his affidavit in reply, Mr [Nygaard] claimed that Mrs [Nygaard] had removed a carton of shoes and clothing to a value of $5,000 to $6,000 including Air Jordan Shoes worth $1,310 and $720. He claimed a *"best guess estimate"* of $40,000 for the full collection, but he did not arrange an appraisal or ever file any valuation evidence. The inference that I draw from his failure to produce any valuation evidence or detailed schedule of the property is that Mrs [Nygaard]'s estimate of value is reliable.[38] If Mr [Nygaard] was able to place a value of $5,000 to $6,000 on the few items Mrs [Nygaard] had removed for [Jonas]'s use it is a reasonable conclusion that the bulk of the collection which remained was worth considerably more than the $40,000 he estimated in his affidavit evidence.[39]

[129] The principal issue was what happened to his collection of clothing and other chattels after separation.

[130] During the relationship the parties' bedroom included an extensive walk-in wardrobe/dressing room, with a bathroom attached to that wardrobe, exclusively for Mr [Nygaard]'s use and contained the clothing that was *"in season"* at the time. Mrs [Nygaard] kept her clothing in a smaller wardrobe and an adjacent room. Mr [Nygaard] thought that she was not interested in clothing, and she only had a small number of outfits to wear.

[131] His collection was extensive including sneakers and high-end casual wear. When he left his family in Vancouver without access to funds, he incurred significant new debt acquiring new clothing on Rodeo Drive Los Angeles to enhance his collection. Mr [Nygaard] kept significant quantities of additional clothing stored in clear plastic boxes and other containers in an extensive roof storage area.

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[38] *Clayton v Clayton* [2015] 3 NZLR 293 (CA) at [186(b)] and (c); and *Brainich-Felth-Eilander v Ward* [2016] NZHC 2481 at [45].

[39] Mr [Nygaard] had been asked during an examination of assets and liabilities before Judge Fleming if he would organise a valuation of his clothes collection and he declined saying it would be an invasion of his privacy. Mr [Nygaard] also acknowledged during the hearing that he generally bought sneakers that would be likely to appreciate in value and that he had some expertise in knowing what to choose.

[132] Mr [Nygaard] apparently didn't keep a written inventory of any kind of the clothing that he had. He occupied the family home to Mrs [Nygaard]'s exclusion until he relocated to Australia in February 2023. The agreement to sell the family home was executed on 28 March 2023 and the sale settled on 28 April 2023. Mrs [Nygaard] never returned to the home to live. By that time, she had established a home in a rental property, and she had been subject to threats of prosecution for trespass by Mr [Nygaard] during his occupation of the home. It is clear to me that having been adamantly excluded from the family home by Mr [Nygaard] she was genuinely reluctant to return.

[133] It appears that neither party took responsibility for removing all the chattels from the home prior to settlement of the sale. Some additional chattels were included in the agreement for sale and purchase with an agreed value, but the purchaser has not yet paid that debt. The purchaser was apparently concerned that a significant volume of property, belonging to the [Nygaard]s or [the company], was left on site after settlement.

[134] Mr [Nygaard] did not take photographs or otherwise document the clothing, tools, or other property that he removed from the home when he relocated to Australia. His evidence was that he only took two suitcases to Australia. Mr [Nygaard] produced as an exhibit a video that one of his subcontractors took of the storage areas of the house. That video appeared to show some plastic bins that may have contained part of Mr [Nygaard]'s clothing collection left in the attic space after he had relocated to Australia.[40] There were some photographs produced to similar effect. However, the evidence did not persuade me on balance of probabilities that all or even most of Mr [Nygaard]'s clothing remained in the house after he left for Australia.

[135] There was no evidence that Mrs [Nygaard] had removed the clothing or in any way taken responsibility for it. Having been – albeit wrongfully – excluded from the home by her fellow trustee Mr [Nygaard], it is understandable that she may have been reluctant to take or take responsibility for any of his property. She had been threatened with prosecution early in their separation when she had removed a small amount of

[40] Mr [Nygaard] accepted that the video did not show any of the clothes which had been on hangers, nor did it appear to show any of his sneakers collection.

clothing for [Jonas]'s use. Her evidence was that [Jonas] at the time was reduced to having his school uniform to wear because [Jonas] had been excluded from the home by his father. Her evidence that she did not remove the clothes herself prior to settlement, and that she was essentially left to clear detritus from the home.

[136] She was extensively cross-examined. I found her in general to be a reliable witness, willing to make concessions where appropriate, and I found her evidence on this issue unshaken. I prefer her evidence to that of Mr [Nygaard] on this issue. He had a strong attachment to this clothing collection, and he consistently demonstrated a strong sense of self-entitlement. I do not accept that he would have simply abandoned the bulk of a clothing collection which he had prized to the point where he had threatened his wife and child with prosecution for removing a few items.

[137] The [Nygaard]s' relationship was regrettably punctuated by occasional incidents of physical violence and a continuing dynamic of psychological violence by Mr [Nygaard] against Mrs [Nygaard]. He did not dispute the evidence of assault in the form of photographs of Mrs [Nygaard] with injuries and torn clothing. When she left the family home Mrs [Nygaard] had a bag of clothing with her and a small amount of cash. Her evidence was that she took nothing else and was never permitted to return to collect anything else from the home.[41] After 26 years together Mr [Nygaard] apparently regarded the home, and most of what was in it as his to use as he wished to the exclusion of his wife and child. Mr [Nygaard] remained in sole occupation of this exquisitely constructed and well-furnished home – which had been renovated with great care and considerable expense using [the company] resources. Mr [Nygaard] invited his new partner to live in the family home with him and she remained in that residence while Mrs [Nygaard] and [Jonas] were living in comparatively inadequate rental accommodation and struggling to meet their living costs.

[138] Generally, evidence of misconduct of this kind during a relationship is irrelevant for relationship property purposes but it explains the cautious approach that

[41] At one point Mr [Nygaard] left some items including a computer chair and a rubbish bag full of clothes outside and advised her through a text message*: "You haven't collected your items. You know it has been raining a little. Did you want me to put it in storage or leave it out?"*

Mrs [Nygaard] took to entry into their home even after Mr [Nygaard] had relocated to Australia.

[139] It was Mrs [Nygaard]'s evidence that in April 2023 at a scheduled court date Mr [Nygaard]'s lawyer enquired whether she wish to retain any of the family chattels from the home. She said she did not, she had no room for them and they held bad memories. From her perspective it was agreed that Mr [Nygaard] would organise for everything to be removed. Mrs [Nygaard] said that all she took from the family home were sentimental items including photos of [Jonas] and her family, and some of [Jonas]'s old baby clothes and childhood toys. She believes that she had made it clear to Mr [Nygaard] that she wanted nothing else from the house. She understood that Mr [Nygaard] had taken what he wanted and *"left me to sort out all the rubbish and things that he did not want. Moving all the rubbish, left behind chattels from the attic and under the house took me three days. I then had to clean the house because they did not*." Exhibit 4 was an email from Ms Hawker to Mr [Nygaard]'s then lawyer sent on 28 April confirming that Mrs [Nygaard] would not take responsibility for the remaining chattels.

[140] I note that an invoice from New Zealand Movers addressed to Mr [Nygaard]'s new partner referred to *"22 Plastic Bins"* as part of the property moved from a Storage King premises in Mt Albert to [Australia]. Mr [Nygaard] said this was part of the new [importing businesses] assets, but there was no reliable corroboration for that.

[141] I find on balance of probabilities that Mr [Nygaard] retained possession of the major part of his collection of clothing, and that he at least retained control of and responsibility for all of it. It was not disputed that it was relationship property. He will be required to account to Mrs [Nygaard] for half of its total value which I find to be $200,000.

Tools

[142] Mr [Nygaard] said that he did not personally own any tools. The extensive collection of tools and machinery stored in storage sheds and under the [address 1] home were all owned by [the company]. Mr [Nygaard] had said the tools and

equipment at [address 1] were worth $150,000 to $250,000. However, in [the company]'s financial statements the "*Cost*" value of plant and equipment was recorded as only $23,245. In cross-examination Mr [Nygaard] appeared to accept that some of the tools may not have been assets of [the company]. *"Okay, then maybe a lot of those tools were [n]ever put on to [the company] …"*

[143] Mr Snedden for Mr [Nygaard] submitted that if the tools at [address 1] were owned by Mr [Nygaard], they are excluded from the pool of relationship property as they were wholly or principally for business purposes. I accept the definition of Family Chattels in s 2 only includes tools *"of household or family use"* but as they were property acquired by Mr [Nygaard] during the relationship, they may be relationship property under s 8(1)(e) of the PRA.

