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

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IN THE FAMILY COURT
AT DUNEDIN

I TE KŌTI WHĀNAU
KI ŌTEPOTI

FAM-2021-012-000487
[2024] NZFC 9009

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[MELODY GRAVES] Applicant
AND	[SETH DILLON] First Respondent
AND	[SETH DILLON], [AIDAN DILLON], and [TRUSTEES LTD A] as trustees of the [DILLON] FAMILY TRUST. Second Respondents

Hearing:	18 April 2024
Appearances:	Ms J Beck for the Applicant Ms K Jarvis for the Respondent
Closing submissions filed:	8 May 2024 for the Applicant 7 May 2024 for the Respondent
Judgment:	17 June 2024

RESERVED JUDGMENT OF JUDGE NA WALSH
RE: Application under sections 44 and 44C

Introduction

[1] Before the Court are [Melody Graves] ("[Melody]") and [Seth Dillon] ("[Seth]") (in his personal capacity as first Respondent) and his brother [Aidan Dillon], and [Trustees Ltd A] as trustees for the [Dillon] Family Trust as second respondents; in proceedings under the Property (Relationships) Act 1976 (the "PRA") concerning the status of the properties at [address 1] ("[address 1]"); and [address 2] ("[address 2]").

[2] [Melody] issued proceedings in December 2021. The case has had a convoluted history. Initially, David Moore acted for [Melody] and then Len Anderson KC was engaged. Following the death of Len Anderson, in 2023, Ms Jenny Beck represented [Melody].

[3] On 27 April 2023, Judge Flatley directed that a one day fixture be set down to determine the status of the two above mentioned properties [Melody]'s claims under section 44 and s 44C.

Background

[4] [Seth] was born in New Zealand but lived for ten years in Germany, he married [Hope] in 1995 and together they have two sons, [Blake] and [James]. [Seth] learnt [a trade] whilst living in Germany.

[5] In [2001], they separated and [Seth] returned to New Zealand in 2004 with no assets. He observed:[1]

> We were renting. We had no property. I left with four cardboard boxes. I had nothing when I left. I was eight grand in the red and had nothing when I came back to New Zealand.

[6] Upon returning to New Zealand, [Seth] worked for his father and brother in [city A]. [Seth] met [Melody] and they entered into a de facto relationship from [2010]. [Melody] was a [employment details deleted].

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[1] Notes of Evidence (NOE) at 32 lines 32-34.

[7] At the time [Melody] first met [Seth], she owned a property and operated a business. The business failed during the global financial crisis in 2007 and [Melody] was bankrupted by a landlord on her personal guarantees.

[8] [Seth] and [Melody] relocated from [city A] to [city B], in [2011], where [Seth] obtained [employment details deleted]. [Melody] obtained [employment details deleted].

[9] [Melody] and [Seth] became engaged in [2011], when [Melody] was 5 months pregnant. They are the parents of [Nikita Graves-Dillon] ("[Nikita]") born [2012], now aged 12 years.

[10] In July 2012, (when [Nikita] was 3 months old) they relocated to [city C], where [Seth] took up a position with [employment details deleted].

[11] The [Dillon] Family Trust was established by Deed dated 2 September 2012, when [Nikita] was 5 months old. The settlor and appointer was [Seth]'s Father, the late [Laurence Dillon]. The discretionary beneficiaries are [Laurence]'s children and his grandchildren (including [Nikita]). [Melody] is not and never has been a beneficiary of the Trust.

[12] On [date deleted] 2013, nine months after the Trust's creation, [Laurence Dillon] died. He left an estate in the vicinity of $9 million.

[13] The Trust's sole source of capital has been from [Seth]'s inheritance from his father's Estate. Its only income has been that generated by the Trust's assets.

[14] [Laurence Dillon] was the father of four sons: [Seth], [Aidan], [Sean], and [Angus Dillon]. [Laurence Dillon] did not put trust structures in place for [Aidan], [Sean], or [Angus].

[15] The current appointer is [Seth]'s brother [Aidan Dillon].

[16] [Melody] claims that the date of separation was 13 January 2019. [Seth] claims the date of separation was 12 May 2019, when he first moved out of [address 1]. However, the Court is not asked to determine the date of separation.

[17] On 30 August 2013, at a time when [Seth], [Melody] and [Nikita] were living in [city C], six weeks after [Laurence Dillon]'s death, an appointment was made to consult a [family lawyer], Sonya de Vries. [Seth] said under cross-examination, that the appointment was driven by [Melody].[2]

[18] On 29 August 2013, [Melody] sent a copy of the trust deed to Ms de Vries and, stated in a covering two page email:[3]

> Our concerns around the trust deed are as follows:
>
> 1.1 Discretionary beneficiaries – can you confirm these are not guaranteed to be treated equally, it is at the discretion of the trustees and can be changed at any time, and can only be really protected if they are trustees also.
>
> d) does this include future children and future daughters in law as beneficiaries or not, given the settler has now passed on.
>
> 4.1 – 6.0 income and capital of the trust how is this to be treated, must it be paid out by trustees only at end of each income year i.e. -what power does [Seth] actually have in terms of accessing these funds, income or capital, does he have/can he have individual authority for managing the funds/signing authority on funds and appointing new trustees and or beneficiaries. What are the practical/logistical implications of managing such a structure? We reside in [city C], the lawyer is in [city A] and his brother is in Auckland?
>
> 7.0 Resettlement please clarify what this clause actually means.
>
> 8.0 Appointment of Trustees, is it usual for this power to be given to [Seth]s brothers now his father has passed, we understand (sadly), that [Seth]s Dad wished to have control over this trust while alive, but upon his death for the power to be given to his brother? ... this seems irregular and unreasonable, can it be changed? Is it unusual practice?
>
> 10.0 Buying of property, home/business, how does this trust compromise this activity, can it be owned in our joint names?
>
> 12. – 13.0 Please clarify what this means
>
> 16.5 All decisions are to be unanimous, is this usual practice or is majority more usual and therefore more flexible

[2] NOE at 43 line 6.
[3] Bundle of Documents (BOD) at 121-122.

> Are there any other terms/clauses of this trust that we have not raised, that we should be made wary of.
>
> At [Seth]s suggestion I sought independent legal advice. My initial fears/concerns were reiterated as being very valid, as [Seth] and I would be building a life together, any future property purchases, under the terms of this trust would leave me horribly vulnerable. What is your opinion on this and what are the potential solutions.
>
> We have discussed perhaps seeking up a second trust for our family unit. For some of the proceedings to be paid into, could this be a potential solutions?, entirely separate to the trust his father set up, or should this trust be wound up and two others setup?, one of [Seth] and his boys in Germany, and another for our family unit?
>
> Thanks for your assistance with these issues.
>
> Kind regards
>
> [Melody] and [Seth]

[19] On 31 August 2013, [Melody] emailed [Seth] commencing with the following statement:[4]

> I needed to do some further processing since the appointment yesterday. So I am trying to order and clarify my thoughts and concerns for you.

[20] [Melody] stated (inter alia):[5]

> Your brothers have received their share direct into their pockets and more (e.g. [Sean] & the practice which he is now selling). They retained control of their lives, ... yours has been kept from you.
>
> You now have options to rectify this inequity, the decision can be yours. For your own self value and self care I would like to see you empowered to take steps to overturn your father's immoral decisions and mistreatment of you compared to your brothers....

[21] I infer from [Melody]'s subsequent correspondence that she did not receive a written response from [Seth].[6] Nevertheless, she put forward, in writing, a proposal to restructure the Trust (including winding it up and [Seth] setting up his own Trust) and a draft letter to the Trust's appointer, [Aidan Dillon] (which included proposals for the distribution of capital.)

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[4] BOD at 113.
[5] BOD at 113.
[6] BOD at 118-122.

[22] However, the Trust was never restructured.

[23] [Seth] resigned from [employment details deleted] in [2014]. [Melody] and [Nikita] returned to [city A] to live with her parents. [Melody] started looking for a home to live in whilst [Seth] worked out his notice. [Melody] deposed:

> [Seth] had talked about renting, but I considered it to be more financially sound to purchase a home, as there were some inheritance funds available at this stage.

Purchase of [address 2]

[24] On 28 May 2014, [Seth] signed a conditional offer by 'Tenderer of Purchase' of [address 2] for $360,000 in his own name, but the words *"as nominee"* are handwritten under his signature. Also, the words 'or nominee' are boldly circled on the standard typed wording on the memorandum of contract.[7]

[25] On 13 June 2014, an unconditional sale was completed at the reduced price of $357,000.

[26] On 16 June 2014, [legal executive] of [Ryan Holder] Law firm emailed [Melody] and asked:[8]

> Hi [Melody]
>
> Please advise who the purchasing entity will be.

[27] And [Melody] responded the same day:[9]

> Hiya
>
> Purchasing entity is [Dillon] Family Trust, Trustees: [Seth Dillon], [Aidan Dillon] and [name deleted - Trustees]. [Seth] and [Aidan] think they only need sign I will try to attach trust document too. (sic) NB: [Laurence Dillon] is now deceased.
>
> Thanks
> [Melody] & [Seth]

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[7] BOD at 147.
[8] BOD at 237.
[9] BOD at 237.

[28] On 16 June 2014, "the purchasing entity" was described to the vendor in a resolution of trustees (namely [Seth], his brother [Aidan], and [Ryan Holder] as Director of [details deleted]) as "the Trust."

[29] A deed of nomination was never completed.

[30] On 17 June 2014, $35,750, a deposit for [address 2] was paid from the [Dillon] Family Trust Bank account at ANZ into [Ryan Holder]'s Trust account. A vendor mortgage of $100,000 was arranged with the vendor, and there is no dispute that [Melody] was proactive in suggesting this initiative to bridge the shortfall. The $100,000 vendor mortgage was secured by a formal mortgage instrument dated 27 June 2014 and the 'Mortgagor' is identified as [Seth Dillon], [Aidan Dillon] and [name deleted].

[31] By a minute dated 27 June 2014, two of the three trustees resolved that the Trust entered into the purchase of [address 2]. The purchase was completed with the transfer of the title to [address 2] from the vendor to the names of the trustees on 27 June 2014.

[32] The vendor mortgage was repaid by the Trust out of further advances from [Seth]'s share of his Father's inheritance, as the funds became available.

[33] There was the following exchange between Ms Beck and [Seth] under cross-examination:[10]

> Q: All right did you tell [Melody] at any stage that she would become a beneficiary of the trust?
>
> A: No. I never said that.
>
> Q: All right.
>
> A: It's true we talked about possibly [Melody] getting partial ownership of [address 2]. But that was more if we got married and we're in a stable relationship. Whereas we've always needed counselling whether it was Christchurch, [city A]. [City A] before we went up north, up in [a town in Auckland], while in Christchurch we had counselling and we had counselling back here in [city A]. So, to be fair we did work on maintain the relationship but it eventually folded.

[10] NOE at p 343 line 17 – p 344 line 2.

> Q: Okay if [Melody] had been told that she was going to become a beneficiary of the trust she wouldn't have had to worry would she about the purchase of [address 2] being made in the name of the trust?
>
> A: Why should she worry about [address 2] being purchased in the name of the trust? The money– the inheritance money went into the trust. It's only my inheritance that could buy [address 1]– oh [address 2], so why should she be worried?

