

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 22/2024  
[2025] NZSC 9

BETWEEN SIRPA ELISE ALALÄÄKKÖLÄ  
Appellant

AND PAUL ANTHONY PALMER  
Respondent

Hearing: 24 October 2024

Court: Ellen France, Williams, Kós, Miller and O'Regan JJ

Counsel: C L Elliott KC, S P Chandra and W H Ranaweera for Appellant  
Q A M Davies and E-J M Tucker for Respondent

Judgment: 6 March 2025

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JUDGMENT OF THE COURT

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- A We answer the questions of law as follows: copyrights are property for purposes of the Property (Relationships) Act 1976 and they may be relationship property.**
- B The appeal is dismissed. We direct that the proceeding be remitted to the Family Court to decide the value and distribution or sale of the artworks and copyrights in them.**
- C The appellant must pay the respondent costs of \$15,000 plus usual disbursements. We allow for second counsel.**
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REASONS  
(Given by Miller J)

**Introduction**

[1] Sirpa Alaläökkölä and Paul Palmer were married in 1997 and separated in 2017. She is an artist, and her paintings were the family's principal source of income.

At separation there was a stock of unsold paintings that she had created during the relationship. We will call these “the artworks”.

[2] This appeal is concerned principally with the copyrights in the artworks. It is not in dispute that the artworks themselves—the physical paintings—are relationship property.

[3] The first issue on appeal is whether any monetary value should be assigned to the copyrights that were fixed in the artworks when Ms Alalääkkölä created them. She contends that copyright is not property at all for purposes of the Property (Relationships) Act 1976 (PRA); alternatively, it is separate property.

[4] The second issue concerns the classification for valuation purposes of the artworks and the copyrights in them. She says that the artworks fall into four categories, in only two of which do the physical works have any value. She also says that in only one of those two categories do the copyrights have any value.

[5] Initially Mr Palmer wanted to retain some of the artworks. He also said that he intended to set up a business to exploit the copyrights in them by reproducing and selling copies on his own account. His position now is that he accepts Ms Alalääkkölä should retain the copyrights and he should be credited with his share of their value in the distribution of other relationship property.

[6] We understand that each party wants to acquire the other’s interest in the family home, where we understand Ms Alalääkkölä has been living since the separation.

[7] In the Family Court, Judge Grace adopted an agreed division of the artworks which left most of them with Ms Alalääkkölä.<sup>1</sup> He held that all the copyrights were her separate property.<sup>2</sup>

[8] Ms Alalääkkölä did not appear at the hearing of Mr Palmer’s appeal before Isac J.<sup>3</sup> She has explained that she was affected by stress. The Judge held that

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<sup>1</sup> *Alalaakkola v Palmer* [2020] NZFC 1635 [FC judgment] at [37].

<sup>2</sup> At [23].

<sup>3</sup> *Palmer v Alalaakkola* [2021] NZHC 2330, [2021] NZFLR 515 [HC judgment] at [5].

copyright in the artworks was relationship property which falls to be divided equally.<sup>4</sup> Mr Palmer was also to receive half the artworks by value.<sup>5</sup> He remitted the case to the Family Court to settle the distribution of property.<sup>6</sup> He drew attention to the Family Court’s jurisdiction to vest artworks or copyright in one party, with an adjustment to the distribution of proceeds of sale of the family home to achieve overall equality of division.<sup>7</sup> He noted that valuations of the artworks and the copyrights would be needed if the parties could not resolve their differences.<sup>8</sup>

[9] Ms Alalääkkölä then engaged counsel. Isac J granted leave to appeal to the Court of Appeal on the question whether copyright is “property” for purposes of the PRA.<sup>9</sup> This encompassed the question whether copyrights in the artworks were separate or relationship property. A further question was added in the Court of Appeal: if copyright is property, how should the copyrights be allocated between the parties?<sup>10</sup>

[10] The Court of Appeal held that the copyrights in artworks created during the relationship should be classified as relationship property.<sup>11</sup> They should remain in Ms Alalääkkölä’s exclusive legal ownership, with a compensatory adjustment from other relationship property to ensure an equal division.<sup>12</sup> The case was remitted to the Family Court for determination.<sup>13</sup>

[11] This Court granted leave on the questions whether the copyrights are property, and if so, relationship property.<sup>14</sup> The grant of leave extends to orders consequential on the answers to the questions of law.