[144] However, Mr Bassett's amended valuation of [the company] took account of Mr [Nygaard]'s evidence and included tools to a cost value of $175,000. I am not persuaded on the balance of probabilities that Mr [Nygaard] had a significant number of additional tools, whether for household use, or which were otherwise not part of the tools Mr Bassett included in his valuation. No further compensation to Mrs [Nygaard] for tools is justified beyond the inclusion of the revised figure for tools in the revised [the company] valuation.

Other Chattels and Paintings

[145] The evidence satisfied me that neither Mr nor Mrs [Nygaard] had taken responsibility for removing the remainder of the chattels from the house. A significant number of chattels were included in the schedules to the agreement for sale of the house.

[146] By the email dated 28 April 2024 to Mr [Nygaard]'s lawyer Mrs [Nygaard] had made her position clear:[42]

> *"Your client has had full and exclusive use of the family home and chattels for over two and a half years. Our client does not wish to retain anything in the family home or storage, nor does she have room to keep them (as advised). This is your client's responsibility."*

[42] Exhibit 4 email 28 April, Nirusha George to John Gandy.

[147] The purchaser of the [address 1] property has agreed to pay $9,000 for some of the chattels but neither party has taken any steps to recover that payment. Mrs [Nygaard] said the purchaser was a friend of Mr [Nygaard] and his new partner but that she had expected the money to be to the account of the trust. I have no evidence the trust owned any of the chattels in question. This is not an issue I can resolve beyond including the $9,000 as an item of relationship property to be divided equally between Mr and Mrs [Nygaard] if either of them collects it. If it remains unpaid, so be it.

[148] As for the rest of the chattels in this well-furnished home Mrs [Nygaard] says that she did not have a chance to take an inventory before Mr [Nygaard] left. She alleged he had taken most of it "[*Mr [Nygaard]'s new partner and Mr [Nygaard]*] *took all the valuable artwork, tools, clothes, kitchen items, furniture, stools, plants and everything of value was gone before they left the country and relocated to [Australia]"*. She only had access a week before settlement and she described the home as *"70 per cent empty"*. She was left to deal with rubbish and clean the house with the help of the real estate agent. Mrs [Nygaard] argues the balance of the chattels should be ascribed a value of $100,000 on Mr [Nygaard]'s "*side of the ledger*" so that she would receive a credit of $50,000 payable by him.

[149] Mr [Nygaard] submits that *"there is a factual dispute as to the location and value of (chattels)"* and that he left the country with only two suitcases.

[150] I prefer Mrs [Nygaard]'s account of what was taken from the property before she regained access. Mr [Nygaard] had ample time to create an inventory, record or photograph and have valued the items he says he left behind. He may not have taken them to Australia, but I find on balance of probabilities that he did not leave them for Mrs [Nygaard], so he must have disposed of them somehow.

[151] I have no reliable evidence of current or market value. In his oral evidence Mr [Nygaard] suggested $30,000 to $40,000 would be a reasonable estimate of the market value of the chattels excluding his clothing. In the absence of any independent evidence – I don't even have a complete inventory – I will adopt the higher of Mr [Nygaard]'s figures, $40,000.

[152] To that I would add an additional $15,000 which was his estimate of the value of the art left in the home.[43] I do not accept his allegation that Mrs [Nygaard] took two pieces of art with her, I accept and prefer her evidence. Mr [Nygaard] did not explain when or how she had the opportunity to take the art. The result is that Mr [Nygaard] should account to Mrs [Nygaard] for an additional $55,000 by a credit or payment to her of $27,500.

Issue 4 – Occupational Rent – Section 182 Family Proceedings Act

[153] The parties agree that Mr [Nygaard]'s occupation of the home to the exclusion of his wife and child would call for compensation, and that the usual route to compensation under s 18B of the PRA is not available as the home is not relationship property. Mrs [Nygaard] has not made an application under s 343 of the Property Law Act 2007, under which a court might require payment by a co-owner of a fair occupation rent.[44] In *Dyas v Elliott* Asher J recognised the s 343 Property Law Act powers were available to a home owned by two trusts, each controlled by one of the spouses.[45]

[154] The parties in this case own the property as trustees of a single trust. They both had a reasonable expectation they would continue to have the use and enjoyment of the home as beneficiaries of that trust. There was no formal tenancy or occupation agreement and no relevant minutes as trustees confirming that. The home was purchased, developed, and used as a family home with the acquiescence – and I find consent – of the three trustees at the time who were Mr and Mrs [Nygaard] and Mrs [Nygaard]'s father.[46] The decision to exclude Mrs [Nygaard] and later [Jonas] from the home was a unilateral act by Mr [Nygaard], which was never endorsed by

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[43] BOD2 at 549.

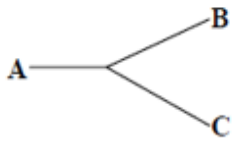
[44] Both the home itself, and the proceeds of sale now held on deposit would represent property as defined in the Property Law Act 2007 giving rise to a right to apply for division or sale under s339 with the court's further power to require payment of a fair occupation rent under s 343(f) then being available in the discretion of the court.

[45] *Dyas v Elliott* [2010] 11 NZCPR 252 (HC).

[46] There was a resolution in the [Nygaard] Trust Opening Minutes of 1 April 2007 that they could reside at an earlier home owned by the trust subject to paying rates, maintenance costs and mortgage payments, but there is no evidence a similar resolution was passed for this home. The minutes said the payments made *"…will be a loan made to the Trust by the occupiers except to the extent that the occupiers and we decide otherwise from time to time. The loan will be repayable on demand."* There was no evidence about any loan due from the Trust to Mr and Mrs [Nygaard].

the Trustees. Mrs [Nygaard] validly says that was a breach of trust – a breach of his duty as Trustee to hold and use the Trust's assets for the benefit of the beneficiaries, rather than for his own benefit. However, the expectations of the parties as beneficiaries may not be a right within the definition of property under the Property Law Act and compensation under s 343 may not be available to Mrs [Nygaard] even if she were to apply.

[155] Mr [Nygaard] concedes compensation may be available to Mrs [Nygaard] through the exercise of the Courts' discretion under s 182 FPA applying the decision of Gwyn J in *K v K*.[47] There is no doubt the [Nygaard] Trust is a nuptial settlement so the first stage of the three-stage process mandated in *Preston v Preston* is satisfied here.[48] The second stage, as *Preston v Preston* confirms at [32], requires an analysis of:[49]

> "[32] … *the consequences of the failure of the premise (a continuing marriage) on which the settlement was made" ... the position under the settlement were the marriage to continue and the position that exists after the dissolution. This is a forward-looking exercise, "comparing the position under the settlement assuming a continuing marriage against the position under a dissolved marriage*." *The Court put this diagrammatically as follows:*
>
> 
>
>
> [33] In this diagram:
>
> "… *A is the time of settlement, B is the position of the spouse under the settlement with the marriage dissolved and C would have been the position under the settlement assuming a continued marriage. The comparison is not between A and B but, rather, between B and C*."

[156] Here as in *K v K*, I conclude there is a disparity or gap between Mrs [Nygaard]'s position under the settlement following dissolution as compared with her position had the marriage continued arising relevantly here from Mr [Nygaard]'s occupation of the home to the exclusion of Mrs [Nygaard]. The key asset held by the trust was the home.

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[47] *K v K* [2022] NZHC 3132, [2022] NZFLR 624.
[48] *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651.
[49] *Preston v Preston* (*supra*) at [32]-[33].

Mrs [Nygaard] was having to live in temporary accommodation and then modest rental accommodation which I accept was barely adequate for her and [Jonas]. This would not have happened had the marriage subsisted. She had to meet her own living costs because Mr [Nygaard] failed to provide her with adequate spousal maintenance until he was compelled to do so as result of the orders made in this court.

[157] Having established that disparity existed the third stage of the *Preston v Preston* process is to determine whether and how to exercise the discretion I have under s 182. A finding of disparity does not necessarily mean that the discretion will be exercised to remedy the disparity but, as was noted in *K v K,* the Supreme Court in *Preston v Preston* suggested there is *"… a presumption in favour of exercising the discretion in favour of the applicant"* once a discrepancy has been established.[50] I was not directed to any "*countervailing factors*" against the exercise of my discretion, and I find that there are no countervailing factors relevant to the claim in relation to exclusion from the home. The question I must address is, what orders should I make – in this case what is a just figure for compensation?

