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

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IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2017-092-001213
[2020] NZFC 2051

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[LUCY HOLLAND] Applicant
AND	[AARON DOLLARD] Respondent

Hearing:	24 October 2019
Appearances:	J Attfield for the Applicant No appearance by or for the Respondent
Decision:	18 May 2020

DECISION OF JUDGE P S GINNEN

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[1] [Lucy Holland] and [Aaron Dollard] began a de facto relationship in 1987. They are the parents of nine children:

[Children's names and dates of birth deleted].

[2] Ms [Holland] says that she and Mr [Dollard] separated in [2009], although he remained living in the home until April 2017. In October 2017 she filed applications for the following orders to be made under the Property (Relationship) Act 1976 ("the Act"):

(a) An extension in time for making an application under the Act; and

(b) An order dividing relationship property.

[3] In respect of the orders dividing relationship property, she has sought:

(a) A ruling pursuant to s 13 that there are extraordinary circumstances that make equal sharing of the property repugnant to justice;

(b) If a s 13 ruling is made, a ruling that the contributions of Ms [Holland] should be reflected by way of a division of property based on a two third share to her;

(c) A s 18B ruling that she has made contributions to the relationship post separation (primarily the outgoings for the family home and the ongoing care of their nine children) and a determination of the level of compensation payable to her by Mr [Dollard]; and

(d) A ruling pursuant to s 32 of the Act that orders should be made in respect of payment of child support by Mr [Dollard].

[4] Mr [Dollard] was served with the substantive proceedings on 22 February 2018. He was served with the application for an extension in time for making an application under the Act on 29 June 2019. He has not filed any documents in response to the applications. He has not engaged with counsel for Ms [Holland]. He did not appear at the formal proof hearing on 24 October 2019.

Factual Background

[5] Since Mr [Dollard] has chosen not to participate in the proceedings, Ms [Holland]'s evidence is unchallenged. She has filed 4 affidavits:

(a) Affidavit of assets and liabilities dated 11 October 2017;

(b) Narrative affidavit dated 11 October 2017;

(c) Affidavit dated 21 January 2019. This affidavit annexed a copy of an affidavit dated 17 November 2015 that she filed in support of an application for a protection order against Mr [Dollard].

(d) Affidavit dated 10 May 2019 in support of the application for extension in time for filing an application.

[6] Ms [Holland]'s evidence is that she and Mr [Dollard] separated in [month deleted] 2009. In late 2009 he was made redundant from his job. He received a redundancy payment which Ms [Holland] described as "significant". There is no evidence beyond that of the amount he was paid. She said that he bought a van, gave her $1,500 and left New Zealand for [overseas location deleted]. She was pregnant with their youngest child at the time. He stayed in [overseas location deleted] for about eight months. He did not tell her how long he intended to stay there, but she said it was a relief to have him gone. She said that since [late 2009] she had been solely responsible for financially supporting the children and the household.[1]

[7] Mr [Dollard] returned to New Zealand in mid-2010 and moved back into the house. Ms [Holland] said that she did not want this, but she felt powerless to stop him.[2] She said he has not worked consistently since this time. He made the odd financial contribution to the household, but this was not consistent nor at such a level to ease the financial burden for her. She paid the mortgage, insurance, rates, food and all the children's expenses. She said that she struggled financially and had done for many years.[3] She said she wanted Mr [Dollard] to move on since he returned in mid-2010 but he would not. She did not feel that they ever resumed a relationship.[4]

[8] It is apparent the relationship was not a happy one. Mr [Dollard] was violent. A temporary protection order was made against him on 17 November 2015, which was made final by operation of law on 22 February 2016. She said that on 15 November 2015 he verbally abused her and threw an aluminium baseball bat at her, which hit her hard on the leg. She was holding [a child] on her knee at the time, who would have

[1] Affidavit dated 17 November 2015, para 19 and affidavit dated 11 October 2017, para7.
[2] Affidavit dated 21 January 2019, para 6.
[3] Affidavit dated 17 November 2015, para 20 and affidavit dated 21 January 2019, para 6.
[4] Affidavit dated 11 October 2017, para 10.

been 5 years old then. Their [teenage child] intervened. She went on to describe a history of past violence, that included:

(a) Mr [Dollard] pulled the oven door off the oven and smashed it in a rage, meaning that she could no longer use the oven;

(b) He smashed into the sliding door. It no longer quite met the frame of the house. She said it was typical of him to destroy things when he is angry;

(c) He drove his car into an open window in the house causing the window frame to buckle and the window to smash.

(d) When [one of their children] was hospitalised with [medical details deleted], and Ms [Holland] was supporting her and caring for [a grandchild], Mr [Dollard] was drunk and abusive on their arrival home. Everyone was upset and reduced to tears.

(e) It was not uncommon for him to take dirty dishes off the bench and break them or throw them out in a rage.