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<sup>4</sup> At [36] and [40].

<sup>5</sup> At [47].

<sup>6</sup> At [48].

<sup>7</sup> At [49].

<sup>8</sup> At [47].

<sup>9</sup> *Alalaakkola v Palmer* [2021] NZHC 3101, (2021) 33 FRNZ 530 at [17].

<sup>10</sup> *Alalääkkölä v Palmer* [2024] NZCA 24, [2024] 2 NZLR 80 (Collins, Katz and Mallon JJ) [CA judgment] at [3], n 4.

<sup>11</sup> At [67].

<sup>12</sup> At [79].

<sup>13</sup> At [80].

<sup>14</sup> *Alalääkkölä v Palmer* [2024] NZSC 56 (Ellen France, Kós and Miller JJ).

## **Background**

[12] Ms Alalääkkölä graduated from the Academy of Fine Arts in Helsinki in the late 1980s and studied at the Tisch School of the Arts in New York under a Fulbright Scholarship before moving to New Zealand in 1993. She says that she had many high-level exhibitions in Finland, notably for the opening of the Museum of Contemporary Art in Helsinki, and has her paintings exhibited in the Finnish National Gallery.

[13] Soon after the parties married in 1997 they purchased a section and had a simple house erected on it, with an attached art studio. It became the family home. She says that she had to paint to support the family, and so became known as a commercial artist. Mr Palmer was a photographer who later commenced a web design business. It appears that his business ventures were less successful, though he attributes this to his decision to support her in selling her artwork.

[14] When the parties separated there was a large stock (perhaps as many as 250) of artworks in New Zealand and at Ms Alalääkkölä's former family home in Finland. There were mutual accusations about what had happened to some of these works. We understand that they are now held in the District Court at Blenheim. We also understand that the parties may have agreed on some or all of the artworks each will retain. These works have yet to be valued for purposes of division.

[15] Ms Alalääkkölä groups the works at issue into four categories: incomplete, unsuitable or damaged works; her private collection of paintings comprising a personal diary of her life and including nudes and some works she now considers culturally insensitive; one-off unique paintings (some commissioned); and works which have been, or were intended to be, the subject of multiple copies.

[16] Ms Alalääkkölä says that she would not sell the works in the first two categories at all and would not exploit the copyright, in some cases because she is deeply attached to them, or concerned to protect her standing as an artist, and in others because they are rejects which she has kept to reuse the canvases. Those in the third category are sold on the basis that she retains the copyright, so precluding the buyer from making copies, but will not make copies herself; in other words, any value in the

copyright is exploited by selling the painting as a work which will remain the only copy in existence. It is unclear whether any of the still-unsold works fall into the third category. For works in the fourth category, she has exploited the copyright to make and sell prints and cards.<sup>15</sup> She says that the fourth category comprises only a small number of works. She has expressed concern that Mr Palmer had taken the domain “sirpa.com”, which was used to market her work, and intended to flood the market with cheap copies and merchandise.

[17] Mr Palmer describes himself as a partner in a family business called Art by Sirpa, which sold painted canvases, prints and digital copies. He says that he reduced his photography and website work to help her art career. He rejects her classification of the artworks, describing it as an asset grab, and claims that they both chose which artworks to set aside as their “private kiwi saver fund for future earnings”. In the Family Court he also stated that he acquired the website domain sirpa.com to use as his outlet to sell originals, art prints and other products if he ended up with his share of the art collection. He offered to surrender the domain to her if she let him have the house free of debt in exchange for the art.

