Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

9 NOVEMBER 2021

MEDIA RELEASE

KATHARINE ELIZABETH PRESTON v GRANT LEE PRESTON

(SC 10/2021) [2021] NZSC 154

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

After her marriage to Mr Preston came to an end, Mrs Preston sought, amongst other things, orders under s 182 of the Family Proceedings Act 1980 for a share of the assets owned by the Grant Preston Family Trust (GPF Trust). Section 182 empowers a court to vary the terms of a nuptial settlement where the parties' marriage comes to an end.

This Court had previously considered the principles applicable under s 182 in the decisions of *Ward v Ward* and *Clayton v Clayton [Claymark Trust]*; but this case gave rise to questions about how those principles would apply where the factual circumstances differed from those in *Ward* and *Clayton*. Those cases had involved marriages of over ten years' duration in which there were children of the spouses together and there was wealth created during the marriage. In contrast, Mr Preston and Mrs Preston were married for a little under five years, had children of their own from previous relationships and no children together, and the assets at issue were primarily owned by the GPF Trust and settled on that Trust prior to their marriage.

The High Court and Court of Appeal held that a deed executed in 2010 which amended the GPF Trust's trust deed by adding Ms Preston as a discretionary beneficiary was a nuptial settlement for the purposes of s 182. However, both Courts held that for a number of reasons, the discretion to make a s 182 award ought not to be exercised.

Mrs Preston was granted leave to appeal to the Supreme Court on the question of whether the Court of Appeal was correct to dismiss her claim for s 182 orders in relation to the GPF Trust. Whether the 2010 deed was a nuptial settlement was not in issue.

Decision

The Supreme Court has unanimously allowed the appeal.

In doing so, the Court confirmed that the principles discussed in *Ward* and *Clayton* apply equally to a case like the present. The purpose of s 182 is to empower the courts to remedy the consequences of the failure of the premise – a continuing marriage – on which the nuptial settlement was made. The comparison is to be made between the position under the settlement were the marriage to continue and the position that exists after the dissolution.

The Court in *Clayton* had envisaged a two-stage process to determining s 182 applications: (1) determine whether there was a nuptial settlement and if so, (2) determine whether the discretion should be exercised.

This case indicated to the Court that it would be more helpful to divide the second stage into two, so that what is required is a three-stage process. The first stage is to determine whether there is a nuptial settlement. The second is to assess whether there is a difference between the position of the spouse under the settlement with the marriage dissolved and what the position would have been under the settlement had the marriage continued. If such a difference exists, the discretion under s 182 is enlivened. The third stage is to then decide how the discretion should be exercised in the particular case.

Given that the 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. Departing from this logic would require there to be factors telling against such an outcome. The types of factors that might militate against the exercise of the discretion will vary as the inquiry is a factual one, but possible illustrations 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.

On the basis of these principles, the Court held that s 182 had not been correctly applied in this case. In particular, there had been no comparison of the difference between Mrs Preston's position under the settlement on dissolution with that under the settlement had the marriage continued. Although a lengthy or detailed arithmetical exercise is not necessarily required, the court needs to have some conception of what the scale of the disparity is before it can conclude, at the third stage, that other factors nevertheless outweigh that gap.

The approach to the parties' respective contributions was also incorrect. This Court in *Clayton* said that when assessing the nature and source of the assets – which is a relevant factor under the discretionary exercise – the assessment must be undertaken consistently with the principle that all forms of contributions are to be treated as equal. Such an approach also avoids what will generally be unedifying and unhelpful debates about the extent to which parties have contributed financially. But in this case, the focus thus far had been on the parties' financial contributions to such an extent that Mrs Preston's non-financial contributions were treated as unequal in value and the context of the family unit in which they were made was largely ignored.

Finally, while a relevant factor, the fact that Mr Preston was the source of the assets was incorrectly treated as decisive, and other relevant factors accordingly not considered.

In terms of determining the appropriate orders in this case, the Supreme Court held that there was a clear difference between the direct and indirect benefits Mrs Preston would have continued to receive from the GPF Trust if the marriage was ongoing compared to her current position after the dissolution. The discretion was therefore enlivened and orders in Mrs Preston's favour were to follow. However, there were certain factors which suggested the orders made ought to reflect a modest sum. These factors were that Mr Preston's children were the final beneficiaries of the GPF Trust; that the main assets had been settled on the Trust prior to the relationship between the parties; and that this was not a lengthy marriage.

Reflecting these circumstances, the Court concluded that orders resulting in the provision of $243,000 ought to be made to Mrs Preston under s 182. That figure reflected approximately 15 per cent of the value of the GPF Trust equity.

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