

**NO PUBLICATION OF THIS PROCEEDING IS PERMITTED UNDER S
169 OF THE FAMILY PROCEEDINGS ACT 1980, EXCEPT WITH THE
LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH
THE EXCEPTION OF PUBLICATIONS OF BONA FIDE PROFESSIONAL
OR TECHNICAL NATURE.**

**IN THE FAMILY COURT
AT AUCKLAND**

FAM 2005-004-001312

UNDER "The Family Proceedings Act 1980"

BETWEEN RH
Applicant

AND AF
Respondent

Hearing: 17 November 2005

Appearances: Mr A P Miller for Applicant
Ms S Kay for Respondent
Ms V Crawshaw for Children

Judgment: 27 January 2006 at 4.10 pm

RESERVED JUDGMENT OF JUDGE D A BURNS

[1] AF and AFF were married in September 1989 and separated in March 2004 – 14 and a half years. They have two daughters – Ab aged 10 and Al aged six.

[2] AF is an accountant and AFF was a full time mother. She had some experience in the clerical/receptionist field.

[3] Prior to and during the relationship AFF experienced issues impacting on her mental he.

[4] Following separation she has become a committed patient. Her brother, RH, was appointed her property manager under the Protection of Personal and Property Rights Act 1988 (“PPPR Act”).

[5] There are two sets of proceedings before the Court: firstly under the Property (Relationships) Act 1976 and secondly under the Family Proceedings Act seeking spousal maintenance.

[6] The parties’ family home was in St Heliers Bay, Auckland. AF worked in Auckland. Following separation he shifted to Palmerston North in order to receive assistance from his parents in looking after the girls and to enable him to maintain his full time position. He shifted his employment from Auckland to further south. Subsequently he shifted from Palmerston North to nearer Wellington and now works in Wellington itself. He lives with his parents and has acquired a property of sufficient size to house himself, the two girls and his parents.

[7] Prior to and following separation, AFF has been hospitalised under the Mental Health Act. At the time of the hearing before me, she resided at Taharoto Mental Health Unit, North Shore Hospital. She has had very limited contact with the girls since separation. She has not paid anything towards their financial support.

[8] AF says that she will be a long term psychiatric patient and the prognosis is not good. He argues that it will be unlikely for her to be able to contribute to the girls’ welfare either by contact or financially.

[9] RH says that the future is far from certain and that, in the past, she has had significant periods of wellness for many years and has been able to function as a good mother. She is likely to get back on to her feet in the future. She will thus need all her capital to be able to recommence her life and be self sufficient.

[10] The relationship property pool is approximately \$850,000.

[11] AF seeks to settle a share of AFF's portion of that pool on the children, to be able to meet their needs. RH says that AF receives a significant income from his employment and is in a position to meet all of the needs of the girls. AFF will need all of her capital to start her new life once she is discharged from hospital.

[12] That is an outline of the major issue that exists in this case, but there are a number of other subsidiary issues. Counsel filed memoranda and both concurred that the issues for determination by the Court are as follows:

What were/are the assets of the parties and what were/are their values?

- Nett proceeds of sale Maskell Street.
- Increasing value of share of nett proceeds of Maskell Street paid to applicant in December 2004.
- Jointly owned shares as at date of hearing.
- Shares sold in August 2004.
- Share dividends.
- Interests from dividends.
- Apartment at Quay West and carpark.
- Income from Quay West.

- Notional interest on income from Quay West post sale Maskell Street.
- Insurance proceeds on car.
- Chattels possession of applicant.
- Chattels possession of respondent.

For division purposes should the mortgage be treated as the amount due at the date of separation or sale?

Was the one chattel (painting) retained by the respondent a family heirloom and is it her separate property?

Does the applicant wish to retain the jointly owned shares or should they be sold?

Should interest be paid on the interim distribution of shares?

Does the applicant wish to retain the apartment and carpark or should they be sold?

