

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

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**IN THE FAMILY COURT
AT PALMERSTON NORTH**

**I TE KŌTI WHĀNAU
KI TE PAPAIOEA**

**FAM-2017-044-000638
[2023] NZFC 3368**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[XIUYUNG SU] Applicant
AND	[GUO SHUI] Respondent

Hearing: 14 November 2022

Appearances: D Zhang for the Applicant
Respondent appears in Person

Judgment: 5 April 2023

RESERVED DECISION OF JUDGE K BROUGHTON

[1] This hearing is to determine the division and classification of property under the Property (Relationships) Act 1976 (PRA).

[2] The applicant is Ms [Xiuyung Su] ([Ms Su]) and the respondent is Mr [Guo Shui] ([Mr Shui]).

[3] These proceedings have been ongoing for a number of years with [Ms Su] filing her application for orders regarding relationship property in October 2017.

[4] Delay has been a constant factor in these proceedings. COVID-19 has had an impact. The only witness apart from the parties, is Mr [Shui]'s mother, Ms [Guanyu Wei] (Ms [Wei]). Ms [Wei] travelled to China with Mr [Shui]. Both were then unable to return to New Zealand given the border restrictions. This in part explains why it has taken a significant period of time for these proceedings to be heard.

Background – Relationship

[5] The parties commenced their relationship in [2013]. They were married on [2013]. There are no children of the relationship.

[6] Both parties agree that they separated on [2017], being when Mr [Shui] moved out of the family home.

[7] The parties have not had any periods of reconciliation since separation. In February 2019, Ms [Su] was granted a final protection order in her favour against Mr [Shui] following on from a defended hearing.¹

Background - Property

[8] During their relationship, the parties purchased two properties. A residential property in Auckland – [(“the Auckland property”)], and a motel business and parcel of land in Palmerston North (collectively “the motel”). Both properties were purchased, in part, with advances provided by Mr [Shui]'s parents.

[9] The parties acknowledge that the Auckland property was initially registered in Ms [Su] and Mr [Shui]'s joint names. In January 2016, it was transferred to Ms [Su]'s sole name. At the time of that transaction, the mortgage to ANZ Bank was repaid with money borrowed from the BNZ Bank. The timing of this transactions also links to the purchase of the motel.

¹ Protection order dated 21 February 2019.

[10] An agreed schedule of the relationship property pool is:

Item	Value
[The motel] in Palmerston North (land and buildings plus business component)	\$2,135,000 By way of Colliers Valuation dated 25 October 2022
Joint ANZ Go account ([details deleted])	\$11.10
Joint BNZ “[Rebecca] Consuming” account ([details deleted])	\$235.80
Joint BNZ account ([details deleted])	\$0.00
Mr [Shui]’s ANZ online account ([details deleted])	\$0.03
Mr [Shui]’s ASB Streamline account ([details deleted])	\$0.84
Mr [Shui]’s ABS Online account ([details deleted])	\$0.58
Ms [Su]’s ABS Streamline account ([details deleted])	\$2,172.41
Ms [Su]’s ABS Savings On Call account ([details deleted])	\$1.06
Ms [Su]’s BNZ “[Rebecca] Personal” account ([detail deleted])	\$42.50 (although Mr [Shui] claims balance as at date of disposition as he contends that rental income from the Auckland property is deposited to this account)
Ms [Su]’s KiwiSaver	\$10,414.54
<i>Family Chattels</i>	

2005 Suzuki Swift	\$3,000
<i>Liabilities</i>	
BNZ Loan for the [Motel] ([details deleted])	\$341,420.71
BNZ Loan for the [Motel]	\$140,065.97
BNZ Loan for [Rebecca] Investments LTD (MIL) ([details deleted])	\$148,713.37
BNZ Bank Overdraft ([details deleted])	\$0.00

[11] A number of peripheral claims have been made; however, the parties agree on the following:

- (a) All the assets of [Rebecca] Investments Limited (“MIL”), and the outstanding loan it is subject to, are relationship property and to be shared equally.
- (b) The motel, and the outstanding loan it is subject to, is relationship property to be shared equally.

The sole family chattel, a 2005 Suzuki Swift, is relationship property. Ms [Su] seeks to retain it and compensate Mr [Shui] for half of its value (\$3,000.00).

Issues to be determined

[12] In regards issues to be determined, the parties’ claims are as follows:

- (a) Ms [Su] makes the following claims:
 - (i) Advances from Mr [Shui]'s parents are gifts, therefore relationship property to be shared equally.
 - (ii) The Auckland property, and the outstanding loan it is subject to, is her separate property.

(iii) That she is entitled to certain sums as compensation under s 18B of the PRA.

(b) Mr [Shui] makes the following claims:

(i) Advances from Mr [Shui]'s parents are loans, therefore relationship debts to be shared equally.

(ii) The Auckland property, and the outstanding loan it is subject to, is relationship property to be shared equally.

(iii) That he is entitled to certain sums as compensation under s 18B of the PRA.

[13] Mr [Shui] also seeks several additional orders/directions of the Court:

(a) The Auckland property and the motel are to be sold.

(b) All unfinished financial statements are to be completed and filed with IRD as soon as possible. Those statements are to include “the lease expenses”.

(c) Ms [Su] is to be forbidden to pay herself a fixed monthly salary in relation to her work at the motel. Her salary is to be the net profit from the motel, as determined by the financial statements filed with the IRD.

