IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA760/2021
[2024] NZCA 24

	BETWEEN	SIRPA ELISE ALALÄÄKKÖLÄ Appellant
	AND	PAUL ANTHONY PALMER Respondent

Hearing:	9 March 2023
Court:	Collins, Katz and Mallon JJ
Counsel:	C L Elliott KC and S P Chandra for Appellant B A Fletcher and E-J M Tucker for Respondent
Judgment:	21 February 2024 at 12.30 pm

JUDGMENT OF THE COURT

A An extension of time is granted for filing the appeal.

B We answer the approved questions of law on appeal as follows:

(1) Are the Copyrights "property" for the purposes of the Property (Relationships) Act 1976 (PRA)?

Yes.

(2) If the Copyrights are property, how should they be classified in terms of the PRA?

The Copyrights should be classified as relationship property.

(3) If the Copyrights are property, how should they be treated in terms of the PRA?

The Copyrights should remain in Ms Alalääkkölä's exclusive legal ownership, with Mr Palmer receiving a compensatory adjustment from other relationship property to ensure an equal division of relationship property.

C The assessment of an appropriate compensatory adjustment is remitted to the Family Court for determination.

D The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Katz J)

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Introduction

[1] This case raises a novel issue, that has not previously been considered by the New Zealand courts. Specifically, how should copyright in artistic works created by one spouse during a relationship be classified for the purposes of the Property (Relationships) Act 1976 (PRA) when the relationship ends?

[2] The appellant, Sirpa Alalääkkölä, is an artist who has created many original artworks (the Artworks) during her 20-year marriage to Paul Palmer. Many of the Artworks were sold during the relationship, providing the main source of income for the family. Others were retained by the parties and are currently in the possession of the Family Court, pending final division of the relationship property. The present dispute, however, does not relate to the ownership or division of the Artworks. Rather, the key issue is whether the copyrights in the Artworks (the Copyrights) are relationship property or Ms Alalääkkölä's separate property.

[3] In the Family Court, Judge Grace found that the Copyrights were Ms Alalääkkölä's separate property.[1] On appeal to the High Court, Isac J found that the Copyrights were relationship property.[2] Ms Alalääkkölä now appeals to this Court,

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1 *Alalaakkola v Palmer* [2020] NZFC 1635 [Family Court copyright judgment] at [23].
2 *Palmer v Alalaakkola* [2021] NZHC 2330, [2021] NZFLR 515 [High Court judgment] at [36].

having been granted leave to do so by the High Court.[3] The approved questions on appeal are:[4]

(a) Are the Copyrights "property" for the purposes of the PRA?

(b) If the Copyrights are property, how should they be classified in terms of the PRA? (In other words, should they be classified as relationship property or separate property?)

(c) If the Copyrights are property, how should they be treated in terms of the PRA? (In other words, how should they be allocated between the parties?)

Background

Key facts

[4] Ms Alalääkkölä graduated from the Academy of Fine Arts in Helsinki, Finland in the late 1980s. She was subsequently awarded a Fulbright scholarship to attend a master's programme at the Tisch School of the Arts at New York University. Her evidence is that she has held "many high level exhibitions in Finland", and has "many paintings in the collection of [the] Finnish National Gallery and in other art collections in Finland".

[5] In 1993 Ms Alalääkkölä began living in New Zealand. She met Mr Palmer in 1996 and in March 1997 they married. They separated 20 years later, in July 2017. Ms Alalääkkölä says that after completing her studies she had "a promising art career ahead of [her]", but throughout her marriage she "compromised greatly" and had to "sacrifice [her] serious art career to become [a] painting machine", producing commercial art to keep the family financially afloat. She says that from about mid-1998, her paintings had become the main source of income for the family.

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3 Senior Courts Act 2016, s 60; and *Alalaakkola v Palmer* [2021] NZHC 3101 [leave and costs judgment].

4 Questions (a) and (b) were approved by Isac J in the leave and costs judgment, above n 3, at [17] and [19]. Question (c) was subsequently approved by this Court.

[6] There is a conflict in the evidence regarding the extent to which Mr Palmer contributed to the business of selling or commercialising Ms Alalääkkölä's art during their marriage. Mr Palmer's evidence is that he played a significant role in promoting and marketing Ms Alalääkkölä's art, as well as creating art cards and prints for sale. Ms Alalääkkölä, on the other hand, claimed that Mr Palmer "has not contributed in any real way to making, marketing, or selling my art, financially, physically or emotionally".

[7] Going forwards, Mr Palmer says that he wishes to continue "to earn a living from our business we had together" and that "I plan to restart my publication business immediately, so that I can rebuild it to what it was prior to separation." Ms Alalääkkölä, however, is strenuously opposed to Mr Palmer continuing to have any commercial involvement with the Artworks, including by commercialising any of the Copyrights.

The Family Court decision

[8] On 10 February 2020, Judge Grace issued a minute making various directions regarding the division of relationship property.[5] He reserved his decision on any issues relating to the Copyrights,[6] which were addressed in a subsequent decision dated 6 March 2020.[7] In that decision, the Judge noted that the parties had agreed that Mr Palmer could keep certain paintings he had identified, but that the "sticking point" was that Mr Palmer "sought also to have the Court transfer the copyright in those particular paintings to him".[8] The purpose of this, the Judge recorded, "was to enable [Mr Palmer] to reproduce copies of the artwork and then to sell them as part of his wish to derive a future income stream from the art".[9] The Judge noted that Ms Alalääkkölä was agreeable to Mr Palmer keeping the paintings which he had

5 *Alalaakkola v Palmer* FC Blenheim FAM-2017-006-161, 10 February 2020 [Family Court minute].
6 At [22].
7 Family Court copyright judgment, above n 1.
8 At [8].
9 At [8].

identified, but objected to him having the Copyrights. This was because, in Ms Alalääkkölä's view, transfer of the Copyrights:[10]

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

[9] Against this background, the Judge found that:

(a) The Copyrights were property for the purposes of the PRA (falling within either or both of paras (c) and (e) of the definition of "property" in s 2 of the PRA).[11]

(b) The Copyrights were severable from the work created. Although the work itself was relationship property, the Copyrights derived from her skill and authorship. Consequently, they were appropriately classified under the PRA as Ms Alalääkkölä's separate property, rather than as relationship property.[12]

[10] The Judge went on to state that even if he was wrong to conclude that the Copyrights were Ms Alalääkkölä's separate property, he would not have ordered a transfer of any of the Copyrights to Mr Palmer.[13]

[11] Mr Palmer appealed to the High Court.

The High Court decision

[12] On appeal to the High Court, Isac J found that:

(a) The Copyrights fell within the definition of "property" in s 2 of the PRA, in particular para (e) of that definition.[14]

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10 At [9].
11 At [14]–[17].
12 At [19]–[23].
13 At [28]–[36].
14 High Court judgment, above n 2, at [32]–[34].

