IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-935
[2020] NZHC 2612

IN THE MATTER	of an appeal under s 174 of the Family Proceedings Act 1980, s 124 the District Courts Act 2016 and Part 20 the High Court Rules 2016
BETWEEN	PETER FRANCIS JOSEPH LITTLE Appellant
AND	DEBRAH LEANNE LITTLE First respondent
	PETER FRANCIS JOSEPH LITTLE and LOCKHART LEGAL TRUSTEE SERVICES NO. 32 LIMITED as trustees of the MARBLE ARCH TRUST Second respondent

Hearing:	29 September 2020
Appearances:	R C Knight and L A Moyle for the appellant M K Headifen for the respondents
Judgment:	6 October 2020

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 6 October 2020 at 2.00pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel:
R C Knight, Barrister, Auckland
M K Headifen, Barrister, Auckland

[1] Peter Little appeals the 26 May 2020 decision of Judge D A Burns in the Family Court at North Shore. Under s 182 of the Family Proceedings Act 1980, the Judge ordered the assets and liabilities comprising the property settled on the Marble Arch Trust for the benefit of Mr Little and his children – fundamentally, a funeral business operated by Mr Little (and his forebears since 1875), and the premises from which it operates and in which the Little family ultimately lived – be resettled in equal shares on two parallel trusts in control of and for the benefit of respectively Mr Little and his former wife, Leanne Little, and each also for the benefit of their two (now adult) children.[1]

[2] On appeal, Mr Little argues the settlements comprising the Marble Arch Trust were not susceptible to such orders, as not being 'nuptial' settlements; or, if they were, the Judge erred in the exercise of his discretion to make the resettlement in those terms.

Background

[3] Mr and Mrs Little met in late 1987, when they were in their mid to late 20s. They lived together in a de facto relationship from mid-1988 until mid-1992. After a year's separation, they reconciled in mid-1993, and conceived their first-born. In their early to mid-30s, they married on 31 October 1993; their son was born on 24 April 1994; and their daughter was born on 30 September 1996.

[4] The family funeral business – forever styled C Little & Sons, and acquired in June 1988 by a company ultimately of that name incorporated by Mr Little – operated from premises in Auckland's Epsom, initially owned by trusts associated with Mr Little's parents. In early October 1993, in anticipation of their marriage, the parties sought but were unable to agree terms to contract out of the Property (Relationships) Act 1976. On 22 October 1993, Mr Little sold all but one of the company's 30,000 shares to the contemporaneously-established Marble Arch Trust of which he was a beneficiary, he effectively retaining one share. After bringing up their children, Mrs Little had increasing involvement with the business from 2000 including carrying out its day-to-day accounting, to the point after ultimate separation she could

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1 *Little v Little* [2020] NZFC 3532. The judgment's entitulement refers to the second respondents as trustees of the Marble Arch Family Trust, as do the pleadings on this appeal. The trust deed identifies it as the Marble Arch Trust, to which the entituling of this judgment has been corrected.

commence work as an experienced funeral director. In 2001, one share in the company was transferred to her. In 2003, the Trust deed was varied to add Mr Little's children as beneficiaries, and in 2009, it was varied to establish them also as residual beneficiaries (rather than the settlor's children as initially was stated, the settlor being Mr Little's solicitor). The Trust was the family's exclusive source of income and accommodation, including at an intermediate dwelling in Auckland's Onehunga (acquired through a progressively forgiven loan from Mr Little, made up from bank borrowings and his inheritance funds).