Occupational Rental – Section 182 Quantum

[158] It is not necessary to undertake *"… a lengthy or detailed mathematical exercise, unless the facts or evidence require it".*[51] I do however need to have *"some conception"* of what the gap between Mrs [Nygaard]'s expectations under the settlement had the marriage continued and her position following dissolution of marriage.[52] My focus, for now is on the value to her of the loss of use of the home. In that focus I will not lose sight of the need to stand back and consider the overall position of both of the parties under the settlement following dissolution. Relevant to my overall assessment will be any relevant contributions they each made to the marriage as a whole, and the settlement of the Trust's assets in particular. I may consider both positive contributions and any actions or behaviour which have negatively impacted on the position each party is now in. However, that assessment will be grounded in the presumption that all contributions to the relationship, whether

[50] *K v K* above n 5 at [71] citing *Preston v Preston* above n 12 at [7] and [53] to [58].
[51] *Preston v Preston* at [61].
[52] Applying *Preston v Preston* at [71].

financial or non-financial are of equal importance and relevance in assessing the nature and source of the assets, recognising that "… *parties to a marriage contribute in sometimes different but equal ways* …".[53] The presumptions and principles set out in ss 1M(b), 1N(b) and 18(2) of the PRA are a guiding talisman for me here.[54]

[159] Before I move to that overall view of the post-dissolution disparity, I need to quantify the disparity arising from the occupation issue. Mrs [Nygaard]'s post-separation accommodation costs were addressed in part by Judge Burns in his decision on final spousal maintenance.[55] His Honour at [25](c) considered it more appropriate for any difference in value or cost between the comparatively modest accommodation Mrs [Nygaard] had been paying for (with assistance from her mother) and the standard of accommodation in the home enjoyed by Mr [Nygaard] to be addressed in these proceedings. He said:

> There will need to be an adjustment between the parties in terms of occupation rent to reflect the difference in the standard of accommodation between the parties post-separation but I consider that is more appropriate for that to be done under s 18B of the PRA rather than spousal maintenance so I am going to take the actual rental cost into account rather than what would be comparative to the standard of living enjoyed by the common household because there is a clear remedy available to the applicant under s 18B and that is the more appropriate vehicle for that adjustment to be made rather than spousal maintenance. I give a clear indication that occupation rent should be paid in this case.

[160] Although His Honour then considered there was *"a clear remedy available to the applicant under s 18B"* he did not have the benefit of the evidence and submissions now available to me. Both parties now concede s 18B is not the route to compensation here.

[161] However, Judge Burns did include an allowance of $585 per week for Mrs [Nygaard]'s actual accommodation costs, and I will need to take that into account when I calculate the amount of compensation she might receive under s 182 for the occupation differential. Mrs [Nygaard] submitted that I might vary the final maintenance order by increasing the amount Mr [Nygaard] ought to pay by $2,000 per

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[53] *Preston v Preston* at [36] applying *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590 above n 10 at [66].
[54] *Preston v Preston*.
[55] *[Nygaard] v [Nygaard]* [2022] NZFC 11464.

week.[56] Judge Burns, with clear reasons, considered it was inappropriate to address the full value of the occupation differential in his maintenance decision and I would not be prepared to differ from his considered decision on maintenance in this regard.

[162] I accept the value of occupation of the home, the value of the comfort and amenity she was excluded from, was considerably higher than the cost of occupation of the two-bedroom apartment Mrs [Nygaard] and [Jonas] were living in. The problem I have is that I do not have any reliable evidence as to the actual market rental available for the home. Mr [Nygaard] did not offer any calculations or estimates of value even in his submissions. The figure Mrs [Nygaard] seeks to rely on which was included in the Goodwins rental agreement for the home may have been aspirational. It may have been achievable during the extraordinary circumstances in the "*high end*" rental market during the America's Cup, but not in the general residential tenancy market.

[163] In *Little v Little* Fitzgerald J confirmed that, at least for s 18B compensation for occupational rent calculation purposes market rent (or occupational rent) and interest on the non-occupying party's unavailable capital are *"true alternatives"*.[57] I note and respectfully agree with the analysis of Judge Callinicos in *S v B*. *"There is a risk that compensation by way of interest alone might not achieve a just outcome by virtue of interest being a somewhat arbitrary tool"*.[58] It would be my preference to use *"occupational rental for the use of the income asset"* as Judge Callinicos recommended – if I had any reliable information as to the fair net market rental for the home.

[164] The home eventually sold for $3,600,000 with the sale settling on 28 April 2023. Mr [Nygaard] had occupation to Mrs [Nygaard]'s exclusion from 9 November 2020. That is a total of just under 129 weeks. Using the Civil Debt Calculator function available through the Ministry of Justice website the interest payable under the Interest on Money Claims Act 2016 would be $174,693.49, or $1,353.21 per week. If I were

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[56] Calculated as a half of the $4,500 per week that was being sought by the parties when the property was offered for rental during the America's cup period through Goodwins net of her calculation of outgoings the [Nygaard]'s would have to cover..

[57] *Little v Little* [2022] NZHC 601 at [130] affirming on appeal the approach of Judge R von Keisenberg in *Little v Little* [2020] NZFC 6638 and applying the decision of Kós J in *Griffiths v Griffiths* [2012] NZFLR 327.

[58] *S v B* [2010] NZFLR 1045 (FC) at [15], a passage approved by Kós J in *Griffiths* at [38].

to require Mr [Nygaard] to compensate her for half of that amount using my discretion under s 182 of the FPA the net additional compensation she would receive – after the rental allowed for in Judge Burns' decision of $585 per week – would only be $91 per week or $11,739 for the entire period, a figure which does not appear to me to be a just sum of compensation for the loss of use and enjoyment of this upmarket home.

[165] The reality for Mrs [Nygaard] is that she was not excluded from the use, comfort, and enjoyment of only half of the party's home. She was entirely excluded from that home for 129 weeks, living in inferior rental accommodation.[59] In the absence of evidence from either party as to market rental I have considered whether to issue this judgment and reserve a right for the parties to file evidence as to market rental before issuing a supplementary judgment once I had that information. However, I am concerned that the further delay that would cause to the parties. It is likely to be a need for a further hearing with some cross-examination and they are entitled to finality.

[166] The award of compensation under s 182 does not require an algebraic or arithmetical calculation. The aim is to produce just compensation, that is compensation that justly recognises the consequence of the failure of the marriage and the difference between the position Mrs [Nygaard] would have been in had the marriage subsisted with the position she is in because of the dissolution.

[167] I also note that the Interest on Money Claims Act allows the court a discretion to order any interest or compensatory sum it may direct in "*special circumstances*". Special circumstances are not extraordinary or unique circumstances.[60] The special circumstances I am able to find here include the exclusion of Mrs [Nygaard] and [Jonas] from the family home and the consequent foreseeable hardship and loss of amenity they suffered.

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[59] Judge Burns noted that she had to move seven times from the date she was excluded from the home to the date of the maintenance hearing in September 2022. *[Nygaard] v [Nygaard]* [2022] NZFC 11464 at [14].

[60] Applying the approach from the Child Support Act jurisdiction in cases such as *Wilcox v Lyon* (1993) 11 FRNZ 1 (HC) Tipping J.

[168] In the circumstances I find it is just that she be compensated – that the loss of amenity she has suffered be recognised – by her being compensated by a weekly $900 in total. From that figure the rental allowed for in Judge Burns' decision of $585 per week should be deducted. Weekly additional compensation of $315 for 129 weeks to the date of settlement would be an additional $40,635 to be awarded to her from the Trust funds under s 182.

Issue 5 – Trusts Act – Jurisdiction and Remedies

[169] The jurisdiction the Family Court has been granted under s 141 of the Trusts Act is limited. As noted in Brookers Family Law at TU141.01(2), "*This section gives the Family Court ancillary jurisdiction to make orders and give directions under the Trusts Act in proceedings before the Family Court under any statutes in which it has jurisdiction under s 11 of the Family Court Act 1980".* The PRA and the FPA are statutes featured in s 11. My jurisdiction here is limited to orders or directions under the Trusts Act that are necessary to preserve property or give proper effect to any determination in the proceeding.[61]

[170] The specific sections of the Trusts Act which Mrs [Nygaard] urges me to use are ss 126 and 127 which provide as follows:

> **126 Court may review trustee's act, omission, or decision**
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> (1) The court may review the act, omission, or decision (including a proposed act, omission, or decision) of a trustee on the ground that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances.
>
> (2) The court may undertake a review on the application only of a beneficiary.
>
> (3) The review must be conducted in accordance with section 127.
>
> (4) This section and section 127 do not limit or affect—
>
> (a) the court's jurisdiction to supervise trusts, including its jurisdiction under the Charitable Trusts Act 1957; or
>
> (b) the Attorney-General's powers and duties with respect to charitable trusts, including powers and duties under the Charitable Trusts Act 1957.