(b) Judge Grace had erred in classifying the Copyrights as Ms Alalääkkölä's separate property. They were properly classified as relationship property under the PRA.[15]

[13] The issue of how best to achieve an equal division of the remaining Artworks and the Copyrights was remitted to the Family Court.[16] Isac J noted, however, that the Family Court has a "broad" discretion in relation to vesting orders and that "there is no requirement that copyright in a work must follow an order vesting the work in one party or the other".[17]

[14] Ms Alalääkkölä now appeals to this Court, with leave of the High Court.[18] Pursuant to r 29(1)(b) of the Court of Appeal (Civil) Rules 2005, the appeal should have been filed within 20 working days of that leave decision. The appeal was filed, however, six working days out of time. An extension of time is not opposed. As the period of delay was very short and there is no prejudice to Mr Palmer, we grant the necessary extension of time.

Is copyright "property" for the purposes of the PRA?

The issue

[15] The first issue is whether copyright is "property" for the purposes of the PRA. Ms Alalääkkölä argued that it is not, whereas Mr Palmer supported the conclusion of both Isac J and Judge Grace that it is.

[16] Property is defined in s 2 of the PRA as follows:

> **property** includes—
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> (a) real property:
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> (b) personal property:
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> (c) any estate or interest in any real property or personal property:
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> (d) any debt or any thing in action:

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15 At [30] and [35]–[36].
16 At [41], [47]–[48] and [56].
17 At [49].
18 Leave and costs judgment, above n 3, at [17] and [19].

(e) any other right or interest

[17] The Artworks in dispute are apparently now all in the possession of the Family Court. There is no dispute that they fall within the definition of property in the PRA. The issue is whether the Copyrights associated with those Artworks also fall within that definition. Judge Grace considered that the Copyrights would fall within para (c) of the definition of "property" in s 2. Alternatively, if the Copyrights were not captured by para (c), he was satisfied that the Copyrights would fall within para (e).[19] Isac J also considered that copyright would fall within the s 2 definition, specifically para (e).[20]

Ms Alalääkkölä's submissions on appeal

[18] It was submitted on behalf of Ms Alalääkkölä that copyright does not fall within the definition of property in the PRA. The key arguments advanced in support of this proposition were that:

(a) Copyright comprises a bundle of rights and interests, each of which must be assessed individually. Part or all of these rights and interests do not fit within the definition of "property" in s 2 of the PRA.

(b) Copyright differs from other types of intangible interests that have been recognised as property under the PRA such as assignable goodwill, fishing rights under the Fishing Act 1996 and rights to compensation under the Accident Compensation Act 2001. Such interests all relate to an accrued benefit where the benefit owner's part is done. The right to control copyright is different. It is the right to control the author's expression of their talent. It is also a purely negative right; to prevent others from exercising the copyright owner's exclusive rights and to claim compensation if they have.

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19 Family Court copyright judgment, above n 1, at [15].

20 High Court judgment, above n 2, at [32]–[34]. The Judge referred to the report of Te Aka Matua o te Ture | Law Commission *Dividing relationship property – time for change? | Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [8.17] where the Commission noted that "[w]e think that the [Property (Relationships) Act 1976'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" (footnote omitted).

Further, copyright is inherently personal in nature and the right to benefit from copyright is inchoate: artists regularly choose not to exercise those rights for a financial benefit.

(c) Here, the Copyrights are the product of Ms Alalääkkölä's overall makeup, personal artistic skills and qualifications, and are therefore not property in terms of the PRA definition. This is analogous to *Z v Z (No 2)*, where this Court found that a spouse's enhanced earning capacity (derived from qualifications and career experience acquired during the marriage) did not fall within the definition of "property" in the Matrimonial Property Act 1976 (subsequently renamed the PRA).[21] Rather, this Court found that the husband's earning capacity was linked to his personal attributes, and that:[22]

> … essentially personal characteristics which are part of an individual's overall makeup such as the person's level of intelligence, memory, physical strength or sporting prowess are not to be seen as "property" within the meaning of the Matrimonial Property Act.

(d) Although the Supreme Court recognised in *Clayton v Clayton* that the meaning of property under s 2 of the PRA can encompass more than the traditional concept of property,[23] a cautious approach is needed before widening the concept further.

(e) The Law Commission had questioned whether the definition of property in s 2 of the PRA "can accommodate new and emerging types of property, such as virtual currencies, digital accounts or libraries, intellectual property rights and other forms of intangible or digital property".[24]

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21 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279.

22 At 279. See also 264 and 280–282.

23 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

24 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) at [3.5], citing Law Commission *Dividing relationship property – time for change?,* above n 20, at [8.16]–[8.21].

Discussion

[19] In New Zealand, copyright is a creature of statute.[25] The Copyright Act 1994 is therefore the necessary starting point when considering the scope of the rights or interests comprising the Copyrights. Section 14(1) of the Copyright Act, which appears (along with ss 15 and 16) under the sub-heading "*Description of copyright*" in pt 1 of the Act, states:[26]

> **14 Copyright in original works**
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> (1) Copyright *is a property right* that exists, in accordance with this Act, in original works of the following descriptions:
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> (a) literary, dramatic, musical, or artistic works:
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> (b) sound recordings:
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> (c) films:
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> (d) communication works:
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> (e) typographical arrangements of published editions.

[20] Copyright comprises a "bundle of rights". In relation to artistic works, the relevant bundle of rights includes the exclusive right to copy the work,[27] issue copies of it to the public,[28] and communicate the work to the public.[29] These rights are subject to certain qualifications, as set out in the Copyright Act.[30] Counsel for Ms Alalääkkölä referred to various other "rights" as also being included within the copyright bundle of rights, such as the right of exclusive control, or the right to economically benefit from the works. These are not, however, separate or standalone rights. Rather, they arise from, and are consequential on, the specific statutory rights conferred on a copyright owner.

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25 Copyright Act 1994, s 225(2). See also *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [240] per Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ; *Beazley Homes Ltd v Arrowsmith* [1978] 1 NZLR 394 (SC) at 400; and *Brooker v John Friend Ltd* [1936] NZLR 743 (SC) at 746–747.

26 Emphasis added.

27 Sections 16(1)(a) and 30.

28 Sections 16(1)(b) and 31.

29 Sections 16(1)(f) and 33.

30 See for example pt 3.

[21] In *Pacific Software Technology Ltd v Perry Group Ltd*, this Court was required to consider the relationship between copyright and the tort of conversion.[31] Writing for the Court, Hammond J observed that:

> [101] As to the juristic nature of copyright, the "great debate", which "has been conducted, largely over the unconcerned heads of copyright owners" (Phillips and Firth, *Introduction to Intellectual Property Law* (1st ed, 1986) para 10.3), is futile. The Act is conclusive. Copyright is a sui generis form of "personal property". It is a bundle of rights conferred by law. It is given the status of property, on the terms laid down in the statute. …

[22] Section 14(1) of the Copyright Act, which states unequivocally that copyright is a property right, is reinforced by other provisions of the Act, namely:

(a) s 120(2), which provides that "[i]n proceedings for infringement of copyright, all such relief by way of damages, injunctions, accounts, or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right"; and

(b) s 131(6), which provides that where any person is convicted of the offence of making or dealing with objects that infringe copyright, in circumstances involving the making of profit or gain:

> … that offence shall be deemed to have caused a loss of property for the purposes of section 32(1)(a) of the Sentencing Act 2002, and the provisions of that Act relating to the imposition of the sentence of reparation shall apply accordingly.

