

**IN THE HIGH COURT OF NEW ZEALAND
BLLENHEIM REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WAIHARAKEKE ROHE**

**CIV-2020-406-5
[2021] NZHC 2330**

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| UNDER | the Property (Relationships) Act 1976 |
| IN THE MATTER | of an appeal against a decision of the District Court at Blenheim |
| BETWEEN | PAUL ANTHONY PALMER Appellant |
| AND | SIRPA ELISE ALALAAKKOLA Respondent |

Hearing: 26 July 2021

Appearances: B A Fletcher for Appellant
No appearance for Respondent

Judgment: 7 September 2021

JUDGMENT OF ISAC J

Introduction

[1] This appeal raises a novel question: is copyright in an artistic work relationship property? Ms Alalaakkola is a painter. During her 20-year marriage to Mr Palmer she created a number of original works. Now that they are separated, one of the issues the parties have been unable to resolve is the status of copyright in the paintings as relationship property. I have found that it is.

[2] In a judgment of 10 February 2020, the Family Court determined the division of relationship property,¹ but reserved the issue of copyright in the artworks and occupational rent until a decision of 6 March 2020.²

[3] The 6 March decision found copyright in the artworks was Ms Alalaakola's separate property. It also fixed occupational rent for the former family home at \$300 per week.

[4] Mr Palmer appeals the 10 February and 6 March 2020 decisions. He says:

- (a) copyright in the paintings created during the relationship is relationship property and should be divided equally between the parties;
- (b) the paintings created during the relationship should also be divided equally between the parties;
- (c) occupational rent be assessed at an appropriate figure; and
- (d) that the directions as to the disposition and possible sale of the family home (made in the 10 February decision) should be cancelled and the home be placed on the open market to be sold by way of auction.

[5] Ms Alalaakkola was served with the notice of appeal and other related documents but did not take part in the appeal process or hearing.

Family Court decisions

10 February decision

[6] The Judge began by noting he was going to deal with the division of relationship property in two stages. That was because the evidence had been unsatisfactory given the two parties were incapable of co-operating with each other.³ Neither were represented by counsel, and it is evident from the irrelevant and at times

¹ *Alalaakkola v Palmer* FAM-2017-006-00016, 10 February 2020.

² *Alalaakkola v Palmer* [2020] NZFC 1635.

³ *Alalaakkola v Palmer*, above n 1, at [1].

inflammatory evidence they filed that the lack of representation was unfortunate. It has undoubtedly hampered the ability of the parties to reach a resolution for themselves.

[7] The Judge identified the scope of the relationship property,⁴ before noting that following separation Mr Palmer entered the former family home and removed a substantial number of Ms Alalaakkola's artworks.⁵ The Judge also noted the existence of other artworks in Finland, where Ms Alalaakkola was born.⁶ He observed the situation relating to the artworks located overseas was "quite unsatisfactory"; some canvases were stored in a cowshed, while others were hanging in a hotel in the local town⁷ and in a gallery.⁸

[8] The Judge then gave directions regarding a process for division of the artworks,⁹ and the family home.¹⁰ In terms of the latter, possession of the home was to vest in the registrar who was to arrange a current valuation. Upon the receipt of the valuation, Ms Alalaakkola was to have the first option to purchase at the figure set out in the valuation report. If she did not exercise the option, Mr Palmer was to have the opportunity to purchase the property at the same value. If Mr Palmer did not exercise his option, the registrar was to place the property on the market for sale by way of public auction.¹¹

[9] The Judge went on to make directions regarding chattels,¹² the bank accounts,¹³ a car,¹⁴ and reserved the matter of copyright,¹⁵ and occupational rent.¹⁶

⁴ At [2]. This consisted of the former family home (with a studio attached to it), a substantial collection of artwork created by Ms Alalaakkola, a van which has been sold by Ms Alalaakkola to her son, bank accounts, and unresolved chattels.

⁵ At [4].

⁶ At [5].

⁷ Ms Alalaakkola says that she sold these to the owner, which Mr Palmer does not accept.