[34] It is [Melody]'s evidence that prior to the purchase of [address 2], she was told that she would become a beneficiary in the [Dillon] Family Trust. She explained:[11]

> ... therefore I was not concerned when the transfer was to the Trust.

[35] It was [Seth]'s evidence as follows:[12]

> My intention was for the Trust to purchase [address 2]. [Melody] and I had discussed this and she agreed with me (especially given that neither of us had the means to complete the purchase, or even pay the deposit). My co-Trustees were also aware that I wanted the trust to purchase [address 2]. However, given that [Aidan] lives in the North Island, it wasn't practical for him to sign the agreement in a tender situation, so I understood that it was fine for me to sign "as nominee" for the Trust.
>
> At the time [address 2] was purchased, neither [Melody] nor I had sufficient assets (or borrowing ability) to settle the purchase. The Trust had received some, but not all of my inheritance, but this was my sole means of gaining access to the necessary funds. [Melody] has acknowledged in her affidavit at paragraphs 19, 20, and 23, that neither of us would have been able to settle the purchase in our personal capacity.
>
> The deposit of $35,750.00 was paid by the Trust from the inheritance it had already received.
>
> The Trust had not yet received the balance of my inheritance, so there was a vendor mortgage of $100,000 as part of the purchase. This was later repaid in full (plus interest) by the Trust on 23 June 2017, after it receive the rest of the inheritance.
>
> [Melody] has made a big deal at paragraph 23 of her affidavit about her involvement in securing the vender mortgage. [Melody] was involved in this, however this contribution pales in comparison with the benefit of rent-free accommodation she received from the Trust in being able to live at [address 2].

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[11] BOD at 47.
[12] BOD at 93 [37]-[41].

Purchase of [address 1]

[36] It is [Melody]'s evidence that:[13]

> The Respondent and I decided that we would buy and make our home at [address 1] and would rent [address 2] as a Bed and Breakfast.

[37] [Melody]'s further evidence is that:[14]

> The Respondent said he and [Aidan Dillon] had decided to offer to give me half of [address 2] to enable this to happen since I had not been made a beneficiary of the Trust

[38] [Aidan Dillon] in response to [Melody]'s assertions deposed:[15]

> I recall that [Melody] was very upset that she did not own any property, and there was a brief discussion whether there was any goodwill gesture that could be made to her to appease her (and therefore relieve some of the pressure that she was putting on [Seth]).
>
> Sometime before the purchase of [address 1]. I did have a discussion with [Melody] that at some future point it may be appropriate for her to have an interest in the ownership of [address 2]. This was more of a product of trying to relieve some to the significant pressure that [Melody] was putting on [Seth], which I could hear was difficult for [Seth] to deal with. But the discussion never progressed, and as such no such consent was ever provided by me or any of the other Trustees as far as I am aware.

[39] On 24 May 2017, [Seth] entered into an unconditional agreement for the purchase of [address 1] for $740,000 and again he signed the agreement for sale and purchase in his own name as purchaser and the printed words *"and/or nominee"* were not deleted.

[40] There was the following exchange between Ms Beck and [Seth]:[16]

> WITNESS REFERRED TO bundle of documents, page 63
>
> Q: Okay. Can you see purchaser [Seth Dillon]?
>
> **A: I see purchaser [Seth Dillon] and/or nominee. Again I'm not a lawyer, I was buying as a trustee on behalf of the trust, that's what I thought. I guess one shouldn't assume something but that's what I assumed because it was only the trust that had money.** (Emphasis added)

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[13] BOD at 51 [9(a)].
[14] BOD at 51 at [9(b)].
[15] BOD at 248 [27] - [28].
[16] NOE at 55 line 20-25.

[41] On 7 June 2019, a deposit of $74,000 was paid from [Seth]'s personal ANZ Serious Saver Account on account of the purchase of [address 1].

[42] On 10 July 2019, the trustees of the Trust resolved to purchase [address 1] and, on the same date, $667,542.85 was withdrawn from [Seth]'s personal account and transferred to his lawyer, [Ryan Holder], to complete the settlement of the purchase of [address 1] on 12 July 2017.

[43] A deed of nomination was not completed for the purchase of [address 1].

[44] [Seth] and [Melody] were both closely involved in choosing [address 1] to buy (having looked at many lifestyle blocks in [location deleted]). They both spoke to the building inspector and looked over the LIM Report for [address 1].

[45] However, [Seth], under cross-examination, was resolute in his position that [address 1] was "always going to be a Family Trust Property." There was the following exchange between [Seth] and Ms Beck:[17]

> Q: And do you also, well do you agree that you and [Melody] treated [address 1] as joint property?
>
> A: No, I don't agree. It was – I'm still aware that all funds came from the [Dillon] Family Trust. I have never at any stage forgotten that, and that it all – ultimately while we were today, while those four years in the [shop] we earnt nothing, so our life was pretty much subsidised and maintained by my inheritance which went into the [Dillon] Family trust.

[46] It was [Seth]'s evidence that his brother, [Aidan Dillon] as a trustee was involved in the "decision-making to buy a trust property."[18] He also said that:[19]

> ... [Ryan Holder] could have disagreed with the purchase of [address 1]. He obviously thought it was an okay property.

[17] NOE at 58 line 15-22.
[18] NOE at 67 line 25-26.
[19] NOE at 67 line 33-34.

The applicant's case

[47] The late Mr Anderson KC in his written submissions of 25 August 2023, succinctly summarised [Melody]'s case as follows:[20]

> [Address 2] was purchased by [Seth] with the title being taken by the Trust as a result of a nomination by [Seth].
>
> [Address 1] was purchased by [Seth] with the title being taken by the Trust as a result of a nomination by [Seth].
>
> In neither case was the Trust a party to the contract and [Seth] is the purchaser in each case even though he did not receive the conveyance.
>
> The claim that each property was bought by the Trust is incorrect. The status of the Trust is that it received the property in each case as the nominated transferee without any rights or obligations under the contract.

[48] Mr Anderson KC referred to the principles of nomination as set out in *Lambly v Silk Pemberton Ltd,* namely*:*[21]

> (a) the purchaser has a right to nominate another party as transferee to take conveyance;
>
> (b) nomination of a transferee does not affect in any way the contractual obligations between the vendor and the purchaser as parties to the contract;
>
> (c) no consent is required from the vendor in related to such a nomination; and
>
> (d) the nominated party does not, solely as a result of the nomination, enter into any sort of contractual relationship with the vendor.

[49] Therefore, Mr Anderson KC submitted that in both the [address 1] and [address 2] acquisitions, the purchaser was [Seth] and the nominee was the Trust.

[50] Mr Anderson KC further submitted that there was no novation and that:[22]

> A novation is where two contracting parties agree that the third party should be substituted either of them, and it requires the discharge of the original contract and the substitution for either of them of a new contract. Once there is a novation there cannot be a specific performance ordered of the original agreement.

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[20] L Anderson's submissions of 25 August 2023 at [5.1]–[5.4].
[21] *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427 (CA)
[22] At 434.

[51] Ms Beck in her concluding submissions, reiterated that if [Seth] and the second respondents had wished the Trust to be bound by the conveyance, they should have signed on behalf of the Trust. Ms Beck submitted:[23]

> As an absolute minimum the parties ought to have entered a Deed of Nomination.

[52] Therefore the crux of [Melody]'s case was that [Seth] did not enter the sale and purchase agreements on behalf of the Trust.

[53] [Melody] does not accept the claim by [Seth] and the second respondents that [Seth] signed the purchase agreements on behalf of the Trust, and that the other trustees could not sign for reasons of "expediency."

[54] Ms Beck submitted that it would not have been difficult for the other trustees to sign. For example, [Aidan Dillon] is an accountant and "regularly signs and scans documents in his professional capacity." Alternatively, Mr [Holder], a retired lawyer living in [city A], "could easily have signed on behalf of the Trust. Indeed, both conveyancing transactions occurred through his office."

[55] Ms Beck submitted that the trustees did not carry out their duties appropriately. She pointed out that the Trust does not permit [Seth], as a beneficiary, to exercise Trust powers in his own favour. The other trustees did not effectively control [Seth]'s use of Trust property as intended in cl 18.7 of the Trust deed.

[56] Ms Beck submitted that Mr [Holder], the independent professional trustee of the Trust, confirmed in his evidence that [Seth] was not able to bind the Trust and could not sign on behalf of the Trust. Clause 18.7 states:

> No trustee who is a beneficiary shall exercise the power vested in that trustees favour. However, any power may be exercised in favour of the trustee who is a beneficiary by the other trustees.

[57] Therefore, Ms Beck submitted that the trustees, particularly the professional trustee, Mr [Holder], ought to have applied the terms of the Trust Deed correctly.

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[23] J Beck's submissions of 8 May 2024 at [8].

Ms Beck submitted that **this failure means "that [Seth Dillon] purchased the properties in his personal capacity and not as a Trustee."**[24] (Emphasis added)

[58] Ms Beck submitted that the independent trustees were not involved in the decision-making process. She pointed out that rather, [Seth] made a decision to purchase the family homes.

[59] [Aidan Dillon], under cross-examination, said that he discussed the purchase of [address 1] over the telephone and advised [Seth] *against* the purchase of the property, stating that it was a bad idea to purchase another residential property so soon after the purchase of [address 2]. [Aidan Dillon]'s advice was that the Trust should purchase more commercial property. Ms Beck conceded that [Aidan Dillon] set a "budget" for the purchase of [address 1], but she claims that this was the limit of [Aidan Dillon]'s involvement.

[60] Ms Beck submitted that [Aidan Dillon] did not view the property in person; he did not speak to the builder who carried out the building report, nor did he look at the LIM report. Rather, [Aidan Dillon] left all the due diligence to [Seth] and so did not exercise his duty correctly, rather he left the decision-making to [Seth].

[61] Ms Beck submitted that Mr [Holder], although located in [city A], was also not involved in the decision-making process. [Seth], in an email dated 7 June 2017, advised Mr [Holder] that he had looked over the LIM and did not see any issues. Further, [Seth] advised Mr [Holder] that he and [Melody] had spoken to the building inspector. Ms Beck submits that this email confirms that Mr [Holder] was not involved in the decision-making process and did not carry out any due diligence.

[62] Ms Beck pointed out that, in a handwritten note,[25] Mr [Holder] confirmed he did not even know who the purchasing entity was, writing "I would imagine this (the Trust) will be the entity purchasing the property."

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[24] At [12].
[25] BOD at 240.

[63] Ms Beck also pointed to an email from [Seth] to Mr [Holder], describing the due diligence and investigation he had carried out on [address 1].[26] She submitted that [Seth] was not receiving information from Mr [Holder] to make a decision, but rather informing him of a decision that had already been made. [Seth] wrote:

> a) I have looked over the Lim Report and don't see any issues with the place.
>
> b) Our offer has been accepted.
>
> c) I am simply paying cash for the property out of my [Dillon] Trust account.

[64] Ms Beck emphasised that [Seth] refers to the Trust account as *'his'* own account. Further, she points out that the money was transferred from the Trust account into [Seth]'s personal bank account, and then paid to the vendor.

