NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION PLEASE SEE WWW2.JUSTICE.GOVT.NZ/FAMILY/LEGISLATION/RESTRICTIONS.

IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2010-009-002693

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	P J C Applicant
AND	J C Respondent

Hearing: 15 December 2010

Appearances: S Kaminski for Applicant
Respondent in Person

Judgment: 20 December 2010

RESERVED JUDGMENT OF JUDGE JJD STRETTELL

Introduction

[1] Mr and Mrs C are British nationals who were married in London on 7 June 1969. They have lived in New Zealand permanently since 2002. They have two children, both adults. They have now separated. The date of separation is in contention. Mr C says the parties separated in 2002, whereas Mrs C says they separated in October 2009.

[2] They have assets of considerable value, all now held in New Zealand. Mrs C issued proceedings under the Relationship Property Act on 20 July 2010. The principal assets owned by the parties include a residential home in Sumner, in Mrs C's name, valued at approximately $550,000; a property in Greta Valley, known as T, which has been valued variously between $2.85 million and $3.5 million; an art collection which has not been valued but has a potential value of in excess of $2 million; a P scheme with an investment of £581,000. There is, in addition, various chattels and associated property, but the above reflects the most significant assets owned.

[3] The parties were married for in excess of 40 years (depending on the date of separation).

[4] The matter came before the Court today, following two interlocutory applications. The first, by Mrs C, restraining the disposition of relationship property and, in particular, the disposition of artworks.

[5] The second application, by Mr C, is for an interim distribution of relationship property, in particular, from the J and P C J A P Scheme.

[6] A further application seeking, by way of interim distribution, a direction that Mrs C return to Mr C the sum of £67,500 paid to her in September 2006 was not pursued by Mr C, following advice from the Court that in fact such application was misconceived.

[7] Dealing briefly, nevertheless, with that matter, it was patently obvious that to the extent such a payment may be required to be accounted for, it could only be done

so at some final disposition of property and after evidence had been heard in respect to the manner in which the payment was made, and to the extent to which such adjustment should be made, if required, in order to ensure, presumably, equal division of relationship property.

[8] By way of background, currently Mr C occupies the T property. On that property he runs a business known as The W. It is a relatively recently opened operation, centred on a restored W, which provides the opportunity for corporate functions; weddings, private events, exhibitions and the like. It is apparent that over recent years, Mr C has invested large sums of money in the property generally and, in particular, the W.

[9] Throughout the parties married life, Mr C has through investment and entrepreneurial activities provided a high standard of living for the parties. It is fair to say he sees that as his responsibility as the breadwinner, and he has a significant sense of responsibility and obligation arising from that. It is apparent, however, that although he maintains various sources of income, including a United Kingdom P, income from the P scheme and income from the commercial business, that in the medium term, although he and Mrs C are asset rich, his ability to meet outgoings are quite limited, other than through use of the sale, at this stage, of assets, or he having access to the P scheme.

[10] In respect to the artwork, ironically, although Mr C opposes the making of the order, he does not want to sell any of the paintings, for him that would be a last resort. It is, for him, a very emotional matter.

[11] Setting that to one side, Mr C submits that, in the alternative, the paintings, or the most valuable of the paintings, were acquired through inheritance and, thus, are not relationship property, or alternatively were acquired after his alleged date of separation (2002) and are not relationship property.

[12] Mrs C submits that they are family chattels and, therefore, are relationship property, irrespective as to how they were acquired.

[13] The restraint order is sought not necessarily to oppose the sale of any individual painting that may be required, or indeed its use for the purpose of security to enable a stream of income for Mr C, but to enable control and to ensure that, having regard to the significant sums in issue, there is available sufficient assets to meet Mrs C's entitlement upon final division of relationship property and, further, having regard to the fact that Mr C had, for the purposes of providing income, attempted to sell a painting in England. For various reasons it did not proceed.

[14] Mr Kaminski submitted that the Court's approach to such an application should follow the Court's approach to s 44 claims, and more particularly relying on *R v U* [2009] NZFLR (SC). There, French J held that an intention to defeat may be inferred from a knowledge of the consequences of the intended action. Thus, given Mr C intended to sell the painting, he must have know that it was a likely consequence it would cause her loss.

[15] The Court is entitled to restrain disposition of property where "it appears to the Court that any disposition of property is about to made, whether for value or not, or on behalf of, or by the direction of, or in the interests of any property involved, in order to defeat the claim or right to any other person under this Act". See s 43 of the Relationship Property Act. The Court's entitlement to act must result from evidence that indicates that a disposition is about to be made. See *Shannon v Shannon*, 5 May 2001, Nicholson J, High Court, Tauranga, CP 13/98. In that case, Nicholson J, following *Coles v Coles* [1988] 4 NZFLR 621, held that any onus upon the applicant might be discharged by necessary inference from the facts.

[16] While there is a similarity of approach by the Courts to both s 43 and s 44 applications, each application is very much determined on the individual factual matrix.

