IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 10/2021
[2021] NZSC 154

BETWEEN	KATHARINE ELIZABETH PRESTON Appellant
AND	GRANT LEE PRESTON First Respondent
	GRANT LEE PRESTON AND FISHER PARTNERS TRUSTEES LIMITED AS TRUSTEES OF THE GRANT PRESTON FAMILY TRUST Second Respondent

Hearing:	3 August 2021
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	V T M Bruton QC, I M Hutcheson and N L Walker for Appellant J M McCleary and R C van den Broek for Respondents
Judgment:	9 November 2021

JUDGMENT OF THE COURT

A The appeal is allowed.

B Orders are made that the Grant Preston Family Trust pay the Huntbos Family Trust $141,000 and release any claim to the $192,000 of the funds held on joint account (the Grant Preston Family Trust share of these funds is $102,000 and the Huntbos Family Trust share is $90,000).

C The Grant Preston Family Trust deed is amended by removing the appellant as a discretionary beneficiary.

D Leave is reserved to the parties to seek further directions or orders that may be necessary to give effect to this judgment.

E The first respondent must pay the appellant costs of $25,000 plus usual disbursements. We certify for second counsel. Unless the parties can agree, costs in the Courts below are to be redetermined in those Courts in accordance with this judgment.

REASONS
(Given by Ellen France J)

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Introduction

[1] Under s 182 of the Family Proceedings Act 1980, the court has the power to vary the terms of a nuptial settlement where the parties' marriage or civil union comes to an end.[1] This Court in *Ward v Ward*[2] and, more recently, in *Clayton v Clayton [Claymark Trust]*[3] considered the principles to be applied in determining whether orders should be made under s 182.[4] These cases made it clear that the purpose of

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1 The regime under s 182 of the Family Proceedings Act 1980 applies to civil unions as well as marriages. Because we are dealing with a marriage, we will refer to marriage only in the judgment.

2 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.

3 *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590.

4 The Court in *Clayton* also considered the principles applicable to determining whether the settlement is a "nuptial" settlement. As we will discuss, this is not in issue in this case.

s 182 was to enable the courts to remedy the consequences of the failure of the premise on which the nuptial settlement was made, that is, a continuing marriage.[5]

[2] This appeal raises questions about the approach to s 182 in respect of a nuptial settlement where the factual circumstances differ from those considered in *Ward* and in *Clayton*. Both of those cases involved the application of s 182 following the dissolution of marriages of over ten years' duration in which there were children of the spouses together, and there was wealth created during the marriage. In the present case, Mr Preston and Mrs Preston separated after a little under five years' marriage, both had children of their own from previous relationships and no children together, and the assets in issue were primarily owned by the Grant Preston Family Trust (the GPF Trust) and settled on that Trust prior to their marriage.

[3] After the marriage came to an end, Mrs Preston sought orders under s 182 for a share of the assets owned by the GPF Trust.[6] She also sought orders under ss 9A, 15, 15A, 17, 44 and/or 44C of the Property (Relationships) Act 1976, as well as making a claim for an equitable interest in the family home and shares in a contracting business, Eastern Bay Thrusting Ltd (EBT Ltd), operated by Mr Preston. Mrs Preston also brought a claim relating to a property at Pauanui which had been purchased during the marriage and ultimately settled on the GPF Trust and the Huntbos Family Trust (the Huntbos Trust), a trust she had set up.[7]

[4] Mrs Preston's claims were considered together in the High Court.[8] Following a trial over the period of 1–8 July 2019, in a judgment delivered on 18 December 2019, Fitzgerald J largely dismissed Mrs Preston's claims.[9] In terms of her s 182 claim, the Judge found that an amendment deed executed in February 2010, which had added Mrs Preston as a discretionary beneficiary to the GPF Trust, was a nuptial settlement

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5 *Ward*, above n 2, at [15] and [20]; and *Clayton*, above n 3, at [51].

6 This set of proceedings was commenced by Mr Preston seeking the classification of relationship property and the division of that between the parties. The proceeding, however, ultimately focused on matters advanced by Mrs Preston, including the s 182 claim.

7 This claim was brought by Mrs Preston and Suzanne Jespersen jointly in their capacity as trustees of the Huntbos Trust.

8 The claims for orders under the Property (Relationships) Act 1976 and under the Family Proceedings Act were transferred to the High Court from the Family Court in 2017.

9 *Preston v Preston* [2019] NZHC 3389 (Fitzgerald J) [HC judgment].

for the purposes of s 182.[10] However, after considering a number of matters, the Judge concluded that no orders should be made under that section.[11] The Judge also rejected Mrs Preston's equitable interest claims and her claim in relation to the Pauanui property.[12]

[5] Mrs Preston appealed to the Court of Appeal from the decision of the High Court.[13] Mr Preston cross-appealed on the finding that the 2010 amendment deed was a nuptial settlement. The Court of Appeal dismissed the cross-appeal, affirming that the amendment deed was a nuptial settlement.[14] It allowed Mrs Preston's appeal in one respect, finding that the GPF Trust was in breach of its obligation to sell its share in the Pauanui property to the Huntbos Trust.[15] Her appeal was otherwise dismissed.[16]

[6] Mrs Preston now appeals to this Court on the question of whether the Court of Appeal was correct to dismiss her appeal in relation to her claim for orders to secure part of the assets of the GPF Trust under s 182.[17] Whether the 2010 amendment deed constitutes a nuptial settlement is no longer in issue.

[7] In answering this question, we first set out the relevant background in more detail and then discuss the approach to s 182. In doing so, we confirm that the principles discussed in *Ward* and in *Clayton* apply equally to a case like the present. Applying those principles, there is no presumption of a 50/50 or any other fractional division in this type of case. However, if there is a disparity between the position as it would have been under the nuptial settlement had the marriage continued and that post-dissolution, we expect that orders will generally be made, absent countervailing factors. That will, of course, depend on the facts; but, where such a disparity exists, the question for the court will generally be as to what would be encompassed in the orders, not whether orders should be made at all.

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10 At [159].
11 At [167]–[168].
12 At [228(b)]–[228(c)].
13 *Preston v Preston* [2020] NZCA 679, [2020] NZFLR 696 (Kós P, Wylie and Muir JJ) [CA judgment].
14 At [22].
15 At [35]–[37].
16 At [38].
17 *Preston v Preston* [2021] NZSC 42.