[23] As the learned author of *Intellectual Property Law in New Zealand* states:[32]

> Although intangible, the law recognises that the rights arising out of intellectual property are property rights. As such they can be sold, licensed, damaged and converted or unlawfully detained.

[24] Copyright is not unique in being a form of property that comprises a bundle of rights. Most and possibly all forms of property comprise "a bundle of rights possessed by one party, which gives rise to corresponding duties in others; especially the duty

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31 *Pacific Software Technology Ltd v Perry Group Ltd* [2004] 1 NZLR 164 (CA).

32 Ian Finch (ed) *Intellectual Property Law in New Zealand* (3rd ed, Thomson Reuters, 2017) at [35.1.1].

not to interfere with the property owners' right to exclusive enjoyment".[33] For example, an interest in a partnership is an intangible form of property that comprises a bundle of rights, usually set out in a partnership deed.[34] In addition to the right to exclusive enjoyment, other common property rights include the right to benefit and the right of sale or assignment.[35] While rights included within a particular "bundle of rights" may differ between different forms of property, there are also many similarities. For example, a copyright owner's right to exclusive enjoyment of a work parallels the right of a landowner to exclude others from trespassing on their land, or the right of the owner of a motor vehicle to exclude others from using that vehicle. Similarly, as with other forms of property, those who have exclusive legal rights over intellectual property have the ability to economically benefit from its use and enforce the rights in their bundle of rights.[36]

[25] We have not been persuaded that there are any specific rights within the copyright bundle of rights that (considered in isolation) are not property, or which result in the Copyrights not falling within the definition of property. Counsel for Ms Alalääkkölä suggested that "moral rights" form part of the copyright bundle of rights, but are not property rights. Moral rights, however, do not form part of the copyright bundle of rights. Moral rights are distinct from copyright and are dealt with separately in the Copyright Act.[37] While copyright has an economic focus, moral rights primarily encompass the rights of an author to be recognised as the creator of their work and object to any derogatory treatment of their work.[38] Moral rights are personal, meaning they cannot be assigned, though the author can waive them.[39] "The moral rights of authors are provided to enable such authors to protect the integrity of their works even though ownership passes to others."[40] Here, there is no question that the moral rights in the Artworks belong to Ms Alalääkkölä. Mr Palmer accepts that

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33 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at [1.6.2].
34 See *Z v Z (No 2)*, above n 21, at 286.
35 See discussion of rights in A M Honoré "Ownership" in A G Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, London, 1961) at 113.
36 Finch, above n 32, at [36.1.1] and [36.1.2].
37 See pt 4.
38 Finch, above n 32, at [35.4.5.3].
39 Copyright Act, ss 107 (providing for waiver of moral rights) and 118 (preventing assignment of moral rights).
40 *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2004] 1 NZLR 26 (CA) at [45].

those moral rights are inalienable and does not seek to argue that they form part of the Copyrights, or are relationship property.

[26] The Law Commission's report *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* does not assist Ms Alalääkkölä's argument.[41] In an earlier issues paper — *Dividing relationship property – time for change? | Te mātatoha rawa tokorau – Kua eke te wā?* — the Commission had considered whether the definition of property could "accommodate new and emerging types of property", such as virtual currencies, digital libraries, intellectual property rights and other forms of intangible or digital property.[42] The Commission had expressed the view that the definition in s 2 of the PRA, particularly the "catch all" "any other right or interest" in para (e), was "wide enough to capture all sorts of intangible things".[43] In its subsequent report, the Commission referred to these comments and ultimately concluded that it was not necessary to amend the existing definition of property in the PRA.[44]

[27] Nor does the decision of the Supreme Court in *Clayton v Clayton* support Ms Alalääkkölä's position. In that case the Supreme Court took a generous interpretation of the meaning of "property" in the PRA. In concluding that certain powers held by one spouse in respect of a trust were relationship property, the Court accepted Ms Clayton's submission that:[45]

> [38] … 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.

[28] Here, it is not necessary to "[broaden] traditional concepts of property" to bring copyright within the scope of the PRA definition of property.[46] Copyright has long been considered a form of property in New Zealand and is expressly identified as

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41 Law Commission *Review of the Property (Relationships) Act 1976*, above n 24.
42 At [3.5].
43 Law Commission *Dividing relationship property – time for change?*, above n 20, at [8.16]–[8.17].
44 Law Commission *Review of the Property (Relationships) Act 1976*, above n 24, at [3.5] and [3.10]–[3.11].
45 *Clayton*, above n 23, at [38]. See also [70], [79]–[80] and [98(a)].
46 See at [38].

such in the Copyright Act.[47] Had there been doubt on the issue, however, the Supreme Court's observations in *Clayton* would have supported inclusion of copyright interests within the PRA definition of property. Ms Alalääkkölä 's analogy with *Z v Z (No 2)* does not assist either, for reasons we discuss further at [41]–[42] below.

[29] In conclusion, Judge Grace and Isac J were correct to find that the Copyrights fell within para (e) of the definition of property in s 2 of the PRA as "any other right or interest". In addition, on the basis that copyright is a sui generis form of personal property (as Hammond J described it in *Pacific Software Technology Group*),[48] Judge Grace was also correct to find that the Copyrights also fall within para (c) of the definition — "any estate or interest in any … personal property".

Are the Copyrights separate property or relationship property under the PRA?

The issue

[30] Having found that the Copyrights are property for the purposes of the PRA, it is necessary to consider their correct classification. Ms Alalääkkölä submitted that the Copyrights are her separate property, whereas Mr Palmer argued they are relationship property.

Classification of property under the PRA

[31] The PRA recognises that contributions to a relationship are not solely financial. Non-monetary contributions, such as domestic work and childcare, are given equal importance to financial contributions in the context of dividing property.[49] The PRA aims to recognise the equal contributions of both parties to a marriage, civil union or de facto relationship and to provide for a just division of relationship property between those parties when their relationship ends.[50] Consistent with this purpose, the default position is that the parties are entitled to share equally in the relationship property, unless there are extraordinary circumstances that would make equal sharing repugnant

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47 Copyright Act, s 14(1).
48 *Pacific Software Technology Ltd v Perry Group Ltd*, above n 31, at [101].
49 Property (Relationships) Act, s 18.
50 Sections 1M(b)–(c) and 1N(b).

to justice.[51] Separate property, on the other hand, is generally retained by the owner and excluded from division.[52] In this case, Judge Grace found that equal sharing would not be repugnant to justice.[53]

[32] The "general scheme of the [PRA] is to define relationship property quite specifically and leave separate property as a residual class", with the result that property that is not captured by the definition of relationship property will generally be dealt with as separate property.[54] The PRA also contains, however, some provisions that expressly identify situations where property will be classified as separate property.[55]

[33] Relationship property is defined in s 8 of the PRA. In general terms, subject to certain exceptions, relationship property will generally include essential family items (such as the family home and chattels); all jointly owned property; and (most relevantly for present purposes) property acquired during the relationship.