[5] Mr and Mrs Little ultimately separated in mid-2009; their marriage was dissolved on 5 November 2012. They then were in their early 50s. Mrs Little brought proceedings under each the Property (Relationships) Act 1976 seeking determinations and vesting of property as between her and Mr Little, and the Family Proceedings Act 1980 seeking enquiry into settlements on the Marble Arch Trust. At trial, after consensual relationship property division, the 1976 Act proceeding was withdrawn.[2]

Judgment under appeal

[6] So far as the 1980 Act proceeding was concerned, the Judge assessed the settlements on the Trust were "nuptial" settlements made with an eye to the parties' marriage,[3] effectively affirmed by the trust deed's 2003 variation to include the children as beneficiaries.[4] The Judge concluded Mrs Little made "an equal contribution" to the increased value of the Trust's assets during the marriage,[5] from a "very modest" sum to "about $5 million".[6] "But for the marriage and the support that Mrs Little provided", there would have been neither assets to accumulate nor children to inherit.[7]

[7] The Judge found the Trust's comprehensive provision for the family during the course of the marriage ceased for Mrs Little from the time of dissolution.[8] It was just Mrs Little should "share in the accumulation of capital during the prime earning period

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2 At [44].
3 At [63].
4 At [69].
5 At [73].
6 At [77].
7 At [74] (emphasis omitted).
8 At [74].

of her life",[9] from this "marriage of long duration".[10] The Judge therefore directed the Trust's "assets and liabilities effectively … be divided equally between the parties … by the mechanism of two parallel trusts".[11]

[8] On appeal, Mr Little argues the Judge erred in concluding the settlements on the Trust were 'nuptial' for the purposes of s 182, as not being made for both or either Mr and Mrs Little in their capacity as spouses. And, if the Judge did not err in that respect, he erred in concluding Mrs Little could have any expectancy in future benefits from the Trust by reason of the valuable benefits she received from the Trust during the marriage.

Approach on appeal

[9] Appeals to this Court from the Family Court are general appeals conducted by way of rehearing,[12] in which Mr Little bears the onus of satisfying me I should differ from the Family Court's decision. I only am justified in interfering with that decision if I consider the decision is wrong – in other words, the Judge erred.[13]

[10] I then am to come to my own assessment of the merits of the case afresh, without deference to the Family Court (save for some caution in differing on witness credibility, when I have not had the advantage of observing the witnesses).[14] I may rely on the Judge's reasons in reaching my own conclusions, but the weight I give those reasons is a matter for me.[15]

[11] To the extent the decision involved exercise of the Judge's discretion, I only may interfere with it if the appellant establishes the Judge acted on wrong principle, did not address relevant matters or took into account irrelevant matters, or was "plainly wrong".[16]

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9 At [77].
10 At [78].
11 At [79].
12 Family Proceedings Act 1980, s 174(1B); High Court Rules 2016, r 20.18.
13 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].
14 At [13].
15 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].
16 *May v May* (1982) 1 NZFLR 165 (CA) at 170; and *Blackstone v Blackstone* [2008] NZCA 312, (2008) 19 PRNZ 40 at [24].

[12] After hearing the appeal I may make any decision I think should have been made, or direct the Family Court to rehear the proceeding or consider and determine any particular matter.[17]

Relevant law

[13] Section 182 of the 1980 Act relevantly provides:

> **182 Court may make orders as to settled property, etc**
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> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act …, the Family Court may inquire into … any ante-nuptial or post-nuptial settlement made on the parties [to the marriage], and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such … settlement, either for the benefit of the children of the marriage … or of the parties to the marriage … or either of them, as the court thinks fit.
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> …
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> (3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the … settlement and any other matters which the court considers relevant.
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> (4) The court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.
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> (5) An order made under this section may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.

The section's purpose is "to empower the courts to review a settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made".[18] It invokes "a two-stage process":[19]

> The first is to determine whether the [settlement] is a nuptial settlement. The second is to assess whether and, if so, in what manner the Court's discretion under s 182 should be exercised.

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17 High Court Rules 2016, r 20.19(1).
18 *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590 at [60].
19 At [27].

Discussion

—are these 'nuptial' settlements?