[18] As noted, his position has now changed; he is content to allow her the copyrights if he is compensated for them. Her position still appears to be that she wishes to retain the copyrights in all the works but does not wish to compensate him. Her position in relation to the future sale or retention of the artworks in categories three and four is unknown.

### **Copyrights as property under the PRA**

[19] The Copyright Act 1994 provides that copyright is a property right that exists, in accordance with the Act, in original works of certain description, including artistic works.<sup>16</sup> It vests initially in the author of a work and, for artistic works, subsists until the end of a period of 50 years from the end of the calendar year in which the author dies.<sup>17</sup>

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<sup>15</sup> There is a dispute, which we need not resolve, about whether copyrights were exploited to make and sell other merchandise.

<sup>16</sup> Copyright Act 1994, s 14.

<sup>17</sup> With some exceptions that are not said to apply here: see ss 21–22.

[20] The Act confers on the copyright owner the exclusive right to do certain things, including showing the work to the public and copying it and issuing copies to the public.<sup>18</sup> Certain acts are expressly restricted in relation to copyright works; they include relevantly copying, the issue of copies to the public, and possession of known infringing copies in the course of a business.<sup>19</sup>

[21] The Act recognises certain moral rights which vest in the author in respect of artistic and certain other works; they are the right to be identified as the author (known as the right of attribution),<sup>20</sup> the right to object to derogatory treatment of the work (integrity, understood as treatment of the work that is prejudicial to the reputation or honour of the author),<sup>21</sup> the right not to have works falsely attributed to them or falsely represented as an adaptation of their work (no false attribution),<sup>22</sup> and the right to privacy of photographs and films which were taken or made for private and domestic purposes.<sup>23</sup> We observe that the Copyright Act does not provide that these moral rights may only be enforced under the Act.<sup>24</sup> For example, derogatory treatment going to reputation could be the subject of proceedings in defamation.

[22] The Act provides that moral rights may be waived by the author, which means the author can monetise them to the extent that a commitment not to enforce them enhances the value of the copyright.<sup>25</sup> But, unlike copyright, they may not be assigned to another person during the author's life.<sup>26</sup> The right to enforce or waive them always remains with the author. On the author's death, moral rights pass to the author's

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<sup>18</sup> Section 16(1).

<sup>19</sup> Sections 30–31 and 36(a). See s 29.

<sup>20</sup> Sections 94–97.

<sup>21</sup> Sections 98–100. But see Jessica Christine Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Cham (Switzerland), 2014) at 87.

<sup>22</sup> Sections 102–104. Non-authors also are protected by the right of no false attribution in s 102.

<sup>23</sup> Section 105. Part 9 of the Act also provides for performers' moral rights.

<sup>24</sup> Section 225(4). Section 225(2) prevents the importation of rights in the nature of copyright. Section 125 provides that the infringement of a moral right is actionable by the person entitled to the right.

<sup>25</sup> Sections 107 and 118. It appears that a right of waiver was included in s 87 of the Copyright, Designs and Patents Act 1988 (UK) from concern that moral rights might otherwise inhibit full exploitation of copyright: see, for example, Gerald Dworkin "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) 19 Colum VLA JL & Arts 229 at 245–246 and 256–257. The 1994 Act was then largely based on the 1988 Act: *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [251].

<sup>26</sup> Copyright Act, s 118.

legatee.<sup>27</sup> Moral rights expire with the copyright or, in the case of the no false attribution right, 20 years after the death of the person entitled to the right.<sup>28</sup>

[23] The Act establishes that copyright “is transmissible, as personal or moveable property”, by assignment, testamentary disposition or operation of law.<sup>29</sup> Infringement of copyright is actionable by the owner.<sup>30</sup> The remedies available for infringement of any other property right are available for infringement of copyright.<sup>31</sup> Reparation is available for loss of property in criminal proceedings for certain infringements.<sup>32</sup>

[24] These provisions confirm that, as the Court of Appeal held,<sup>33</sup> copyright is personal property in New Zealand. The Act carefully distinguishes the rights which together comprise copyright from moral rights, providing that the former are assignable and the latter not. This is not to deny that, as Ms Alalääkkölä says, each artwork is an expression of her personality and product of her skill. It is to recognise that the Copyright Act fosters creativity partly by recognising moral rights in creative works and partly by conferring economic incentives in the form of property rights which authors may exploit for gain.