[34] Separate property under the PRA can be broadly categorised into three types:

(a) property acquired prior to the relationship or after the date of separation;[56]

(b) gifts or inheritances from third parties or distributions from a trust (subject to intermingling);[57] and

(c) specific types of property such as heirlooms, taonga, and gifts from the other spouse.[58]

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51 Sections 11 and 13. Different principles apply to division of property where the relationship was of short duration: see ss 2E, 14, 14AA and 14A. Different principles also apply to the division of any property which is relationship property by operation of s 9A: see s 9A(2).

52 Subject to the court's powers under ss 15A, 18B and 18C.

53 Family Court minute, above n 5, at [11].

54 Bill Atkin *Family Law Service* (online ed, LexisNexis) at [7.320]; and Property (Relationships) Act, s 9(1).

55 See ss 9 and 10.

56 Section 9(4).

57 Section 10(1) and (2).

58 See the definition of "family chattels" in s 2, and ss 9A and 10(2).

The Family Court decision

[35] Judge Grace found that the Copyrights were separate property and therefore vested solely in Ms Alalääkkölä as the person who created the Artworks.[59] The Judge noted that each of the Artworks had two distinct (and severable) property rights attached to it, the rights to the physical painting itself and the associated copyright.[60] The Judge concluded that although the Artworks created during the relationship were relationship property,[61] the Copyrights in those Artworks were not.[62] The Judge summarised the argument for treating the Copyrights as separate property as follows:

> [22] … that the artistic skill that rests in the applicant [Ms Alalääkkölä] 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.

The Judge appears to have accepted this argument, finding that:

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

The High Court decision

[36] Isac J reached a different conclusion. He acknowledged that it is Ms Alalääkkölä's "artistic skill that allows the [Copyrights] to exist", but went on to say that:

> [35] … 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.

[37] On the Judge's analysis, when Ms Alalääkkölä applied her skill towards creating the Artworks during the course of the relationship, the Copyrights in those works "became relationship property, as it came into existence during the relationship".[63] The Judge noted that, if the Copyrights were treated as separate property, this would have the consequence that people who had other skills prior to

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59 Family Court copyright judgment, above n 1, at [22]–[23] and [28].
60 At [19].
61 At [17].
62 At [23].
63 High Court judgment, above n 2, at [36].

entering into a relationship and used those skills to produce property (in the broad PRA sense of that term) during the course of the relationship "would be able to avoid the equal sharing presumption on the basis that the skill was 'theirs'".[64] Such a result, the Judge noted, would be inconsistent with the scheme of the PRA.[65]

[38] The Judge therefore concluded that the Copyrights were not Ms Alalääkkölä's separate property but were relationship property.[66]

Submissions on appeal

[39] We have found that the Copyrights are "property" for the purposes of the PRA, for the reasons set out at [19]–[29] above. Copyright arises automatically under the Copyright Act once an original work is created.[67] Section 8(e) provides that (subject to certain exceptions) property acquired during the relationship is relationship property. The starting point for the analysis, therefore, is that if the Copyrights were acquired by Ms Alalääkkölä during the relationship, they will be relationship property. Hence, counsel for Mr Palmer argued the Copyrights must be relationship property as they arose when each individual Artwork was created during the course of the parties' relationship.

[40] Ms Alalääkkölä's submissions were somewhat more nuanced. In essence, she submitted that even if some of the bundle of rights and interests comprising the Copyrights were acquired during the relationship, the relevant bundle of rights and interests also includes (or is inextricably linked to) other property rights and interests that pre-date or post-date the relationship. The inclusion of these rights and interests takes the Copyrights outside the definition of relationship property and requires that they be categorised as separate property — namely property acquired prior to the

64 At [36].
65 At [36].
66 At [30] and [36]–[37].
67 Copyright Act, s 14(1).

relationship or after the date of separation.[68] Specifically, Ms Alalääkkölä submitted that the Copyrights should be classified as her separate property because:

(a) The property interest in the Copyrights is inextricably tied to her skills as the creator of the Artworks. Those skills are personal to her and were acquired prior to her relationship with Mr Palmer.

(b) Part of the property interest in the Copyrights lies in their future commercialisation, which will be Ms Alalääkkölä's post-separation income.

(c) The property interest in the Copyrights includes Ms Alalääkkölä's business of producing and selling art, which she commenced prior to the relationship.

(d) Section 21 of the Copyright Act provides that the author of the relevant work (the person who creates it) will generally be the first owner of copyright in the work. That person is Ms Alalääkkölä. This further supports the conclusion that the Copyrights are her separate property.

Ms Alalääkkölä's artistic skills and qualifications

[41] Ms Alalääkkölä submitted that the Copyrights are inextricably linked to (and are a product of) her artistic skills and qualifications. These unique skills are personal to her and were acquired prior the relationship. Ms Alalääkkölä submitted that this context justifies treating the Copyrights as separate property for the purposes of the PRA. Ms Alalääkkölä also referred, by analogy, to the Court's conclusion in *Z v Z (No 2)* that personal skills and attributes do not constitute relationship property (or indeed property at all) for the purposes of the PRA.[69]

[42] In our view these submissions conflate two distinct concepts. One relates to the content of the relevant property rights, which comprises the bundle of rights set

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68 Property (Relationships) Act, s 9(4).
69 *Z v Z (No 2)*, above n 21, at 279.

out at [20] above. The other is Ms Alalääkkölä's personal skills and qualifications as an artist. Although those skills were used in the creation of the Artworks, they are distinct from the Copyrights which attach to the Artworks (as Isac J found).[70] The skills and qualifications remain an intrinsic part of Ms Alalääkkölä's individual makeup and as such would not transfer to a new owner of any of the Artworks or the associated Copyrights. In no sense, however, do Ms Alalääkkölä's personal skills and attributes form part of the bundle of rights comprising the property rights in the Copyrights. Rather, the Copyrights attach to the individual Artworks to which her skills have been applied.

[43] Isac J was therefore correct to conclude that Ms Alalääkkölä's personal skills and qualifications as an artist are distinct from the property rights in the Copyrights.[71] As in *Z v Z (No 2)*, Ms Alalääkkölä's personal skills and attributes are part of her individual makeup and do not constitute "property" for the purposes of the PRA. Many skills are gained by people before marriage who then go on to use those skills during marriage to produce or acquire property. This does not put the property so produced or acquired beyond the reach of the PRA.

