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IN THE FAMILY COURT
AT AUCKLAND

FAM-2011-004-000054

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	A S J Applicant
AND	M L S First Respondent
AND	A C S (TRUSTEE) Second Respondent

Hearing: 26, 27 July and 2 August 2012

Appearances: Ms A Fisher and Ms S Ambler for the Applicant
Mr G Cameron for the First Respondent

Judgment: 4 October 2012

RESERVED JUDGMENT OF JUDGE S J FLEMING

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[1] Ms Jennings and Mr Swayne were married to each other twice. They first married in 1987 and separated less than two years later in January 1989.

[2] Mr Swayne at the time of that marriage already owned two properties both of which were mortgage free. One was the home in which the two lived in Ranfurly Road, Epsom and the other was a holiday home in Whangamata. He was also a partner in a law firm prior to marriage.

[3] Some time after that separation in 1989, Mr Swayne formed a new relationship with a Ms Lush. They lived in the Ranfurly Road property throughout the de facto relationship and had two children.

[4] In 1994, during the course of that relationship, Mr Swayne settled a Trust. The following year (1995) he created a lease for life interest in both the family home at Ranfurly Road and the bach at Whangamata. In 1996 he transferred his residuary interest in the home and the Whangamata bach to the Trust. For the sake of completeness Mr Swayne, at some stage, subdivided the Ranfurly Road property and two new titles were issued but that has no direct relevance in this case.

[5] Mr Swayne and Ms Lush separated in October 1997 and shortly thereafter - at the beginning of 1998 - Mr Swayne contacted Ms Jennings and they rekindled their relationship. It seems quite early on they talked of having a family and both were keen to do so and as soon as possible given Ms Jennings was by then aged 42 years. They married again on 28 November 1998 and had one child - Amber - who was born in September 1999 and is now 14 years of age.

[6] Ms Jennings worked in outside employment during the marriage. That employment included relief teaching, giving piano lessons and cleaning office premises. She sold a property she owned prior to the second marriage and used the equity in it - approximately $20,000 - during the relationship. Expenses were shared between the two until Amber turned four when Ms Jennings assumed responsibility for Amber's costs while Mr Swayne paid all other household expenses. It seems the contributions by each remained about financially equal. An addition to the Ranfurly

Road property provided accommodation for boarders, which was another source of income for the family. Although Mr Swayne retired from his law practice in November 1989 he would draw from the Trust and received rental income from the premises where his law practice operated from to pay household expenses.

[7] Mr Swayne and Ms Jennings generally shared domestic tasks including those associated with the boarders. Mr Swayne's two children from his relationship with Ms Lush stayed from time to time and Ms Jennings also played her part in their care.

[8] They finally separated in July 2009. By that stage Mr Swayne's drinking of alcohol had reached a level where it was impacting on their relationship. Mr Swayne remained in the Ranfurly Road property and Ms Jennings moved out with their daughter Amber.

[9] There is no challenge to equal division of relationship property.

[10] The issues to determine are:

- Whether a s.21 agreement signed prior to the first marriage in 1987 still applies and, if so, whether it should be set aside on the grounds of serious injustice?

- The value of Mr Swayne's life interest in Ranfurly Road?

- Whether there should be an adjustment made pursuant to s.18C in favour of Ms Jennings?

- Is Mr Swayne's life interest in the bach, relationship property?

- If Mr Swayne's life interest in the bach is his separate property then should an award be made in favour of Ms Jennings pursuant to either s.9A or s.17?

- Whether a Constructive Trust can be established over Trust assets?

- Ms Jennings' claim for a payment pursuant to s.18B.

- Should property be settled on the parties' child pursuant to s.26 of the Act?

Section 21 agreement

[11] Prior to their first marriage in 1987 Mr Swayne and Ms Jennings signed an agreement under s.21 of the Act. The agreement is unremarkable and could be described as standard for the time. It broadly provided all property belonging to either party prior to the marriage was and would remain separate property. When the two separated in 1989 Ms Jennings took her own possessions she had prior to marriage and nothing more. Mr Swayne did the same. It appears there was no dispute about the division of property.