The section 44 claim

[65] Section 44 of the Act provides:

> **44 Dispositions may be set aside**
>
> (1) Where the High Court or the District Court or the Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (party B) under this Act, the court may make any order under subsection (2).
>
> (1A) The court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.
>
> (2) In any case to which subsection (1) applies, the court may, subject to subsection (4),—
>
> (a) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his or her personal representative, shall transfer the property or any part thereof to such person as the court directs; or
>
> (b) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his or her personal representative, shall pay into court, or to such person as the court directs, a sum not exceeding the difference between the

[26] Email dated 7 June 2017.

> value of the consideration (if any) and the value of the property; or
>
> (c) order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his or her personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the court directs, or shall pay into court or to such person as the court directs a sum not exceeding the value of the interest.
>
> (3) For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit.
>
> (4) Relief (whether under this section, or in equity, or otherwise) in any case to which subsection (1) applies shall be denied wholly or in part, if the person from whom relief is sought received the property or interest in good faith, and has so altered his or her position in reliance on his or her having an indefeasible interest in the property or interest that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

[66] Ms Beck referred to *Sutton v Bell,*[27] where the Supreme Court made it clear that all that is required to bring a claim under s 44 is knowledge that a transaction will have the effect of defeating a claim or rights under the PRA. There is no need to show that the disposition was made with the purpose or motivation of defeating rights under the PRA:[28]

> An intention to defeat the rights of another party to a de facto relationship can be inferred from the disposing party's knowledge of the effect of the disposal will have on the other party's rights; there is no requirement for proof of the disposing party's motivation to so defeat another's interest.

[67] Ms Beck submitted that [Seth] did not need to have the conscious purpose of defeating [Melody]'s rights. It is sufficient that he intended a course of conduct that produced the effect. As the Court in *Sutton v Bell* notes, it is important to distinguish "motive" and "purpose" from "intent."[29]

[68] Ms Beck argued that all that is required here is knowledge, on [Seth]'s part, that [Melody]'s rights would be defeated by transferring the property to the Trust.

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[27] *Sutton v Bell* [2023] NZSC 65.
[28] At [77]
[29] At [95]

[Seth] had this knowledge. He was aware that the effect of disposing the properties to the Trust was to defeat [Melody]'s rights under the PRA.

[69] Ms Beck further submitted that *Sutton v Bell* approved the findings of the Court in *Regal Castings Ltd v Lightbody* as appropriate to s 44 cases.[30] The Court in *Regal Castings* confirmed that it is not necessary to establish dishonest intent, in addition to an intent to defeat, hinder or delay recourse to the property. The critical question before the Court is whether the person disposing of the property knew or must have known that their actions would defeat a claim or rights held under the PRA.

[70] Ms Beck submitted that [Seth] was very aware of the effect that the Trust had on [Melody]'s rights under the PRA. He had taken legal advice from Sonya de Vries, a barrister in [city C], about the legal consequences and implications of the Trust. He knew that it excluded [Melody] from being able to make a claim under the PRA.

[71] Ms Beck submitted that, at the time of purchase of [address 1], [Seth] and [Aidan Dillon] discussed giving [Melody] a part share of that property in recognition of the unfairness of the Trust, as it excluded [Melody].

[72] Ms Beck referred to Judge Walker's decision in *[Golden] v [Herring]* which summarised the test for a successful claim under s 44 as follows:[31]

> a) The disposition disposed a beneficial ownership in property.
>
> b) The disposition may either remove assets from the pool of assets owned by one or both of the parties to the relationship or it may prevent assets from coming into such a pool.
>
> c) The disposition was made by, on behalf, by direction or in the interests of any person.
>
> d) The disposition has the effect of defeating a spouse's claim under the PRA.
>
> e) The disposition was made with the intent of defeating a spouses claim or rights. The Applicant holds the evidential burden. The test – as per *Regal Castings v Lightbody* - is whether the person that disposed of the property knew or must have known that there was a significantly enhanced risk that their spouse would not obtain a share of the relationship property.

[30] *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [53]-[54].
[31] *[Golden] v [Herring]* [2023] NZFC 7971 at [28].

f) The evidence of intent can be direct or it can be inferred from the surrounding circumstances.

g) The intention to defeat the spouse's claim or rights must exist at the time of the disposition. However the spouse's claim or rights do not need to exist at the time of the disposition.

h) A successful s 44 application results in the Court having the discretion to make one of the orders in s 44(2). There is the need for receipt of the property otherwise than in good faith and for valuable consideration. A lack of good faith is a lesser onus than demonstrable bad faith.

[73] Therefore, Ms Beck submitted that the following elements established a claim under s 44:

a) [Seth] disposed of his beneficial interest under each agreement for Sale and Purchase when he transferred the title to the Trust.

b) Each disposition removed the family home from the relationship property pool.

c) Each disposition was made at the direction of [Seth] and in his interests.

d) Each disposition had the effect of preventing [Melody] from having a right to half the property which she would have had if [Seth] had completed the purchase.

e) The effect of each disposition to the Trust was to defeat [Melody]'s rights and [Seth] was aware of this.

The Trust did not receive the conveyance in good faith?

[74] Ms Beck submitted that the fact that the Trust paid for [address 2] does not prevent an order being made, as the Supreme Court has indicated that the requirements for valuable consideration and good faith are conjunctive, i.e. both are required otherwise it falls to the Court to make one of the orders set out in s 44(2).

[75] She submitted that [Seth], [Aidan Dillon], and Mr [Holder], in their capacity as trustees were well aware that the purchase of the two homes by the Trust would defeat any claim that [Melody] had under the PRA. They did not receive the properties in good faith.

[76] Ms Beck submitted that, Mr [Holder], who had also been [Melody]'s lawyer, certainly had a duty to explain to her that the only correct method to exclude the

operation of the PRA was via a s 21 contracting out agreement. Given this duty, Mr [Holder] should have been acutely aware of the way the Trust excluded [Melody]'s rights under the PRA.

[77] Ms Beck submitted that [Aidan Dillon] was uncomfortable with the way that the Trust excluded [Melody] from any share in the family homes, as he discussed making provision for her by giving her a part share in [address 2].

[78] Ms Beck therefore submitted that, following *Sutton v Bell,* the appropriate remedy is the transfer of each property to [Melody] and [Seth] as tenants in common in equal shares.

Section 44C claim

[79] Ms Beck submitted that if s 44 does not apply it is necessary to consider s 44C. The test in s 44C has three limbs:

(a) since the de facto relationship began, either or both partners have disposed of relationship property to a Trust;

(b) the disposition had the effect of defeating the claim or rights for one of the partners; and

(c) the disposition is not one to which s 44 applies.

[80] She submitted the prerequisites are satisfied as each home was disposed of to a Trust during the parties' de facto relationship and the effect of each transfer to the Trust was that [Melody]'s claim to the family home was defeated.

[81] Ms Beck submitted that [Seth] purchased [address 2] and [address 1] in his personal capacity for the following reasons:

(a) The terms of the trust deed were not followed and [Seth] acquired personal rights in these properties.

(b) The other trustees did not sign the sale and purchase agreements.

(c) [Seth] was not able to bind the Trust, as he is a beneficiary. No deed of nomination was signed.

(d) The payment, in particular for [address 1], came from [Seth]'s personal bank account.

(e) There was significant intermingling of Trust funds in [Seth]'s personal bank account. The moment the money was transferred from the Trust's bank account into [Seth]'s personal bank account, it was intermingled and became relationship property.

[82] Ms Beck submitted that [Melody] is not a beneficiary under the Trust and in theory has no rights or claims to the family homes after they were transferred to the Trust. Therefore, the disposition had the effect of defeating her rights under the PRA.

[83] Ms Beck submitted that the Court has wide powers under s 44C(2) to order one partner or spouse to pay a sum of money or transfer property to the other partner or spouse. The Court may also order the Trust to pay one partner or spouse Trust income.

[84] She said the appropriate remedy is the transfer of each property to [Melody] and [Seth] as tenants in common in equal shares.

Summary

[85] Ms Beck therefore concluded that:

(a) The elements of the claim under s 44 are made out. [Seth] purchased [address 2] and [address 1] and he did not enter the agreements on behalf of the Trust, as he was not authorised by the trust deed to do so. [Seth] acquired personal rights to the property. When he transferred the property to the Trust it had the effect of defeating [Melody]'s rights under the PRA. [Seth] had taken legal advice about the effect of the

Trust on [Melody]'s rights under the PRA and knew that the dispositions to the Trust would defeat her claims under the PRA to the family homes. The test does not require a dishonest intent, merely knowledge that the disposition will have the effect of defeating rights under the PRA. The Trust did not receive the conveyance in good faith.

(b) Ms Beck submitted that, in the alternative, the elements of a claim under s 44C are also made out. Each home was acquired personally by [Seth] and was then disposed to a Trust during the course of a de facto relationship and the effect of each transfer was to defeat [Melody]'s claim to the family home.

(c) Therefore, Ms Beck submitted that it is in the interests of justice that the Court make an order to transfer each property to [Melody] and [Seth] as tenants in common in equal shares.

Respondents' submissions

[86] Ms Kimberley Jarvis, counsel for [Seth] and the second respondents, made the primary submission that [Seth] signed the agreement for sale and purchase for [address 2] and [address 1] in his capacity as Trustee of the [Dillon] Family Trust on behalf of the other trustees. Therefore, Ms Jarvis submitted that no disposition of property by [Seth] to the trustees in fact ever occurred, "**as the trustees were always the purchasers, not [Seth] personally**."[32] (Emphasis added)

[87] Ms Jarvis submitted that, in the absence of any disposition, [Melody] has no basis for her claims under ss 44 or s 44C.

[88] In particular Ms Jarvis submitted that:

(a) [Seth] had no knowledge of the effect of signing the agreements for sale and purchase "as nominee" and then nominating the trustees as purchaser of [address 2] and [address 1].

[32] Ms Jarvis' submissions dated 7 May 2024 at [5]

(b) In particular, [Seth] was unaware that he was potentially acquiring any personal rights, and therefore, no knowledge that he could be alienating the said rights, let alone defeating the potential claim or rights of [Melody].

(c) [Seth] therefore had no intention to defeat the claim or rights of [Melody].

(d) Even if the Court finds [Seth] did intend to defeat [Melody]'s claim or rights:

(i) [Melody] would have had no claim or rights in respect of [address 2] because it was no longer the family home by the time of separation and would have reverted to its prior status as [Seth]'s separate property; and

(ii) [Melody]'s claim or rights in respect of [address 1] (which would have had family home classification at separation but for the Trust) would be for a half share of the equity in the property, which in the circumstances would be limited to the increase in value between its zero equity net value at the date of disposition and its current market value.

[89] In terms of [Melody]'s claim in respect of [address 2] and [address 1] under s 44C:

(a) Neither [address 2] nor [address 1] had acquired relationship property status prior to [Seth] nominating the trustees as purchaser of the properties.

(b) In the event that the Court finds that [address 2] or [address 1] had acquired relationship property status prior to the nomination, then her claim or rights in respect of either property are limited to the increase

> in value in the respective properties, between their zero net equity value at disposition and their current market value.