(f) He was angry and snapped the keys of the car, so she could not use it. After he broke the keys she struggled without a car for a few weeks until she could get into a position to buy another car on finance.

(g) He threw a petrol can at her, which missed.

(h) Before [their oldest child]'s birth he smashed up the house and put his arm through the sliding door and cut an artery. He was hospitalised. There was Police involvement.

(i) One time he assaulted her, causing bruising to her face. He pushed her and hit her from time to time.

(j) He called her names. He called her a slut and accused her of having affairs. He called her a bad mother and said she cannot look after the children. He said these things in front of the children, which upset them.

[9] Ms [Holland] said that there were many other occasions of damage, however the ones set out above are the ones she documented. She said on every occasion she paid to replace or repair the damage.[5]

[10] In her affidavit dated 21 January 2019 Ms [Holland] said that despite the temporary protection order being made in November 2015, Mr [Dollard] still refused to leave. She said the only way that she could get him to leave was to involve the Police, and she did not want to upset the younger children by having the Police remove their father. She said their "unacceptable living circumstances limped on".[6] He eventually left the property after concerns for the welfare of the children saw the intervention of Oranga Tamariki, who communicated "in no uncertain terms" that if he did not leave they would uplift the younger children.[7] There was a family group conference on 20 April 2017, which Ms [Holland] attended, and he did not. He agreed to leave the house the next day.[8]

[11] There is a final parenting order that Ms [Holland] is to have day-to-day care of the children under 16 years old. The order provides for Mr [Dollard] to have supervised contact with the children. Ms [Holland] says that he has not maintained contact with the younger children, although he has some contact with the older children.

[12] Ms [Holland] has also said that throughout the relationship Mr [Dollard] had a drinking problem. She said that there were two s 132 social worker reports completed in the Care of Children Act proceedings, which identified issues of family violence and Mr [Dollard]'s alcoholism.[9] In the Domestic Violence Act proceedings she said

[5] Affidavit dated 21 January 2019, para 9.
[6] Affidavit dated 21 January 2019, para 11.
[7] Affidavit dated 21 January 2019, para 12.
[8] Affidavit dated 11 October 2017, para 11.
[9] Affidavit dated 21 January 2019, para 10.

that he constantly drinks, although he can be violent whether he is intoxicated or not. She said his drinking had worsened given he was not working.[10] In the relationship property proceedings she said that he constantly consumed alcohol and his income went on supporting his habit. She expressed a concern that whatever share he receives from their relationship property would be applied to supporting his alcohol addiction.[11]

Relationship Property

[13] The most significant item of relationship property is the family home situated at [address deleted], which the parties bought [in the early 1990s]. They are the registered joint owners of the home.

[14] A valuation of the property was obtained from a registered valuer. As at 24 September 2018 the value was $510,000.

[15] The following interests are registered against the property:

(a) A mortgage in favour of [finance company deleted];

(b) A caveat for the benefit of Habitat for Humanity Auckland Limited; and

(c) A caveat for the benefit of the Legal Services Commission against the interest of Ms [Holland].

[The finance company]

[16] At the date of separation, the balance outstanding to [the finance company] was $165,360.28.

[17] The balance as at the date of the formal proof hearing was $152,032.55.

[18] When the parties refinanced in April 2006 with [the finance company] there was a condition of their refinancing that the sum of $10,012.50 would be held on trust

[10] Affidavit dated 17 November 2015, para 22.
[11] Affidavit dated 21 January 2019, para 7.

pending completion of work upon the property. These funds remain in the trust account of [law firm deleted].

Habitat for Humanity

[19] On 8 February 2013 Ms [Holland] secured an interest free loan from Habitat Humanity for $9,700 to undertake work upon the property, which was necessary to bring the property to a good standard. She has repaid that loan in full.

Other Property Interests

[20] Ms [Holland] has disclosed the following additional property interests:

(a) Household chattels which were accumulated during their relationship. She deposed that the chattels are of limited value.

(b) A Kiwisaver account in Ms [Holland]'s name. She said the account was established after the parties separated.

(c) A joint ASB bank account. There is no evidence as to the value of the account at the date of separation. Ms [Holland] said that she still operates this account and that Mr [Dollard]'s name has been removed from it.

(d) A [motor vehicle], which Ms [Holland] purchased after the parties separated.

Debts

[21] Ms [Holland]'s evidence is that she has incurred a number of debts in an attempt to maintain the property and support the children. In her affidavit dated 20 January 2019 she listed those debts as follows:

(a) Gem Card $8,049.54;

(b) [Bank name deleted] Visa $5,139.20;

(c) Warehouse Money $2,541.16;

(d) Finance Now $762.72

(e) [bank name deleted]Visa $2,562.36.

[22] All the above debt balances were as at September or October 2018. She said that she incurred the debts in an attempt to keep the house and support the children.[12] She said the funds have been used for either maintaining the family home; repairing the home and bringing up the children.