[12] Ms Fisher submits this agreement, signed as it was prior to the parties first marriage in 1987, does not apply to the second marriage.

[13] Secondly, Ms Fisher submits if it does, it should be set aside on the grounds of serious injustice.

[14] Mr Cameron, on the other hand, submits the agreement does apply to the second marriage although the agreement itself does not specifically provide it applies if the parties separate and later remarry. However, the agreement does provide it is binding on the parties "in all circumstances in which property rights would without this agreement be determined..." and the operation of it is unaffected if the parties separate and then reconcile or even when their marriage has been dissolved. By analogy Mr Cameron submits I should read the agreement as applying where the parties have remarried because the Act itself now provides no real distinction between de facto relationships and relationships where parties marry. I do not agree with that submission but of course there is still specific provision in the agreement that it applies "in all circumstances".

[15] Further Mr Cameron submits if the agreement is binding, then it should not be set aside because giving effect to it would not cause serious injustice.

[16] In my view the agreement signed in 1987 prior to the parties first marriage does not apply to their second marriage notwithstanding the agreement itself provides it is binding on them "in all circumstances". It was clearly not contemplated at the time the agreement was signed they would separate, live apart for nine years or so, divorce, remarry and have a child. Despite Mr Swayne's evidence to the contrary, I do not believe either he or Ms Jennings thought the agreement would still apply to their second marriage. Ms Jennings said there was no discussion about the agreement prior to the second marriage and I generally preferred her evidence where there was a conflict because Mr Swayne had obvious difficulties in accurate recall.

[17] However even if I am wrong and the agreement does still apply, I am satisfied giving effect to it would cause serious injustice having regard to the factors contained in s.21J(4). The most relevant of these factors is the change of circumstances since it was signed in 1987. I have already referred to those circumstances but repeat again:

- They separated in 1989 and having lived apart for nine years, remarried, and did not discuss the agreement signed eleven years before;

- They had a child;

- Ms Jennings sold her assets owned pre-marriage and used the funds for family purposes;

- She continued to work while Mr Swayne retired and contributed at least equally financially and in every other way to the family.

[18] I am quite satisfied the agreement has become unfair or unreasonable because of these changes of circumstances and to give effect to it would cause serious injustice.

[19] The agreement is accordingly set aside.

Valuation of Life Interest - Ranfurly Road

[20] It is agreed Mr Swayne's life interest in the property at 93A Ranfurly Road is relationship property. The only issue I was asked to determine was its value.

[21] Ms Jennings proposes the value of the life interest be fixed in accordance with the evidence of an actuary, Mr Davies. He values the life interest (as at the present time) at $874,938 (say $875,000). Mr Swayne proposes that the value be fixed as per the evidence of Mr Edginton, a registered valuer (supported by Mr Gamby), and he values the life interest (as at 3 July 2009) at $240,000.

[22] There are two significant differences between the valuations. The first relates to the assumed life span of Mr Swayne and the second (and possibly less important) relates to the basis for the calculation - that is, whether it is assessed on rent which would be payable on the dwelling or in accordance with the methodology used by Mr Davies.

[23] Mr Swayne is aged 63 years now. Mr Davies has used a future life expectancy for him of 17 years based on a mortality table commonly used by actuaries in relationship property cases. He takes no account of Mr Swayne's description as an alcoholic.

[24] Mr Edginton, on the other hand, used a life expectancy of five years, calculated from the date of separation (July 2009). If the present time is used, Mr Swayne would have, on that basis, a life expectancy of around two years.