No disposition of property

[90] Ms Jarvis submitted that [Seth] did not enter into the agreements for sale and purchase in his personal capacity, but rather he entered the agreements on behalf of the trustees. Accordingly, there was no need for any nomination of the trustees as purchaser by [Seth], as the trustees were the purchaser in the first place. This means that there was no transfer or disposition of property by [Seth] to the Trust.

[91] While prima facie the agreements for sale and purchase show that [Seth] signed in his personal capacity "or nominee," Ms Jarvis submitted that the Court should look at the substance of the transaction instead of its form, such as the Supreme Court did in *Deng v Zheng* where it looked at the surrounding evidence to infer the true nature of a partnership arrangement where there were limited documents for the transaction.[33]

[92] The evidence of the trustees was that they had unanimously decided to purchase [address 2] and [address 1] prior to [Seth] signing the agreements, and that they collectively understood that the trustees would be the purchasers of each property.

[93] [Seth]'s evidence was that he believed that by signing "or nominee" and "as nominee" he was in fact entering the agreements for sale and purchase on behalf of his fellow trustees. The evidence is that neither [Seth], nor [Melody], had any ability to purchase either property personally, and there is no evidence to suggest that they believed they could have done so at the time [Seth] signed the documents on behalf of the trustees.

[94] [Seth] was a layperson, having received minimal (and incorrect) legal advice prior to signing the agreement. Mr [Holder], as an independent trustee and practising lawyer, advised [Seth] that he could enter the agreements on behalf of the Trust by signing "or nominee." Ms Jarvis therefore submitted that this was incorrect advice.

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[33] *Deng v Zheng* [2022] NZSC 76.

[95] Ms Jarvis submitted that [Seth]'s lack of understanding of the formalities required to enter into the purchase documents on behalf of the trustees is in part evidenced by the fact that he handwrote below his signature "as nominee" on the purchase agreement for [address 2]. Ms Jarvis therefore submitted that it is, of course, nonsense for a party to sign an agreement personally as their own nominee but it demonstrates [Seth]'s level of understanding of the technicalities involved.

[96] Unlike the present day Auckland District Law Society Agreement for Sale and Purchase, the fourth edition version that [Seth] signed did not have a signature block with prompts for the capacity in which the purchaser signed (whereas the current edition prompts a party to circle if they are signing as for example, a trustee, a director, or an agent). Ms Jarvis submitted that [Seth] therefore took the steps he believed were necessary to indicate that he signed the agreements on behalf of the trustees by handwriting the words "as nominee" and circling the "or nominee" wording on the form.

[97] Ms Jarvis submitted that much was made at the hearing of the fact that no deeds of nomination were ever executed between [Seth] and the trustees. She submitted that it was not put to the trustees whether they knew why no deed of nomination was entered into, but an obvious inference to draw is that the reason no deed of nomination was executed is because it simply wasn't necessary – the trustees believed that [Seth] had entered the agreement on their behalf, and that they were the purchaser, not [Seth]. Ms Jarvis submitted that if the trustees were the true purchaser, then there would simply be no need for any deed of nomination.

[98] Ms Jarvis submitted that the evidence of the trustees was consistent in that they believed that [Seth] had executed the documentation on their behalf, and that the trustees were the true purchaser.

[99] Ms Jarvis submitted that the other contemporaneous documentation supports this position: for each of the trustees' resolution for the purchase of [address 2] ("[address 2] Resolution") and the minutes of the trustee meeting for the purchase of [address 1] ("[address 1] Minute"), it is clear that the trustees believe that they are the purchaser in the first instance (rather than as nominees of [Seth].)

[100] The [address 2] resolution records that "the Trust has entered into an agreement" and the [address 1] Minute records that "An Agreement for Sale and Purchase has been executed by the [Dillon] Family Trust." Neither document makes mention of any nomination from [Seth], instead framing the transactions as something involving only the trustees, not [Seth] in his personal capacity.

Validity of Trustee Actions

[101] Ms Beck argued at the hearing that [Seth]'s involvement in the transaction as trustee and beneficiary was inconsistent with the terms of the trust deed. However, Ms Jarvis in response submitted that this is a red herring, as any internal procedural inconsistencies in trustee decision-making would not give rise to a claim for [Melody] as a stranger to the Trust.

[102] While cl 16.7 of the trust deed prohibits a trustee who is a beneficiary from exercising a power in his favour, cl 16.6 requires unanimous decision making, so the two independent trustees (Mr [Aidan Dillon] and Mr [Holder]) could have vetoed the decisions had they had concerns about violation of cl16.6.

[103] Ms Jarvis submitted that, in any event, the decisions for each property can actually be viewed as two discrete decisions; the decision to purchase, then the decision about the terms upon which to allow [Seth] as a beneficiary to live in the property. Only the latter has any self-interest for [Seth], but it is the former which was brought into question by Ms Beck.

[104] Finally, Ms Jarvis submits that the decisions themselves were not ultra vires, given that the trustees had the power to purchase properties and allow beneficiaries to live there rent-free.[34]

[Melody]'s claims under section 44

[105] The key issue in respect of [Melody]'s s 44 claim is whether [Seth] intended to defeat [Melody]'s claim or rights when he nominated the trustees to settle the purchases of [address 2] and [address 1] respectively.

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[34] BOD at 35 cl 10d.

[106] Ms Jarvis submitted the relevant intention to defeat must be formed by the person who disposed of the property, and that such intention must be in existence prior to or contemporaneous with the disposition.

[107] Further, Ms Jarvis submitted that if the Court wishes to grant relief under s 44, the Court must first be satisfied that:

(a) [Seth], as the person who transferred the properties to the Trust, had the intention to defeat [Melody]'s claim or rights; and

(b) [Seth] had formed that intention at the time of the disposition of [address 2] and [address 1] to the Trust.

[108] Ms Beck explored in evidence the intentions of [Seth]'s father as settlor of the Trust, some two years prior to the purchase of [address 2], and also the intentions of [Aidan Dillon] and [Ryan Holder] throughout their time as trustees of the Trust, including their thoughts on the fairness of the current situation. Ms Jarvis, in reply, submitted that these matters are entirely irrelevant to the assessment of [Melody]'s s 44 claim.

Intention – Knowledge of effect of transaction

[109] Ms Jarvis submitted that [Seth] genuinely believed he was entering into the agreements for sale and purchase on behalf of the trustees, and therefore he had no idea that he could be acquiring rights for himself personally.

[110] Ms Jarvis submitted that, in the circumstances, any potential claim or rights to have been acquired by [Melody] would have to flow directly from rights acquired by [Seth] in signing the agreements for sale and purchase in his own name "or nominee." Necessarily, [Seth] would need to have known that:

(a) he was acquiring rights personally;

(b) [Melody] could have acquired her own rights by virtue of the rights he had acquired; and

(c) that by nominating the trustees as purchaser he was defeating those rights.

[111] Furthermore, Ms Jarvis submitted that [Melody] is unable to show that [Seth] had any knowledge that he was acquiring rights personally when he signed the agreements for sale and purchase, much less that he had knowledge that having the trustees settle the purchase could defeat [Melody]'s claim or rights.

[112] Ms Jarvis emphasised that the evidence of all parties was that neither [Seth] nor [Melody] had any ability to settle a purchase of property in their personal capacity, so the purchase would need to be completed by the trustees.

[113] Furthermore, she reminded the Court that is was clear from the evidence that no discussions about relationship property or entitlements had been explored by [Seth] prior to signing the agreements for sale and purchase "as nominee," on what he thought was on behalf of the trustees, and on the advice of his co-trustee and solicitor at the time, [Ryan Holder].

[114] Given that [Seth]'s consistent evidence was that he did not know that he could possibly be personally acquiring rights at the time he signed the agreements for sale and purchase for each of the two properties. Ms Jarvis submitted he simply could not have known signing as he did could create rights for [Melody], nor that nominating the trustees as purchaser could defeat those rights.

[115] Ms Jarvis submitted that the weight of circumstantial evidence also supports [Seth]'s position that he had no understanding that he had signed the agreements for sale and purchase in his personal capacity rather than on behalf of the trustees. This is demonstrated by the absence of any Deeds of Nomination, and the contemporaneous trustee resolutions and minutes which each (erroneously) refer to the Trust having entered into or executed an agreement for sale and purchase.

[116] The evidence from the trustees at the time was that the intention was for the Trust to purchase the two properties, and that, for expediency, [Seth] was the Trustee signing the agreements on behalf of the three of them. Moreover, one of the trustees

was also the lawyer acting for the trustees and advised [Seth] to sign on behalf of the Trust as nominee, without apparently giving any advice as to the possibility that this could create rights for him (through whom [Melody] could acquire rights).

[117] Therefore, Ms Jarvis submitted that, in the absence of evidence of any intention, or even any knowledge from [Seth] of the effect of signing the agreements for sale and purchase as he did, [Melody]'s s 44 claim must fail.

[Melody]'s claim under Section 44C

[118] Ms Jarvis submitted that for [Melody] to succeed in a claim under s 44C, she needs to establish that there was a qualifying disposition, being:

(a) to a trust;

(b) of relationship property;

(c) made since the marriage or de facto relationship began;

(d) by either or both spouses or de facto partners;

(e) one to which s 44 does not apply; and

(f) a disposition having the effect of defeating the claim or rights of one of the spouses or partners.

[119] Ms Jarvis submitted that the terms of s 44C make it clear that, at the time of the disposition, the property in question must be relationship property. Accordingly, [Melody] must establish that [address 2] and/or [address 1] were relationship property at the time of their transfer to the Trust in order to establish as 44C claim.

[120] Ms Jarvis submitted that the evidence established that both [Melody] and [Seth] did not have the capacity to get finance, pay a deposit, service lending or settle in any way the purchases of either [address 2], or [address 1] without the assistance of

the Trust.[35] Accordingly, Ms Jarvis submitted that neither property could have acquired relationship property status simply by virtue of [Seth]'s signature on the agreements because he had no means to settle either purchase from relationship property (or even separate property) funds.

[121] Ms Jarvis therefore submitted that if [Seth] had been called upon to settle the purchases of either [address 2] or [address 1], he would have been unable to do so, and would have faced bankruptcy.

[122] The evidence from the trustees is that they would not have distributed funds to [Seth] in his capacity as a beneficiary to settle the purchase; however, had they done so, the funds would have had a separate property classification (being a distribution from a Trust settled by a third party containing inheritance funds) rather than a relationship property classification (until such time as the parties resided in the property as the family home, which did not happen for either property until after transfer to the Trust).

[123] Ms Jarvis submitted that, in the absence of evidence that [Seth] would have had the capacity to settle the purchases of [address 2] and/or [address 1] with relationship property, the only ways that either [address 2] or [address 1] could have acquired any relationship property classification prior to their transfer to the Trust, is by having become the family home before the trustees settled the purchase; or having had relationship property applied to them before the trustees settled the purchase.

[124] [Melody] and [Seth] did not live in either [address 2] or [address 1] until after the titles to the properties had been transferred into the name of the trustees. Thus, Ms Jarvis submitted neither property was ever the family home prior to transfer to the Trust.