⁸ At [5].

⁹ At [6]–[11]. These are outlined in more detail in the discussion section below.

¹⁰ At [12]–[15].

¹¹ The net proceeds of the sale (after the necessary payments relating to the property and sale and any adjustments that may be made) was then to be available for equal distribution.

¹² At [16]–[18].

¹³ At [19].

¹⁴ At [20]–[21].

¹⁵ At [22].

¹⁶ At [26].

6 March decision

[10] In his 6 March decision, the Judge began by noting that as the relationship commenced in 1997 the issue of copyright was governed by the Copyright Act 1994.¹⁷ Section 14 of that Act provides that copyright is a property right that exists in accordance with the Act. It includes copyright over original artwork.¹⁸ He then observed that the copyright vests in the applicant (Ms Alalaakkola) alone, because she was the “author” who created the work under s 5 of the Act.¹⁹ And s 16 provides that the owner of the work has the exclusive right to copy the work.²⁰

[11] The Judge then outlined the parties’ positions.²¹ He noted that the parties had agreed that Mr Palmer could keep the paintings he had identified, but that the “sticking point” was that Mr Palmer sought to have the Court transfer the copyright in those particular paintings to him so he could reproduce copies of the artwork and then sell them to derive a future income stream.²² Although Ms Alalaakkola was agreeable to Mr Palmer keeping the art he had identified, she objected to him having the copyright because, as the Judge put it,²³

She would have no control over how many prints were made, and the cost at which they may be sold, and in her view the respondent [Mr Palmer] could therefore undermine the future financial or intrinsic value of her artistic creations, and that she therefore loses control over her own work.

[12] The Judge then identified three questions he had to address:²⁴

- (a) Is copyright relationship property for the purposes of the Property (Relationships) Act 1976? If so,

¹⁷ *Alalaakkola v Palmer*, above n 2, at [3].

¹⁸ At [4].

¹⁹ At [5]. Despite Mr Palmer saying he assisted Ms Alalaakkola with the art by purchasing canvasses and the like, the Judge considered at [6] that Ms Alalaakkola was solely responsible for the actual creation of the art, and that she was the one with the talent. In that regard, the Judge did not think the paintings could be regarded as work of joint authorship as provided by s 6 of the Copyright Act.

²⁰ At [7].

²¹ At [8]–[10].

²² At [8].

²³ At [9].

²⁴ At [10].

- (b) Can the Court transfer the copyright in the agreed pieces of art from the applicant to the respondent?
- (c) If so, should the Court exercise its discretion and transfer the copyright?

[13] Turning to the first issue, the Judge pointed to the definition of property in s 2 of the Property (Relationships) Act.²⁵ He noted the paintings themselves are property, and that an individual copyright must attach to each individual painting.²⁶ The Judge considered the copyright that attaches to the art work would either be property under s 2(c)²⁷ or s 2(e)²⁸ of the Act, and that a statement in *Clayton v Clayton* supports this:²⁹

We accept the submission for Mrs Clayton that the property definition in s 2 of the PRA must be interpreted in a manner that reflects the statutory context. We see the reference to “any other right or interest” when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.

[14] After observing that each artwork has two distinct and severable property rights — the painting itself and the copyright in it³⁰ — the Judge posed this question: does the “property” in respect of the copyright attaching to the painting created during the relationship, change to relationship property merely because the paintings were created during the relationship and are therefore themselves relationship property?³¹

[15] He suggested on the one hand it could be argued that the copyright does not come into existence until the painting is created, and so if the painting is created during the relationship it must be relationship property.³² On the other hand, however, the Judge said:³³

²⁵ At [13].

²⁶ At [14].

²⁷ Defined as “any estate or interest in real or personal property”.

²⁸ Defined as “any other right or interest”.

²⁹ The Judge cited *Clayton v Clayton* [2015] NZCA 30, but the correct citation is for the Supreme Court’s decision: *Clayton v Clayton* [2016] NZSC 29; [2016] 1 NZLR 551; (2016) 4 NZTR 26-002; [2016] NZFLR 230; (2016) 31 FRNZ 61 at [38].