[25] The reason Mr Edginton assesses the life interest on the basis of a life expectancy of five years is because Mr Swayne is an alcoholic. It seems he was instructed to use five years by Mr Swayne's counsel and on the basis of a report of a Dr Toby Rose. Dr Rose was recommended by Dr Simon Mackereth who said:

> "I believe (Mr Swayne) is currently drinking alcohol at a rate which will significantly shorten his life expectancy ... I would recommend review by Dr Toby Rose, gastroenterologist, with a view to determining life expectancy (he has previously seen Mark with respect to colon polyps)".

[26] Dr Rose wrote a report - he did not file any affidavit - dated 29 September 2011. He had not seen Mr Swayne for three years and when he had it was with a view to assessing:

> "...his bowel with respect to bowel polyps. That was a brief consultation for a bowel examination. In the history I had taken from him at the time, it was mainly related to his bowel and he did not let me know that he was drinking heavily. I am sorry to hear that he has had considerable problems with his marriage, life and stresses and has unfortunately been drinking heavily".

[27] Dr Rose said, on the basis of information provided to him by Mr Swayne's lawyer, that:

> "People with episodes of alcoholic hepatitis have a very limited life expectancy".

[28] He suggested that might be around one or two years "in many cases if they continue drinking". He added that it would be:

> "A few years longer if they were able to discontinue drinking and remain "dry"."

[29] He also added when Wernicke 's encephalopathy was present it was also "associated with poor long term survival".

[30] Dr Rose's opinion was it would be inappropriate to apply actuarial life expectancy tables based upon the average life expectancy of a 63 year old in the case of Mr Swayne.

[31] Dr Rose provided another report dated 28 November 2011. In that report he suggested it would be preferable for an opinion to be obtained from Dr Henley, who was responsible for Mr Swayne's care, noting he (Dr Rose) had not seen Mr Swayne for some time. He generally commented on the limited life expectancy of a person suffering from advanced liver disease where Wernicke's encephalopathy is present and such a person continued to drink alcohol. However in this case the evidence is that Mr Swayne does not suffer from "advanced liver disease".

[32] In addition, Dr Rose said:

> "The length of life expectancy however is very variable from weeks to months or even some years, and all we can state is that in various studies there have been various observed mean survival times. Predicting the life expectancy of any individual is very difficult. We thus merely express things in terms of probability of survival over a period of time."

[33] Dr Henley provided a brief report which appeared to relate to cognitive impairment, which he describes as "considerable". He had this to say:

> "... The timing of recovery, and indeed if recovery will occur, is entirely conjecture at this stage."

[34] That report is dated 24 November 2011.

[35] There is also a report on Mr Swayne from a psychologist, James Webb, which was prepared following a meeting between Mr Webb and Mr Swayne in April of this year to conduct a neuropsychological assessment. His report indicates Mr Swayne had been alcohol abstinent for some months and had made progress with treatment. His conclusion was Mr Swayne had mild cognitive impairment overall relative to the average healthy man on the street.

[36] Finally, there was a report from the Laura Ferguson Trust which noted the gains Mr Swayne had made in his goal of being able to return to live at home. By the time of the discharge report (around June 2012) Mr Swayne had "an episode of drinking alcohol" as a result of which he was discharged to a rest home in the hope he would continue to totally abstain from alcohol, as he had been.

[37] Mr Swayne's evidence at the hearing was he was drinking approximately one bottle of wine a night which he considered was acceptable. It is a reduction in the amount he had been drinking prior to the end of last year when he was admitted to hospital. He did not recall being advised by any medical practitioner not to drink alcohol at all.

[38] Mr Davies accepted the proposition an alcoholic was likely to have a reduced life expectancy but maintained the only condition which should affect reliance on mortality tables is a terminal condition. Alcoholism is not a terminal condition.

[39] Mr Swayne has complications relating to his level of alcohol consumption but he does not suffer from cirrhosis of the liver which could be classified as a terminal condition. It is entirely possible Mr Swayne will cease drinking alcohol as he did this year. The evidence is, if he did cease to drink alcohol, it would affect his life expectancy. It is also possible he will continue to drink at his present level or even more, but that still does not provide a basis to calculate and fix his precise life expectancy. He may live more than 17 years and he may live less. In the words of Dr Rose:

> "... predicting the life expectancy of any individual is very difficult."