Principles and Purposes of the Act

[23] The purposes of the Act are set out in s 1M: to reform the law relating to the property of couples; to recognise equal contribution of partners to a relationship partnership; and significantly for the purposes of this case:

> To provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.[13]

[24] The starting point is to recognise the equal contribution of both partners to the relationship property. Section 11 of the Act provides that each partner is entitled to share equally in the family home, chattels and any other relationship property. Ms [Holland] has sought a significant departure from this starting point. I will work through each one of her claims in turn.

Application for extension of time for making application

[25] Section 24 of the Act requires any application under the Act to be made within 3 years after the de facto relationship ended. Ms [Holland] says that the relationship ended in November 2009, so her application should have been filed by November 2012. It was filed on 11 October 2017, nearly 5 years out of time. This is assuming

[12] Affidavit dated 11 October 2017, para 31.
[13] Section 1M(c).

that the relationship ended in November 2009, not in April 2017 when Mr [Dollard] moved out of the home. Even though Ms [Holland]'s evidence is unchallenged I must still be satisfied that the evidence establishes that the relationship ended in November 2009.

[26] The elements of a de facto relationship are set out in s 2D of the Act.

> 2 **Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a
>
> **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman) –
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to [, or in a civil union with,] one another.
>
> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant to a particular case:
>
> (a) the duration of the relationship:
>
> (b) the nature and extent of common residence:
>
> (c) whether or not a sexual relationship exists:
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
>
> (e) the ownership, use, and acquisition of property:
>
> (f) the degree of mutual commitment to a shared life:
>
> (g) the care and support of children:
>
> (h) the performance of household duties:
>
> (i) the reputation and public aspects of the relationship.
>
> (3) In determining whether 2 persons live together as a couple –
>
> (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and

(b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) For the purposes of this Act, a de facto relationship ends if –

(a) the de facto partners cease to live together as a couple; or

(b) one of the de facto partners dies.

[27] All the circumstances of the relationship must be taken into account, including any of the matters in s 2D(2) that are relevant to this particular case. A holistic assessment of the relationship is required, and a determination as to whether that relationship can properly be described as a de facto one. A *"mechanical or arithmetical assessment"* of the s 2D factors is not enough: *"[t]here is always a need to stand back and assess the relationship as a whole — a qualitative rather than a quantitative determination is called for"*.[14]

[28] There is no question that the parties lived in a de facto relationship between 1997 and November 2009. They had 9 children together and bought a home together, and Ms [Holland] acknowledges that they were in a de facto relationship for that period. Did that relationship end though in November 2009? Or in November 2015 when she obtained the temporary protection order against Mr [Dollard]? Or in April 2017 when he moved out of the home?

[29] In *F v F* Judge Ryan emphasised that, where the parties were still residing in the same place, determining whether the relationship had ended was a balancing exercise weighing up factors that pointed in both directions. There must be:[15]

> …cogent evidence of a significant change in the way [the parties] conducted their relationship which can only be explained as being a total cessation of cohabitation. A simply [sic] assertion by the Respondent that he considered himself separated is not sufficient. Persons are "living apart" where there are two households being carried on under the one roof. The home is the "cornerstone" of the relationship and there must be a compelling reason to conclude that the parties ceased living together before the Applicant moved out.

[14] *Miller v Carey* [2015] NZHC 887 at [19] per Gendall J.
[15] *F v F* (Family Court, North Shore, FAM-2003-044-1895, 13 September 2004, Judge Ryan at [17]

[30] There are factors that point towards the de facto relationship continuing beyond November 2009, such as the length of the preceding relationship;[16] the parties continuing to live together in the same household, even after a protection order had been made that would have enabled Ms [Holland] to call upon Police assistance to remove Mr [Dollard];[17] the continued joint ownership of the family home;[18] the parties 9 children;[19] and Ms [Holland]'s implicit support of Mr [Dollard] by allowing him to benefit from her management of the household. On her evidence he did not work consistently after he returned from [overseas location deleted], and his income went on supporting his alcohol habit.[20] Accordingly, as well as supporting their 9 children Ms [Holland] also continued to support Mr [Dollard], which is a factor that points to a continuing de facto relationship.

[31] There are also factors that point towards the de facto relationship having ended in November 2009, such as Mr [Dollard]'s departure for [overseas location deleted] for 9 months; him not communicating with Ms [Holland] how long he intended to be gone for; Ms [Holland] shouldering the entire financial and non-financial burden of retaining the home, running the household and raising their 9 children;[21] her performance of all household duties from then;[22] and Ms [Holland]'s evidence that she considered the relationship having ended in November 2009.[23]

[32] There is no evidence about whether the couple continued a sexual relationship after November 2009[24] or about the reputation and public aspects of the relationship.[25]

[33] The key factor that would indicate that they did continue to live as a couple after November 2009 is Mr [Dollard]'s continued occupation of the home together with Ms [Holland] and the children for another 7 years.