³⁰ At [19]. The Judge had before this (at [18]) also concluded that copyright in the artworks created before the relationship and post-separation would not constitute relationship property.

³¹ At [20].

³² At [21].

³³ At [22]–[23].

... it could be argued that the artistic skill that rests in the applicant to create the art is a personal skill or qualification particular to her, and a skill which she had prior to the relationship, that it remains her separate property. This approach is consistent with s 16 of the Copyright Act which vests the copyright in the author of the art.

[23] Both parties were not involved in the creation of the artworks. They were created solely by the applicant as the artist. The work created is relationship property, but her skill in the creation is not. It is her separate property.

[16] Although it was unnecessary to go further having found that copyright in the works was not relationship property, nevertheless under the heading ‘Can a Court order a transfer of copyright’, the Judge concluded it can.³⁴

[17] The Judge then moved to what he referred to as the crux of the problem in the case: should the Court exercise its discretion to order transfer?³⁵

[18] He noted that “clearly the Property (Relationships) Act requires a just and fair division of relationship property” and that the intent is “that both parties are entitled to share equally in property that has come into existence during the relationship.”³⁶ But he said the Court only has jurisdiction to order division of relationship property, and it does not have jurisdiction to order transfer of separate property.³⁷

[19] The Judge gave three reasons why he would not have ordered a transfer of the copyright if he was wrong to classify the copyright as separate property.³⁸ The three reasons were:

- (a) if copyright is transferred it could mean each party is required to account to the other in respect of any item created under their copyright. The Judge said this would create a “potential nightmare for accountability in the future” and would also be inconsistent with the clean break principle encompassed in the Act;³⁹

³⁴ At [24]–[26]. Citing s 113 of the Copyright Act and *Oraka Technologies v Geostel Ltd* [2013] NZCA 111 at [76].

³⁵ At [27].

³⁶ At [27].

³⁷ At [28].

³⁸ At [29]–[36].

³⁹ At [29].

- (b) Ms Alalaakkola is the creator of the art and is likely to continue to paint in the future. If copyright is transferred, she could potentially find herself in competition with copies of her own artworks (they being the reproductions produced by Mr Palmer) as she would have lost total control over the numbers of prints that Mr Palmer may reproduce and the cost at which he may sell them;⁴⁰ and
- (c) Transferring the copyright to Mr Palmer would be contrary to the clean break principle, and has the potential to bring the parties into conflict throughout the life of the copyright, as Ms Alalaakkola would have no ability to interfere or endeavour to control the amount or extent of reproduction.⁴¹

[20] The Judge noted there was no dispute that Mr Palmer would receive the agreed paintings on final division, and that Mr Palmer is entitled to sell those paintings as he sees fit. However, the Judge added that any individual who purchases a painting is not entitled to reproduce any painting without a proper authorisation from the artist. In this case Ms Alalaakkola will not give that authorisation and Mr Palmer is asking the Court to make an order against her wishes.⁴²

[21] The Judge said Ms Alaaakola had given “valid reasons” as to why she did not give her consent, and on his view the Court should not act inconsistently with her expressed wish. To do so, the Judge added, is “merely inviting the parties to continue with future conflict.”⁴³

[22] The Judge accordingly declined to transfer copyright in the paintings that the parties have agreed can be retained by Mr Palmer as his separate property.⁴⁴

⁴⁰ The Judge agreed with Ms Alalaakkola that this has the potential to undermine the value and saleability of any new work that she may create, and any prints that she herself would be at liberty to produce by virtue of the copyright in the paintings which she retains and creates in the future.

⁴¹ The Judge noted that the clear intent of Mr Palmer is to derive a future income by his reproducing and selling of the artworks.

⁴² At [34].

⁴³ At [35].

⁴⁴ At [36].