[40] By way of comparison, the Estate and Gift Duties Act 1968 provides the Commissioner is to determine the life expectation of a person suffering from a "mortal illness in such manner as the Commissioner thinks fit" (s.68F). In other words, the Commissioner is not compelled, in those cases, to use the mortality tables.

[41] Obviously it is not possible to predict any persons date of death hence the use of mortality tables. The evidence falls well short of establishing a life expectancy of five years (as at July 2009) or two years as at the present time, or any other precise date.

[42] I accept the only principled basis upon which to calculate Mr Swayne's life expectancy is by reference to the life expectancy table - that is a life expectancy of a further 17 years.

[43] The second significant issue in the assessment of the value of the life interest is whether it is undertaken on the basis of rental value for the home or the value of it. Of course the value of the home is not the only basis used in Mr Davies' method of valuing the life interest.

[44] Mr Davies relies on the present day value of the home based on a valuation prepared by Mr Gardener. The value is $1.575 million. The valuation is not accepted by Mr Swayne and I will refer to the reasons why subsequently.

[45] Mr Edginton and Mr Gamby, on the other hand, assert the appropriate way to value a life interest is broadly based on rental income.

[46] I prefer Mr Davies approach in assessing the value of a life interest. Using rental income fails to take into account the additional benefits of a life interest which include the following advantages:

- Entitlement to reside in a house of choice and in this case the property has been home for many years.

- Having the effective right to remain in the home of choice throughout your lifetime and never being forced to move.

- Having the ability to move to alternative accommodation if you so choose, and to another property of choice.

[47] These are distinct benefits that are not taken into account when calculating a market rent for a property. Furthermore predicting levels of rent into the future is a very difficult exercise.

[48] In any event, as was pointed out by Mr Davies, the value of the life interest is largely the same on either method, provided the same assumptions are made.

[49] I referred earlier to the challenge as to the current value of the home. Mr Gardener, for Ms Jennings, valued the property twice. He first valued it on 28 March 2011 at $1.265 million. In arriving at that valuation Mr Gardener deducted the sum of $50,000 which he said was to take into account "perceived stigma for remediated plaster home 3.75%".

[50] Mr Gardener updated his valuation on 8 June 2012 and valued the property then at $1.575 million. He made no deduction for any stigma associated with

"remediated plaster homes". He said he no longer believed such a stigma existed and in retrospect considered he had been too negative in his earlier assessment, which was undertaken at a time of much negative media publicity about "leaky homes". He agreed he knew of no available evidence as to the effect on the value of a property which had been a leaky home but was remediated, which is hardly surprising.

[51] Mr Gamby, on the other hand, believes all monolithic clad properties are subject to stigma whether or not there has been remediation work undertaken. He believed the value should be discounted by 10% rather than 3.75%. Again, there is no available evidence to support his position either.

[52] In the end I am persuaded the current valuation, as estimated by Mr Gardener, is the appropriate one. I note this is a large property in a much sought after location. Mr Gamby, while critical of Mr Gardener's decision to not discount for "any stigma" had not viewed the property and did not present a view as to the value of it. In other words the only valuation evidence is that of Mr Gardener and accordingly the value is fixed at $1.575 million.

[53] The value of Mr Swayne's life interest is therefore $875,000 and Ms Jennings is entitled to a half share in that value.

Section 18C

[54] Ms Fisher submitted if there was any adjustment made to reflect a reduced life expectancy then I should apply s.18C and make an adjustment. There is no need to consider this section because I have not made any such adjustment.

The bach

[55] It was submitted on behalf of Ms Jennings, Mr Swayne's life interest in the bach is relationship property. I do not accept that submission. It is clearly his separate property having been acquired prior to the second marriage. Although the

family enjoyed the time they stayed at the bach (which they did frequently), that does not affect the status of the life interest as separate property.