[25] Ms Chandra, who argued this part of the case for Ms Alalääkkölä, accordingly focused her argument on whether copyright is property for purposes of the PRA. Section 4A of the PRA provides that every enactment must be read subject to the PRA unless the PRA or other enactment expressly provides to the contrary.<sup>34</sup> The PRA contains its own definition of property:<sup>35</sup>

**property** includes—

- (a) real property:
- (b) personal property:

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<sup>27</sup> Section 119. The exception is the right of no false attribution, which is not transferred but is actionable by the personal representatives.

<sup>28</sup> Section 106.

<sup>29</sup> Section 113(1).

<sup>30</sup> Section 120(1).

<sup>31</sup> Section 120(2).

<sup>32</sup> Sections 131(6), 132 and 134.

<sup>33</sup> CA judgment, above n 10, at [20]–[25].

<sup>34</sup> See also Copyright Act, s 225(1)(a).

<sup>35</sup> Property (Relationships) Act 1976 [PRA], s 2 definition of “property” (emphasis in original).

- (c) any estate or interest in any real property or personal property:
- (d) any debt or any thing in action:
- (e) any other right or interest

[26] “Relationship property” is defined to include “all property acquired by either spouse ... after their marriage ... began”.<sup>36</sup> Separate property includes property acquired before the relationship or after the date of separation.<sup>37</sup>

[27] Ms Chandra argued that while copyright is a species of property under the Copyright Act, it is sui generis and need not be property under the PRA, which exists to regulate relationships between spouses or partners and not to regulate commercial transactions between strangers. She argued that “any other right or interest” in the PRA definition should be read in context to exclude personal attributes such as earning capacity or artistic talent, and the phrases “personal property” and “any estate or interest in any ... personal property” are confined to tangible property. The artworks would be property but not the copyright in them.

[28] The Court of Appeal observed that in *Clayton v Clayton [Vaughan Road Property Trust]* this Court had held that the phrase “any other right or interest” should be interpreted in the social context of the PRA, which broadens traditional concepts of property, potentially capturing rights and interests that would not be classified as property in other contexts.<sup>38</sup> The Court of Appeal held that it was not necessary to take an expansive approach here; it sufficed that copyright has long been considered a form of property in New Zealand and is expressly identified as such in the Copyright Act.<sup>39</sup>

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<sup>36</sup> Section 2 definition of “relationship property” and s 8(1)(e). This category of relationship property is subject to certain provisions which do not concern us. They are s 9(2)–(6) (elaborating on the definition of separate property), s 9A (circumstances in which separate property becomes relationship property) and s 10 (property acquired by succession, survivorship, under a trust or by gift).

<sup>37</sup> Sections 8(1) and 9(4)(a). Again there are exceptions which do not concern us, such as where the property was acquired in contemplation of the relationship for the parties’ common use or benefit: s 8(1)(d).

<sup>38</sup> CA judgment, above n 10, at [27] citing *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [38].

<sup>39</sup> CA judgment, above n 10, at [28].