[14] When determining the issues, I have considered the evidence of both parties, their credibility and credibility of the only other witness, Ms [Wei], as well as submissions filed by both counsel for Ms [Su], Mr Zhang, and Mr [Shui], himself.

Chinese culture

[15] It would be remiss not to provide commentary/observations of Chinese culture when determining this case.

[16] The Supreme Court, in *Deng v Zheng*, made a number of observations regarding cases where the cultural background of the parties differs from that of the judge.² Though these were in the context of a business dispute between two Chinese parties, they are nonetheless of some guidance. The Court observed that judges should approach these cases with caution, and that judicial rules of thumb may have limited utility where they are premised on judicial assumptions not shared by the parties.³

[17] Specifically, referring to expert evidence, the Court noted that there is a tendency for Chinese parties to rely on unwritten arrangements, and that requiring evidence for transactions, particularly between friends and family, would appear to be distrusting. Caution was advised, however, given that these values cannot be presumed to be universally held among Chinese people.⁴

[18] This is not a new concept in relationship property cases in New Zealand. The tendency among Chinese families to conduct transactions informally and without documentation was recognised as early as 2002, in *Speller v Chong*.⁵ In recent years, judicial alertness to these kinds of cultural concerns have also been held, by the Family Court, to have relevance to Te Ao Marama.⁶

[19] There are several cases on parental advances hinging on Chinese cultural considerations, with similar facts to this case. Those relevant cases will be considered below when determining the issues before the Court.

² *Deng v Zheng* [2022] NZSC 76.

³ At [78].

⁴ At [39], [81].

⁵ *Speller v Chong* [2003] NZFLR 385 at [8].

⁶ *[Chen] v [Hai]* [2022] NZFC 10816 at [35].

Advances provided by Mr [Shui]'s parents

Advances

[20] Mr [Shui]'s parents advanced two lots of funds to the couple, in multiple transactions. The evidence is that these multiple transactions were necessary due to Chinese regulations on sending money out of the country.

[21] The first advance was in 2013, amounting to \$235,000 (or \$236,000), of which \$195,000 was applied to the purchase of the Auckland property, \$15,000 (or \$25,000) to the purchase of a cleaning business, and the remainder towards the purchase of household affects.

[22] The second advance was in 2015, amounting to \$285,000, and was applied in its entirety to the purchase of the motel.

Ms [Su]'s position

[23] Ms [Su] says that the advances from Mr [Shui]'s parents were gifts. She says that at no time did she believe that the monies advanced had been by way of loan. She was shocked to see loan documents after the separation and maintains that the intention for the advances to be loans did not materialise until separation. Ms [Su] also disputes she was aware that a total of \$235,000.00 (or \$236,000.00) had been transferred to Mr [Shui]. She says that when the Auckland property was purchased, she was only aware of \$195,000 being gifted, which was applied to the deposit. Ms [Su] says that she was unaware of the total sum until she read it in evidence.

[24] Counsel for Ms [Su], Mr Zhang, submits that all of the advances from Mr [Shui]'s parents are gifts.⁷ He relies on the presumption of advancement, and cites *Narayan v Narayan* in support.⁸ He notes that the presumption is rebuttable, but only by acts or declarations that are reasonably contemporaneous to the transaction.⁹

⁷ [Xiuyung Su] – Opening submissions at 6.

⁸ *Narayan v Narayan* [2010] NZFLR 161.

⁹ At [47]; and *Shepherd v Cartwright* [1955] AC 431 at 652.

[25] As such, he submits that the loan documents prepared by Mr [Shui], after the advances, are not admissible in his favour to rebut the presumption of advancement, and that they were intended to create a false impression that they had been created contemporaneously. Mr Zhang also notes Mr [Shui]’s refusal to provide the loan documents to Ms [Su] for forensic examination, and his admission that he created the documents on his own, in the protection order decision.¹⁰

[26] Relying again on the rules in *Narayan* and *Shepherd*, Mr Zhang submits that Ms [Wei]’s affidavit stating that the advances were loans is similarly inadmissible to rebut the presumption of advancement.¹¹

[27] In respect of the 2013 advances, and the gifting certificate provided by Mr [Shui] to the bank to secure the loan to purchase the Auckland property, Ms [Su]’s evidence is that Mr [Shui] told her that his mother had emailed the document to him. She says she never received an email but that he physically passed her a copy of the gift certificate. Ms [Su]’s evidence is that the gift certificate is explicit as to the money advanced being an “unconditional gift” and that there was no expectation of funds being “returned” or “repaid”.

[28] On behalf of Ms [Su], Mr Zhang makes the following submissions:

- (a) Mr [Shui]’s assertion that he falsely signed the document on Ms [Wei]’s behalf cannot be trusted, given that it amounts to an admission of criminal conduct.
- (b) Mr [Shui]’s current declaration of the falsity of the gift certificate is inadmissible, again relying on the rules in *Narayan* and *Shepherd*.¹²
- (c) Ms [Wei]’s phone number on the gift certificates is strong evidence that they are genuine, given that the bank would have been able to contact her to confirm that she had signed them.¹³

¹⁰ [Xiuyung Su] – Opening submissions at 7; *[Su v Shui]* [2019] NZFC 1084 at [36].