Section 9A

[56] Ms Jennings brings claims, if I determine the life interest in the bach as separate property - as I have - pursuant to s.9A and s.17.

[57] Section 9A relevantly provides where any increase in the value of separate property was attributable (wholly or in part, and whether directly or indirectly) to the actions of the other spouse, then the increase in value is relationship property.

[58] Section 9A(1) does not apply because there is no evidence of any application of relationship property to any increase in value of separate property.

[59] In her submissions Ms Fisher said Ms Jennings' contributions in support of this claim are the following:

- Her earnings went into the relationship and therefore Mr Swayne was able to sustain his assets.

- The sale of Ms Jennings' home and the use of the proceeds for the benefit of the family enabled Mr Swayne to preserve his separate property.

- Painting the roof of the bach, the decking and balustrades; making curtains and bedspreads and purchasing furniture and effects for the property; maintaining the interior and exterior, trimming foliage and mowing lawns.

- Caring for Mr Swayne in terms of his general health.

[60] Mr Swayne disputed the extent of those contributions particularly around the amount of work Ms Jennings claimed to have undertaken on the bach. Ms Jennings' sister filed an affidavit supporting her sister's position but she did not appear to have any direct knowledge of it in the sense of having observed the work. However as I commented earlier, Mr Swayne's difficulty in accurately recalling events was quite

apparent when he gave evidence so where there is a conflict I prefer Ms Jennings account of events particularly since she gave her evidence in a forthright manner, making concessions, where appropriate, in cross examination.

[61] The leading case is that of the Supreme Court in *Rose v Rose* [2009] 3 NZLR 1. The Court made it clear there was no longer any necessity for a non-owning party to demonstrate a direct physical connection to the separate property causing an increase in the value. Instead when there has been a relevant contribution, any increase in value should be divided between parties "unless it can truly be said that it has not derived from the conduct of the non-owning spouse in any material way" (p 16, para 44). In that case Mrs Rose had made a vital financial contribution to the property such that it effectively avoided the sale of the property. In addition Mrs Rose took responsibility for looking after the household and family in general which enabled Mr Rose to devote many hours to the business. Mrs Rose accordingly established she had indirectly contributed to the increase in value.

[62] In *Rose* reference was made to a "purely passive investment" which may provide an example of an increase in value not being derived from the conduct of the non-owning spouse in any material way. That is really the position here. In this case the asset is not "like a farm or other business in which the owning spouse works ..." so that:

> "It will often be likely that some conduct of the non-owning spouse will have had some direct or indirect influence on any increase in value. That will be so when the claimant's actions have enabled the other spouse to devote labour or expenditure to his or her separate property with consequent increase in its value. It will also be so when the claimant has provided financial support by paying for household expenditure and thereby enabling the owner of the separate property to pay for work on it which increases its value." (p 16, para 44)

[63] The property in this case is the life interest. Even if there has been an increase in the value of the life interest I am not satisfied it is attributable directly or indirectly to Ms Jennings' actions. The bach was acquired prior to the commencement of the relationship and was always unencumbered. No works of any significance, or improvements, were done on the bach which could have led to an increase in its value which might, in turn, have increased the value of the life

interest. It is in the nature of a "passive investment" which involved no more than a very minimal financial contribution (rates and insurance in the main together with the cost of a small amount of maintenance) and there was no need for any significant time to be devoted to the development or enhancement of the property. Ms Jennings herself did not suggest Mr Swayne had devoted time to the asset. In fact, she said when he retired he spent most of his time swimming and reading. Even if there had been such time devoted, the evidence is both shared tasks relating to the bach and domestic and household duties just as they shared ongoing family expenses.

[64] The evidence does not establish a claim pursuant to s.9A.

Section 17

[65] Alternatively Ms Jennings claims, pursuant to s.17, the life interest in the bach, being Mr Swayne's separate property, has been sustained by her actions and seeks either an increase in her share in relationship property or a sum of money as compensation.