[29] We agree. Copyright is the product of personality, inventiveness and skill, attributes of the person which are not in themselves property.<sup>40</sup> But the Copyright Act draws a clear distinction between moral rights, which remain with a living author, and economic rights, which may be assigned. The distinction is traced to the Berne Convention for the Protection of Literary and Artistic Works, art 6bis(1) of which provides:<sup>41</sup>

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

[30] The Copyright Act expressly provides that copyright is property, and further that it exists apart from the author's moral rights. The holder may sell or assign copyright and may protect it by action for damages, injunctions and accounts.<sup>42</sup> Those rights and remedies lend copyright a value realisable in money. For these reasons, copyright fits the PRA definition of "property" as "personal property". There is no reason to exclude intangible personal property from the definition, and if copyright were instead treated as an interest fixed in the physical artworks, it would still meet the definition as "any estate or interest in any ... personal property". It is not necessary to have recourse to the final limb of the definition, except to remark that it confirms that "property" has a broad meaning and should be interpreted consistently with the objectives of the PRA.<sup>43</sup>

[31] The argument that copyright is not property because it is a result of the creator's expression of personality and skill is an attempt to combine, for PRA purposes, economic and moral rights that Parliament chose to separate in the Copyright Act. One would need to find in the PRA a clear justification for doing so.

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<sup>40</sup> *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279. This is true even though the threshold for originality before copyright subsists is "more than minimal skill and labour" by the author: *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [37]–[38].

<sup>41</sup> See now Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 3 (opened for signature 24 July 1971, entered into force 10 October 1974) [Berne Convention]. A similar version of art 6bis(1) first appeared in the 1928 revision. Moral rights, save for a narrower version of the right of no false attribution, were not adopted in New Zealand copyright legislation until the 1994 Act was enacted.

<sup>42</sup> Copyright Act, ss 113 and 120.

<sup>43</sup> *Clayton*, above n 38, at [38].

[32] It is not obvious what that justification would be. To treat copyright as property under the PRA is not to detract from the copyright. Rather, it is to recognise the value of the bundle of economic rights that copyright embodies. The involuntary nature of a court-ordered transfer does not in itself detract from the copyright.

[33] It has been argued that treating copyright as relationship property deters creative activity by conferring property rights on the non-author spouse.<sup>44</sup> That seems unlikely. As a matter of fact, a court is likely to find that the author entered the relationship willingly and hoped it would endure. The relationship may at one time have fostered creativity.<sup>45</sup> And under New Zealand's deferred community property regime, ownership remains with the author partner unless and until a court assigns property to the non-author partner (or the parties agree otherwise). To the extent that fear of a relationship property claim is a disincentive, the author can insist on contracting out under s 21 of the PRA. The relationship might deter creative activity if the non-author partner shared in works created post-separation, but under the PRA property acquired after the relationship ended is (subject to certain qualifications which are not said to apply here) separate property.<sup>46</sup>

[34] That said, copyright does differ from other property in ways which may matter a great deal in a court-imposed settlement reached under the PRA. The author retains both copyright and moral rights in a previously unpublished work that is distributed to a former partner under the PRA. If the copyright is distributed with the work, the author retains moral rights unless she chooses to waive them. In a hostile separation, the author may have reasonable concerns about derogatory treatment of the work that is harmful to her reputation and may constitute a breach of moral rights.<sup>47</sup> She may also reasonably fear that the former partner will exploit copyright in ways that detract from the value of future works. In this case, Ms Alalääkkölä fears that Mr Palmer might create merchandise, such as fridge magnets or tea towels, which presumably

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<sup>44</sup> See Debora Polacheck "The 'Un-Worth-y' Decision: The Characterization of a Copyright as Community Property" (1995) 17 *Hastings Comm & Ent LJ* 601 at 619.

<sup>45</sup> See Tal Itkin "When Love Ends: The Division of Copyright Between Spouses" (2022) 26 *Marq Intell Prop & Innovation L Rev* 97 at 103; and Julie E Cohen "Copyright as Property in the Post-Industrial Economy: A Research Agenda" [2011] *Wis L Rev* 141 at 143.

<sup>46</sup> PRA, s 9(4)(a).

<sup>47</sup> Copyright Act, s 98(2).

would be profitable for him but may come at a cost to her reputation and future earning potential.

[35] The problem posed by moral rights and the author's concern to protect their post-separation interests will complicate any valuation made for purposes of division. A court's task is somewhat easier if the parties agree that the works and copyrights should remain with the author, freeing her to manage the works and copyrights as she sees fit. But the valuation exercise would nonetheless require that the court make assumptions about whether and how she will sell the works and manage the copyrights and enforce their moral rights.