¹¹ [Xiuyung Su] – Opening submissions at 7.

¹² At 7-8; [Xiuyung Su] – Closing submissions at 8.

¹³ At 9-10.

[29] Regarding the 2015 advances, Ms [Su] says that like the 2013 advance, these monies were a gift. She relies on effectively, past performance and the advances to her and Mr [Shui] being provided to them with no intention of repayment.

[30] On behalf of Ms [Su], Mr Zhang submits that Mr [Shui]'s justifications for the lack of contemporaneous documentation supporting his assertions that they were loans. As such, he submits that they were also gifts.¹⁴

- (a) Ms [Su] says that Mr [Shui]'s parents are wealthy and that they were capable of making significant advances as gifts. She says that they did not use their total life savings as suggested by Mr [Shui] and his mother and that overall, the funds advanced were inconsequential to them. Ms [Su]'s evidence is that Mr [Shui]'s father was a [surgeon] but that his wealth was made from commission attained from his role of determining what supplier to use at the hospital. The impression given by Ms [Su] is that she understood that Mr [Shui] Senior made excessive commission to the point that Ms [Wei] left her employment as [details deleted] to open a [shop] to “wash” commission. In addition, Ms [Su]'s evidence is that Mr [Shui] Senior said to her when she told him how much she earned, that he made more in half a year than what she would earn in ten years. Ms [Su]'s firm evidence is that Mr [Shui]'s parents had the ability to advance significant funds, without creating any detriment to themselves or their livelihood. It is noted that in evidence, Ms [Su] accepts that she did not document the advances from her own parents contributing to the purchase of the Auckland property.¹⁵

¹⁴ [Xiuyung Su] – Opening submissions at 8, 19.

¹⁵ At 35.

[31] On behalf of Ms [Su], Mr Zhang submits the following points:

- (a) Ms [Su] states that she told Mr [Shui]'s father that she makes \$50,000 to \$60,000 per year, and that in response, he told her that he makes more in half a year than she makes in ten years.¹⁶
- (b) Ms [Su] states that Mr [Shui]'s father was formerly employed as a [surgeon], and now works [details deleted] for a hospital. It is submitted that these professions both provide very significant income.¹⁷
- (c) Mr [Shui] made offers on other motel businesses much more expensive than the motel, therefore evidencing that his parents were able to assist in the purchase of a more expensive motel.¹⁸

Mr [Shui]'s position

[32] Mr [Shui], who is self represented, relied on his mother's evidence and submits that the advances are loans for the following reasons:¹⁹

- (a) Ms [Wei] asserts that all the advances to the parties were loans, not gifts.
- (b) Ms [Wei] asserts that she did not sign the gift certificate for the 2013 advance.
- (c) That his parents advanced the parties a total of \$520,000, comprising their whole life savings. It is submitted that it is impossible to suggest that they would entertain an advance that amounts to the entirety of their savings as a gift.

¹⁶ At 4; Notes of Evidence at 3-4, 40-41.

¹⁷ [Xiuyung Su] – Closing submissions at 4; NOE at 3-4.

¹⁸ At 5-8; NOE at 4-5; Bundle of Documents A at 132.

¹⁹ [Guo Shui] – Opening submissions at [2A].

[33] Mr [Shui] notes some points of law in respect of the advances:²⁰

- (a) Section 20 of the PRA does not require that relationship debts be documented as formal loans.
- (b) *Zhang v Li*, a case involving an undocumented advance from Chinese parents to their children, supports his assertions.²¹

The evidence

[34] In summary, Mr [Shui]'s evidence is as follows:

- (a) He accepts that he signed the gift certificate in respect of the 2013, advance on behalf of Ms [Wei], without her knowledge.²²
- (b) In Chinese culture, loans between family members are not generally documented.²³
- (c) Ms [Wei] transferred the money for the purchase of the motel before obtaining supporting loan documentation to facilitate a timely settlement.²⁴
- (d) He made offers on more expensive motels without confirming that his parents would loan the required funds.²⁵

[35] In summary, Ms [Wei]'s evidence is as follows:

- (a) [Surgeons] are not particularly wealthy in China.²⁶

²⁰ [Guo Shui] – Closing submissions at [2].

²¹ *Zhang v Li* [2017] NZHC 129.

²² NOE at 89.

²³ At 100-101.

²⁴ At 103.

²⁵ At 105-107.

²⁶ At 110.

- (b) The advances comprised Ms [Wei] and her husband's entire life savings.²⁷
- (c) That she and her husband had to borrow from relatives to make the advances to the parties.²⁸
- (d) That she and her husband were unable to continue paying for a lawyer for Mr [Shui].²⁹
- (e) That in Chinese culture, loans between family members are not typically documented.³⁰
- (f) That Mr [Shui] signed the gift certificate on her behalf.³¹

The presumption of advancement

[36] Where money is transferred from parent to child, the presumption of advancement is the starting point. That presumption may be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of gift. Acts or declarations subsequent to the transfer are not admissible to rebut the presumption "unless so connected with it as to be reasonably contemporaneous".³²

[37] Contemporaneous oral declarations as to the intent of the transferor are admissible to rebut the presumption. The seminal case on this point, *Warren v Gurney*, was decided on hearsay evidence, and before the advent of affordable audio recording equipment.³³

[38] Though the Courts in New Zealand have yet to explicitly abolish the presumption of advancement, as has been done in other jurisdictions, it has been

²⁷ At 110-111, 139; Bundle of Documents at 32-33.