[66] I accept the application of this section involves the two-stage inquiry referred to by Ms Fisher, namely:

- First, I must be satisfied that a relevant sustenance of the separate property has occurred; and

- Secondly, I must decide how to exercise my discretion to make an adjustment.

[67] Ms Jennings relies on the same contributions already outlined when discussing s.9A and claims those constitute sustenance of the life interest. The contributions, comprising her income, capital from the sale of her property, her undertaking work on the bach and looking after Mr Swayne are contributions to the marriage partnership but I accept they can also qualify as relevant actions under s.17 if they fulfil the requirements of that section (*Hebberd v Hebberd* (1992) 3 NZLR 517). The question is whether the actions can be regarded as sustaining the life

interest - that is, keeping it up or keeping it going in the sense of ensuring its continued existence or value, *French v French* (1988) 1 NZLR 62.

[68] Although the expenses on the bach have always been minimal (along with presumably the cost of the maintenance work undertaken) Ms Jennings financial contribution overall was important and necessary. Mr Swayne and Ms Jennings had a responsibility to support their daughter, not just themselves. Mr Swayne retired in November 1999 shortly after Amber's birth, but he did still receive sufficient income to contribute at least his share of household expenses. He received some rental income and used distributions or repayments of capital from the Trust. His parents' inheritance was paid into the Trust as well. There was also income from boarders of around $500 per week which was used to pay household expenses. However, Ms Jennings clearly needed to also provide financial assistance and she worked hard outside the home - teaching piano, cleaning offices premises and undertaking relief teaching.

[69] In addition Ms Jennings did assist in the general maintenance of the bach as well as the garden and lawns.

[70] Overall in all the circumstances I am satisfied that Ms Jennings has by her actions, sustained the value of the life interest in the bach in more than a minor way. However when assessing what compensation should be paid I take into account the level of the contribution which is at the lower end but more than minor, and the enjoyment the family generally derived from having access to a holiday home over the course of the relationship. In all the circumstances of this marriage I am satisfied the appropriate compensation is $20,000.

Occupation Rent

[71] It is accepted Ms Jennings is entitled to a half share in rent for the period Mr Swayne has been in exclusive occupation of the home they shared as a family. The quantum is also accepted at $154,000 (as at the date of hearing) of which half is due to Ms Jennings - $75,000. Rent will continue to accrue to Ms Jennings from the date of separation up to the date of settlement of her entitlement to the life interest.

Constructive Trust

[72] Ms Jennings claims a constructive Trust "over the Trust assets (i.e. the residual interest in the family home and bach and the Mark Swayne Trust Funds)" (Ms Fisher's closing submissions paragraph 5.1).

[73] This Trust was established in February 1994 with the parties marrying over four years later in November 1998. The trustees of the Mark Swayne Trust are Mr Swayne and a solicitor, Mr Stones. The beneficiaries of the Trust are Mr Swayne and the children.

[74] Ms Jennings was aware of the existence of the Trust prior to the second marriage and that she was not a beneficiary in it. However she said she had no concerns about the fact she was not a beneficiary because she understood the Trust would provide for Mr Swayne's family which would include her as well as the children. It was apparent Ms Jennings knew little about the details of the Trust or how a Trust in general operated.

[75] It is accepted the criteria for the imposition of a constructive trust over assets owned by another are:

- The claimant must have made direct or indirect contributions to the property in question.
- The applicant must demonstrate the expectation of an interest.
- The expectation must be a reasonable one in all the circumstances.
- The other person would reasonably expect there to be such an interest *Lankow v Rose* (1995) 1 NZLR 277.

[76] The essence of a qualifying contribution, whether in the nature of payments or services, is that either those payments or services assisted in the acquisition, improvement or maintenance of the property or its value, or the provision of the

payment or service, helped the other party to acquire, improve or maintain the property or its value (*Lankow v Rose*, p.295 per Tipping J).