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[16] s 2D(2)(a)
[17] s 2D(2)(b)
[18] s 2D(2)(e)
[19] s 2D(2)(g)
[20] Affidavit dated 21 January 2019, para 6 and 7.
[21] s 2D(2)(d) and (g).
[22] s 2D(h).
[23] s 2D(f).
[24] s 2D(c).
[25] s 2D(i).

[34] Mr [Dollard]'s violence and alcoholism must be relevant when considering this factor. The dynamics of family violence are complex (as are, for that matter, alcoholism). These complexities see relationships continue for many years notwithstanding a dysfunctional pattern of ongoing violence or alcoholism. The assertion of power and control are central features of family violence, and those features are evident in the examples given in Ms [Holland]'s affidavit in support of her application for a protection order. This lends weight to her assertion that even though the relationship ended in November 2009 she felt powerless to stop Mr [Dollard] from moving back in to the home and that she was too frightened to raise the issues relating to their property matters until he moved out in April 2017.[26] As well as that, Ms [Holland]'s efforts to house, clothe, feed and raise the couple's 9 children while struggling financially must have been an all-consuming endeavour, leaving her with little energy or strength to deal with the removal of Mr [Dollard]. I accept that it took the intervention of Oranga Tamariki, and the threat of the removal of the children, to finally motivate him to leave.

[35] I turn to Ms [Holland]'s affidavit in support of her application for a protection order. She said: *"[Aaron] told me that he did not want me any longer. He told me to "get out".*[27] That particular cruelty suggests they were in a relationship at that time.

[36] In the same affidavit she said that the reality is that she is the one who looks after the children and has been solely financially supporting the children since the end of 2009;[28] and that he made no financial contribution to the household and she paid the mortgage, insurance, rates, food and met all of the children's expenses.[29] This is consistent with the later affidavits that she swore in support of the relationship property proceedings. However, she did not say in her 2015 affidavit that the relationship had ended in November 2009. There was no evidence of her applying for a protection order to remove an ex-partner from their home, rather the evidence pointed to Ms [Holland] seeking the protection of an order to safely end an abusive relationship that was in existence at the time.

[26] Affidavit dated 10 May 2019, para 8.
[27] Affidavit dated 17 November 2015, para 5.
[28] Affidavit dated 17 November 2015, para 19.
[29] Affidavit dated 17 November 2015, para 20.

[37] On balance I am of the view that the de facto relationship ended in April 2017, not in November 2009. Mr [Dollard]'s departure for [overseas location deleted] in November did mark a key change in the parties' relationship. On Ms [Holland]'s evidence it was from that date that she assumed the sole responsibility of caring for the children and all the financial responsibilities of home ownership. It was from then that the extraordinary circumstances she relies on to support a s 13 application arose. In fact there is very little evidence about the circumstances of the relationship before November 2009 that a s 13 finding could be based on.

[38] However, the evidence of the change in their relationship in November 2009 falls short of proving that they separated in November 2009 and were not living together as a couple for the next 7 years that they both occupied the family home. There is no question that the relationship was an unhappy one. I do not minimise the complexities of family violence. But when I consider all the factors, I find that the relationship continued until the threat of the removal of the children on 20 April 2017 strengthened her resolve to end the relationship and motivated him to leave the next day.

[39] Having decided that the de facto relationship ended on 21 April 2017 I no longer need to consider Ms [Holland]'s application to extend time for filing the proceedings. The proceedings were filed in October 2017, well within the statutory time limit of filing proceedings within 3 years after the de facto relationship ended.[30]

Section 13 claim for an exception to equal sharing

[40] Ms [Holland] summarises the basis for her s 13 claim in her affidavit dated 21 January 2019:[31]

> [Aaron] and I purchased the family home on [date deleted] 1992. This is evidenced by the historical title search annexed to the valuation. [Aaron] and I separated in late 2009. We have jointly owned the property for nearly 27 years, however I have been solely responsible for all outgoings on the property for 10 years of the time that we have owned that property. This roughly equates to 1/3 of the period of ownership I have solely financially maintained that property without contribution from [Aaron]. This is despite [Aaron]

[30] S 24(1)(c).
[31] Affidavit dated 21 January 2019, para 16.

> continuing to live in the property after separation without contribution. For this reason, I am seeking that the property is divided with [Aaron] receiving a one third share and me receiving a two third share. I make this claim as I believe that it would be repugnant to justice for us to share equally in the property.

[41] Section 13 of the Act provides an exception to equal sharing:

> 13 **Exception to equal sharing**
>
> (1) If the Court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.
>
> (2) This section is subject to sections 14 to 17A.

[42] Sections 14 to 17A do not apply to this case.

[43] The language used in s 13 establishes that it is a rare case where an exception to the presumption of equal sharing will be displaced. As stated in *Castle v Castle*[32]:

> The extraordinary circumstances will, I think, require to be those which force the court to say that, notwithstanding the primary direction to make any core division, the particular case is so out of the ordinary that an equal division is something the Court feels it simply cannot countenance.