²⁸ Bundle of Documents at 35.

²⁹ Bundle of Documents at 111.

³⁰ At 116.

³¹ At 121-122.

³² *Narayan*, above n 7, at [46]-[47].

³³ *Warren v Gurney* [1944] 2 All ER 472 (CA) at 473-474; affirmed on this point in *Narayan* at [46].

subject to some criticism. In *Young v Young*, it was termed an anachronism, one that stems from the obligation of a father where he has inadequately provided for his son.³⁴

[39] This is particularly so in the case of transfers from a parent to an independent adult child, where, in the High Court, there is conflicting authority as to whether the presumption still exists. In *Nelson v Meier*, the Court held that the presumption only applies where the parents are in loco parentis, and there is a relationship of dependency.³⁵ However, two years later, in *Woolf v Kaye*, the High Court held that the presumption still applies whether the child is dependent or not.³⁶

[40] The Court of Appeal is yet to expressly abolish the presumption; however, in *Reid v Castleton-Reid*, it opined that “it is difficult to see any rationale for the operation of the presumption of advancement where an adult child is well established in life...”.³⁷

[41] In summary, despite significant criticism, the presumption of advancement still stands in New Zealand, and it applies whether or not the child is dependent on the parent.

Parental advances in Chinese culture

[42] In Chinese culture, loans and advances between family members are often done verbally, without formal documentation. There are a number of cases that illustrate this, often with the assistance of expert evidence.³⁸ It is not uncommon that, in the face of dispute or litigation, families will create documents purporting to be contemporaneous records of loan agreements.³⁹ In *Zhang v Li*, the Court observed that these documents might either be fraudulent, or “...a clumsy attempt to record the true situation...”.⁴⁰

³⁴ *Young v Young* [2000] NZFLR 128 at 133.

³⁵ *Nelson v Meier* [2016] NZHC 787 at [56]-[58].

³⁶ *Woolf v Kaye* [2018] NZHC 2191 at [188].

³⁷ *Reid v Castleton-Reid* [2019] NZCA 372 at [85].

³⁸ *Speller v Chong*, above n 4, at [8]-[9]; *Zhang v Li*, above n 19, at [16]; *[Name deleted] v [Name deleted]* [2019] NZHC 2461 at [94];

³⁹ *Zhang v Li*; *Speller v Chong*; *[Name deleted] v [Name deleted]*; *Zhou v Yu* [2016] NZFLR 338.

⁴⁰ *Zhang v Li* at [13]-[14].

[43] Similarly, it is not uncommon that documents recording transfers as gifts are created for the sole purpose of obtaining finance, not representing the true nature of transfers. This practice is not however, isolated to Chinese families.⁴¹

[44] It should be noted that I am cautious to ascribe cultural values identified in particular cases, to all Chinese people, particular when those values are derived from expert evidence proffered by partisan counsel. That being said, broadly speaking, the authorities support the proposition that there is an obligation in Chinese culture to repay informal advances from parent to child when the adult children are financially capable of doing so.⁴²

Analysis

[45] Ms [Su]'s position and Mr Zhang's submissions rely primarily on the presumption of advancement, reinforced by assertions as to Mr [Shui]'s parents' wealth. Mr Zhang refers to the inadmissibility of the loan documents, and I agree, they are inadmissible in Mr [Shui]'s favour, not being contemporaneous records.

[46] Mr [Shui]'s submissions seek to rebut the presumption with assertions of contemporaneous oral declarations by Ms [Wei], and the subsequent loan documents; the former being admissible in Mr [Shui]'s favour under the rule in *Warren v Gurney*, and the latter inadmissible as above.

[47] While Mr Zhang submits that the affidavits by Mr [Shui] and Ms [Wei] as to Ms [Wei]'s intention at the time of the transfers are inadmissible, I disagree. While the affidavits themselves are not contemporaneous, noting the decision in *Warren v Gurney*, such affidavits, or an oral equivalent, are the only practical way to establish a contemporaneous oral declaration in the absence of an audio recording.

⁴¹ *TN v AK* [2019] NZHC 2466 at [76]-[78]; *Lo v Lo* [2021] NZCA 693 at [10], [33]-[34]; *Chinappa v Narain* [2022] NZCA 183 at [38] and [42].

⁴² *Speller v Chong*, above n 4, at [9]-[10]; *[Name deleted] v [Name deleted]*, above n 38, at [36]

[48] I consider the following points to weigh against the presumption of advancement:

- (a) Ms [Wei] affirmed that the transfers were always intended to be loans, and that she made oral declarations to that effect at the time.
- (b) Mr [Shui] affirms that Ms [Wei] made oral declarations that the advances were to be loans.
- (c) The advances total \$520,000. Ms [Wei] asserts that this comprises her and her husband's entire life savings, although noting that there is no clear evidence to rebut this assertion. The fact that Mr [Shui] is self-represented, in my view, supports this assertion.
- (d) The authorities suggest that Chinese culture entails an obligation to repay transfers from parent to child.

