

# Update Fisher on Matrimonial and Relationship Property

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## Case commentary

### Chapter 1 — Nature of relationship property — enforcement of overseas orders

*Almarzooqi v Salih* [2020] NZHC 1049 concerned a UAE court order that the husband pay dowry, along with sums for alimony support and housing support, based upon a UAE marriage contract. The wife unsuccessfully sought enforcement of the contract in New Zealand. Associate Judge Johnston held that the claim to enforce the marriage contract “ignores our statutory regime altogether and is inconsistent with it”. See [1.65].

### Chapter 2 — De facto relationships — indicia of living together

In *Byakova v Cherry* [2020] NZFC 1964, the Judge worked through each of the factors, which, in combination, led to a finding that the parties’ relationship had existed until October 2016, and not October 2010, as asserted by the respondent. See [2.6].

### Chapter 2 — De facto relationships — intermittent relationships

In *Ross v Duncan* [2020] NZFC 2666, there was a clear break between relationships, and court’s task was to consider the duration of the second relationship. During the break, one of the parties was in a committed relationship with another person. See [2.10].

### Chapter 2 — De facto relationships — mutual commitment to a shared life

In *Clear v Sutton* [2017] NZHC 1484, [2017] NZFLR 567, the mutual commitment to a shared life was a core feature in a 5 year relationship that did not involve shared finances, property or residence. It was held that their lives were wholly intertwined, despite other indicia not being present. See [2.12], [2.16] and [2.19].

### Chapter 2 — De facto relationships — relationship of short duration — s 2E, Property (Relationships) Act 1976

In *Ross v Duncan* [2020] NZFC 2666 the court considered the power under s 2E(1)(b)(ii) to treat a relationship of more than three years as a relationship of short duration. The relationship of 3 years’ and 2 months’ duration was held to be a relationship of short duration. See [2.20].

### Chapter 2 — De facto relationships — serious injustice — s 14A, Property (Relationships) Act 1976

In *Ross v Duncan* [2020] NZFC 2666, the test for serious injustice under s 14A(2)(b) was met, with an 80/20 split in favour of the owner partner. See [2.24].

**Chapter 2 — De facto relationships — engagement to marry — s 21, Property (Relationships) Act 1976**

*M v H* [2017] NZHC 2385, [2017] NZFLR 751 reaffirmed that the meaning of in contemplation of marriage required a clear and present intention to marry. See [2.34].

**Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlements**

In *Poros v Bax* [2020] NZHC 1602 the property acquired by the trust four weeks prior to the marriage lacked any contribution by either party to the acquisition, no contributions during the marriage and where there was no intention for Mr Poros to benefit. Jagose J held that the timing of the acquisition of the property was insufficient to connect the acquisition to the marriage. See [6.12].

**Chapter 6 — Variation of agreements and trusts on dissolution — nuptial settlements**

In *Dyer v Gardiner* [2020] NZCA 385 the Court of Appeal reversed the finding in the High Court that the gifting arrangements and capital advances were a “quid pro quo” against the benefits received by the parties in living in the property rent free. The Court held that the transactions post-marriage were nuptial settlements. See [6.12] and [6.15].

**Chapter 9 — Protecting the non-owner spouse or partner — lodging notice of claim**

In *Romanes v Mikro Holdings Ltd* [2020] NZFC 211 the property was owned by a company, the shares in which were the husband’s separate property. Judge Wills held that a notice of claim could not be sustained on the basis of a constructive trust claim or one under s 44 of the Property (Relationships) Act 1976. See [9.17].

**Chapter 9 — Protecting the non-owner spouse or partner — in order to defeat — s 44, Property (Relationships) Act 1976**

In *Dyer v Gardiner* [2020] NZCA 385, the wife had set up a trust for her son from a previous relationship. The son was an adult but remained dependent on his mother. Despite this worthy cause, the Court of Appeal held that various transactions, including the disposition of shares to the trust, were also in order to defeat the husband’s relationship property interests. See [9.42] and [9.46].