[17] Two issues arise in relation to this application. Firstly, the only evidence before the Court relates to the proposed sale of one painting by Mr C in England. Mrs C did not oppose the sale of that painting. It did not sell because of difficulties with transport, but it was Mrs C's position that those funds could have been used for the very purpose Mr C seeks, ie, to sustain himself pending final division of

property. Her concern is that other paintings may be sold. There is no evidence of that before the Court. Indeed, Mr C's position is not only that he would give an undertaking, at least until March 2011, but his oral evidence is to the effect that he simply does not wish to sell any paintings. On that basis, I cannot be satisfied that there is sufficient evidence to permit such a restraining order to be made, although it is open for the Court to reconsider the matter were there to be evidence of such proposed disposition other than by agreement.

[18] While no further consideration is required because of that finding, it is helpful, nevertheless, to set out in a little more depth, in answer to the objections raised by Mr C, the prima facie position in relation to the paintings.

[19] It remains simply a prima facie position because the evidence has not been tested by cross-examination. However, Mr C argues that the paintings are not relationship property and, therefore, cannot be subject to restraint under s 42. He maintains that they are an inheritance and, thus, protected in terms of s 10 of the Act. Section 10 states:

> **[10] Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift**
>
> (1) Subsection (2) applies to the following property:
>
> (a) property that a spouse or [[partner]] acquires from a third person—
>
> (i) by succession; or
>
> (ii) by survivorship; or
>
> (iii) by gift; or
>
> (iv) because the spouse or [[partner]] is a beneficiary under a trust settled by a third person:
>
> (b) the proceeds of a disposition of property to which paragraph (a) applies:
>
> (c) property acquired out of property to which paragraph (a) applies.
>
> (2) Property to which this subsection applies is not relationship property unless, with the express or implied consent of the spouse or [[partner]] who received it, the property or the proceeds of any disposition of it have been so intermingled with other relationship

property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

(3) Property that 1 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]].

(4) Regardless of subsections (2) and (3) and section 9(4), both the family home and the family chattels are relationship property, unless designated separate property by an agreement made in accordance with Part 6.

[20] Prima facie is correct. Assets acquired by way of inheritance are protected. However, that is itself subject to 10.4 which, designates the assets as relationship property if they fall within the definition of family chattel.

[21] Such artwork would be classified as a family chattel in terms of the definition inter alia if they are, s 2A(3), "articles of household or family use or amenity, or of household ornament, including tools, garden effects and equipment. Thus, pictures used within the household for household ornament prima facie would be family chattel and, thus, relationship property pursuant to s 10(4).

[22] That clearly is the case if, in fact, the parties did not separate until 2009, as alleged by Mrs C. The matter had not been argued in terms of whether, if the parties separated in 2002, the artworks were, at the time of separation, designated as family chattels, although the evidence tended to suggest they still were. Nor was it argued that the items were heirlooms in terms of the exclusion under the definition.

[23] In *Humphrey v Humphrey*, a decision of Judge Moran, Family Court, Christchurch, FAM-2003-009-3044, suggested to fall within the definition "an item must possess unique characteristics or be of particular importance and, generally, have been retained in the family for several generations". The evidence does not tend to indicate such a lineage in this case.

[24] In summary, therefore, the matter, although not necessarily requiring of decision having regard to the findings on the fact, indicates on balance that there is a prima facie argument to support a definition of family chattel. Thus, the Court would continue to be concerned were there to be any unilateral attempt to dispose of such property despite there being no order in place.

[25] Turning now to the application for interim disposition. Sections 25(3) and 33 of the Act confer jurisdiction on the Court to make an order for interim distribution of property. The order is a discretionary one. In *Burton v Burton* [2002] NZFLR 172, Paterson J had to consider such an application. At para [18] he noted:

> It follows, in my view, that the purpose of s 25(3) in respect of a specific asset is to give the Court a discretion to make an order, on an interim application, that it is able to make on final distribution. The order must be in accordance with the scheme of the Act. An order giving possession of money which is matrimonial property without altering the status of that money is not such an order.

He goes on at para [22]:

> It is therefore my view that there is no power in s 25(3) of the Act which empowers the Court to give possession of a balance in a trust A, or money, to one of the spouses without vesting the ownership of the money in that spouse. A vesting order converts the money into the separate property of the recipient spouse. In the circumstances of this case, the Court can vest a specific property, which includes a chosen action, in one or both of the spouses. However, in doing so, it should not infringe the provisions of the Act. In other words, it should not make an order which ultimately means that Court is unable to make the appropriate order on the final resolution of the matrimonial property case. It should not vest in a spouse more than the spouse is likely to get on a final order under the Act.

[26] In summary, therefore:

(a) The application must relate to a specific asset.

(b) Such an order converts relationship property into separate property.

(c) Any order should have regard to the likely entitlement of a party on the making of final orders under the Act, thus, any distribution should not negatively affect finalisation of the substantive claims (see in particular *Murray v Murray* [1989] FRNZ 177 (CA)).