[23] In relation to occupational rent, the Judge noted this issue arose because Ms Alalaakkola remained in occupation of the family home following separation⁴⁵ and had run an AirBnB out of the property (although there was no evidence of how long she had run it for or what money she derived from it).⁴⁶ There appeared to be consensus as between the parties that the property could have derived an income of \$300 per week although there was no valuation or evidence supporting that figure.⁴⁷

[24] In suggesting \$300 a week was a fair and reasonable expectation, the Judge considered three factors:

- (a) Mr Palmer has by virtue of the 10 February decision derived his share of increase in the equity due to inflation between the date of separation and now;
- (b) if the property were to be rented at \$300 per week from the date of separation until settlement of the sale of the home, then out of the accumulated income one would have to pay mortgage, rates, and insurance; and
- (c) there “is absolutely no evidence to support any finding as to the length of time the AirBnB was operated or what income was derived” so the Judge considered he was not in a position to make any adjustment in respect of that income.

[25] The rent was to be calculated at \$300 per week from the date of separation down to the date of settlement, with deductions made for the mortgage, rates and insurances paid by Ms Alalaakkola. The balance figure remaining was then ordered to be divided between the parties equally.⁴⁸

⁴⁵ Paying mortgage, rates and most of the insurance, but recently had let the insurance lapse.

⁴⁶ At [38].

⁴⁷ At [39].

⁴⁸ At [41].

Approach on appeal

[26] An appeal under s 39 of the Property (Relationships) Act is a general appeal and proceeds by way of rehearing. The approach outlined by the Supreme Court in *Austin Nichols & Co Inc v Stitching Lodestar* therefore applies.⁴⁹ The Court must come to its own view on the merits, taking into account the relevant facts and any new evidence admitted, and the applicable law.⁵⁰

[27] In *B v F* Heath J outlined the approach to appellate review in the context of appeals under the Act and adopted the following approach:⁵¹

- (a) The Court must take account of the advantage the Family Court Judge had of hearing and seeing the witnesses who gave evidence before him.⁵²
- (b) To the extent the Family Court Judge exercised any discretion in reaching his decision, the High Court must determine whether those discretionary decisions were or were not open to the Judge. Some “reasonably plain ground” ought to be made out before an appellate court will intervene.⁵³
- (c) Otherwise, this Court is free to reconsider the Family Court’s decision and to substitute its own view on questions of fact and evaluation, if convinced that the first instance decision was wrong.

Discussion

Copyright

[28] The Judge had to grapple with two very different pieces of legislation. The Copyright Act confers upon owners of the copyright work the exclusive right to do

⁴⁹ *Austin, Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] NZLR 141.

⁵⁰ At [16].

⁵¹ *B v F [de facto relationship]* [2010] NZFLR 67 (HC), as outlined in *Pinney v Cooper* [2020] NZHC 1178 at [21].

⁵² *Austin, Nichols & Co Inc v Stitching Lodestar*, above n 49, at [13].

⁵³ *Blackstone v Blackstone* [2008] NZCA 312 at [8], per Glazebrook J citing *May v May* [1982] 1 NZFLR 165 (CA).

certain things in relation to the work. Except in cases of joint authorship, copyright tends to be an intensely individual right. That is, it vests only in the author of the work. It protects an individual's form of expression.

[29] In contrast, the Property (Relationships) Act as a piece of social legislation has a presumption of equal sharing at its heart. The Act recognises the equal contribution of husband and wife to the marriage. Relationship property is therefore a broad term, and includes all property acquired by either spouse or partner after their marriage began.⁵⁴

[30] It seems the interaction between the two Acts has not been the subject of consideration before, at least in New Zealand.⁵⁵ In this unchartered area, the Judge was faced with a difficult decision. But I consider the Judge fell into error when he considered the copyright in the artworks produced during the marriage to be Ms Alalaakkola's separate property.

[31] There are several reasons for this.

[32] First, there is no doubt that copyright is a proprietary right. Section 14 of the Copyright Act confirms this. I consider it follows that the definition of property in s 2 of the Property (Relationships) Act, and in particular the phrase "any other right or interest" at s 2(e), captures copyright in artworks.⁵⁶ Including copyright under s 2 does not engage the Supreme Court's observations in *Clayton v Clayton* about the potential broadening of the traditional concepts of property under the Property (Relationships) Act,⁵⁷ as copyright has long been considered a form of property.