[44] Nor do we accept Ms Alalääkkölä's submission that a distinction should be drawn in this context between highly personal skills and attributes, such as artistic skills, and other less personal skills such as those held by doctors, lawyers, accountants, businesspeople or tradespeople. The PRA recognises that both partners in a relationship contribute to the creation of relationship property in different ways. Hence, in the creative sphere, one partner undertaking the household work and caring for children might allow the other partner to paint, invent, or write music or a book. Recognising intellectual property acquired during a relationship as relationship property is consistent with the PRA's recognition that although the contributions of the partners to a relationship may be different, they are both valuable.

[45] In conclusion, Ms Alalääkkölä's skills and qualifications do not constitute property for the purposes of the PRA regime and are not relevant to how the Copyrights should be classified.

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70 High Court judgment, above n 2, at [35].
71 At [35]–[36].

Future commercialisation of the Copyrights

[46] Ms Alalääkkölä's next submission was that the future commercialisation of the Copyrights will give rise to post-separation income streams that will be her separate property. This, she submitted, supports the conclusion that the Copyrights (or part of them) must also be her separate property.

[47] This argument is circular and does not advance the analysis. It presupposes that Ms Alalääkkölä will necessarily have the exclusive entitlement to receive any post-separation income generated from the Copyrights. That depends, however, on the outcome of this appeal. If the Copyrights are relationship property, any income resulting from their commercialisation (until final division of the relationship assets) will also be relationship property.[72] On the other hand, if the Copyrights are separate property, any income resulting from their commercialisation will generally also be separate property.[73]

The business of producing and selling Ms Alalääkkölä's artworks

[48] Ms Alalääkkölä's next submission was that the property interests in the Copyrights include, or are intrinsically connected to, her business of producing and selling and commercialising the Artworks. As she commenced that business prior to her relationship, Ms Alalääkkölä submitted, the Copyrights must be (at least in part) her separate property.

[49] Again, this argument conflates two distinct property rights or interests. The business that Ms Alalääkkölä commenced prior to her relationship, and which the couple then appear to have jointly operated during their relationship (although the extent of Mr Palmer's involvement is in dispute), constitutes a distinct and separate type of property. The business may have been the vehicle used to commercialise both the Artworks (primarily by sale to the public) and the Copyrights, but it does not form part of the bundle of property rights that comprise the Copyrights. The ownership, value and division of any business assets are separate matters. Those matters are not before us in this appeal.

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72 Property (Relationships) Act, s 8(1)(l).
73 Section 9(3) (subject to s 9A).

The interaction between the Copyright Act and PRA

[50] Ms Alalääkkölä's final submission on this aspect of the appeal was that s 21 of the Copyright Act, which provides that the author of a work is generally the first owner of copyright in that work,[74] supports her claim that the Copyrights are her separate property. More specifically, Ms Alalääkkölä submitted that a third-party purchaser of one of the Copyrights would be entitled to rely on a transfer of copyright from her, as the first owner of the copyright under s 21. If the Copyrights are relationship property, however, it was submitted that Ms Alalääkkölä (as the author/copyright owner) would be unable to give good title, notwithstanding the statutory framework of the Copyright Act. This would create both uncertainty and unnecessary complexity.

[51] We note at the outset that the classification of the Copyrights as relationship property would not mean that any prior transfers of copyright by Ms Alalääkkölä would be legally invalid. Rather, any proceeds of sale of the relevant copyright would become relationship property.[75] The Copyrights are no different in this respect from any other form of property (including vehicles or real estate) which, during a relationship, may be held in the sole legal ownership of one partner despite being relationship property. The PRA does not prevent the legal owner transferring good title to any such assets unless, of course, the parties have reached an agreement to the contrary, or interim or final court orders have been made in relation to such assets.[76] We will therefore focus more broadly on the submission that s 21 of the Copyright Act supports the view that the Copyrights should be classified as separate property.

[52] The interrelationship between the Copyright Act and the PRA does not appear to have previously been considered by a New Zealand court. Counsel for Mr Palmer referred, by analogy, to two United States cases that have considered similar issues. The first case, *Re Marriage of Worth*, was a decision of the California Court of Appeal.[77] The second case was *Rodrigue v Rodrigue*, a decision of the United States

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74 Copyright Act, s 21(1).
75 Property (Relationships) Act, s 8(1)(l).
76 Section 19.
77 *Re Marriage of Worth* 195 Cal App 3d 768 (1987).

Court of Appeals for the Fifth Circuit,[78] on appeal from a decision of the United States District Court for the Eastern District of Louisiana.[79]

[53] At the time of these decisions, California and Louisiana were two of nine states in the United States that had "community property" regimes in respect of relationship property.[80] All other states utilised "some variant of the equitable-distribution system" for the division of relationship property.[81] As we understand it, under equitable-distribution systems, assets and debts acquired during marriage are divided fairly and equitably upon divorce, but not necessarily equally.[82] Community property regimes, however, are more similar to New Zealand's PRA regime, although they also differ in some respects. The learned authors of *Family Law Service* identify five broad approaches to relationship property — unitary systems, separate property systems, judicial discretion, community property systems, and deferred community systems — explaining that the New Zealand regime falls within the category of deferred community systems, which is "a variant of the community property approach".[83] The authors explain "community property systems" and "deferred community systems" as follows:[84]

> 4. **Community property systems** — the traditional approach in civil law countries has been to regard the property acquired during the course of the marriage as belonging to the community (ie both spouses) rather than the individual who has made the acquisition. This principle operates not only on the termination of a marriage but also during its continuance. Modern community regimes provide extensive rules relating to the joint management of community property.[85]
>
> 5. **Deferred community systems** — this approach is a variant of the community property approach, the main difference being that the rules about ownership by the community do not apply until the relationship has broken down, ie the community is deferred. Property is dealt with according to the ordinary law of real and personal property during the course of cohabitation.

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78 *Rodrigue v Rodrigue* 218 F 3d 432 (5th Cir 2000) [*Rodrigue* appeal decision].

79 *Rodrigue v Rodrigue* 55 F Supp 2d 534 (ED La 1999) [*Rodrigue* District Court decision].

80 See Dane S Ciolino "Why Copyrights Are Not Community Property" (1999) 60 La L Rev 127 at 149. See also 130–133 and n 140.

81 At 149.

82 *Spencer-Forrest v Forrest* 159 A 3d 762 (NY App Div 2018) at 765.

83 Atkin, above n 54, at [7.301].

84 At [7.301].

85 The Joint Family Homes Act 1964 is an example of community property operating under limited conditions and with respect to one kind of property only.

[54] The author explains that the PRA "fits most aptly" into the deferred community system category because, although it contains some provisions which operate during the relationship, the PRA does not generally affect ownership of, or dealings with, property until an application for division of the property is made. This usually occurs once the parties have separated, or their marriage has been dissolved. The author summarises that:[86]

> The [PRA] "undoubtedly confers valuable rights, however they should be juristically defined".[87] Nevertheless, the Act does not automatically create any beneficial interest which survives the death of the other party.[88] Only if the rights are crystallised by a Court order or by an agreement under Part 6 can they be described as including legal or beneficial title.