[8] The parties ultimately agreed that if we were to decide the appeal in Mrs Preston's favour, we should make orders so as to finally resolve the dispute between the parties. In allowing the appeal, as we shall explain, we have concluded that orders should be made which would effectively result in provision of the sum of $243,000 to Mrs Preston.

The background

[9] We begin by setting out the facts in a little more detail.

The facts

[10] Mr Preston and Mrs Preston met in 2007. They began a de facto relationship in about March 2009. By that time, Mr Preston's two children were both young adults. The elder of Mrs Preston's two children was a teenager and her younger child was almost three years old. The parties married on 4 December 2010.

[11] The GPF Trust, a discretionary family trust, was settled in 2004, some three years before the parties met.[18] Mr Preston's two children are the final beneficiaries. The trustees are Mr Preston and Fisher Partners Trustees Ltd.[19] The GPF Trust purchased a section in The Fairway, Whakatāne, in 2005, and Mr Preston and the GPF Trust built a home there which was completed in mid-2007. The Fairway became the family home. Mrs Preston moved to live there in October 2009 with her younger child.

[12] Prior to the commencement of the parties' de facto relationship, the assets of the GPF Trust were expanded when, in November 2008, Mr Preston transferred 99 of the 100 shares he owned in EBT Ltd to the GPF Trust for $160,000.

[13] On 1 February 2010, 10 months before the parties' marriage, the trust deed for the GPF Trust was amended. Mr Preston, as settlor, executed a deed of amendment

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[18] At inception, the discretionary beneficiaries included Mr Preston and his children. There was also the power for Mr Preston, as settlor, to appoint further discretionary beneficiaries.

[19] The latter was described as a professional advisory trustee.

which added the following classes as discretionary beneficiaries:

> Any wife or widow for the time being of the Settlor;
>
> Any person who is living or has lived with the Settlor of the opposite sex on a domestic basis in such a manner as if they were legally married to each other, although they may not be so married.

This amendment had the effect of including Mrs Preston as a discretionary beneficiary of the GPF Trust.

[14] The evidence was that this addition reflected the advice of Mr Preston's accountants. Mrs Preston was receiving benefits from the GPF Trust's property via both contributions and day-to-day expenses. The addition was also seen to have tax efficiencies.

[15] From about mid-2009, Mrs Preston worked on a part-time basis for EBT Ltd in a paid position as an office administrator. Mrs Preston had some funds of her own, some of which she lent by way of advances on an interest-free basis to EBT Ltd to assist its cashflow.[20] These advances were repaid. Mrs Preston also studied towards a Bachelor's and Honours degree in psychology at Massey University. She enrolled in a doctoral programme at Massey University in 2015.

[16] The property at Pauanui was purchased in December 2012. The High Court noted that Mr Preston's contribution was $10,000 and Mrs Preston's contribution was $60,000. The balance of the purchase price was met by a bank loan.[21] The property was used by the parties as a holiday home – there were two caravans and a utility shed. The property was ultimately settled in the names of the GPF Trust and the Huntbos Trust as tenants in common in equal shares. The two Trusts entered into a property sharing agreement in relation to this property. The terms of that agreement required the property to be sold if either party gave the requisite notice.

[17] The parties separated on 27 September 2015. An order for dissolution was made in November 2018, to take effect from December 2018. Mrs Preston initially

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[20] There was some dispute at the High Court hearing about the profitability of the company. The Judge found the company was profitable: HC judgment, above n 9, at [61].

[21] At [183].

occupied the Pauanui property after the separation. In November 2015, the Huntbos Trust gave notice exercising its option to purchase this property. However, the transfer did not occur at that time. Proceedings commenced in September 2016.

[18] We now say a little more about the approach in the Courts below.

The Courts below

The High Court decision

[19] Having concluded that the 2010 amendment deed was a nuptial settlement, the Judge turned to the question of whether orders should be made under s 182. The Judge concluded that there was a gap between the position as it was under the settlement had the parties' marriage continued and the position as it was after dissolution.[22] There was therefore what the Judge described as a "prima facie" basis for exercising the discretion under s 182.[23] However, relying on the following factors, the Judge declined to exercise the discretion:[24]

(a) The terms of the settlement contemplated that a spouse would be a discretionary beneficiary only so long as they were married to the settlor.

(b) The GPF Trust was settled well before the parties met and for the primary purpose of preserving assets for the benefit of Mr Preston's children.

(c) All of the GPF Trust's assets were acquired prior to the marriage.

(d) The GPF Trust's assets had been sourced from separate property.

(e) Mrs Preston made no material or substantial contribution to sustaining the GPF Trust's assets but had nonetheless benefited from them.

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22 At [166].
23 At [167].
24 At [167].

(f) The marriage was of a relatively short duration.

[20] In relation to the Pauanui property, Mrs Preston claimed there had been a breach of the property sharing agreement by the GPF Trust. Her case was essentially that the Huntbos Trust, having triggered the right to purchase in November 2015, was entitled under the property sharing agreement to purchase the property at the price that should have been agreed as at November 2015. The Judge did not accept that submission, concluding that the obligation on the GPF Trust was to convey the property at its market value.[25]

The Court of Appeal decision

[21] The Court of Appeal confirmed that the 2010 deed amending the GPF Trust was a nuptial settlement as it was an arrangement made in contemplation of the parties' marriage and which made some continuing provision for Mrs Preston as a spouse.[26]

[22] In upholding the High Court decision not to exercise the discretion in favour of Mrs Preston, the Court saw her case as resulting in a conflation of the Property (Relationships) Act and s 182 regimes. The Court said that s 182 was not an expansive source of power. This was particularly so given the other available remedies, such as the ability under ss 44 and 44C of the Property (Relationships) Act to, respectively, have dispositions set aside or to obtain compensation for property disposed of to a trust.[27] The Court agreed that the factors identified by the High Court told against making orders in favour of Mrs Preston. The Court of Appeal placed particular emphasis on the original object of the GPF Trust, that is, to make provision for Mr Preston's children. The Court also attached a great deal of importance to the source of the assets of the GPF Trust, emphasising that all of the assets were acquired prior to the parties' marriage. Finally, the Court said it was not persuaded that any injustice resulted from the position after dissolution remaining unaltered. In this respect, the Court did not consider Mr Preston had gained any unfair benefit.[28]

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25 At [219]–[227].
26 CA judgment, above n 13, at [22].
27 At [23]–[24].
28 At [27].