[61] Section 141(2) Trusts Act 2019.

127 Procedure for court's review of trustee's act, omission, or decision

(1) An applicant for a review under section 126 must produce evidence that raises a genuine and substantial dispute as to whether the act, omission, or decision in question was or is reasonably open to the trustee in the circumstances.

(2) If the court is satisfied that the applicant has established a genuine and substantial dispute, the onus is on the trustee to establish that the act, omission, or decision was or is reasonably open to the trustee in the circumstances.

(3) If the court is satisfied on the balance of probabilities that the act, omission, or decision was not or is not reasonably open to the trustee in the circumstances, the court may (but subject to subsection (4))—

(a) set aside the act or decision, or direct the trustee to act in the case of an omission:

(b) restrain the trustee from acting or deciding in the case of a proposed act or decision, and direct the trustee to act in the case of a proposed omission:

(c) make any other orders that the court considers necessary.

(4) The court must not make an order that affects—

(a) a valid distribution of the trust property that was made before the trustee had notice of the application; or

(b) any right or title acquired by a person in good faith and for value.

[171] Mrs [Nygaard] says that acts and decisions made by Mr [Nygaard] alone in relation to trust property were made in his capacity as Trustee of the [Nygaard] Trust and were made "*either ultra vires or for improper purpose and were contrary to Mr [Nygaard]'s fiduciary obligations of the Trust*".

[172] The [Nygaard] Family Trust was settled by Mr and Mrs [Nygaard] on 1 April 2007. They and their son [Jonas] are named as beneficiaries and [Jonas] is the sole final beneficiary. There is nothing in the Trust Deed to allow a sole Trustee or even a majority of Trustees to make decisions concerning Trust property. The rule of trustee unanimity therefore applies.[62] Clause 13 of the Trust Deed confirms this providing that any discretion conferred on the Trustees may only be exercised by resolution in

[62] The duty to act unanimously is confirmed in s 38 of the Trusts Act 2019. "If there is more than 1 trustee, the trustees must act unanimously."

writing, signed by all the Trustees and recorded in the Trustees Minutes. There is no evidence that Minutes were routinely maintained during the relationship. Clearly the Trustees would have needed to have executed mortgage document agreements, loan agreement, transfers of real property and the like. However, day to day decisions about the use of funds and Trust bank accounts, the carrying out of improvement to the Trust property – principally the family home – appear to have been made by the parties and often Mr [Nygaard] alone.

[173] There was no valid Trustee decision to exclude Mrs [Nygaard] nor [Jonas] from the property. It was a decision that Mr [Nygaard] made alone. He made many other decisions alone. His own evidence is that funds from the Trust bank account and overdraft facility were routinely used for [the company] purposes and funds moved freely between [the company] bank accounts and Trust bank accounts. Trust funds were also applied for personal purposes, whether for the family as a whole or Mr [Nygaard] alone.

[174] A significant source of funding for the family to which both Mr and Mrs [Nygaard] originally had access to was an ASB Orbit home loan – a flexible or revolving fund facility. It had an authorised limit of $350,000 debit. When Mrs [Nygaard] filed her maintenance application in September 2021 that Orbit account had been drawn down to its limit, she said by Mr [Nygaard]. She said she had been told that if she moved back into the family home he would return the funds to the Orbit account. In February 2020 she found she had been removed as a signatory and her access to the relevant bank accounts had been denied. The bank would not tell her where significant amounts of money that had been withdrawn from the Family Trust bank account had gone. She had to rely on requests she made to Mr [Nygaard] for funds for household and personal expenses from that point on.

[175] Following an argument in Canada, Mr [Nygaard] purchased an airline ticket and flew to Los Angeles on what Mrs [Nygaard] described as "*a shopping spree*".[63] At that time he made several transfers out of the [Nygaard] Family Trust into accounts or credit cards controlled by him including:

[63] Mr [Nygaard] accepted he was upset because Mrs [Nygaard] had called him selfish.

(a) A transfer of $2,965 on 18 February to a credit card.

(b) A transfer of $2,943 to a different credit card.

(c) A transfer of $10,000 to his KiwiSaver account on 20 January 2020;

(d) A withdrawal of $112,000 on 22 January 2020 with the funds deposited to one of his credit cards.

[176] Over five months the Orbit facility debit had increased from $17,466 as at August 2019 to $350,000 in January 2020. None of those withdrawals were formally authorised by the Trustees.

[177] Fundamental obligations that Mr [Nygaard], indeed all Trustees of the [Nygaard] Family Trust, had included to hold the assets of the Trust for the benefit of the beneficiaries, to preserve them and apply them for the benefit of the beneficiaries and not to benefit themselves at the expense of the beneficiaries using Trust property.[64]

[178] The Trust Deed does contain a conflict-of-interest clause authorising the Trustees to act and exercise their powers even in circumstances where there might be a conflict between their interest and their duty to the Trust fund or the beneficiaries. However, that clause does not permit as single Trustees to act unilaterally for their own self-benefit to the detriment of other beneficiaries.

[179] Mr [Nygaard]'s decision to exclude his wife and son from the home owned by the Trust was a breach of his obligations as a Trustee. If this were an application under the Trusts Act in the High Court, that Court would have the ability to review Mr [Nygaard]'s decisions and acts. A beneficiary could make such an application. Once the Court was satisfied that a genuine and substantial dispute had been established as to whether a Trustee's act, omission or decision was reasonably open to the Trustee, the onus is on the Trustee to establish that the act, omission or decision was or is reasonably open to them.[65] Under s 127(3) if the Court is satisfied that a

[64] Trustee's mandatory duties and default duties are codified in ss 22 to 39 of the Trusts Act 2019.
[65] Section 127(1) and (2) of the Trusts Act 2019.

Trustee act, omission or decision was not reasonably open to them the Court can set aside the act or decision or direct the Trustee to act in the case of an admission. The Court can restrain the Trustee from acting or direct the Trustee to act and the Court can "*make any other orders that the Court considers necessary*".[66]

[180] Those are broad powers that might be useful or expedient for me to use if I had jurisdiction to do so. However, to review the acts or decisions made by Mr [Nygaard] I would need to be satisfied that the order or direction was necessary to preserve or to protect property or to give effect to my determinations.[67]

[181] I do not consider it is necessary for me to resort to the provisions of the Trusts Act in this case. There are other remedies available here where a remedy is appropriate. Mr [Nygaard]'s decision to exclude Mrs [Nygaard] from the family home is being compensated through an "*occupational rent*" which I am granting as part of the exercise of my discretion under s 182 of the FPA.

[182] To the extent that Mr [Nygaard] had withdrawn funds from the Trusts Orbit facility during the relationship and applied them for his self-benefit, Mrs [Nygaard] will at least be partially compensated because Mr [Nygaard] has agreed that the credit balance in his personal bank accounts at the date of separation are relationship property and he needs to compensate her accordingly.

[183] The withdrawals and "*revenge spending*" that Mr [Nygaard] effected in January 2020 occurred during the relationship – prior to separation. Mr [Nygaard] accepted the withdrawals he made in January 2020 were retaliatory or at least "*could have been*" made because he was "*upset*".[68]

[184] It appears the $112,000 he withdrew was transferred by him to a credit card of [the company] and then made their way into his personal ASB Streamline account. Mr Moriarty had conducted a tracing exercise and had concluded that the $112,000 that Mr [Nygaard] withdrew in January 2020 had found its way from the Trusts Orbit Home Loan account to a credit card and then to Mr [Nygaard]'s Streamline bank

[66] Section 127(3).
[67] As set out in s 141 of the Trusts Act 2019.
[68] NOE from hearing before Judge Burns, 28 September 2022 at 35.

account with the funds effectively not leaving relationship bank or credit cards. This evidence was not challenged by Mr Bassett. Mr [Nygaard] spent some money on clothing at that time as part of his "*revenge spending*" on Rodeo Drive Los Angeles, but Mrs [Nygaard] is being compensated for the value of his clothing collection. I have no evidence that Mr [Nygaard] caused a significant loss in the value of relationship property at that time that might be compensable under the PRA.