Should a sum of money be settled for the benefit of the children from the relationship property share of the respondent on the children and, if so, in what amount and, if so, what form should such an order take?

How much should the applicant be required to pay the respondent?

If the applicant is unable to immediately pay monies due to the respondent, should he be required to provide security and pay interest?

Should the application pay the respondent spousal maintenance including a lump sum on account of arrears?

Should there be a deferral in the realisation of relationship property assets?

[13] I now deal with those issues in reverse order.

SETTLEMENT ON THE CHILDREN OR DEFERRAL?

[14] Section 26 of the Act says as follows:

[26 Orders for benefit of children of marriage, [civil union, or de facto relationship]

- [(1) In proceedings under this Act, the Court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.]*
- (2) If the Court makes an order under subsection (1), the Court may reserve such interest (if any) of either spouse or [partner], or of both of them, in the relationship property as the Court considers just.*
- (3) An order under this section may be made and has effect regardless of any agreement under Part 6.]*

“26 Regard for interests of children

- “(1) The Court shall, in proceedings under this Act, have regard to the interests of any minor or dependent children of the marriage, and may if it considers it just make an order settling the matrimonial property or any part thereof for the benefit of the children of the marriage or of any of them, and reserving such interest (if any) of the husband or the wife or both in the property as the Court considers just.*
- “[(2) If in the opinion of the Court there are special circumstances which render it necessary or expedient that any minor or dependent children of the marriage be represented in any proceedings under this Act, the Court may appoint a solicitor or counsel to represent such children.*
- “(3) Fees for professional services provided by any solicitor or counsel appointed under subsection (2) of this section, and reasonable expenses incurred,—*
- “(a) May be determined in accordance with regulations made under this Act; and*
- “[(b) Are payable by such party or parties to the proceedings as the Court orders or, if the Court so decides, are payable out of public money appropriated by Parliament for the purpose.]*
- “(4) Any amount of any fees and expenses ordered to be paid by any party under subsection (3)(b) of this section shall, if paid by the Crown, be a debt due to the Crown by that party and, in default of payment of the amount, payment thereof may be enforced, by order of a District Court or the High Court as the case may require, in the same manner as a judgment of that Court.]”*

[15] Section 26A of the Act says:

[26A Postponement of sharing

- (1) *On the division of relationship property under this Act, the Court may make an order postponing the vesting of any share in the relationship property, either wholly or in part, until a specified future date or until the occurrence of a specified event if the Court is satisfied that immediate vesting would cause undue hardship for a spouse or [partner] who is the principal provider of ongoing daily care for 1 or more minor or dependent children of the marriage[, civil union, or de facto relationship].*
- (2) *The Court may order postponement of vesting under this section only for as long as necessary, and only to the extent necessary, to alleviate the undue hardship.*
- (3) *Nothing in this section limits section 33.]*

[16] The Court of Appeal said in the decision of *Coxhead v Coxhead* [1993] 2 NZLR as follows:

“... it cannot be authority for simply reducing the proper entitlement of one spouse and increasing that of the other. ... in relation to s 26”.

[17] In *Bradwell v Kennedy* 23/305 CIV 2004-486-611, Young J also commented that *“s 26 is not a way of getting around s 13”*.

[18] In this case, the Court appointed counsel to assist the Court to ensure that the interests of the children were placed appropriately before the Court and arguments both for and against the interests of the children were argued in a balanced way. Ms Crawshaw was appointed in that capacity. She drew my attention to the leading authority in relation to s 26 of the PRA, a decision of His Honour Judge Adams in *R v R* (1998) 17 FRNZ at pp 75-76. She submitted that His Honour, after considering the case law under s 26, concluded that the following principles apply:

- “(1) Prima facie matrimonial property is to be regarded as the property of the parties to the marriage [(1998) 17 FRNZ 75, 76].*
- (2) In every case where there are minor or dependent children the Court is obliged to have regard to the respective interests of each such child.*
- (3) The context of the consideration of the welfare and interests of the children is “in the light of the property division between husband and wife, to ensure their financial protection during minority or dependency” (per Casey J in **Rhodes v Rhodes** (No 2) (1979) 2 MPC 160. I note also the discussion of s 26 by His Honour Judge Inglis QC in **Wheeler v Wheeler** (1984) 2 NZFLR 385).*
- (4) The Court is not precluded from considering the interests of adult children and may have jurisdiction under s 26 Matrimonial Property Act 1976 to settle property for*

the benefit of an adult child (Voorburgh v Voorburgh (1979) 2 MPC 197); Re Roberts [1994] 1 NZLR 200; (1993) 10 FRNZ 668; [1993] NZFLR 731; Lockie v Lockie (1993) 11 FRNZ 81).

- (5) *It will be the exceptional case where the consideration leads to an actual award for a child.*
- (6) *It would be wrong in principle to use s 26 to anticipate succession.*
- (7) *Default or inability of a parent to provide appropriate maintenance, upbringing, shelter, or nurture for a child are relevant factors, whether or not the default is wilful.*
- (8) *In the general run of cases a s 26 order should not be used to substitute or supplement child support arrangements. Nonetheless the Court's discretion is unfettered by statute.*
- (9) *Section 26 is not a backhanded means of providing damages to a child for ordinary parenting shortcomings.*
- (10) *An award under s 26 must be reasonable in all the circumstances (p 86, line 26)".*

[19] She also drew my attention to a decision of *S v C* [1998] NZFLR 734 at p 6, where the father was a chronic paranoid schizophrenic, living in supervised accommodation. His Honour Judge Brown noted that s 26 resulted in the Court's "duty to weigh the kind of raw choice presented by the present proceeding" in terms of balancing the needs of the psychiatric patient and those of the children. In that case, the children were all adult and the majority of the respondent's share of the funds were to be paid to the adult children in equal sums.

[20] She also drew my attention to the decision of *C v C* (1977) 1 MPC 44, where Barker J made an order for the benefit of the children where the children's mother had been in psychiatric care for eight years and had no prospect of recovery. He noted "*moreover the interests of the minor or dependent children cannot be ignored, because of the clear direction given by s 26(1) that the Court shall have in regard to their interests. Obviously, a balancing has to take place between the interests of the mental patient and those of the children*".

[21] She also drew my attention to a decision of *M v M* [2004] NZFLR 72 where the High Court upheld on appeal the Family Court decision to make an order under s 26 where the mother had the care of a disabled daughter (who had Downs Syndrome and epilepsy) and who was likely to be dependent on her for her lifetime.

[22] She also referred to the decision of *Speller v Chong* [2003] NZFLR 385, a decision of His Honour Judge Inglis QC. That decision was upheld on appeal by the

High Court. Judge Inglis made an order pursuant to s 26 for the specific purpose of a lump sum maintenance for the children in terms of orders under s 26 for that specific purpose instead of an order under s 32 (lump sum child support). The Judge in that case vested part of the husband's share in relationship property "*on trust for general education, maintenance and advancement of the youngest child, with the mother as trustee, the capital and accrued income of the trust fund to vest in the youngest child when he attains his majority according to New Zealand law*".

[23] She directed me to the decision of ***Rhodes v Rhodes*** (Supreme Court, Christchurch M 93/77, 19 February 1979, a decision of Casey J) where it was made clear that an order under s 26 ought to be made where it is required either to "*protect an improvident parent's share of property for their needs or where the children are unlikely to be adequately provided for by their parents on the dispositions made under the Act*".

[24] She rightly submitted that the factors the Court needs to consider in this particular case are:

Whether the children are adequately provided for in their current financial circumstances.

The need of the applicant to retain a family home for the children's and his benefit.

