

Update Fisher on Matrimonial and Relationship Property

February 2020 — Service 93

Rewritten commentary

Chapter 16 — Changes after separation

Part C of Chapter 16 has been rewritten and updated by barrister Augustine Choi.

Case commentary

Chapter 1 — Nature of relationship property — Law Commission review of relationship property law

The Law Commission's *Review of the Property (Relationships) Act 1976 Te Arotake i te Property (Relationships) Act 1976* (R143, Wellington 2019) made 140 recommendations but included among them were two recommending that relationships ending in death be examined separately as part of a wider review of succession law. The Government refrained from considering the other recommendations on relationship property until the succession report is completed by the Law Commission. See [1.11.2].

Chapter 2 — De facto relationship — common residence

In *Vann v Fay* [2016] NZFC 1676, Mr Fay moved out due to differences with Mrs Vann's children, with moving into separate residences not affecting the nature of the relationship between the parties. See [2.12].

Chapter 3 — Gifts — unconscionable bargain

Even if the donor may have intended to make a gift, the gift will be set aside if the circumstances are such that is unconscionable for the donee to accept the gift: *Willis v Thompson* [2017] NZHC 1645, [2017] NZAR 1448 and *Hurlimann v Noland* [2018] NZHC 2251. See [3.2].

Chapter 3 — Gifts — intention to make gift

It is of the essence of a gift that the donor intends to make the gift: *Hurlimann v Noland* [2018] NZHC 2251; *Tian v Zhang* [2019] NZHC 2231. See [3.2] and [3.3].

Chapter 9 — Protecting the non-owner spouse or partner — notice of claim of interest — trust

In *Pisidia Holdings Ltd v Darby* [2019] NZHC 1216, [2019] NZFLR 96 the husband owned 100 per cent of the shares in Pisidia, the owner of seven lots of land subject to s 42

notices. The shareholding was transferred to a trust. It was held that, even if *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230 applied, this did not mean that either spouse had a claim to the land (as opposed to an interest in the trust). See [9.17] and [9.28].

Chapter 9 — Protecting the non-owner spouse or partner — notice of claim of interest — constructive trust

In *Parry v Parry* [2019] NZHC 2388, [2019] NZFLR 215, the wife was relying on a constructive trust claim. Associate Judge Paulsen held this would not be a claim to an interest under s 42(1) of the Property (Relationships) Act 1976. On the facts of *Parry*, a constructive trust could not be established anyway. See [9.17].

Chapter 9 — Protecting the non-owner spouse or partner — notice of claim of interest — de facto relationship

A s 42 notice was lifted in *Selak v Smith* [2019] NZHC 1487, [2019] NZFLR 188 per Associate Judge Bell because the parties' de facto relationship was one of short duration (less than three years) and the conditions in s 14A for bringing such a relationship under the Property (Relationships) Act 1976 were not satisfied. See [9.29].

Chapter 10 — Meaning and value of property — date of acquisition of fresh rights to property — insolvency

In *Goldstone v Goldstone* [2019] NZHC 1649 a husband and wife had jointly owned a family home. Prior to their separation, both parties were adjudicated bankrupt; after their separation, the Official Assignee disclaimed the property as being an item of onerous property. Under the Insolvency Act 2006, the High Court vested the property in the husband alone, declaring that as his interest in the property was acquired after the separation, the property was not either relationship property or separate property that would come within the jurisdiction of the Family Court under the Property (Relationships) Act 1976. See [10.8].

Chapter 11 — Classification of property — estate planning gifting programmes

In *Cossio v Cossio* [2018] NZHC 2779, [2019] NZFLR 156 shares were acquired by a son from his father for full value, the purchase price being fully funded by a loan from the father to the son. The Court held, on the authority of *Mills v Dowdall* [1983] NZLR 154; (1983) 2 NZFLR 210, that the shares were relationship property pursuant to (now) s 8(1)(e) of the Property (Relationships) Act 1976. Leave to appeal against that decision has been given by the Court of Appeal: *Cossio v Cossio* [2019] NZCA 349. See [11.60].

Chapter 15 — Debts — relationship debt — incurred for benefit of spouses or partners

In *Penn v McQueen* [2019] NZHC 2192, [2019] NZFLR 241, Katz J took the view that a loan from the husband's mother taken out to renovate a London UK house but also used for living expenses was a relationship debt under s 20(1)(d). See [15.6], [15.10] and [15.14].

Chapter 17 — Division where spouse or partner dies — final distribution

In *McConkey v Clarke* [2019] NZHC 924, [2019] NZFLR 170 it was submitted that the term "final distribution" should be interpreted in accordance with the decision of the Family Court in *Re Estate of Herbert* [2007] NZFLR 844 where it was held that the cases decided under the Matrimonial Property Act 1963 and the Law Reform (Testamentary Promises) Act 1949 could not be imported into the Property (Relationships) Act 1976. The

High Court agreed with the Family Court that final distribution had occurred as a consequence of a deed of family arrangement. See [17.6] and [17.10].

Chapter 17 — Division where spouse or partner dies — When proceedings may be commenced after death of spouse or partner

Section 89 of the Property (Relationships) Act 1976 provides that proceedings may be commenced after the death of one of the spouses or partners if at the date of death of the deceased the partners were not living together, the partner must have been living with the deceased within three years of the deceased's death: *McConkey v Clarke* [2019] NZHC 924, [2019] NZFLR 170. See [17.34].

Chapter 19 — Proceedings under the Act — grounds for inquiry — s 38, Property (Relationships) Act 1976

An inquiry under s 38 of the Property (Relationships) Act 1976 has been used where one party has failed to comply with discovery: *Godfrey v Godfrey* [2017] NZFC 9016. See [19.35].

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

The current position is that the Court should apply the costs regime set out in the District Court Rules: *Campbell v Goldie* [2019] NZHC 1573, [2019] NZFLR 125. See [19.41] and [19.42].

Chapter 19 — Proceedings under the Act — appeals — further evidence on appeals

Where the request to adduce further evidence stems from that party's failure to make full disclosure of relevant documents the applicant could have difficulty pursuing the Court to allow the further evidence. Parties should make sure they put their best case at trial: *Bhamidipati v Bhamidipati* [2019] NZHC 720. See [19.46].