[49] In favour of the presumption, I note the following:

- (a) The advances were made from parent to child.
- (b) There are no contemporaneous documents suggesting that they were loans.
- (c) In respect of the 2013 advances, there is a gift certificate asserting that they are not loans. However, the issues with the authenticity of this document are relevant.
- (d) Mr [Shui] made offers on significantly more expensive motels, suggesting that he anticipated being able to attain finance.

Outcome

[50] On the balance, but by a slim margin, I consider that the presumption of advancement is rebutted in this case, in part by evidence of contemporaneous oral

declarations, and in part by Chinese cultural considerations. I observe the words of the Court of Appeal in *Reid v Castleton-Reid*:

The presumption of advancement is just that, a presumption as to the most likely inference of fact in the absence of evidence to the contrary.⁴³

[51] It follows that the transfers are determined as loans, thus relationship debts.

The Auckland property

[52] The Auckland property was purchase by the parties in November 2013, by way of auction held in September 2013.

[53] In the presence of lawyers, Mr [Shui] signed a deed of gift transferring the legal title of the Auckland property from both Mr [Shui] and Mr [Su], to Ms [Su] alone.

Ms [Su]'s position

[54] Ms [Su]'s claims the Auckland property to be her separate property, not only because of the deed of gift, but also because Mr [Shui] told her many times that he would give it to her. Ms [Su] says that she told Mr [Shui] in front of their lawyer that he did not need to do that. She says that she thought Mr [Shui] was just kidding or joking and wanted to make her happy. Her evidence is that Mr [Shui] kept talking about it, however, there was no action.⁴⁴ Ms [Su] maintains that she believed Mr [Shui] to be joking and did not realise he was serious until their meeting at the lawyers when the deed of gift was presented.

[55] Ms [Su]'s further says that she overheard Mr [Shui] and their lawyer, Ms Rosa Hughes (Ms Hughes), talking and that after that telephone call, Mr [Shui] explained to her that he was arranging for the deed of gift to be prepared. She says that at the lawyers meeting, she was not offered any independent legal advice. She accepts that Ms Hughes was asking questions around why Mr [Shui] was signing the property to her. Ms [Su] says that Mr [Shui]'s response was "I want to give her a gift to make my

⁴³ *Reid v Castleton-Reid*, above n 37, at [86].

⁴⁴ NOE, p 7, lines 25-30.

wife happy”.⁴⁵ It is Ms [Su]’s evidence that this gesture was to demonstrate his remorse that he had not given her a big wedding or honeymoon.

[56] On behalf of Ms [Su], Mr Zhang submits that the deed of gift is determinative, and that Mr [Shui] intended to transfer the beneficial interest in the Auckland property to Ms [Su].⁴⁶

[57] Supporting this submission, Mr Zhang notes that Mr [Shui] signed the deed in the presence of lawyers, and declined independent advice, having had the implications of the deed explained to him. He rejects Mr [Shui]’s assertion that he did not understand the effect of the deed. He notes Ms [Su]’s evidence that Mr [Shui] signed the deed to compensate for a lack of a honeymoon, and Mr [Shui]’s own evidence that he transferred the property to her to satisfy her vanity.⁴⁷ He further submits that Mr [Shui] has sufficient education and English language skills to understand the effects of the deed of gift.⁴⁸

[58] Mr Zhang refutes Mr [Shui]’s submissions that the Auckland property was used for the joint benefit of both parties. He submits that the payment of the rental income to a joint bank account was of Mr [Shui]’s design, Ms [Su] having no input on this matter.⁴⁹

[59] Mr Zhang further submits that the expenses of the Auckland property outweighed any rental income, therefore it was not used for their joint benefit.⁵⁰ Mr Zhang submits that, even if the rental income from the Auckland property was applied to the repayments for the motel, that only makes the rental income relationship property, and not the property itself.⁵¹

⁴⁵ NOE, p 9, line 7.

⁴⁶ [Xiuyung Su] – Opening submissions at 9.

⁴⁷ [Xiuyung Su] – Opening submissions at 9-10; [Xiuyung Su] – Closing submissions at 20.

⁴⁸ [Xiuyung Su] – Closing Submissions at 22-23.

⁴⁹ [Xiuyung Su] – Opening submissions at 11.

⁵⁰ At 11.

⁵¹ At 12.

Mr [Shui]'s position

[60] In his opening submissions, Mr [Shui] submits that he signed the deed of gift labouring under a misunderstanding, and that, in any event, the Auckland property is intermingled with other relationship property, and has been used for the joint benefit of the parties. He submits that the Auckland property is subject to mortgages totalling \$840,000, which were used to fund the purchase and operation of the motel.⁵²

[61] Mr [Shui]'s evidence is that he changed the title of [the Auckland property] to Ms [Su], to make her happy. He says that their relationship was unstable and that he simply wanted his wife to be happy.

[62] Mr [Shui]'s submits that changing the title of the property did not change or alter his interest in the same because the parties were married. He maintains that it was never his intent to gift his wife the property so that he had no interest in it.

[63] Mr [Shui] accepts that he engaged lawyers, Gaze Burt, to assist with this transaction. He accepts that he had no conversation with his lawyers around clarifying New Zealand Law on this specific issue. Mr [Shui]'s says that there were numerous documents to sign the morning that he and Ms [Su] went to their lawyers due to the transaction of, not only the Auckland property and refinancing of that property, but also the purchase of the motel.