[185] As I interpret s 141 of the Trusts Act, I can only resort to the discretions and remedies in that Act if there is a "*determination*" I can make under the PRA or indeed the FPA and if the remedies, powers, and discretions in the Trusts Act are needed to give "*effect*" to that determination.[69] Mrs [Nygaard] has not explained which provisions in the PRA might provide a remedy for Mr [Nygaard]'s withdrawals from the Trusts Orbit account. It cannot be, for example, s 44(1) of the PRA because that would allow me to grant a remedy only if there had been any disposition of property "*in order to defeat the claim or rights of any person under this Act*". Mrs [Nygaard]'s right – her legitimate expectation – that Mr [Nygaard] would not breach his fiduciary duty and Trust funds and apply them for his own benefit is not a right provided for in or protected by the PRA. It is a right derived from equity and the Trusts Act. Mrs [Nygaard] had no other "*right*" or "*claim*" under the PRA to have the assets of the [Nygaard] trust restored or preserved that I am aware of.

[186] In any event I have no clear evidence that further compensation for Mrs [Nygaard] for the unauthorised withdrawals is necessary. I do not know exactly how much of the approximately $120,000 that was wrongly drawn on the Orbit Trust account was still reflected in Mr [Nygaard]'s separation date bank balance of $323,378.86, but I accept Mr Moriarty's evidence that there was not a significant "*alienation*" of funds from the family bank accounts. Mrs [Nygaard] will be receiving her 50 per cent share of that balance. I am therefore unable to find that I have jurisdiction under s 141 of the Trusts Act in these circumstances. I also do not consider that it is necessary to resort to the provisions of the Trusts Act because Mrs [Nygaard] is otherwise adequately compensated.

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[69] Leaving to one side the issue of the power that I have to preserve property under s 141(2)(a) which does not apply here.

[187] Some of Mr [Nygaard]'s actions were breaches of his fiduciary obligations to Mrs [Nygaard] and to [Jonas] as beneficiaries of the Trust. Equitable damages, perhaps even exemplary damages may be justified if an appropriate claim was brought, but it is not the function of the Family Court in this context to police trustee conduct.[70]

Issue 6 – Tax Debts

Dividend Withholding Tax

[188] The assets of [the company] include an overdrawn shareholder current account of $2,132,215. That is essentially money that Mr [Nygaard] "*owed the company*" having drawn on company funds in addition to the salary he was being paid. The equity value of the company including that asset would be $3,305,964 in Mr Bassett's opinion. Mr Bassett's valuation of the interests of Mr and Mrs [Nygaard] in [the company] for relationship property purposes deducted the shareholder current account to produce the net value of $1,172,749. Mr Bassett acknowledged that to reach that position a dividend would need to be declared and dividend withholding tax would need to be paid of $166,931. In his updated valuation affidavit dated October 2023, Mr Bassett deducted that liability before calculating the value of the parties' interests in the company.

[189] Mr [Nygaard] has retained control of the company and all the benefits derived from the assets of the company post-separation. There is no justification in any claim by Mr [Nygaard] for Mrs [Nygaard] to contribute further to any contingent dividend withholding tax liability. It has already been taken into account when calculating the net value of the benefits that Mr [Nygaard] retained.

Income Tax

[190] Mr [Nygaard] claims to already have an income tax liability of $184,381.07 which he says Mrs [Nygaard] should contribute to. There was no direct evidence of

[70] I am not encouraging further litigation. I hope the [Nygaard] Family can "*move on*" after this judgment is effected.

the debt. As part of a supplementary bundle, Mr [Nygaard] included a spreadsheet evidently prepared by his accountant, Mr Butch Reichelmann. Mr Reichelmann was not called. However, Mr Bassett accepted in cross-examination that if a dividend was formally declared – which would be necessary to "*clear*" the shareholder current account – there would be additional personal tax payable by Mr [Nygaard] of $184,000.

[191] This tax liability arose because the individual tax rate changed on 1 April 2021 so that the top marginal rate increased from 33 per cent to 39 per cent. Had the dividend been declared prior to 31 March 2021 the additional tax liability would not have arisen. It would have been in Mr [Nygaard]'s hands to avoid this additional liability by declaring the dividend at an earlier date.

[192] Mrs [Nygaard] described this additional tax liability as "*a contingent liability that has not arisen yet in which may never arise*". She said that if the debt is taken into account, it ought to be classified as Mr [Nygaard]'s personal debt and should not be shared. She argues alternatively that Mr [Nygaard] ought to compensate Mrs [Nygaard] pursuant to s 18C of the Act.

[193] Mrs [Nygaard] suggested that Mr [Nygaard] may *"Let the company lapse without declaring a dividend*". As a result, she argues, he may never pay the tax debt and may not be required to pay it.

[194] I cannot ignore the consensus of the experts, Mr Bassett, and Mr Moriarty. This tax debt will arise if and when a dividend was declared. A dividend needs to be declared to "*clear*" the shareholder current account debt which would otherwise be a liability of Mr [Nygaard]'s and a relationship debt. In calculating the net value of the asset that Mr [Nygaard] is to account to Mrs [Nygaard] for, this debt needs to be deducted – effectively by way of an offset against the value of the shares.

[195] As for Mrs [Nygaard]'s allegation that it is a personal debt rather than a relationship debt, [the company] clearly was a common enterprise carried on during the relationship. Mrs [Nygaard] argues that the income tax liability "*does not arise as*

part of the normal operation of a business". She alleges that it arose because of Mr [Nygaard]'s mismanagement of the company post-separation.

[196] Both expert accountants accepted that a competent accountant should have advised Mr [Nygaard] of the pending changes to the top marginal personal tax rate and should have advised him to declare a dividend prior to 31 April 2021. That would have avoided the debt arising. However, I have no evidence that Mr [Nygaard] received that advice. In any event, the fact that a debt arises through mismanagement – through some error or misjudgement on the part of one spouse – does not make it a personal debt or liability. I accept Mr Moriarty's opinion that "*those sort of tax complexities are often outside the skill set of company directors*".

[197] When Mr [Nygaard] was asked about the advice he received this exchange occurred:

> Q: Were you advised to declare a dividend in the period in advance of the 1st of April 2021?
>
> A: I – I let my accountants know the situation that I was in and they decided that they would sort things out, obviously, to suit my situation and – like Butch has always done, he's tried to do the best for me, I guess.
>
> Q: I don't know if I understand the answer Mr [Nygaard]. Are you saying that you probably were advised to declare a dividend but you couldn't afford to do it at the time?
>
> A: No, that's correct, yeah.
>
> …
>
> A: I wasn't in a position to pay those amounts.
>
> …
>
> Q: Hang on, you just told me in answer to an earlier question that you were advised to declare the dividend before the tax rate changed in 2021.
>
> A: Yeah, I can't remember, sorry.

[198] It was not clear to me from that exchange that Mr [Nygaard] actually knew that there would be an additional liability of $184,000 if he did not declare a dividend before 1 April 2021. I am unable to find on balance of probabilities that Mr [Nygaard]

made a deliberate decision not to declare the dividend with the intention of diminishing the value of relationship property.

[199] If I were satisfied on the balance of probabilities that Mr [Nygaard] had deliberately decided not to declare a dividend knowing that additional tax liability would be incurred, then would I accept that s 18C would apply. However, unlike Mr [Nygaard]'s decision to "*ditch the business*" of [the company] I am not satisfied that relationship property has been materially diminished in value by his deliberate inaction as to justify compensation for this contingent tax liability.

[200] When calculating the amount that Mr [Nygaard] should pay to Mrs [Nygaard] for the value of the [the company] shares, the sum of $184,381.07 should be deducted.

Issue 7 – Section 182

[201] In her closing submissions Mrs [Nygaard] said that she "… *seeks simple orders under s 182 Family Proceedings Act 1980 which exclude Mr [Nygaard] from the [Nygaard] Trust*". She listed three "*primary reasons*".

(a) This was the only way to compensate her for her share of the relationship property and the decisions that Mr [Nygaard] made as a Trustee of the Trust which have diminished the Trust Fund.

(b) Mr [Nygaard] had already received financial and non-financial benefits from the Trust which exceed "*what remains within it*".

(c) Mrs [Nygaard] is the only parent who can genuinely be trusted to ensure that [Jonas] continues to benefit from the Trust as he was intended to when it was settled.

[202] Mrs [Nygaard] submitted that resort had to be had to s 182 because "*Mr [Nygaard] spent the entirety of the funds in his bank account, wound down the parties' major asset and his own income stream, and has embarked on a new life with a new family*."