Whether the applicant is put to additional expense/costs in being entirely responsible for the children's care.

The likelihood of the respondent to be able to assist with child support.

The respondent's psychiatric status in terms of present evidence before the Court and her likely needs.

The nature/form of an order under s 26.

[25] Mr Miller, acting for AFF through RH, drew my attention to the principles in the Act under s 1N and 1N(a), (b) and (c). He also reinforced the Court of Appeal decision in *Coxhead*. He referred me to a decision of *Matehe v Matehe* (1998) 17 FRNZ 343 where it was stated that where both parties are in a “reasonable capital position” a Court may be reluctant to accord the interests of the child any special consideration.

[26] He also referred me to the extract in *Fisher on Matrimonial and Relationship Property* Lexis Nexis NZ 18.84, where it is stated that the criteria for settlement under s 26 are:

“That such a settlement will normally be warranted only where, after taking into account child support obligations and appropriate provision for implementing the relationship property division and providing for occupation of the family home under the Property (Relationships) Act 1976, there remain grounds for believing that during their minority or dependency the children will not be adequately provided for by their parents”.

“Consequently, in line with its more immediate statutory predecessors, settlements under the Property (Relationships) Act 1976, Section 26 have normally been declined on the ground that the children are already adequately provided for by other means”.

An award under Section 26 will therefore be granted only in the exceptional case. It is further stated at 18.84 (Fisher) that a case may exist for a settlement under Section 26 where-

- *“A party has abandoned the family and is unlikely to pay adequate maintenance”.*
- *“Where there are dependent children of whom neither party has custody”.*
- *“Where the parties have demonstrated that they are unfit to have uncontrolled responsibility for the material welfare of the children.*
- *“Where the financial future of the parties seems hazardous”.*
- *“Where the custodial parent has remarried or is living in a de facto relationship and there is a danger that the interests of the children of the first family will become subordinated to those of the second family”.*
- *“A parent’s default or inability to provide properly for a child are relevant factors whether or not the default is wilful”.*

[27] He further submitted that:

“In each of these cases, however, it would still seem a prerequisite that adequate provision for the children will not be provided by the parent in question by other means. On the principles previously outlined, it is also appropriate in most cases to confine the children’s interest under the settlement to minority and dependency with residual capital reserved to the parent from whose share the settlement was taken, unless there are special factors such as recompense or past neglect”.

[28] He further directed me to 18.3 of *Fisher* which sets out the factors against settlements on children indicating that s 26 settlements will only be made in limited circumstances-

Earlier cases in which settlements on children were relatively common now seem distinguishable in view of the decreased modern emphasis upon punishing domestic misconduct and the lack of current jurisdiction to order that all or part of maintenance for a wife and children take the form of a settlement upon both.

The relationship between the Property (Relationships) Act 1976 and the Child Support Act 1991 suggest that financial provision for children on the breakdown of a relationship is normally intended to take the form of child support under the 1991 Act, rather than a property settlement under the Property (Relationships) Act. In contrast, the principal purpose of the Property (Relationships) Act 1976 is in terms of Section 1M to recognise the equal contribution of husband and wife and to provide for a just division of the relationship property between the spouses ...

The children merely having a subsidiary role in “taking account of the interests of any children of the marriage or children of the de facto relationship”.

The phrase “interests of any minor or dependent children in Section 26(1) is not intended to imply that the children have any proprietary rights of their own in the relationship property in an analogist to that of their parents. Parliament did not in that pre-emptory fashion intend to bypass the existing channels whereby children succeed to their parent’s property. The phrase “Interests of any minor or dependent children” in Section 26(1) is concerned with the welfare of the children in the light of the property division between the parents to ensure the financial protection of the children during minority or dependency.

Such welfare can normally be safeguarded by ensuring that the property division between the parties themselves is implemented in an appropriate form under Section 27 to 33. It has obvious application in dealing with occupation of the family home and the custodial parent’s ability to acquire an appropriate home ...