[77] Ms Jennings claims she made indirect contributions by using her income and capital of about $20,000 for household expenses and family purposes. However none of the Trust assets were ever encumbered and ongoing expenses were minimal, comprising only rates and insurance. The assets are much more akin to the "passive investment" referred to in *Rose* (supra) as being an example of a situation where it could be said an increase in value would not have derived from the conduct of the non-owning spouse. The case was of course dealing with s.9A(2) but the comments are useful in considering the claim of indirect contributions in this case. Trust funds which existed prior to the marriage, or were derived from Mr Swayne's inheritance after marriage, were used to improve Trust assets and to support the family in part because Mr Swayne drew money from the Trust for that purpose.

[78] Mr Swayne retired early on in the marriage and so was free to devote time to the Trust, although the evidence established he did not spend any significant time in doing so. He did some interior painting on Ranfurly Road and maintenance work on the bach. Ms Jennings contributions did not enable Mr Swayne to have that time available. The evidence does not establish Ms Jennings undertook the majority of the domestic tasks either, which may have enabled Mr Swayne, if he had wished to do so, to devote himself to Trust business. The evidence was they largely shared domestic tasks and apparently contributed to household and family expenses in a broadly equal way.

[79] Ms Fisher further submitted contributions were made by Ms Jennings in that she declined an opportunity for promotion to Deputy Principal just so she could care for Amber and be available to assist in the care of Mr Swayne's children from his previous relationship when they stayed. Of course, Mr Swayne was also assisting in the care of the children but anyway I do not accept these actions of Ms Jennings could be classified as a contribution to the assets of the Trust.

[80] Similarly, the reference to attending to Mr Swayne's health needs do not qualify as contributions to Trust assets in this case.

[81] Finally Ms Fisher submitted Ms Jennings made contributions to the Trust because she was involved in the renovation of Ranfurly Road and made improvements to the bach. The evidence shows Ms Jennings suggested the addition of extra accommodation at Ranfurly Road so boarders could be accommodated and therefore more income generated for the family. The cost of the work was entirely funded by the Trust and mainly out of settlement funds derived from a successful claim to do with the construction of the existing dwelling. No relationship property was contributed to the cost of that renovation. Ms Jennings asserted she did assist in the renovation work but even on her description it was a modest contribution. She described Mr Swayne as being a "very good, very efficient painter" who painted the interior but said she painted the architraves. She also referred to general interior decoration which she undertook.

[82] As to the work undertaken on the bach, Ms Jennings agreed that the work could be accurately described as "maintenance" and specifically comprised of assisting in the painting of the roof, making curtains, mowing lawns for a time and as earlier described when dealing with the s.17 claim.

[83] I accept the work on Ranfurly Road and the bach are contributions to Trust assets but they are minimal in the context of the entire relationship and were not such that any of the parties could reasonably have expected Ms Jennings to have an interest in the assets as a result of the contributions.

[84] One of the major distinguishing features about this case, as opposed to a number of others referred to in submissions (aside from the fact it is a claim against a Trust rather than a person), is that all the assets were acquired prior to the relationship commencing (firstly by Mr Swayne and then subsequently by the Trust) and were also unencumbered. Furthermore there were no improvements undertaken on any assets apart from the Ranfurly Road property which had the addition of accommodation above the garage. That accommodation was funded entirely by financial sources other than relationship property and neither party undertook any real work in respect of the assets. Ms Jennings always knew she was not a beneficiary in the Trust.

[85] Accordingly the Constructive Trust claim is dismissed.

Section 18B

[86] Section 18B provides if after the date of separation and before the hearing a spouse has done anything that would have been a contribution to the marriage, a Court may, if it considers it just, order compensation either by payment of a sum of money or transfer of property.