[36] These considerations suggest that courts should design orders to minimise conflict in the distribution of property and unnecessary harm to the author's future reputation and income. They do not compel the conclusion that copyright is not property at all.

[37] Further, capturing copyright in works created during the relationship furthers the social purpose of the PRA. To recognise that it is an expression of the author's personality and skill is not to exclude the possibility that it is also the product of her relationship for purposes of the PRA. The other partner may have helped to monetise it or may have contributed in ways which allowed the author to create the works that brought the copyrights into existence. In these respects copyright is no different from property in the works themselves. We add that, as the Court of Appeal observed, a principle that "property" excludes anything created or acquired during the relationship using personal skills that antedate it could not easily be confined to copyright in artistic works.<sup>48</sup>

### **Copyright as relationship property**

[38] If copyright is property, Ms Chandra argued, it is not property "acquired" during the marriage and therefore not relationship property under s 8(1)(e) of the PRA. Copyright is not acquired. It is created with the work. The concept of acquisition is informed by considerations such as the purpose of the right and whether it is clearly

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<sup>48</sup> CA judgment, above n 10, at [28] and [43].

traceable to the efforts of the marriage. In this case, the copyright was attributable to skills acquired before the relationship began. She contended that it should be classified as separate property for that reason. We add for completeness that it has been argued that it is better to classify copyright as separate property partly because a spouse's contributions to the other's separate property may be recognised to an appropriate extent under the PRA.<sup>49</sup>

[39] We do not accept this argument, for several reasons. First, under s 8(1)(e) relationship property includes “all property acquired by either spouse or partner” after their relationship began.<sup>50</sup> In ordinary usage, “acquire” can mean “to get or obtain by any means”,<sup>51</sup> a meaning wide enough to include things made or created by the owner.

[40] Second, the legislation contains indications that the PRA uses “acquired” in a broad sense, consistent with the expansive definition of property in s 2. Notably, it provides in s 9A(2) that increases in the value of property are themselves relationship property in certain circumstances.<sup>52</sup>

[41] Third, under s 18(1)(d) the contribution of a spouse or partner to the relationship includes “the acquisition or creation of relationship property”. It is difficult to see why the drafter would use “created” in s 18 and not in s 8. The legislative record offers no explanation. But what can be said is that s 18 envisages that property “created” during the relationship may be relationship property as defined. We have observed that Ms Alalääkkölä accepts the artworks, which she undoubtedly created, are relationship property.

[42] Finally, it is not the case that the copyrights were created or made. The creative work went into the original works, not the copyrights. Copyright was fixed in the works by operation of law. It comprises a bundle of rights, each of which can naturally be said to have been acquired when the work was created. Consistent with that usage,

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<sup>49</sup> Susan Corbett and Jessica C Lai “To Have and to Hold? Intellectual Property as Relationship Property” (2022) 30 NZULR 169 at 174–175.

<sup>50</sup> See above n 36.

<sup>51</sup> Bryan A Garner (ed) *Black's Law Dictionary* (12th ed, Thomson Reuters, St Paul (Minnesota), 2024) at 29.

<sup>52</sup> See also *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1 at [26].

art 6(2) of the Berne Convention provides that certain restrictions shall not “affect the rights which an author may have acquired in respect of a work published”.<sup>53</sup>

[43] We turn to Ms Chandra’s argument that copyright is separate property because it was created through personal attributes and skill acquired before the relationship began. We do not agree. The argument overlooks the distinction between personal attributes and skills, which are not property, and their use during the relationship to create an artefact which is. As a matter of fact, the use of those attributes and skills may be the product not only of the author’s personality and skills but also the division of effort within the marriage.