“In the usual case, the interests of the children can be protected by these various means without needing to appropriate to the children ownership of assets otherwise forming part of a parent’s share under the statutory property regime”.

[29] He further argued:

“Finally, the emphasis under Section 26 is upon the interests of the children only during their minority or dependency. It must be borne in mind that, as far as possible children should not suffer in their material welfare as a result of the breakdown of the marriage or relationship, they would in the normal course have received merely shelter, food and education according to the means of the parents in any event, and not property of any substance during their minority or dependency. There is little justification for using Section 26 to effect a settlement which by appropriating capital of children places children in a better position materially than they would have been in had the marriage or relationship

survived. Likewise it would be wrong to use Section 26 to anticipate succession, i.e. give a child a share in property which might eventually be inherited on the child's death, or to use Section 26 as a backhand way of compensating a child for parental shortcomings”.

[30] Ms Kay, on behalf of AF, argued that a trust should be set up for the interests of the children where the children were the only discretionary beneficiaries to have an interest in the capital sum and that AF would contribute to the capital of the trust in equal proportions to AFF.

[31] She referred me to an early decision of *Dangerfield v Brewerton* (1985) 3 NZFLR where the Court deemed it relevant to consider future maintenance in a case where there was no financial or emotional support from the father. It appears that case resolved the issue by way of lump sum maintenance.

[32] She also made submissions in relation to the principles enunciated by His Honour Judge Adams in *R v R*. She argued that the application of those principles meant in this particular case there should be a lump sum set aside for the interests of the children from the property interest of AFF.

[33] I do not have any direct evidence before me as to AFF’s current situation and prognosis for the future. With the consent of all counsel, however, I was able to read the file under the PPPR Act and had access to a report dated 28 June 2005 prepared, for the purposes of that application, by the Regional Psychiatric Services of Waitemata District Health Board. That report, which was comprehensive, outlined a 22 year history of contact with mental health services. It indicated that there were periods of wellness but that she would relapse, especially if she decreased or stopped her medication.

[34] It was clear that she suffered from a mental disorder as defined by the Mental Health Act and also, for the purposes of the Criminal Procedure (Mentally Impaired Persons (Act) 2003). She is currently under a compulsory treatment order (inpatient). After reading the report, I concluded that she is likely to remain a committed patient for a substantial period of time. I anticipate she will be able to go back into the community with oversight from the mental health services and there will be periods of time that she will function reasonably well provided she takes her medication.

[35] I do not anticipate, however, that she will be able to have meaningful contact with the two girls and provide emotional support to them for the foreseeable future, nor will she be in a position to be able to support them financially by any provision for child support. I hope, for her sake, this will not be the case but I need to be realistic about the likely prognosis. It is likely, therefore that the responsibility for caring for the two girls will fall on AF.

[36] The Care of Children Act 2004 came into force on 1 July 2005. It introduced some significant changes to the law relevant to children. One of those changes was the clear statement of the responsibility of parents towards children. Section 4 of that Act sets out the paramountcy principle. Section 5 sets out the principles relevant to child's welfare and best interests. Section 15 defines guardianships. Section 16 sets out the exercise of guardianship, including the duties, powers, rights and responsibilities of the guardian of a child, including (without limitation) a guardian (a) having the role of providing day to day care for the child, (b) contributing to the child's intellectual, emotional, physical, social, cultural and other personal development, and (c) determining for or with the child or helping the child to determine questions about important matters affecting the child.

[37] It is clear that AFF is a guardian of the two girls and has an ongoing responsibility for their care and welfare. In this case I have to balance her responsibilities to her children against her entitlement under the Property (Relationships) Act. After considering the evidence and submissions I have decided not to settle property on the children but to defer part of AFF's entitlement for a period of time until the children are closer to being independent. I do so for the following reasons:

[38] The Court has been asked to make a prediction about AFF's future. There is too much uncertainty. When considering the principle under the PRA, the Act is about the division of property owned by the parties not their children. The youngest child has been described as having special needs. On listening to the evidence, this is more in the area of her educational needs, as opposed to her health. I am satisfied the state education system can meet those needs.