[125] Ms Jarvis also pointed out that no funds for the purchase of [address 2] and [address 1] came from relationship property sources. Instead, the deposit, the balance funds, and in the case of [address 2] the subsequent repayment of vendor finance, were all paid directly from Trust funds.

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[35] BOD at 18 – 19, 93 and 96.

[126] Ms Jarvis therefore submitted that [Melody]'s s 44C claims in respect of [address 2] and [address 1] must fail because neither property acquired relationship property classification prior to its transfer to the Trust.

[127] Ms Jarvis submitted that if the Court considers that there was a relationship property character to either [address 2] or [address 1], it must then assess the value of those claims.

[128] [Melody]'s case is that she would be entitled to half of the current market value of each of the properties.

[129] However, Ms Jarvis submitted that this is unrealistic, given that it assumes that [Seth] and/or [Melody] would somehow have found the resources to fund the entire purchase price of each property, despite the clear evidence that neither of them were able to come up with the funds to contribute to a purchase, nor were they able to obtain or service third party financing.

[130] The trustees' evidence was that they would not have distributed funds to [Seth] in his personal capacity to settle the purchases because this was not in the interests of the other beneficiaries to do so. It is therefore submitted that, at best, the trustees may have loaned the purchase price to [Seth] or the parties.

[131] Section 20D of the Act provides that the net value of relationship property is calculated by ascertaining the value of the property and deducting relationship debts. In the event that [address 2] and/or [address 1] are relationship property, Ms Jarvis submitted any loan from the trustees to [Seth] to purchase the properties would be relationship debt.

[132] The Court noted when rejecting the s 44C claim in *[Golden] v [Herring]*:[36]

> The simple proposition here is that if there was no equity in the property at that time then what interest has been defeated?

[36] *[Golden] v [Herring]* [2023] NZFC 7971 at [54].

[133] It was therefore submitted by Ms Jarvis that the net value of each of [address 2] and [address 1] at the time of their transfer to the Trust was zero. Accordingly, [Melody] had no interest in the properties which was capable of being defeated.

[134] If the Court found that [Melody] had an interest to be defeated, Ms Jarvis submitted it must necessarily be limited to any movements in value since the zero value transfer.

[135] Ms Jarvis submitted that there is no evidence to suggest that [Seth] or [Melody] would have been able to repay any of the purchase price debt to the Trust following transfer of each of the properties. It could therefore be inferred that the purchase price of each of the properties would have remained outstanding as at the date of the hearing.

[136] Accordingly, in calculating the value of [Melody]'s claim or rights in respect of either [address 2] or [address 1] under s 44C, the calculation should be made on the basis of deducting the purchase price from the current market value of each of the properties. In effect [Melody]'s claim would, at best, be for half of the increase in value of each of the properties since transfer.

[137] Ms Jarvis further submitted that even if the prerequisites of s 44C(1) have been met (which is denied) then the Court still has a discretion as to whether to make any award under s 44C(2).

[138] Ms Jarvis reminded the Court that it can decline to exercise its discretion in [Melody]'s favour, under s 44C(4)(f), on the basis that it would not be just to do so where the disposition of relationship property to the Trust is relatively small, and [Melody] has been more than compensated for that loss by the rent-free occupation of the property.[37]

[139] She submitted that the value of the alleged disposition of relationship property for each of [address 2] and [address 1] was zero on the basis set out above.

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[37] *LG v KFW* [2012] NZFC 5566.

[140] At the hearing, [Melody] suggested there had been other disposition to the trust.

[141] [Melody] claimed that rates, maintenance, insurance, and renovations on the properties were paid from relationship property funds. [Melody] also alleged that [Seth] had been transferring $20 per month to the Trust bank account from relationship property funds.

[142] Ms Jarvis submitted that, even if [Melody]'s evidence on both points is accepted (which [Seth] and the trustees do not), the sum total of relationship property transferred to the Trust at its highest watermark is likely to be less than $5,000.00.

[143] By comparison to this, Ms Jarvis pointed out that [Melody] has had the benefit of living entirely rent-free in each of the properties ([address 2] for three and a half years from June 2014 until December 2017; [address 1] for almost six years from December 2017 until the present day) which well exceeds that value.

[144] The evidence from Mr [Dillon] is market rental for [address 1] is approximately $650 to $800 per week. In the five years since separation, Ms [Graves] has had sole occupation of [address 1] and a five-year approximate rental would be between $156,000 and $221,000 on those figures.

[145] [Seth] and the trustees therefore submit that the value of relationship property allegedly disposed of to the Trust is well outweighed by the benefits of rent-free accommodation received by [Melody], and the Court should therefore decline to make any award in her favour under s 44C.

Conclusion for [Seth] and the trustees

[146] Ms Jarvis therefore submitted for [Seth] and the trustees that:

(a) there was no disposition of property to a Trust at all. [Seth] entered into the agreements for sale and purchase of the properties on behalf of the trustees, rather than in his personal capacity with a subsequent

nomination of the trustees as purchasers of the two properties as alleged by [Melody];

(b) even if there were a disposition, [Melody]'s claim under s 44 must fail on the basis that [Seth] had no knowledge of the effect of the transaction, and therefore could not have had any intention to defeat [Melody]'s claim or rights to [address 2] or [address 1]; and

(c) even if there was a disposition, [Melody]'s claim under s 44C must fail on the basis that neither [address 2] nor [address 1] were relationship property at the time they were acquired by the Trust.

[Melody]'s Section 44 Claim

Was the disposition by [Seth] of [address 2] and [address 1] to the trustees made in order to defeat the claims or rights of [Melody]?

[147] In assessing the evidence of the four witnesses, I have reflected on their individual motives, interests and intentions behind the respective positions they have adopted during this case.

[148] I find proven that [Seth] entered into the agreements for the sale and purchase of [address 2] and [address 1] on behalf of the trustees, rather than in his personal capacity.

[149] I am not satisfied, on the evidence, that [Seth] was aware in signing the agreement for sale and purchase in his own name or nominee that:

(a) he was acquiring rights personally;

(b) [Melody] could have acquired her own rights by virtue of the rights he had acquired; and

(c) by nominating the trustees as purchaser he was defeating those rights.

[150] I find [Seth] was unequivocal, under cross-examination, that he believed he was signing each of the two agreements for sale and purchase, by signing "or nominee" and, again for [address 2] on 16 June 2014 and by not deleting the printed words "and/or nominee" for [address 1] on 24 May 2017 for the two properties to be purchased and owned by the Trust.

[151] In making this finding, I find it is relevant to refer to the following passages of evidence in assessing the reasons behind [Laurence Dillon]'s creation of the Trust in 2012.

[155] [Seth] and Ms Beck had the following exchange, during cross-examination, about [Laurence Dillon]'s reasons for creating the Trust:[38]

> Q: And your father [Laurence Dillon] was the appointer, that's right?
>
> A: Yes. Yes.
>
> Q: The trust was his idea?
>
> A: Well [Aiden] tells me that my father approached [Aiden] because, well firstly because of my sons [Blake] and [James] so even before I met [Melody] there were – I didn't know about this that – but they're both accountants and Dad had trust in [Aidan] I guess so yes, and Dad wanted to project my inheritance. He – I wasn't in a stable marriage like my three brothers and I wasn't a strong Christian like my three brothers and I guess Dad simply wanted to protect my inheritance.
>
> Q: So why did you let him do it because after all you're a grown man and –
>
> A: Yes.
>
> Q: – as you say you're an intelligent man. Why did you acquiesce in this arrangement?
>
> A: Well I'm very proud of my parents. I didn't think I'd be here in this process but, yeah, in respect...
>
> Q: Sorry, take your time.
>
> A: Yeah, in respect I went along with his wishes.
>
> Q: All right.

[38] NOE page 35 line 31 – page 36 line 16.

[156] Ms Beck and [Aidan Dillon] also had the following exchange during cross-examination:[39]

> Q: Okay. So why put in a different structure for [Seth]?
>
> A: So the conversations I had with my father which pertained to not just [Seth]'s inheritance but also the sale of the properties, distributions to my other brother [Angus], previous wind-ups of the trust go back over a long time. The conversation I had with [Laurence] regarding [Seth] was before [Melody] was even dating [Seth]. We didn't even know [Melody] at that point in time and it was some time in 2009, before his 70th birthday and [Seth] at that time had two sons in Germany and my father was – what I remember most from the conversation was that he was concerned that their rights and privileges as grandchildren of his would be taken care of in the future. At the same time my father's life was also quite complicated because my mother died in 2005 and he remarried in 2006 and he was a wealthy man with four sons and multiple parties so it was quite complicated but he saw [Seth]'s situation as being more unique than the rest of us and to reiterate at that point in time when we were having those conversations I didn't even know [Melody] and [Melody] and - [Seth] didn't even know [Melody] so...
>
> Q: All right so you would have heard this morning – I'll just find – [Seth] in his affidavit page 90 said: "I believe it was [Melody]'s behaviour toward me that was the reason that my father decided to treat me differently to my brothers." So you're saying that's not right?
>
> A: I'm saying that that – how I would interpret that is that at that moment in time I'm sure that's what was top of mind for [Seth] and that's how it's been recorded. But I know that there was more to it than that because I had conversations specifically with my father and my father definitely had doubts about [Melody]. He had doubts about her financial competence because she had already been bankrupt and you know, he had his reasons. He was a very skilful chartered accountant. He had worked in the community for a long time and advised many people on their financial management and their financial issues. He was a good judge of character and I believe, an honourable man. And in fact, I have a recording of the last thing he ever said to me where he actually recognises [Melody] and quite openly states his care for her so I don't believe that he was in any way being unfair. He was just being wise.

[157] There was also the following exchange:[40]

> Q: Mr [Dillon], you'll remember that we were talking about the creation of the family trust. What did you understand the intention of the trust was?
>
> A: I guess the intention of the trust was to protect my inheritance.
>
> Q: From what?
>
> A: From being wasted. I mean there were three trustees, me, [Aidan] and now [Nelson Burgess], before that [Ryan Holder]. So those – I guess that

[39] NOE page 77 line 29 – page 78 line 29.
[40] NOE at 37 lines 1-25.

gives three people in decision-making for buying assets using trust funds. And, yeah, dad had four beneficiaries like the three children and myself.

Q: All right. Where did [Melody] fit into that scenario?

A: **I would say she benefited from that money in lots of ways. I mean, I did – I didn't have the funds to buy a house and neither did [Melody], so we were able to – once inheritance money started coming in, you know, we could buy [address 2], great, no mortgage, I mean, it's tough when you have to pay a mortgage.** It just made life a lot easier and then we did buy the [shop] because, you know, the hope is that you're buying an income. It did provided – I was a disaster for four years. So that was a failure. But I mean I also made, talked to [Aidan], he talked about possible investment with [details deleted], so that's been a great success. So we got two properties there and they, they provide the trust with something like $1,050 to $1,150 a month, okay. (Emphasis added)

[158] Ms Beck referred [Seth] to his affidavit and asked:[41]

Q: All right. Paragraph 17, I'll read the second sentence to you: *"I believe that it was [Melody]'s behaviour toward me that was the reason that my father decided to treat me differently to my brothers setting up a trust to receive my inheritance from him rather than it being paid to me directly."* Now are you saying that the trust was put in place so as to prevent [Melody] from having access to trust funds?