[27] Applying those criteria here is not without some difficulty. Mr C seeks to have available to him the sum of £90,000 from the combined P scheme. His proposal is complicated. It necessitates the Court agreeing to the release to him of a half share of the combined P scheme, the sum of £290,000 sterling. He proposes to use that sum to acquire for the P fund a parcel of land currently owned by Mr C at T

but subject to a plan of subdivision. He proposes that once the subdivision is approved (March 2011), he would use the sum of £290,000, being the half share of the J P scheme, to acquire for the P scheme Lot 2 of the proposed subdivision, being an area of 15.5 hectares. Following the transaction, the P scheme would then own Lot 2, whilst Mr C says he would retain £90,000 for his own personal use and would pay £200,000 to Mrs C.

[28] The proposal is not without its complications and difficulties. Firstly, having regard to the law as it stands, the order of this Court, were it to be made, would convert the £290,000 sterling to Mr C's separate property. He is then proposing to use his separate property to acquire for the P scheme an item of relationship property (conceded as such), Lot 2 of the proposed subdivision of T. Whilst the explanation as to why he would then advance £200,000 sterling to Mrs C was not clear, inferentially it must be seen as simply a payment on A of amount due in regard to relationship property. He insisted, in evidence, that that is what he wished to do.

[29] The matter is complicated further by the manner in which this English based P scheme, although now converted to a sterling A held in a New Zealand bank (National Bank) is to be considered. That is to say, is it subject to English tax law or not? Mr C says that because there has already been a 25 percent cash withdrawal from the scheme, there can be no further cash withdrawal, other than by way of investment in certain selected types of assets. Presumably the proposed acquisition of this land would be within the approved asset category. No evidence was given in respect to that. Nor is it clear what the impact of the Court order will have on its tax implications if it is still to be treated as subject to English tax law. In other words, if the Court made an order transferring the sum of £290,000 to Mr C as his separate property, does that have tax implications despite the proposed acquisition of the land? Further, does that have any tax implication for the other half share of the P scheme prima facie to be classified on final division as Mrs C's? The answer to that is unknown.

[30] Final complexity is added to this by the evidence given by Mr C that the proposed subdivision is only permitted by the local authority on the basis that it is not acquired by a third party. What that specifically meant was not enlarged on and

only became known at the end of the hearing. But it may be an inference that could be drawn that this proposed subdivision was simply undertaken to enable access to be obtained to the cash funds in the P scheme that would not otherwise be available to the parties. This question was not, however, put to Mr C.

[31] Mrs Kaminski, on behalf of Mrs C, opposes any interim distribution. After drawing the Court's attention to the matters already referred to, he submits that the implications of this application go much further than simply an interim distribution. It necessitates the acquisition of property in order to enable, on the one hand, Mr C to receive certain funds, by implication it transfers a liquid asset into a real estate, against the wishes of Mrs C, and potentially impacting adversely against a final disposition of property. Although not touched on further, further complexities arise, given that Mr C proposes to then pay a rental to the P fund as tenant of the then owned subdivided land.

[32] There are a number of factors which cumulatively cause the Court concern as to this proposed transaction, they are:

(1) The impact of the proposed order upon an English P scheme is not known. It may have adverse consequences. The Court, at least, is entitled to know what, if any, are the consequences of (a) that proposed transaction taking place, (b) the impact of the Court order. Secondly, Mrs C, as a J owner of the P, is entitled to know what the implications might be.

(2) The P scheme, which prima facie is relationship property, is the only liquid asset available to settle any relationship property claim. It is not without merit that Mr Kaminski says that the full amount may be required to meet Mrs C's claim, although that is not an inevitable outcome.

(3) There are alternative sources of income that may overcome the current need.

(4) It is open to Mr C to seek interim bridging finance, having regard to the value of assets owned freehold. There is no evidence as to whether any specific steps have been taken to undertake such investigation.

[33] In regard to those matters, only (3) requires further explanation. With the agreement of Mrs C, if only subsequent to Mr C's decision to sell, a painting was to have been sold at a London art auction. It, unfortunately, was lost during transit, but has subsequently been recovered, but was too late for the auction. It has been returned to Mr C, but he now does not wish to pursue it, he wishes to retain it. Clearly, whilst this was a change of view, it is open to Mr C to, nevertheless, again put it in for auction, with Mrs C's consent, and in the interim borrow against the likely value of the painting, also acceptable to Mrs C.

[34] I am not persuaded, at this stage, that the order sought should be made. That is not to say that an interim distribution should not necessarily be made prior to finality if the proposed alternatives are not available, as opposed to simply not being the first choice of the respondent. It is not the Court's desire or intention to unnecessarily limit Mr C's ability to meet expenditure, including his own needs in the interim. There are, however, in the matters raised, sufficient concerns to indicate, firstly, the complexity of this proposal are of concern and, secondly, other options may well enable the issue to be more satisfactorily addressed.

[35] Finally, I am conscious that this matter is subject to a proposed settlement conference on 20 January next year. The opportunity remains to incorporate within such conference proposals to meet the needs of both parties in the interim. With respect, the interests of justice require both parties to, pending final division of property, having regard to their assets, live in a financially stress free environment. The Court would hope, if the parties are unable to agree on a means of ensuring this, to assist them. To that end, therefore, whilst this application is declined, leave is, nevertheless, reserved for further application for interim distribution to be made.

JJD Strettell
Family Court Judge

Signed at _____ on _____ 2010