[44] That is the case here. Ms Alalääkkölä was the family income-earner. We do not know the number of unsold artworks in her third and fourth categories, but it seems a reasonable inference that the number is substantial, and quite likely explained by the need to paint in quantity to sustain the family. We acknowledge that she regrets having become a commercial painter and believes it came at a heavy cost to her reputation as a serious artist. But the artworks remain. They must be brought into account in the settlement, along with the copyrights in them.

### **Treatment of works and associated copyrights in the parties’ relationship property settlement**

[45] What we have to say on this topic is based on the limited evidence to date and subject to factual findings that may be made in the Family Court. For reasons which will become apparent, we do not assume that Ms Alalääkkölä necessarily will prefer to retain all the unsold works in each of her four categories, along with associated copyrights.

[46] The starting point is that relationship property is valued at the date of the hearing of the application unless there is reason to adopt a different date, and market value at that date is the typical measure of value for distribution purposes.<sup>54</sup>

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<sup>53</sup> The restrictions referred to are those which one country that is party to the Berne Convention may impose on rights granted to nationals of countries not party to the Convention which have failed to adequately protect the works of authors who are nationals of the former country: Berne Convention, above n 41, art 6(1).

<sup>54</sup> PRA, s 2G; and *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562 per Richardson J.

[47] We find it appropriate to adopt Ms Alalääkkölä's four categories: incomplete, unsuitable or damaged works; her private collection of paintings comprising a personal diary of her life and including nudes and some works she now considers culturally insensitive; one-off unique paintings (some commissioned) to be sold on the basis that they would remain the only copy in existence; and works which have been, or were intended to be, the subject of multiple copies.<sup>55</sup>

[48] We record that we understand the copyrights in issue are confined to those in the unsold physical works; that is, the artworks as we have defined them. There is no evidence that the copyrights in category three and four works that were sold before separation are in issue. If there is a dispute about copyrights in such works, any value in the copyrights would need to be brought into the valuation exercise.

[49] As we understand it, none of the works in the first two categories has been disclosed to the public and in none of the four categories has copyright been assigned to anyone else by Ms Alalääkkölä, as the original holder. We infer, as noted above, that some of those in the third category may have been sold, with Ms Alalääkkölä retaining the copyrights but undertaking not to exploit them.<sup>56</sup> The fourth category comprises works in which she retains the copyrights and has exploited them, or intended to do so, by making copies (usually as prints) and selling them to the public.

[50] The right to disclose or divulge unpublished works to the public was recognised at common law as a right attaching to the author.<sup>57</sup> In *Millar v Taylor*, Lord Mansfield held that “[i]t is fit that [an author] should judge when to publish, or whether he ever will publish.”<sup>58</sup> Disclosure is also recognised as one of five *droits moraux* in French law (in which it is called the right of disclosure or divulgation; the

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<sup>55</sup> We record that during argument counsel debated a potential fifth category, comprising unsold works that are held in the District Court at Blenheim. However, these works do not form a distinct category for our purposes. They comprise all (or most) of the artworks that the Family Court will have to allocate to one of the other categories.

<sup>56</sup> Above at [16].

<sup>57</sup> Gillian Davies and Kevin Garnett “Origins of the Theory of Moral Rights” in Gillian Davies and Kevin Garnett (eds) *Moral Rights* (2nd ed, Thomson Reuters, London, 2016) 13 at [2–002].

<sup>58</sup> *Millar v Taylor* (1769) 4 Burr 2303 at 2398, 98 ER 201 (KB) at 252.

others are the rights of paternity or respect *du nom*, the right of integrity, the right of reconsideration and withdrawal, and the right of access).<sup>59</sup>

[51] The Copyright Act recognises a less extensive class of moral rights and qualifies them in a number of important ways, including provision that they may be waived. By vesting copyright in the author on the work's creation,<sup>60</sup> the Act treats the right to disclose not as a moral right but as an economic one because the bundle of rights includes the rights to show the work in public and to communicate the work to the public.<sup>61</sup> Ms Alalääkkölä accordingly enjoys the right to decide when a given work is complete, whether it is fit for public viewing, and when it should leave the private domain.