[39] My view is the described issue does not justify of itself capital being set aside. It emerged during the hearing that the main concern of AF is the lack of child support and emotional support. He sought sufficient capital to be set aside to reduce his mortgage, thus relieving pressure on his cash flow. The prognosis for both children is good.

[40] If AF remained in the family home (in St Heliers Bay), he would have had a good case to defer the sale in the interests of the children. I am confident AF can meet the children's needs but the lack of child support does put a strain on him. AFF has an obligation and responsibility to the children and it is not fair to AF that the responsibility falls entirely on him. For AF to have the use of part of AFF's capital whilst the children are dependent enables her to meet that obligation (in part) but also provides certainty that she will be able to receive her capital entitlement in due course. I intend to build in a review so that the issue of further deferment can be considered at that time depending on AFF's circumstances and her health when that is better known.

[41] I accept the children need a roof over their heads and that the standard of accommodation should be similar to that enjoyed by AF and AFF when they were together. I accept, as well, that AF is meeting all of the children's needs.

[42] I further accept the reasons for the relocation of the children were necessary. AF needed the support of his parents to be able to look after the children and maintain a full-time job. It was not possible for AFF to co-parent these children.

[43] When looking at the cases on occupation orders the Court has struck the balance point between the needs of the children to have a stable home, as against the right of the parties to receive both his/her capital, as between one to five years. In this case, on the basis of the evidence that I have heard I believe the outer end of that spectrum is appropriate.

[44] In this case, the nett proceeds of the sale of the former family home were \$401,062. I have rounded this to \$200,000 each. I have therefore decided \$200,000 of AFF's entitlement of relationship property should be advanced, following

division, by her to AF, to be secured by appropriate mortgage on usual Law Society terms, to provide the necessary security. The term of that mortgage should be for a period of five years from the date of this judgment. It should be on an interest-free basis and only to provide for interest on a penalty basis in the event of non-payment of the principal at 10 percent per annum. The use of that amount of capital will thus relieve AF from having to obtain a mortgage from a bank in a similar amount and thus be a back-door way of meeting AFF's child support obligations. It will have a flow- on beneficial effect to the children because there will be more money in AF's hands to enable him to meet the needs of the children. He will also be able to ensure that when AFF's circumstances are better known as time evolves and her ability to be able to meet the needs of the children are clarified.

[45] I grant leave to either party on seven days' notice to make application for variation of this order in the event of the underlying factual circumstances significantly changing, e.g. the children leave AF's care and return to their mother's care or AFF obtains a full-time job and is in a position to meet her child support obligations.

OTHER ISSUES

[46] I have followed the same sequence as counsel's submissions.

Rental Accommodation – AFF Post-Separation

[47] In my view there should be no adjustment for this payment between the parties because, following separation, there is always a period of adjustment and it was appropriate, in my view, to treat this as a form of support for AFF to provide her with accommodation.

Painting

[48] Having carefully listened to the evidence, in my view the painting taken by AFF post-separation is a family heirloom. It was clear that it had been within the H family for at least one generation (probably more). It was a treasured item and should be retained by AFF as an heirloom. It is her separate property as a result and should not form part of relationship property. Although there is no definition of heirloom contained within the Act, in my view an heirloom is something that should be passed down from one generation to another to qualify and, in this particular, that criterion is clearly met.

Informal Payments

[49] Again, for similar reasons as above, the informal payments by AF of \$3,890 should be treated as support and not the subject of a capital readjustment between the parties.

Tax Rebate

[50] This is an amount received by AFF that she was entitled to. The evidence showed that the tax rebate was divided equally between the parties. In my view there is therefore no need for any further adjustment between them on that issue.