[23] As we have said, Mrs Preston succeeded in her appeal in relation to the Pauanui property. The Court of Appeal found that the Huntbos Trust was entitled to purchase the property as at November 2015 at the price that should have been agreed under the property sharing agreement at that time.[29]

[24] We add that there is no issue now as to the price at which the property should have been transferred. The transfer of the property to the Huntbos Trust has now occurred. The position in relation to the Pauanui property is only relevant in explaining the parties' respective circumstances.

The case for the parties

[25] We discuss the parties' submissions in more detail in the context of the issues arising from the case. At this point, it is sufficient to note that Mrs Preston's argument is that the Court of Appeal did not follow the correct approach to s 182 as set out by this Court in *Clayton*. Rather, Mrs Preston argues that the Court of Appeal incorrectly conflated s 182 and the Property (Relationships) Act regime. The end result is that Mr Preston has effectively had the benefits associated with a contracting out agreement under s 21 of the Property (Relationships) Act although the parties made no such agreement. Mrs Preston also makes submissions as to the way in which the analysis in *Clayton* should be adapted to accommodate factually different cases, such as those involving, for example, shorter marriages or blended families.[30]

[26] Mr Preston supports the approach taken in the Courts below and says that there has been no error of law. Rather, he says the appeal is directed against the exercise of a discretion and that the prerequisites for such an appeal are not met. He submits that the lower Courts gave appropriate weight to the factors telling against the exercise of the discretion under s 182 in this case. The factors relied on include the source of the

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29 At [35]–[36].

30 The appellant uses the term "blended family" to refer to a family unit where one (or both) spouse brings children from a prior relationship. We use this term in the same sense, but note that the constitution of blended families can be varied. In its recent Study Paper describing significant demographic changes in New Zealand in the last 40 years, Te Aka Matua o Te Ture | Law Commission defined blended families as a stepfamily where, in addition to stepchildren, at least one child is the biological or adopted child of both partners: *Relationships and families in contemporary New Zealand: He hononga tangata, he hononga whānau i Aotearoa o nāianei* (NZLC SP22, 2017) [NZLC Study Paper] at 7.

assets; the fact that this was a "relatively short" marriage in which the parties maintained separate financial arrangements; and the interests of Mr Preston's children.

The approach to s 182

Relevant provisions

[27] Section 182(1) of the Family Proceedings Act provides that the court may make orders in relation to nuptial settlements:

> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, the Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.

[28] Section 182(3) gives the court the ability to take into account a wide range of factors in the exercise of the discretion under the section. It states:

> (3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.

[29] Subsection (4) makes it clear that there is no need for there to be children of the marriage before the discretion can be exercised. Under s 182(5) the court may review an order made under the section "on the application of either party to the marriage or civil union or of either party's personal representative". Finally, subs (6) provides that:

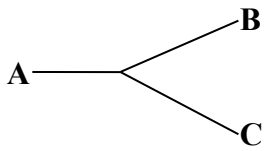
> (6) Notwithstanding subsections (1) to (5), the court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.

[30] In *Clayton*, the Court said that s 182 envisages a two-stage process: first, determine whether there is a nuptial settlement; and second, assess whether and, if so, in what manner the court's discretion under s 182 should be exercised.[31]

[31] As it is no longer in dispute that the 2010 amendment deed constituted a nuptial settlement, we focus on the latter stage in the discussion that follows. It is helpful to note at this point that in modern-day New Zealand, nuptial settlements usually take the form of family trusts. That was the case in *Clayton* and *Ward*, and this context provides some explanation for the focus on trust-based factors relevant to the s 182 discretion identified in those cases, as discussed below. However, as we also come to discuss, there is no restriction in s 182 on the form of a nuptial settlement, and the need for some flexibility – in order to preserve the court's power to deal with the diverse range of circumstances that may come before it – is an important aspect of the approach to s 182.

Purpose and principles

[32] In terms of the approach to the discretion under s 182, it is useful to begin by reiterating the purpose of s 182. This Court in *Clayton* confirmed that, as outlined in *Ward*,[32] the purpose is "to empower the courts to remedy the consequences of the failure of the premise (a continuing marriage) on which the settlement was made".[33] The Court went on to explain that the comparison to be made was between the position under the settlement were the marriage to continue and the position that exists after the dissolution. This is a forward-looking exercise, "comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage".[34] The Court put this diagrammatically as follows:[35]



31 *Clayton*, above n 3, at [27].
32 *Ward*, above n 2, at [15].
33 *Clayton*, above n 3, at [51]. See also at [52] and [60].
34 At [53].
35 At [54].

[33] In this diagram:[36]

> … A is the time of settlement, B is the position of the spouse under the settlement with the marriage dissolved and C would have been the position under the settlement assuming a continued marriage. The comparison is not between A and B but, rather, between B and C.

[34] The Court reiterated the view expressed in *Ward* that it was not appropriate to try to set out any "comprehensive list of relevant considerations" applicable to s 182(3), which empowers the court to take into account any matters it considers relevant.[37] That was because "each case will require individual consideration".[38] Nor should there be any "formulaic or presumptive approach".[39]

[35] But the Court did discuss a number of factors that would be relevant, most of which followed from the comparison between the position under the settlement with the marriage dissolved, B, and the position under the settlement if the marriage continued, C.[40] The factors were:[41]

(a) The interests of children (particularly dependent children). This was a "primary consideration".[42]

(b) The interests of other beneficiaries of the nuptial settlement.

(c) The terms of the settlement and how the trustees are exercising or are likely to exercise their powers in the changed circumstances.

(d) Who established the trust and the source and character of its assets.[43] Whatever their origin, all assets in the trust are, however, part of the nuptial settlement.[44]

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36 At [54].
37 At [57], citing *Ward*, above n 2, at [26].
38 At [57], citing *Ward*, above n 2, at [26].
39 At [57].
40 Confirming the approach in *Ward*, above n 2, at [26].
41 See *Clayton*, above n 3, at [58]–[59]; and *Ward*, above n 2, at [26].
42 *Clayton*, above n 3, at [56] and [58]. Section 182(1) and (6) refer specifically to the interests of a "child of the marriage or civil union". "Child of the marriage" is defined in s 2.
43 See below at [36].
44 *Clayton*, above n 3, at [68].