⁵⁴ Property (Relationships) Act, s 8(1)(e), subject to the separate property and s 10 exceptions.

⁵⁵ For consideration of the issue in the United States, see J. Wesley Cochrane "It Takes Two to Tango!: Problems with Community Property Ownership of Copyrights and Patents in Texas" (2006) 58 Baylor Law Review 407. See especially *Re: Marriage of Worth* 195 Cal.App 3d 768 241 Cal Rptr 135 [1987], where the Court held that ownership of copyright relating to the Trivial Pursuit game was a matrimonial property asset and that the wife had rights as a joint owner of copyright, as well as rights to the income derived from a work produced during marriage.

⁵⁶ See too Law Commission *Dividing relationship property – time for a change* (NZLC IP41, 2017) at 8.17 where it was noted that "we think that the PRA's definition of property, and in particular the catch all "any other right or interest" is wide enough to capture all sorts of intangible things."

⁵⁷ See [13] of this judgment.

[33] Indeed, considering the breadth of what has been classified as property under the Act historically — an option to purchase, fishing rights under the Fisheries Act 1983, rights to compensation under the Accident Compensation Act (where the accident occurred during a relationship)⁵⁸ — it is certainly not a stretch to classify copyright as relationship property.

[34] Second, there is no indication in either the Copyright Act or the Property (Relationships) Act that s 16 of the Copyright Act — which effectively vests the exclusive right to copy the work in its author — was intended to remove intellectual property from the reach of the Property (Relationships) Act. In other words, there is nothing to suggest the property rights created by the Copyright Act should be treated any differently from any other sort of property produced or acquired by a partner or spouse during the course of a relationship.

[35] The Judge’s finding that the copyright is Ms Alalaakkola’s separate property is understandable. After all, it is her artistic skill that allows the copyright to exist. But the skill, and copyright that arises from that skill, are distinct. And a focus on the skill, rather than the property it creates, is not where the focus should lie in the division of relationship property.

[36] At the point Ms Alalaakkola put her skill towards an artwork during the course of the relationship, the subsequent copyright in that work became relationship property, as it came into existence during the relationship. Were it otherwise, people who had any number of skills prior to a relationship who then produced property — in the broad Property (Relationships) Act sense — from that skill during the relationship would be able to avoid the equal sharing presumption on the basis that the skill was ‘theirs’. That would be inconsistent with the scheme of the Act, which, among other things, recognises the equal contribution of both spouses to the marriage partnership.

⁵⁸ See RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.3] for these and other examples.

Discretion

[37] Given my finding that copyright in the works was relationship property, I consider that it was not open to the Judge to exercise a discretion on whether or not to transfer an interest in it to Mr Palmer, or indeed to allow an unequal division of that property.

[38] The starting point must be s 11; that on the division of relationship property under the Act, each of the spouses or partners is entitled to share equally in the family home, the family chattels and any other relationship property. The equal sharing presumption may only be displaced in extraordinary circumstances that make equal sharing repugnant to justice.⁵⁹ That is simply not the case here. The terms “extraordinary circumstances” and “repugnant to justice” import an incredibly high test. Such emphatic language is rare in legislation, and its use indicates the presumption of equal division should rarely be departed from.

[39] The case in question is not so out of the ordinary that the Court can countenance an unequal division.⁶⁰ The marriage lasted for 20 years. The longer the relationship endures, the more difficult it will be to demonstrate that it would be repugnant to justice for there to be an equal sharing of assets.⁶¹

[40] The Judge’s concern that Ms Alalaakkola may find herself in competition with herself is not a reason to decline to transfer copyright, but simply a consequence of the equal division of property. In any event, it is not clear the extent to which Mr Palmer’s reproduction of a selection of paintings will in fact undermine the value and saleability of any new works Ms Alalaakkola creates.