[55] A further relevant difference between the New Zealand and United States legal systems is that the United States has a dual court system where state and federal matters are handled separately. Copyright legislation is federal law, whereas relationship property legislation is state law. If federal and state legislation cannot be reconciled, this will engage the supremacy clause of the United States Constitution, pursuant to which federal law generally takes precedence over state law.[89] This complicating aspect of United States law featured prominently in both *Re Marriage of Worth* and *Rodrigue v Rodrigue* because federal copyright law provided that full ownership of all copyrights vested in the author immediately upon creation of the work. In contrast, under the state community property regimes which applied in those cases, co-ownership of all relevant copyrights arguably vested in both spouses immediately upon creation of an artistic work during the marriage. The Courts in those cases were therefore required to consider these two potentially conflicting regimes.[90]

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86 Atkin, above n 54, at [7.301].
87 *Commissioner of Inland Revenue v Van Doorne* [1983] NZLR 495 (CA) at 497.
88 *Cross v Commissioner of Inland Revenue* [1991] 3 NZLR 1 (CA).
89 United States Constitution, art VI, cl 2.
90 See for example *Rodrigue* appeal decision, above n 78, at 433; and *Re Marriage of Worth*, above n 77, at 770.

[56] In the New Zealand context, however:

(a) The PRA is a *deferred* community property system.[91] Hence, in this case, there was no conflict between the Copyright Act and the PRA at the time the Copyrights were created. On the creation of each of the Artworks, Ms Alalääkkölä became the sole legal owner of associated Copyrights, pursuant to s 21 of the Copyright Act. Under the PRA, that remains the position unless and until there is a transfer of one or more of the Copyrights pursuant to either a court order or the agreement of the parties. Determining whether the Copyrights are relationship property does not turn on legal or equitable ownership, but on the application of the criteria set out in the PRA (as summarised at [31]–[34] above).

(b) Because New Zealand does not have a dual court system, even if there was a conflict between the Copyright Act and the PRA, there would be no presumption that the Copyright Act prevails (unlike in the United States). On the contrary, the PRA would prevail, as s 4A of the PRA provides that: "[e]very enactment must be read subject to this Act, unless this Act or the other enactment expressly provides to the contrary."

[57] The author/artist spouses in *Re Marriage of Worth* and *Rodrigue v Rodrigue* were therefore able to advance legal arguments that would not be available in a New Zealand context. It is nonetheless instructive to consider the reasoning of those decisions. Both Courts rejected the claim by the author/artist spouse that the relevant copyrights and/or the associated economic benefits were their separate property, but did so for materially different reasons.

[58] In *Re Marriage of Worth*, the husband, Frederick Worth, wrote two encyclopaedias of trivia during his marriage to his wife, Susan Worth. When the couple divorced, they agreed that Susan would receive a half share of all future royalties. Frederick later sued the makers of the board game Trivial Pursuit for

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91 Atkin, above n 54, at [7.301].

copyright infringement. Susan succeeded in obtaining a court order that she was entitled to half of any damages awarded. Frederick appealed. He argued that, as the sole author of the encyclopaedias, he alone owned the copyright in them. The California Court of Appeal, however, found that under the relevant community property legislation, property acquired during a marriage is owned by the community (in other words, by both spouses).[92]

[59] Frederick also relied on the agreement to share royalties, arguing that he had only agreed to share the royalties and not the copyrights themselves. Susan was not therefore entitled to a share of any damages awarded for copyright infringement, as such damages are not royalties.[93] The Court rejected this argument also, again relying on the "community nature of the copyrights".[94] Because Susan and Frederick were common owners of the copyrights, Susan was entitled to share in any damages that Frederick recovered in his claim for copyright infringement.[95]

[60] Finally, Frederick argued that there was an irreconcilable conflict between the federal copyright legislation (granting him sole ownership of the copyrights) and the state community property legislation, and that federal copyright law prevailed by operation of the Supremacy Clause.[96] This argument also failed. The Court found that there was no language in the federal copyright legislation expressing the desire of Congress to make copyright separate property in community property states, or precluding it from being treated as community property. Further, the federal copyright legislation provided for co-ownership and transfer of copyright.[97] Accordingly, there was no inconsistency between the state and federal legislation which would trigger the Supremacy Clause.[98] The copyright in the books was therefore a community property asset and the parties were entitled to an equal share of any proceeds from the copyright infringement claim.[99]

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92 *Re Marriage of Worth*, above n 77, at 773–775 per Racanelli PJ, with whom Elkington and Newsom JJ agreed, at 778. Racanelli PJ gave the judgment for the Court.
93 At 776.
94 At 776.
95 At 776.
96 At 776–777.
97 At 777–778.
98 At 778.
99 At 778.

[61] In *Rodrigue v Rodrigue* the husband, George Rodrigue, was a famous artist.[100] After his divorce from his wife Veronica Rodrigue was finalised, George filed a proceeding asking the Court to declare that he was the sole owner of all of the intellectual property rights in his paintings. He argued that the federal copyright legislation pre-empted the state community property regime on this issue, and therefore his copyrighted works were not part of the pool of community property.[101] Veronica, on the other hand, filed a counterclaim asserting an entitlement to a one-half interest in the copyright in the paintings.[102]

[62] The Federal Court of Appeals found that George was entitled to the exclusive control and management of the intellectual property rights in the artworks he had created during the marriage, but that Veronica was entitled to a one-half interest in the net economic benefits generated by or resulting from those copyrighted works.[103] In a footnote, the Court specifically addressed *Re Marriage of Worth*, noting that its approach and the approach taken in that case were "consistent yet analytically distinct".[104]

[63] The New Zealand statutory framework differs from those before the Courts in *Re Marriage of Worth* and *Rodrigue v Rodrigue* in the ways we have outlined above. However, community property systems (as in California and Louisiana, where *Re Marriage of Worth* and *Rodrigue v Rodrigue* were decided) and deferred community property systems (as in New Zealand) are closely related and appear to share a common underlying policy. Specifically, both regimes are underpinned by the presumption that relationship property should be shared equally. This reflects a societal view that both parties contribute equally to a relationship, albeit in potentially

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100 *Rodrigue* appeal decision, above n 78, at 433 per Wiener J for the Court.

101 At 434–435.

102 At 434.

103 At 438–439 and 443.

104 At 438, n 26, stating: "We are cognizant of (and do not necessarily disapprove) the 'transfer' approach of the California court in *Worth*, holding that … the copyright 'vests initially' in the author-spouse at the time of creation, and thereafter … is automatically transferred 'by operation of [state community property] law,' to the matrimonial community … Our approach is consistent yet analytically distinct; the author-spouse alone (at the time of creation and at all times thereafter, absent voluntary transfer of the copyright) is vested with … five exclusive 'fundamental rights'; those rights are never automatically transferred to the community. The *fruits* of the copyright, nevertheless, are community property at the 'very instant' they are acquired. …"

different ways.[105] It is not therefore surprising, in our view, that the Courts in both *Re Marriage of Worth* and *Rodrigue v Rodrigue* (on appeal) concluded that the copyrights at issue in those cases (or the economic benefits flowing from those copyrights) should be classified as relationship property rather than separate property. Although *Rodrigue v Rodrigue* held that George was entitled to the exclusive control and management of the intellectual property rights in the artworks, that reflected the primacy of federal law (which the Court found could be reconciled with state law). In New Zealand however (as we have noted at [56](b)] above] the Copyright Act is read subject to the PRA. Overall, to the extent that these two cases can be relied on by analogy, the reasoning expressed in those cases supports Mr Palmer's position rather than that of Ms Alalääkkölä.