(e) The manner in which the trustees would have exercised their discretion if the marriage had continued.

(f) The wider benefits to the family the trust has provided or might have been expected to provide.[45]

(g) The suitability of the relevant trust structure in light of the changed circumstances.

(h) Need (although this is not a prerequisite).

(i) The length of the marriage.

[36] As the focus is on the gap in expectations, contributions are not a controlling factor of the s 182 discretion. However, the Court made the point that it may be relevant when assessing the source and character of the assets vested in the trust. In particular, the Court said s 182 had to be applied "in the twenty-first century", which meant that the source and character of the assets should be considered in the current social context where it is "recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage".[46]

[37] "Ultimately", the Court explained, the task for a judge faced with a s 182 application was:[47]

> … to exercise the discretion in accordance with the terms of s 182 and in light of its purpose, taking into account all relevant circumstances in the particular case. Nuptial settlements are premised on the continuation of the marriage or civil union. The purpose of s 182 is to empower the courts to review a settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made. Each case will require individual consideration.

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45 The Court emphasised that where the nuptial settlement was a discretionary family trust, the situation must be looked at "from the perspective of the family unit of which the applicant is part": at [50].

46 At [66]. That principle is also reflected in ss 1M(b), 1N(b) and 18(2) of the Property (Relationships) Act.

47 At [60] (footnotes omitted).

[38] Finally, the Court, echoing what had been said in *Ward*, observed that the principles of the Property (Relationships) Act did not underpin s 182. There was accordingly "no entitlement, or presumption, as to a 50/50 or any other fractional division of the trust property".[48] As noted above, the Court went on to say that, nonetheless, s 182 had to be applied "in the twenty-first century".[49]

A three-stage process

[39] As noted, the Court in *Clayton* envisaged a two-stage process, that is, whether there was a nuptial settlement and, if so, whether the discretion should be exercised. The present case indicates to us that it will be more helpful to divide the second stage into two. What is accordingly required is a three-stage process, as follows:

(a) The first stage is to determine whether there is a nuptial settlement.

(b) The second stage is to assess whether there is a difference between the position of the spouse under the settlement with the marriage dissolved (position B in the diagram set out above at [32]) and what the position would have been under the settlement had the marriage continued (position C). If there is a gap between B and C, the discretion under s 182 is enlivened.

(c) The third stage is to determine how the discretion should be exercised in the particular case.

The approach to the third stage

[40] The present case raises a question about the touchstone that applies when the court gets to the point of determining, as the High Court did here, that there is a prima facie case for the exercise of the discretion; that is, there is a nuptial settlement and there is a gap between B and C. We note in this respect that because we have split the inquiries envisaged in *Clayton* at stage two into two, some of the factors discussed

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48 At [65], citing *Ward*, above n 2, at [20].
49 At [66].

in the list set out above at [35] may have greater relevance to determining whether or not there is a gap between B and C.

[41] Ms Bruton QC, who argued this part of the case for Mrs Preston, submitted that the Court should endorse a list of factors, some of which are additional to those in the list set out above from *Clayton*, as relevant to the exercise of the discretion under s 182. It was also argued that it would be helpful to require the court to put itself in the shoes of an independent and fair-minded trustee. This, it was submitted, would provide a useful framework for the exercise of the discretion under s 182. For Mr Preston, Mr McCleary took no particular issue with the relevance of the factors identified in terms of their application to the present case, although he would add the fact that the parties had ring-fenced their finances. It was submitted that the reference in *Clayton* to preventing one party unfairly benefitting should be the ultimate safety check.[50] He also submitted that Mrs Preston's proposed approach about looking at the matter from the perspective of an independent trustee was not vastly different from what the court is likely to do in the exercise of its discretion in any event.

[42] We address these submissions in turn.

[43] The first six of the factors in the appellant's suggested list are essentially encompassed by the factors discussed in *Clayton* and we say no more about them.[51] The additional factors advanced are as follows: each spouse's access to personally-owned assets; the desirability of keeping assets intact for future generations; the wishes of the settlor; the position that the claimant spouse would have been in had the assets been personally owned and not held in trust; the need of each of the parties to have a home for themselves and for any dependent children; and the social context and the modern-day principle that all contributions to the marriage are to be treated as equal.

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50 In *Clayton*, above n 3, at [44], the Court said that one of the purposes of s 182 is "to prevent one party benefitting unfairly from the settlement at the expense of the other in the changed circumstances".

51 These factors were: the extent to which the claimant spouse would have benefited from the trust had the marriage continued; the terms of the settlement and how the trustees are exercising or are likely to exercise their powers in the changed circumstances; who established the trust, and the source and character of the assets vested in the trust; the length of the marriage; the existence and needs of other beneficiaries; and the needs of children of the relationship (whether natural or stepchildren).

[44] We see no need to require a court to address these further factors as a matter of course. As was said in *Clayton*, the assessment is ultimately a factual one to be undertaken consistently with the purposes of s 182. What is relevant will accordingly depend on the particular facts. A longer list of potentially relevant factors will not necessarily assist in undertaking the task. In addition, we accept the submission for Mr Preston that there is a need to maintain some flexibility in the court's inquiry. A court may be presented with a wide variety of circumstances.

[45] In terms of the need to maintain some flexibility, Te Aka Matua o Te Ture | the Law Commission in its final report on the Property (Relationships) Act referred to the changes in patterns of "partnering, family formation, separation and repartnering" since the enactment of the Property (Relationships) Act in 1976.[52] The Commission, in its Study Paper on the same topic, also noted the view of experts that diversification of family forms and living arrangements was "likely to continue, and may even accelerate".[53] The relevant considerations may have to change over time accordingly.