[44] In *Martin v Martin* case Richardson J said[33]

> Circumstances may be extraordinary in kind or degree. A circumstance which is not inherently extraordinary may have some additional features which make it extraordinary. Mere disparity of contributions or even a disproportionately greater contribution is not sufficient to justify unequal sharing. But the disparity may be so gross as to be an extraordinary circumstance rendering equal sharing repugnant to justice.

[45] In *Joseph v Johansen*[34] Cooke P observed that *"...while the test is stringent, the range of circumstances to be taken into account in applying it is not limited in any*

[32] *Castle v Castle* [1977] 2 NZLR 97 per Quilliam J at page 102.
[33] *Martin v Martin* [1979] 1 NZLR 97 at page 112
[34] *Joseph v Johansen* 10 FRNZ 302.

way."[35] In that case the husband was an alcoholic, and the wife's contributions to the marriage partnership in efforts and money predominated. Cooke P said[36]:

> For most of the time of the marriage the husband was suffering from alcoholism. The view was well open to the Family Court Judge that this severely limited his contributions on all fronts. Of course, alcoholism is not a rare condition, but the Judge was entitled to find that the combination of circumstances here sufficiently contrasted with those of the ordinary run of marriages to enable the circumstances to be called extraordinary and equal sharing to be seen as repugnant to justice.

[46] When considering the test for a s 13 determination Judge Fleming has noted[37]:

> Extraordinary circumstances making equal sharing repugnant to justice is a stringent and difficult test to overcome. However it was never designed to be an impossible one.

[47] In *Greaves v Baldwin* Walker J summarised the legal principles as follows:[38]

> There are three elements to the test:
>
> (a) Are there extraordinary circumstances?
>
> (b) If so, do they make equal sharing repugnant to justice?
>
> (c) If so, what should the division be considering the parties' contribution to the marriage?
>
> It is important not to conflate the first of these two elements. Whether extraordinary circumstances exist is a factual question. Whether there is repugnancy such that s 13 bites is a value judgement. It does not follow that equal sharing is necessarily repugnant merely because the circumstances are extraordinary. The test is a rigorous or stringent one and the fact of a disproportionately greater financial contribution by one partner does not of itself attract unequal sharing.

Are there extraordinary circumstances?

[48] The notable features of this de facto relationship are:

(a) The parties had 9 children.

[35] *Joseph v Johansen* 10 FRNZ 302 at 304.
[36] *Joseph v Johansen* 10 FRNZ 302 at 304 at 305.
[37] *Browne v Starke* [2016] NZFC 7132
[38] *Greaves v Baldwin* [2019] NZHC 3390, paras [59] and [60].

(b) From November 2009 Ms [Holland] assumed full responsibility for the care of their 9 children, including payment of all child related expenses.

(c) From November 2009 Ms [Holland] paid all the expenses related to maintenance and upkeep of the family home; all the mortgage payments and other homeownership outgoings.

(d) Ms [Holland] arranged for and repaid loans to assist her with the maintenance and upkeep of the home; and credit facilities to assist with the upkeep of the home and the significant living expenses associated with a family of 9 children.

(e) Ms [Holland] managed to retain home ownership, notwithstanding significant financial struggle.

(f) Ms [Holland] managed to keep the children in her care during Oranga Tamariki investigation and intervention, overcoming the potentially insurmountable challenges of Mr [Dollard]'s violence and alcoholism to do so.

[49] Care must be taken when considering Mr [Dollard]'s violence and alcoholism. Misconduct of a partner is not a basis for a s 13 finding (accepting that alcoholism is better described as an illness than as misconduct). Except as permitted by s 18A, the Court may not take any misconduct of a spouse or partner into account in proceedings under the Act:

> **18A Effect if misconduct of spouses or partners**
>
> (1) Except as permitted by subsections (2) and (3), a court may not take any misconduct of a spouse or partner into account in proceedings under this Act, whether to diminish or detract from the positive contribution of that spouse or partner or otherwise.
>
> (2) Subject to subsection (3), the court may take into account any misconduct of a spouse or partner –

(a) in determining the contribution of a spouse to the marriage, or of a civil union partner to the civil union, or of a de facto partner to the de facto relationship; or

(b) In determining what order it should make under sections 26, 26A, 27, 28, 28B, 28C, and 33.

(3) For conduct to be taken into account under subsection (2), the conduct must have been gross and palpable and must have significantly affected the extent or value of the relationship property.