[203] I accept Mrs [Nygaard]'s submissions that Mr [Nygaard] has already received significant financial and non-financial benefit of the Trust. I have already dealt with compensation for his exclusive occupation of the home. I do not accept that resort needs to be had to s 182 to compensation for "*the use of $112,000 of the Trusts money*" considering Mr Moriarty's tracing exercise.

[204] It is common ground that capital distributions totalling $673,610.26 have been paid to Mr [Nygaard]. A good part of those capital distributions have been used to meet his maintenance obligations to Mrs [Nygaard].

[205] Mr [Nygaard] accepted that one of the key purposes of the Trust was to provide comfortable housing, minimal debt, and the ability to draw on Trust funds for capital expenditure when the parties agreed it was appropriate. Mrs [Nygaard] referred to the loss that she and [Jonas] had suffered, citing the words of the Supreme Court from *Clayton*:[71]

> "The section makes it very clear, however, that a provision directly from the settlement, or any variation of it, can be for the benefit of the children of the marriage. Indeed, children are mentioned in s 182(1) before the parties and the restriction in s 182(6) does not apply if the interest of the children so require. This suggests that the interests of the children (in particular dependent children) are a primary consideration under the section."

[206] Mrs [Nygaard] submitted that [Jonas] "*cannot expect to receive any further financial benefit from Mr [Nygaard]*". Sadly, [Jonas] and his father are currently estranged. From his evidence it seemed clear that Mr [Nygaard] had not yet reflected on how he might restore his relationship with [Jonas] – he seemed not to understand that he might take the initiative in that regard.

[207] Mr [Nygaard] was questioned about what he would do with any share of the Trust assets that he receives because of this decision. He had recently bought a property in [Australia] with his new partner. They were living there with their young son and his new partner is expecting another child. Mr [Nygaard]'s evidence was that any money he received would go into reducing the mortgage over that property. He said it was his intention in his Will to leave [Jonas] anything that he took out of the

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[71] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30 above n 10, [2016] 1 NZLR 590 at [56].

relationship with Mrs [Nygaard] and that anything that went into his new property "… *belongs to [Jonas]. Any benefits that come out of that belong to (his new son)*". It is the dollar amount that he put into the property "*frozen in time at current values*" that he intended to hold for [Jonas]'s benefit. It appeared that Mr [Nygaard] still did not understand that assets of the Trust should be available solely for the benefit of the Trust beneficiaries. His new partner and new children are not beneficiaries of the [Nygaard] Trust.

[208] The distance that Mr [Nygaard] had created between he and [Jonas] was exemplified by the way proceedings under the Family Violence Act were resolved. A protection order that Mrs [Nygaard] had obtained was made final and an application that Mr [Nygaard]'s partner was making was withdrawn on the condition that Mrs [Nygaard] and [Jonas] both agreed that neither of them would ever contact Mr [Nygaard] or his partner again. After [Jonas] was excluded on the family home Mr [Nygaard] declined to pay his school fees. He acknowledged that Mrs [Nygaard] did not have the money to pay for them "… *I just expected her to pay it because I was expected to pay it for years*". I accept the prospect of [Jonas] receiving significant future support from his father, or from any trust funds controlled by his father is remote.

[209] In considering how to exercise my discretion under s 182 I accept that I am not constrained to consider the case through the lens of an independent and fair-minded Trustee.[72]

[210] Section 182 is frequently invoked to address issues of fairness, justice and equity. As the Court of Appeal said in *X v X*:[73]

> "The common thread in these cases in which s 182 has been invoked to vary a Trust is that it was necessary to achieve fairness and justice between the parties and would not be to the detriment of the children of the marriage. The section is a route available to the courts when there is little or no relationship property available for division. It would be "necessary" to interfere with a settled Trust when to refrain from interference would leave one party unfairly disadvantaged (*Fielding v Burrell* [2005] NZFLR 558), or in a state of hardship (*Krystal v Krystal*).[74]

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[72] *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651.
[73] *X v X [Family Trust]* [2009] NZFLR 956 (CA) at [44].
[74] *X v X* (*supra*) at [44].

[211] Considerations of fairness should not be unconstrained or unprincipled. The three-stage analysis in *Preston v Preston* referred to earlier in this judgment continues to apply. My primary task is to compare the position of the parties under the settlement assuming a continuing marriage against their position under a dissolved marriage. Before I reach conclusions as to the fairness and justice of any division of the Trusts Act I should compare the position that they are each in at the end of the marriage and as a result of the decisions made in this judgment.

Trust Distributions Reconciliation

[212] The remaining assets of the Trust are represented in the $2,303,385 plus accrued interest that was on deposit at the date of the hearing. The parties agree that the debt owed to Mrs [Nygaard]'s mother, [Gina Bell] of $50,000 should be paid before division of the Trust assets so the net amount remaining available for division between them is $2,253,385. Mrs [Nygaard] should be credited with $40,625 as compensation for her exclusion from the home before the funds are nominally divided leaving $2,212,760. If that amount were divided equally, they would each receive $1,106,380. With Mrs [Nygaard]'s additional $40,625 she would be entitled to $1,147,005.

[213] Mr [Nygaard] has already received $684,780.26 in interim distributions, much of which was applied to his spousal maintenance obligations. Mrs [Nygaard] has already received $154,887.50. In other words, Mr [Nygaard] has already drawn an additional $529,892.76 ahead of her. To equalise Mrs [Nygaard] should receive an additional $264,946. from "*Mr [Nygaard]'s half*". That would leave Mr [Nygaard] with $841,434 but would mean they would have both received equal distributions from the funds from the sale of the home.[75]

Relationship Property Reconciliation

[214] In relationship property terms Mrs [Nygaard] retained her KiwiSaver at $88,080, a Range Rover at $53,600, a bank account with a separation date balance of $5,346, so she retained assets totalling $147,026. It is acknowledged that she has paid

[75] Apart from the additional $40,625 to be paid to Mrs [Nygaard].

rates post-separation of $6,496.50 leaving her with net relationship property of $140,529.50.

[215] Mr [Nygaard] retained the [the company] shares – effectively valued at $1,172,749. The income tax liability of $184,381 should be deducted leaving a net value of $988,368. He conceded his bank balance of $323,378 was relationship property. He has retained his KiwiSaver of $90,641, his clothing collection at $200,000, $55,000 for the art and other household chattels and the two paintings valued at $8,700. The net relationship assets retained by Mr [Nygaard] are therefore $1,666,087. From that two Visa debts of $876 and $244 which are acknowledged to be relationship property need to be deducted, leaving net relationship property in his hands of $1,664,967. Deducting the property Mrs [Nygaard] has retained of $140,529 sees Mr [Nygaard] having held $1,524,438 more than her in relationship property assets.

[216] If the adjustment sum that Mr [Nygaard] is required to pay Mrs [Nygaard] is to come from "*his half share*" of the Trust funds after the adjustments in [214] of $841,434, then he will have to pay her $762,219[76] leaving him with $79,715. That is his position before I consider the issue of the suspended maintenance payments. If I lift the order suspending his obligation to pay maintenance and require him to pay up to the date of hearing that will be an additional $136,000 due from Mr [Nygaard] to Mrs [Nygaard].

[217] Leaving the issue of maintenance to one side, on those calculations Mr [Nygaard] would be leaving the relationship with relatively little. However, a good part of the position that he is in is a direct result of the deliberate decision he made to shut down [the company]. The income stream that would have been available to him to meet his maintenance obligations to Mrs [Nygaard] was destroyed as was the value of the parties' equity in their property. The advances that he has received from the Trust which have been applied to relationship property to meet his maintenance obligations are a direct result of the decision that he made. I am not penalising Mr [Nygaard]. There is nothing punitive about this judgment, it simply reflects the reality

[76] Half of $1,524,438.

the parties would have been in following their separation but for Mr [Nygaard]'s decisions.

[218] There is no element of unequal sharing. My analysis has proceeded on the basis of equal sharing where no specific adjustment or compensation is needed. I accept there is no presumption of equal sharing of assets in the s 182 context.[77]

[219] The only elements of compensation are because of my s 18C decision in relation to the company and the occupational rental adjustment.

Section 182 Orders

[220] Against that background I need to consider how I am to exercise my discretion under s 182; is any additional adjustment in Mrs [Nygaard]'s favour appropriate?

[221] I do not think it either appropriate or necessary to make any further provision for Mrs [Nygaard] from the assets of the Trust given the position Mr [Nygaard] will be left in.