Costs of Preparation of Home for Sale

[51] In my view AF is entitled to receive an adjustment back of one-half of the costs of the preparation of the home for sale. Those costs would have been normal incidence of sale and, in my view, were necessary to effect the sale. It is only appropriate that AF have an adjustment for one-half.

Share Portfolio

[52] The share portfolio is relationship property. It should be divided equally between the parties. The value should be fixed at the date of hearing. If AF wishes to acquire from AFF the balance of the shares retained, AFF's one-quarter share should be valued at \$19,999 being the amount that she received. The unsold balance should be valued at the date of hearing. If AF does not wish to acquire the shares from the marriage partnership, they should be sold forthwith and the nett proceeds of sale divided equally.

Post-Separation Payments Made by AFF

[53] In my view any payments made by her for accommodation or other payments are her own responsibility and no adjustment should be made in her favour or any payments made.

Joint Account

[54] The joint account value should be taken as at the date of separation.

Quay West Apartment

[55] I direct that AF is to have 14 days after the release of this judgment to exercise an option to acquire from the marriage partnership the Quay West apartment at the valuation presented to the Court and agreed to between the parties. This is not to incorporate an adjustment for GST. No GST was paid on the acquisition of this apartment.

[56] Whilst it is a possibility that it may attract GST on sale, there is no certainty with respect to that and it depends, to a large extent, upon the manner in which it is sold. Accordingly, if AF wishes to exercise the option referred to, he needs to do it on the basis of GST being zero-rated. If he does not exercise the option, I direct that there is an order for sale and the property is to be placed on the market forthwith. The nett proceeds of sale are to be divided equally between the parties. There is to

be an adjustment in favour of AFF for one-half of the nett rental stream income, taking into account any tax rebates. Accordingly, the only costs that are to be deducted from the rental are the costs of the mortgage and administration costs. The parties will each be responsible for their own taxation liabilities arising from the rental income. There is to be no adjustment between the parties for their respective taxation positions.

[57] In the event of sale and GST being incurred, then that GST liability is to be met equally.

Adjustment for Increased Value of Nett Proceeds Maskell Street

[58] RH seeks, on behalf of his sister, an adjustment for what is alleged to have been the likely increase in value of her half share if Maskell Street had not been sold. For the reasons outlined above, for deferral of realisation of her share I do not propose to make any adjustment for this claim. In my view it is part of her meeting her ongoing responsibility for the needs of the children by providing a home for them.

Share Dividends

[59] My view is the share dividends directly rise from relationship property. There should be an adjustment for one half of the share dividends received by AF in favour of AFF. I invite counsel to undertake the necessary calculations as part of the final wash-up of relationship property. I do not propose, however, to provide for any interest to be payable in favour of AFF on the receipt by AF of those dividends.

Income from Quay West

[60] Similarly the income from Quay West should be shared equally between the parties. The income has been used, as I understand it, to meet the outgoings on the property. I am satisfied that the income has been used to meet the outgoings and that AF has faithfully used those proceeds accordingly. In my view, there therefore needs to be no further adjustment with respect to the income on Quay West, but there

will have to be quantification on the shortfall, which will need to be adjusted from the proceeds of sale or, alternatively, by way of adjustment on the final wash-up.

Family Chattels

[61] It is clear from the evidence that the respondent retained the majority of the household furniture and chattels. There needs to be an adjustment for one half of the value in favour of the applicant by the respondent. The valuation evidence before me is of little assistance. At the end of the day I have to do my best to make an assessment on the evidence I have before me. I direct that the respondent pay to the applicant the sum of \$7,500 representing her one half share of the household furniture and chattels retained by the respondent.