[50] In *J v J*[39] the husband had a lengthy extramarital affair in his overseas residence, while the wife remained in New Zealand alone, raising their three children, two of whom had significant health issues. In the Family Court the husband's misconduct formed the basis of the Judge's approach to s 13. On appeal to the High Court it was held that s 18A precluded the Judge taking the husband's misconduct into account. This approach was confirmed in the Court of Appeal, where William Young J held that:[40]

> Section 18A replaces what was s 18(3) of the Act. Given the context in which it appeared, the qualified prohibition on taking misconduct into account provided for by s 18(3) might be thought to have applied only to the assessment of contributions. It was, however, applied expansively, see for instance *Joseph v Johansen* (1993) 10 FRNZ 302 very much on the basis that misconduct which was irrelevant in assessing contributions could not be seen as warranting an extraordinary circumstances finding. In that context, we see s 18A(1) as making it clear beyond argument that misconduct is irrelevant except to the extent provided for by s 18A(2) and (3).

[51] In *E v W*[41] the misconduct of Mr E (convicted of sexually abusing two of Ms W's daughters) was not relevant to s 13. Judge Somerville noted that s 18A placed severe limits on the relevance of that conduct. He set out s 18A in full and said[42]:

> It is plain from this that the only conduct of a party to which the Court may have regard is gross and palpable misconduct which has significantly affected the extent or value of the relationship property and even that misconduct can only be taken into account in determining the contribution of a party to the relationship or in relation to decisions made under ss26 (orders for benefit of children), 26A (postponement of sharing), 27 (occupation orders), 28 (tenancy

[39] *J v J* (2005) 25 FRNZ 1 (CA).
[40] *J v J* (2005) 25 FRNZ 1 (CA) at 4.
[41] *E v W* (2006) 26 FRNZ 38.
[42] *E v W* (2006) 26 FRNZ 38.

> orders), 28B (ancillary furniture orders), 28C (furniture orders) and 33 (orders made ancillary to ss25 to 32).
>
> Mr E's criminal acts against Ms W's children, although reprehensible, cannot be taken into account by me when considering any of the issues raised by Ms W.
>
> There is nothing preventing me, however, from having regard to the effects of Mr E's criminal acts. For example, the effect of that conviction on his earning potential and the demands placed on Ms W as the parent of the children, particularly during the trial.

[52] Later in the decision Judge Somerville considered a s 18B claim for compensation for contributions made after separation, which required an examination of the contributions of spouses set out in s 18. He said: [43]

> Since the repeal of s 15, however, s 18's relevance to the actions of the party during the relationship are now limited to those exceptional circumstances where s 13 applies or where the relationship is shorter than three years. Indeed, for those who survive the first three years of their relationship, s 18 has virtually no significance until they separate. They each receive an equal share in the relationship property no matter what contribution they make to the relationship. They receive a half whether there are children or aged relatives to care for and regardless of the energy or indolence of either spouse. Mental illness, alcoholism, and criminal recidivism have no impact on the share that either party receives. It is only after separation that s 18 has significance.

[53] What then is the relevance of Mr [Dollard]'s violence and alcoholism in a s 13 assessment? Violence and alcoholism are not extraordinary circumstances. Sadly, violence and alcoholism feature all too often in relationships that come before the Family Court. Essentially Ms [Holland]'s case is that the disparity in contribution to the relationship is so great that it is an extraordinary circumstance. It may not be inherently extraordinary that Ms [Holland] was able to retain the care of 9 children in the face of Oranga Tamariki investigation and intervention; or that she was able to singlehandedly run the household and keep the family home throughout years of financial struggle. The fact that she was able to do those things while also contending with Mr [Dollard]'s violence and alcoholism must be extraordinary. When I weigh up all the factors contributing to the disparity of contributions, I find that there are extraordinary circumstances in terms of s 13.

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[43] *E v W* (2006) 26 FRNZ 38.

Do the extraordinary circumstances make equal sharing repugnant to justice?

[54] Yes. When all the extraordinary circumstances of this case are considered, equal sharing must be repugnant to justice. The court simply cannot countenance the proposition that the property be shared equally between Ms [Holland] and Mr [Dollard].

What should the division be considering the parties' contributions to the relationship?

[55] The quantification of the shares under s 13 is more a matter of impression than formulaic.[44] Ms [Holland]'s view is that since she has shouldered financial responsibility for the property without contribution from Mr [Dollard] for roughly a third of the time since they've owned it, that the property ought to be divided with him receiving one share and her receiving two shares. That is a tempting analysis, if somewhat generous in view of the case law. However, that analysis overlooks the s 13 requirement for a determination of the contribution of each of them to the de facto *relationship*, not their contribution to the *property*.

[56] Section 18 of the Act defines the contributions to a relationship. The contributions include financial and non-financial contributions. The following contributions are relevant in this case:

(a) The care of any child of the de facto relationship.[45] Again, there were 9 children of this relationship.

(b) The management of the household and the performance of household duties.[46] This was a very large household, which would have required considerable skill to run.