Further evidence

[64] Mr [Shui]'s narrative affidavit expands on his submissions. In it, he states that:⁵³

- (a) Ms [Su] loves the idea of fame and money, and he thought it would make her happier if the Auckland property and the company that bought the motel were in her name.

⁵² [Guo Shui] – Opening submissions at [2C].

⁵³ Bundle of Documents at 45-48.

- (b) He signed the deed of gift on the understanding that they would still own the property together, and that the name on the title would not make a difference.
- (c) He gave a guarantee to BNZ for all of its loans to Ms [Su].
- (d) Rental funds from the Auckland property were paid into a joint account, transferred to the business account, and then used to pay the mortgage.
- (e) Funds from the joint account were used to pay the costs of insuring the Auckland property.
- (f) Income from the motel business was used to meet shortfalls between the rental income, and the mortgage repayments and expenses.

[65] The parties' former lawyer for the property and business transactions, Mr Michael Bright, has provided an affidavit with annexures, which sheds some light on the nature of the deed of gift:

- (a) Mr [Shui] instructed Gaze Burt Limited to "...transfer [the Auckland property] to my wife's name". Ms Rosa Hughes then asked Mr [Shui] to "...please confirm that you would like to gift Y[Guo] your share of the property..."⁵⁴
- (b) A later email from Ms Hughes refers to "...transfer[ring] the [Auckland] property into just [Guo]'s name..."⁵⁵
- (c) An email from Mr Tony Wang, mortgage broker, refers to the titles of the properties as part of the "refinance and ownership structure", and states that an unlimited guarantee will be taken from both parties to guarantee the debt of the Auckland property and the motel.⁵⁶

⁵⁴ Bundle of Documents at 142, 162, 170.

⁵⁵ At 158.

⁵⁶ At 152.

- (d) The deed of gift itself uses the wording: “It is our intention to gift the Land and the Title to [XIUYING SU]”.⁵⁷

[66] Both parties have made a number of unsubstantiated assertions regarding the true nature of the deed of gift, and Mr [Shui]’s understanding of it. Given the lack of supporting evidence, and the credibility issues, I cannot put much weight on those assertions.

The law

[67] Section 10(3) of the PRA states:

- (3) Property that one spouse or partner acquires by gift from the other spouse or partner is not relationship property unless the gift is used for the benefit of both spouses or partners.

[68] An allegation of gift between partners requires the establishment of the intention to gift on the part of the donor.⁵⁸ The onus is on the donee to establish that a gift was intended.⁵⁹

Analysis

[69] As above, the onus is on Ms [Su] to establish that it is a gift. The deed of gift is effectively the only piece of evidence, albeit a strong one, in favour of her assertion. Supporting it are relatively bare assertions about Mr [Shui]’s level of understanding of the deed, and his intention in respect of it.

[70] In terms of Mr [Shui]’s understanding of the effect of the deed of gift, I consider that his assertion that he thought it was merely a change on paper, not effecting his beneficial entitlement, to be plausible. While I do not place great weight on the assertion in and of itself, it is reinforced by the evidence.

⁵⁷ At 183.

⁵⁸ *Milne v Armijo* HC Christchurch, CP7/88, 25 August 1989 at 2; cited in *Herbison v Waugh* [2018] NZHC 3101 at [21].

⁵⁹ *Johnston v Johnston* HC Auckland CIV-2004-404-5565, 28 June 2005; *Y v Y* [1977] 2 NZLR 385 at 388.

[71] Mr [Shui] did not at any point request that the Auckland property be “gifted” to Ms [Su], and instead used words like “transferring”. I also consider it relevant that he referred to transferring the Auckland property into Ms [Su]'s “name”, rather than transferring it to Ms [Su]. I note, on the other hand, that he did confirm with Ms Hughes that he wanted to gift it to Ms [Su], and signed a document clearly marked “Deed of Gift”, after having the implications of the deed explained to him.

[72] The parties appear to have deliberately structured their financial and business affairs so that Ms [Su]'s name was the sole name on their assets. This is also the case with the motel, which is, as accepted by Ms [Su], relationship property. I also note that all of the accounts, and the business which operated the motel, bear the name “[Rebecca]”, Ms [Su]'s adopted English name.

[73] Mr [Shui], despite the deed of gift, remained financially involved with the Auckland property. In the first place, he contributed more funds to its purchase than did Ms [Su], and he gave an unlimited guarantee for the mortgage to BNZ bank over it. The parties both funded shortfalls between the rental income and expenses using relationship property.

Outcome

[74] I consider that Ms [Su] has not established an intention on Mr [Shui]'s part to gift his beneficial entitlement in the Auckland property to her. Thus, s 10(3) is not engaged, and the Auckland property is relationship property, there being no gift.

Section 18 claims

[75] Ms [Su] claims that she is entitled to the following sums as compensation under s 18B of the PRA:

- (a) \$29,791.67, being remuneration for salary not claimed for contributions to the motel (5.5 months at \$65,000 per annum).
- (b) \$7,090 for cash allegedly taken by Mr [Shui] between January and May 2017.

[76] Mr [Shui] claims that he is entitled to the following sums as compensation under s 18B of the PRA:

- (a) \$113,750, comprising 50 per cent of the salary Ms [Su] paid herself from June 2019 to December 2022.
- (b) \$3,850, comprising 50 per cent of transfers allegedly made by Ms [Su] from joint accounts to her personal account.
- (c) \$5,000, comprising the estimated cash income of the motel from December 2020 to September 2022, allegedly taken by Ms [Su].