[64] In conclusion, Isac J was clearly correct to find that there is nothing in either the Copyright Act or the PRA to suggest that Parliament intended to remove intellectual property from the reach of the PRA. As the Judge stated:[106]

> [34] … 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.

Conclusion

[65] We have not been persuaded by any of the arguments advanced on behalf of Ms Alalääkkölä on this aspect of the appeal. In summary:

(a) The property rights in the Copyrights do not include Ms Alalääkkölä's artistic skills or qualifications. Those skills are discrete and, in any event, are not property rights in terms of the PRA.

(b) The business through which Ms Alalääkkölä and Mr Palmer previously commercialised the Artworks and the Copyrights does

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105 See for example Property (Relationships) Act, ss 1C(3), 1M and 1N; *Re Marriage of Worth*, above n 77, at 773; and Ciolino, above n 80, at 131–132.

106 High Court judgment, above n 2.

not form part of the bundle of rights for the Copyrights. Again, the business is a discrete category of property under the PRA.

(c) The fact that income may be generated, post-separation, from the commercialisation of the Copyrights does not assist in determining the correct classification of the Copyrights under the PRA. Rather, the classification of the relevant income streams as either separate property or relationship property will turn on the classification of the underlying assets (the Copyrights) under the PRA.

(d) Finally, for the reasons set out at [50]–[64] above, s 21 of the Copyright Act does not support Ms Alalääkkölä's argument that the Copyrights are her separate property.

[66] Section 8(e) of the PRA provides that relationship property includes "all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began".[107] The scope of s 8(e) is not restricted to property that is already legally and/or beneficially owned by both spouses. Rather, it encompasses *all property* acquired by *either spouse* during the relationship, including property in the sole legal ownership of one spouse. The fact that Mr Palmer is not currently a legal owner of the Copyrights does not preclude them from being classified as relationship property under the PRA. Accordingly, as the Copyrights were all acquired by Ms Alalääkkölä during the relationship (namely when each of the Artworks was created by her) they fall within the definition of relationship property in s 8(e).

[67] In conclusion, Isac J did not err in finding that the Copyrights are relationship property under the PRA.

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[107] Section 8(e) of the Property (Relationships) Act is subject to certain qualifications and carve-outs, but it has not been suggested that any of them apply here.

How should the Copyrights be treated under the PRA, to ensure an equal division of relationship property?

The issue

[68] The final issue before us is how the Copyrights should be treated under the PRA. Specifically, should they be divided between Ms Alalääkkölä and Mr Palmer, or should Ms Alalääkkölä retain ownership of the Copyrights, with a compensating adjustment being made from other relationship property to ensure an overall equal division of the relationship property?

The Family Court decision

[69] As noted above, Judge Grace found that the Copyrights vested solely in Ms Alalääkkölä as her separate property.[108] The Judge went on to state, however, that if this conclusion was in error, he would not have ordered a transfer of any of the Copyrights to Mr Palmer in any event.[109] The Judge was particularly concerned about the possible implications of such a transfer, including the potential for ongoing conflict between Ms Alalääkkölä and Mr Palmer, and the risk of undermining Ms Alalääkkölä's future work and livelihood.[110] In his view, Ms Alalääkkölä had given "valid reasons" as to why she did not consent to Mr Palmer making reproductions of any of the Artworks and the Court should not go against her expressed wish: "[t]o do so, and grant [Mr Palmer] his request, is merely inviting the parties to continue with future conflict."[111]

The High Court decision

[70] Isac J emphasised the importance of the presumption of equal sharing in the PRA, and found that there was no basis for that presumption being rebutted in this case.[112] He accordingly remitted the matter to the Family Court to enable the Copyrights to be valued,[113] noting that it would be for the Family Court to make any

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108 Family Court copyright judgment, above n 1, at [22]–[23].
109 At [28] and [36].
110 At [28]–[36].
111 At [35].
112 High Court judgment, above n 2, at [38].
113 At [41] and [56].

final vesting orders required to achieve an equal distribution of the relationship property.[114] The Judge further observed that:

> [49] … 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.

Submissions on appeal

[71] On appeal, Ms Alalääkkölä sought an order that she retain sole legal ownership of the Copyrights as part of the overall division of the relationship property. She argued that it is critical that, as the creator of the Artworks, she is able to retain control of the Copyrights to protect her artistic integrity and future professional interests. Ms Alalääkkölä expressed concern that transferring any of the Copyrights to Mr Palmer would negatively impact her business and reputation and be contrary to the clean break principle.

[72] Ms Alalääkkölä acknowledged that vesting all of the Copyrights in her as part of the overall division of relationship property would require a compensatory adjustment be made to Mr Palmer from other relationship property, such as the proceeds of sale of the family home.

[73] Mr Palmer's position was that the Copyrights should be divided (more or less) equally between the parties. Specifically, he seeks a transfer of the Copyrights associated with any of the Artworks that it has been agreed he can keep as part of the division of the relationship property.

Discussion

[74] As noted at [6] above, the reason that Mr Palmer requests that some of the Copyrights be vested in him is that going forwards he wishes to continue

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114 At [47]–[48].

"to earn a living from our business we had together" and that "I plan to restart my publication business immediately, so that I can rebuild it to what it was prior to separation".

[75] Ms Alalääkkölä takes strong exception to Mr Palmer's aim of establishing a business to commercialise the Copyrights (or some of them). She explained her reasons for opposing his proposal as follows:

> … [I]n many ways I am my art, and my art is me. It is my identity and soul. It is my personal brand. I imbue my art with love and with my life force and energy. Each piece I produce has meaning to me and when I choose to share it for sale, I have made a conscious choice to let it go.
>
> … I genuinely feel it's wrong that another person who has not created the art would have the right to represent me and what I stand for, by being able to publish, reproduce and distribute my art as they please without my approval or consultation.
>
> …
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> I am very concerned that [Mr Palmer] will flood the market with cheap prints and merchandise without any consultation with me, putting work out that I would never want to be seen, exposing sensitive work, and work that is deeply private and personal to me, to try and embarrass me.
>
> I fear that if he can't make money out of me, he will do what he can to hurt me and my career.
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> …
>
> I am … really worried that if [Mr Palmer] has rights to my paintings, not just the physical paintings but my copyright, that he will use that as a weapon against me and the difficulties I have been facing in the last few years will continue for many years to come.
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> What I want is a clean break and to hold on to my art, my copyright and preserve my good name, my identity and my soul. I want to continue my business so I can continue to look after myself and help my children.