[46] The submission that the court should be focused on the need for each of the parties to have a home received particular emphasis in the argument for Mrs Preston. Where there is a proper basis for making an order under s 182 and the evidence demonstrates that there is sufficient capital in the settlement for each spouse to receive a home without unduly compromising other relevant considerations, this may well be a just and practical result. This was the case in *Oldfield v Oldfield*[54] and in

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52 Te Aka Matua o Te Ture | Law Commission *Review of the Property (Relationships) Act 1976: Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) [NZLC Report] at 5. The Commission noted that although limited, the available data indicates that blended families like those in the present case are becoming more common and their prevalence is likely to continue to increase: NZLC Study Paper, above n 30, at 5, 31 and 66. The average duration of marriages or civil unions ending in divorce in 2020 was 13.42 years, although that figure is not an accurate reflection of the actual length of the relationship as the relationship may have qualified as a de facto relationship well before marriage and the parties may have been separated for some time before dissolution: Statistics NZ | Tatauranga Aotearoa "Group: Marriages, Civil Unions, and Divorces – VSM" <http://infoshare.stats.govt.nz>. See also NZLC Study Paper, above n 30, at 25.

53 NZLC Study Paper, above n 30, at 66.

54 *Oldfield v Oldfield* [2020] NZHC 8. The parties had been married for over 40 years. Over that period, they had children and had built up a successful family business. The bulk of their assets were held in trust. After the parties separated, Mr Oldfield was living in the former family home. In issue was whether the family trust should be resettled into two mirror trusts, as Mr Oldfield sought, or remain as a single trust, as Mrs Oldfield submitted. By the time the High Court came to consider this, the family trust had purchased a home for Mrs Oldfield to live in, of similar value to that of Mr Oldfield's. Against that background, the Court did not order resettlement into mirror trusts but reserved leave for the parties to address what adjustments would need to be made to the trust deed. See also *Oldfield v Oldfield* [2019] NZHC 492, (2019) 5 NZTR ¶29-015.

Stiles v Stiles,[55] authorities referred to by the parties. But there will be other cases where that outcome is not practical or possible. There may also be cases where considering the matter through this lens leads to a less generous outcome than is appropriate. In any event, we consider that the factors identified in *Clayton* cover the ground to the extent necessary.

[47] In terms of the last of the proposed additional factors, the relevance of the social context, the requirement for contributions to be treated as equal is explicit in *Clayton* and is identified as relevant in the context of how to assess the source and character of trust assets. We will discuss shortly the way in which this aspect also features in the second stage of the inquiry, that is, in assessing whether there is a gap between positions B and C.

[48] Finally, we do not see it as necessary to require the Court to put itself in the place of an independent and fair-minded trustee when considering the exercise of the discretion under s 182. While we accept that using such a lens may have the advantage of providing a framework for the exercise of the discretion which is more neutral about the property rights of the primary asset owning or contributing spouse, it is not clear that a trust framework will always be appropriate. In some cases, the best outcome may be to move away from existing trust arrangements. For example, as this Court said in *Clayton*, "a trust which runs a family business with both [spouses] as trustees may not be an appropriate structure where a marriage has been dissolved".[56] The Court in *Ward* also made the point that the relief to which an applicant is entitled is an order "in whatever form is best suited to the circumstances".[57] In other words, the court should not be unduly constrained.

[49] Further, and as noted above, while usually s 182 cases in New Zealand occur (or will occur) in a trust context, nuptial settlements can encompass ones other than

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55 *Stiles v Stiles* [2019] NZHC 3462. The parties were married for over 15 years and had two children. Again, assets were held in a family trust. The Family Court made an order re-settling the family trust into two new trusts. The Family Court's order that 60 per cent of the proceeds of the sale of the former family home vest in Ms Stiles, reflecting her particular needs, was upheld in the High Court as the only "realistic source of capital" for her to "re-establish herself": at [142]. That approach also reflected issues relating to under-declaration of income on the part of Mr Stiles: at [143].

56 *Clayton*, above n 3, at [59].

57 *Ward*, above n 2, at [27].

those imposed via a trust. As is referred to in *Clayton*,[58] there have been cases, although now dated, recognising the existence of nuptial settlements which vested property in a spouse or gifted the spouse an annuity. These settlements did not involve trusts.[59] In such cases, adopting the point of view of a trustee would not be the most appropriate lens for the relevant assessment.

[50] Therefore, we consider the purposes and principles of s 182 provide sufficient guidance to the exercise of the discretion. The Court in *Clayton* made the point that the court should consider what the trustees would have done. It is not necessary, at least as matters stand, to go beyond that and require a court to put itself in the position of an independent and fair-minded trustee as a matter of course.[60]

Concluding observations

[51] Against this background, we make the following concluding observations in relation to the approach to the third stage of the inquiry.

[52] First, we understand from the parties that, in marriages of similar duration and circumstances to those apparent in *Ward* and *Clayton*, cases are generally being settled on a 50/50 basis. Although the point was made in *Clayton* that there is no presumption of a 50/50 split, we do not see any dissonance between the principles underpinning s 182 and settlements proceeding on the basis of equal sharing in cases with facts similar to those in *Ward* and *Clayton*.[61]

[53] Second, in terms of cases where the factual features in *Ward* and *Clayton* are absent, we expect that if there is a disparity between positions B and C, then, generally,

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58 *Clayton*, above n 3, at [32], n 58.

59 Some of these cases involved deeds of separation and bonds, with covenants to pay. It is sufficient to refer to *Halpern v Halpern* [1951] P 204 at 210, where the Court said the relevant provision will usually take "the form of periodical payments either with the intervention of trustees, as in an ordinary marriage settlement, or without them, as in a separation deed or a bond; but it may take other forms". See also *Smith v Smith* [1945] 1 All ER 584 at 586.

60 The Law Commission recommended that the courts "should have broader powers … to provide for a just division of property when a trust is involved" and in that context, recommends the repeal of s 182: NZLC Report, above n 52, at [59] of the executive summary, R58–R66 (set out at 32–33) and [11.26].

61 The Court in *Clayton*, above n 3, at [67] noted that where, as in that case, the trust was settled during the marriage and contained or was sustained by assets accumulated by one or both of the spouses only over the course of the marriage, "it may well be that the discretion will result in equal sharing, absent other countervailing circumstances".

the court would still exercise its discretion in favour of the applicant, absent countervailing circumstances. Such an outcome is mandated by the statutory purpose. Given that the very purpose of s 182 is to remedy the disparity, if the court is faced with a disparity, the usual course would be to make orders so as to provide that remedy. As a matter of logic, departing from that position requires there to be factors which would tell against that outcome.

[54] Third, the type of factors that might militate against the exercise of the discretion will vary because the inquiry is a factual one. But possible illustrations of such a case include those situations where the interests of a dependent child are predominant, or where both parties bring considerable assets to the marriage and have maintained some separation in the way those assets are utilised.