(c) The provision of money including the earning of income for the purposes of the de facto relationship.[47] The ability to do so must have

[44] *Greaves v Baldwin* [2019] NZHC 3390, para [70].
[45] Section 18(1)(a).
[46] Section 18(1)(b).
[47] Section 18(1)(c).

been hampered by the responsibilities of childcare and running the household.

(d) The payment of money to maintain or increase the value of the relationship property or any part of that property.[48] This is a particularly onerous contribution given the family's financial struggles.

[57] Ms [Holland]'s contribution significantly outweighed Mr [Dollard]'s in each of these domains for at least 8 years of the 30 year relationship. I conclude that Ms [Holland] is entitled to a 65% share and Mr [Dollard] a 35% share of the relationship property.

Post separation contributions – s 18B

[58] Ms [Holland]'s compensation claim for post separation contributions is premised on the relationship having ended in November 2009. Having decided that the relationship ended in April 2017 the relevant contributions are the ones made since then.

[59] I am able to order payment of compensation by Mr [Dollard] to Ms [Holland] under s 18B if she has done anything that would have been a contribution to the de facto relationship if the relationship had not ended, and if I consider it just to do so.[49] Ms [Holland] has made qualifying post separation contributions, and I do consider it just for her to be compensated.

[60] Ms [Holland] has sought compensation for half the cost of the value of the Habitat for Humanity loan; half the cost of the rates paid; half the value of the debts incurred in her name; and compensation for the care of the children.

[61] In her affidavit dated 11 October 2017 Ms [Holland] said she had paid the Habitat for Humanity loan in full. Given that I have found that the relationship ended in April 2017, it is likely that the loan was repaid during the relationship. If there were

[48] Section 18(1)(e)(i).
[49] Section 18B.

loan payments outstanding after 21 April 2017, I order that Mr [Dollard] compensate Ms [Holland] for half of those outstanding loan payments.

[62] I order that Mr [Dollard] compensate Ms [Holland] for half of the land rates from 21 April 2017 to the date of hearing.

[63] I accept that the debts incurred in Ms [Holland]'s name as set out in paragraph 21 of her affidavit dated 21 January 2019 were incurred for family purposes and were necessary to maintain the children and the home in circumstances where Mr [Dollard] made no financial contribution. They would have been relationship debts had the relationship still been in existence when the debts were incurred. I order that Mr [Dollard] compensate Ms [Holland] for half of those debts.

[64] Ms [Holland] is entitled to compensation for her ongoing care of the children. Care must be taken with s 18B to avoid double counting or unfairness. Therefore, "where proper child support is being paid, the situation must be scrutinized to avoid fixing compensation on an inappropriate basis"[50] Mr [Dollard] has not paid any child support to Ms [Holland].

[65] Section 18B compensation is not intended to compensate for the financial costs of care. Rather, *"The section was intended to be a way of providing to a child caring spouse a capital sum which recognises the fact that day-to-day care of the children has fallen to one parent by virtue of the separation"*.[51]

[66] The amount of compensation awarded for the care of children varies widely. In *IAT v SJG* [2013] NZHC 2976 Collins J upheld the finding of the Family Court that Ms G receive $40,000 for post separation contributions made to the care of the parties' two children. Ms G had supported the children for six years while living in rented accommodation and had sacrificed a higher standard of living than if she had been able to return to work.

[50] *KBH v LJD* FC Gisborne FAM-2004-016-140, 21 December 2005, Judge Adams at [85].
[51] JA v SNA [Economic disparity] [2008] NZFLR 297, Ronald Young J at [24].

[67] In *Tarr v Tarr*[52] Mrs Tarr had the sole care of the two children, performed household duties and had foregone a higher standard of living than would otherwise have been available. Mr Tarr did not pay child support for approximately two years after the date of separation and paid the minimum amount required after that. The post separation period being considered by the Court was 20 years. The High Court upheld the Family Court's s 18B award of $60,000.

[68] In *JA v SNA*[53] the High Court upheld the Family Court's decision to award compensation for four years of post separation care of the child of a relationship at $15,000.

[69] In *L v W* [54] Gendall J was mindful of the provisions in the Act requiring the Court to take into account the position of dependent children when making relationship property decisions. He made an adjustment for the absence of formal support to the mother for the care of the parties' son for over six years and resolved that a figure of $100 per week to generally reflect that was appropriate. He fixed the total sum at $33,200 and noted that it is to be paid and utilised for the child's benefit.

[70] The post separation period being compensated for is for two and a half years, from 17April 2017 to the date of hearing on 24 October 2019. Ms [Holland] had rent free occupation of the home during that time, the benefit of which is outweighed by her ongoing responsibility for the children, running the household and home ownership duties. She has also foregone a higher standard of living that would have been available to her if she had abandoned those responsibilities. The younger four children were under 19 years old between those dates. [Child's birthday deleted]. There were older children still living in the household and there is evidence that Ms [Holland] had an active role in assisting with the care of the parties' grandchild too. I take into account that s 18B compensation is for financial and non-financial contributions, and the requirement under the Act to take into account the interests of any children of the relationship. I consider that in the circumstances of this case an award of $60,000 is fair compensation for Ms [Holland]'s post separation

[52] *Tarr v Tarr* [2014] NZHC 1450.
[53] *JA v SNA* [2008] NZFLR 297
[54] *L v W* [2019] NZHC 2461 at [156] and [157].

contributions of caring for the children, running the household, and foregoing a higher standard of living than what would otherwise have been available to her.