A: No. I would say that trust was simply put in place to protect my share of the inheritance.

Q: But why would you have needed to be treated differently from your brothers?

A: **Well my dad knew that I had a failed marriage, so I had my two sons [Blake] and [James], so he wanted to protect their interests because he, you know, he did meet them. And I guess I wasn't happily married whereas my three brothers were happily married, yeah, I guess my dad didn't have as much faith in me as he did in my three brothers.** (Emphasis added)

Q: All right, but he wanted to prevent [Melody] from having access to your money, not so?

A: It was money, it was inheritance created by my parents. It wasn't my money. My father and mother made smart decisions, like buying the Grange, my father, you know, was very good with money, and my mother had good ideas as well. So it was simply protecting my inheritance. It had nothing to do – look, that is written there, I don't know exactly what my father's intentions were. We've already talked about how he talked to [Aidan] before he'd even met [Melody]. I respected his opinion because I inherited a lot of money.

Q: Did he not talk to you about why he was setting up the trust?

[41] NOE page 40 line 21 – page 41 line 33.

A: I don't think so. He made that decision and I lived with it, because let's face it, I haven't been terribly, I haven't really built on my, you know, [degree] and, I wasn't terribly successful career wise, so I was very lucky I guess to receive such an inheritance.

Q: All right have a look at page 91, paragraph 26.

A: Right.

Q: I'll read you a couple of sentences from that paragraph: *"I believe that he,"* that's your dad*, "wanted what was best for me. I was aware that he did not trust [Melody] as he was concerned that she would try to get her hands on as much of my inheritance as possible."* So, can you confirm that the trust was set up so as to– with the effect of preventing [Melody] from having any direct connection with the money?

A: We talked about how we went to that barrister, van Dreze or whatever her name was in [city C] and that's what the barrister told [Melody]. Well if [Melody] was dissatisfied with the trust why didn't she walk out way back then? She knew about this trust.

Q: All right.

A: She lived with the trust just like I lived with the trust. I can't do with my money like with trust money like my brothers can. Right?

[159] On 28 May 2014, [Seth] personally signed an agreement to purchase [address 2] for $357,500 as purchaser but the words "and/or nominee" are handwritten under his signature. Furthermore, the standard typed words "or nominee" are boldly circled on the document.

[160] [Seth] and Ms Beck had the following exchange:[42]

Q: And you signed as [Seth Dillon] and/or Nominee?

A: [Seth Dillon] or Nominee yes, yeah.

Q: Right.

A: Well I'm – I don't know a lot. I'm not a lawyer. I think maybe I should have had better legal advice but I signed on behalf of as it – **I signed as a trustee on behalf of the trust.** (Emphasis added)

Q: But you didn't write as trustee on behalf of the trust?

A: Well I wish I had but the intention was to buy – to sign as a trustee on behalf of the trust. It's only the trust that had money. I had no money. [Melody] had no money. So the money had to come from the trust.

[42] NOE at 45 line 7-16.

[161] I agree with Ms Jarvis' submission that when the Court looks at the substance of the transactions instead of its form, [Seth] clearly entered into the agreements on behalf of the trustees. The Supreme Court in *Deng v Zheng* approved the approach taken by the Court of Appeal in focussing "on the substance of the parties' arrangements as revealed by their conduct over time."[43]

[162] In my opinion [Seth]'s candid explanation makes complete sense:[44]

> Its only the trust that had money. I had no money [Melody] had no money. So the money had to come from the trust.

[163] Notwithstanding [Seth]'s resolute position about his status in signing the agreements for sale and purchase, I find [Seth] was a credible and straightforward witness. I find that [Seth] in the context of a relationship with [Melody] which was, at times volatile, was put under intense pressure by [Melody] as early as August 2013 to change the Trust. [Seth] deposed:[45]

> 25. My father had 4 sons, and I was the only one for whom a trust was established to receive inheritance. This was a bone of contention for [Melody], who believed that it was unfair that I was being treated differently to my brothers, who were to receive their inheritances directly.
>
> 26. It never particularly bothered me that I was being treated differently from my brothers; I trusted my father and wanted to honour his wishes. **I believed that he wanted what was best for me. I was aware that he did not trust [Melody], as he was concerned that she would try to get her hands on as much of my inheritance as possible.** (Emphasis added)
>
> 27. For [Melody] though, this was a sore point and it became a real source of tension in our relationship. [Melody] frequently raised the issue of the trust and my inheritance, actively lobbying me to try to get it changed so that she would have a share of it.
>
> 28. Two particular attempts by [Melody] to get me to change the Trust stand out for me, because she wrote me lengthy letters full of emotional blackmail in trying to appeal to me to get the Trust changed. She even drafted letters for me to send to my brother and documents for the Trust.

[164] There is no further documentary evidence of [Melody]'s endeavours to "get the Trust changed" after her correspondence to [Seth] in or about the end of August 2013. However, it is [Melody]'s evidence that the Trust financed a trip for [Seth],

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[43] *Deng v Zheng* [2022] NZSC 76 at [89].
[44] NOE at 45 lines 15- 16.
[45] BOD at 91[25] – [28]

[Melody] and [Nikita] to Europe between July – October 2014 in order to introduce [Seth]'s two Germany-based sons to [Nikita]. Upon their return to [city A], [Seth] was unemployed and they lived off [Seth]'s first amount of his father's inheritance.

[165] In May 2015, after taking advice from three accountants (two of whom were [Seth]'s brothers) [details deleted] was created to purchase [details deleted] to be co-managed by [Melody] and [Seth]. [Melody] and [Seth] have one share each in the company and the remaining 98 shares are owned by the [Seth Dillon] Family Trust. The purchase was entirely funded by the Trust's capital resources.

[166] [Melody], in her first narrative affidavit dated 9 December 2021, claimed that at about that time she and [Seth] were looking to purchase [address 1]:[46]

> [Seth] had also offered gifting me half of [address 2], in fact he had already told our staff that this had occurred, when actually it never happened.

[167] [Seth], in response, deposed:[47]

> [Melody] has misrepresented what actually happened. The discussion about [Melody] getting half of [address 2] was actually a comment made by [Aidan], as he was concerned that [Melody] may try to take a claim against the property (given that she was running a campaign to get into my Trust so that we would have direct access to my inheritance). There was never any discussion that the Trust would transfer half of the property to her. I also have no idea why she thinks I would have told our staff about it: first, I never told her that she could have half of the property; second, it would be no business of my staff's as to how my Trust chose to deal with its assets.

[168] [Melody], in her updated affidavit dated 9 March 2023, claimed that, prior to the purchase of [address 2]:[48]

> ... I had been told that I would become a beneficiary in the [Dillon] Family Trust ("The Trust") and therefore I was not concerned when the transfer was to the trust.

[169] [Melody] said that when she and [Seth] decided to buy [address 1] and rent out [address 2] as a bed and breakfast:[49]

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[46] BOD at 20 at [39].
[47] BOD at 94 at [47].
[48] BOD at 50 at [8(c)].
[49] BOD at 51 [9(b)].

> The Respondent said he and [Aidan Dillon] had decided to offer to give me half of [address 2] to enable this to happen since I had not been made a beneficiary of the Trust.

[170] [Seth], in response, said:[50]

> ... [Melody] claims that he had been told she would be a beneficiary to the Trust. I deny that this is the case. My father set up the Trust and the Applicant is not recorded as a beneficiary in the Trust Deed. I have never tried to change the Trust Deed.
>
> It was [Melody] who tried everything she could to get into the Trust. She put huge pressure on me during our relationship to get her onto the Trust, and to try to get her access to my inherited funds in it. She wrote me lengthy letters full of emotional blackmail trying to appeal to me to get the Trust Deed changes (these are attached to my First Affidavit as B and C). She then drafted letters for me to send to my brother and documents for the Trust, putting pressure on me to send them.
>
> However, I felt bound to honour my late father's wishes as to who the beneficiaries of the Trust would be: me and my children (two sons from a previous relationship, and my daughter with [Melody]).

[171] There was the following exchange between [Seth] and Ms Beck during cross-examination:[51]

> Q: All right did you tell [Melody] at any stage that she would become a beneficiary of the trust?
>
> A: No. I never said that.
>
> Q: All right.
>
> A: It's true we talked about possibly [Melody] getting partial ownership of [address 2]. But that was more if we got married and we're in a stable relationship. Whereas we've always needed counselling whether it was Christchurch, [city A]. [City A] before we went up north, up in [a town in Auckland], while in Christchurch we had counselling and we had counselling back here in [city A]. So, to be fair we did work on maintain the relationship but it eventually folded.

[172] There was also the further exchange:[52]

> Q: All right. Would you have been thinking about it because the position seemed unfair for [Melody]?

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[50] BOD at 221 [33]-page 222 at [35].
[51] NOE at 43 lines 17-27
[52] NOE page 52 line 17 – page 54 line 20

A: It's true that [Melody] is not mentioned as a beneficiary. You know, if Dad had lived a bit longer things could have changed because I think there was some talk maybe if there was someone that he had love and affection for there might be something but you know, what am I to do that Dad wanted to protect my inheritance? He set up the trust. The wealth was generated by my – our parents so – and [Melody] and I profited from that inheritance and [Melody]'s still profiting from that inheritance. But I mean it's not great being in a legal battle. Who wants this to go on forever.

Q: So at no stage while your father was still alive did you say [Melody] needs to be a beneficiary of the trust?

A: No, I never said that to Dad. Yeah.

Q: Do you...

A: I haven't known [Melody] that long. Look I would like to think that I – and I'm not a person that tries to keep everything for themselves, you know, I don't think I'd go around, you know, like Liberace you know, I don't need a lot of fancy stuff. I could have spent more than I have but you know, the [shop] is not very financial and I'd been in a legal battle for over five years which has cost the trust a lot of money so – and it's still costing the trust a lot of money.

Q: Do you recall writing an email to [Ryan Holder] in May 2017 referring to the idea of doing something for [Melody] property wise?

A: No I don't.

Q: There could exist one but I'm not aware of it. I mean, I'm – you know, if you show me one.

A: All right. I do have copies here of...

Q: But I have, I mean, yeah.

A: An email of the 31st of May 2017.

Q: Right.

A: I would really need a signature I would say.

THE COURT ADDRESSES MS JARVIS– CONFIRMS UNSEEN

CROSS-EXAMINATION CONTINUES: MS BECK

Q: Does that look to you Mr [Dillon] –

A: Mhm.

Q: – like an email written by you?

A: To be perfectly honest I can't remember this email at all.

Q: Do you produce it as an email done by yourself?

A: No.

Q: Well your name is at the bottom isn't it?

A: That doesn't mean anything. I have talked about giving ownership of 51 to 55% of [address 2] to [Melody]. No I don't remember that to be honest and getting it...

Q: All right, let's talk about that paragraph that bit by bit. I have talked about giving ownership of 51 to 55% of [address 2] to [Melody] and getting a relationship property agreement for the rest of my assets.

A: No. No.

Q: This has your name at the bottom doesn't it?

A: It doesn't mean anything. [Melody] could have written this email.