Mortgage on Maskell Street – Date of Separation or Date of Sale

[62] In my view the normal principle should apply in this particular case. The respondent, AF, should be solely responsible for the outgoings on the Maskell Street home from the date of separation down to the date of sale. He should receive a credit for any principal reductions made on the mortgage from the date of separation to the date of sale and, accordingly, in determining the amount of equity in the Maskell Street property, the mortgage outstanding at the date of separation should be used for that purpose. There should be no adjustment for other outgoings on the property, including rates, water rates, fire insurance, etc, because AF had the use of the home for that period of time and AFF was having to put a roof over her head somewhere else at whatever cost and she would have had to meet that cost herself. I acknowledge that there was a period of time where AF provided assistance. However, for the reasons I have already given, I do not propose to make an adjustment for that.

Spousal Maintenance

[63] RH, on behalf of AFF, has sought spousal maintenance. It was said that AF earned a very good income and that AFF was in relatively impoverished circumstances and was in need of support. A budget was prepared showing the

shortfall in her income situation. The application was based on s 63 of the Family Proceedings Act. That section has a number of jurisdictional requirements. It is said that the tax rebate insurance proceeds and share distributions were capital payments and should not be treated as income. Reliance is placed on the standard of living of the common household. At the date of hearing, AFF was at Taharoto Mental Health Unit, North Shore Hospital. She was in receipt of a benefit. Other than that her needs were being met by the state. In addition to a weekly payment by way of future instalments, arrears were sought from the date of separation. It is proposed that the sum of \$600 per week be paid and arrears of \$30,000 (being 50 weeks at \$600).

[64] Section 63(1) refers to the need for maintenance to meet the reasonable needs of the claimant party because of one or more of the circumstances specified in subs (2). In other words, setting up a jurisdictional link for the Court to be satisfied that one or more of the circumstances in subs (2) applies.

[65] Subsection (2) has a number of different factors. Firstly, there is the ability of the claimant party to be self-supporting. Secondly, there is the issue of ongoing support for dependent children. Thirdly, there is the standard of living of the parties who lived together in the common household. If there is any physical or mental disability. It is clear to me, in this case, that the alleged inability of AFF to meet her needs is not due to any division of functions within the marriage but is solely due to her suffering from mental health issues. It is clear that the first task of the Court is to identify the applicant's reasonable needs and the amount of money required to satisfy. The second is necessary to identify the extent to which the applicant cannot meet those needs. Thirdly, it is necessary to see whether that inability arises because of a qualifying circumstance.

[66] In my view, the applicant has failed to establish the necessary jurisdictional requirements for an award for spousal maintenance. I am not satisfied that the applicant has been unable to meet her own needs. I am not satisfied that there is a link between any inability to meet those needs and the division of functions within the marriage. The causal link has not been established and, on the evidence before me, I am satisfied that the State has been meeting her reasonable needs for the majority of the time post-separation. In my view, I have not been shown where the

applicant has had to incur any debt to demonstrate that she has not been able to meet the needs. I acknowledge it is likely that she has used capital supply to her to meet needs but there was clear evidence that some of her choices in payments or money expended were unwise and many of those payments were not for meeting her living costs. The respondent has had to meet significant costs in providing care and support for the parties' children and it would be an inappropriate burden on him to require him to pay spousal maintenance in addition to providing that support.

[67] The applicant, in my view, has been in a position to be self-supporting post-separation. She has not had the constraints of providing care for the children, however her health has clearly prevented that occurring. In the exercise of my discretion in this matter, I am not satisfied that it is appropriate for a spousal maintenance award to be made and, for the same reasons, do not propose to make an award of arrears.

[68] I therefore dismiss the application for spousal maintenance.

Disposition

[69] I now invite counsel to confer in the light of this decision. Decisions have to be made by the respondent. I grant leave to either party to come back before me on three days notice for such further orders or directions as are necessary to implement this decision. I hope that both parties now negotiate and can now resolve matters without the need for further recourse to the Court.

Dated at Auckland this 27th day of January 2006 at 4.10 pm.

D A Burns
Family Court Judge