[77] As raised above and for completeness, Mr [Shui] also seeks a number of ancillary orders:

- (a) The Auckland property and the motel are to be sold.
- (b) All unfinished financial statements are to be completed and filed with IRD as soon as possible. Those statements are to include “the lease expenses”.
- (c) Ms [Su] is to be forbidden to pay herself a fixed monthly salary in relation to her work at the motel. Her salary is to be the net profit from the motel, as determined by the financial statements filed with the IRD.

The law

[78] Section 18(1) of the PRA lists, non-exhaustively, contributions to a marriage, civil union, or de facto relationship. Relevant in this case are subs (1)(e) and (f), which refer to the payment of money to maintain or increase the value of relationship property or the separate property of the other spouse, and the performance of work or services in respect of the same property.

[79] Section 18B(2) states:

- (2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—
 - (a) order the other spouse or partner (party B) to pay party A a sum of money:
 - (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

[80] Where one party makes their share of capital in a residence available to the other partner, it qualifies as a contribution for the purposes of s 18.⁶⁰ This is the basis of occupational rent claims.⁶¹

[81] Rather than calculating contributions as a precise science, the Courts have adopted a global assessment of post-separation contributions.⁶² One partner's contribution may either entirely offset or reduce the amount of compensation awarded to the other partner. The preparation of extensive accounts and precise accounting is not appropriate in determining contributions.⁶³ Evaluation of the relative contributions is likely a matter of "general impression".⁶⁴

Occupational rent

[82] Where a spouse is required by law to vacate the family home by virtue of a protection order, the fact of that protection order is of no moment to occupational rent claims, the claimant still having been deprived of the use of a jointly owned asset.⁶⁵

[83] In *Bullians v Bullians*, the High Court declined to make an order under s 18B where the claimant sought compensation for improvements to a company, on the basis that he was fairly compensated by salary drawn in his favour.⁶⁶

⁶⁰ *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006 at [21], [24].

⁶¹ See also *Little v Little* [2022] NZHC 601 at [120]-[121].

⁶² *Chong v Speller* (2004) 24 FRNZ 273, [2005] NZFLR 400 (HC) at [40]; *KBH v LJD* FC Gisborne FAM-2004-016-140, 21 December 2005 at [82].

⁶³ *A v A* [2008] NZFLR 297 at [24]; *X v Y* [2015] NZHC 1166 at [69].

⁶⁴ *Tarr v Tarr* [2014] NZHC 1450.

⁶⁵ See *C v M* FC Timaru FAM-2005-076-227, 25 August 2006.

⁶⁶ *Bullians v Bullians* HC Hamilton CIV-2005-419-1283, 7 December 2005 at [56]-[58].

[84] In *[Rice v Young]*, the parties jointly owned a motel.⁶⁷ The respondent sought an adjustment to his entitlement to reflect post separation contributions to it. The Court observed that, while the respondent did have the benefit of residing at the motel, he did not draw a manager's salary, and undertook all of the management of the business himself. An alternative date of valuation was adopted to reflect his contributions, rather than an adjustment under s 18B.⁶⁸

[85] In *RPB v CRH*, the applicant sought compensation for the respondent's occupation of the family home, which was operated as a bed and breakfast.⁶⁹ Observing that both parties benefited from the respondent's continued occupation of the property, and finding that it would be unjust to retrospectively require her to pay occupational rent for a period prior to the applicant giving notice of a potential s 18B claim, the Court declined to exercise the discretion under s 18B.⁷⁰

[86] In *H v H*, the applicant sought compensation for the respondent's occupation of the family lifestyle block, while she met her own accommodation expenses following separation, and contributed to the rates and outgoings on the property.⁷¹ Though the applicant was awarded compensation under s 18B, this was reduced to reflect the efforts the respondent had put into the lifestyle block, including animal care and property maintenance.⁷²

[87] In *Zhou v Yu*, in determining a complex claim under s 18B, the Court excluded the maintenance and storage costs of a car from the calculations, on the basis that the applicant had exclusive use of the car following separation.⁷³

Salary claims

[88] In *Harmer v Thomas*, the appellant sought compensation under ss 86 and 18B for contributions to the family farm following separation.⁷⁴ At first instance, a base

⁶⁷ *[Rice v Young]* [2018] NZFC 6843.

⁶⁸ At [56]-[60].

⁶⁹ *RPB v CRH* [2012] NZFC 1997.

⁷⁰ At [54]-[56].

⁷¹ *H v H* FC Nelson FAM-2005-042-527, 29 March 2007.

⁷² At [30].

⁷³ *Zhou v Yu* [2015] NZFC 7668.

⁷⁴ *Harmer v Thomas* CIV-2006-409-002615 HC Christchurch, 5 June 2007 .

salary was fixed for the appellant's work on the farm, and he was granted compensation. On appeal, the Court opined that he was lucky to receive any compensation, given that the family farm was unable to afford to pay a farm manager's salary. It was also noted that, ordinarily, owner occupiers of family farms only take taxable income out of the net surplus.⁷⁵

[89] In *Clarkson v Slegers*, the applicant sought compensation under s 18B for contributions towards a family business.⁷⁶ The Court declined to exercise the discretion under s 18B, finding that there was no evidence as to whether the business could afford to pay the salary sought, and no other evidence on which to calculate appropriate remuneration.⁷⁷

Discussion

[90] First and foremost, I consider that the lack of financial statements for the motel poses an obstacle in determining some of the s 18B claims.