[52] Because an original artwork is closely associated with an artist's personality and reputation, the right to decide whether and when to disclose it to the public should be respected so far as it can be exercised consistent with a just division of relationship property.<sup>62</sup> In this case a just division will be equal by value,<sup>63</sup> but so long as that is achieved the relationship property may be distributed in a manner which protects Ms Alalääkkölä's control over previously unpublished works that she does not now wish to publish.

[53] Works that the Family Court finds fall into the first category should be valued accordingly on the basis that they will not be disclosed but will remain in the private domain. That may mean that their value, if any, is as canvases that Ms Alalääkkölä may reuse for future works.

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<sup>59</sup> Maria Mercedes Frabboni "France" in Gillian Davies and Kevin Garnett (eds) *Moral Rights* (2nd ed, Thomson Reuters, London, 2016) 415 at [13–006]–[13–028].

<sup>60</sup> But see above n 17.

<sup>61</sup> See above at [20]. See also Raymond Sarraute "Current Theory on the Moral Right of Authors and Artists Under French Law" (1968) 16 *Am J Comp L* 465 at 466–467; and Jeffrey M Dine "Authors' Moral Rights in Non-European Nations: International Agreements, Economics, *Mannu Bhandari*, and the Dead Sea Scrolls" (1995) 16 *Mich J Intl L* 545 at 546 and 551.

<sup>62</sup> Here we use "original" in the colloquial sense. This concern may arise less acutely in connection with other works which attract copyright but nonetheless are not closely associated with an author's personality and reputation.

<sup>63</sup> Isac J found that there was no basis for rebuttal of the presumption of equal sharing in this case: HC judgment, above n 3, at [38]–[39].

[54] Works falling into the second category should also be valued on the basis they will not be sold or otherwise disclosed to the public during Ms Alalääkkölä's lifetime or by her executor. That will affect their market value, if any, as at the valuation date.<sup>64</sup> It is a question of fact whether any given work falls into this category.

[55] Works falling into the third category should be valued on the basis that they will remain the only copies in existence. As previously noted, any value in the copyright should be reflected in the price of the physical work.<sup>65</sup>

[56] Works falling into the fourth category should be valued on the assumption that the works will be sold on the basis that the copyrights may be exploited.

[57] We make three points about the valuation of works falling into the third and fourth categories. First, Ms Alalääkkölä acknowledges that prior to separation she intended to sell these works. They should be valued accordingly even if she does not now wish to publish them. The copyrights must also be valued in accordance with her practice during the relationship and as at the hearing date (or other date chosen by the Family Court), even if she now chooses not to exploit, or not to continue exploiting, copyrights in works that the Court classifies as category four.

[58] Second, a market valuation as at the valuation date may need to recognise that the collective value of the works may be less than the sum of their individual valuations. That tentative observation is based on a valuer's opinion, which seems plausible, that their values would be reduced if they were all offered for sale at once. Put another way, the valuation may need to recognise that sales would take place over time, affecting the value of the works and copyrights at the valuation date.

[59] Third, there is evidence that it will be difficult to value the works accurately. For that reason, we do not exclude the possibility that, when presented with a valuation, either party may invite the Court to direct that some works be sold to establish market value, rather than accept a valuation that they believe is wrong.

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<sup>64</sup> See above at [46].

<sup>65</sup> Above at [16].



## **Disposition**

[60] We answer the questions of law as follows: copyrights are property for purposes of the PRA and they may be relationship property.

[61] The appeal is accordingly dismissed. We direct that the proceeding be remitted to the Family Court to decide the value and distribution or sale of the artworks and copyrights in them.

[62] Ms Alalääkkölä must pay Mr Palmer costs. However, both parties have benefited from the Court's clarification of valuation principles. In the circumstances, we direct that she pay \$15,000—that is, 50 per cent of usual costs—plus usual disbursements. We decline Mr Davies' request for an uplift on costs but allow usual disbursements for second counsel.

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