[41] Valuing the copyright will be the most challenging question, but it seems a necessary step to take in order to ensure an equal division. The parties may wish to consider again whether they can reach an agreement on value. Failing that, it would seem necessary for them to provide credible valuation evidence from independent

⁵⁹ Property (Relationships) Act, s 13.

⁶⁰ *Fisher on Matrimonial and Relationship Property*, above n 58, at 12.22 citing Quilliam J in *Castle v Castle* [1977] 2 NZLR 97, 102; *Castle v Castle* [1980] 1 NZLR 14.

⁶¹ *Lester v Wheeler* [2013] NZFC 3634 at [48].

witnesses qualified to provide such an opinion. Ultimately, the question will be one for the Family Court.

Paintings created during the marriage

[42] Mr Palmer says the paintings created during the relationship should be divided *equally* between the parties. It is not clear whether by this he means they should be divided equally by value, or by number.

[43] Little attention was paid to this ground of appeal at both the hearing or in submissions. As well, there is little to no information available on the number of paintings in issue, where they are located, or identifying those works on which the parties had managed to reach some agreement.

[44] From what I can gather, this ground of appeal arises as the Judge directed that:⁶²

... the paintings which the respondent [Mr Palmer] identified during the course of the hearing, and which the applicant [Ms Alalaakkola] agreed that the respondent could retain, are to vest solely in the respondent. The remaining paintings are to vest solely in the applicant. There is no need for any valuation. Copyright in all paintings remains with the applicant...

[45] It is unclear why the Judge departed from the directions he gave in the 10 February decision. There, he said:⁶³

[7] The first direction that I am going to give is the artworks that Mr Palmer has and the artwork that Ms Alalaakkola has in New Zealand are to be presented to the registrar of this Court not later than 4.00 pm this coming Friday. Both of them are then to attend at a time to be arranged with the registrar to sort out the paintings into what I perceive will need to be four piles. There will be a pile of paintings that the parties agreed were painted by Ms Alalaakkola prior to the commencement of this relationship. There will be a pile of paintings that may have been painted post the separation. There will be a pile of paintings that were clearly painted during the course of the relationship. The fourth pile will be paintings that are in dispute.

[8] Paintings that have been painted prior to the relationship commencing or subsequent to the relationship terminating are clearly separate property belonging to Ms Alalaakkola and once the parties are in agreement on those

⁶² *Alalaakkola v Palmer*, above n 2, at [37].

⁶³ *Alalaakkola v Palmer*; above n 1, at [7]–[10].

particular paintings she is free to then remove them from the Court premises as those paintings are to be her separate property.

[9] The remaining paintings are in contention. There has been a discussion today regarding a possible resolution of the division of those paintings, but it is clear that Mr Palmer wants to set up a business into the future and re-produce the paintings which he seeks to retain and therefore he would receive payment for those prints. Ms Alalaakkola is not prepared to agree to that because she sees herself as having the copyright on the paintings, and she is opposed to relinquishing that copyright. So that matter I think needs a little further investigation.

[10] If the parties in the meantime are unable to resolve the division of those paintings then they will need to be valued and the registrar will be authorised, if the parties have not resolved the division of the balance of the paintings within 21 days of there being produced to the registrar, then the registrar is authorised to obtain a valuation of the paintings which can then be provided to the parties. I will then give further directions as to the disposition of the artwork once I have had a chance to consider the copyright issue.

[46] But in the 6 March decision, the Judge only allowed Mr Palmer to retain the paintings Ms Alalaakkola agreed he could retain. In other words, it seems Mr Palmer did not receive a half share of all the relevant paintings either by value or number. If the parties were unable to resolve the division issue, then having the paintings valued — as the Judge had said would occur — appears to have been the best way forward in terms of an equal division. Just why that valuation did not occur, or why the Judge only allowed Mr Palmer to retain the paintings Ms Alalaakkola accepted he could keep, has not been made clear. Ms Alalaakkola says in a memorandum filed for the Family Court proceedings that she arranged for a valuer, but that Mr Palmer tried to influence the valuer, leading to the valuer withdrawing.⁶⁴ Mr Palmer's position on this issue was not raised at the hearing, although I suspect he would reject Ms Alalaakkola's contention.