[87] It is accepted Ms Jennings has had the sole care of Amber since the separation in July 2009. It seems she has little contact with her father. The preponderance of evidence satisfies me that this is the result of a decision made by Mr Swayne. Mr Swayne pays child support though seemingly reluctantly and in the past at least, irregularly. Amber lives with her mother in a one bedroom flat underneath a house owned by Ms Jennings sister. Amber and her mother share the bedroom.

[88] The care of a child is a contribution to the relationship (s.18(1)(a)) and so is the foregoing of a higher standard of living (s.18(g)). Ms Jennings and Amber moved out of the large Ranfurly Road home and Ms Jennings has struggled financially since the separation. This is one of the reasons why she and her daughter share a bedroom and live in a flat underneath her sister's house. The accommodation is really unsatisfactory and certainly inferior to where Mr Swayne has been residing, but this is balanced by the fact she will receive her share of a notional rent for Ranfurly Road by agreement and that needs to be taken into account.

[89] This is a case where I am satisfied, having regard to the purposes of the Act, it is appropriate for Ms Jennings to be compensated for her care of Amber since separation. Not only has Mr Swayne scarcely had contact with his daughter, he has also taken no part in her practical and emotional support. Ms Jennings has had the task of caring for their daughter with all the practical sacrifices that inevitably involves, including transporting her to her numerous commitments and prioritising their daughter's needs unassisted by the other parent.

[90] The next issue to decide is the amount of such compensation, bearing in mind the purpose of the section is not to provide any credit for financial costs for the care of a child but rather to recognise the fact the child's care after the separation has fallen on one parent. The compensation does not require a "precise mathematical calculation" and neither is it easy to decide upon a "fair capital sum" (*JA v SNA* (2008) NZFLR 297)).

[91] Ms Jennings has been caring for Amber for the past three years. As I have noted it was a considerable task to undertake alone. In my view it is reasonable for Ms Jennings to be compensated at the rate of somewhere around $5000 per year. Since it has been just over three years since the parties separated. Ms Jennings is to receive compensation of $15,000 pursuant to s.18B.

Section 26

[92] Ms Jennings seeks a portion of Mr Swayne's separate property be settled on Amber pursuant to s.26 of the Act. (Ms Fisher's submissions 1 August 2012 para 7.1).

[93] As Mr Cameron points out the section provides an order may be made "settling the relationship property or any part of that property for the benefit of the children of the marriage ..." (para 26 (1)). There is no provision for a settlement out of separate property.

[94] I agree further that the only relationship property in this case is Mr Swayne's life interest in Ranfurly Road which is agreed to be relationship property. I have valued that interest at $875,000.

[95] The grounds put forward in support of the claim are that Mr Swayne has demonstrated unreliability in paying child support and seeks to minimise his liability; that Amber is residing in cramped accommodation; her mother Ms Jennings who is financially mostly responsible for her support has a history of cancer and that Amber should have the security of "a home to live in".

[96] In this case Amber has the benefit of receiving $15,000 per year from the Swayne Family Trust to assist in the financial cost of her support over and above child support payments. In addition Mr Swayne's health is such that it could reasonably be anticipated he will need to continue to draw on capital for his own support. Certainly there is no suggestion he will ever return to the workforce to earn any income.

[97] In all the circumstances of this case I am not satisfied it is just to make any order settling any part of the relationship property for the benefit of Amber.

Other Matters

[98] In closing submissions Ms Fisher sought ancillary orders which were designed, in the main, to secure payment of any award made in favour of Ms Jennings. Mr Cameron was not in a position to present submissions in opposition and accordingly I indicated I would determine the substantive issues in this decision and reserve leave for the parties to bring on the other applications for hearing, noting there may also need to be service on other interested parties. Further, there may be an issue as to jurisdiction in view of orders having been made in the High Court.

[99] Finally costs are reserved. If the parties are unable to agree upon costs, submissions should be filed within 21 days.

Signed at Auckland this 4th day of October 2012 at 11 am / ~~pm~~

S J Fleming
Family Court Judge