[55] As an example of the first type of situation, the interests of a dependent featured strongly in *Dyer v Gardiner*, although there the Court concluded there was in fact no disparity between B and C.[62]

[56] *Wylie v Wylie* provides an illustration of the latter situation identified above.[63] In that case, Mr Wylie was unsuccessful in his application under s 182. For present purposes it is sufficient to explain that, before the parties' marriage, Mr Wylie owned a number of sections and residential properties. The Court said he kept these properties in his name and the income from them for himself throughout the marriage.[64] The value of those properties was only shared with his wife, Dr Wylie, in a very limited manner. The parties' family home had been in Dr Wylie's ownership prior to the parties' marriage and had been transferred to a trust established in the course of her first marriage. She continued to pay the outgoings on the property throughout the marriage to Mr Wylie. Although the High Court found there was no jurisdiction to make an order under s 182, the Court indicated that, in any event, no orders would have been made given this set of facts.[65]

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62 *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293.
63 *Wylie v Wylie* [2019] NZHC 2638 [*Wylie* (HC)]. See also *Wylie v Wylie* [2021] NZCA 521.
64 *Wylie* (HC), above n 63, at [44] and [474].
65 The parties had made a contracting out agreement so that s 182(6) was in play and the relevant trust was not a nuptial settlement.

[57] To reiterate, in a case such as the present where there is a disparity between the position as it would have been under the settlement if the marriage had continued and that following dissolution, the question for the court will generally be as to the way in which the discretion is to be exercised, not whether or not to make any orders at all.

[58] We now address whether the Court of Appeal applied the correct approach in this case.

Did the Court of Appeal apply the correct approach?

[59] We consider the Court of Appeal erred in law in its approach to s 182 in three ways, as we now discuss.

The second stage of the inquiry – the scale of the disparity

[60] First, we agree with the submissions for Mrs Preston that the Court of Appeal did not correctly follow the staged approach in *Clayton*. In particular, the Court did not undertake a comparison of the difference between Mrs Preston's position under the settlement on dissolution with that under the settlement had the marriage continued. It was necessary for the Court to undertake this comparison because of the brevity of the assessment undertaken in the High Court. The High Court Judge said this:

> [166] In this case, it is reasonable to assume that, had Mr and Mrs Preston's marriage continued, direct and indirect benefits to Mrs Preston from the trust would also have continued, both in terms of the provision of trust assets to assist with her ongoing studies, as well as any direct and indirect benefits relating to day-to-day family and personal expenditure. This is to be compared with the position after the dissolution of the marriage, where it is reasonable to assume that the trustees (being Mr Preston and Fisher Trustees) will not exercise their discretion in favour of her.

[61] The argument for Mr Preston is that there was no need for any more expansive inquiry or discussion. That is because Mrs Preston succeeded in her argument that there was a disparity, but the Court plainly reached the view that there were factors militating against making any orders in her favour under s 182. Any further analysis of the disparity would accordingly have been hypothetical.

[62] We accept that in these situations the court does not necessarily need to undertake a lengthy or detailed arithmetical exercise, unless the facts or the evidence require it. This is apparent from the assessment set out in *Clayton*.[66] But the court does need to have some conception of what the gap between B and C actually is before concluding, at the third stage, that other factors outweigh that gap. Otherwise, as in this case, the scale of the difference in position post-dissolution for Mrs Preston and her dependent child will not be appreciated. Considering the matter in this disciplined way also means there is a proper framework against which the discretion can be exercised at stage three.

[63] We agree with counsel for Mrs Preston that the approach taken in *Bethell v Bethell* illustrates the type of analysis envisaged by *Clayton*.[67] The Judge in that case began by noting the position that each party would have been in before a resettlement, with sufficient reference made to the relevant arithmetic. Next, the Judge considered the circumstances of each party during the marriage. For example, reference was made to the fact that the parties had been living in a comfortable home and that Ms Bethell could objectively have expected to continue enjoying this benefit and the benefits of a good lifestyle with her children as they grew up. By contrast, on dissolution, Mr Bethell was the only one likely to continue to receive those types of benefits.[68]

[64] The Judge viewed the parties as having contributed in their different ways to the improvement in value of assets during the relationship. As the Judge put it, the parties had "met … challenges as a partnership".[69] The particular contributions of funds that Mr Bethell had made to the current equity of the trust were not ignored, but rather were considered in the context of the overall circumstances of the parties as they were and as they would be post-dissolution. The Judge concluded that there should be a resettlement of $300,000 held to the credit of a new discretionary trust to be established by Ms Bethell for her benefit and for that of her children, grandchildren and other beneficiaries as provided for in the nuptial settlement trust but to the

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66 *Clayton*, above n 3, at [75]–[77].
67 *Bethell v Bethell* [2018] NZHC 3171, (2018) 4 NZTR ¶28-032.
68 See the discussion at [181].
69 At [181(h)].

exclusion of Mr Bethell, his siblings and their spouses.[70] The figure of $300,000 reflected approximately 20 per cent of the equity of the nuptial settlement.

[65] We accept that there were factual features in that case which distinguish it from the present. But the relevance of the case for these purposes is the approach to the assessment of the gap between B and C, which is consistent with that in *Clayton*. Obviously, not all cases will require the level of detail seen in *Bethell*, but the analysis must be such as to enable the court to reach a clear view as to the extent of any disparity between B and C. The assessment undertaken in this case did not provide that information. Our assessment of the gap between B and C in this case is set out below.[71]

Treatment of contributions

[66] Second, we also accept the submission for Mrs Preston that the Court of Appeal erred in the approach to the parties' respective contributions. We have referred to the discussion in *Clayton* about the relevance of the principle that all forms of contributions should be treated as equal in assessing the nature and source of the assets.[72] The Court in *Clayton* added:[73]

> Section 182 also has to be applied to the most common current form of settlement, the discretionary family trust. In such cases, as we set out above, the situation must be considered from the perspective of the family unit, assuming a continuing marriage, and compared to the position under the dissolved marriage.