[91] This information is critical to determining the quantum of compensation in respect of the salary claims by both parties, and to identify the application of monies allegedly transferred from joint accounts.

Salary claims

[92] In my view, Mr [Shui]'s claim for half of the salary drawn by Ms [Su] is too simplistic. It does not take into account the fact Ms [Su] was entitled to some compensation for her continued efforts in running the motel, alone, following the protection order and Mr [Shui] ceasing to reside at the property.

[93] I consider it would be more appropriate to determine what the appropriate salary would have been with reference to that drawn by the parties prior to separation, and contrast that with the \$65,000 per annum drawn by Ms [Su] following separation

⁷⁵ At [78]-[79].

⁷⁶ *Clarkson v Slegers* [2021] NZFC 6401.

⁷⁷ At [57]-[58].

and claimed for the period prior to her drawing it. This requires the financial statements as above, and significant accounting work.

[94] In respect of Ms [Su]'s claims for salary, I consider the decisions in *Harmer* and *Clarkson* to be determinative. There is no evidence to support the proposition that the business would be able to pay the salary she seeks. Furthermore, I consider there is merit in Mr [Shui]'s submission that prior to separation, the parties took only surplus funds from the motel business, rather than a fixed salary, though further evidence is needed to confirm this.

[95] Given the lack of evidence before me, I cannot confidently determine the entitlements of either party regarding the claims for salary. To do so, by effectively speculating, would be unfair and unjust.

Unauthorised transfers, cash takings

[96] Regarding the unauthorised bank transfer and cash claims, the discrepancy between the (unsubstantiated) claims made by the parties amounts to around \$1,800. When viewed against the total pool of relationship property, it must be acknowledged that this is an insignificant sum.

[97] It is my view that these claims are unlikely to be resolved, even with forensic accounting. I note the words of the Court in *X v Y* to the effect that precise accounting is not appropriate in these cases, and in the absence of clear evidence either way. I therefore conclude that no adjustment is made in respect of these claims.

Occupational rent

[98] The issue of occupational rent is somewhat complicated by the fact that the residence in question is a motel. Ms [Su] had the benefit of residing at the motel, that benefit likely being part of the compensation for that position. I consider the motel business to be broadly comparable to cases involving small owner-occupier farms.

[99] While Ms [Su] did have exclusive use of an asset constituting relationship property, prima facie giving rise to grounds for a claim under s 18B, this is balanced

by her efforts in running the business, efforts which benefited Mr [Shui] also. I consider the case *RPB v CRH* is reasonably analogous to the facts before me, and consequently, I do not consider that compensation in Mr [Shui]'s favour is in the interests of justice.

[100] Furthermore, even if it were just to compensate Mr [Shui] for occupational rent, his proposed figures are not appropriate. As held by the Court in *S v S*, occupational rent is to be determined with reference to the market rent for the family home. I have no information before me on the appropriate market rate for a motelier's accommodation, nor whether Mr [Shui]'s accommodation costs are reasonable.

[101] Accordingly, no adjustment is made in regards occupational rent.

Outcome

[102] By way of summary, I determine as follows:

- (a) The advances by Mr [Shui]'s parents were loans and not gifts.
- (b) The Auckland property and outstanding loan, is relationship property.
- (c) No adjustments can be made for s 18B claims due to insufficient evidence.
- (d) No adjustment is made for occupational rent.

[103] The following orders and directions are made:

- (a) The Auckland property is to be sold, outstanding debt, including advance to the [Shui] Seniors', to repaid and net rent is to be divided equally. Ms [Su] will need to disclose this amount (with supporting bank statements).
- (b) Ms [Su] has one calendar month to confirm whether she can purchase Mr [Su]'s share of the motel business, adopting the valuation obtained by Colliers dated 25 October 2022. If Ms [Su] cannot refinance at that

value, the motel is to be sold, with any outstanding loans, including advance to the [Shui] Seniors', being repaid and remaining balance shared equally.

- (c) The balances of all personal accounts, excluding Ms [Su]'s BNZ "[Rebecca] Personal" account ([details deleted]), where rent has been deposited, are to lie where they fall.⁷⁸
- (d) Ms [Su] is to adjust Mr [Shui] \$1,500.00 for the Suzuki Swift.
- (e) Ms [Su] is to adjust Mr [Shui], one half share of her Kiwisaver.
- (f) All other chattels to lie where they fall.

[104] The lack of evidence in regards the financial statements is troubling. As I understand it, there remains outstanding financial statements to be filed with IRD. This must be done immediately and by way of co-operation between the parties.

[105] I make no order or direction in regards salary. The Court cannot do this in absence of financial statements being filed.

[106] In regards costs, any application and supporting submissions should be filed 21 days after receipt of this decision.

[107] I encourage the parties to resolve any residual matters, fairly and ethically. They have been involved in the Family Court for almost five years. It is timely now for them to move forward with their respective lives.

Judge KNP Broughton
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 05/04/2023

⁷⁸ Refer paragraph 10, which adopts the agreed schedule of relationship property.