[222] Mrs [Nygaard] was seeking orders which resettled the Trust to remove Mr [Nygaard] as a settlor, trustee, and discretionary beneficiary. The Trust Deed would need to be varied to provide that she as sole remaining settlor would hold the power of appointment of Trustee, and she then proposed to appoint an independent corporate Trustee to replace Mr [Nygaard]. She said a resettlement on those terms would be consistent with the terms of the Trust Deed which allow the Trustees to declare a resettlement of Trusts for the advancement or benefit of any one or more of the beneficiaries to the exclusion of the others.

[223] Had the marriage subsisted without dissolution and had the Trustees discharged their discretions responsibly and for the benefit of the Trustees, I find it likely that the assets of the Trust would have continued to be applied principally for the benefit of Mr and Mrs [Nygaard] through the provision of a home for them – which was also to [Jonas]'s benefit as long as he was living in the home. It is likely that future benefits

[77] *Preston v Preston,* above n 68 at [52]; and *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [20].

to [Jonas] as the final beneficiary of the Trust would be dependent upon any needs that he had and on there being any *"surplus"* assets or income that the Trust held. An intention to equally benefit Mr and Mrs [Nygaard] from the Trust assets is sufficiently demonstrated from the fact that the Trust held the parties' homes during the relationship and by the equal control they had over the Trust as trustees, settlors, and appointers.

[224] I accept that s 182 is "*not a trust busting*" provision. In *Ward v Ward* the Supreme Court emphasised that s 182 was not to be used to enforce the applicant's relationship property entitlements. "*The court's task is not to produce the outcome that would have applied if the relationship property had not gone into a trust. A fact specific judicial assessment is required in each case*."[78]

[225] I have decided at paragraphs [153]–[168] above that Mr [Nygaard] should compensate Mrs [Nygaard] for his occupation of the home owned by the Trust to her exclusion. That decision is specifically to address the disparity that has arisen because of the dissolution. Mrs [Nygaard] would not have been excluded from the home had the marriage subsisted.

[226] It is clear to me from the evidence that I have heard and from what has happened since separation that Mrs [Nygaard] will continue to provide meaningful support for [Jonas] as and when he needs it as she has done since the separation. I am not required to retain the existing Trust structure, or even to resettle the property on new Trusts. Under s 182(1) I may "… *make such orders with reference to the application of the whole or any part of any property settled or on the variation of the terms of any such agreement or settlement … as the Court thinks fit*."

[227] In *Zhou v Lassnig & Ors*, Mr Lassnig was removed as a settlor, trustee, discretionary beneficiary, and final beneficiary of the Trust and 20 per cent of the net equity of the Trust was paid to him personally.[79] In *Henry v Morgan,*[80] Andrew J

[78] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [30].
[79] *Zhou v Lassnig & Ors* [2024] NZCA 177.
[80] *Henry v Morgan* [2024] NZHC 1841.

upheld the Family Court decision where the Trust assets were distributed equally to Mr Henry and Ms Morgan personally with the Trust in question *"dissolved"*.[81]

[228] I am unaware of any particular benefit or utility to the parties in retaining the [Nygaard] Trust structure.

[229] In considering the interests of [Jonas], I am satisfied that his mother will make provision for him from the assets that she receives from the Trust. She may well choose to settle a new Trust with him as the beneficiary. I see no need to tie her hands for the future.

[230] I have real concerns about whether Mr [Nygaard] would comply with his fiduciary obligations as a Trustee and hold any assets that were settled on a Trust which included him and [Jonas] as beneficiaries appropriately. As a result, I see no utility in directing that assets be settled in a new Trust for Mr [Nygaard], nor in giving him control of the existing [Nygaard] Trust structure.

[231] I have decided in the interests of fairness that the [Nygaard] Trust should be "*wound up*" with a distribution of the Trust assets to each of them to be made in accordance with this judgment. The legal and accounting costs of settling the Trust assets on the parties are to be paid from the Trust assets before distribution.

[232] Given the length of their marriage and the fact that all the Trust assets were acquired during the marriage and because of their joint efforts, I would have considered it appropriate to divide the assets equally with compensation as ordered then to be paid from each parties' share.[82]

[233] I acknowledge that my decision to settle the assets they are receiving on the parties personally is impacted by the reality that unless that occurs there is no fund from which Mrs [Nygaard] might receive the relationship property division/compensation that she is entitled to. This is not however a situation where I

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[81] There was equal sharing of the Trust assets in that case.

[82] A decision that would echo the presumption of equal contribution to, and equal sharing of the relationship derived analogously from the relevant provisions of the PRA including ss 1M(b) and 1N.

am directly using my discretion in s 182 to give effect to the equal sharing regime in the PRA. Mr [Nygaard] will be credited with the sum of money settled on him from the trust under s 182 as set out in paragraphs [214]-[215] above. Mr [Nygaard] has a separate obligation under the PRA to pay Mrs [Nygaard] a sum of money, which can be satisfied from that settlement. The outcome is fair and just.

Issue 8 – Section 99 Family Proceedings Act – Spousal Maintenance

[234] Judge Burns' decision requiring Mr [Nygaard] to pay Mrs [Nygaard] $4,000 per week was made on 8 November 2022.

[235] In the second reserved decision, delivered on 14 February 2023, Judge Burns confirmed that maintenance should continue until division of relationship and Trust property. Mr [Nygaard] was seeking an order for remission of arrears from September 2023 and a discharge of the order Judge Burns made. In his closing submissions Mr [Nygaard] said, "*the change in circumstances comprise the sale of the family home; the move to Australia; the partnering of Mr [Nygaard] with [his new partner] and the birth of [Mr [Nygaard]'s new son]*."

[236] Mr [Nygaard] has not appealed Judge Burns' decision. I do not have the ability to revisit Judge Burns decision as if this were an appeal. Section 99(1) requires me to have regard to the principles of maintenance set out in ss 62-66 and 81 of the FPA. However, unless there has been a material change in circumstances since Judge Burns made his decision, or there is some other explanation for the application, I would not be prepared to grant Mr [Nygaard]'s application because I would simply be substituting my view or judgement for that of Judge Burns in relation to the same essential facts and circumstances. As Tipping J said in *Frost v Frost*:[83]

> "In my view when an application is made to vary the terms of the registered maintenance agreement the Court is entitled to consider what circumstances have led to the application for variation, even if those circumstances be simply the effluxion of time. Although the jurisdiction under s 99 is not circumscribed by reference to a change in circumstances or any other criterion, it can hardly have been Parliament's intention to facilitate a change to an order of the court or an agreement of the parties unless something had happened to justify that

[83] *Frost v Frost* (1989) FRNZ 655 (HC) at 659.

> change or there was or had become inherently unfair or unreasonable in terms of the agreement which justifies a re-examination."

[237] In considering whether I should vary or alter Judge Burns' decision in any way, I am conscious of what Chilwell J said in *Johnson v Johnson*:[84]

> "It is my judgment that s 99(4) is designed to preserve the sanctity of court orders. A party who has a maintenance order against him or her ought to be vigilant to apply for orders under s 99. Until he or she does in the formal liability varied, discharged or suspended he or she ought to be bound by the order. The court has a discretionary power to prevent injustices in the exercise of its discretion under s 99(6). I reject Mr Galbraith's submission. The discretion under s 99(6) is unfettered.

[238] It was for that reason that I directed that Mr [Nygaard] was to pay arrears of maintenance up to September 2023 as a condition of the order that I made suspending his maintenance obligations pending this hearing.

[239] Judge Burns' decision was a considered and nuanced decision. He ordered Mr [Nygaard] to pay $2,500 per week to meet Mrs [Nygaard]'s reasonable needs and an additional $1,500 per week to meet legal and accounting expenses. Maintenance was to be payable *"…until resolution of the parties' relationship property and trust affairs…"*.[85] Judge Burns drew inferences Mr [Nygaard] was able to pay maintenance, that *"he must have had sufficient income to be able to meet the obligation"* from Mr [Nygaard]'s *"decision to unilaterally wind down the [business] in light of his clear obligation to maintain his wife"*. Judge Burns was satisfied that even if his income was insufficient there *were "sufficient capital resources available to the respondent to meet the spousal maintenance obligation"*. He considered Mr [Nygaard] had made *"tactical decisions with a view to manipulating the position to try and eliminate his obligation to pay spousal maintenance"*.[86]

[240] Under s 56 of the FPA the Court must have regard to the means of each party including their *"potential earning capacity"*.[87] I accept from the evidence that I heard that Mr [Nygaard] cannot now afford to pay a significant amount in spousal maintenance based on his current actual income. Mr [Nygaard] is now working as an

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[84] *Johnson v Johnson* (1982) 1 NZFLR 212 (HC) at 223.
[85] *[Nygaard] v [Nygaard]* (*supra*) at [26].
[86] At [23](n).
[87] Section 65(2)(a)(i) of the Family Proceedings Act 1980.

employed [occupation deleted] in [Australia] earning $2,200 per week after tax. It is obvious that he has a substantial shortfall between his current actual income and the suspended maintenance obligation. In a budget he supplied in support of his application under s 99 to suspend, discharge and/or vary his maintenance obligations he deposed to a deficit of expenses (including the maintenance order) over income of $6,348 per week. He lives with his new partner and infant son in an apartment he has purchased on [location deleted]. His contribution of $80,000 to the deposit for the apartment came from an interim distribution from the Trust's house sale proceeds.