[76] The Copyright Act confers the benefits of copyright protection solely on the person whose intellectual and creative efforts have given rise to the protected works. The legislation protects and promotes creativity by granting authors, artists, and other creators exclusive control over their original works, including the right to reproduce, distribute, perform, and display their works (as applicable).[115] This gives creators the ability to control the output of their creativity and encourages the creation of new

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[115] See Copyright Act, s 16; Ian Finch, above n 32, at [4.1]; and Frankel, above n 33, at [5.4].

works by ensuring creators can benefit economically from their efforts, fostering continued artistic production.[116] While "the immediate effect" of copyright law is to "secure a fair return for an 'author's' creative [labour]", the "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good".[117]

[77] In our view this broader context strongly supports the view that, where possible, the division of relationship property under the PRA should reflect the unique and personal nature of copyright, particularly where (as here) the original works that have given rise to the Copyrights are artistic works that are personal in nature. The situation may be different if the dispute were, for example, over copyright in engineering drawings. But that is not the case.

[78] Here, it is our view that it is consistent with the overall policy objectives of the Copyright Act that Ms Alaläääkkölä, as the author and creative force behind the Artworks, be able to continue to control the commercialisation of the Copyrights. It would be inappropriate and unfair to require her to transfer ownership of some of the Copyrights to Mr Palmer for a range of reasons, including that:

(a) As Ms Alaläääkkölä explained in her affidavit, her art is highly personal to her. Her collection includes both works intended for sale or commercialisation and other works (including nudes, unfinished works and private collection pieces) that were never intended to be commercialised.[118] As the sole creator of the Artworks, it is appropriate that Ms Alaläääkkölä be able to choose if, when and how to commercialise the Copyrights associated with them.

(b) Ms Alaläääkkölä intends to continue to paint, and to support herself through her art business. As Judge Grace noted, if some of the Copyrights were transferred to Mr Palmer, Ms Alaläääkkölä could potentially find herself in competition with copies of her own work (namely reproductions produced by Mr Palmer).[119] It may well be

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116 Finch, above n 32, at [4.1] and [4.5.2]; and Frankel, above n 33, at [5.4].
117 *Twentieth Century Music Corp v Aiken* 422 US 151 (1975) at 156.
118 See Copyright Act, s 105.
119 Family Court copyright judgment, above n 1, at [31].

in Ms Alalääkkölä's interests to carefully control the release of copies of her works to the market. Mr Palmer, on the other hand, would likely be incentivised to maximise profits from older works, regardless of any impact that this may have on Ms Alalääkkölä's artistic reputation or ongoing career. Ms Alalääkkölä would have no control over the numbers of prints that Mr Palmer may reproduce or the cost at which he may sell them. This could undermine the value and saleability of any new work that Ms Alalääkkölä may create, and any prints that she herself may wish to release to the market.

(c) Ms Alalääkkölä's reputation and personal brand as an artist (as well as her future livelihood) could be negatively impacted by Mr Palmer's actions in relation to any of the Copyrights he owned. For example, if Mr Palmer were to flood the market with cheap copies of Ms Alalääkkölä's work or print her work on items such as cheap tea towels or coffee mugs, this could have the potential to permanently damage her personal brand.

(d) Ms Alalääkkölä holds the moral rights in respect of the Artworks, and these are inalienable. If some of the Copyrights were to be transferred to Mr Palmer, Ms Alalääkkölä would retain the right to object if he attempted to licence uses of the Copyrights that Ms Alalääkkölä believed to be derogatory.[120] This would be a further source of potential ongoing conflict that is contrary to the clean break principle, and which can be avoided if both the economic and moral rights remain with Ms Alalääkkölä.

[79] Although the Copyrights are relationship property, and therefore subject to the equal sharing regime in the PRA, that regime does not require that each specific item of property be divided equally. Rather, the overall pool of relationship must be divided equally. Here, transferring some of the Copyrights to Mr Palmer would be inconsistent

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120 See Copyright Act, s 98.

with, and would undermine, the "clean break" philosophy of the PRA. In contrast, allowing Ms Alalääkkölä to retain ownership of the Copyrights would enhance the prospects of the parties being able to move on with their lives (including their financial lives) independently and with a minimum of ongoing conflict. The appropriate course, therefore, is for the ownership of the Copyrights to remain with Ms Alalääkkölä, and for Mr Palmer to receive a compensatory adjustment from other relationship property to ensure an equal division of relationship property.

[80] It was common ground that, if we reached this conclusion, the matter would need to be remitted to the Family Court to assess the quantum of any compensatory adjustment, as there is no evidence before this Court regarding the value of the Copyrights.

Costs

[81] Ms Alalääkkölä has failed to persuade us that the Copyrights do not fall within the definition of property in the PRA, or that (if they are property) they should be classified as her separate property.

[82] In respect of the third issue on appeal (the treatment of the Copyrights under the PRA) we have found that the Copyrights should remain in Ms Alalääkkölä's sole legal ownership, with a compensatory adjustment to be made to Mr Palmer from other relationship property. Isac J, however, did not make any order to the contrary (for example, by ordering that the Copyrights be divided equally). Rather, he simply remitted the issue to the Family Court for determination, noting the broad discretion that Court had in relation to vesting orders and that "there is no requirement that copyright in a work must follow an order vesting the work in one party or the other".[121] Given that Ms Alalääkkölä had failed to appear at the High Court appeal hearing, and both parties had been self-represented in the Family Court, Isac J likely heard little or no argument on this issue (and certainly none from Ms Alalääkkölä). The arguments advanced on behalf of Ms Alalääkkölä in this Court regarding the appropriate treatment of the Copyrights under the PRA could have been advanced in the

[121] High Court judgment, above n 2, at [49].

High Court, but were not. It is nevertheless quite possible that, in the absence of this appeal, the same result would have been reached in the Family Court.

[83] Given this context, it is our view that the costs of this appeal should not be discounted to reflect that the outcome of the third issue favoured Ms Alalääkkölä more than Mr Palmer. Mr Palmer is entitled to full costs in respect of this appeal.

Result

[84] An extension of time for filing the appeal is granted.

[85] We answer the approved questions of law on appeal as follows:

(a) Are the Copyrights "property" for the purposes of the PRA?

Yes.

(b) If the Copyrights are property, how should they be classified in terms of the PRA?

The Copyrights should be classified as relationship property.

(c) If the Copyrights are property, how should they be treated in terms of the PRA?

The Copyrights should remain in Ms Alalääkkölä's exclusive legal ownership, with Mr Palmer receiving a compensatory adjustment from other relationship property to ensure an equal division of relationship property.

[86] The assessment of an appropriate compensatory adjustment is remitted to the Family Court for determination.

[87] The appellant must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

Solicitors:
Zone Law Limited, Wellington for Appellant
Gascoigne Wicks, Blenheim for Respondent