[14] A "generous approach" is to be taken to the interpretation of "settlement". To be an "ante-nuptial or post-nuptial settlement" in terms of s 182, the arrangement must be one that "makes some form of continuing provision for both or either of the parties to a marriage in their capacity as spouses, with or without provision for their children".[20] 'In their capacity as spouses' means "only that there must be a connection or proximity between the settlement and the marriage".[21] If the settlement is documented, determination of its qualifying character is "primarily one of construction of the settlement documentation",[22] to "be construed in accordance with ordinary principles, while remembering that a generous approach to the issue of whether a settlement is a nuptial settlement is required".[23]

[15] The Trust was settled on 22 October 1993 by Mr Little's solicitor, for Mr Little as its beneficiary, together with any trust or other settlement under which he was a beneficiary and any charity. The initial trustees, being Mr Little (with power to appoint new trustees) and an accountant, had power to add beneficiaries and discretion to pay or apply any part of the Trust's net income "for or towards the personal support maintenance comfort education advancement in life or otherwise howsoever for the benefit of" extant beneficiaries, and to pay apply or transfer any part of the Trust's capital "to or for the benefit of such of the beneficiaries as may then be living" and "without limiting the generality of the foregoing for the maintenance education advancement and benefit of such beneficiary or beneficiaries". Such payments also may be made "to the guardian or parent of any of the beneficiaries for the time being a minor".

[16] The deed established as residual beneficiaries "such of the Beneficiaries who are the children of the Settlor as shall then be living". 'Children' is defined to "include

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20 At [32] and [34], approving *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 at [27].

21 At [34], citing *Kidd v Van Den Brink* HC Auckland CIV 2009-404-4694, 21 December 2009 at [18].

22 At [38].

23 At [38], citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].

children by adoption as well as natural born children". 'Spouse' also is defined to "include widow or widower whether remarried or not and any former spouse", but the word does not appear to have any operational function in the deed. (By variation of 31 August 2003, the trustees added "the child or children" of Mr Little as beneficiaries. By variation of 28 July 2009, Mr Little's children became the residual beneficiaries. I view the latter variation as rectifying, to correct initial appointment of the settlor's children in that role.)

[17] The settlement of the business on the Trust does not appear itself to be documented (although associated company records illustrate the settlement's consequences). Mr Little explained he wanted to ensure he protected his interests in the business "should the marriage fail". He apprehended he had done so by transferring them to the Trust, "for the benefit of myself and any future children". Under cross-examination, he accepted he sought to protect the business from any claim to it by Mrs Little in the event of their separation. On settlement of the Onehunga property in July 1998, the trustees "granted to Peter the right to reside in the property upon the proviso that Peter pays all costs and outgoings attributable to this use, occupation and enjoyment of the Property". The settlement of the Epsom property on the Trust in November 2003 was preceded by the trustees' resolution:

> To permit Peter Little and his family to occupy and use, without creating a lease or a tenancy, the residential component of the Trust's property … for as long a period as he wishes, provided that he pays all costs of repairs and maintenance, rates, insurance premiums, interest on any borrowings and other outgoings to [*sic*] respect of that residential component part of the property, unless otherwise agreed with the trustees.

[18] I have no hesitation in concluding the settlements have the necessary nuptial quality. They each are made directly with an eye for the marriage, initially expressly "should the marriage fail". The marriage was to (and did) rely on the trustees' disgorgement of business profits to provide its income in sums beyond mere salaries, and also on the trustees' provision of the family with accommodation. The trustees' express permission for Mr Little "and his family" to occupy and use the residential component of the property, when only Mr Little and his children then were beneficiaries, graphically illustrates the post-nuptial aspect of that property's

subsequent settlement on the Trust. Such regard for the marriage is sufficient to qualify the settlements as nuptial.[24] The Judge was right.

—whether the Judge's discretion should have been exercised

[19] The consequent discretion enables the Family Court to remedy any adverse consequence dissolution has on retention of benefit from the nuptial settlement:[25]

> … to remedy the consequences of the failure of the premise of a continuing marriage. The comparison is undertaken … between the position under the settlement had the marriage continued and the position that pertains after the dissolution. This is not backward looking to the time of settlement. It is forward looking, comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage.

Thus discretion only is to be exercised if the positions of the spouses in relation to the nuptial settlements differ "with the marriage dissolved" from that "assuming a continued marriage".[26] There is "no formulaic or presumptive approach" to that assessment.[27]

[20] With the marriage dissolved, there is no prospect the trustees may distribute any part of the business' income or Trust's capital to benefit Mrs Little because she is not a beneficiary, and substantial prospect they will distribute the business' income or Trust's capital only to benefit Mr Little (and possibly the children). With the marriage dissolved, the trustees' permission for Mr Little "and his family" to live in the residential component of the property no longer extends to Mrs Little. There is little prospect the trustees will add Mrs Little as a beneficiary.