Q: But you go on to say: "My brother [Aidan] suggested the idea."

A: He suggested half ownership not 51 to 55%. What's that bullshit detail, 51 to 55%? To give [Melody] a majority shareholding? Why would I do that?

Q: The trouble Mr [Dillon] – if you're going to suggest that [Melody] wrote this she wouldn't...

A: Well I don't believe I wrote it. Maybe [Melody] didn't write it. Maybe some other person wrote it.

Q: All right. And then it goes...

A: This is completely foreign to me.

Q: It goes on to say: "Right at the moment I am not keen to do this."

A: Right.

Q: So if [Melody] had written this she wouldn't have been very likely to write that would she?

A: That's true. "Right at the moment I'm not keen to do this. Maybe I should come and see you some time to discuss such matters." I honestly have no recollection of this email.

[173] [Seth] under re-examination by Ms Jarvis said:[53]

A: I don't think so. Like this– I don't think I wrote this email.

[174] In summary, Ms Beck showed [Seth] an email dated 31 May 2017 purportedly written and sent by [Seth] to [Ryan Holder]. [Seth]'s counsel, Ms Jarvis, in response

[53] NOE at 73 line 21

to the Court's inquiry, confirmed that she had never previously seen the email. As [Seth] was adamant that he had no recollection of writing the email and as its existence had never come to light during three years of litigation, the Court ruled that it was not to be admitted.

[175] [Ryan Holder] was cross-examined by Ms Beck about an email exchange between Mr [Holder]'s Legal Executive, [Ria Walter] and [Seth] on 7 June 2017 about the purchase of [address 1]. However, Mr [Holder] was not shown the email dated 31 May 2017 or cross-examined about it.

[176] Having had the benefit of seeing and hearing [Melody] giving evidence and being cross-examined, I find that [Melody] was not a subservient, naïve or unsophisticated partner in the relationship with [Seth], particularly when it came to their finances.

[177] There was the following exchange between [Melody] and Mr Jarvis:[54]

> Q: But you were the person who was giving him the drive and organising things for him?
>
> A: Well I have an extensive background in financial planning, investment management. I've been told that I have quite a business head on my shoulders so I do have a particular skillset that, [Seth]'s skills are in other areas, but I have financial skills.
>
> Q: So you're more likely to be in charge of the sort of administrative details and financial details for the two of you?
>
> A: Correct

[178] I find it was [Melody] who recommended to [Seth] that [Ryan Holder], a solicitor who she had previously engaged, should act on the purchase of [address 2] and, subsequently the purchase of [address 1]. It was [Melody] who started looking for employment for [Seth] in [his learnt trade] industry at a time when [Seth] was unhappy and frustrated working in [city A] for his family. It was [Melody] who assisted [Seth] in completing his application for the position; she reviewed his CV and was proactive in not only submitting the applications but following it up when there was no reply. It was [Melody] who, in January 2015, discovered that [details deleted]

[54] NOE at 3 lines 18-26.

was up for sale. It was [Melody] who initiated and drove the joint appointment with Sonya de Vries, the Solicitor in [city C] about the trust deed's provisions, its effects, and implications.

[179] However, I find the tenor of [Melody]'s email on 29 August 2013 to Ms de Vries purportedly identifying "our concerns around the trust deed" and signed off as "Kind regards [Melody] and [Seth]" as constituting, in reality, [Melody]'s concerns.

[180] I find [Melody]'s subsequent correspondence to [Seth] following their consultation with Ms de Vries supports [Seth]'s evidence that [Melody] embarked on a concerted campaign to change the Trust structure even by going as far as preparing a draft letter to [Aidan Dillon] to set in train the changes.

[181] The obvious fact is that, notwithstanding [Melody]'s endeavours, the Trust structure remained unchanged. I find there was a "quite a high level conceptional discussion"[55] between [Aidan], [Melody], [Seth], and to a lesser degree, [Ryan Holder], about [Melody] having a "share in the ownership of [address 2]."[56]

[182] I accept [Aidan Dillon]'s evidence that he would not have agreed to [Melody] being made a beneficiary of the Trust as a result of what he felt was [Melody] pressuring [Seth] to sign the agreement to buy the [business] contrary to his advice about how to responsibly progress its acquisition with proper due diligence.

[183] I do not find it is proven that, prior to the purchase of [address 2], [Melody] was told that she would become a beneficiary of the Trust and this was the reason [Melody] was "not concerned when the transfer was to the trust." Also, I do not find it is proven that [Seth] and [Aidan Dillon] offered to give her half of [address 2] as "[she] had not been made a beneficiary of the trust."[57] I prefer [Seth]'s evidence that he never said to his father, [Laurence Dillon], that [Melody] needed to be a beneficiary of the Trust, particularly when [Seth] explained under cross-examination "I haven't known [Melody] that long..."[58]

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[55] NOE at 80 line 17.
[56] BOD at 50 [8(c)].
[57] BOD at 51 at [9(b)].
[58] NOE at 52 line 33.

[184] In my opinion, [Melody], just like [Seth], always knew that the Trust would purchase and own both properties as they had no money of their own to fund the purchases. I find that [Seth] entered into the sale and purchase agreements on behalf of the Trust and not in his personal capacity.

[185] I find that, in the circumstances, [Seth] signed both sale and purchase agreements for reason of understandable 'expediency.' For example, the agreement for sale and purchase for [address 2], at cl 28.0 discloses multiple amendments, and initialling by the vendor and [Seth] over the provision of vendor finance and offers and counter offers concerning the purchase price.[59] Likewise the agreement for sale and purchase of [address 1] also discloses amendments and initialling concerning the purchase price,[60] and the provision of a code of compliance certificate.[61]

[186] I am fortified in making this finding, as [Aidan Dillon] deposed:[62]

> Given my location out of town, we decided that it would be easiest if [Seth] simply signed the Agreements for Sale & Purchase on behalf of the Trust rather than having to send the Agreements backwards and forwards for signing and initialling any changes made in the negotiating process.

[187] I find [Aidan Dillon], a chartered accountant and Chief Financial Officer, was an impressive and reliable witness. I accept his evidence that "I have always taken my role as a trustee seriously, and I have been fully involved in all decision-making regarding the Trust."[63]

[188] There was the following exchange between [Aidan Dillon] and Ms Beck during cross-examination:[64]

> No, no, what I said was, I raised the issue because I could see that [Melody] felt left out, right, she wanted to be involved, and I absolutely wanted to support that, but as time progressed the conditions required for me to move on that in relation to a trust, or a change of the Trust Deed, for example add her as a beneficiary, simply did not meet the standard that I had. And that was my

[59] BOD at 147.
[60] BOD at 170.
[61] BOD at 179.
[62] BOD at 246, 247 at [17].
[63] BOD at 245
[64] NOE at 79 lines 22-32

> judgment call. But that does not necessarily mean that I would not have been open to other ways of, of acknowledging her importance as the mother of [Nikita], because at that point she was no longer the partner of [Seth].

[189] I find [Aidan Dillon]'s responses during cross-examination reveal that he had a deep understanding of his father's reasons for setting up the Trust. He described his father as follows:[65]

> A: ... He was a very skilful chartered accountant. He had worked in the community for a long time and advised many people on their financial management and their financial issues. He was a good judge of character and I believe, an honourable man. And in fact, I have a recording of the last thing he ever said to me where he actually recognises [Melody] and quite openly states his care for her so I don't believe that he was in any way being unfair. He was just being wise.
>
> Q: Well he was being so wise that she was to all intents and purposes cut out of everything. You'd agree with that?
>
> A: No I don't, I think the way you've put that is rather extreme and that's certainly not how I interpret it and the conversations that I had with [Melody] which are recorded in here were that I was actually, as my father was and we were on the same page in this, we were hoping for the relationship to solidify and that they would, you know, from my religious background marriage is important, that's my own perspective, but from the perspective of the relationship I was wanting to see that really solidify and as a trustee I was open to that, my father had made me responsible for that.

[190] I accept [Aidan Dillon]'s evidence that:[66]

> The decisions to purchase each of these properties was made by [Seth], [Ryan Holder] (as director of [details deleted]) and I as trustees before [Seth] signed any documentation.

[191] I also accept [Aidan Dillon]'s evidence that as he lived in Auckland he was:

> .. not able to attend open homes and be present when offers were made, but they were always discussed with me prior to us making a decision for the Trust to make an offer on either of the properties. This is because the Trust would be purchasing the property, so the Trustees had to agree to the purchase, and to the price being offered.

[192] [Aidan Dillon]'s following evidence in my opinion appears entirely consistent and credible:[67]

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[65] NOE page 78 line 23 – page 79 line 7
[66] BOD at 248 [13].
[67] BOD pages 247 [20] – page 248 [23].

> 20. For my part, I never even considered whether [Seth] might be acquiring property rights when he signed the Agreement of Sale and Purchase on behalf of [Ryan] and I as co-trustees. As far as I was concerned, the Trust was purchasing the assets, and [Seth] signing the agreements was the correct procedure for the Trust to follow to secure the purchase and get the process moving. All phone calls and communication I had with [Seth] and [Ryan] during this time was with the intention that the Trustees were making the purchase for the trust.
>
> 21. I most certainly did not believe that [Seth] signed the Agreements for Sale and Purchase on our behalf would have given him the right to purchase the properties in his personal capacity.
>
> 22. [Seth] did not ever suggest that he might be able to purchase the properties personally because of how he had signed the Agreements for Sale and Purchase. Indeed, had he suggested that he had the right to do so, I would have strongly objected, on the basis that I understood I was purchasing the property in my capacity as Trustee (which is why [Seth] signed on my behalf.)
>
> 23. Furthermore, had [Seth] attempted to settle the purchase, he would have been unable to do so. I understand that [Seth] has never had any significant assets or income outside of anything the [Seth] has never has any significant assets or income outside of anything that the Trust might decide to advance or distribute to him. He therefore would have had to seek an advance or distribution from the Trust, which I would have refused on the grounds that I believed that the trust should have the benefit of a return on its investments (both in terms of capital gain and in terms of income), rather than simply either advancing or distributing the funds to [Seth].

[193] Furthermore, [Aidan Dillon] has established a budget for the purchase of [address 1] in distribution a diversified portfolio.

[194] Notwithstanding Ms Beck's issues with the trustees' alleged non-compliance with cl 18.7 of the trust deed; I find unequivocally that the weight of evidence shows that the independent trustees were involved in the decision-making process and [Seth] did not make the decision to enter into the sale and purchase agreements for himself.

[195] I am not persuaded by the fact that, in [Ryan Holder]'s email to the vendor's lawyer there is no mention there was no mention of the Trust in the subject heading of his email (it merely read "Bain to [Dillon]") or that, in [Seth]'s email he said "our offer" of $730,000 has been accepted. It does not show [Seth] personally buying [address 1]. I find that [Seth]'s response under cross-examination has the tenor of common-sense and candour when he said:[68]

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[68] NOE at 57 lines 31-32.

> But the trust did buy the - it doesn't really matter what I write, it's the trust that bought the house.