[67] By contrast, in this case the focus has been on the parties' financial contributions to such an extent that non-financial contributions have been treated as unequal in value. Moreover, the context of the family unit in which they were made has been largely ignored. The Court relied primarily on the dictum in *Ward* eschewing any presumption of equal sharing,[74] but that is a different thing to the court's duty to properly assess relevant contributions in considering the nature and source of the assets. To treat as relevant only financial contributions to a marriage is to materially

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70 At [184].
71 See below at [75]–[77].
72 See above at [36].
73 *Clayton*, above n 3, at [66] (footnote omitted).
74 CA judgment, above n 13, at [23].

undervalue the other roles and functions spouses perform in support of the relationship and its economic base.

[68] The Court of Appeal in this respect adopted the approach taken by the High Court.[75] The departure from the equal contribution approach is reflected in the conclusion in the High Court that Mrs Preston made "no material or substantial" contribution to sustaining the GPF Trust's assets.[76] And the contributions that were made were seen as outweighed by the fact that Mrs Preston had benefited in terms of the financial support she received so that she could complete her university studies.[77] We consider that that latter factor did not detract from her contributions but, rather, was an indication of the gap that existed for Mrs Preston between her position if the marriage continued and that post-dissolution.

[69] The conclusion as to Mrs Preston's lack of material or substantial contribution followed consideration of her contributions to the completion of the family home at The Fairway and to EBT Ltd. Mrs Preston's claims about work done to complete the landscaping of that home were largely dismissed.[78] The Judge also concluded that Mrs Preston's claims as to contributions to the out of office work of the company were exaggerated.[79] It is not suggested that any of these findings comprise an error of law. Rather, the error was in treating other contributions, such as undertaking housework and assisting in the ongoing running of a household, as lesser in value.

[70] Counsel for Mr Preston expressed concern at what he saw as an undue focus in argument on non-financial contributions given the range of factors potentially relevant. He suggested the approach taken in the lower Courts was perhaps not unreasonable where more traditional circumstances, like those in *Ward* and *Clayton*, were absent. But that misses the point that different contributions are equal in value. Mrs Preston's contributions have essentially been treated as less valuable where the

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75 At [27].
76 HC judgment, above n 9, at [167(e)].
77 At [167(f)].
78 See at [74(f)] in the context of the discussion on when the de facto relationship began.
79 At [81].

trust assets were treated as the family assets and both contributed to them in their own way.[80] In adopting the same approach, the Court of Appeal has accordingly erred.

[71] We also need to address in this context the argument made on behalf of Mr Preston that this was not a family unit in the sense of blended finances. Rather, the submission is that there were a number of factors suggesting that the parties' finances were not intermingled but that they in fact made deliberate attempts to create a firewall between each other's assets. Reference was made to various factors including the fact that: Mrs Preston settled her own trust, the Huntbos Trust, to hold her own assets; the Pauanui property was owned by the parties' respective Trusts as tenants in common in equal shares; there were no joint bank accounts; and there was no will addressing or acknowledging a joint financial life or making provision for each other on death.

[72] Where spouses bring their own children and accumulated wealth to a marriage later in life, some measure of ongoing financial separation is common. But that will not necessarily be decisive for the purposes of s 182. In any event, as we will discuss, Mr Preston's argument ignores a range of other factors which indicated that the parties were nonetheless operating as a family unit to which each contributed. Reference can be made to the following: Mrs Preston's loans to the business;[81] an overseas holiday funded by Mrs Preston which the parties enjoyed together with some of their children; the use of her funds to buy cars for Mr Preston's children; and the family unit benefited from the dividends paid to Mr Preston from the company. Further, in terms of the setting up of the Huntbos Trust, in which Mrs Preston and her children are beneficiaries, it is not significant that each party would want to provide some protection for their own children. The GPF Trust was for the benefit of Mr Preston's children and was never amended to include Mrs Preston's children as beneficiaries. In any event, despite the unequal financial contributions towards the purchase of the

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80 It is not necessary to address the argument for the appellant that Mr Preston disregarded the trust structure, a submission which is challenged by Mr Preston and was not pursued in the High Court.

81 In terms of the financial contributions, there was no real acknowledgement, in weighing up the circumstances, of the fact that advances made to the company by Mrs Preston, while repaid, had given the company the benefit of interest-free money, or of the greater contribution of the Huntbos Trust to the purchase price of the Pauanui property.

Pauanui property, the two Trusts were to share equally in any increase in the equity of the property, which is indicative of a financially-blended family unit.[82]

[73] Finally, the likely explanation for the focus on financial contributions in the High Court is that Mrs Preston had brought a separate claim based on a constructive trust and the findings about contributions in relation to s 182 reflected findings made on the constructive trust claim. But, in dealing with the s 182 claim, adopting that constructive trust analysis was not correct. Our approach also avoids what will generally be unedifying and unhelpful debates about the extent to which parties have contributed financially. Indeed, the exercise undertaken in this case only serves to highlight the problems with that type of analysis. The position should be looked at in a more broad-brush way.

The source of assets treated as decisive

[74] Third, we consider the Court of Appeal erred in its approach to the source of the assets in the GPF Trust. We accept, as Mr Preston submitted, that the Court was correct to treat this as a relevant factor under s 182(3).[83] But the Court appears to have effectively seen the fact that Mr Preston was the source of the assets as decisive, without considering other relevant factors. We say that because that was why the Court said Mr Preston gained "no unfair benefit" from the state of affairs on dissolution.[84] There is merit also in the submission for Mrs Preston that, in focusing on what the Court describes as Mr Preston's "separate property", principles applicable to the Property (Relationships) Act have incorrectly influenced the approach to s 182.[85] Finally, the Court's observation that making an order in this case might encroach upon Mr Preston's separate property or "third party trust property" ignores the legal reality, which is that all GPF Trust property is part of the nuptial settlement.[86] Mr Preston's submission that there was no confusion as to what property formed part of the nuptial settlement is not correct.

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82 We see the parties' arrangements here as factually different from those considered in *Wylie* (HC), above n 63.

83 As we discuss below at [78], we accept it is a factor favouring a relatively modest s 182 award.

84 CA judgment, above n 13, at [27].

85 At [23].

86 At [23]. Contrast *Clayton*, above n 3, at [68].

The appropriate orders

[75] In terms of assessing the gap in the present case, we accept, with one primary qualification, Mrs Preston's description of the difference between positions B and C in this case. The qualification is that we do not include any reference to the loss of Mrs Preston's peaceful access to the Pauanui property.[87] That is because it is not possible for us to resolve the factual differences between the parties as to the correctness of that proposition. Accordingly, and objectively assessed,[88] we see the gap as follows.