[21] Counsel for Mr Little, Ross Knight, argued as Mrs Little was not contributing to the business, she was not entitled to expect any continuing benefit from its settlement on the Trust. Neither, having "left" the family, was she entitled to expect continuing accommodation (even if that was desired by her) from the Epsom property's settlement on the Trust. But those factors, even if correct, do not address

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24 At footnote 63: "It has also been said there will be a nuptial settlement if a particular marriage is a fact a settlor takes into account in framing the settlement", citing *Joss v Joss* [1943] P 18 at 20, cited with approval in *In the Marriage of Knight* (1987) 90 FLR 313 at 316.

25 At [53] (internal footnotes omitted).

26 At [54].

27 At [57].

the spouses' different positions on dissolution against the counterfactual of a continued marriage. In that counterfactual, Mrs Little's life would continue to be supported by the nuptial settlements made on the Trust (so far as they could do so), which she sustained in presumed equal measure by her contributions to the marriage. The trustees could be expected to continue to use those assets to provide support to the family. The dissolution of the marriage does not diminish the settlements' prospective residual benefit. Those wider benefits are relevant, particularly from a marriage of the Littles' duration, spanning their 30s to their 50s.[28] On dissolution of the marriage, Mrs Little has no prospect of securing those benefits from the settlements. Assessed at the point of dissolution, the settlements had a future value to Mrs Little from the perspective of a continued marriage. The spouses' positions in relation to the settlements accordingly differ as between factual and counterfactual.

[22] Thus the Judge was right to make orders, "to remedy the consequences of the failure of the premise on which the settlement was made".[29]

—how the Judge's discretion was exercised

[23] The Judge perceived "if the assets were owned by Mr Little personally or by Mr and Mrs Little together … she would be entitled to share equally in the assets under the [Property (Relationships) Act 1976]", and "it would produce an unjust and completely inappropriate result" if Mrs Little "was not to share in the accumulation of capital during the prime earning period of her life".[30] He held:[31]

> Mrs Little had a reasonable expectation in sharing equally in the assets accumulated during the marriage. The promises made by Mr Little were premised on the marriage continuing. The subsequent separation and divorce represents a material change in circumstance.

and ordered "equal sharing of the assets of the trust between Mr and Mrs Little".[32]

[24] The Judge's reference to the 1976 Act, even if accurate in the circumstances I have outlined, is unfortunate. Section 182 of the 1980 Act is to be interpreted:

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28 At [59].
29 At [60].
30 *Little v Little*, above n 1, at [77].
31 At [79].
32 At [79].

> … in light of its own historical context and rationale …. [T]he principles of the Property (Relationships) Act do not underpin s 182. This means that there is no entitlement, or presumption, as to a 50/50 or any other fractional division of the trust property.[33]

[25] That historical context and rationale is to address nuptial settlements on dissolution of the marriage, property which is by definition not the property of the spouses or even necessarily either of them.[34] Nonetheless:[35]

> … s 182 has to be applied in the twenty-first century. … [T]he source and character of the assets which have been vested in a trust are factors to be taken into account in the exercise of the discretion. In the current social context it is recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage.
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> …
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> Where … a trust is settled during marriage and contains or is sustained by assets accumulated by one or both of the spouses only during the marriage, it may well be that the discretion will result in equal sharing, absent other countervailing circumstances.