[241] Judge Burns was aware that at least the arrears of maintenance Mr [Nygaard] was required to pay would have to come from the house sale proceeds, that is from Trust property.[88] In *Clayton v Clayton (Maintenance)* Mr Clayton's access to bowings from a trust was recognised by Courtney J as a source from which his maintenance obligations could be met:[89]

> "In some circumstances a person in Mr Clayton's position can be required to access capital assets for this purpose and I consider this case to be one in which it is reasonable to require that."

[242] In *Clayton,* Courtney J found that Mrs Clayton would have been able to meet her own living and legal expenses *"without recourse to maintenance"* if she had access to relationship property earlier.[90] Mrs [Nygaard] may well not have needed to have recourse to maintenance had Mr [Nygaard] not deliberately diminished the value of the [the company] shares and had relationship property and Trust issues been resolved earlier.

[243] I am also concerned that Mr [Nygaard]'s current comparatively low income is a product of his decision to cease the operation of [the company]. I accept his actual income is low, but that is not a fair reflection of his potential earning capacity which is illustrated by examining the performance of [the company] prior to separation. [The company]'s accounts showed it earned a net profit after deducting a directors' salary of $150,000 attributed to Mr [Nygaard], and after tax of $534,546 in the year to 31 March 2019 and $444,763 to 31 March 2020.

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[88] *[Nygaard] v [Nygaard]* (*supra*) at [26](a).
[89] *Clayton v Clayton (Maintenance payments)* [2015] NZFLR 501(HC) at [72].
[90] At [47] and [73].

[244] Mrs [Nygaard] says that all of the "*changed circumstances*" that Mr [Nygaard] relied on were known to Judge Burns or at least known to Mr [Nygaard] at the date of Judge Burns' maintenance decision. She says that none of them are changed circumstances. I address each of them below.

Relocation to [Australia]

[245] I agree with Mrs [Nygaard] that at the time of the hearing before Judge Burns Mr [Nygaard] was well aware that he was winding down [the company]. He had made the decision to "*ditch the business*" and move to [Australia]. The decision to move overseas was made as early as March 2022, several months prior to the maintenance hearing. This is not a changed circumstance.

Winding Up [the Company]

[246] It is about Mr [Nygaard]'s decision to stop trading the parties' highly successful [business] was made before the hearing. It was a decision that was known to Judge Burns. It is not a changed circumstance.

Mr [Nygaard]'s New Child

[247] Mr [Nygaard] confirmed in his affidavit of 23 September 2023 that he knew of his partner's pregnancy in August 2022 which was a month prior to the spousal maintenance hearing. The fact that he had a new child to support cannot be considered a new changed circumstance.

The New Home in [Australia] and the Mortgage Obligation

[248] The purchase of the new home in [Australia] occurred in March 2023. I agree with Mrs [Nygaard] that Mr [Nygaard] did so in the knowledge that he was at that time in breach of the maintenance order made in New Zealand. He was accruing a debt to Mrs [Nygaard] in the amount of $4,000 a week. She cogently says that he should not be able to use this decision to incur a new debt (the mortgage) as a reason to avoid his legal obligation to maintain his wife. Consciously taking on this obligation in breach of the court order should not be rewarded.

Section 99 Variation Decision

[249] In her supplementary submission on s 99, Mrs [Nygaard] said, "*It is also demonstrably incorrect that Mr [Nygaard] lacks the means for which to pay his current maintenance arrears to Mrs [Nygaard]. Mrs [Nygaard] will readily consent to a sufficient lesser funds from the balance of funds being held by Insight Legal from the sale of the former family home at [address 1]*".

[250] As a result of the decisions in this judgment, the compensation awarded and the adjustments that are necessary, Mr [Nygaard] is likely to receive little more than $79,712 plus any interest accrued. He has met his obligations under the PRA to Mrs [Nygaard] from "*his share*" of the proceeds of sale of the Trust home. That is not enough to meet the arrears of maintenance that were outstanding at the start of this hearing, let alone to the date of this judgment.

[251] What I now know, that Judge Burns did not know at the time of hearing, is that Mr [Nygaard] does not and will not have a significant pool of capital to meet his maintenance obligations from.

[252] I am also now satisfied that Mr [Nygaard]'s actual income is insufficient to meet the outgoings that he has in [Australia]. It is clear to me that he cannot afford to properly maintain his new family and his existing family.

[253] The pending birth of a second child is a new circumstance which will add to Mr [Nygaard]'s financial burden.

[254] I accept Mr [Nygaard]'s evidence as to his current income as an employed [occupation deleted]. I have no evidence that he is likely to resume trading [the company]. I agree that Mr [Nygaard] has additional earning potential or at least that he clearly had additional earning potential at the time of Judge Burns' decision. It was certainly not too late for him to "*resurrect*" the business of [the company] at that stage.

[255] One of the key factors that I am required to consider in any maintenance decision is the ability of the liable spouse to pay. I have no evidence that Mr [Nygaard]

is living extravagantly or that there are any economies that he could make which would enable him to meet the obligations he has in Australia comfortably let alone enable him to make a substantial payment of maintenance to Mrs [Nygaard].

[256] Having said that, I accept Mrs [Nygaard] has an ongoing financial need for support which subsisted up to the time of actual division of relationship property.

[257] Ultimately, I do not consider that it would be fair or just to require the last part of the [Nygaard] Trust funds that are available for Mr [Nygaard] to be used to pay maintenance to Mrs [Nygaard] in a sum that cannot be justified based on what I now know about his actual income now and his actual capital resources.

[258] It is for that reason that I am granting Mrs [Nygaard]'s application to the extent that his obligation to pay maintenance is to end as of September 2023.

Costs

[259] Overall Mrs [Nygaard] has been the successful party in applications before the Court. She is entitled to costs at least on a 2B scale. If her counsel considers that increased costs are justified, they are to file focused submissions of no more than seven pages plus any relevant schedules. They will need to include details of actual costs incurred and they will need to bring to account the sums that were awarded to Mrs [Nygaard] as part of the maintenance decisions. They are to file those submissions by 4.00 pm on 24 October 2024.

[260] Mr [Nygaard] is to respond by 4.00 pm on 13 November 2024. I understand that he may have been legally aided for the purpose of these proceedings which may have a significant affect on liability to award costs.

Summary of Orders

Relationship Property

[261] Mrs [Nygaard] is to retain as her separate property the following:

(a) Her KiwiSaver.

(b) The proceeds of sale of the Range Rover motor vehicle.

(c) Her bank account with the separation balance of $5,346.

[262] Mr [Nygaard] is to retain as his separate property:

(a) The [the company] shares.

(b) His KiwiSaver.

(c) His clothing collection.

(d) The chattels and miscellaneous art that were in the home at a value of $55,000 in total and the two paintings he kept at a value of $8,700 in total.

[263] Mr [Nygaard] is to pay Mrs [Nygaard] $762,219 to "*equalise*" the relationship property pool and compensate Mrs [Nygaard] for the deliberate diminution of the [company] asset value.[91]

[Nygaard] Trust

[264] The funds on deposit of $2,303,385 plus accrued interest are to be applied as follows:

(a) $50,000 is to be paid to [Gina Bell].

(b) $40,125 is to be paid to Mrs [Nygaard] as compensation for her exclusion from the home.

(c) The balance and any accrued interest is to be divided equally.

[91] As set out in paras [125] and [216] to [218].

(d) From Mr [Nygaard]'s half-share, Mrs [Nygaard] is to be paid $264,946.38 to equalise as he has drawn an additional $529,892.76 ahead of her.

Signed at Auckland this 4th day of October 2024 at 3.00 pm

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Judge Kevin Muir
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 04/10/2024