**Chapter 9 — Protecting the non-owner spouse or partner — in order to defeat — s 44, Property (Relationships) Act 1976**

In *Byakova v Cherry* [2020] NZFC 1964, the respondent transferred three-quarters of the home to his daughter while the applicant was away and when the relationship was in its death throes. Judge Matheson was “more than satisfied that the respondent knew the likely consequences” on the applicant. See [9.42] and [9.46].

**Chapter 9 — Protecting the non-owner spouse or partner compensation for dispositions to a trust — s 44C, Property (Relationships) Act 1976**

In *Dyer v Gardiner* [2020] NZCA 385, the Court of Appeal said that “. . . a pragmatic approach is required when determining if a disposition ‘is not one to which s 44 applies’”. Thus, if the court declines to exercise its discretion to grant relief under s 44(2), it is not precluded from granting relief under s 44C. See [9.54].

**Chapter 10 — Meaning of property — goodwill**

In *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507, [2018] NZFLR 1 the goodwill of a professional partnership of two solicitors was accepted to be largely that of the firm, rather than of the individual partners. See [10.16] and [10.21].

**Chapter 12 — Division of relationship property — misconduct — s 18A, Property (Relationships) Act 1976**

In *Hewson v Deans* [2020] NZHC 1465 the High Court pointed out that the husband's misconduct in attempting to avoid his full income tax liability did not affect the extent and value of relationship property. The Family Court's order for unequal sharing of relationship property was then set aside and equal division ordered. See [12.40].

**Chapter 13 — Economic disparity — effects of division of functions within marriage, civil union or de facto relationship — s 15, Property (Relationships) Act 1976**

In *Gosbee v Gosbee* [2020] NZHC 1001 the Court rejected an appeal against the decision of the Family Court that no award should be made under s 15 as the real reason for the discrepancy was the deliberate choice of the applicant. See [13.3] and [13.4].

**Chapter 15 — Debts — relationship debt — tax liability**

Tax liability was explored further in *Hewson v Deans* [2020] NZHC 1465. The result was that the tax liability was partly a relationship debt and partly a personal one. See [15.7].

**Chapter 18 — Jurisdiction, orders and implementation — direct vesting of assets — property owned by company — s 33, Property (Relationships) Act 1976**

While s 33(3)(e) of the Property (Relationships) Act refers to "any property", it cannot be used in relation to property owned by a company: *Romanes v Mikro Holdings Ltd* [2020] NZFC 211. See [18.29].

**Chapter 18 — Jurisdiction, orders and implementation — occupation orders**

In *Lobb v Ryan* [2020] NZHC 834 Powell J held that an application for occupation is not conditional on making an application for any other order. See [18.69].

**Chapter 18 — Jurisdiction, orders and implementation — child support — s 32, Property (Relationships) Act 1976**

In *Cotton v Marriott* [2019] NZFC 7588, the Judge decided not to make a child support order because no child support assessment had been made. The Judge thought that the Commissioner of Inland Revenue should be served. See [18.88].

**Chapter 18 — Jurisdiction, orders and implementation — child support — s 32, Property (Relationships) Act 1976 — lump sum**

In *Beck v Wilkerson* [2019] NZFC 9883 the mother sought a lump sum child support payment to assist in buying a house. However, the total amount that she would be entitled to under the formula was only \$11,000. The Judge decided to give her the option of taking this amount or continue with periodic child support payments. See [18.69].

**Chapter 18 — Jurisdiction, orders and implementation — interim orders**

In *Biggs v Biggs (No 2)* [2020] NZCA 231 the wife was granted a further interim payment of \$700,000 to cover legal costs (ie on top of the \$400,000 already granted). The Court of Appeal accepted that the payment could come out of the husband's separate property on the basis that he would be reimbursed. See [18.90].