[196] I concur with Ms Jarvis' submissions that no disposition of property by [Seth] to the Trustees occurred as the trustees were always the purchasers, not [Seth] personally. Therefore there was no need for any deed of nomination. I also find that [Seth] had no intention to defeat [Melody]'s claim or rights as:

(a) [Seth] had no knowledge of the effect of signing the agreements for sale and purchase 'as nominee' and then nominating the trustees as purchasers of [address 2] and [address 1];

(b) [Seth] was unaware that he was potentially acquiring any personal rights, and therefore no knowledge that he could be alienating those rights, let alone defeating [Melody]'s potential claim or rights.

Did the Trust receive [address 2] and [address 1] in good faith?

[197] I find on the evidence that [Seth], [Aidan Dillon] and [Ryan Holder] in their capacity as trustees received the two properties in good faith, as the properties were always going to be owned by the Trust. [Melody] and [Seth] had no money to complete the purchase of the properties. The purchase of the properties was always going to be funded by the Trust's capital resources.

[198] Ms Beck emphasised that [Seth] having received legal advice from Sonya de Vries knew that the Trust excluded [Melody] from being able to make a claim against the two properties under the Property (Relationship) Act. That one appointment between [Melody], [Seth] and Ms de Vries in August 2013 occurred nine months before the conditional purchase of [address 2] in May 2014.

[199] In my opinion, [Melody]'s email of 29 August 2013, although signed off "Kind Regards [Melody] and [Seth]," was clearly written by [Melody]. To what extent, [Seth] had actual input into the email's content is unknown: The email states (inter alia):[69]

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[69] BOD at121.

> ...
>
> [Seth] and I have talked and he has confirmed that his wish would be to provide for our daughter and myself on his death, a 4 way split between us and his two sons who live in Germany. Upon separation he has also indicated that he would wish to provide for us.
>
> Our objectives, [Seth] wishes to keep his inheritance separate but with full discretion to manage it how he sees fit, particularly to repay Germany, and provide for us as he chooses. Keeping in mind, that he would like to honour his father's wishes to a point.
>
> My key concerns, are that my daughter and I would be provided for in the event of [Seth]'s premature death or our separation. Eg. Should [Seth] die prematurely I should have the ability to have some authority over my daughter's future security. And should we separate if there is a family home/business I would need to be protected from being left with nothing.

[200] [Seth] and Ms Beck had the following exchange during [Seth]'s cross-examination:[70]

> Q: All right. When your father set up the trust, did you understand that in terms of the mechanisms set in place, [Melody] was not going to receive anything at all should you separate?
>
> A: Well, we did go to a barrister in [city C] and that is what the barrister said. And I guess that was upsetting for [Melody] but look I'm just one of four beneficiaries, no trust stuff belongs to just me either, it simply belongs to the trust and there are four beneficiaries and we've got three trustees or manage that, as you say quite amount of money was inherited. So a trust did make sense.

[201] In the end, the Trust was set up by a third party in 2012, and [Seth]'s following evidence convinces me that the Trust received [address 2] and [address 1] in good faith and in the spirit of [Laurence Dillon]'s wishes and intentions, viz:[71]

> The intention was always for the Trust to purchase both properties – I had never intended to purchase or acquire any rights in any property (and neither had [Melody]), because neither of us had any money that we could use to settle the purchase of either property (as is set out in paragraphs 38 and 56 of my First Affidavit).
>
> Furthermore, the trustees wished to invest the funds held by the trust for the benefit of all beneficiaries (i.e. me and my three children). This is why the Trustees did not simply distribute funds to me to purchase assets like [address 2] or [address 1], as then any capital gain or investment return would go to me solely, rather than to benefit the wider beneficiaries (such as my three children) . There was no agreement for the Trustees to distribute funds to me,

[70] NOE at 39 line 21-29.
[71] BOD at 220 at [29]-[30].

> and nor would I have asked them for it, as I was aware of the rationale for the Trust to hold my inheritance for the benefit of me and my descendants (my three children).

Conclusion

[202] Therefore, I do not find that [Melody] has proven her claim under s 44.

[Melody]'s Section 44C claim

[203] The essence of [Melody]'s claim under s 44C was that [address 2] and [address 1] were relationship property that were each disposed of to a Trust during their de facto relationship and the effect of each disposition was that [Melody]'s claim to the properties was therefore defeated.

[204] Ms Beck submitted in support of the claim that [Seth] bought the properties in his personal capacity, and that the payment in particular for [address 1] came from [Seth]'s personal bank account.

[205] Although Trust funds were used to make the purchase, Ms Beck submitted that there was "significant intermingling: of Trust funds in [Seth]'s personal bank account. Ms Beck therefore submitted that the moment the money was transferred from the Trust's bank account into [Seth]'s personal bank account it was intermingled and became relationship property. The implication is that [address 2] and [address 1] also became relationship property.

[206] [Melody], under cross-examination by Ms Jarvis, asserted "that... there was a huge intermingling of funds between personal and trust accounts."[72] [Melody] also stated:[73]

> As I said, this – you seem to have this notion that the trust and [Seth] were quite separate. That is not how it presented in the relationship. [Seth] had full access to those trust funds, he used it like a bank account. So you keep talking about the trust as a separate, that was not my experience when I was with [Seth].

[72] NOE at 12 lines 10-11.
[73] NOE at13 lines 21 -25.

[207] However, I find that the mere fact the Trust funds were put into [Seth]'s personal account does not mean they were "intermingled" and became relationship property. In *Lavery v Lavery*[74], the issue was whether 5 separate inheritances the husband received during his marriage lost their separate property status when they became intermingled with relationship property funds in a bank account. Thomas, J examined ss 8 and 10 of the PRA in the context of funds in bank accounts and observed:[75]

> This changes the presumption in s 8 to a presumption that the property is not relationship property unless, with the express or implied consent of the partner who received it, the property has become so intermingled with other relationship property that it is unreasonable or impracticable to regard it as separate property. The mere fact of intermingling is not enough; it is "coloured by the words 'unreasonable' and 'impracticable'", which import a pragmatic approach.[76] Whether intermingling is present to the degree necessary to dislodge the presumption is largely a question of fact. In respect of separate property in bank accounts, mere mixing of funds may not dislodge the presumption but circumstances such as whether the accounts stayed constant or fluctuated will be relevant.[77] Also relevant is policy: it may be "contrary to the spirit of the Act" to deprive a party of their separate property merely because proceeds from an inheritance was located in a joint account for a period.[78]

[208] The evidence of the trustees, which I accept, is that they would not have distributed the funds to [Seth] in his capacity as a beneficiary, to settle the purchase. If there was a distribution of Trust funds into [Seth]'s bank account, I would consider the funds to have a separate property classification (being a distribution from a Trust settled by a third party containing inheritance funds) rather than a relationship property classification.

[209] I also agree with Ms Jarvis' submissions that as [Melody] and [Seth] did not live in either [address 2] or [address 1] until after the titles were transferred into the Trustee's names, neither [address 2] nor [address 1] constituted the family home prior to being transferred to the Trust.

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[74] *Lavery v Lavery* [2018] NZHC 3235
[75] At [77].
[76] *Jackson v Jackson* [1984] 1 NZLR 382 (CA) at 383
[77] *Flay v Flay* (1990) 6 FRNZ 131 (HC); and *Branch v Vickery* HC Auckland HC57/98, 25 August 1998.
[78] At [133]

[210] Accordingly, I do not find [Melody] has proven that [address 2] and/or [address 1] were relationship property at the time of their transfer to the Trust. Therefore, the transfer of [address 2] and [address 1] was not a disposition of relationship property.

Was there another disposition of relationship property?

[211] [Melody], in her evidence, claimed that rates, maintenance, insurance and renovations on the properties were paid from relationship property funds. Her evidence was that several thousand dollars of relationship property were spent on the properties. [Melody]'s evidence was that the bills for the renovations for [address 1] (e.g. laundry, heat-pumps, curtains, painting) were paid for:[79]

> ... through his personal account because I would've sat there and I would've paid those bills because that was part of my role in the relationship, paying bills.

However, [Melody] did not produce relevant bank statements to support her claim. I find that there is no evidence that any of these expenses were paid personally by her and [Seth] prior to the trustees taking title of either [address 2] or [address 1]. I accept the evidence of the trustees that no relationship property funds were ever applied to either [address 2] or [address 1] during the parties' defacto relationship as the Trust paid for the maintenance and improvements on both property.[80]

[212] [Melody] also alleged at the hearing that [Seth] had been transferring $20 per month to the Trust bank account from relationship property funds. She produced two bank statements in evidence showing transfers of $20 per month to the Trust bank account. I accept [Seth]'s evidence, under cross-examination, that this was done for the sole purpose of earning interest each month on the funds in the Trust bank account.

[213] I cannot find with any certainty on the evidence that the $20 per month transfer was a disposition of relationship property. In any event, I accept Ms Jarvis' calculations that this would be:[81]

> at the rate of $240 per annum, or approximately $1,520 between the establishment of the Trust and the later of the two dates of separation.

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[79] NOE at 20 lines 1-3.
[80] BOD at 94 and 96.
[81] Ms Jarvis' closing submissions dated 5 July 2024 at [89].

[214] Ms Jarvis submitted:[82]

> Even if Ms [Graves]'s evidence on both points is accepted (which Mr [Dillon] and the Trustees do not), the sum total of relationship property transferred to the Trust at its highest water mark is likely to be less than $5,000.00.[83]
>
> By comparison to this, Ms [Graves] has had the benefit of living entirely rent-free in each of the properties ([address 2] for 3.5 years from June 2014 until December 2017;[84] [address 1] for almost 6 years from December 2017 until the present day[85]) which well exceeds that zero value.
>
> The evidence from Mr [Dillon] is market rental for [address 1] is approximately $650 to $800 per week[86]. In the five years since separation, Ms [Graves] has had sole occupation of [address 1] and a five year approximate rental would be between $156,000 and $221,000 on those figures.
>
> Mr [Dillon] and the Trustees therefore submit that the value of relationship property allegedly disposed of to the Trust is well outweighed by the benefits of rent-free accommodation received by Ms [Graves], and the Court should therefore decline to make any award in her favour under s 44C.

[215] Even if I had found that the $20 per month was sourced from relationship property funds, I would have declined to make an order under s 44C because [Melody] has been adequately compensated, given the manner in which she has financially benefited from the property.[87]

Conclusion

[216] In conclusion, I find that [Melody]'s claim under s 44C must fail on the primary basis that neither [address 2] nor [address 1] were relationship property at the time they were acquired by the Trust.

Costs

[217] As the applicant has been unsuccessful, I will leave it to counsel to endeavour to reach agreement on the issue of costs, if costs are sought at this stage.

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[82] At [90]-[94].
[83] On the basis that [address 2] and [address 1] had zero equity at the time of transfer, plus the several thousand dollars allegedly contributed by Ms [Graves] and Mr [Dillon], and the $20 per month allegedly contributed by Mr [Dillon].
[84] BOD at 97.
[85] BOD at 98-99.
[86] BOD at 97.
[87] *LG v KFW* [2012] NZFC 5566.

[218] In the event of non-agreement, the respondents are to file submissions (limited to six pages) within 21 days, and the applicant is to file submissions (limited to six pages) in reply within 14 days of receipt.

_____
Judge N.A. Walsh
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 17/07/2024