[26] Section 182 addresses only dissolutions of marriages (and civil unions), not de facto relationships. The business was acquired by Mr Little's company years in advance of his marriage. The Trust neither was settled during the marriage, nor contained assets accumulated by Mr Little only during the marriage. The grounds for favouring equal sharing do not exist. Considerations of equal sharing of relationship property under the 1976 Act do not assist. (But then neither do considerations of retention or application of separate property, such as may apply to Mr Little's initial funds or inheritance.) The parties' expectations are not, in any event, determinative,[36] and are "particularly difficult to assess" if discretionary beneficiaries.[37]

[27] I find the Judge erred in making provision for equal sharing of the Trust's assets. The presumption of equal sharing is an irrelevant consideration. I therefore will set aside his order for such equal sharing by resettlement of the Trust's assets on two parallel trusts. I also observe the Judge's reliance on earlier authority for such

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33 *Clayton v Clayton*, above n 18, at [65] (internal footnotes omitted), approving *Ward v Ward*, above n 20, at [20].
34 At [63].
35 At [66]–[67].
36 At [49].
37 At [50].

resettlement was on authority not for resettlement of trust assets on dual trusts, but for settlement of the proceeds of sale of the trust assets on dual trusts.[38] I note, but do not rely on, the additional expert evidence on appeal contending the pure resettlement mechanism to have multiple complexities in Mr and Mrs Little's circumstances. The potential inappropriateness of husband and wife continuing to run a family business through trust structures after dissolution has been noted.[39]

—how should the discretion be exercised?

[28] The relevant 'change in circumstances' since the initial settlement was Mrs Little's contribution of mutual support to the marriage, including bringing up the children and involvement in the business. Leaving aside the 1976 Act, to the extent Mrs Little expected disposition of the Trust's assets in her interests, it was only in the context of her expectation of a continuing marriage.[40] Mr Little's assurances, such as they were, were based on the same foundation.

[29] For so long as it could be sustained, derivation of benefit from the Trust's assets would not be at the expense of continuation of the long-standing family business, for which at least Mr Little effectively was caretaker for future generations. Mrs Little's acquisition of insurance, expressly to be able to acquire the dual-purpose Epsom property (rather than a specific domestic residence) in the event of Mr Little's death, similarly was incentivised. Those future generations start with the children, whose interests "are a primary consideration" under s 182.[41] But it was always possible the business could not be sustained even while the marriage continued. The counterfactual includes the business may adjust or fail, and the marriage be supported only from its proceeds or not at all.

[30] Remedying the consequences of the marriage's failure thus cannot be assessed by reference to the Trust's assets themselves. It is to be assessed firstly by reference to the increase in net value of the Trust's assets between settlements and dissolution, which was to support any continuing marriage. It would be necessary then objectively

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38 *Little v Little*, above n 1, at [81].
39 *Clayton v Clayton*, above n 18, at [59].
40 At [51].
41 At [56].

to calculate Mrs Little's share in that increased value,[42] starting from a social expectation of equality,[43] but taking into account relevant factors as the trustees may be anticipated to have taken into account had the marriage endured, including need and other current or future benefits, whether for Mr Little, Mrs Little, or the children.[44] The object should be a monetary figure, which the trustees would be ordered to pay by application of any part of the property settled.[45]

[31] Although both counsel urged I resolve this proceeding without reference back to the Family Court, I do not have the evidence I require to be able to conduct that assessment. The Family Court also is the expert tribunal to make such assessments. I therefore will direct that Court to exercise its discretion in accordance with the preceding paragraph.

Result

[32] I uphold the appeal. I set aside the Judge's order for equal sharing of the trust's assets by resettlement on two parallel trusts. I direct the Judge to exercise his discretion under s 182 of the Family Proceedings Act 1980 in accordance with the considerations set out at [30] above, on such additional evidence as may be necessary to make the assessment.

Costs

[33] As the successful party, Mr Little presumptively is entitled to have his costs paid by Mrs Little.[46] However, given my direction for the matter to return to the Family Court for its determination, my preliminary view is costs should lie where they fell: that is, be borne by the party incurring them.

[34] If that is not accepted by the parties, or they cannot otherwise agree, I reserve costs for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily

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42 At [49].
43 At [66].
44 At [50].
45 Family Proceedings Act 1980, s 182(1).
46 High Court Rules 2016, r 14.2(1)(a).

recovery rate – to be filed and served by Mr Little within ten working days of the date of this judgment, with any response and reply to be filed within five working day intervals after service.

—Jagose J