[47] Overall, given the approach to division of the paintings on the face of the Family Court's decision it seems likely that there has been an unequal division. As relationship property, Mr Palmer is entitled to receive half the paintings *by value* created during the relationship. Valuation of the paintings will be needed to ensure an equal distribution, as well as vesting orders assuming the parties continue to be unable to agree on a physical division of the works.

⁶⁴ In this same memorandum, Ms Alalaakkola says Mr Palmer has approximately 187 items.

[48] This issue is also remitted to the Family Court. But I sound a note of caution for Mr Palmer. That is because there is a suggestion in the position he adopted in the Court below that his aim is to obtain an equal division of the paintings by number, on the basis that he will also receive copyright in those works he receives.

[49] In this regard, the Family Court’s discretion in relation to vesting orders is broad. It should not be assumed that the only order open to the Court is one vesting ownership of specific paintings in one party or the other. The same consideration applies to division of copyright in the artworks. It would be possible, for instance, for some, none or all of the works to be vested in one party, with an adjustment to the division of the proceeds of sale of the family home in order to obtain overall equality of division. And, there is no requirement that copyright in a work must follow an order vesting the work in one party or the other. Those matters are entirely at large, and for the Family Court to determine.

Occupation rent

[50] Mr Palmer seeks leave to introduce evidence about the appropriate post-separation rental for the family home and produces an affidavit of a Ms Gill, an experienced property manager, in support. The evidence is essentially aimed at establishing the occupation rent set by the Judge for the family home of \$300 was too low, and that it should have been higher based on the market conditions. The “new” evidence does not indicate how Ms Gill undertook her appraisal, or whether she in fact inspected the property.

[51] The Court may only grant leave if there are “special reasons for hearing the evidence”.⁶⁵ That power is sparingly exercised, as an appeal generally proceeds on the evidence that was before the decision-maker. Ultimately, the proposed evidence must be cogent, credible and fresh. Evidence is not fresh if it could, with reasonable diligence, have been produced at trial.⁶⁶ The absence of freshness is not an absolute disqualification, but when the further evidence is not fresh, it will not generally be admitted unless the circumstances are exceptional and the grounds compelling.⁶⁷

⁶⁵ High Court Rules 2016, r 20.16(3).

⁶⁶ Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR20.16.02].

⁶⁷ For a summary of the principles, see *B v A* [2020] NZHC 580 at [25].

[52] The Judge appears to have had little evidence to enable to him to determine the appropriate figure for the occupation rent, but his conclusion strikes me as eminently reasonable in the circumstances and based on the evidence he did receive. The fact there was no valuation or real estate agent assessment as to a fair rental is not the fault of the Judge. In any event, the figure the Judge arrived at and what the proposed evidence says are not so drastically different as to amount to special reasons for admitting the evidence.

[53] This evidence is not fresh. It could have been provided at trial. And nothing has been advanced which would qualify as exceptional circumstances. Leave is therefore declined.

[54] Equally, the orders made by the Judge as to the sale of the house appear to be a considered and fair way to proceed in the circumstances. Mr Palmer's ground of appeal is focussed on the expediency of the Judge's orders, rather than any principled objection to the order. This ground of appeal is therefore dismissed. I do however urge the parties and the Registrar to complete the orders for sale without further delay, as I understand they were "put on hold" once Mr Palmer's appeal was filed.

Result

[55] The appeal is allowed in part.

[56] The proceeding is remitted to the Family Court in light of this Court's findings regarding the copyright issue and the paintings created during the relationship. Valuations of both will be needed if the parties cannot resolve their differences. And I do urge the parties to endeavour to do so in light of this judgment. Their proceedings began in 2017. It is not in their best interests to have this matter involve any more time before the courts if it can be avoided.

[57] In all other respects, the appeal is dismissed.

Isac J

Solicitors:
Gascoigne Wicks, Blenheim for Appellant