Child Support

[71] Ms [Holland] has asked that any sum calculated as payable to Mr [Dollard] shall firstly be applied to the payment of child support arrears and secondly held on trust to satisfy his future obligations.

[72] It would be unfair to make an order in respect of child support arrears given Ms [Holland]'s successful claim for s 18B compensation for her post separation care of the children. I decline to do so.

[73] If I grant Ms [Holland]'s application to hold any sum payable to Mr [Dollard] on trust to satisfy his future child support obligations he would not have access to those funds until [the youngest child] turns 19 years old in 2029. Having regard to the purpose and principles of the Act, and the fact that Mr [Dollard]'s share of the relationship property has already been reduced by the findings under s 13 and s 18B, I do not consider that a just outcome.

[74] In any event, there is insufficient evidence before me to make orders regarding child support. In *Hammond v Hardy* [2007] NZFLR 910 (HC) Priestly J held:

> The s 32(2)(c) power to make an order can only be made under the stipulated provisions of the Child Support Act. Such an exercise would require evidence relating to the appropriate formula and the circumstances in which a departure from the statutory assessment to which the respondent is currently subject, might be justified.

[75] I decline to order that any sum payable to Mr [Dollard] be held in trust to satisfy his future child support obligations. Ms [Holland] has the enforcement provisions of the Child Support Act available to her and it is more appropriate for those to be used in these circumstances.

Funds held in trust by [the law firm]

[76] When the parties refinanced in April 2016 with [the finance company], it was a condition of their refinancing that $10,012.50 would be held in trust pending completion of work upon the property. These funds remain in the trust account of [the law firm]. The funds are part of the relationship property pool to be divided in accordance with the 65% - 35% shares that have been ordered. Once the appropriate adjustment have been made there shall be an order that the funds held by [the law firm] shall vest in the sole name of Ms [Holland].

Summary

[77] In summary:

(a) I find that the parties' de facto relationship ended on 21 April 2017. Accordingly, the application for an extension of time for making an application under the Act is not required and is dismissed.

(b) I find that there are extraordinary circumstances that make equal sharing of the relationship property under the Act repugnant to justice.

(c) I determine that in accordance with the contribution of each party the relationship property shall be divided between them by way of a 65% share to Ms [Holland] and a 35% share to Mr [Dollard].

(d) I order pursuant to s 18B that Mr [Dollard] pay compensation to Ms [Holland] for her post separation contributions as follows:

(i) Half of the balance of any outstanding payments of the Habitat for Humanity loan as at 21 April 2017.

(ii) Half of the land rates paid by Ms [Holland] from 21 April 2017 to the date of hearing.

(iii) Half of the debts set out in paragraph 22 of Ms [Holland]'s affidavit dated 21 January 2019.

(iv) A lump sum of $60,000 compensation for Ms [Holland]'s post separation contributions of caring for the children, running the household, and foregoing a higher standard of living than what would have otherwise been available to her.

(e) I decline to make any orders pursuant to s 32 of the Act relating to child support.

(f) The sum of $10,012.50 held by [the law firm] is relationship property to be divided between the parties by way of a 65% share to Ms [Holland] and a 35% share to Mr [Dollard]. Once the appropriate adjustments are made the sum shall vest in the sole name of Ms [Holland].

Draft Relationship Property Order

[78] Counsel for Ms [Holland] filed a draft relationship property order attached to her submissions dated 18 January 2019. She is directed to file an amended order reflecting the orders made in this decision as follows:

(a) Delete clause 1.

(b) Amend clause 2 to add the sum $10,012.50 held by [the law firm] and to reflect the s 13 orders as to a 65% share to Ms [Holland] and a 35% share to Mr [Dollard].

(c) Include the amount of compensation in clause 3, having calculated the amounts in paragraph 77(d) above.

(d) Amend clause 4(d) to include the amount Ms [Holland] is to pay to Mr [Dollard].

(e) Amend clause 4(d) by deleting the words "This sum is a half share of the net value of the family home" and replacing them with "This sum

is a 35% share of the net value of the family home and the sum held in trust by [the law firm]".

(f) Delete clause 5.

(g) Delete clause 7.

Costs

Ms [Holland] is legally aided. She has been largely successful in her claims against Mr [Dollard], who failed to engage in the proceedings. It is appropriate that a costs award is made. Counsel for Ms [Holland] is to file a memorandum within 21 days addressing the issue of costs.

P S Ginnen
Family Court Judge