

Update Fisher on Matrimonial and Relationship Property

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Case commentary

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

In *Johnston v Johnston* [2020] NZHC 2887, Downs J on the facts rejected an argument that New Zealand was forum non conveniens (except for movables in the United States). See [1.65].

Chapter 5 — Agreements — setting aside agreement — jurisdiction

A claim simply to set aside a relationship property agreement in reliance on s 21F or s 21J must be brought in the Family Court, rather than the High Court: *Prescott v Thompson* [2020] NZHC 3322. See [5.14].

Chapter 5 — Agreements — enforcement of agreements — summary judgment

In *Barwick v Koenen* [2019] NZHC 1341, (2019) 21 NZCPR 1 the wife was successful in summary judgment application to enforce clause regarding implementation of division and sale of a property to meet adjustment sum. See [5.15].

Chapter 5 — Agreements — independent legal advice — content and quality of advice

Advice not about relationship property issues cannot qualify as relevant independent advice: *Peterson v Mills* [2020] NZHC 2400. See [5.71].

Chapter 5 — Agreements — avoidance due to serious injustice — change in circumstances

To be relevant a change of circumstance requires a causal nexus between the change in circumstance and the claimed serious injustice from giving effect to the agreement: *Remnant v Mills* [2020] NZHC 3414. See [5.77], [5.78A] and [5.84].

Chapter 5 — Agreements — avoidance due to serious injustice — agreement unfair

Evidence from the lawyer acting in the mediation for the party claiming the agreement was reached in an unfair way may be highly relevant. The agreement in *Remnant v Mills* [2020] NZHC 3414 was not set aside where the Court did not accept applicant to be mentally impaired at mediation. See [5.81] and [5.82].

Chapter 11 — Classification of property — separate property classification — burden of proof — s 8(1)(e), Property (Relationships) Act 1976

The party asserting a separate property classification under s 8(1)(e) has the burden of establishing that the acquisition came entirely from his or her separate property: *Hoeven v Hoeven* [2020] NZHC 2854. See [11.22] and [11.24].

Chapter 13 — Economic disparity — no relationship property — s 15, Property (Relationships) Act 1976

If there is no pool of relationship property to divide, there is no jurisdiction to make an order under s 15: *Pinney v Cooper* [2020] NZHC 1178, [2020] NZFLR 150. See [13.1].

Chapter 18 — Jurisdiction, orders and implementation — orders of Court — ancillary orders — variation of trusts — s 33(3)(m), Property (Relationships) Act 1976

Section 33(3)(m) permits an order varying the terms of a non-testamentary trust. Judge Pidwell used s 33(3)(m) to change the terms of a trust and facilitate the sale of a home: *Higgins v Higgins* [2019] NZFC 3703. See [18.37].

Chapter 18 — Jurisdiction, orders and implementation — occupation orders — warrant to recover land

In *O'Donnell v O'Donnell* [2020] NZFC 3041, the parties had been separated for 12 years. The husband refused to move from the home and said that the issues would be resolved by the Lord. Judge Callinicos granted an occupation order in the wife's favour so that a sale could be effected. He granted this accompanied by a warrant to enforce under s 27(4). See [18.70], [18.71] and [18.99].

Chapter 18 — Jurisdiction, orders and implementation — interests of children — representation of children — s 26, Property (Relationships) Act 1976

Lawyer for child was appointed in *Radley v Radley* [2019] NZFC 10326 to help deal with a s 26 issue and with "whether or not the needs of the parties' child should be taken into account in resolving relationship property issues". See [18.82] and [18.84].

Chapter 18 — Jurisdiction, orders and implementation — orders relating to maintenance — s 32, Property (Relationships) Act 1976 — lump sum

In *Quinn v Quinn* [2019] NZFC 10552 Judge Otene rejected a submission that s 32 is unfettered by the requirements of the Family Proceedings Act 1980. She accepted that past maintenance could be awarded. However, she did not grant it on the facts. See [18.87].

Chapter 19 — Proceedings under the Property (Relationships) Act — transfer of proceedings

A consequence of relationship property proceedings being transferred to the High Court is that a related application under s 182 of the Family Proceedings Act 1980 may be filed in the High Court directly: *Booth v Booth* [2020] NZCA 451. See [19.16].

Chapter 19 — Proceedings under the Property (Relationships) Act — costs — s 40, Property (Relationships) Act 1976

Where the successful party proceeds in a matter involving issues at stake that are of little significance they risk failure in an application for costs: *Smith v Smith* [2020] NZCA 556. See [19.42].