[76] First, Mrs Preston and her dependent child have lost access to the family home which was a trust asset. That home provided them with comfortable rent-free accommodation. Second, Mrs Preston no longer has access to funding from the GPF Trust for day-to-day living expenses. We see it as important in this respect that Mr Preston drew disproportionate dividends from the GPF Trust to support himself, Mrs Preston and other family members. Third, Mrs Preston can expect no further assistance with funding in terms of her study and has no recourse now to profits or growth in EBT Ltd. It is reasonable to assume that direct benefits to Mrs Preston would have continued while the two were married. As the High Court noted, Mr Preston's evidence was that he would have made statements to Mrs Preston to the effect that, "while we are husband and wife, of course you will continue to benefit from and enjoy the fruits of the business".[89] The indirect benefits to the wider family, particularly Mrs Preston's dependent child, would presumably also have continued. By contrast, on dissolution, only Mr Preston and his children will be able to benefit from both the GPF Trust and developments in EBT Ltd in these ways.

[77] There is a paucity of figures available to measure the gap in monetary terms in the absence of updated valuations for the various properties. But, to take a broad-brush approach, we can work on the basis that in the context of considering Mrs Preston's claim based on economic disparity under s 15 of the Property (Relationships) Act, the

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87 The appellant also referred to the fact that a job with EBT Ltd was no longer a feasible option, but she had ceased work with the company some time earlier.

88 See *Clayton*, above n 3, at [48], where the Court said it was the objectively assessed reasonable expectations that are relevant, although the subjective views of the parties could be relevant to that objective assessment.

89 HC judgment, above n 9, at [176].

evidence before the High Court suggested the present value of the disparity over a three-year period was in the order of $500,000.[90] We add that while we understand the Huntbos Trust has purchased the Pauanui property since the Court of Appeal judgment, a mortgage of some $337,000 was required in order to achieve that.

[78] While it follows from our discussion that we reject Mr Preston's submission there should be no orders made, there are factors suggesting that orders made to Mrs Preston to recompense her for this gap should reflect a modest sum. The first factor is that Mr Preston's children are the final beneficiaries of the GPF Trust. The second factor relates to the source and nature of the Trust assets: the shares in EBT Ltd were originally Mr Preston's personal property and transferred to the Trust prior to the beginning of the parties' de facto relationship and marriage; and The Fairway was purchased by the Trust, also prior to the relationship and marriage. The property at Pauanui was settled on the Trust during the relationship but was governed by the property sharing agreement. The final factor is that this was not a lengthy marriage; the parties separated after a little under five years of marriage.

[79] In terms of the latter factor, counsel for Mr Preston emphasises the importance of the length of the marriage in this case. The point made is that the B versus C comparison to be undertaken is not time sensitive to position A. In other words, counsel argues, a new spouse immediately upon marriage has an expectation of position C. If the parties separated a few weeks later, the spouse will then be in position B.

[80] We accept that the B and C delta is not time sensitive to position A in the diagram set out in *Clayton*. But we do not see this as meaning anything more than that the length of the marriage likely becomes a more significant factor if the marriage was short than if long. It is not, as we have already made clear, automatically a reason for declining to make an order, nor do we understand counsel for the respondent to suggest this to be the case.

[81] Mrs Preston submits that orders that would result in provision to her of $243,000 should be made. On the figures provided to us by the appellant, that sum

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90 At [115].

reflects approximately 15 per cent of the value of the GPF Trust equity. There is a difference between the parties of $70,000 in terms of the value of that equity, but in the value ascribed to the shares in the company, Mrs Preston has adopted the position of Mr Preston's expert as to the ratio to be applied in determining that value. Further, Mr Preston's position was that no orders should be made and he did not advance any alternative figure, apart from referring to a settlement offer made early on in the litigation. That offer is not relevant in the present context. Mr Preston also argues that adopting Mrs Preston's approach would mean that he would have to sell either The Fairway or EBT Ltd before he could be put in the same position as Mrs Preston of having a mortgage-free home. However, it was accepted that the approximately $800,000 debt, being the bulk of the debt relied on by Mr Preston in this regard, was company debt.[91] In the circumstances and in a context where both parties want the matter finally resolved, we consider that the figure of $243,000 advanced on behalf of Mrs Preston is appropriate.

[82] While we have not accepted the submission for Mrs Preston that, as a general rule, the goal of orders made under s 182 should be the provision of a home for each of the parties, that will be the practical result here. In this case, the purposes of s 182 are met by orders which will see Mrs Preston hold the Pauanui property effectively mortgage-free while Mr Preston will have the property at The Fairway. We consider that outcome is consistent with the purposes of s 182.

Result

[83] For these reasons, the appeal is allowed. We make the following additional orders:

(a) That the Grant Preston Family Trust pay the Huntbos Family Trust $141,000 and release any claim to the $192,000 of the funds held on joint account (the Grant Preston Family Trust share of these funds is $102,000 and the Huntbos Family Trust share is $90,000).[92]

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91 In the hearing, our attention was not drawn to any particular reason why the company debt could not be refinanced.

92 These are rounded figures.

(b) The Grant Preston Family Trust deed is amended by removing the appellant as a discretionary beneficiary.

(c) Leave is reserved to the parties to seek further directions or orders that may be necessary to give effect to this judgment.

[84] Mr Preston argued that if the appeal was allowed, costs in this Court should lie where they fall. This submission was advanced on the basis that we should treat the appeal as public interest litigation, particularly given the focus on the approach to s 182. However, we see the case as no different in this respect from other cases where the leave criterion, namely, that the proposed appeal raises questions of general or public importance, would be met.[93] We do not see any reason for departing from the usual position that costs in this Court should follow the event. We make an order that Mr Preston pay Mrs Preston costs of $25,000 plus usual disbursements. We certify for second counsel. Unless the parties can agree, costs in the Courts below are to be redetermined in those Courts in accordance with this judgment.

Solicitors:
Russell McVeagh, Wellington for Appellant
Buddle McCleary Kennedy Ltd, Whakatāne for Respondents

[93] Senior Courts Act 2016, s 74(2)(a). See *FMV v TZB* [2021] NZSC 145 at [10].